

Testimony of Jameel Jaffer*

Before the United States Senate Committee on the Judiciary On the Nomination of Neil Gorsuch for Associate Justice of the U.S. Supreme Court

March 23, 2017

Thank you for inviting me to testify concerning the nomination of Judge Neil M. Gorsuch to the United States Supreme Court. This Committee has no task more important than the one it is engaged in this week. If Judge Gorsuch is confirmed, he will likely play a central role in shaping American law and society for two or three decades or more. He will help decide the scope of individual rights, the relation of individual rights to one another, and the division of power among the three branches of government.

I am familiar with Judge Gorsuch's professional biography and have reviewed many of his opinions, and it is obvious that Judge Gorsuch has the professional competence to serve as an Associate Justice. Others have testified to Judge Gorsuch's dedication, thoughtfulness, and collegiality, and I have no reason to doubt that he possesses these qualities. His service with the Bush administration's Justice Department, however, raises important questions about his views concerning executive power and the role of the judiciary in the sphere of national security. At the time Judge Gorsuch served in the Justice Department,¹ the Bush administration was advancing extremely broad claims of executive power in the service of unlawful policies relating to surveillance, detention, military commissions, and interrogation. Judge Gorsuch was closely involved in developing and defending these claims. I urge you not to confirm him without first carefully examining his views concerning executive power and assuring yourselves that he will forcefully defend individual rights, and the authority of Congress and the federal courts, in the context of national security.

It hardly needs to be said that questions relating to executive power are especially important today. Invoking national security considerations, President Donald Trump has issued executive orders banning Muslims from six (originally seven) countries from traveling to the United States. He has said that he will consider prosecuting U.S. citizens in the military commissions at Guantánamo. He has reportedly loosened some of the restrictions that President Barack Obama adopted in relation to the use of lethal force overseas. He has promised to intensify surveillance of minority communities inside the United States. If Judge Gorsuch is confirmed, he will almost certainly be called on to consider the lawfulness of some of these policies, and his conclusions will have a profound

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¹ He was then "Mr. Gorsuch," of course, but for simplicity I will refer to him as "Judge Gorsuch" throughout this testimony.

effect on the lives of millions of Americans and others, and on the relationship of the United States with the rest of the world.

It would be a mistake, though, to assess Judge Gorsuch's views of executive power through a partisan lens. The powers that are abused today by a Republican president may be abused tomorrow by a Democratic one. The question the Committee should ask is whether Judge Gorsuch will safeguard individual rights and the separation of powers— whoever occupies the Oval Office.

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Judge Gorsuch served as Principal Deputy Assistant Attorney General from June of 2005 through July of 2006—a time when the Justice Department was advancing extremely broad claims relating to executive power. In the months after the September 2001 terrorist attacks, President Bush authorized the National Security Agency (“NSA”) to conduct warrantless surveillance of Americans’ international communications. He authorized the Department of Defense (“DOD”) to imprison alleged “enemy combatants,” including American citizens, indefinitely without charge or trial, and to prosecute foreign-citizen enemy combatants in military commissions that violated the Geneva Conventions. He authorized the Central Intelligence Agency (“CIA”) to torture prisoners in secret prisons overseas.

Administration lawyers defended these policies in internal memos, white papers, and legal briefs. One thread running through their arguments was that Congress lacked authority to regulate the President’s Article II war powers—i.e. that the Commander in Chief enjoyed “preclusive authority” with respect to war-making.² Another thread, equally controversial, was that the courts lacked authority and competence to hear challenges to the exercise of those powers.

Over the course of his tenure at the Justice Department, Judge Gorsuch helped make these arguments. In April 2006, he described himself as the “main [point of contact] on terrorism-related civil litigation for the Executive Office of the President.³ In a November 2005 self-assessment, he described himself as having “helped coordinate litigation efforts involving a number of national security matters,” including litigation relating to the abuse of prisoners.⁴ Judge Gorsuch contributed to litigation and legislative strategy, drafted briefs, and helped administration officials defend their policies publicly.⁵

² David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 Harv. L. Rev. 941, 944 (2008).

³ SJC_DOJ_Gorsuch_000034. All documents cited by Bates stamp in this testimony are available on the Committee’s website.

⁴ DOJ_NMG_007349.

⁵ A March 8, 2017 letter from the Justice Department to Sen. Dianne Feinstein lists cases in which Judge Gorsuch played a role. *See* Letter from Ryan Newman, Acting Attorney General, to Sen. Dianne Feinstein, Ranking Member, Committee on the

I. Judge Gorsuch’s Role in the Bush Administration’s Efforts to Marginalize Congress

The Framers of the Constitution believed that “[t]he accumulation of powers, legislative, executive, and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny.”⁶ Accordingly, they “built in to the tripartite Federal Government . . . a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.”⁷ Because the Framers feared concentration of power in one branch, the Constitution “diffuses power[,] the better to secure liberty.”⁸

As the Supreme Court observed in *Youngstown Sheet & Tube Co. v. Sawyer*, its seminal case concerning executive power, the doctrine of separation of powers is elemental to our constitutional structure. *Youngstown* involved President Truman’s attempted seizure of the nation’s steel mills during the Korean War. The Truman administration argued that the seizures were a permissible exercise of the President’s authority as Commander in Chief, but the Court disagreed, finding that the President could not constitutionally disregard a duly enacted statute that implicitly prohibited the seizures. “The President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker,” the Court wrote.⁹ “The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad.”¹⁰ Justice Jackson’s celebrated concurrence observed that courts can uphold the President’s actions in violation of a federal statute “only by disabling the Congress from acting upon the subject.”¹¹ He warned: “Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.”¹²

As Justice Jackson made clear, the claim that the Commander-in-Chief authority is “preclusive” is irreconcilable with the doctrine of separation of powers. And yet this claim is one that the Bush administration advanced in multiple contexts during Judge Gorsuch’s

Judiciary, March 8, 2017, <http://fixthecourt.com/wp-content/uploads/2017/03/DOJ-Newman-letter-in-response-to-Feinstein-letter-3.8.17.pdf> (hereinafter, “March 8 DOJ Letter”).

⁶ The Federalist No. 47 (James Madison).

⁷ *Clinton v. Jones*, 520 U.S. 681, 699 (1997) (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976)).

⁸ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

⁹ *Id.* at 587.

¹⁰ *Id.*

¹¹ *Id.* at 637-38.

¹² *Id.* at 638.

tenure at the Justice Department. In *ACLU v. NSA*, for example, the Justice Department contended that the president had the authority as Commander in Chief to authorize surveillance that Congress had prohibited through the Foreign Intelligence Surveillance Act (“FISA”).¹³ Judge Gorsuch’s role in the case was apparently “limited to monitoring its developments,”¹⁴ but documents provided by the Justice Department to the Committee indicate that Judge Gorsuch also helped senior administration officials defend the warrantless wiretapping program publicly. For example, Judge Gorsuch drafted the prepared oral statement that Attorney General Alberto Gonzales delivered to this Committee in February 2006.¹⁵ In that testimony, Gonzales contended that Congress had authorized the warrantless wiretapping program when it passed the Sept. 2001 Authorization for Use of Military Force—an enactment that did not mention surveillance at all. He also suggested that review by NSA personnel was an adequate substitute for review by federal courts.¹⁶ Judge Gorsuch’s draft of Judge Gonzales’s statement included the claim that the president possessed “inherent” powers to conduct surveillance in wartime that “cannot be diminished or legislated away by other co-equal branches of government.” Judge Gorsuch appears to have excised that line only after Paul Clement, the Solicitor General, objected to it.¹⁷

The Bush administration advanced related claims in *Hamdan v. Rumsfeld*, a case in which Judge Gorsuch “review[ed] . . . opinions,” “participat[ed] in discussing litigation options,” and “review[ed] the pleadings.”¹⁸ The administration argued that the President enjoyed the authority as Commander in Chief to authorize military commissions that were inconsistent with the Uniform Code of Military Justice (“UCMJ”) and the Geneva Conventions, which had been incorporated into the UCMJ. The Supreme Court disagreed. In concurrence, Justice Kennedy observed that the government’s argument, if accepted, would upset the careful balance struck by the Framers and jeopardize individual liberty.

¹³ Memorandum of Points and Authorities in Support of the United States, *ACLU v. NSA*, No. 06-cv-10204 (E.D. Mich. May 26, 2006), ECF No. 34, <https://www.aclu.org/files/pdfs/safefree/nsadefs.memo.dismiss.052606.pdf>. I was counsel to the plaintiffs in this case and in several of the other cases discussed below.

¹⁴ March 8 DOJ Letter.

¹⁵ DOJ_NMG_0152612-0152627.

¹⁶ DOJ_NMG_0152616-0152617 (“Second, the program is triggered only when a career professional at the NSA has reasonable grounds to believe that one of the parties to a communication is a member or agent of al Qaeda or an affiliated terrorist organization Third, to protect the privacy of Americans still further, the NSA employs safeguards to minimize the unnecessary collection and dissemination of information about U.S. persons. Fourth, this program is administered by career professionals at the NSA.”).

¹⁷ SJC_DOJ_Gorsuch_000065; *see also* email from Neil Gorsuch to Paul Clement et al., Feb. 3, 2006, available at <https://assets.documentcloud.org/documents/3520275/Gorsuch-in-Camera-Documents.pdf>.

¹⁸ March 8 DOJ Letter.

“Concentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the Constitution’s three-party system is designed to avoid,” he wrote.¹⁹

The Bush administration also advanced the claim of preclusive executive power in relation to the interrogation of prisoners, another issue with respect to which Judge Gorsuch played a significant role. The foundational Justice Department memos authorizing torture were of course written before Judge Gorsuch joined the Bush administration. However, the claim that the President had the authority as Commander in Chief to authorize interrogation methods that Congress had prohibited was one that the administration continued to defend during Judge Gorsuch’s tenure at the Justice Department. In December 2005, Congress enacted the Detainee Treatment Act, which prohibited agencies of the U.S. government from subjecting prisoners to cruel, inhuman, or degrading treatment. Judge Gorsuch appears to have viewed this prohibition as a setback but seems to have known that the administration would not significantly adjust its policies in response to it.²⁰ (In a series of memos written earlier that year, the Office of Legal Counsel had concluded that waterboarding and other barbaric methods did not constitute cruel, inhuman, or degrading punishment.²¹) He argued that President Bush should issue a signing statement to “inoculate against the potential of having the Administration criticized sometime in the future for not making sufficient changes in interrogation policy” in response to the legislation.²² Days later, when President Bush signed the bill into law, he issued a statement indicating that he would interpret the law “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 limits on the judicial power.”²³

II. Judge Gorsuch’s Role in the Bush Administration’s Efforts to Marginalize the Judiciary

Another theme running through the Bush administration’s defense of its policies was the argument that the courts lacked authority or competence to consider the lawfulness of government action undertaken in the name of national security—even in contexts implicating fundamental liberties. During his tenure at the Justice Department, Judge Gorsuch played an important role in the administration’s efforts to marginalize the courts.

¹⁹ *Hamdan v. Rumsfeld*, 548 U.S. 557, 638 (2006) (Kennedy, J., concurring).

²⁰ DOJ_NMG_0149598.

²¹ Mark Mazzetti & Scott Shane, *Interrogation Memos Detail Harsh Tactics by C.I.A.*, N.Y. Times (Apr. 16, 2009).

²² SJC_DOJ_Gorsuch_000042.

²³ This last sentence appears to have been written by David Addington, but there is no evidence that Judge Gorsuch objected to it. Charlie Savage, *Newly Public Emails Hint at Gorsuch’s View of Presidential Power*, N.Y. Times (Mar. 18, 2017).

Perhaps most significantly, Judge Gorsuch advocated for very broad legislation prohibiting federal courts from hearing habeas petitions filed by Guantánamo detainees. As noted above, the Detainee Treatment Act of 2005 barred federal agencies from subjecting prisoners to cruel, inhuman, or degrading treatment. The same legislation, however, purported to strip the federal courts of jurisdiction to consider Guantánamo prisoners' challenges to their detention and treatment. Judge Gorsuch advocated for a signing statement that would construe the jurisdiction-stripping provisions broadly.²⁴ Later, he drafted an op-ed defending the signing statement. The op-ed referred categorically to habeas petitions filed by Guantánamo prisoners as “frivolous lawsuits by terrorist detainees.”²⁵ One of Judge Gorsuch's contributions to the *Hamdan* litigation was to solicit an amicus brief from Senators Graham and Kyl in support of the government's view that the DTA's jurisdiction-stripping provisions should be applied to petitions filed before the DTA was enacted, including to Hamdan's petition.²⁶ After the Supreme Court decided the case, rejecting virtually all of the government's arguments, Judge Gorsuch played a key role in drafting a post-*Hamdan* jurisdiction-stripping proposal.²⁷ (A version of the proposal was incorporated into the Military Commissions Act of 2006 but later invalidated by the Supreme Court in *Boumediene v. Bush*.²⁸)

Judge Gorsuch was involved in other efforts to prevent or dissuade the courts from considering the lawfulness of the government's national security policies. In *ACLU v. NSA*, discussed above, and in *El-Masri v. Tenet*,²⁹ a case concerning the CIA's extraordinary rendition and torture of a German national whom the agency had abducted in Macedonia, the Bush administration contended that concerns relating to the disclosure of state secrets required dismissal. Judge Gorsuch “participated in discussing litigation options” in *El-Masri*,³⁰ and after the Fourth Circuit dismissed the case on state secrets grounds, he received an email commending him for his work.³¹ Mr. El-Masri, it should be noted, was a case of mistaken identity—an innocent person abducted, transported to Afghanistan, held incommunicado, tortured brutally by CIA agents and contractors, and then released without explanation or apology.³²

²⁴ SJC_DOJ_Gorsuch_000042.

²⁵ DOJ_NMG_0150887.

²⁶ DOJ_NMG_0151350.

²⁷ DOJ_NMG_0163495; DOJ_NMG_0163501; DOJ_NMG_0163505; DOJ_NMG_0163525; DOJ_NMG_0163526; DOJ_NMG_0040159; DOJ_NMG_0040171; DOJ_NMG_00440177; DOJ_NMG_040178; DOJ_NMG_0164194; DOJ_NMG_0037490.

²⁸ 553 U.S. 723 (2008).

²⁹ 437 F. Supp. 2d 530 (E.D. Va. 2006), *aff'd sub nom.*, *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007).

³⁰ March 8 DOJ Letter.

³¹ DOJ_NMG_0029192.

³² *El-Masri v. Former Yugoslav Republic of Macedonia*, ECHR (Dec. 13, 2012).

Judge Gorsuch was also involved in “developing case strategy” in *ACLU v. Department of Defense*,³³ a Freedom of Information Act suit for records concerning the abuse and torture of prisoners in U.S. custody. Among the records sought by the plaintiffs were hundreds of photographs relating to prisoner abuse in military facilities overseas. During Judge Gorsuch’s tenure at the Justice Department, the administration’s position was that the Defense Department was entitled to withhold the photographs because of the risk that their disclosure would lead to violence against American soldiers or civilians. The administration also contended that the CIA was justified in refusing to confirm or deny the existence of three documents that were part of the foundation for the agency’s torture program—a directive in which President Bush authorized the agency to establish secret prisons, and two legal memos addressing the lawfulness of certain interrogation methods. With respect to both the photos and the CIA documents, the Justice Department urged the court to accord nearly absolute deference to the executive’s assertion that secrecy was necessary.³⁴ The court declined.³⁵

The argument that courts should defer to the executive’s assessment that secrecy was necessary was an argument that the Bush administration made in other contexts as well. *ACLU v. Department of Defense* was a Freedom of Information Act case, but the administration advanced essentially the same argument in constitutional cases. To take one example, in *Doe v. Gonzales*,³⁶ a challenge to the constitutionality of the “national security letter” (“NSL”) statute, the Justice Department defended the constitutionality of gag orders that the statute permitted the FBI to impose on NSL recipients as a matter of course. Judge Gorsuch “participated in developing case strategy and reviewed briefs.”³⁷ In a brief filed with the Second Circuit in August 2005, approximately two months after Judge Gorsuch joined the Justice Department, the administration acknowledged that NSL recipients could challenge the constitutionality of gag orders in individual cases, but it contended that courts should essentially rubber-stamp the “predictive judgment[s]” of executive officials in recognition of the “unique competence of counterterrorism and counterintelligence officials to judge those risks [of harm] and the courts’ relative lack of expertise to second-guess the executive’s judgment in this area of national security.”³⁸ The Justice Department specifically defended the constitutionality of indefinite gag orders, contending that, in terrorism and foreign intelligence investigations, “the dangers posed by disclosures do not

³³ March 8 DOJ Letter.

³⁴ March 8 DOJ Letter.

³⁵ *ACLU v. Dep’t of Def.*, 543 F.3d 59 (2d Cir. 2009) (affirming district court’s order requiring disclosure of abuse photos); *ACLU v. Dep’t of Def.*, 389 F. Supp. 2d 547 (S.D.N.Y. 2005) (requiring CIA to acknowledge existence of one of the two legal memos).

³⁶ 449 F.3d 415 (2d Cir. 2006).

³⁷ March 8 DOJ Letter.

³⁸ Brief of Defendant-Appellant at 25-26, *Doe v. Gonzales*, 05-0570 (2d. Cir. Aug. 26, 2005), <https://www.aclu.org/files/nsll/legal/ReplyBrGovt082605.pdf>.

end with the closing of an individual investigation or the arrest or conviction of a particular suspect.”³⁹ The Second Circuit rejected the government’s arguments.⁴⁰

* * *

Some of the arguments that Judge Gorsuch was associated with at the Justice Department were extreme, lacked support in precedent, and could not be reconciled with the text of relevant statutory and constitutional provisions—and eventually they were rejected for these reasons by the courts. Some of the policies that Judge Gorsuch was defending—most notably, the policies relating to extrajudicial detention, rendition, and torture—have been discredited.⁴¹ Some of these arguments and policies have not yet been addressed by the courts, even as they continue to animate claims relating to executive power today. The question for the Committee is what Judge Gorsuch’s tenure at the Justice Department can tell us about the philosophy he would bring to issues of executive power as an Associate Justice of the Supreme Court.

It is important to recognize that Judge Gorsuch might approach issues relating to executive power differently as an Associate Justice than he did as a Justice Department lawyer. It is conceivable that as an Associate Justice he would reject some of the arguments he made when he served in the Bush administration. At the Justice Department, Judge Gorsuch was a lawyer with a client. He has said that he regarded himself a “scrivener”⁴² or a “scribe.”⁴³

It is worth noting, however, that Judge Gorsuch sought out a high-level position with the Justice Department in the fall of 2004, just seven months after *The New Yorker* and *60 Minutes* published the Abu Ghraib photos showing prisoners being abused by American soldiers, and only five months after the *Washington Post* published one of the torture program’s foundational documents⁴⁴—a memo in which the Office of Legal Counsel wrote that interrogation methods would not contravene criminal laws relating to torture unless they inflicted the kind of pain associated with organ failure or death, that in any event the statute criminalizing torture did not apply to interrogations “undertaken pursuant to [the] Commander in Chief authority,” and that interrogators prosecuted for

³⁹ *Id.* At 21-22.

⁴⁰ *Doe v. Mukasey*, 49 F.3d 861 (2d Cir. 2008).

⁴¹ See generally Executive Summary, “Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program,” Senate Select Committee on Intelligence (Dec. 13, 2012).

⁴² SJC_DOJ_Gorsuch_000066.

⁴³ Matt Flegenheimer, Adam Liptak, Carl Hulse & Charlie Savage, *Seven Highlights from the Gorsuch Confirmation Hearings*, N.Y. Times (Mar. 21, 2017).

⁴⁴ Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture*, Wash. Post (June 8, 2004).

torturing prisoners would be able to rely on the defenses of necessity and self-defense.⁴⁵ It is not the case, in other words, that Judge Gorsuch happened to be a government lawyer at a time when the government—his client—endorsed torture and a sweeping view of presidential power. The government endorsed those things first, very publicly, and then Judge Gorsuch chose his client.

It is also worth noting that Judge Gorsuch appears not to have registered any disagreement with any of the policies he defended—though other officials did.⁴⁶ Nor is there evidence that he registered discomfort with any of the broad arguments that the Justice Department advanced in support of those policies—though, again, others did.⁴⁷ The documents provided by the Justice Department to the Committee suggest that Judge Gorsuch was comfortable with the policies and with the Bush administration’s defenses of them, and, indeed, that it was *challenges* to the policies that troubled him. In one email, Judge Gorsuch criticized law firms that represented prisoners held at Guantánamo, wondering why “more ha[d] not been made” of the fact that the same law firms that represented Boeing and General Dynamics were (in the words of an article attached to his email) “help[ing] alleged terrorists.”⁴⁸ As we now know, many of those “alleged terrorists” were not terrorists at all, and eventually the government freed them. It is notable that Judge Gorsuch seems not to have seen a role in the American legal system for the private attorneys who represented them pro bono.

Against this background, it is crucial that the Committee question Judge Gorsuch about the perspective he would bring to issues of executive power. The Committee should not confirm Judge Gorsuch without first assuring itself that he will protect individual rights, and the constitutional authority of Congress and the courts, in the sphere of national security.

Thank you again for giving me the opportunity to submit this testimony.

⁴⁵ Memorandum from Jay Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President, re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340S, August 1, 2002.

⁴⁶ See, e.g., Jane Mayer, *The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees Was Thwarted*, *The New Yorker* (Feb. 27, 2006); Jameel Jaffer & Larry Siems, *Honoring Those Who Said No*, *N.Y. Times* (Apr. 27, 2011).

⁴⁷ Charlie Savage & James Risen, *New Leak Suggests Ashcroft Confrontation Was Over N.S.A. Program*, *N.Y. Times*, (June 27, 2013).

⁴⁸ DOJ_NMG_151368.