U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

March 17, 2017

The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Feinstein:

This responds to your letter dated March 15, 2017, which asked the Department of Justice (the Department) to provide copies of 19 privileged documents previously made available to the Judiciary Committee for *in camera* review. Your letter indicates that despite the 174,905 pages of documents produced for public review and out of the 11,219 pages of *in camera* documents made available by the Department, these 19 documents are "vital to the Judiciary Committee's ability to perform its advice and consent function."

As explained in the Department's letters offering those and thousands of other documents for review, the privileges and confidentiality interests covering the documents protect the internal exchange of ideas essential to the Department's exercise of its institutional responsibilities, including law enforcement and litigation. Also, we had understood from the Committee's letter of February 21, 2017, that the Department's privileges and confidentiality interests would be respected. Nevertheless, after consulting with relevant components and because of the small number of documents sought, as well as the extraordinary circumstances surrounding a Supreme Court nomination, we have decided to accommodate your request. Accordingly, we are herewith providing the documents without objection to the Committee's public disclosure of them in connection with its consideration of Judge Gorsuch's nomination.

The Department does not anticipate making any further productions regarding this matter. We appreciate your respect for the Department's deliberative processes and confidentiality interests. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,

Samuel R. Ramer
Acting Assistant Attorney General

Enclosures

cc: The Honorable Charles E. Grassley
Chairman

Campbell, Benton

From:	Campbell, Benton
Sent:	Thursday, March 16, 2006 5:45 PM
To:	Gorsuch, Neil M; Hahn, Paul (USAEO)
Cc:	Elston, Michael (ODAG); Wroblewski, Jonathan; Fisher, Alice; Friedrich, Matthew
Subject:	USAM Rule 16 Proposal
Attachments:	Rule 16 march 15 2006.wpd; BC.USAM.3-15-06.wpd

Neil and Paul – attached is the latest revision of a proposal for a new section of the United States Attorney's Manual addressing Rule 16 disclosures of *Brady* and *Giglio* evidence. As you may already know, this is part of our effort to head off a proposal by the American College of Trial Lawyers to amend the current Rule 16 of the Federal Rules of Criminal Procedure to require the government to disclose exculpatory and impeachment information without reference to its materiality. I have also attached a copy of that proposed amendment as it currently reads and as it will be considered by the Judicial Conference's Criminal Rules Advisory Committee at its upcoming meeting here in DC on April 3 and 4, 2006. We are interested in circulating the USAM proposal through the Department and to the United States Attorneys' community for comment. We will circulate it here in the criminal division, but this new proposal will also impact other divisions – such as tax, civil rights or antitrust – that bring criminal cases and we are interested in their views. We also would like for this to be reviewed by the AGAC and the Criminal and Appellate Chiefs in the U.S. Attorney's Offices.

Because we would like to have the option to include this proposal in the materials available for the Advisory Committee's April 3 meeting, we need to have all comments back by noon on Wednesday, March 22, 2006. Feel free to give me a call if you have any questions, and thanks for your help.

Ben Campbell
CRM Div.

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March 15, 2006

MEMORANDUM

TO: Holders of the United States Attorneys' Manual, Title 9

FROM: Office of the Attorney General

Alberto R. Gonzales
Attorney General

RE: Principles of Federal Prosecution

NOTE:
1. This is issued pursuant to USAM 1-1.550.
2. Distribute to Holders of Title 9.
3. Insert in front of affected sections.

AFFECTS: 9-27.000

PURPOSE: The Department of Justice is proud of the long record of federal prosecutors meeting or exceeding their obligation to disclose exculpatory and impeachment evidence. The purpose of this amendment to the U.S. Attorneys' Manual is to further develop the Department's guidance to federal prosecutors in fulfilling their obligation, pursuant to *Brady v. Maryland* and *Giglio v. United States*, to disclose exculpatory and impeachment evidence to criminal defendants. The policy embodied in this bluesheet asks prosecutors, in most cases, to go beyond the minimum disclosure required by the Constitution. The goals of the policy are to ensure that all federal prosecutors are aware of their disclosure obligations, that prosecutors take the necessary and appropriate steps to fulfill such obligations, that witnesses are fully protected from harassment, assault, and intimidation, that disclosure occurs at a time and in a manner consistent with the needs of national security, and that disclosure is made in a manner and to an extent that promotes fair trials and expedites proceedings.

The policy embodied in this bluesheet is intended to be flexible yet produce regularity. As first stated in the preface to the original 1980

general terms with a view to providing guidance rather than to mandating results. The intent is to assure regularity without regimentation, to prevent unwarranted disparity without sacrificing flexibility." The policy also recognizes the paramount importance of fully protecting witnesses and safeguarding other vital interests. Through the use of circumscribed standards and principles outlined herein, federal prosecutors should exercise their judgment and discretion so as to build confidence in criminal trials, while keeping witnesses safe and allowing for efficient resolution of cases.

The bluesheet creates a new section 9-27.___, dated _____, 2006, in your United States Attorneys' Manual.

[NEW SECTION] USAM § 9-27.___

A. **Purpose.** Consistent with applicable federal statutes, rules, and case law, the policy set forth here is intended to promote regularity in disclosure practices, through the reasoned exercise of prosecutorial judgment and discretion by attorneys for the government, with respect to the government's obligation to disclose exculpatory and impeachment evidence to criminal defendants. The policy is also intended to encourage timely disclosure of exculpatory and impeachment evidence so as to expedite trial procedures and ensure that trials are fair. The policy, however, recognizes that witness security is paramount, *see* USAM § 9-21.000, and that if disclosure prior to trial might jeopardize witness safety, disclosure must be delayed. This policy is not a substitute for researching the legal issues that may arise in an individual case, nor does it supersede the significant body of excellent training materials on this subject. Additionally, this policy does not alter or supersede the *Giglio* policy adopted in 1996, *see* USAM § 9-5.100, or the policy that requires prosecutors to disclose "substantial evidence that directly negates the guilt of a subject of the investigation" to the grand jury before seeking an indictment, *see* USAM § 9-11.233.

B. **Constitutional obligation to ensure a fair trial.** Government disclosure of material exculpatory and impeachment evidence is part of the constitutional guarantee to a fair trial. Neither the Constitution nor this policy creates a discovery right for trial preparation or plea negotiations. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). As a result, the disclosure obligation discussed herein pertains only to cases that proceed to trial.

C. **Disclosure of exculpatory and impeachment evidence.** The law requires the disclosure of exculpatory and impeachment evidence when such evidence is material to guilt. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150, 154 (1972). While materiality is the standard for the disclosure of exculpatory and impeachment evidence, as articulated in *Kyles v. Whitley*, 514 U.S. 419 (1995) and *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999), the Department encourages prosecutors to take an expansive view of the materiality requirement and err on the side of disclosure without engaging in speculation as to whether the evidence will be material to guilt or the outcome of a trial. In cases where such broad disclosure is not appropriate, prosecutors nonetheless must disclose exculpatory and impeachment evidence known to the prosecutor's office and government agencies working with the office on the criminal case, including state and local authorities where applicable, if such evidence is material to a finding of guilt or to punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150, 154 (1972). Because they are Constitutional obligations, *Brady* and *Giglio* evidence must be disclosed regardless of whether the defendant makes a request for exculpatory or impeachment evidence.

1. **Materiality and Admissibility.** Recognizing that it is sometimes difficult to assess the admissibility and materiality of evidence before trial, prosecutors generally should take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence. Exculpatory evidence is material to a finding of guilt, and thus the Constitution requires disclosure, when it is (1) favorable to the defendant; and (2) if disclosed and used effectively, may make the difference between conviction and acquittal. Impeachment evidence is material if (1) it relates to a key government witness; and (2) significantly impacts the reliability of such a witness in a way that may determine guilt or innocence. *United States v. Bagley*, 475 U.S. 667, 676 (1985). While ordinarily, evidence that would not be admissible at trial need not be disclosed, *Wood v. Bartholomew*, 516 U.S. 1, 6 (1995), this policy encourages prosecutors not to engage in speculation as to whether particular evidence will be admitted by a trial court and to disclose evidence that might reasonably be deemed admissible.

2. **The prosecution team.** It is the obligation of federal prosecutors, in preparing for trial, to seek all exculpatory or impeachment information from the government agency investigating the criminal case against the defendant and all other members of the prosecution team. Members of the prosecution team include federal, state, and local law enforcement officers participating in the investigation and prosecution of the criminal case against the defendant. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

3. **Timing of disclosure.** Due process requires that disclosure of exculpatory and impeachment evidence material to guilt or innocence be made in sufficient time to permit the defendant to make effective use of that information at trial. *See, e.g. United States v. Farley*, 2 F.3d 645, 654 (6th Cir. 1993). In most cases, the disclosures required by the Constitution and this policy will be made in advance of trial. Exculpatory evidence, for example, must be disclosed as soon as it is discovered. Impeachment evidence is typically disclosed at a reasonable time to allow the trial to proceed efficiently, and prosecutors should normally make the disclosures required under this policy approximately two weeks before trial. In some cases, however, the prosecutor may have to balance the goals of this policy against other significant interests and may conclude that it is not appropriate to provide early disclosure. In such cases, required disclosures may be made at a time and in a manner consistent with the policy embodied in the Jencks Act, 18 U.S.C. § 3500.

D. **Exceptions.** To the extent that this policy encourages disclosure of evidence or information beyond the requirements of the Constitution, exceptions to this policy may be made on a case-by-case basis. Such exceptions should be made infrequently and only

after a supervisor has concluded that other measures, including protective orders, will be insufficient to protect the interests of the United States. Examples of cases in which it may be appropriate for a supervisor to limit the application of this policy include, but are not limited to, cases that involve the national security of the United States and cases in which the United States has reason to believe that early and broad disclosure of evidence will jeopardize the safety of a witness or lead to obstruction of justice or witness tampering.

E. **Comment.** This policy establishes guidelines for the exercise of judgment and discretion by attorneys for the government in determining what information to disclose to a criminal defendant pursuant to the government's disclosure obligation as set out in *Brady v. Maryland* and *Giglio v. United States*. As the Supreme Court has explained, disclosure is required when evidence in the possession of the prosecutor or prosecution team is material to guilt or innocence. This policy encourages adopting a broad view as to materiality and favors expansive disclosure well in advance of trial. Under this policy, in most cases, the government's disclosure will exceed its constitutional obligations. This expanded disclosure requirement, however, does not create a general right of discovery in criminal cases. Where it is unclear whether evidence or information should be disclosed, prosecutors are encouraged to reveal such information to defendants or to the court for inspection *in camera*. By doing so, prosecutors will ensure confidence in fair trials and verdicts. Prosecutors are also encouraged to undertake periodic training concerning the government's disclosure obligation and the emerging case law surrounding that obligation.

March 15, 2006 draft

Rule 16. Discovery and Inspection

(a) GOVERNMENT'S DISCLOSURE.

(1) *INFORMATION SUBJECT TO DISCLOSURE.*

* * * *

(H) *Exculpatory or Impeaching Information.*[1] Upon a defendant's request, the government must make available all information that is known to the attorney for the government or agents of law enforcement involved in the investigation of the case that is either exculpatory or impeaching. The court may not order disclosure of impeachment information earlier than 14 days before trial.

COMMITTEE NOTE

Subdivision (a)(1)(H). New subdivision (a)(1)(H) is based on the principle that fundamental fairness is enhanced when the defense has access before trial to any exculpatory or impeaching information known to the prosecution. The requirement that exculpatory and impeaching information be provided to the defense also reduces the possibility that innocent persons will be convicted in federal proceedings. *See generally* ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3-3.11(a) (3d ed. 1993), and ABA Model Rule of Professional Conduct 3.8(d) (2003). The amendment is intended to supplement the prosecutor's obligations to disclose material exculpatory or impeaching information under *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), *Kyles v. Whitley*, 514 U.S. 419 (1995), *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999), and *Banks v. Dretke*, 540 U.S. 668, 691 (2004).

The rule contains no requirement that the information be "material" to guilt in the sense that this term is used in cases such as *Kyles v. Whitley*. It requires prosecutors to disclose to the defense all exculpatory or impeaching information known to any law enforcement agency that participated in the prosecution or investigation of the case without further speculation as to whether this information will ultimately be material to guilt.

The amendment distinguishes between exculpatory and impeaching information for

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[1]The Rules Committee voted 7 to 4 in favor of stating the rule in terms of "information" rather than "evidence." The Department of Justice and some members of the subcommittee continue to favor the term "evidence" in the rule and the committee note.

purposes of the timing of disclosure. Information is exculpatory under the rule if it tends to cast doubt upon the defendant 's guilt as to any essential element in any count in the indictment or information.

Because the disclosure of the identity of witnesses raises special concerns, and impeachment information may disclose a witness 's identity, the rule provides that the court may not order the disclosure of information that is impeaching but not exculpatory earlier than 14 days before trial. The government may apply to the court for a protective order concerning exculpatory or impeaching information under the already-existing provision of Rule 16(d)(1), so as to defer disclosure to a later time.

From: Gorsuch, Neil M
</o=usdoj/ou=jmd/cn=recipients/cn=mailboxes/cn=ngorsuch>
To: Senger, Jeffrey M
</o=usdoj/ou=jmd/cn=recipients/cn=mailboxes/cn=jsenger>
Cc:
Bcc:
Subject: Re: LETTER
Date: Wed Aug 02 2006 08:03:41 EDT
Attachments:

Is ltr out yet? What's latest?

-----Original Message-----
From: Senger, Jeffrey M
To: Elwood, Courtney; Wooldridge, Sue Ellen (ENRD)
CC: Gorsuch, Neil M
Sent: Tue Aug 01 19:35:07 2006
Subject: Re: LETTER

I do think we have to be careful how we raise the tribal issue in any public communication. McCain forged a delicate balance with tribes in getting this far with the bill, and the idea of closing out their own claims as well will certainly be provocative.

-----Original Message-----
From: Elwood, Courtney
To: Wooldridge, Sue Ellen (ENRD)
CC: Senger, Jeffrey M; Gorsuch, Neil M
Sent: Tue Aug 01 19:23:31 2006
Subject: Re: LETTER

I'll be curious to hear the answer. The AG was clear to me that resolving the Tribal trust was part of the discussion and, for Jeff's call with McCain's staff, the Senators were intrigued by including that element in the legislation. Perhaps DOI, the Senators or others feared announcing such a big step in this letter -- w/o previewing with the Tribes -- would spark an unwelcome reaction from a variety of factions.

-----Original Message-----
From: Wooldridge, Sue Ellen (ENRD)
To: Elwood, Courtney
Sent: Tue Aug 01 19:17:32 2006
Subject: Fw: LETTER

I am trying to find out why this moved again. It deletes all reference to tribal (which may be fine, but I have a call in to find out what happened and why the change).

Sent from my BlackBerry Wireless Handheld

Sent Using U.S. DOJ/ENRD BES Server

-----Original Message-----
From: James_Cason@ios.doi.gov <James_Cason@ios.doi.gov>

To: Wooldridge, Sue Ellen (ENRD) <SWooldridg@ENRD.USDOJ.GOV>
Sent: Tue Aug 01 19:09:58 2006
Subject: Re: LETTER

Sue Ellen:

Here is the latest version....

Dear Senator McCain:

I want to thank you for your leadership on Indian Country issues. I appreciate your taking time earlier today to meet with Senator Dorgan, Attorney General Gonzales and me to discuss legislative resolution of several issues involving Indian Country. I believe we have a historic opportunity to embrace constructive solutions to long-standing trust management concerns held by generations of Indians.

The Administration is committed to working with you and other members of Congress to resolve current and potential claims for a historical accounting by individual Indians and bring closure to current and potential claims by individual Indians related to cash and asset mismanagement. In addition, we seek a comprehensive solution that would include such issues as allotment fractionation, which must be addressed to foster material improvement in the management of the individual trust.

If we can define a legislative settlement consistent with our collective goals, I believe, together, we can determine what financial consideration and level of funding for improved beneficiary services would be provided to Indian Country. There is both an atmosphere and positive attitude in the Administration to find a settlement solution.

As always, it will be a pleasure to work with you.

Sincerely,

DIRK KEMPTHORNE

cc: Senator Byron Dorgan
Attorney General Alberto Gonzales

"Sue.Ellen.Wooldridge @usdoj.gov" <Sue.Ellen.Wooldridge
08/01/2006 04:06 PM

To: James Cason/SIO/OS/DOI@DOI
cc:
Subject: LETTER

Can we see a copy before it is sent to McCAIN?

Sent from my BlackBerry Wireless Handheld

Sent Using U.S. DOJ/ENRD BES Server

Gorsuch, Neil M

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

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

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

Raul/Courtney, Rachel etc.:

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

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

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

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

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

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

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

Hearing Before the
Committee on the Judiciary
United States Senate
Concerning
Detainees
June 15, 2005

Witness: Deputy Associate Attorney General J. Michael Wiggins

Questions from Senator Joseph R. Biden

5. In Deputy Associate Attorney General Wiggin's written testimony, he discusses the similarities of the Combatant Status Review Tribunal hearings with the Army regulations that govern hearings under Article 5 of the Third Geneva Convention. In retrospect, do you think we could have saved a lot of trouble here had we just undertaken these Article 5 hearings as soon as possible after detention as required by the Third Geneva Convention, instead of waiting to begin any review process until after years and years of detention?

ANSWER: For this question, the Department defers to the Department of Defense, which is in a better position to provide a response.

6. When deciding to not use the Uniform Code of Military Justice and instead coming up with "military commissions" or in formulating the procedures and rules governing Combatant Review Status Tribunals, was there any thought that went in to how these decisions would be perceived world-wide, and in particular in Muslim countries?

ANSWER: For this question, the Department defers to the Department of Defense, which is in a better position to provide a response.

7. Do you support the creation of a 9/11-style independent commission to consider U.S. interrogation and detention operations and to propose recommendations to the President and to the Congress?

ANSWER: Our understanding is that the Department of Defense has undertaken 11 major reviews and investigations to examine every aspect of detention operations. These efforts have been led by senior officers in the military and prominent civilian officials, including former Secretaries of Defense. As a result of their efforts, the Department of Defense has reviewed nearly 500 recommendations and incorporated numerous changes to its processes, procedures, and policies.

Questions from Senator John Cornyn

1. The United States Supreme Court has held that the U.S. Government can detain Enemy Combatants during wartime. Is there any basis for the assumption that such detention can

last in perpetuity?

ANSWER: Under the U.S. Constitution, the congressional Authorization for Use of Military Force, and the customary laws of war, the United States may detain enemy combatants during wartime "for the duration of these hostilities." *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2642 (2004) (plurality); *see also id.* at 2641 (concluding that Congress has authorized detention "for the duration of the relevant conflict"). This does not mean that detention will last forever. Although, during any conflict, it may be difficult to foresee exactly when or how the conflict will end, there is no question that hostilities are ongoing in the present conflict. While the United States has achieved many successes in the war against al Qaeda and its supporters, that war continues in Afghanistan, Iraq, and around the world. The United States, however, has no interest in detaining enemy combatants longer than necessary and DOD has effective processes in place to review, on an annual basis, the status of enemy combatants detained at Guantanamo Bay, and to release Guantanamo detainees from U.S. custody when detention by the U.S. is no longer necessary. While more than 230 detainees have departed Guantanamo, detainee releases and transfers are not without risks. The Department of Defense has informed us that approximately a dozen detainees who were released from Guantanamo are known to have later taken part in anti-coalition activities.

2. Why do the Geneva Conventions not apply to those we now detain at Guantanamo Bay?

ANSWER: As the President has made clear, our Nation has been and will continue to be a strong supporter of the Geneva Conventions and the principles they embody. The Geneva Conventions, however, do not apply to all armed conflicts or to all persons regardless of circumstances and conditions. There are important policy reasons not to ignore this fact: for example, people will have no incentive to comply with the Geneva Conventions if they receive the Conventions' benefits without honoring the Conventions themselves. The Conventions do not apply to our conflict with al Qaeda. Al Qaeda is an international terrorist group, not a state, and therefore is not and can not be a party to the Conventions. Al Qaeda also does not recognize the Conventions or comply with the principles they embody. It conducts its operations in flagrant violation of the laws and customs of war, including by targeting innocent civilians. With respect to our conflict with the Taliban, the President determined that the Geneva Conventions do apply, but that Taliban detainees do not qualify for "prisoner of war" status because they do not satisfy the requirements set forth in Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War: for example, they do not conduct their operations in accordance with the laws and customs of war, they do not have a fixed distinctive sign recognizable at a distance, and they are not commanded by a person responsible for his subordinates. Regardless of the precise scope of the Geneva Conventions, the President has directed that, 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 the principles of Geneva.

3. With regard to detained combatants, is the application of a process like the Administrative Review Board required by the Geneva Convention or any international or domestic law?

ANSWER: Under the U.S. Constitution, the congressional Authorization for Use of Military Force, and the customary laws of war, the United States may detain enemy combatants for the duration of hostilities. Despite its clear legal authority to detain enemy combatants for the duration of hostilities, the United States has no interest in detaining enemy combatants longer than necessary. Although there is no domestic or international legal requirement to do so, the Department of Defense has implemented an Administrative Review Board process to provide an annual individualized assessment of whether each enemy combatant detained by the Department of Defense at Guantanamo Bay should continue to be detained by the United States or should be released or transferred.

Questions from Senator Patrick Leahy

1. In response to a question from Senator Biden, you said that, because the so-called war on terror could last decades, "it is our position that legally they (Guantanamo detainees) could be held in perpetuity." What would constitute an end to the "war on terror"? How will we know when this war is over?

ANSWER: Under the law of war, whether hostilities have ceased is a factual question, which involves whether the fighting has ended and whether there is a reasonable basis for believing that it is likely to resume. During any conflict, it may be difficult to foresee exactly when or how the conflict will end. In the present conflict, however, there is no question that hostilities are ongoing. While the United States has achieved many successes in the war against al Qaeda and its supporters, that war continues in Afghanistan, Iraq, and around the world. In fact, it is our understanding that at least 12 detainees released from Guantanamo Bay have been recaptured or killed fighting United States and coalition forces in Pakistan and Afghanistan.

2. Some of the current detainees at Guantanamo have already been held for more than three years. During that time, they have been subject to harsh conditions, and interrogated repeatedly. Realistically, what are the chances of successfully prosecuting any of these detainees in the Federal courts, assuming that the evidence exists to convict them?

ANSWER: The ability of the United States to pursue a Federal prosecution of any individual on a terrorism related charge is determined by the facts and circumstances of the particular case. These facts and circumstances include the quantity and quality of admissible evidence, the existence of some basis to assert jurisdiction, the extent to which prosecution risks the disclosure of classified information, and the potential legal and factual defenses available to the detainee. Any decision to prosecute a detainee in the Federal courts would require a thorough analysis of all these facts and circumstances. Issues arising from a detainee's detention at Guantanamo, including allegations of "harsh conditions" and "repeated interrogations," would be considered as an additional element of the analysis. As a result, even if one assumes that sufficient evidence exists to convict certain detainees in the Federal courts, one cannot accurately assess the chances of successful prosecutions in the abstract.

3. A May 10, 2004, email from an FBI agent to T.J. Harrington states that FBI and Justice

Department officials held meetings to discuss interrogation tactics at Guantanamo. The email states: "We all agreed DOD tactics were going to be an issue in the military commission cases." Would you agree that the Defense Department's methods of interrogation may be "an issue" in any attempt to prosecute a Guantanamo detainee? Please explain your response.

ANSWER: We are not familiar with the context in which the quoted statement was made. We can assure you, however, that all interrogation techniques currently approved for use by the Department of Defense at Guantanamo Bay, Cuba, are lawful. We defer to the Department of Defense regarding whether the Department of Defense's methods of interrogation may be an issue in any attempt to try a Guantanamo detainee by military commission.

4. President Bush recently discussed the case of Iyman Faris, the Ohio truck driver who was convicted of plotting to blow up the Brooklyn Bridge. The President said that when Faris was confronted with the evidence against him, "[he] chose to cooperate, and he spent the next several weeks telling authorities about his al Qaeda association." Isn't it possible, and even likely, that if the Administration had charged some of these detainees with crimes that carry stiff prison terms, many of them would have cooperated with the government?

ANSWER: As your question suggests, Iyman Faris began cooperating with the FBI shortly after he was first approached by the FBI in Ohio. Indeed, his cooperation went on for some time before he was formally charged with a crime. It is possible that, if Guantanamo detainees had been charged in our Federal courts with crimes that carry stiff prison terms, at least some of them would have cooperated with the government. However, as noted in the answer to question two above, such a Federal criminal prosecution cannot be initiated unless the facts and circumstances of the particular case support such a prosecution. Moreover, detainees at Guantanamo already have significant incentives to cooperate in order to avoid being charged in a military commission or to reduce any sentence that they may receive following an adjudication of guilt in a commission. They may also be motivated by the opportunity to be released entirely from Guantanamo. While it may be difficult to isolate the incentives that trigger cooperation in each instance, the intelligence information obtained from Guantanamo detainees suggests that a large number have decided to provide at least some cooperation.

5. As detailed by the *Wall Street Journal* in April of this year, military commissions were used following World War II to try Japanese prison camp guards who interrogated Americans by, among other things, making them stand [at] attention or squat for periods of up to 30 minutes during interrogations; repeatedly interrogating American prisoners without providing for sufficient time for sleep; and refusing to stop the interrogations when American prisoners indicated that they did not wish to participate. Sixty years ago, American military commissions found that these interrogations were crimes against humanity and sentenced the Japanese to prison for terms of five to twenty years. Is it the Department's position that interrogations of detainees in U.S. custody utilizing similar methods are lawful? Is it the Department's position that statements made utilizing these methods may be used as evidence to convict detainees of war crimes?

ANSWER: All interrogation techniques currently approved for use by the Department of Defense at Guantanamo Bay, Cuba, are lawful. Our understanding is that the Department of Defense takes allegations of detainee mistreatment by United States Armed Forces seriously and investigates credible allegations thoroughly, wiht appropriate action taken in cases where violations are substantiated. Whether a particular interrogation technique is lawful and whether particular statements made as a result of a particular technique may be introduced as evidence depends on the facts and circumstances. Without knowing the facts and circumstances, it would be inappropriate to speculate about the legality of the scenarios you describe. It is also worth noting that the Americans who were interrogated by the Japanese during World War II were entitled to special protections as Prisoners of War ("POWs"). Under the current Geneva Convention relative to the Treatment of Prisoners of War ("GPW"), no "form of coercion may be inflicted on prisoners of war to secure from them information of any kind whatever." Moreover, "prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind." POWs are also entitled to other special protections under the GPW. Although the President has directed that, as a matter of policy, the United States Armed Forces shall continue to treat detainees humanely, it must be remembered that al Qaeda and Taliban detainees at Guantanamo Bay are not legally entitled to the special protections afforded POWs.

Questions from Senator Russell D. Feingold

1. The Bill of Rights protects the right to be free from coerced confessions, both to protect the civil liberties of defendants, and to ensure the accuracy of information relied upon to deprive individuals of their freedom. Setting aside the question of what constitutional rights apply to the detainees at Guantanamo Bay, would you agree that evidence obtained through the use of torture should be treated as suspect?

ANSWER: For this question, the Department defers to the Department of Defense because Military Commission members are in the best position to address the question in the context of a particular case.

2. Lieutenant Commander Swift in his written testimony stated that his client, Mr. Hamdan, has been charged with conspiracy. Please describe the elements of an offense of "conspiracy" under the substantive law applied by the military commissions.

ANSWER: For this question, the Department defers to the Department of Defense, which is in a better position to provide a response.

3. You testified before the Committee that the military commissions determine whether to allow the use of evidence obtained through torture or other coercive interrogation techniques. Can you identify any instance(s) in which a military commission has explicitly considered whether or not it should consider evidence produced through torture or other coercive techniques? If so, please identify the instance(s) and the outcome(s).

ANSWER: For this question, the Department defers to the Department of Defense, which is in a

better position to provide a response.

4. The Administration's position is that the detainees at Guantanamo are "enemy combatants" who were picked up on the "battlefield" in as many as 40 different nations.

a. How did the U.S. officials who initially detained each of the individuals now at Guantanamo Bay determine, prior to or at the time of detention, whether the individual was an "enemy combatant"? Please submit documentation of the procedure used to make this determination.

b. Were any of these individuals given an opportunity, prior to detention, to contest their status as enemy combatants?

c. How many detainees have been released from Guantanamo Bay? Please identify each such detainee and indicate on what basis the detainee was released.

ANSWER: For this question, the Department defers to the Department of Defense, which is in a better position to provide a response.

5. In Judge Joyce Hens Green's recent decision finding the procedures of the Combatant Status Review Tribunals unconstitutional, she noted that the government did not formally define "enemy combatant" until July 2004. On what basis was the government detaining people prior to July 2004?

ANSWER: For this question, the Department defers to the Department of Defense, which is in a better position to provide a response.

6. You testified before the Judiciary Committee that the President has the authority to hold individuals for trial "for those crimes that violate the laws of war or other crimes that are regularly tried before military commissions." What "other crimes" are "regularly tried before military commissions" besides war crimes?

ANSWER: Military commissions are authorized under past executive practice to try all violations of the law of war and offenses made triable by military commission by statute. Congress has recognized and sanctioned this jurisdiction in 10 U.S.C. § 821, which provides that the jurisdiction conferred on courts martial in the Uniform Code of Military Justice "does not deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions." Under the law of war, violations of the law of war are triable by military commission. We are aware of only two offenses currently made triable by military commission by statute: aiding the enemy and spying. 10 U.S.C. §§ 904, 906.

7. Lieutenant Commander Swift told the Judiciary Committee that the rules of the military commissions are explicitly unenforceable and can be changed at any time. Is that statement correct?

ANSWER: For this question, the Department defers to the Department of Defense, which is in a better position to provide a response.

From:	Gorsuch, Neil M </o=usdoj/ou=jmd/cn=recipients/cn=mailboxes/cn=ngorsuch>
To:	Bucholtz, Jeffrey (CIV) </o=usdoj/ou=civil/cn=recipients/cn=mailboxes/cn=jbucholt>; Engel, Steve </o=usdoj/ou=jmd/cn=recipients/cn=mailboxes/cn=sengel>; Bradbury, Steve </o=usdoj/ou=jmd/cn=recipients/cn=mailboxes/cn=sbradbury>
Cc:	Katsas, Gregory (CIV) </o=usdoj/ou=civil/cn=recipients/cn=mailboxes/cn=gkatsas>
Bcc:	
Subject:	RE: Hamdan legislation comments
Date:	Thu Jul 13 2006 16:42:27 EDT
Attachments:	

Adding Steve Engel and Steve Bradbury.

From: Bucholtz, Jeffrey (CIV)
Sent: Wednesday, July 12, 2006 7:26 PM
To: Gorsuch, Neil M
Cc: Katsas, Gregory (CIV)
Subject: Hamdan legislation comments

Neil: Here are a few comments on the 7/6 draft (attached), though I recognize that it may have been superseded by now.

The only substantive comments I have relate to section 6, re: judicial review, and section 8, re: temporal effect.

Section 6(a) bars all review other than what's provided in the two exceptions of any claim relating to any aspect of an alien's detention, etc. It's not limited to aliens detained at GTMO, aliens detained by the military, aliens detained as enemy combatants, or in any other way. As written it would bar a Zadvydas challenge to detention beyond six months pending removal of an alien detained by DHS. It would bar a conditions of confinement Bivens or med-mal FTCA claim by a convicted prisoner detained by BOP who happened to be an alien. I'm sure there are good reasons to draft this more broadly than the DTA, which was specific to GTMO, but I doubt these consequences are intended. And I am confident that, regardless of the language of the bill, these consequences would be rejected by courts. On the one hand, the bill may get watered down on the Hill, so we don't want to aim low. But on the other hand, this may be too extreme to be constructive.

I would add "on" after "pending" and before "or filed after the date of enactment". And I would reorder the categories of barred claims in the last sentence to avoid any suggestion that claims relating to an alien's detention, classification, or conditions of confinement are only covered to the extent they relate to the alien's prosecution by military commission. I'd change it to "relating to any aspect of an alien's detention, prosecution by military commission, classification, or conditions of confinement".

In section 8(b), I would add "at any time since September 11, 2001" after "detained as an enemy combatant by the United States" and before "that is pending on or after the date of the enactment" at the end of the provision, in order to ensure that it applies to pending claims by aliens who were, but no longer are, detained as enemy combatants (e.g., the Rasul Bivens/RFRA case).

Here are some minor comments:

1. In section 1(c)(8), "That" at the beginning of the second sentence should be "The" or "This". In the final sentence, call me a paranoid punctuator, but I'd add a comma before "whose activities" to make clear that we're saying Geneva doesn't confer rights on members of al Qaeda, full stop, not simply that it doesn't confer rights on the particular members of al Qaeda whose activities demonstrate no respect for the laws of war.

2. In section 1(c)(11), the second sentence says that the detainee can petition for judicial review of his detention in CADC "and, thereafter, to the Supreme Court." I assume the idea is that cert is available from a CADC decision as it normally would be, but this could be read to suggest that the detainee could petition the SCt for review of his detention -- as opposed to for review of the CADC decision. I'd change the sentence to something like "exclusively in the U.S. Court of Appeals for the D.C. Circuit, with certiorari review available thereafter in the Supreme Court of the United States."

3. In section 3(e), the second sentence is unclear. It says "Each such report shall be submitted in unclassified form, with classified annex, if necessary and consistent with national security." Does this mean that we can skip the unclassified report if there's no unclassified report that would be consistent with national security? That we can skip the classified annex if providing one wouldn't be consistent with national security (even though it would be classified)? Something else?

4. Section 4(a)(4)(C) gives the Presiding Officer authority to discipline attorneys and act upon any contempt. In an unrelated case recently, there appeared to be a problem with a court-martial statute that gave DOJ authority to prosecute a violation of a court-martial subpoena but didn't give DOJ authority to enforce the subpoena civilly. This provision doesn't say anything about DOJ having authority to enforce a Presiding Officer order. If that's intentional, that's fine. But if not, maybe it would be worth considering this issue.

5. In section 4(a)(4)(E), it's not clear how the interlocutory certification is supposed to work. Does the Presiding Officer have sole discretion to certify or not certify, like a district ct under 1292(b)? If he certifies, does the CADC have discretion to accept or not accept the appeal, as under 1292(b), or must the CADC hear it? I assume we'd want it to work like under 1292(b), but if there's a reason for a contrary view, that's fine; either way, it might be worth clarifying this. This issue also goes to section 6(a)(2).

6. I think section 4(b)(1) may need to be rephrased. It says "To summon witnesses to trial and to require their attendance and testimony to put questions to them." Maybe it should be "testimony to questions put to them"? Or something else may be intended.

7. In section 4(c)(4), I would move the words "in accordance with the instructions from the Presiding Officer." As currently phrased, it could be read to suggest that sentence shall be imposed only when an accused is convicted "in accordance with instructions from the Presiding Officer," as opposed to in violation of those instructions. Moving those words to after "the other members of the commission" and before "shall impose a sentence", would avoid this issue. Later in this sentence, "firm" should be "fine". And I'm not sure what the "such" in "such other lawful punishment" refers to.

8. In section 6(a)(1), "Combat" should be "Combatant" in the title and at the end.

Let me know if you have any questions or if there's anyone else I should send these comments to. Thanks,

Jeff

From: Senger, Jeffrey M
</o=usdoj/ou=jmd/cn=recipients/cn=mailboxes/cn=jsenger>
To: Silas, Adrien
</o=usdoj/ou=jmd/cn=recipients/cn=mailboxes/cn=asilas>; Edney, Michael </o=usdoj/ou=jmd/cn=recipients/cn=mailboxes/cn=medney>
Cc: Leiter, Jordan
</o=usdoj/ou=coar/cn=recipients/cn=wt/cn=jordanleiter>; Gorsuch, Neil M
</o=usdoj/ou=jmd/cn=recipients/cn=mailboxes/cn=ngorsuch>
Bcc:
Subject: RE: OSAG Questions on Detainees
Date: Fri May 26 2006 17:09:47 EDT
Attachments:

Okay with me as long as it's okay with OLC.

From: Silas, Adrien
Sent:Friday, May 26, 2006 5:03 PM
To:Senger, Jeffrey M; Edney, Michael
Cc:Leiter, Jordan; Gorsuch, Neil M
Subject:FW: OSAG Questions on Detainees

OASG and OLC reaction to CIV response below?

From: Cummings, Holly (CIV)
Sent:Thursday, May 25, 2006 1:50 PM
To:Silas, Adrien
Subject:FW: OSAG Questions on Detainees

Adrien, Below is CIV's response.

From: Henry, Terry (CIV)
Sent:Thursday, May 25, 2006 1:35 PM
To:Cummings, Holly (CIV)
Cc:Nichols, Carl (CIV); Garvey, Vincent (CIV); Katerberg, Robert (CIV)
Subject:RE: OSAG Questions on Detainees

We have concerns about the ability of a DOJ witness to credibly assert that "no evidence has been obtained at Guantanamo Bay 'through the use of torture.'" Accordingly, we suggest the following edit:

1. The Bill of Rights protects the right to be free from coerced confessions, both to protect the civil liberties of defendants, and to ensure the accuracy of information relied upon to deprive individuals of their freedom. Setting aside the question of what constitutional rights apply to the detainees at Guantanamo Bay, would you agree that evidence obtained through the use of torture should be treated as suspect?
ANSWER: As the President has repeatedly and unequivocally emphasized, the United States neither commits nor condones torture. See, e.g., Statement on United Nations International Day in Support of Victims of Torture, 40 Weekly Comp. Pres. Doc. 1167-68 (July 5, 2004) ("America stands against and

will not tolerate torture. We will investigate and prosecute all acts of torture . . . in all territory under our jurisdiction. . . . Torture is wrong no matter where it occurs, and the United States will continue to lead the fight to eliminate it everywhere."). Torture, moreover, is a federal crime, is not permitted, and cannot be justified for any reason. Thus, no evidence has been obtained at Guantanamo Bay "through the use of torture." In addition, the United States has undertaken an international law obligation "to ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings." CAT Art. 15. And, the General Counsel of the Secretary of Defense recently reaffirmed that statements established to have been made as a result of torture shall not be admitted as evidence against an accused in a military commission proceeding. See Military Commission Instruction No. 10 (Mar. 24, 2006).

Terry M. Henry
Senior Trial Counsel
Civil Division, Federal Programs Branch
U.S. Department of Justice
Tel. 202.514.4107

From: Cummings, Holly (CIV)
Sent:Thursday, May 25, 2006 12:25 PM
To:Henry, Terry (CIV); Katerberg, Robert (CIV)
Cc:Nichols, Carl (CIV); Garvey, Vincent (CIV)
Subject:RE: OSAG Questions on Detainees

Please see below and advise. Thank you.

From: Senger, Jeffrey M
Sent:Thursday, May 25, 2006 12:02 PM
To:Silas, Adrien; Monheim, Thomas
Cc:Leiter, Jordan; Edney, Michael; Libutti, Tim (CIV); Cummings, Holly (CIV); Gorsuch, Neil M
Subject:RE: H36, Detainees - OASG Q&A (Control -9124)

Is Civil okay with OLC's proposed answer to Feingold 1? If so, we appear to have reached an accord (OLC's draft accommodates the concern that CRM raised).

I found two typos: In our answer to Feingold 3, change "mad" to "made." In our answer to Feingold 5, remove the hyphen from "one-hundred."

Jeff

From: Silas, Adrien
Sent:Wednesday, May 24, 2006 8:53 PM
To:Monheim, Thomas; Gunn, Currie (SMO); Senger, Jeffrey M; Shaw, Aloma A

Cc:Leiter, Jordan; Edney, Michael; Libutti, Tim (CIV); Cummings, Holly (CIV)
Subject:H36, Detainees - OASG Q&A (Control -9124)

I have attached the only comments received from DOJ components (from OLC, CIV, and CRM) in response to OMB's passback of interagency comments on these OASG Q&A. The component comments go beyond responding to the OMB passback. OLC, in particular, would like to submit the rewrite to OMB for clearance.

ODAG and OASG views on what we should submit to OMB in response to its passback of comments?

I. OLC COMMENTS:

From: Edney, Michael
Sent:Wednesday, April 05, 2006 5:02 PM
To:Silas, Adrien
Cc:Eisenberg, John; Willen, Brian; Boardman, Michelle; Smith, George; Mitchell, Dyone
Subject:RE: H36, Detainees - OASG Q&A (Control -9124)

The Office of Legal Counsel has rewritten these QFRs. For your convenience, we have attached clean and blacklined versions. This changes are important, and we require consultation in the event any are not implemented. Thanks, and feel free to contact me with any questions.
<< File: Final Edits Clean.wpd >> << File: Final Edits Blackline.wpd >>

Michael J. Edney
Office of Legal Counsel
United States Department of Justice
(202) 514-0188

II. CIV COMMENTS

From: Libutti, Tim (CIV)
Sent:Monday, April 03, 2006 11:09 AM
To:Silas, Adrien
Subject:FW: H36, Detainees - OASG Q&A (Control -9124)

I just received the email below. My previous email on this is below. Thanks.

From: Henry, Terry (CIV)
Sent:Monday, April 03, 2006 10:57 AM
To:Libutti, Tim (CIV)
Cc:Nichols, Carl (CIV); Katerberg, Robert (CIV)
Subject:RE: H36, Detainees - OASG Q&A (Control -9124)

Tim,

One follow up, if the fact that Feingold 1 is not tethered to DoD military commissions is giving folks pause about DoJ not taking a position, one fix would be to preface the first sentence of the answer we suggested below with, "Given that the question necessarily implicates the military commissions at Guantanamo Bay that are run by the Department of Defense,.." Thus, the answer would read:

"Given that the question necessarily implicates the military commissions at Guantanamo Bay that are run by the Department of Defense, for this question, the Department defers to the Department of Defense. Our understanding is that the Department of Defense explicitly prohibits the use in military commissions of evidence obtained by torture."

Terry M. Henry
Senior Trial Counsel
Civil Division, Federal Programs Branch
U.S. Department of Justice
Tel. 202.514.4107

From: Libutti, Tim (CIV)
Sent:Monday, April 03, 2006 9:26 AM
To:Silas, Adrien
Subject:FW: H36, Detainees - OASG Q&A (Control -9124)

The comments below are from Terry Henry (Federal Programs). Thanks.

We continue to believe that the response to Feingold question 1 (to which Mr. Wiegmann refers) should continue to "defer to DoD" in this context given that the matter involved (military commissions) is one as to which DoD has responsibility. However, the response could be changed to the version outlined below. We would defer to OLC regarding whether the response should include any more general statement about policies against torture or the use of evidence obtained by torture as Mr. Wiegmann suggests. Thanks.

Questions from Senator Russell D. Feingold

1. The Bill of Rights protects the right to be free from coerced confessions, both to protect the civil liberties of defendants, and to ensure the accuracy of information relied upon to deprive individuals of their freedom. Setting aside the question of what constitutional rights apply to the detainees at Guantanamo Bay, would you agree that evidence obtained through the use of torture should be treated as suspect?

ANSWER: For this question, the Department defers to the Department of Defense because Military Commission members are in the best position to address the question in the context of a particular case. Our understanding is that the Department of Defense explicitly prohibits the use in military commissions of evidence obtained by torture.

III. CRM COMMENTS:
From: Leiter, Jordan
Sent: Thursday, April 06, 2006 11:56 AM
To: Silas, Adrien
Cc: Drennan, John; Opl, Legislation; Stemler, Patty; Samuels, Julie; Campbell, Benton; Edelman, Ronnie
Subject: CRM comments on : H36, Detainees - OASG Q&A (Control -9124)

Adrien: sorry about getting back to you so late on this. CTS is still reviewing this (we only sent it out to them this morning).
Our appellate section has already noted a concern, which I have reprinted below (from John Drennan). My only comment concerns our response to the second Sen. Leahy question, which is about whether there is a realistic possibility that we will prosecute long-held GTMO detainees in federal court. I would not respond, as we do, that a factor informing our prosecutorial discretion is consideration of detainees' "allegations of 'harsh conditions' and 'repeated interrogations' . . . ." I think that what we mean to say by this is that if a detainee alleged harsh treatment, the allegation would matter to criminal prosecutors and

would cause us to think hard about whether we have in fact obtained reliable, admissible evidence from the detainee. However, as currently written and in the eyes of an uncharitable audience, it could suggest instead that if a detainee alleged harsh treatment, we might opt to continue that detainee's status as an enemy combatant rather than risk exposure of, and investigation into, the mistreatment allegation in federal court (which is plainly untrue). In other words, it might erroneously suggest that our prosecution decisions favor a keep-your-mouth-shut-about-mistreatment approach by GTMO detainees.

IV. REQUEST FOR COMPONENT VIEWS ON THE OMB PASSBACK

From: Silas, Adrien
Sent: Thursday, March 30, 2006 4:07 PM
To: Libutti, Tim (CIV); Edwin Kneedler; James Bellot; Kevin Jones; Winnie Brinkley; Wykema Jackson; Dyone Mitchell; George Smith; Michelle Boardman; Betty Lofton; Julie Samuels; Legislation OPL; Patricia Massie; David Smith; Natalie Voris; Little, Kimani (CRT); Beth Beers; Carol.Keeley@ic.fbi.gov; dcoates@leo.gov; Kristen Mack; L. Sue Hayn; mhowell5@leo.gov; Rene Morton; Spinola, Teresa ; Ed Ross; Matthew Bronick
Cc: Monheim, Thomas; Rybicki, James E; Blake, Dave; Aloma Shaw; Currie Gunn; Jeffrey Senger
Subject: H36, Detainees - OASG Q&A (Control -9124)

Please provide me your comment or "no comment" on the attached OMB passback of interagency comments on the Justice Department's draft responses to congressional questions by no later than 10 a .m. on Monday, April 3, 2006. Thank you.

<< File: H36control.pdf >> << File: 06-24-05 Ltr re QFRs for Wiggins from 06-15-05 hearing re Detainees.pdf >> << File: terror70a.let.wpd >> << File: terror70b.let.wpd >>
ODAG
OASG
OSG
OLC
OLP
CRM
CIV
EOUSA
CRT
FBI
BOP

-----Original Message-----
From: M._Bryan_Legaspi@omb.eop.gov [mailto:M._Bryan_Legaspi@omb.eop.gov]
Sent: Wednesday, March 22, 2006 1:00 PM
To: Silas, Adrien
Cc: John_D._Burnim@omb.eop.gov; James_J._Jukes@omb.eop.gov
Subject: RE: DOJ responses to questions from the 06-15-05 hearing re Detainees - For Clearance

Just wanted to share with you the NSC (Wiegmann) comment on this QFR.

I guess I am OK with this if DoD and State have cleared. I would think there could be less "defer to DoD" answers though, and I would think DOJ would have a view on the one question relating to use of testimony obtained by torture. Also would suggest supplementing that answer by sentence "USG law and policy does not permit the use of torture."

Please edit as appropriate per Brad's comments. OMB clears. Thanks.

Bryan

-----Original Message-----
From: Adrien.Silas@usdoj.gov [mailto:Adrien.Silas@usdoj.gov]
Sent: Wednesday, March 22, 2006 10:53 AM
To: Legaspi, M. Bryan
Subject: FW: DOJ responses to questions from the 06-15-05 hearing re Detainees - For Clearance

Any progress on OMB clearance of this one?

-----Original Message-----
From: Silas, Adrien
Sent: Thursday, February 16, 2006 12:02 PM
To: M. Bryan Legaspi
Subject: FW: DOJ responses to questions from the 06-15-05 hearing re Detainees - For Clearance

Thank you for pointing out this omission. I have attached a revised version, with the "all" deleted in Feingold question 6.

-----Original Message-----
From: M._Bryan_Legaspi@omb.eop.gov [mailto:M._Bryan_Legaspi@omb.eop.gov]
Sent: Wednesday, February 08, 2006 4:13 PM
To: Silas, Adrien
Cc: John_D._Burnim@omb.eop.gov
Subject: RE: DOJ responses to questions from the 06-15-05 hearing re Detainees - For Clearance

Adrien,

I'll forward these comments to DOD to see if they have any objections.

For Feingold Question 6, the revised version does not seem to incorporate State's edit (to delete "all") and the comments do not address why DOJ did not want to accept that edit. Could you advise why? Thanks.

Bryan

-----Original Message-----
From: Adrien.Silas@usdoj.gov [mailto:Adrien.Silas@usdoj.gov]
Sent: Tuesday, February 07, 2006 7:48 PM
To: Legaspi, M. Bryan
Subject: FW: DOJ responses to questions from the 06-15-05 hearing re Detainees - For Clearance

The Justice Department has the following response to the OMB passback of comments on the Justice Department's responses to questions from the Senate Judiciary Committee concerning detainees:

Biden Question 5: While have concerns about the proposed response to question 5 from Senator Biden, this is a complicated issue and DoD would be in a better position to draft a stronger response. We also question the tone of the proposed revised response. Additionally, we note that the proposed response appears inaccurate, in that it ignores the Government resources expended to create and implement procedures for the Combatant Status Review Tribunals. We believe that the original response (deferring to DoD) should be retained. If it were necessary to revise the response along the lines of the proposed revisions, we would suggest using the following text:

The Department of Defense has informed us that all individuals ultimately detained by the DoD were initially screened through an extensive multi-step process to determine their enemy combatant status

and whether detention at Guantanamo was appropriate. Information on this process is available through the DoD website at: http://www.defenselink.mil/news/Apr2004/d20040406qua.pdf The subsequent Combatant Status Review Tribunals provided considerably more extensive process to detainees than the procedures that implement Article 5.

Biden Question 7: We are not in a position to confirm the accuracy of the numbers ("11" and "nearly 500") in the new, redlined answer. The person who inserted them should confirm their accuracy. Moreover, if the original answer is replaced, we believe that the response must be prefaced with "Our understanding is that ..."

Cornyn Question 1: We will delete the text in the response beginning with "In Iraq, not only" and ending with "hundreds of casualties". Due to the passage of time, the events these sentences describe no longer constitute current events illustrating that the war against al Qaeda continues. The examples would be awkward and not nearly as persuasive because the events are no longer current.

DOD is in the best position to confirm the accuracy of the number ("230") contained in the proposed new response. In addition, we recommend replacing the new text with the following:

and DOD has effective processes in place to review, on an annual basis, the status of enemy combatants detained at Guantanamo Bay, and to release Guantanamo detainees from U.S. custody when detention by the U.S. is no longer necessary. While more than 230 detainees have departed Guantanamo, detainee releases and transfers are not without risks. The Department of Defense has informed us that approximately a dozen detainees who were released from Guantanamo are known to have later taken part in anti-coalition activities.

Additionally, the last sentence of the DOJ-proposed response also appears in the response to Senator Leahy's question 1. However, the passback would delete this sentence (along with other text) from the Cornyn response and rephrase it. It is unclear to us why this sentence would be acceptable in the Leahy response, but not in the Biden response.

Leahy Question 1: We will delete the text in the response beginning with "In Iraq, not only" and ending with "hundreds of casualties". Due to the passage of time, the events these sentences describe no longer constitute current events illustrating that the war against al Qaeda continues. The examples would be awkward and not nearly as persuasive because the events are no longer current.

Leahy Question 5: We believe that the response the Department of Defense proposes should be prefaced by the following: "Our understanding is that . . ." since our knowledge on this point is based primarily on DoD's information to us.

Feingold Question 1: Saying that we defer to the Department of Defense regarding the weight given evidence obtained by torture "because Military Commission members are in the best position to address the question in the context of a particular case" is problematic. The question asks about evidence obtained by torture and there are treaty obligations prohibiting consideration of such evidence. Whether torture has occurred may be a question of fact for a military commission, but the weight given such evidence may not be, depending on how one views the applicability of the Convention Against Torture. However, there is no need to address the issue head on here. Therefore, we support the original answer: "For this question, the Department defers to the Department of Defense." and oppose adding what is effectively an affirmation by us that the military commissions can consider evidence obtained by torture.

We suggest replacing the proposed revised response with the following text, which we believe makes the same point, only more clearly:

For this question, the Department defers to the Department of Defense because Military Commission members are in the best position to address the question in the context of a particular case.

Feingold Question 3: We strongly prefer the original Justice Department-proposed response. At the very least, preface the edit with "Our understanding is that ..."

Feingold Question 6: The correct citation for the offense of spying under the UCMJ is 10 U.S.C. § 906 not "90" as the draft states and we will make this change.

We have attached a revised set of responses.

<<terror70b.let.wpd>> <<terror70a.let.wpd>>

Article II Authority

Issue: Do you believe that the President has the power under Article II to ignore laws enacted by Congress? What is the scope of the President's powers under Article II?

Talking Points:

* **The President has a constitutional responsibility to "take Care that the Laws be faithfully executed." Therefore, he cannot "ignore" laws passed by Congress or refuse to enforce them simply because he may disagree with them as a matter of policy.**

* **The President, however, also has a constitutional responsibility to preserve, protect, and defend the Constitution. It is therefore the longstanding position of the Executive Branch that the President may decline to enforce an unconstitutional law.** The Department of Justice under Attorney General Reno described this proposition as "unassailable."

* **To avoid the need to decline to enforce a law, it also is the longstanding practice of the Executive Branch, as well as the courts, to construe statutory language so as to avoid serious constitutional problems.**

Background:

* Article II of the Constitution vests all "executive Power" in the President and makes him the Commander in Chief of the Armed Forces.

* The Supreme Court has long recognized that the President has broad, independent authority in matters of foreign affairs and as Commander in Chief during war. The President, for example, is the "sole organ" of the U.S. in international relations (*Curtiss-Wright*), and foreign policy is "the province and responsibility of the Executive" (*Navy v. Egan*).

* Of course, the President's powers in matters of war and national security are greatest when supported by a congressional enactment (*Steel Seizure Case*).

* In conducting the War on Terror, the President has acted in conformity with applicable statutory requirements.

    - Five justices of the Supreme Court concluded in *Hamdi* that Congress, in the Authorization for the Use of Force following the attacks of 9/11, "clearly and unmistakably" authorized the detention of enemy combatants in the fight against our nation's terrorist enemies, as a "fundamental and accepted [ ] incident to war."

- Another fundamental and accepted incident to war is conducting surveillance in order to detect and locate the enemy and to learn his plans. The AUMF therefore also authorizes such surveillance, and provides the statutory authorization contemplated by the Foreign Intelligence Surveillance Act (FISA) for surveillance outside the procedures of FISA.

* At this hearing, it would be imprudent to purport to define the limits of the President's constitutional powers based on hypotheticals.

Drafter (OLC): C. Kevin Marshall, 202-514-3713
Reviewer (OLC): Steve Bradbury, 202 514-2046

From: Elwood, Courtney
</o=usdoj/ou=jmd/cn=recipients/cn=mailboxes/cn=celwood>
To: Gorsuch, Neil M
</o=usdoj/ou=jmd/cn=recipients/cn=mailboxes/cn=ngorsuch>
Cc:
Bcc:
Subject: RE: Memo on Communications with the Executive Office of the President
Date: Tue Apr 04 2006 13:55:38 EDT
Attachments:

You raise a good point as to (1); I had not thought of that. I had considered (2), but frankly did not know the best way to address it. So I left it as it was done in the previous memo. I will think about fixes for both, and recirculate.

Thanks.

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

From: Gorsuch, Neil M
Sent:Tuesday, April 04, 2006 1:25 PM
To:Elwood, Courtney
Subject:RE: Memo on Communications with the Executive Office of the President

This looks very good to me. I have only a couple questions: (1) What abt the rather discrete criminal matters that arise in OASG components (eg TAX, ENRD, ATR)? Might it make sense to have OASG permitted to report on criminal matters that arise from the activities of its components? (2) Does the term "national security matters" mean matters that will arise from the new NSD and are now based in CRIM? If so, ODAG is clearly the right component to report to EOP. But what if the term is construed to include plain vanilla CIV litigation over, say, GTMO or Darby photos? I've been the main poc on terrorism-related civil litigation with Brett Gerry as were my predecessors. Would it again make sense to allow OASG to report on litigation matters that arise within its docket?

From: Elwood, Courtney
Sent:Monday, April 03, 2006 5:01 PM
To:Garre, Gregory G; Elwood, John; Elston, Michael (ODAG); Gorsuch, Neil M
Subject:Memo on Communications with the Executive Office of the President

Four years ago, AG Ashcroft issued a memo, dated April 15, 2002, on communications between the Department of Justice and the White House. Judge Gonzales has asked that we update that memo and redistribute it to remind old personnel and to educate the new. I have attempted to do so in the attached draft.

I welcome your comments.

<< File: Department of Justice Communications with the EOP.wpd >>

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

From:	Monheim, Thomas </o=usdoj/ou=jmd/cn=recipients/cn=mailboxes/cn=tmonhelm>
To:	Nowacki, John </o=usdoj/ou=jmd/cn=recipients/cn=mailboxes/cn=jnowacki>
Cc:	Elwood, Courtney </o=usdoj/ou=jmd/cn=recipients/cn=mailboxes/cn=celwood>; Gorsuch, Neil M </o=usdoj/ou=jmd/cn=recipients/cn=mailboxes/cn=ngorsuch>; Marshall, C. Kevin </o=usdoj/ou=jmd/cn=recipients/cn=mailboxes/cn=cmarshall>; Prestes, Brian </o=usdoj/ou=jmd/cn=recipients/cn=mailboxes/cn=bprestes>
Bcc:	
Subject:	RE: One more go-around on detainee points
Date:	Wed Feb 15 2006 19:59:19 EST
Attachments:	

John,

I would NOT use the term "prisoner" in bullet 2 of the "Detainee - Key Talking Points". As you know, a "prison" usually refers to a place of confinement as punishment after conviction (or otherwise in the administration of justice). These individuals are "detainees" in the War on Terror, not "prisoners." This legal distinction is even more critical, considering that the same talking point goes on to explain that one of the individuals at Abu Graib responsible for "shocking mistreatment" was tried and sentenced to ten years in "prison."

Please let me know if you have any questions or need any more information. Thanks.

Tom

-----Original Message-----
From: Nowacki, John
Sent: Wednesday, February 15, 2006 12:55 PM
To: Monheim, Thomas; Marshall, C. Kevin; Elwood, Courtney; Gorsuch, Neil M; Prestes, Brian
Subject: FW: One more go-around on detainee points
Importance: High

Please disregard; I see that Tom has sent a different version around.

-----Original Message-----
From: Nowacki, John
Sent: Wednesday, February 15, 2006 12:51 PM
To: Monheim, Thomas; Marshall, C. Kevin; Elwood, Courtney; Gorsuch, Neil M
Cc: Prestes, Brian
Subject: FW: One more go-around on detainee points
Importance: High

The latest iteration of State's talking points is attached. For the most part DOJ's major edits are intact; the most significant change seems to be in the Detainee points, where "Credible complaints of abuse are taken seriously, acted upon promptly, investigated thoroughly, and when there have been abuses, such as . . ." has become "When there have been abuses, such as the shocking mistreatment of prisoners by a small group of guards at Abu Ghraib, those violations of our law and policy are taken

seriously, acted upon promptly, investigated thoroughly, and the wrongdoers are held accountable for their actions."

I've added a comment in the GTMO points suggesting that the CSRT/ARB explanation unnecessary because of the explanation in the Graham-Levin section, and added "we believe" to the 11th bullet in the Renditions TP's (one of our previously suggested edits).

State wants to get this out as soon as possible -- see below -- but didn't send it until late yesterday. My apologies for the late forward, but with the OPA work on the accomplishments speech event this morning I wasn't able to review this earlier.

-----Original Message-----
From: VolkerKE@state.gov [mailto:VolkerKE@state.gov]
Sent: Tuesday, February 14, 2006 7:46 PM
To: Nowacki, John
Cc: PetersenRB@state.gov; VolkerKE@state.gov
Subject: FW: One more go-around on detainee points

John - I just saw your other note. I think the changes the DOD sent earlier today were meant to take into consideration your proposed changes. Please take a look and let me know rather immediately (ok, first thing tomorrow as I don't want to spend my evening here) if these are okay. Your opinion on the question posed below is also of interest. We hope to send these out tomorrow.

Thanks.

Karen
-----Original Message-----
From: Volker, Karen E
Sent: Tuesday, February 14, 2006 7:41 PM
To: 'Del Monte, Bryan, CIV, OSD-POLICY'; Deeks, Ashley S
Cc: Smith, Daniel B; Petersen, Robert B; Volker, Karen E; Stimson, Charles D. (Cully), CIV, OSD-POLICY; Barbara Burfeind (Barbara.Burfeind@osd.mil); Liotta, Alan, CIV, OSD-POLICY
Subject: One more go-around on detainee points

Bryan - I went over the papers you sent to me and compared them to what we thought had been agreed after your back and forth with Dan yesterday. The rendition and Guantanamo points seem to be in good order. You made additional changes to the master detainee talking points (particularly to the first two bullets) that are different from what we thought had been agreed. Your edits substantially change language crafted by Karen Hughes personnally. I tried to isolate what I think is the main purpose in your changes and adjusted Karen's language accordingly while preserving the style of opening that she had tried to achieve in these points. I think this does the trick. If possible, I think Karen would want to adjust this even further but pose the following question:

Can:
United States personnel are required to treat detainees consistent with U.S. law and treaty obligations, including a prohibition on torture and a prohibition on cruel, inhuman, or degrading treatment

be replaced with:

United States personnel treat detainees consistent with U.S. law and treaty obligations, which include a prohibition on torture and a prohibition on cruel, inhuman, or degrading treatment

?
I also went back to the language that Karen prefers on the opening of the second bullet. She is, afterall, the communicator. I think I saw the legal reasons for your change and hope that my slight edits to her text take care of your (and presumably others') concerns.

We will assume that these adjustments are okay with you unless you can explain legal reasons why they cannot work.

Do you have the name and contact information for the person across the river that you said should clear on one of these sets? If so, could you please pass it to me? Thanks.

Karen and the NSC would both like to have these points go out early tomorrow.

THanks.

Karen

-----Original Message-----
From: Del Monte, Bryan, CIV, OSD-POLICY
[mailto:Bryan.DelMonte@osd.mil]
Sent: Tuesday, February 14, 2006 5:06 PM
To: Volker, Karen E; Del Monte, Bryan, CIV, OSD-POLICY
Cc: Smith, Daniel B; Stimson, Charles D. (Cully), CIV, OSD-POLICY; Liotta, Alan, CIV, OSD-POLICY; Burfeind, Barbara, CIV, OSD-POLICY; Ansah-Twum, Ellen Y; Petersen, Robert B
Subject: RE: Detainee Talking Points

I incorporated all of the Justice, State L, and SWCI comments made in the meeting today - and those documents you sent me - in to the document with Haynes for clearance... Justice's additions were added in full - I don't recall any of justice's edits no longer being relevant (since they usually focused on different aspects of the document.) The State L and SWCI stuff I added from our drafts done tonight...

I have attached the documents to this email...

Bryan

-----Original Message-----
From: Volker, Karen E [mailto:VolkerKE@state.gov]
Sent: Tuesday, February 14, 2006 5:03 PM
To: Del Monte, Bryan, CIV, OSD-POLICY
Cc: Smith, Daniel B; Stimson, Charles D. (Cully), CIV, OSD-POLICY; Liotta, Alan, CIV, OSD-POLICY; Burfeind, Barbara, CIV, OSD-POLICY; Ansah-Twum, Ellen Y; Petersen, Robert B; Volker, Karen E
Subject: RE: Detainee Talking Points

Dear Bryan - thanks. What do you mean that you have cross-hatched the edits? Incorporated them all into one document? Cross-hatched usually means (to me, at least) when we send the cable to the NSC for final transmission. We will cross-hatch it to the NSC from here (as the originator of the points). I think there is just confusion with the terms used. In any case, could you please send to me now the versions that you have sent to OGC so I can start putting them into the cable format? (That takes a little time.) Then I could just add OGC's comments at the end. Thanks.

Karen

-----Original Message-----
From: Del Monte, Bryan, CIV, OSD-POLICY
[mailto:Bryan.DelMonte@osd.mil]
Sent: Tuesday, February 14, 2006 4:57 PM
To: Volker, Karen E
Cc: Smith, Daniel B; Stimson, Charles D. (Cully), CIV, OSD-POLICY; Liotta, Alan, CIV, OSD-POLICY; Burfeind, Barbara, CIV, OSD-POLICY
Subject: RE: Detainee Talking Points

Dear Karen,

I have cross-hatched the edits from L, S/WCI, and Justice as we discussed. I just went through all the documents with OGC (Diane). They need to shop it around in their shop again and get another check before taking it to Haynes... I do not know if it will go to Haynes tonight - but they are moving towards that goal as quick as they can. Diane will reply back to you and to Bob - copying me and Cully. They all know to expedite the process... I imagine it will be out tonight or tomorrow morning...

Bryan

-----Original Message-----
From: Volker, Karen E [
mailto:VolkerKE@state.gov]
Sent: Tuesday, February 14, 2006 2:06 PM
To: Petersen, Robert B
Cc: Del Monte, Bryan, CIV, OSD-POLICY; Barbara.Burfeind@osd.mil; Volker, Karen E; Smith, Daniel B; Volker, Karen E
Subject: FW: Detainee Talking Points

Robert - Please look these over and compare to what DOD has agreed to.
Please work with Bryan. These are comments on an earlier (Friday)
version of the points but hopefully we will be able to come to closure
today. Thanks.

Karen

-----Original Message-----
From: John.Nowacki@usdoj.gov [
mailto:John.Nowacki@usdoj.gov]
Sent: Tuesday, February 14, 2006 12:18 PM
To: Volker, Karen E
Cc: Petersen, Robert B
Subject: Detainee Talking Points

Karen -- the attached documents contain the full
and final edits from
DOJ on the talking points.

Thanks.
John

John A. Nowacki
Senior Counsel, Office of Public Affairs
U.S. Department of Justice
202-616-2777

Gorsuch, Neil M

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

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

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

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

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

Gorsuch, Neil M

From:	Gorsuch, Neil M
Sent:	Thursday, December 29, 2005 4:57 PM
To:	Bradbury, Steve; 'BellingerJB@state.gov'; Elwood, John; 'John_B._Wiegmann@nsc.eop.gov'; 'jimenezf@dodgc.osd.mil'; 'Brett_C._Gerry@who.eop.gov'; 'Raul_F._Yanes@omb.eop.gov'
Subject:	RE: Draft Signing Statement

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

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

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

I agree with John's comments.

-----Original Message-----
From: BellingerJB@state.gov [mailto:BellingerJB@state.gov]
Sent: Thursday, December 29, 2005 1:00 PM
To: Elwood, John; John_B._Wiegmann@nsc.eop.gov; Rosalyn_J._Rettman@omb.eop.gov; jimenezf@dodgc.osd.mil; Brett_C._Gerry@who.eop.gov

Brett_C._Gerry@who.eop.gov
Cc: Bradbury, Steve; Gorsuch, Neil M; David_S._Addington@ovp.eop.gov;
Shannen_W._Coffin@ovp.eop.gov; roberjle@ucia.gov;
Michael_Allen@nsc.eop.gov; melodar@ucia.gov; Raul_F._Yanes@omb.eop.gov
Subject: RE: Draft Signing Statement

Although long, this version looks good to me.

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

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

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

OK, here is a revised version that attempts to incorporate the substance of most comments. I could not incorporate everything as there were conflicting comments, but I did my best. I have put this version into the formal OMB clearance process, so it should come around to everyone again through that route for formal comment. David Addington has suggested a one-line signing statement, which is now the last line of this statement. I am interested in everyone's views on that approach -- this is now much longer than what we would traditionally do, but there are various objectives that people wanted to accomplish with this.
Thanks to everyone for the informal comments and quick turn-around.

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

The provisions of Title X regarding the standards for treatment of detainees are an important statement reaffirming the values and principles we share as a Nation. U.S. law and policy already prohibit torture. Section 1003, which prohibits cruel, inhuman or degrading treatment or punishment, is intended to codify the Administration's existing policy of abiding by the substantive constitutional standard applicable to the United States under Article 16 of the Convention Against Torture in its

treatment of detainees in U.S. custody anywhere.
As the sponsors of this legislation have stated, however, it does not create or authorize any private right of action for terrorists to sue anyone, including our men and women on the front lines in the war on terror. On the contrary, section 1004 provides additional protection for those engaged in authorized AND LAWFUL detention or interrogation of terrorists from any civil suit or criminal prosecution that might be brought under other provisions of law.

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

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

-----Original Message-----
From: Wiegmann, John B.
Sent: Wednesday, December 28, 2005 8:33 PM
To: 'John.Elwood@usdoj.gov'; Rettman, Rosalyn J.; jimenezf@dodgc.osd.mil; Gerry, Brett C.
Cc: Steve.Bradbury@usdoj.gov; Addington, David S.; Coffin, Shannen W.
Subject: RE: Draft Signing Statement

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

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

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

Thank you very much.

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

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

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

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

Gorsuch, Neil M

From: Gorsuch, Neil M
Sent: Wednesday, January 11, 2006 7:14 PM
To: McCallum, Robert (SMO)
Subject: RE:

I've now had a chance to review the letter and agree that we need to highlight the deliberative process exemption more clearly. I will communicate this to Rebecca.

From: McCallum, Robert (SMO)
Sent: Wednesday, January 11, 2006 4:29 PM
To: Gorsuch, Neil M
Subject: RE:

Do we want to define that our understanding of his inquiry is directed to personnel decisions/deliberative process or do we want to leave it implied? How's about:

We understand that your inquiry concerns the exercise of the Presidential prerogative to appoint, remove, and/or reassign persons to Executive Branch leadership positions and the deliberative process involved in such Presidential actions. In light of the Department's confidentiality interests with regard to our internal deliberative process, it would not be appropriate to disclose the requested documents nor to make Mr. McCallum available for an interview by Committee staff. We also have substantial questions about whether information regarding the exercise of the Presidential prerogatives relating to Presidential appointees is relevant to Ms. Henke's fitness for the position for which she has been nominated.

I will be guided in this suggestion by OLA's view and yours. It can be argued that the emails to and from me may not substantively involve deliberative process. The interview clearly would. Otherwise, it looks fine to me. Robt.

From: Gorsuch, Neil M
Sent: Wednesday, January 11, 2006 3:15 PM
To: McCallum, Robert (SMO)
Subject: FW:
Importance: High

Rebecca would very much like your review and input on this. I will take a look at it as well.

From: Seidel, Rebecca
Sent: Wednesday, January 11, 2006 2:40 PM
To: Gorsuch, Neil M
Subject:
Importance: High

<< File: DOJ response letter to lieberman.henke.1-10-06 draft.wpd >>

ngorsuch@hotmail.com

From: ngorsuch@hotmail.com
Sent: Friday, February 03, 2006 9:26 PM
To: Gorsuch, Neil M
Attachments: AGremarks2.doc

NMG Draft 2/3/06

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

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

* * *

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

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

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

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

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

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

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

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

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

***

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

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

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

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

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

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

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

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

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

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

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

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

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

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

***

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * *

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

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

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

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

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

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

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

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

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

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

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

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

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

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

***

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

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

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

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

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

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

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

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

***

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

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

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

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

Gorsuch, Neil M

From: Gorsuch, Neil M.
Sent: Saturday, February 4, 2006 8:42 AM
To: Elwood, Courtney
Subject: Re:

Haven't heard back yet but I am hopeful we can patch over any difference of views.

-----Original Message-----
From: Elwood, Courtney <Courtney.Elwood@SMOJMD.USDOJ.gov>
To: Gorsuch, Neil M <Neil.Gorsuch@SMOJMD.USDOJ.gov>
Sent: Sat Feb 04 08:18:16 2006
Subject: RE:

This doesn't make me happy. Where are we on it now. Have you heard from Steve and Paul on this draft?

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

-----Original Message-----
From: Gorsuch, Neil M.
Sent: Friday, February 03, 2006 9:49 PM
To: Elwood, Courtney
Subject: Fw:

Fyi.

-----Original Message-----
From: Gorsuch, Neil M <Neil.Gorsuch@SMOJMD.USDOJ.gov>
To: Clement, Paul D <Paul.D.Clement@SMOJMD.USDOJ.gov>; Bradbury, Steve <Steve.Bradbury@SMOJMD.USDOJ.gov>
Sent: Fri Feb 03 21:47:51 2006
Subject: Fw:

Gentlemen, tonight Paul expressed the concern that the draft circulated earlier today suggested a

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

----Original Message----
From: ngorsuch@hotmail.com <ngorsuch@hotmail.com>
To: Gorsuch, Neil M <Neil.Gorsuch@SMOIMD.USDOJ.gov>
Sent: Fri Feb 03 21:26:00 2006
Subject:

jimenezf@dodgc.osd.mil

From:	jimenezf@dodgc.osd.mil
Sent:	Thursday, February 09, 2006 4:03 PM
To:	Gorsuch, Neil M; Katsas, Gregory (CIV); Nichols, Carl (CIV); Marshall, C. Kevin
Subject:	FW: DTA Questions for DOJ
Attachments:	ARB-DTA Memo 9 Feb 1510.doc; RCM405.pdf; Addition to the ARB Report.doc

Please ignore my last e-mail and use this one instead.

-----Original Message-----
From: Becker, Grace, Ms, DoD OGC
Sent: Thursday, February 09, 2006 16:00
To: Becker, Grace, Ms, DoD OGC; Allen, Charles, Mr, DoD OGC; Beaver, Diane, Ms, DoD OGC; Jimenez, Frank, Mr, DoD OGC; Hecker, Karen, Ms DoD OGC; Printer, Norman, Mr, DoD OGC
Subject: RE: DTA Questions for DOJ

Sorry. New attachments. I attached the same document twice and missed another.

-----Original Message-----
From: Becker, Grace, Ms, DoD OGC
Sent: Thursday, February 09, 2006 15:33
To: Allen, Charles, Mr, DoD OGC; Beaver, Diane, Ms, DoD OGC; Jimenez, Frank, Mr, DoD OGC; Hecker, Karen, Ms DoD OGC; Printer, Norman, Mr, DoD OGC
Subject: FW: DTA Questions for DOJ

Here are DOJ's responses and my latest draft of both documents -- the ARB memo and 2 options of what to include in the ARB report. Comments welcome.

The .pdf file is a copy of a source document that I cite in one of my footnotes.

Grace

-----Original Message-----
From: Jimenez, Frank, Mr, DoD OGC
Sent: Thursday, February 09, 2006 10:22
To: Hecker, Karen, Ms DoD OGC; Becker, Grace, Ms, DoD OGC
Subject: FW: DTA Questions for DOJ

See below. What's the latest draft?

-----Original Message-----
From: C.Kevin.Marshall@usdoj.gov [mailto:C.Kevin.Marshall@usdoj.gov]
Sent: Wednesday, February 08, 2006 19:11
To: jimenezf@dodgc.osd.mil
Cc: Brian.Preston@usdoj.gov; John.Elwood@usdoj.gov; Steve.Bradbury@usdoj.gov; John.Eisenberg@usdoj.gov; Neil.Gorsuch@usdoj.gov
Subject: FW: DTA Questions for DOJ

Frank,

OLC has given your questions a quick look, and here are some brief, informal answers. For any of these, we would be happy to review anything DOD might draft, and we might be able to provide better guidance at that stage, given all of the factual and discretionary issues that your questions raise.

1. The DTA requires that the CSRT and ARB procedures that the SECDEF submits to Congress "ensure that" a CSRT or ARB, in making a determination of status, to the extent practicable, "assess" whether any statement "derived from or relating to" a detainee "was obtained as a result of coercion" and "the probative value (if any) of any such statement." When an ARB or CSRT considers such a statement, one part of the required "assess[ment]" certainly could be to ask the detainee whether the statement was obtained as a result of coercion. But the text of the DTA does not directly require this approach, as opposed to other possible means of assessment. Whether, however, this approach could be said to be necessary in order to "assess" in a meaningful way, either in general or in a particular case, is not one that we have enough factual knowledge to be able to answer. DOD should in the exercise of its discretion in implementing the statute consider and answer that question based on its greater factual knowledge.

2. The DTA requires the above-described assessment only "to the extent practicable." Consistent with ordinary dictionary definitions of the term, we understand practicable to mean "capable of being done," though, in context, it likely does not mean "capable of being done at any cost"; if it did, then the "practicable" caveat would not add anything. Thus, "to the extent practicable" is probably better read to impose something akin to a safety valve that excuses assessments that would be particularly burdensome.
Again, DOD is in a better position than DOJ to determine when and under what circumstances it would be impracticable for DOD to make an assessment – that is, under what circumstances such an assessment would be a such a strain on DOD resources that it could be said to be impracticable. The question involves both a factual assessment and an exercise of discretion on DOD's part in implementing the statute.

3. The DTA does not appear to directly answer your question. It imposes on each CSRT and ARB the

duty to make assessments [to the extent practicable], but is silent regarding whether each ARB or CSRT must decide the preceding practicableness question case-by-case, based on DOD guidelines promulgated across the board, or something in between, such as guidelines on practicableness that depend on the factual context of each case.
Conceivably, DOD could be aware of entire categories of per se impracticableness (as the question suggests), in which case the DTA would appear, at a quick glance, to permit an across-the-board determination with respect to such categories. DOD is in a better position than DOJ to determine which option, as a matter of fact and policy, makes the most sense. As a matter of law, the DTA seems to leave the particulars open.

4. The DTA does not appear to compel an answer to this question, beyond requiring that the procedures "ensure" an assessment to the extent practicable. To the extent that documenting compliance in some way would be aimed at "ensur[ing]" that the procedures accomplish this, the DTA leaves discretion in DOD to implement such a requirement as seems best. The DTA would appear to permit any of the options proposed in the question. To the extent that your question reaches beyond this statutory mandate, it is a matter of policy and litigation strategy. Producing something more than a mere conclusory statement of compliance, however, would likely be valuable for purposes of defending the CSRT or ARB against future claims that DOD did not comply with Section 1005(b).

C. Kevin Marshall
U.S. Department of Justice
Office of Legal Counsel
(202) 514-3713 (phone)
(202) 514-0539 (fax)

-----Original Message-----
From: jimenezf@dodgc.osd.mil <jimenezf@dodgc.osd.mil>
To: Gorsuch, Neil M <Neil.Gorsuch@SMOJMD.USDOJ.gov>
Sent: Wed Feb 08 14:01:06 2006
Subject: RE: DTA Questions for DOJ

I know OLC must be swamped, but if we don't hear soon, we'll be forced to take our best shot and hope it's the right approach.

-----Original Message-----
From: Neil.Gorsuch@usdoj.gov [mailto:Neil.Gorsuch@usdoj.gov]
Sent: Friday, February 03, 2006 14:50
To: Terry.Henry@usdoj.gov; Carl.Nichols@usdoj.gov; Steve.Bradbury@usdoj.gov; John.Elwood@usdoj.gov; John.Eisenberg@usdoj.gov; jimenezf@dodgc.osd.mil
Cc: Heckerk@dodgc.osd.mil; beckerg@dodgc.osd.mil
Subject: RE: DTA Questions for DOJ

Frank, these are prob questions better suited to OLC than CIV. For that reason, I'm adding Steve Bradbury, John Elwood, and John Eisenberg. NMG

-----Original Message-----
From: jimenezf@dodgc.osd.mil [mailto:jimenezf@dodgc.osd.mil]

Sent: Friday, February 03, 2006 2:12 PM
To: Henry, Terry (CIV); Gorsuch, Neil M; Nichols, Carl (CIV)
Cc: Heckerk@dodgc.osd.mil; beckerg@dodgc.osd.mil
Subject: DTA Questions for DOJ

1. Does the DTA require CSRT and ARB panels to ask every detainee whether their prior statements were coerced? 2. What constitutes practicableness? When is it not practible to make a coercion determination? 3. Should the practicableness determination be left in each panel's hands (which introduces the possibility of inconsistency across panels), or should each panel instead be instructed to make a coercion determination for each statement (which removes the discretion suggested by the statute), or should we instead employ a hybrid approach, e.g., instruct each panel about areas of per se impracticableness (such as statements by third-party detainees no longer on island) and leave the rest to each panel's judgment? 4. How exactly should compliance be documented in each panel's report: a conclusory statement of compliance, a detailed explanation of compliance, or some other approach?

See attached for some of our internal wrangling on this. We have a short fuse - second round of ARBs has already begun.

Thanks -

Frank R. Jimenez
Deputy General Counsel (Legal Counsel)
U.S. Department of Defense
1600 Defense Pentagon, Room 3B688
Washington, D.C. 20301-1600
(703)697-2714 / (703)614-6745 (Fax)
E-mail: jimenezf@dodgc.osd.mil

Addition to the ARB Report

Option 1:

"The ARB has complied with the Detainee Treatment Act of 2005. In making a determination of status or disposition of any detainee, the Administrative Review Board considered, to the extent practicable, whether any statement derived from or relating to such detainee was obtained as a result of coercion; and the probative value, if any, of any such statement. In addition, the ARB considered any new evidence that became available relating to the enemy combatant status of a detainee."

Option 2:

"During the course of the ARB hearing, the panel considered whether, to the extent practicable, a statement or statements derived from or relating to the detainee was obtained as a result of coercion, and the probative value, if any, of such statement. We concluded that (check the appropriate box):

☐ There was no allegation and no evidence in the record that suggested that a statement derived from or relating to a detainee was obtained as a result of coercion.

If there was an allegation or evidence in the record that suggested that a statement derived from or relating to a detainee was obtained as a result of coercion:

☐ It was not practicable to make a determination of whether the statement was obtained as a result of coercion.

☐ The statement was not obtained as a result of coercion.

☐ The statement was obtained as a result of coercion and that statement was not considered during the ARB hearing.

☐ The statement was obtained as a result of coercion and that statement was given lower weight as a result of the ARB panel's finding.

In addition, the ARB considered any new evidence that became available relating to the enemy combatant status of a detainee."

XX February 2006

From: Staff Judge Advocate, OARDEC

To: Administrative Review Board (ARB) Members

Subj: Legal Guidance for ARB Proceedings

A. You are required to observe the following legal guidance when considering evidence produced during an ARB proceeding:

1. As an ARB member, you are not bound by the rules of evidence that would apply in a court of law. You are free to consider any information you deem relevant and helpful to a resolution of the issues before you. For instance, you may consider hearsay evidence at your discretion, taking into account the reliability of such evidence under the circumstances.

2. The Detainee Treatment Act of 2005 provides that an ARB "shall, to the extent practicable, assess (A) whether any statement derived from or relating to such detainee was obtained as a result of coercion; and (B) the probative value, if any, of such statement." Practicable means "reasonably capable of being accomplished; feasible."[1] Coercion is defined as "[c]ompulsion by physical force or threat of physical force."[2] Compulsion means "[t]he act of compelling; the state of being compelled."[3]

a. If a detainee alleges that his statement or a statement by another about him was obtained through coercion, you must make all reasonable efforts to determine whether the allegation is true. Similarly, if there is any evidence in the record before you that suggests that a detainee's statement or a statement by another about him was obtained through coercion, you must make all reasonable efforts to determine whether the statement resulted from coercion. In determining whether it is practicable to assess if any coercion occurred, you may consider the following factors: (1) whether a witness' testimony is relevant and not cumulative; (2) whether the witness is reasonably available (in other words, whether they are currently located at GTMO); and (3) whether alternative methods of obtaining the information or the witness' testimony are available.[4]

b. If you determine that a statement derived from or relating to a detainee was obtained as a result of coercion, you must then decide the "probative" value, if any, of such statement. A statement has probative value if it "[t]end[s] to prove

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[1] Black's Law Dictionary (8th ed. 2004).
[2] *Id.*
[3] *Id.*
[4] *See* R.C.M. 405(f) (military rule for production of witnesses in investigative hearings, which is the military counterpart to civilian grand jury proceedings).

or disprove" a fact.[5] In other words, you must determine the weight or significance, if any, such statements deserve under all of the circumstances. In deciding the weight or significance, if any, to give to the detainee's statements, you should consider the specific evidence offered on the matter, particularly evidence that might tend to indicate that the statement was made involuntarily. Statements made as a result of coercion may be unreliable. You are also to use your own common sense and knowledge of human nature, and the nature of any corroborating evidence, as well as the other evidence in the ARB proceeding.

3. Also remember that any allegation of abuse made by a detainee during an AMO interview or during any part of the ARB proceeding must be reported promptly and in accordance with OARDEC guidance on this matter.

B. Please contact me if you have any questions regarding this matter.

T. A. McPALMER

[5] Black's Law Dictionary (8th ed. 2004).

(e) Unless otherwise prescribed by the Secretary concerned, direct a pretrial investigation under R.C.M. 405, and, if appropriate, forward the report of investigation with the charges to a superior commander for disposition.

Discussion

An investigation should be directed when it appears that the charges are of such a serious nature that trial by general court-martial may be warranted. *See* R.C.M. 403. If an investigation of the subject matter already has been conducted, *see* R.C.M. 405(b).

Rule 405. Pretrial investigation

(a) *In general.* Except as provided in subsection (k) of this rule, no charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made in substantial compliance with this rule. Failure to comply with this rule shall have no effect if the charges are not referred to a general court-martial.

Discussion

The primary purpose of the investigation required by Article 32 and this rule is to inquire into the truth of the matters set forth in the charges, the form of the charges, and to secure information on which to determine what disposition should be made of the case. The investigation also serves as a means of discovery. The function of the investigation is to ascertain and impartially weigh all available facts in arriving at conclusions and recommendations, not to perfect a case against the accused. The investigation should be limited to the issues raised by the charges and necessary to proper disposition of the case. The investigation is not limited to examination of the witnesses and evidence mentioned in the accompanying allied papers. *See* subsection (e) of this rule. Recommendations of the investigating officer are advisory.

If, at any time after an investigation under this rule the charges are changed to allege a more serious or essentially different offense, further investigation should be directed with respect to the new or different matters alleged.

Failure to comply substantially with the requirements of Article 32, which failure prejudices the accused, may result in delay in disposition of the case or disapproval of the proceedings. *See* R.C.M. 905(b)(1) and 906(b)(3) concerning motions for appropriate relief relating to the pretrial investigation.

The accused may waive the pretrial investigation. *See* subsection (k) of this rule. In such case, no investigation need be held. The commander authorized to direct the investigation may direct that it be conducted notwithstanding the waiver.

(b) *Earlier investigation.* If an investigation of the subject matter of an offense has been conducted before the accused is charged with an offense, and the accused was present at the investigation and afforded the rights to counsel, cross-examination, and presentation of evidence required by this rule, no further investigation is required unless demanded by the accused to recall witnesses for further cross-examination and to offer new evidence.

Discussion

An earlier investigation includes courts of inquiry and similar investigations which meet the requirements of this subsection.

(c) *Who may direct investigation.* Unless prohibited by regulations of the Secretary concerned, an investigation may be directed under this rule by any court-martial convening authority. That authority may also give procedural instructions not inconsistent with these rules.

(d) *Personnel.*

(1) *Investigating officer.* The commander directing an investigation under this rule shall detail a commissioned officer not the accuser, as investigating officer, who shall conduct the investigation and make a report of conclusions and recommendations. The investigating officer is disqualified to act later in the same case in any other capacity.

Discussion

The investigating officer should be an officer in the grade of major or lieutenant commander or higher or one with legal training. The investigating officer may seek legal advice concerning the investigating officer's responsibilities from an impartial source, but may not obtain such advice from counsel for any party.

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(2) *Defense counsel.*

(A) *Detailed counsel.* Except as provided in subsection (d)(2)(B) of this rule, military counsel certified in accordance with Article 27(b) shall be detailed to represent the accused.

(B) *Individual military counsel.* The accused may request to be represented by individual military counsel. Such requests shall be acted on in accordance with R.C.M. 506(b). When the accused is represented by individual military counsel, counsel detailed to represent the accused shall ordinarily be excused, unless the authority who detailed the defense counsel, as a matter of discretion, approves a request by the accused for retention of detailed

counsel. The investigating officer shall forward any request by the accused for individual military counsel to the commander who directed the investigation. That commander shall follow the procedures in R.C.M. 506(b).

(C) *Civilian counsel.* The accused may be represented by civilian counsel at no expense to the United States. Upon request, the accused is entitled to a reasonable time to obtain civilian counsel and to have such counsel present for the investigation. However, the investigation shall not be unduly delayed for this purpose. Representation by civilian counsel shall not limit the rights to military counsel under subsections (d)(2)(A) and (B) of this rule.

Discussion

See R.C.M. 502(d)(3) concerning the duties of defense counsel.

(3) *Others.* The commander who directed the investigation may also, as a matter of discretion, detail or request an appropriate authority to detail:

(A) Counsel to represent the United States;

(B) A reporter; and

(C) An interpreter.

(e) *Scope of investigation.* The investigating officer shall inquire into the truth and form of the charges, and such other matters as may be necessary to make a recommendation as to the disposition of the charges. If evidence adduced during the investigation indicates that the accused committed an uncharged offense, the investigating officer may investigate the subject matter of such offense and make a recommendation as to its disposition, without the accused first having been charged with the offense. The accused's rights under subsection (f) are the same with regard to investigation of both charged and uncharged offenses.

Discussion

The investigation may properly include such inquiry into issues raised directly by the charges as is necessary to make an appropriate recommendation. For example, inquiry into the legality of a search or the admissibility of a confession may be appropriate. However, the investigating officer is not required to rule on the admissibility of evidence and need not consider such matters except as the investigating officer deems necessary to an informed recommendation. When the investigating officer is aware that evidence may not be admissible, this should be noted in the report. *See also* subsection (i) of this rule.

In investigating uncharged misconduct identified during the pretrial investigation, the investigating officer will inform the accused of the general nature of each uncharged offense investigated, and otherwise afford the accused the same opportunity for representation, cross-examination, and presentation afforded during the investigation of any charge offense.

(f) *Rights of the accused.* At any pretrial investigation under this rule the accused shall have the right to:

(1) Be informed of the charges under investigation;

(2) Be informed of the identity of the accuser;

(3) Except in circumstances described in R.C.M. 804(b)(2), be present throughout the taking of evidence;

(4) Be represented by counsel;

(5) Be informed of the witnesses and other evidence then known to the investigating officer;

(6) Be informed of the purpose of the investigation;

(7) Be informed of the right against self-incrimination under Article 31;

(8) Cross-examine witnesses who are produced under subsection (g) of this rule;

(9) Have witnesses produced as provided for in subsection (g) of this rule;

(10) Have evidence, including documents or physical evidence, within the control of military authorities produced as provided under subsection (g) of this rule;

(11) Present anything in defense, extenuation, or mitigation for consideration by the investigating officer; and

(12) Make a statement in any form.

(g) *Production of witnesses and evidence; alternatives.*

(1) *In general.*

(A) *Witnesses.* Except as provided in subsection (g)(4)(A) of this rule, any witness whose testimony would be relevant to the investigation and not cumulative shall be produced if reasonably available. This includes witnesses requested by the accused, if the request is timely. A witness is "reasonably available" when the witness is located within 100 miles of the situs of the investigation and the significance of the testimony and personal appearance of the witness outweighs the difficulty, expense, delay, and effect on military operations of

obtaining the witness' appearance. A witness who is unavailable under Mil. R. Evid. 804(a)(1)-(6), is not "reasonably available."

Discussion

A witness located beyond the 100-mile limit is not *per se* unavailable. To determine if a witness beyond 100 miles is reasonably available, the significance of the witness' live testimony must be balanced against the relative difficulty and expense of obtaining the witness' presence at the hearing.

(B) *Evidence.* Subject to Mil. R. Evid., Section V, evidence, including documents or physical evidence, which is under the control of the Government and which is relevant to the investigation and not cumulative, shall be produced if reasonably available. Such evidence includes evidence requested by the accused, if the request is timely. As soon as practicable after receipt of a request by the accused for information which may be protected under Mil. R. Evid. 505 or 506, the investigating officer shall notify the person who is authorized to issue a protective order under subsection (g)(6) of this rule, and the convening authority, if different. Evidence is reasonably available if its significance outweighs the difficulty, expense, delay, and effect on military operations of obtaining the evidence.

Discussion

In preparing for the investigation, the investigating officer should consider what evidence will be necessary to prepare a thorough and impartial investigation. The investigating officer should consider, as to potential witnesses, whether their personal appearance will be necessary. Generally, personal appearance is preferred, but the investigating officer should consider whether, in light of the probable importance of a witness' testimony, an alternative to testimony under subsection (g)(4)(A) of this rule would be sufficient.

After making a preliminary determination of what witnesses will be produced and other evidence considered, the investigating officer should notify the defense and inquire whether it requests the production of other witnesses or evidence. In addition to witnesses for the defense, the defense may request production of witnesses whose testimony would favor the prosecution.

Once it is determined what witnesses the investigating officer intends to call it must be determined whether each witness is reasonably available. That determination is a balancing test. The more important the testimony of the witness, the greater the difficulty, expense, delay, or effect on military operations must be to permit nonproduction. For example, the temporary absence of a witness on leave for 10 days would normally justify using an alternative to that witness' personal appearance if the sole reason for the witness' testimony was to impeach the credibility of another witness by reputation evidence, or to establish a mitigating character trait of the accused. On the other hand, if the same witness was the only eyewitness to the offense, personal appearance would be required if the defense requested it and the witness is otherwise reasonably available. The time and place of the investigation may be changed if reasonably necessary to permit the appearance of a witness. Similar considerations apply to the production of evidence.

If the production of witnesses or evidence would entail substantial costs or delay, the investigating officer should inform the commander who directed the investigation.

The provision in (B), requiring the investigating officer to notify the appropriate authorities of requests by the accused for information privileged under Mil. R. Evid. 505 or 506, is for the purpose of placing the appropriate authority on notice that an order, as authorized under subparagraph(g)(6), may be required to protect whatever information the government may decide to release to the accused.

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(2) *Determination of reasonable availability.*

(A) *Military witnesses.* The investigating officer shall make an initial determination whether a military witness is reasonably available. If the investigating officer decides that the witness is not reasonably available, the investigating officer shall inform the parties. Otherwise, the immediate commander of the witness shall be requested to make the witness available. A determination by the immediate commander that the witness is not reasonably available is not subject to appeal by the accused but may be reviewed by the military judge under R.C.M. 906(b)(3).

Discussion

The investigating officer may discuss factors affecting reasonable availability with the immediate commander of the requested witness and with others. If the immediate commander determined that the witness is not reasonably available, the reasons for that determination should be provided to the investigating officer.

(B) *Civilian witnesses.* The investigating officer shall decide whether a civilian witness is reasonably available to appear as a witness.

Discussion

The investigating officer should initially determine whether a civilian witness is reasonably available without regard to whether the witness is willing to appear. If the investigating officer determines that a civilian witness is apparently reasonably available, the witness should be invited to attend and when appropriate, informed that necessary expenses will be paid.

If the witness refuses to testify, the witness is not reasonably available because civilian witnesses may not be compelled to attend a pretrial investigation. Under subsection (g)(3) of this

rule, civilian witnesses may be paid for travel and associated expenses to testify at a pretrial investigation.

(C) *Evidence.* The investigating officer shall make an initial determination whether evidence is reasonably available. If the investigating officer decides that it is not reasonably available, the investigating officer shall inform the parties. Otherwise, the custodian of the evidence shall be requested to provide the evidence. A determination by the custodian that the evidence is not reasonably available is not subject to appeal by the accused, but may be reviewed by the military judge under R.C.M. 906(b)(3).

Discussion

The investigating officer may discuss factors affecting reasonable availability with the custodian and with others. If the custodian determines that the evidence is not reasonably available, the reasons for that determination should be provided to the investigating officer.

(D) *Action when witness or evidence is not reasonably available.* If the defense objects to a determination that a witness or evidence is not reasonably available, the investigating officer shall include a statement of the reasons for the determination in the report of investigation.

(3) *Witness expenses.* Transportation expenses and a per diem allowance may be paid to civilians requested to testify in connection with an investigation under this rule according to regulations prescribed by the Secretary of a Department.

Discussion

See Department of Defense Joint Travel Regulations, Vol. 2, paragraphs C6054, C6060.

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(4) *Alternatives to testimony.*

(A) Unless the defense objects, an investigating officer may consider, regardless of the availability of the witness:

(i) Sworn statements;

(ii) Statements under oath taken by telephone, radio, or similar means providing each party the opportunity to question the witness under circumstances by which the investigating officer may reasonably conclude that the witness' identity is as claimed;

(iii) Prior testimony under oath;

(iv) Depositions;

(v) Stipulations of fact or expected testimony;

(vi) Unsworn statements; and

(vii) Offers of proof of expected testimony of that witness.

(B) The investigating officer may consider, over objection of the defense, when the witness is not reasonably available:

(i) Sworn statements;

(ii) Statements under oath taken by telephone, radio, or similar means providing each party the opportunity to question the witness under circumstances by which the investigating officer may reasonably conclude that the witness' identity is as claimed;

(iii) Prior testimony under oath; and

(iv) Deposition of that witness; and

(v) In time of war, unsworn statements.

(5) *Alternatives to evidence.*

(A) Unless the defense objects, an investigating officer may consider, regardless of the availability of the evidence:

(i) Testimony describing the evidence;

(ii) An authenticated copy, photograph, or reproduction of similar accuracy of the evidence;

(iii) An alternative to testimony, when permitted under subsection (g)(4)(B) of this rule, in which the evidence is described;

(iv) A stipulation of fact, document's contents, or expected testimony;

(v) An unsworn statement describing the evidence; or

(vi) An offer of proof concerning pertinent characteristics of the evidence.

(B) The investigating officer may consider, over objection of the defense, when the evidence is not reasonably available:

(i) Testimony describing the evidence;

(ii) An authenticated copy, photograph, or reproduction of similar accuracy of the evidence; or

(iii) An alternative to testimony, when permitted under subsection (g)(4)(B) of this rule, in which the evidence is described.

(6) *Protective order for release of privileged information.* If, prior to referral, the Government agrees to disclose to the accused information to which the protections afforded by Mil. R. Evid. 505 or 506 may apply, the convening authority, or other person designated by regulation of the Secretary of the service concerned, may enter an appropriate protective order, in writing, to guard against the compromise of information disclosed to the accused. The terms of any such protective order may include prohibiting the disclosure of the information except as authorized by the authority issuing the protective order, as well as those terms specified by Mil. R. Evid. 505(g)(1)(B) through (F) or 506(g)(2) through (5).

(h) *Procedure.*

(1) *Presentation of evidence.*

(A) *Testimony.* All testimony shall be taken under oath, except that the accused may make an unsworn statement. The defense shall be given wide latitude in cross-examining witnesses.

Discussion

The following oath may be given to witnesses:

"Do you (swear) (affirm) that the evidence you give shall be the truth, the whole truth, and nothing but the truth (, so help you God)?"

The investigating officer is required to include in the report of the investigation a summary of the substance of all testimony. *See* subsection (j)(2)(B) of this rule. After the hearing, the investigating officer should, whenever possible, reduce the substance of the testimony of each witness to writing and, unless it would unduly delay completion of the investigation, have each witness sign and swear to the truth of the respective summaries. The following oath may be given to a witness in such cases:

"You (swear) (affirm) that this statement is the truth, the whole truth, and nothing but the truth (, so help you God)?"

If the accused testifies, the investigating officer may invite but not require the accused to swear to the truth of a summary of that testimony. If substantially verbatim notes of a testimony or recordings of testimony were taken during the investigation, they should be preserved until the end of trial.

If it appears that material witnesses for either side will not be available at the time anticipated for trial, the investigating officer should notify the commander who directed the investigation so that depositions may be taken if necessary.

If during the investigation any witness subject to the code is suspected of an offense under the code, the investigating officer should comply with the warning requirements of Mil. R. Evid. 305(c), (d), and, if necessary, (e).

(B) *Other evidence.* The investigating officer shall inform the parties what other evidence will be considered. The parties shall be permitted to examine all other evidence considered by the investigating officer.

(C) *Defense evidence.* The defense shall have full opportunity to present any matters in defense, extenuation, or mitigation.

(2) *Objections.* Any objection alleging failure to comply with this rule, except subsection (j), shall be made to the investigating officer promptly upon discovery of the alleged error. The investigating officer shall not be required to rule on any objection. An objection shall be noted in the report of investigation if a party so requests. The investigating officer may require a party to file any objection in writing.

Discussion

See also subsection (k) of this rule.

Although the investigating officer is not required to rule on objections, the investigating officer may take corrective action in response to an objection as to matters relating to the conduct of the proceedings when the investigating officer believes such action is appropriate.

If an objection raises a substantial question about a matter within the authority of the commander who directed the investigation (for example, whether the investigating officer was properly appointed) the investigating officer should promptly inform the commander who directed the investigation.

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(3) *Access by spectators.* Access by spectators to all or part of the proceeding may be restricted or foreclosed in the discretion of the commander who directed the investigation or the investigating officer.

Discussion

Closure may encourage complete testimony by an embarrassed or timid witness.

Ordinarily the proceedings of a pretrial investigation should be open to spectators.

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(4) *Presence of accused.* The further progress of the taking of evidence shall not be prevented and the accused shall be considered to have waived the right to be present whenever the accused:

(A) After being notified of the time and place of the proceeding is voluntarily absent (whether or not informed by the investigating officer of the obligation to be present); or

(B) After being warned by the investigating officer that disruptive conduct will cause removal from

the proceeding, persists in conduct which is such as to justify exclusion from the proceeding.

(i) *Military Rules of Evidence.* The Military Rules of Evidence—other than Mil. R. Evid. 301, 302, 303, 305, 412 and Section V—shall not apply in pretrial investigations under this rule.

Discussion

The investigating officer should exercise reasonable control over the scope of the inquiry. *See* subsection (e) of this rule. An investigating officer may consider any evidence, even if that evidence would not be admissible at trial. However, *see* subsection (g)(4) of this rule as to limitations on the ways in which testimony may be presented.

Certain rules relating to the form of testimony which may be considered by the investigating officer appear in subsection (g) of this rule.

(j) *Report of investigation.*

(1) *In general.* The investigating officer shall make a timely written report of the investigation to the commander who directed the investigation.

Discussion

If practicable, the charges and the report of investigation should be forwarded to the general court-martial convening authority within 8 days after an accused is ordered into arrest or confinement. Article 33.

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(2) *Contents.* The report of investigation shall include:

(A) A statement of names and organizations or addresses of defense counsel and whether defense counsel was present throughout the taking of evidence, or if not present the reason why;

(B) The substance of the testimony taken on both sides, including any stipulated testimony;

(C) Any other statements, documents, or matters considered by the investigating officer, or recitals of the substance or nature of such evidence;

(D) A statement of any reasonable grounds for belief that the accused was not mentally responsible for the offense or was not competent to participate in the defense during the investigation;

Discussion

See R.C.M. 909 (mental capacity); 916(k) (mental responsibility).

(E) A statement whether the essential witnesses will be available at the time anticipated for trial and the reasons why any essential witness may not then be available;

(F) An explanation of any delays in the investigation;

(G) The investigating officer's conclusion whether the charges and specifications are in proper form;

(H) The investigating officer's conclusion whether reasonable grounds exist to believe that the accused committed the offenses alleged; and

(I) The recommendations of the investigating officer, including disposition.

Discussion

For example, the investigating officer may recommend that the charges and specifications be amended or that additional charges be preferred. *See* R.C.M. 306 and 401 concerning other possible dispositions.

See Appendix 5 for a sample of the Investigating Officer's Report (DD Form 457).

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(3) *Distribution of the report.* The investigating officer shall cause the report to be delivered to the commander who directed the investigation. That commander shall promptly cause a copy of the report to be delivered to each accused.

(4) *Objections.* Any objection to the report shall be made to the commander who directed the investigation within 5 days of its receipt by the accused. This subsection does not prohibit a convening authority from referring the charges or taking other action within the 5-day period.

(k) *Waiver.* The accused may waive an investigation under this rule. In addition, failure to make a timely objection under this rule, including an objection to the report, shall constitute waiver of the objection. Relief from the waiver may be granted by the investigating officer, the commander who directed the investigation, the convening authority, or the military judge, as appropriate, for good cause shown.

Discussion

See also R.C.M. 905(b)(1); 905(b)(3).

If the report fails to include reference to objections which were made under subsection (h)(2) of this rule, failure to object to the report will constitute waiver of such objections in the absence of good cause for relief from the waiver.

The commander who receives an objection may direct that the investigation be reopened or take other action as appropriate.

Even if the accused made a timely objection to failure to

jimenezf@dodgc.osd.mil

From: jimenezf@dodgc.osd.mil
Sent: Tuesday, February 14, 2006 9:23 AM
To: Katsas, Gregory (CIV); Marshall, C. Kevin
Cc: Gorsuch, Neil M; Prestes, Brian
Subject: RE: DTA Questions for DOJ

There are resolvable conflicts and irresolvable conflicts. The DTA allows the use of statements obtained through torture if they nevertheless have probative value; the CAT prohibits the use of such statements. Some would call that a conflict, though a resolvable one. The bottom line, I take it, is that the DTA must yield to the CAT. This means that CSRT and ARB panels must be instructed not only to determine the probative value of statements obtained through coercion falling short of torture, but also not to consider statements they determine to have been obtained through torture. This leads me to wonder whether the panels should be instructed on how to draw the line between torture and lesser conduct. Any thoughts?

-----Original Message-----
From: C.Kevin.Marshall@usdoj.gov [mailto:C.Kevin.Marshall@usdoj.gov]
Sent: Tuesday, February 14, 2006 08:54
To: Gregory.Katsas@usdoj.gov; jimenezf@dodgc.osd.mil
Cc: Brian.Prestes@usdoj.gov
Subject: RE: DTA Questions for DOJ

There's no conflict. DTA doesn't mandate use of statements obtained through coercion, much less torture, and CAT prohibits admission of statements obtained through torture. Moreover, DTA doesn't purport to be exclusive of other prohibitions. If a statement was obtained through coercion that falls short of torture, assess probativeness; if obtained by coercion that reaches the level of torture, don't admit.

C. Kevin Marshall
U.S. Department of Justice
Office of Legal Counsel
(202) 514-3713 (phone)
(202) 514-0539 (fax)

-----Original Message-----
From: jimenezf@dodgc.osd.mil [mailto:jimenezf@dodgc.osd.mil]
Sent: Monday, February 13, 2006 6:56 PM
To: Gorsuch, Neil M; Katsas, Gregory (CIV); Nichols, Carl (CIV); Marshall, C. Kevin
Cc: Prestes, Brian
Subject: RE: DTA Questions for DOJ

Thanks, Greg and Kevin, for your input. To the extent the DTA [allowing use of statements obtained through coercion if they contain probative value] and the CAT [disallowing use of statements obtained through torture] are inconsistent, how should we resolve the conflict?

-----Original Message-----
From: C.Kevin.Marshall@usdoj.gov [mailto:C.Kevin.Marshall@usdoj.gov]
Sent: Monday, February 13, 2006 18:24
To: Gregory.Katsas@usdoj.gov; Neil.Gorsuch@usdoj.gov;
Carl.Nichols@usdoj.gov; jlmenez@dodgc.osd.mil
Cc: Brian.Prestes@usdoj.gov
Subject: RE: DTA Questions for DOJ

Frank,

Here are OLC's comments:

Legal Guidance for ARB Proceedings

1. Paragraph 2's definition of "compulsion" is circular ("[t]he act of compelling"). Consider replacing it with a more informative definition or deleting it.

2. Paragraph 2's definition of "practicable" includes both "reasonably capable of being accomplished" and "feasible." There is some possibility that these standards could be thought to diverge, with something being "feasible" in the sense of "possible," yet not "reasonably capable of being accomplished." It seems safer to eliminate this possibility by selecting one of these phrases. Because paragraph 2.a later uses an "all reasonable efforts" formulation, which is closer to "reasonably capable of being accomplished" than to "feasible," and because some consideration of the burden of a technically possible assessment seems permissible (as noted in our prior comments), consider finding support for a definition of "practicable" that focuses on the "reasonably capable" concept without reference to a "feasible" component.

3. Paragraph 2.a. in its last sentence provides that, in determining whether it is practicable to assess whether coercion occurred, one may want to consider three enumerated factors. We suggest revising this last sentence. At least the first and third factors are focused on the importance of the statement to the proceeding, rather than directly considering the burden of making an inquiry. "Practicable[ness]" does seem to reasonably include some sort of cost/benefit analysis, and thus a consideration of the statement's importance seems warranted, but the paragraph might be stronger if it first clearly required an assessment of the burden of the inquiry. One obvious factor would be whether the statement was made by the detainee himself or not; if so, then the first step might be just to examine the detainee (which seems unlikely to be impracticable), but perhaps there would then be a question

whether a witness not at GTMO would be needed to confirm or disprove the detainee's claims of coercion. If the statement at issue is one not made by the detainee, then the location of the declarant would seem to be a primary consideration, but there may be some others that could be mentioned.

4. Paragraph 2.b provides that "[I]f you determine that a statement derived from or relating to a detainee was obtained as a result of coercion, you must then decide the 'probative' value." The DTA, however, seems to provide that the probative-value determination, like the initial determination of whether the statement was "obtained as a result of coercion," is subject to the "to the extent practicable" caveat. It is not obvious to us how this determination might not be practicable when it was practicable to determine that a statement was obtained as a result of coercion, but in order to better track the statutory language, you might say, "you must then, to the extent practicable, decide the 'probative' value, if any, of such statement." If DOD is of the view that this assessment of probative-ness will never be impracticable, then, instead of making the above change, consider so stating.

5. Footnote 4; the purpose and value of this citation are unclear. We agree with Greg's suggestion.

6. OLC would not object to adding in Paragraph 2.b a reference to Article 15 of the CAT, which requires that we "ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made." The text of this article (unlike that of other CAT articles) does not limit its territorial scope, and we are unaware of any other basis for concluding that it does not apply. Even though it is not self-executing and has not been implemented by legislation, it remains binding on the US as a matter of international law, and it is directly relevant here. We defer, however, to DOD and the litigators on whether to make this addition. When the military commission order was revised last summer, there was a decision not to mention Article 15; I believe that this was to avoid giving the impression that there might be statements obtained by torture. An added sentence might state as follows:
"Consistent with Article 15 of the Convention Against Torture, you should decline to admit as evidence [except against a person accused of torture as evidence that the statement was made] any statement that you conclude to have been made as a result of torture."

Addition to the ARB Report

1. We agree with Greg that Option 2 is preferable to Option 1, because producing something more than a mere conclusory statement of compliance (option 1) would likely be better for defending the ARB proceeding against future claims in court.

2. We recommend that, with respect to either option, the text of the DTA be reproduced verbatim, rather than paraphrased (e.g., use "assessed" rather than "considered"), because there is little benefit, and some risk, in straying from the DTA's text.

C. Kevin Marshall
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(202) 514-3713 (phone)
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-----Original Message-----
From: Katsas, Gregory (CIV)
Sent: Monday, February 13, 2006 10:38 AM
To: jimenez@dodgc.osd.mil; Gorsuch, Neil M; Nichols, Carl (CIV); Marshall, C. Kevin
Subject: RE: DTA Questions for DOJ

Frank, sorry for the delay in responding. Three thoughts for you to consider. First, I'd be wary of incorporating into the ARB instructions an express cross-reference to the R.C.M. To some extent, that buys into the other side's worldview that CSRT/ARB procedures should be assessed by reference to ordinary criminal processes, rather than by reference to common-law-of-war processes for preventive detention of ECs, as reflected in 190-8. To the extent the R.C.M. provision affords useful guidance, I'd simply use the same standards in the instruction, but without the cross-reference. Second, for documentation purposes, I prefer the checklist (option 2) to the general boilerplate (option 1). Third, if we make explicit that ARB panels may consider (albeit with "lower weight") statements "obtained as a result of coercion," we will need to think through some tricky questions about reconciling that with Art. 15 of the CAT, which I think we have said applies extraterritorially, and which, in any event, we have said that we choose to follow.

-----Original Message-----
From: jimenez@dodgc.osd.mil [mailto:jimenez@dodgc.osd.mil]
Sent: Thursday, February 09, 2006 4:03 PM
To: Gorsuch, Neil M; Katsas, Gregory (CIV); Nichols, Carl (CIV); Marshall, C. Kevin
Subject: FW: DTA Questions for DOJ

Please ignore my last e-mail and use this one instead.

-----Original Message-----
From: Becker, Grace, Ms, DoD OGC
Sent: Thursday, February 09, 2006 16:00
To: Becker, Grace, Ms, DoD OGC; Allen, Charles, Mr, DoD OGC; Beaver, Diane, Ms, DoD OGC; Jimenez, Frank, Mr, DoD OGC; Hecker, Karen, Ms DoD OGC; Prinster, Norman, Mr, DoD OGC
Subject: RE: DTA Questions for DOJ

Sorry. New attachments. I attached the same document twice and missed another.

deliberative process, or other privilege. Do not disseminate without prior approval from the Office of the DoD General Counsel.

-----Original Message-----
From: Becker, Grace, Ms, DoD OGC
Sent: Thursday, February 09, 2006 15:33
To: Allen, Charles, Mr, DoD OGC; Beaver, Diane, Ms, DoD OGC; Jimenez, Frank, Mr, DoD OGC; Hecker, Karen, Ms DoD OGC; Printer, Norman, Mr, DoD OGC
Subject: FW: DTA Questions for DOJ

Here are DOJ's responses and my latest draft of both documents -- the ARB memo and 2 options of what to include in the ARB report. Comments welcome.

The .pdf file is a copy of a source document that I cite in one of my footnotes.

Grace

This message may contain information protected by the attorney-client, attorney work product, deliberative process, or other privilege. Do not disseminate without prior approval from the Office of the DoD General Counsel.

-----Original Message-----
From: Jimenez, Frank, Mr, DoD OGC
Sent: Thursday, February 09, 2006 10:22
To: Hecker, Karen, Ms DoD OGC; Becker, Grace, Ms, DoD OGC
Subject: FW: DTA Questions for DOJ

See below. What's the latest draft?

-----Original Message-----
From: C.Kevin.Marshall@usdoj.gov [mailto:C.Kevin.Marshall@usdoj.gov]
Sent: Wednesday, February 08, 2006 19:11
To: jimenezf@dodgc.osd.mil
Cc: Brian.Prestes@usdoj.gov; John.Elwood@usdoj.gov; Steve.Bradbury@usdoj.gov; John.Eisenberg@usdoj.gov; Neil.Gorsuch@usdoj.gov
Subject: FW: DTA Questions for DOJ

Frank,

OLC has given your questions a quick look, and here are some brief, informal answers. For any of these, we would be happy to review anything DOD might draft, and we might be able to provide better guidance at that stage, given all of the factual and discretionary issues that your questions raise:

1. The DTA requires that the CSRT and ARB procedures that the SECDEF submits to Congress "ensure that" a CSRT or ARB, in making a determination of status, to the extent practicable, "assess" whether any statement "derived from or relating to" a detainee "was obtained as a result of coercion" and "the probative value (if any) of any such statement." When an ARB or CSRT considers such a statement, one part of the required "assess[ment]" certainly could be to ask the detainee whether the statement was obtained as a result of coercion. But the text of the DTA does not directly require this approach, as opposed to other possible means of assessment. Whether, however, this approach could be said to be necessary in order to "assess" in a meaningful way, either in general or in a particular case, is not one that we have enough factual knowledge to be able to answer. DOD should in the exercise of its discretion in implementing the statute consider and answer that question based on its greater factual knowledge.

2. The DTA requires the above-described assessment only "to the extent practicable." Consistent with ordinary dictionary definitions of the term, we understand practicable to mean "capable of being done," though, in context, it likely does not mean "capable of being done at any cost"; if it did, then the "practicable" caveat would not add anything. Thus, "to the extent practicable" is probably better read to impose something akin to a safety valve that excuses assessments that would be particularly burdensome.
Again, DOD is in a better position than DOJ to determine when and under what circumstances it would be impracticable for DOD to make an assessment -- that is, under what circumstances such an assessment would be a such a strain on DOD resources that it could be said to be impracticable. The question involves both a factual assessment and an exercise of discretion on DOD's part in implementing the statute.

3. The DTA does not appear to directly answer your question. It imposes on each CSRT and ARB the duty to make assessments (to the extent practicable), but is silent regarding whether each ARB or CSRT must decide the preceding practicableness question case-by-case, based on DOD guidelines promulgated across the board, or something in between, such as guidelines on practicableness that depend on the factual context of each case.
Conceivably, DOD could be aware of entire categories of per se impracticableness (as the question suggests), in which case the DTA would appear, at a quick glance, to permit an across-the-board determination with respect to such categories. DOD is in a better position than DOJ to determine which option, as a matter of fact and policy, makes the most sense. As a matter of law, the DTA seems to leave the particulars open.

4. The DTA does not appear to compel an answer to this question, beyond requiring that the procedures "ensure" an assessment to the extent practicable. To the extent that documenting compliance in some way would be aimed at "ensur[ing]" that the procedures accomplish this, the DTA leaves discretion in DOD to implement such a requirement as seems best. The DTA would appear to permit any of the options proposed in the question. To the extent that your question reaches beyond this statutory mandate, it is a matter of policy and litigation strategy. Producing something more than a mere conclusory statement of compliance, however, would likely be valuable for purposes of defending the CSRT or ARB against future claims that DOD did not comply with section 1005(b).

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-----Original Message-----
From: jimenezf@dodgc.osd.mil <jimenezf@dodgc.osd.mil>
To: Gorsuch, Neil M <Neil.Gorsuch@SMOJMD.USDOJ.gov>
Sent: Wed Feb 08 14:01:06 2006
Subject: RE: DTA Questions for DOJ

I know OLC must be swamped, but if we don't hear soon, we'll be forced to take our best shot and hope it's the right approach.

-----Original Message-----
From: Neil.Gorsuch@usdoj.gov [mailto:Neil.Gorsuch@usdoj.gov]
Sent: Friday, February 03, 2006 14:50
To: Terry.Henry@usdoj.gov; Carl.Nichols@usdoj.gov; Steve.Bradbury@usdoj.gov; John.Elwood@usdoj.gov; John.Eisenberg@usdoj.gov; jimenezf@dodgc.osd.mil
Cc: Heckerk@dodgc.osd.mil; beckerg@dodgc.osd.mil
Subject: RE: DTA Questions for DOJ

Frank, these are prob questions better suited to OLC than CIV. For that reason, I'm adding Steve Bradbury, John Elwood, and John Eisenberg. NMG

-----Original Message-----
From: jimenezf@dodgc.osd.mil [mailto:jimenezf@dodgc.osd.mil]
Sent: Friday, February 03, 2006 2:12 PM
To: Henry, Terry (CIV); Gorsuch, Neil M; Nichols, Carl (CIV)
Cc: Heckerk@dodgc.osd.mil; beckerg@dodgc.osd.mil
Subject: DTA Questions for DOJ

1. Does the DTA require CSRT and ARB panels to ask every detainee whether their prior statements were coerced? 2. What constitutes practicableness?
When is it not practible to make a coercion determination?
3. Should the practicableness determination be left in each panel's hands (which introduces the possibility of inconsistency across panels), or should each panel instead be instructed to make a coercion determination for each statement (which removes the discretion suggested by the statute), or should we instead employ a hybrid approach, e.g., instruct each panel about areas of per se impracticableness (such as statements by third-party detainees no longer on island) and leave the rest to each panel's judgment? 4. How exactly should compliance be documented in each panel's report: a conclusory statement of compliance, a detailed explanation of compliance, or some other approach?

See attached for some of our internal wrangling on this. We have a short fuse - second round of ARBs has already begun.

Thanks -

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Elwood, John

From: Elwood, John
Sent: Thursday, February 2, 2006 10:23 AM
To: Gorsuch, Neil M
Subject: RE: Layers of review

Here's from a draft answer to Specter:

"The emergency authorizatin provision in FISA, which allows 72 hours of surveillance before obtaining a court order, does not--as many believe--alow the Government to undertake surveillance immediately. Rather, in order to authorize emergency surveillance under FISA, the Attorney General must personally 'determine[] that . . . The factual basis for issuance of an order under [FISA] to approve such surveillance exists." 50 U.S.C. S 1805(f). FISA requires the Attorney General to determine that this conditi on is satisfied *in advance* of authorizing the surveillance to begin. The process neeeded to make that determinatino, in turn, takes precious time. By the time I am presented with the applicatino, the informatino wil have passed from intelligence officers at the NSA to NSA attorneys for vetting. Once NSA attorneys are satisfied, they will pass the information along to Department of Justice attorneys. And once these attorneys are satisfied, they will present the information to me. And this same process takes the decision away from the intelligence officers best situated to make it during an armed conflict. We can afford neither of those consequences in this armed conflict with an enemy that has already proven its ability to strike within the United States."

From: Gorsuch, Neil M
Sent: Thursday, February 02, 2006 10:18 AM
To: Elwood, John
Subject: RE: Layers of review

I'd appreciate those details if you have them handy. Thanks!

From: Elwood, John
Sent: Thursday, February 02, 2006 10:18 AM
To: Gorsuch, Neil M
Subject: Layers of review

Did Eisenberg get back to you? If not, I have details on the layers of review necessary for even the most expedited of FISA actions.

Eisenberg, John

From: Eisenberg, John
Sent: Friday, February 03, 2006 4:37 PM
To: Gorsuch, Neil M
Cc: Bradbury, Steve
Subject: RE: 2/3 Draft - Judiciary Cmte Opening Remarks
Attachments: AG remarks (2)_ed.doc

Neil:

Looks great. Here are my suggestions.

John

-----Original Message-----
From: Gorsuch, Neil M
Sent: Friday, February 03, 2006 3:47 PM
To: Elwood, Courtney; Sampson, Kyle; Taylor, Jeffrey (OAG); Sours, Raquel; Elwood, John; Scolinos, Tasia; Moschella, William; Bradbury, Steve; Eisenberg, John; Clement, Paul D
Subject: 2/3 Draft - Judiciary Cmte Opening Remarks

All - Thanks for the excellent comments. I have tried to incorporate everything I've received so far in the attached draft. Ideas about cuts would now be very helpful as this draft weighs in at about 30 minutes. If you do suggest additions, might I ask you to please include counterbalancing cuts in your edits? Finally, OLC's fact check changes are included in this draft, but given various changes folks have suggested this draft will need another entirely fresh scrub by those who actually know something about the program! Many thanks, NMG

NMG Draft 2/3/06

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

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

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

* * *

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

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

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

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

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

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

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

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

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

***

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

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

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

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

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

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

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

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

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

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

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

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

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

***

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * *

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

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

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

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

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

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

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

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

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

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

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

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

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

***

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

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

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

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

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

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

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

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

* * *

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

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

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

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

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

Gorsuch, Neil M

From: Gorsuch, Neil M
Sent: Monday, February 06, 2006 1:17 PM
To: Sampson, Kyle; Moschella, William
Subject: Intel Cmte hearings

Will sent message via J Clinger that he'd like me to prepare some testimony for the upcoming Intel cmte hearings. I'm happy to help and, in doing so, it would be helpful to have from you (1) a copy of the final as-given testimony today incorporating all of the WH/Intel Cmty comments, and (2) any directions from either of you on any new pts the AG should address in these upcoming talks/different pts of emphasis we ought to make given the audience. Also, will both of these hearings be closed? Thanks very much.

B/t/w and despite my obvious bias, I think the AG is doing a really nice job today. He's running circles around the cmte members and I can't help but believe that he's scoring plenty of pts with the American people. The news networks ran his opening remarks in full but broke away pretty shortly after questioning began.

Clement, Paul D

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

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

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

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

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

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

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

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

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

Gorsuch, Neil M

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

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

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

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

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

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

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

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

I agree with John's comments.

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

Although long, this version looks good to me.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you very much.

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

==========

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

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

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

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

Gorsuch, Neil M

From: Gorsuch, Neil M
Sent: Saturday, February 4, 2006 8:42 AM
To: Elwood, Courtney
Subject: Re:

Haven't heard back yet but I am hopeful we can patch over any difference of views.

-----Original Message-----
From: Elwood, Courtney <Courtney.Elwood@SMOJMD.USDOJ.gov>
To: Gorsuch, Neil M <Neil.Gorsuch@SMOJMD.USDOJ.gov>
Sent: Sat Feb 04 08:18:16 2006
Subject: RE:

This doesn't make me happy. Where are we on it now. Have you heard from Steve and Paul on this draft?

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

-----Original Message-----
From: Gorsuch, Neil M
Sent: Friday, February 03, 2006 9:49 PM
To: Elwood, Courtney
Subject: Fw:

Fyi.

-----Original Message-----
From: Gorsuch, Neil M <Neil.Gorsuch@SMOJMD.USDOJ.gov>
To: Clement, Paul D <Paul.D.Clement@SMOJMD.USDOJ.gov>; Bradbury, Steve <Steve.Bradbury@SMOJMD.USDOJ.gov>
Sent: Fri Feb 03 21:47:51 2006
Subject: Fw:

Gentlemen, tonight Paul expressed the concern that the draft circulated earlier today suggested a certain realm of responsibilities exclusively belonging to the president upon which congress may not

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

-----Original Message-----
From: ngorsuch@hotmail.com <ngorsuch@hotmail.com>
To: Gorsuch, Neil M <Neil.Gorsuch@SMOJMD.USDOJ.gov>
Sent: Fri Feb 03 21:26:00 2006
Subject:

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

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

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

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

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

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

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

Neil: Some thoughts from John Elwood.

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

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

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

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

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

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

Comments for Neil? Thx!

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

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