Description of document:	Correspondence between the Office of Legal Counsel (OLC) and Brett Kavanaugh, January 20, 2001, to May 30, 2006
Requested date:	16-July-2018
Release 01 date:	03-August-2018
Release 02 date:	17-August-2018
Release 03 date:	31-August-2018
Release 04 date:	14-September-2018
Release 05 date:	17-September-2018
Posted date:	01-April-2019
Note:	Records released 03-Aug-2018 begin on PDF page 12 Records released 17-Aug-2018 begin on PDF page 243 Records released 31-Aug-2018 begin on PDF page 435 Records released 14-Sep-2018 begin on PDF page 631 Records released 17-Sep-2018 begin on PDF page 725
Source of document:	FOIA Request Office of Legal Counsel Room 5511, 950 Pennsylvania Avenue, NW Department of Justice Washington, DC 20530-0001 Email: usdoj-officeoflegalcounsel@usdoj.gov

U.S. Department of Justice

Office of Legal Counsel

Washington, D.C. 20530

August 3, 2018

Re: FOIA Tracking No. FY18-162

This letter partially responds to your July 16, 2018 Freedom of Information Act ("FOIA") request to the Office of Legal Counsel ("OLC"), seeking "correspondence sent by the Assistant Attorney General in charge of [OLC] and his or her primary deputy to Brett M. Kavanaugh and all correspondence sent by Brett M. Kavanaugh to the Assistant Attorney General in charge of [OLC] and his or her primary deputy from January 20, 2001, to May 30, 2006."

As of this date, we have processed 404 pages of responsive records. We have enclosed 230 pages with redactions and withheld the remaining 174 pages in full. Our redactions are based on FOIA Exemption Five, 5 U.S.C. § 552(b)(5), or FOIA Exemption Six, 5 U.S.C. § 552(b)(6). The full withholdings are based on Exemption Five. For your information, Exemption Five exempts material protected by the attorney-client, deliberative process, and presidential communications privileges, as well as the attorney work product doctrine and other privileges. Exemption Six exempts material the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. We have determined that none of the withheld material is appropriate for discretionary release. We are continuing to process responsive records.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. § 552(c). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

For any further assistance and to discuss any aspect of your request, you may contact Melissa Golden, OLC's FOIA Public Liaison, at usdoj-officeoflegalcounsel@usdoj.gov, (202) 514-2053, or at Office of Legal Counsel, United States Department of Justice, 950 Pennsylvania Ave., N.W., Room 5511, Washington, DC 20530.

Additionally, you may contact the Office of Government Information Services ("OGIS") at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi

Road, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

You have the right to an administrative appeal. You may administratively appeal by writing to the Director, Office of Information Policy ("OIP"), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-0001, or you may submit an appeal through OIP's FOIAonline portal by creating an account on the following web site: https://foiaonline.regulations.gov/foia/action/public/home. Your appeal must be postmarked or electronically transmitted within 90 days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

Paul P. Colborn
Special Counsel

Enclosures

U.S. Department of Justice

Office of Legal Counsel

Washington, D.C. 20530

August 17, 2018

Re: FOIA Tracking No. FY18-162

This letter partially responds to your July 16, 2018 Freedom of Information Act ("FOIA") request to the Office of Legal Counsel ("OLC"), seeking "correspondence sent by the Assistant Attorney General in charge of [OLC] and his or her primary deputy to Brett M. Kavanaugh and all correspondence sent by Brett M. Kavanaugh to the Assistant Attorney General in charge of [OLC] and his or her primary deputy from January 20, 2001, to May 30, 2006."

Since the last partial response, we have processed 419 pages of responsive records. We have enclosed 191 pages with redactions and withheld the remaining 228 pages in full. Our redactions are based on FOIA Exemption Five, 5 U.S.C. § 552(b)(5), or FOIA Exemption Six, 5 U.S.C. § 552(b)(6). The full withholdings are based on Exemption Five. For your information, Exemption Five exempts material protected by the attorney-client, deliberative process, and presidential communications privileges, as well as the attorney work product doctrine and other privileges. Exemption Six exempts material the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. We have determined that none of the withheld material is appropriate for discretionary release. We are continuing to process responsive records.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. § 552(c). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

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Road, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

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Sincerely,

Paul P. Colborn

Paul P. Colborn
Special Counsel

Enclosures

U.S. Department of Justice

Office of Legal Counsel

Washington, D.C. 20530

August 31, 2018

Re: FOIA Tracking No. FY18-162

This letter partially responds to your July 16, 2018 Freedom of Information Act ("FOIA") request to the Office of Legal Counsel ("OLC"), seeking "correspondence sent by the Assistant Attorney General in charge of [OLC] and his or her primary deputy to Brett M. Kavanaugh and all correspondence sent by Brett M. Kavanaugh to the Assistant Attorney General in charge of [OLC] and his or her primary deputy from January 20, 2001, to May 30, 2006."

Since the last partial response, we have processed 403 pages of responsive records. We have enclosed 195 pages with redactions and withheld the remaining 208 pages in full. Our redactions are based on FOIA Exemption Three, 5 U.S.C. § 552(b)(3), FOIA Exemption Five, 5 U.S.C. § 552(b)(5), or FOIA Exemption Six, 5 U.S.C. § 552(b)(6). The full withholdings are based on Exemption Five. The redactions based on Exemption Three, which exempts material protected from disclosure by statute, withhold material protected from disclosure by 18 U.S.C. §3521(b)(1)(g). For your information, Exemption Five exempts material protected by the attorney-client, deliberative process, and presidential communications privileges, as well as the attorney work product doctrine and other privileges. Exemption Six exempts material the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. We have determined that none of the withheld material is appropriate for discretionary release. We are continuing to process responsive records.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. § 552(c). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

For any further assistance and to discuss any aspect of your request, you may contact Melissa Golden, OLC's FOIA Public Liaison, at usdoj-officeoflegalcounsel@usdoj.gov, (202) 514-2053, or at Office of Legal Counsel, United States Department of Justice, 950 Pennsylvania Ave., N.W., Room 5511, Washington, DC 20530.

Additionally, you may contact the Office of Government Information Services ("OGIS") at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government

Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

You have the right to an administrative appeal. You may administratively appeal by writing to the Director, Office of Information Policy ("OIP"), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-0001, or you may submit an appeal through OIP's FOIAonline portal by creating an account on the following web site: https://foiaonline.regulations.gov/foia/action/public/home. Your appeal must be postmarked or electronically transmitted within 90 days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

Paul P. Colborn

Paul P. Colborn
Special Counsel

Enclosures

U.S. Department of Justice

Office of Legal Counsel

Washington, D.C. 20530

September 14, 2018

Re: FOIA Tracking No. FY18-162

This letter partially responds to your July 16, 2018 Freedom of Information Act ("FOIA") request to the Office of Legal Counsel ("OLC"), seeking "correspondence sent by the Assistant Attorney General in charge of [OLC] and his or her primary deputy to Brett M. Kavanaugh and all correspondence sent by Brett M. Kavanaugh to the Assistant Attorney General in charge of [OLC] and his or her primary deputy from January 20, 2001, to May 30, 2006."

Since the last partial response, we have processed 382 pages of responsive records. We have enclosed 93 pages with redactions and withheld the remaining 289 pages in full. Our redactions are based on FOIA Exemption Five, 5 U.S.C. § 552(b)(5), or FOIA Exemption Six, 5 U.S.C. § 552(b)(6). The full withholdings are based on Exemption Five. For your information, Exemption Five exempts material protected by the attorney-client, deliberative process, and presidential communications privileges, as well as the attorney work product doctrine and other privileges. Exemption Six exempts material the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. We have determined that none of the withheld material is appropriate for discretionary release. We are continuing to process responsive records.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. § 552(c). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

For any further assistance and to discuss any aspect of your request, you may contact Melissa Golden, OLC's FOIA Public Liaison, at usdoj-officeoflegalcounsel@usdoj.gov, (202) 514-2053, or at Office of Legal Counsel, United States Department of Justice, 950 Pennsylvania Ave., N.W., Room 5511, Washington, DC 20530.

Additionally, you may contact the Office of Government Information Services ("OGIS") at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government

Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

You have the right to an administrative appeal. You may administratively appeal by writing to the Director, Office of Information Policy ("OIP"), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-0001, or you may submit an appeal through OIP's FOIAonline portal by creating an account on the following web site: https://foiaonline.regulations.gov/foia/action/public/home. Your appeal must be postmarked or electronically transmitted within 90 days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

Paul P. Colborn
Special Counsel

Enclosures

U.S. Department of Justice

Office of Legal Counsel

Washington, D.C. 20530

September 17, 2018

Re: FOIA Tracking No. FY18-162

This letter partially responds to your July 16, 2018 Freedom of Information Act ("FOIA") request to the Office of Legal Counsel ("OLC"), seeking "correspondence sent by the Assistant Attorney General in charge of [OLC] and his or her primary deputy to Brett M. Kavanaugh and all correspondence sent by Brett M. Kavanaugh to the Assistant Attorney General in charge of [OLC] and his or her primary deputy from January 20, 2001, to May 30, 2006."

Since the last partial response, we have processed 135 pages of responsive records. We have enclosed all 135 pages with some redactions. Our redactions are based on FOIA Exemption Three, 5 U.S.C. § 552(b)(3), FOIA Exemption Five, 5 U.S.C. § 552(b)(5), or FOIA Exemption Six, 5 U.S.C. § 552(b)(6). The redactions based on Exemption Three, which exempts material protected from disclosure by statute, are marked with the relevant statutes. For your information, Exemption Five exempts material protected by the attorney-client, deliberative process, and presidential communications privileges, as well as the attorney work product doctrine and other privileges. Exemption Six exempts material the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. We have determined that none of the withheld material is appropriate for discretionary release. We have now completed processing responsive records.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. § 552(c). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

For any further assistance and to discuss any aspect of your request, you may contact Melissa Golden, OLC's FOIA Public Liaison, at usdoj-officeoflegalcounsel@usdoj.gov, (202) 514-2053, or at Office of Legal Counsel, United States Department of Justice, 950 Pennsylvania Ave., N.W., Room 5511, Washington, DC 20530.

Additionally, you may contact the Office of Government Information Services ("OGIS") at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government

Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

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Sincerely,

for Paul P. Colborn
Special Counsel

Enclosures

RECORDS RELEASED 2018-08-03

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Thursday, September 20, 2001 9:49 AM
To: 'Kavanaugh, Brett'
Subject: Comments on Title IV of draft bill

A handful of comments:

1. (b) (5) [redacted].

One simple fix would b (b) (5) [redacted]. E.g.:

(b) (5) [redacted]

2. (b) (5) [redacted]

If you want me to draft language to address (b) and (c), let me know.

3. (b) (5) [redacted].

4. (b) (5) [redacted]. E.g.:

(b) (5) [redacted]."

5. (b) (5) [redacted].

Helgard_C._Walker@who.eop.gov

From:	Helgard_C._Walker@who.eop.gov
Sent:	Thursday, October 4, 2001 3:10 PM
To:	Brett_M._Kavanaugh@who.eop.gov
Cc:	Whelan, M Edward III; Jay_P._Lefkowitz@omb.eop.gov; Rebecca_A._Beynon@omb.eop.gov; Joel_D._Kaplan@who.eop.gov; Steven_D._Aitken@omb.eop.gov
Subject:	RE: OLC: (b) (5) Airline Board
Attachments:	pic05304.pcx

(b) (5)

Brett M. Kavanaugh
10/04/2001 02:58:04 PM

Record Type: Record

To: Helgard C. Walker/WHO/EOP@EOP
cc: See the distribution list at the bottom of this message bcc:
Subject: RE: OLC: (b) (5) Airline Board (Document link: Helgard C. Walker)

Yes. We were told by OLC on the morning of Friday the 21st that (b) (5) . Joel and I so informed the congressional staffs and some Members. We were not involved in the negotiations about this specific issue, however. The negotiations entailed the 4 leaders (Daschle, Lott, Hastert, Gephardt) sitting in a room with 2 staff members each during lunch on the 21st. Gephardt apparently still insisted on (b) (5) . The compromise apparently reached among these 4 leaders -- who were apparently aware of the OLC advice and Administration position -- was to (b) (5) .

Ed advises [redacted (b) (5)] .

Let me know if you have further questions.

Helgard C. Walker
10/04/2001 02:46:18 PM

Record Type: Record

To: "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov>, Brett M. Kavanaugh/WHO/EOP@EOP
cc: Jay P. Lefkowitz/OMB/EOP@EOP, Rebecca A. Beynon/OMB/EOP@EOP, Joel D. Kaplan/WHO/EOP@EOP, Steven D. Aitken/OMB/EOP@EOP bcc:
Subject: RE: OLC: [redacted (b) (5)] Airline Board (Document link: Brett M. Kavanaugh)

Brett, do you remember dealing with/thinking about this issue during the legislative process?

(Embedded
image moved "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov>
to file: 10/04/2001 01:50:28 PM
pic05304.pcx)

Record Type: Record

To: Jay P. Lefkowitz/OMB/EOP, Rebecca A. Beynon/OMB/EOP

cc: Helgard C. Walker/WHO/EOP, Joel D. Kaplan/WHO/EOP, Steven D. Aitken/OMB/EOP
Subject: RE: OLC: [redacted (b) (5)] Airline Board

I haven't had time to review it with care yet, but [redacted (b) (5)] .

One solution might be to [redacted (b) (5)] .

-----Original Message-----
From: Jay_P._Lefkowitz@omb.eop.gov [mailto:Jay_P._Lefkowitz@omb.eop.gov]
Sent: Thursday, October 04, 2001 1:33 PM
To: Rebecca_A._Beynon@omb.eop.gov
Cc: Whelan, M Edward III; Jay_Lefkowitz@dc.kirkland.com;
Helgard_C._Walker@who.eop.gov; Joel_D._Kaplan@who.eop.gov;
Steven_D._Aitken@omb.eop.gov
Subject: Re: OLC: [redacted (b) (5)] Airline Board

This was an issue that came up during the drafting and I thought [redacted (b) (5)] solved the problem.

Is that not correct?

From: Rebecca A. Beynon on 10/04/2001 01:28:35 PM

Record Type: Record

To: Jay Lefkowitz, Helgard C. Walker/WHO/EOP@EOP, Joel D. Kaplan/WHO/EOP@EOP,
Steven D. Aitken/OMB/EOP@EOP

cc: M.edward.whelan@usdoj.gov
Subject: OLC: [redacted (b) (5)] Airline Board

Ed Whelan from OLC has just raised with me the point that [redacted (b) (5)] . He hasn't formed a definite opinion yet, but wanted to bring the issue to our attention. Ed, could you supply a little more information? Thanks very much.

Message Copied To:_____

"whelan, m edward iii" <m.edward.whelan@usdoj.gov>
jay p. lefkowitz/omb/eop@eop
rebecca a. beynon/omb/eop@eop
joel d. kaplan/who/eop@eop
steven d. aitken/omb/eop@eop

Jay_P._Lefkowitz@omb.eop.gov

From:	Jay_P._Lefkowitz@omb.eop.gov
Sent:	Thursday, October 4, 2001 3:19 PM
To:	Helgard_C._Walker@who.eop.gov
Cc:	Whelan, M Edward III; Brett_M._Kavanaugh@who.eop.gov; Helgard_C._Walker@who.eop.gov; Jay_P._Lefkowitz@omb.eop.gov; Rebecca_A._Beynon@omb.eop.gov; Joel_D._Kaplan@who.eop.gov; Steven_D._Aitken@omb.eop.gov
Subject:	RE: OLC: (b) (5) Airline Board
Attachments:	pic03867.pcx

(b) (5)
.

(b) (5)
.

Helgard C. Walker
10/04/2001 03:11:55 PM

Record Type: Record

To: Jay P. Lefkowitz/OMB/EOP@EOP
cc: See the distribution list at the bottom of this message bcc:
Subject: RE: OLC: (b) (5) Airline Board (Document link: Jay P. Lefkowitz)

As you can see from the email that I just sent out, (b) (5)

Jay P. Lefkowitz
10/04/2001 02:59:04 PM

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP
cc: See the distribution list at the bottom of this message bcc:
Subject: RE: OLC: [redacted] (b) (5) [redacted] Airline Board (Document link: Helgard C. Walker)

Helgi:

Can you give us a hand with an insert to [redacted] (b) (5) [redacted]

thanks very much

Brett M. Kavanaugh
10/04/2001 02:58:04 PM

Record Type: Record

To: Helgard C. Walker/WHO/EOP@EOP
cc: See the distribution list at the bottom of this message bcc:
Subject: RE: OLC: [redacted] (b) (5) [redacted] Airline Board (Document link: Jay P. Lefkowitz)

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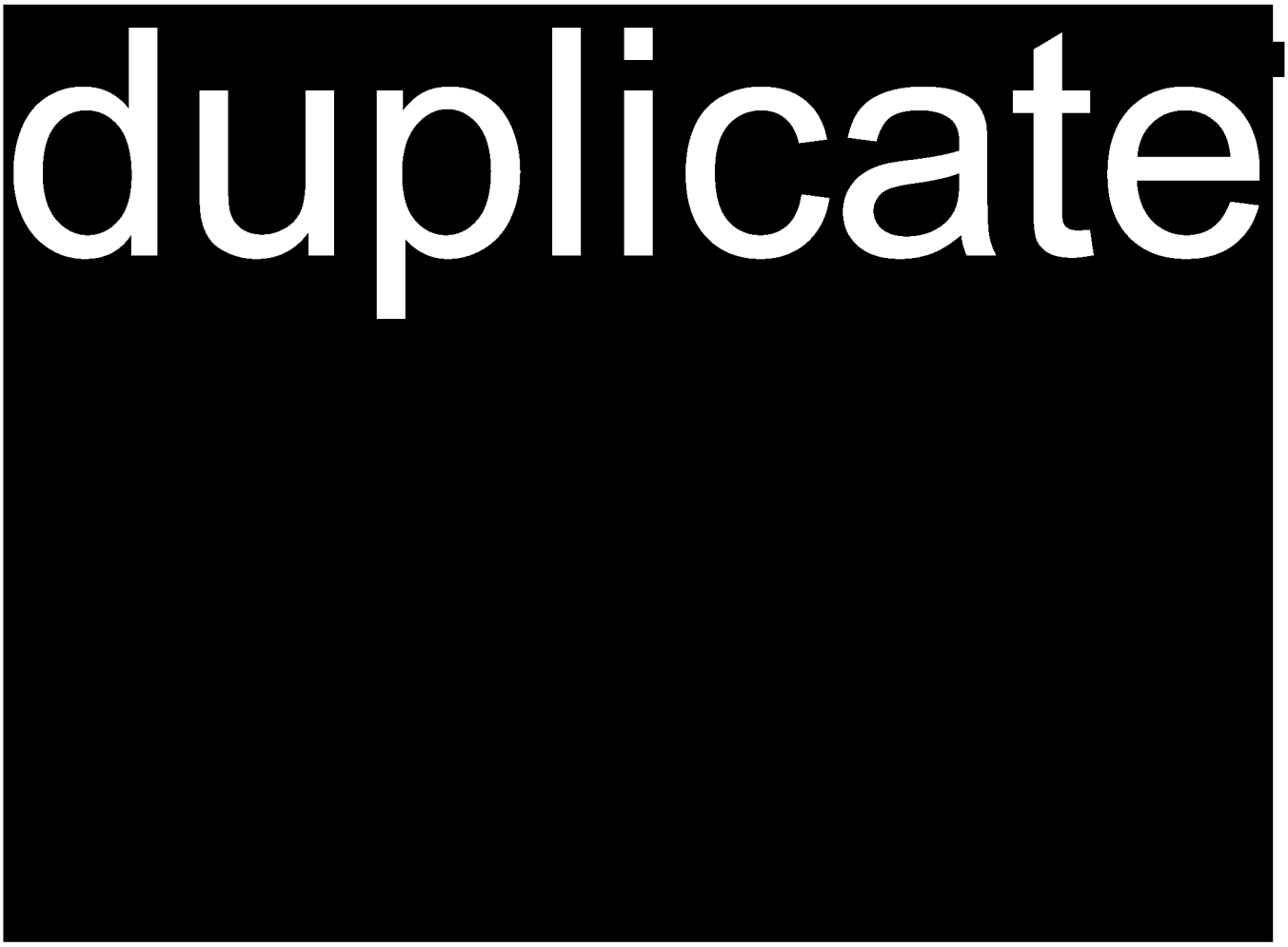
duplicate



Joel_D._Kaplan@who.eop.gov

From:	Joel_D._Kaplan@who.eop.gov
Sent:	Thursday, October 04, 2001 3:58 PM
To:	Brett_M._Kavanaugh@who.eop.gov
Cc:	Whelan, M Edward III; Helgard_C._Walker@who.eop.gov; Jay_P._Lefkowitz@omb.eop.gov; Rebecca_A._Beynon@omb.eop.gov; Joel_D._Kaplan@who.eop.gov; Steven_D._Aitken@omb.eop.gov
Subject:	RE: OLC: (b) (5) Airline Board

(b) (5)
?

(b) (5)
?

Jay_P._Lefkowitz@omb.eop.gov

From:	Jay_P._Lefkowitz@omb.eop.gov
Sent:	Thursday, October 04, 2001 4:04 PM
To:	Helgard_C._Walker@who.eop.gov
Cc:	Whelan, M Edward III; Brett_M._Kavanaugh@who.eop.gov; Jay_P._Lefkowitz@omb.eop.gov; Brett_M._Kavanaugh@who.eop.gov; Helgard_C._Walker@who.eop.gov; Rebecca_A._Beynon@omb.eop.gov; Joel_D._Kaplan@who.eop.gov; Steven_D._Aitken@omb.eop.gov
Subject:	RE: OLC: (b) (5) Airline Board
Attachments:	pic23291.pcx

I talked with Walker's GC who is sensitive to the issue, and I will be speaking with him and Walker at 5:30.

(b) (5)
.

Helgard C. Walker
10/04/2001 03:50:18 PM

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP
cc: See the distribution list at the bottom of this message bcc:
Subject: RE: OLC: (b) (5) Airline Board (Document link: Jay P. Lefkowitz)

I think that is an excellent suggestion -- (b) (5)
' In the meantime, I'll try and come up with some language. If OLC has any ideas as a starting point, I'd love to hear them.

Brett M. Kavanaugh
10/04/2001 03:42:49 PM

Record Type: Record

To: Helgard C. Walker/WHO/EOP@EOP
cc: See the distribution list at the bottom of this message bcc:
Subject: RE: OLC: (b) (5) Airline Board (Document link: Helgard C. Walker)

(b) (5)

One way to do this is (b) (5)

Helgard C. Walker
10/04/2001 03:11:55 PM

Record Type: Record

To: Jay P. Lefkowitz/OMB/EOP@EOP
cc: See the distribution list at the bottom of this message bcc:

duplicate

duplicate

duplicate

duplicate

duplicate

Helgard_C._Walker@who.eop.gov

From:	Helgard_C._Walker@who.eop.gov
Sent:	Thursday, October 04, 2001 4:16 PM
To:	Whelan, M Edward III
Cc:	Jay_P._Lefkowitz@omb.eop.gov; Brett_M._Kavanaugh@who.eop.gov; Rebecca_A._Beynon@omb.eop.gov; Joel_D._Kaplan@who.eop.gov; Steven_D._Aitken@omb.eop.gov
Subject:	RE: OLC: (b) (5) Airline Board
Attachments:	pic18686.pcx

Interesting point. I think, however, that (b) (5)
Other views?

(Embedded
image moved "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov>
to file: 10/04/2001 04:01:53 PM
pic18686.pcx)

Record Type: Record

To: Jay P. Lefkowitz/OMB/EOP@EOP, Helgard C. Walker/WHO/EOP@EOP

cc: See the distribution list at the bottom of this message Subject: RE: OLC: (b) (5)
Airline Board

An additional comment: It is not at all clear to me that (b) (5)
. As I read the Act, (b) (5)
I don't mean to argue this point here.
Rather, I simply want to point out t (b) (5)

(b) (5)

-----Original Message-----
From: Jay_P._Lefkowitz@omb.eop.gov [mailto:Jay_P._Lefkowitz@omb.eop.gov]
Sent: Thursday, October 04, 2001 3:52 PM
To: Helgard_C._Walker@who.eop.gov
Cc: Whelan, M Edward III; Brett_M._Kavanaugh@who.eop.gov;
Jay_P._Lefkowitz@omb.eop.gov; Brett_M._Kavanaugh@who.eop.gov;
Helgard_C._Walker@who.eop.gov; Rebecca_A._Beynon@omb.eop.gov;
Joel_D._Kaplan@who.eop.gov; Steven_D._Aitken@omb.eop.gov
Subject: RE: OLC: (b) (5) Airline Board

I have already put in a call.

I'll let you know as soon as I speak with Walker.

Helgard C. Walker
10/04/2001 03:50:18 PM

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP
cc: See the distribution list at the bottom of this message bcc:

duplicate

duplicate

duplicate

duplicate

duplicate

duplicate

Whelan, M Edward III

From:	Whelan, M Edward III
Sent:	Thursday, October 04, 2001 4:17 PM
To:	'Jay_P._Lefkowitz@omb.eop.gov'
Cc:	'Helgard_C._Walker@who.eop.gov'; 'Brett_M._Kavanaugh@who.eop.gov'; 'Rebecca_A._Beynon@omb.eop.gov'; 'Joel_D._Kaplan@who.eop.gov'; 'Steven_D._Aitken@omb.eop.gov'
Subject:	RE: OLC: (b) (5) Airline Board

I think (b) (5) ought to be something like the following:

"(b) (5)
."

-----Original Message-----
From: Jay_P._Lefkowitz@omb.eop.gov [mailto:Jay_P._Lefkowitz@omb.eop.gov]
Sent: Thursday, October 04, 2001 4:08 PM
To: Whelan, M Edward III
Cc: Helgard_C._Walker@who.eop.gov; Brett_M._Kavanaugh@who.eop.gov; Rebecca_A._Beynon@omb.eop.gov; Joel_D._Kaplan@who.eop.gov; Steven_D._Aitken@omb.eop.gov
Subject: RE: OLC: (b) (5) Airline Board

If Ed's suggestion is the consensus view, then I don't believe I will have a hard time selling that to Walker. (b) (5) .

(Embedded
image moved "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov>
to file: 10/04/2001 04:01:53 PM
pic09837.pcx)

Record Type: Record

To: Jay P. Lefkowitz/OMB/EOP, Helgard C. Walker/WHO/EOP

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Brett_M._Kavanaugh@who.eop.gov

From:	Brett_M._Kavanaugh@who.eop.gov
Sent:	Thursday, October 4, 2001 5:45 PM
To:	Whelan, M Edward III
Cc:	Helgard_C._Walker@who.eop.gov; Jay_P._Lefkowitz@omb.eop.gov; Rebecca_A._Beynon@omb.eop.gov; Joel_D._Kaplan@who.eop.gov; Steven_D._Aitken@omb.eop.gov
Subject:	RE: OLC: (b) (5) Airline Board
Attachments:	pic27339.pcx

(b) (5)
.

(Embedded
image moved "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov>
to file: 10/04/2001 05:13:30 PM
pic27339.pcx)

Record Type: Record

To: Helgard C. Walker/WHO/EOP@EOP

cc: See the distribution list at the bottom of this message Subject: RE: OLC: (b) (5)
Airline Board

(b) (5)

(b) (5)

(b) (5)

-----Original Message-----
From: Helgard_C._Walker@who.eop.gov
[mailto:Helgard_C._Walker@who.eop.gov]
Sent: Thursday, October 04, 2001 4:39 PM
To: Whelan, M Edward III
Cc: Jay_P._Lefkowitz@omb.eop.gov; Brett_M._Kavanaugh@who.eop.gov;
Rebecca_A._Beynon@omb.eop.gov; Joel_D._Kaplan@who.eop.gov;
Steven_D._Aitken@omb.eop.gov
Subject: RE: OLC: (b) (5) Airline Board

Yes, I think that's good. Here's a somewhat tweaked version, (b) (5)
:

"(b) (5)
."

(b) (5)

On a housekeeping note, I would add this language (b) (5)
.

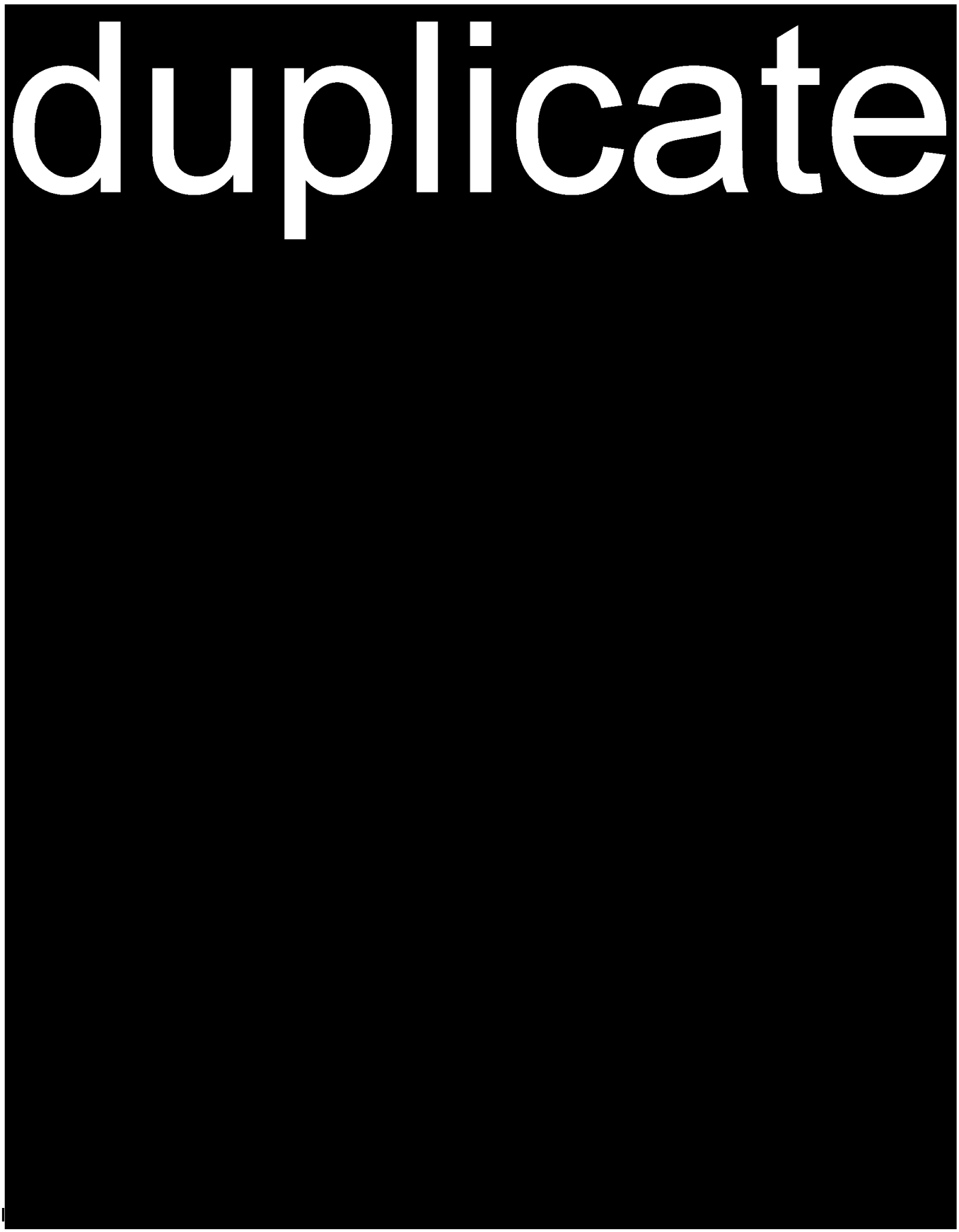
One last thing to keep in mind -- though I don't see how we can avoid it, given this pickle that we're in -
- is that (b) (5)
. But again, it's unavoidable, I think.

HCW

(Embedded
image moved "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov> to file: 10/04/2001 04:17:07
PM pic00788.pcx)

Record Type: Record

To: Jay P. Lefkowitz/OMB/EOP@EOP



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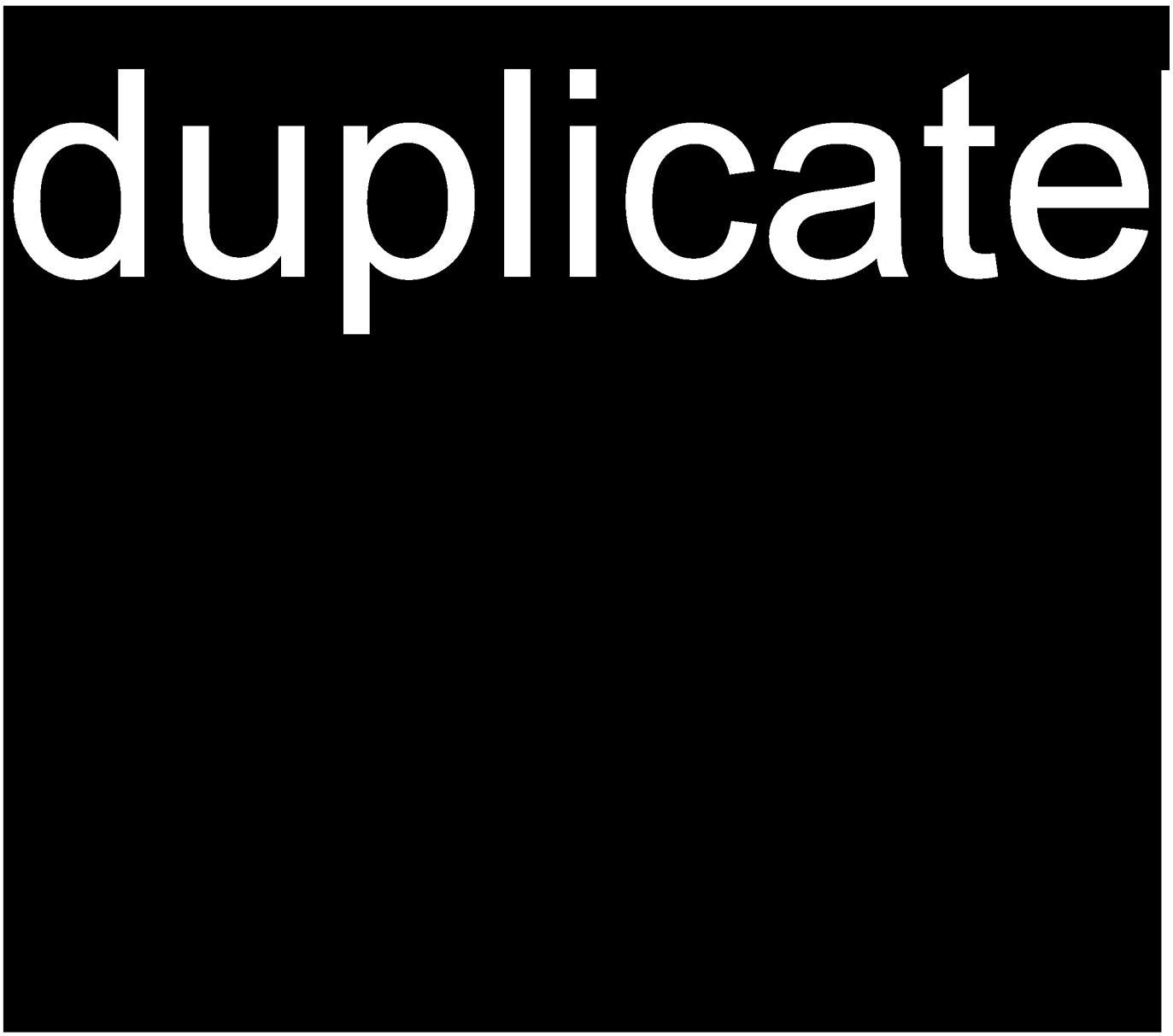

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Thursday, October 04, 2001 6:03 PM
To: 'Helgard_C._Walker@who.eop.gov'; 'Brett_M._Kavanaugh@who.eop.gov'
Subject: Airline Board: (b) (5)

FYI: Tim Flanigan spoke briefly with me about (b) (5)

(b) (5) I'll have some more specific ideas on this in the morning.

Helgard_C._Walker@who.eop.gov

From:	Helgard_C._Walker@who.eop.gov
Sent:	Thursday, October 04, 2001 6:05 PM
To:	Whelan, M Edward III
Cc:	Jay_P._Lefkowitz@omb.eop.gov; Brett_M._Kavanaugh@who.eop.gov; Rebecca_A._Beynon@omb.eop.gov; Joel_D._Kaplan@who.eop.gov; Steven_D._Aitken@omb.eop.gov
Subject:	RE: OLC: (b) (5) Airline Board
Attachments:	pic22174.pcx

Another interesting tidbit is that (b) (5)
This suggests to me that, (b) (5)

(Embedded
image moved "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov>
to file: 10/04/2001 05:55:56 PM
pic22174.pcx)

Record Type: Record

To: Helgard C. Walker/WHO/EOP@EOP

cc: See the distribution list at the bottom of this message Subject: RE: OLC: (b) (5)
Airline Board

I'm fine on the draft language.

In case it's useful to pass along, (b) (5)

-----Original Message-----
From: Helgard_C._Walker@who.eop.gov
[mailto:Helgard_C._Walker@who.eop.gov]
Sent: Thursday, October 04, 2001 5:47 PM

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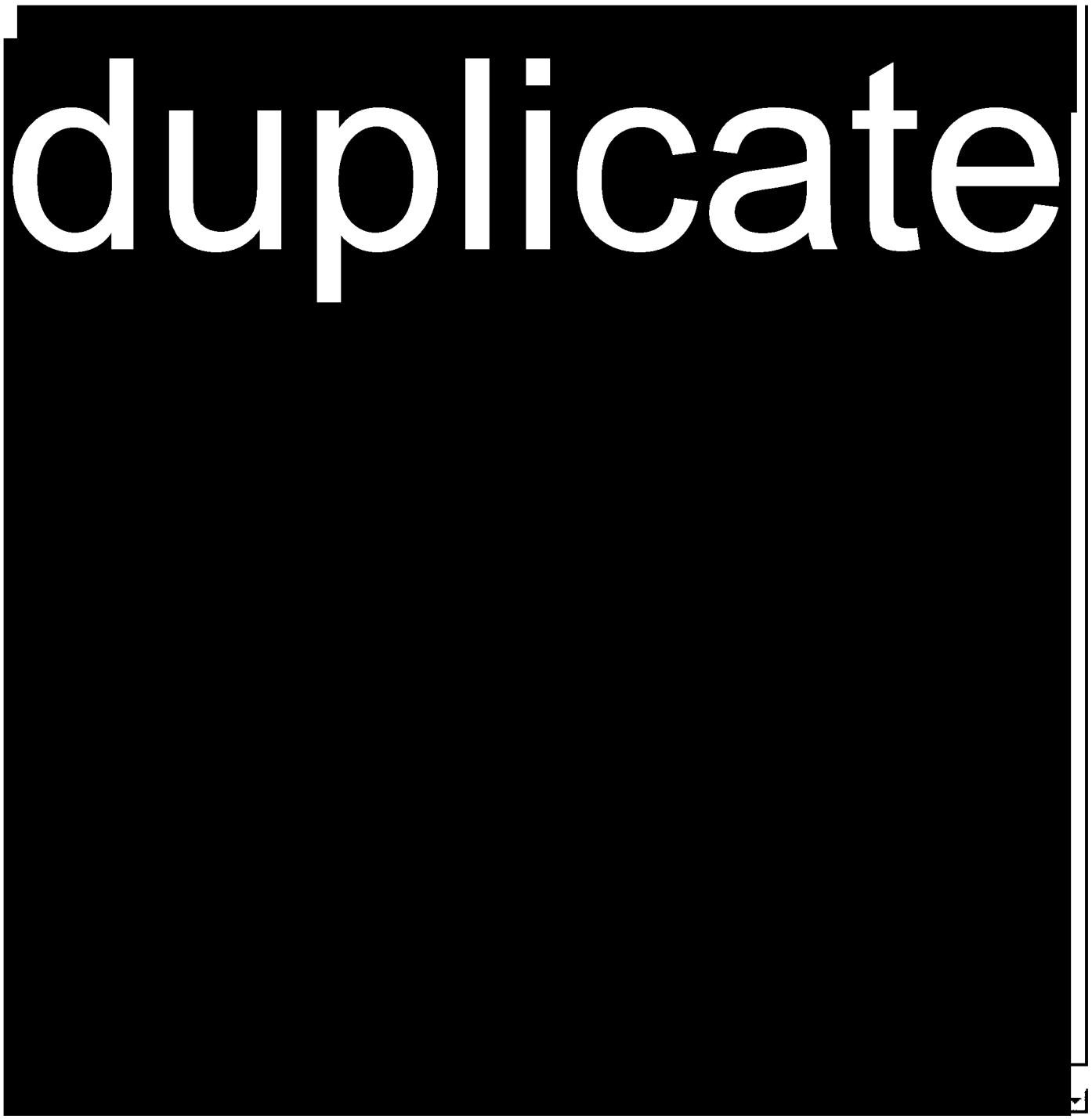


Helgard_C._Walker@who.eop.gov

From:	Helgard_C._Walker@who.eop.gov
Sent:	Thursday, October 4, 2001 6:21 PM
To:	Brett_M._Kavanaugh@who.eop.gov
Cc:	Whelan, M Edward III; Helgard_C._Walker@who.eop.gov
Subject:	Re: Airline Board: (b) (5)
Attachments:	pic09048.pcx

I agree with Ed that (b) (5)
.

Brett M. Kavanaugh
10/04/2001 06:13:21 PM

Record Type: Record

To: "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov> cc: helgard c. walker/who/eop@eop bcc:
Subject: Re: Airline Board: (b) (5) (Document link: Helgard
C. Walker)

I think (b) (5) .

(Embedded
image moved "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov>
to file: 10/04/2001 06:02:36 PM
pic09048.pcx)

Record Type: Record

To: Helgard C. Walker/WHO/EOP@EOP, Brett M. Kavanaugh/WHO/EOP@EOP

Brett_M._Kavanaugh@who.eop.gov

From:	Brett_M._Kavanaugh@who.eop.gov
Sent:	Thursday, October 4, 2001 6:26 PM
To:	Jay_P._Lefkowitz@omb.eop.gov
Cc:	Whelan, M Edward III; Helgard_C._Walker@who.eop.gov; Jay_P._Lefkowitz@omb.eop.gov; Brett_M._Kavanaugh@who.eop.gov; Rebecca_A._Beynon@omb.eop.gov; Joel_D._Kaplan@who.eop.gov; Steven_D._Aitken@omb.eop.gov
Subject:	RE: OLC: [redacted] (b) (5) [redacted] Airline Board
Attachments:	pic30385.pcx

Duly considered. [redacted] (b) (5) [redacted].

Jay P. Lefkowitz
10/04/2001 06:23:40 PM

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP
cc: See the distribution list at the bottom of this message bcc:
Subject: RE: OLC: [redacted] (b) (5) [redacted] Airline Board (Document link: Brett M. Kavanaugh)

[redacted] (b) (5)
[redacted]

[redacted]
[redacted].

Brett M. Kavanaugh
10/04/2001 06:18:08 PM

Record Type: Record

To: Helgard C. Walker/WHO/EOP@EOP
cc: See the distribution list at the bottom of this message bcc:
Subject: RE: OLC: P[redacted] (b) (5) [redacted] Airline Board (Document link: Jay P. Lefkowitz)

seems simple and right to me

Helgard C. Walker
10/04/2001 06:14:24 PM

Record Type: Record

To: Jay P. Lefkowitz/OMB/EOP@EOP
cc: See the distribution list at the bottom of this message bcc:
Subject: RE: OLC: [redacted] (b) (5) [redacted] Airline Board (Document link: Brett M. Kavanaugh)

Here's a version based on our prior language:

"[redacted] (b) (5) [redacted]."

[redacted] (b) (5) [redacted]

Jay P. Lefkowitz
10/04/2001 06:04:27 PM

Record Type: Record

To: "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov> cc: See the distribution list at the bottom of this message bcc:
Subject: RE: OLC: P[redacted] (b) (5) [redacted] Airline Board (Document link: Helgard C. Walker)

Ed:

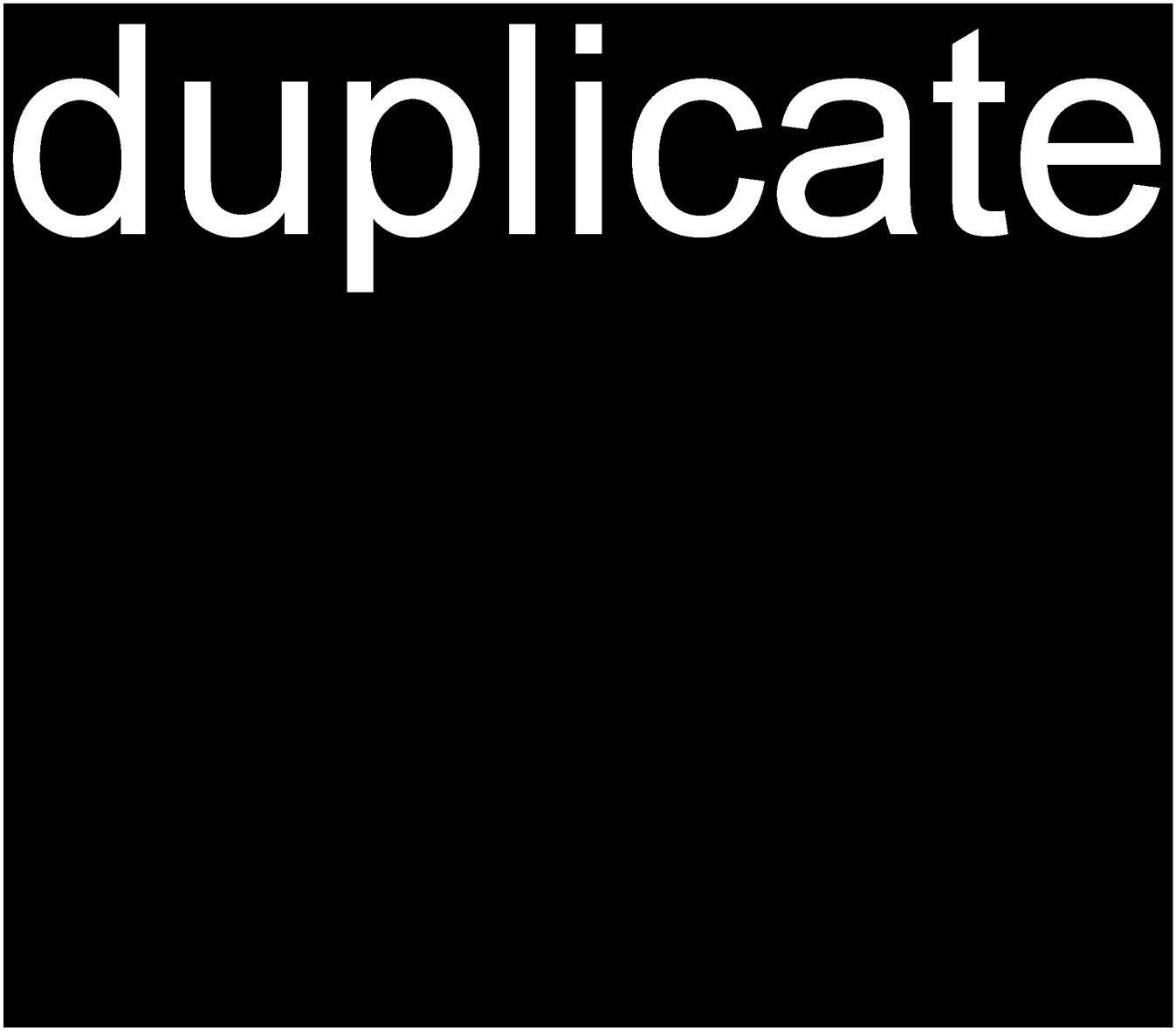
Just had a long talk with David Walker and [redacted] (b) (5) [redacted]

(b) (5) [redacted]

Can you improve on this?

(Embedded
image moved "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov>
to file: 10/04/2001 05:55:56 PM
pic30385.pcx)

Record Type: Record



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Jay_P._Lefkowitz@omb.eop.gov

From:	Jay_P._Lefkowitz@omb.eop.gov
Sent:	Thursday, October 4, 2001 6:30 PM
To:	Helgard_C._Walker@who.eop.gov
Cc:	Whelan, M Edward III; Brett_M._Kavanaugh@who.eop.gov; Helgard_C._Walker@who.eop.gov; Jay_P._Lefkowitz@omb.eop.gov; Rebecca_A._Beynon@omb.eop.gov; Joel_D._Kaplan@who.eop.gov; Steven_D._Aitken@omb.eop.gov
Subject:	RE: OLC: [redacted] (b) (5) Airline Board
Attachments:	pic10945.pcx

Agree completely. I just sent it around to "consult"

Helgard C. Walker
10/04/2001 06:28:50 PM

Record Type: Record

To: Jay P. Lefkowitz/OMB/EOP@EOP
cc: See the distribution list at the bottom of this message bcc:
Subject: RE: OLC: [redacted] (b) (5) Airline Board (Document link: Jay P. Lefkowitz)

My opinion is [redacted] (b) (5) [redacted].

Jay P. Lefkowitz
10/04/2001 06:23:40 PM

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Helgard_C._Walker@who.eop.gov

From:	Helgard_C._Walker@who.eop.gov
Sent:	Thursday, October 04, 2001 6:35 PM
To:	Whelan, M Edward III
Cc:	Jay_P._Lefkowitz@omb.eop.gov; Brett_M._Kavanaugh@who.eop.gov; Rebecca_A._Beynon@omb.eop.gov; Joel_D._Kaplan@who.eop.gov; Steven_D._Aitken@omb.eop.gov
Subject:	RE: OLC: (b) (5) Airline Board
Attachments:	pic31661.pcx

I think, (b) (5)
.

(Embedded
image moved "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov>
to file: 10/04/2001 06:28:27 PM
pic31661.pcx)

Record Type: Record

To: Jay P. Lefkowitz/OMB/EOP, Brett M. Kavanaugh/WHO/EOP

cc: Helgard C. Walker/WHO/EOP, Rebecca A. Beynon/OMB/EOP, Joel D. Kaplan/WHO/EOP, Steven D. Aitken/OMB/EOP Subject: RE: OLC: (b) (5) Airline Board

(b) (5)

-----Original Message-----
From: Jay_P._Lefkowitz@omb.eop.gov [mailto:Jay_P._Lefkowitz@omb.eop.gov]
Sent: Thursday, October 04, 2001 6:25 PM

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Helgard_C._Walker@who.eop.gov

From:	Helgard_C._Walker@who.eop.gov
Sent:	Thursday, October 04, 2001 6:42 PM
To:	Whelan, M Edward III
Cc:	Brett_M._Kavanaugh@who.eop.gov; Jay_P._Lefkowitz@omb.eop.gov; Rebecca_A._Beynon@omb.eop.gov; Joel_D._Kaplan@who.eop.gov; Steven_D._Aitken@omb.eop.gov
Subject:	RE: OLC: (b) (5) Airline Board
Attachments:	pic26691.pcx

Great idea. So here's the current version:

"(b) (5)
."

(Sentence got unwieldy so I had to break it up.)

(Embedded
image moved "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov>
to file: 10/04/2001 06:27:01 PM
pic26691.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP, Helgard C. Walker/WHO/EOP@EOP

cc: Jay P. Lefkowitz/OMB/EOP@EOP, Rebecca A. Beynon/OMB/EOP@EOP, Joel D. Kaplan/WHO/EOP@EOP, Steven D. Aitken/OMB/EOP@EOP Subject: RE: OLC: (b) (5) Airline Board

I like Helgi's language, too. We might add "(b) (5) at the end.

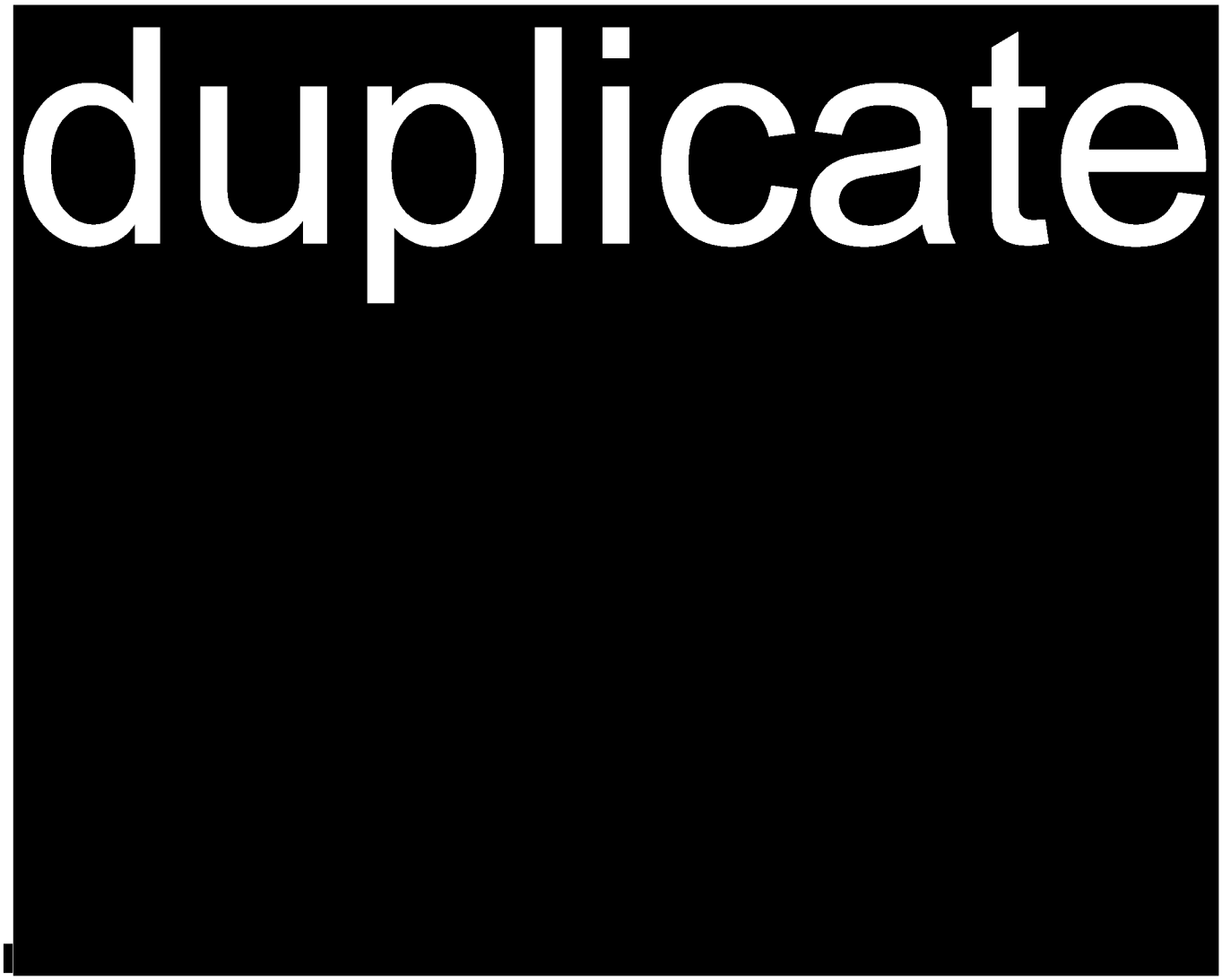
-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Thursday, October 04, 2001 6:21 PM
To: Helgard_C._Walker@who.eop.gov
Cc: Whelan, M Edward III; Jay_P._Lefkowitz@omb.eop.gov;
Helgard_C._Walker@who.eop.gov; Brett_M._Kavanaugh@who.eop.gov;
Rebecca_A._Beynon@omb.eop.gov; Joel_D._Kaplan@who.eop.gov;
Steven_D._Aitken@omb.eop.gov
Subject: RE: OLC: [redacted] (b) (5) Airline Board

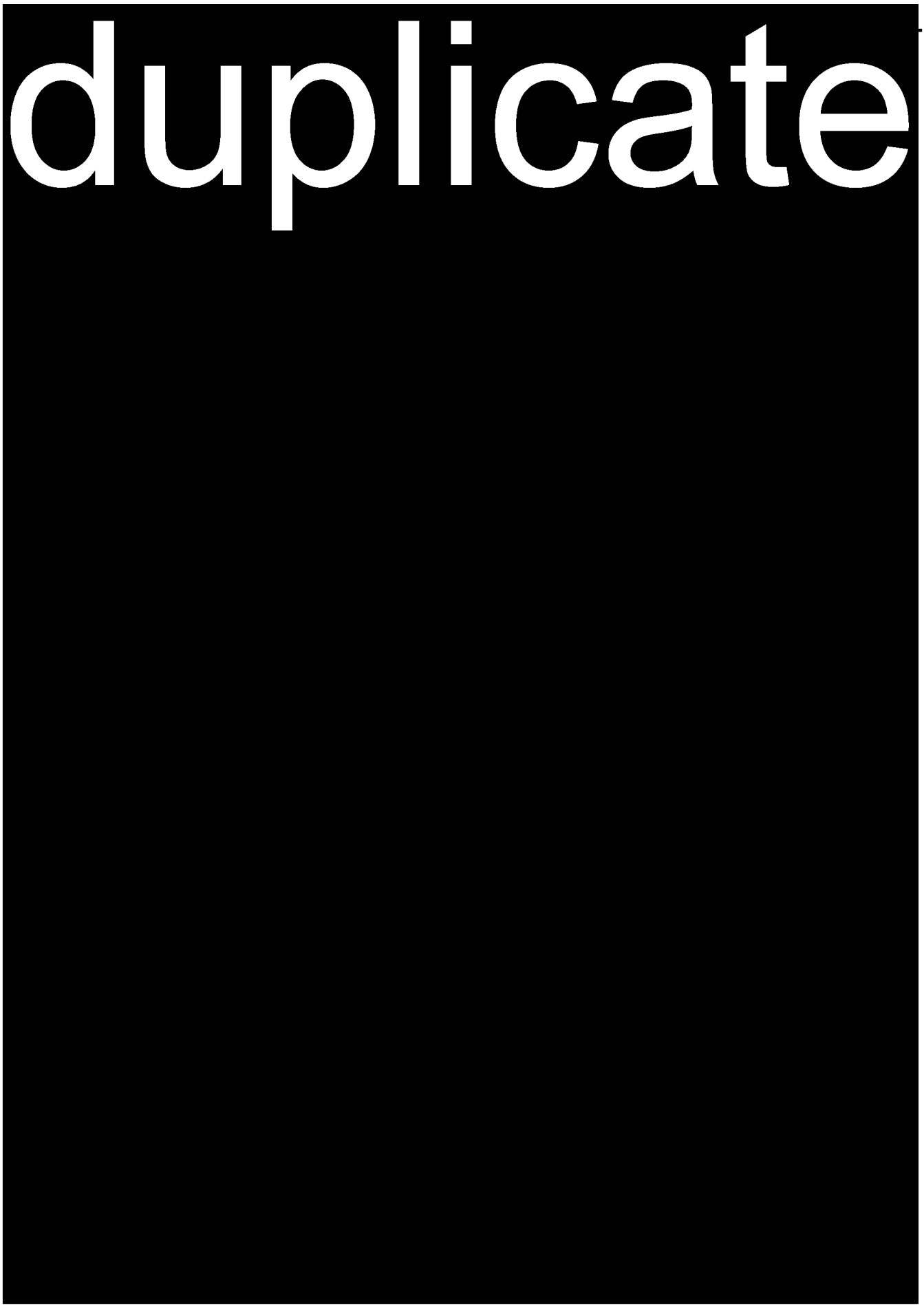
seems simple and right to me

Helgard C. Walker
10/04/2001 06:14:24 PM

Record Type: Record

To: Jay P. Lefkowitz/OMB/EOP@EOP





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Whelan, M Edward III

From:	Whelan, M Edward III
Sent:	Thursday, October 04, 2001 8:27 PM
To:	'Helgard_C._Walker@who.eop.gov'; 'Jay_P._Lefkowitz@omb.eop.gov'
Cc:	'Brett_M._Kavanaugh@who.eop.gov'
Subject:	RE: Proposed Language

(b) (5)

-----Original Message-----
From: Helgard_C._Walker@who.eop.gov
[mailto:Helgard_C._Walker@who.eop.gov]
Sent: Thursday, October 04, 2001 7:31 PM
To: Jay_P._Lefkowitz@omb.eop.gov
Cc: Whelan, M Edward III; Brett_M._Kavanaugh@who.eop.gov
Subject: Re: Proposed Language

(b) (5)
. What's your view, Ed?

PS I think you had Brett's old email, so I've copied him.

Jay P. Lefkowitz
10/04/2001 07:27:22 PM

Record Type: Record

To: Helgard C. Walker/WHO/EOP@EOP
cc: brett_kavanaugh@dc.kirkland.com
bcc:
Subject: Re: Proposed Language (Document link: Helgard C. Walker)

It's a good question, but I don't think it's a problem.

However, I'll look into it a little more.

Helgard C. Walker
10/04/2001 07:22:41 PM

Record Type: Record

To: Jay P. Lefkowitz/OMB/EOP@EOP
cc: brett_kavanaugh@dc.kirkland.com
bcc:
Subject: Re: Proposed Language (Document link: Jay P. Lefkowitz)

(b) (5)
[redacted].

Jay P. Lefkowitz
10/04/2001 07:16:35 PM

Record Type: Record

To: Brett_Kavanaugh@dc.kirkland.com, Helgard C. Walker/WHO/EOP@EOP

cc:
Subject: Proposed Language

GAO's negotiating with us now. Here's their bid, followed by my counterproposal, which I haven't sent yet.
---------- Forwarded by Jay P. Lefkowitz/OMB/EOP on 10/04/2001 07:14 PM ----------
--

(Embedded
image moved Anthony H Gamboa <GamboaA@gao.gov>
to file: 10/04/2001 06:48:19 PM
pic30604.pcx)

Record Type: Record

To: Jay P. Lefkowitz/OMB/EOP@EOP

cc:
Subject: Proposed Language

(f) For purposes of any operational and decisionmaking functions, the "Board" means the voting members of the Air Transportation Stabilization Board established under Section 102 of the Act. The voting members of the Board are the Chairman of the Board of Governors of the Federal Reserve System (who is the Chairman of the Board), the Secretary of the Treasury and the Secretary of Transportation, or their designees. The Comptroller General, who is a nonvoting member, will not participate in the review, operations, or deliberations of the Board but will provide such audit and evaluation support as the Board may request.

(f) [redacted] (b) (5)

Helgard_C._Walker@who.eop.gov

From:	Helgard_C._Walker@who.eop.gov
Sent:	Friday, October 05, 2001 6:18 PM
To:	Whelan, M Edward III
Cc:	Hart, Rosemary; Brett_M._Kavanaugh@who.eop.gov; Rebecca_A._Beynon@omb.eop.gov
Subject:	RE: Airline Loan Guarantees
Attachments:	pic32468.pcx

I think it's too late, as the regs have already gone out the door, but I'll copy Rebecca so that we can lay a marker on this point as possible action in any supplemental regs issued by the Board.

(Embedded
image moved "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov>
to file: 10/05/2001 05:10:11 PM
pic32468.pcx)

Record Type: Record

To: Helgard C. Walker/WHO/EOP@EOP

cc: "Hart, Rosemary" <Rosemary.Hart@usdoj.gov> (Receipt Notification Requested), Brett M. Kavanaugh/WHO/EOP@EOP Subject: RE: Airline Loan Guarantees

Sorry -- one additional suggestion: Changing '[redacted (b) (5)]:" in the last line to '[redacted (b) (5)]" would be even better.

-----Original Message-----
From: Whelan, M Edward III
Sent: Friday, October 05, 2001 5:06 PM
To: 'Helgard_C._Walker@who.eop.gov'
Cc: Hart, Rosemary; 'Brett_M._Kavanaugh@who.eop.gov'
Subject: RE: [redacted (b) (5)]

I'm fine on [redacted (b) (5)].

With respect to (b) (5) .

-----Original Message-----
From: Helgard_C._Walker@who.eop.gov
[mailto:Helgard_C._Walker@who.eop.gov]
Sent: Friday, October 05, 2001 4:25 PM
To: Whelan, M Edward III
Cc: Hart, Rosemary; Brett_M._Kavanaugh@who.eop.gov
Subject: RE: Airline Loan Guarantees

Ed, here's the language we wound up with on (b) (5):

(b) (5)

Since you were satisified with prior, similar versions of this, I take it you also think this language is (b) (5). Is that correct? I just wanted to nail this down, since you felt (b) (5).

(b) (5)

Brett, I am copying you to see if you know anything about (b) (5).

HCW
HCW

(Embedded

(Embedded image moved "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov> to file: 10/05/2001 01:31:43 PM pic15212.pcx)

Record Type: Record

To: Helgard C. Walker/WHO/EOP@EOP

cc: "Hart, Rosemary" <Rosemary.Hart@usdoj.gov> (Receipt Notification Requested)
Subject: RE: Airline Loan Guarantees

Helgi: Rosemary advises that [redacted (b) (5)]. -- Ed

-----Original Message-----
From: Whelan, M Edward III
Sent: Thursday, October 04, 2001 5:20 PM
To: 'Helgard_C._Walker@who.eop.gov'
Cc: Hart, Rosemary
Subject: RE: Airline Loan Guarantees

Helgi:

I suspect that the issues are intertwined: [redacted (b) (5)].

I think [redacted (b) (5)], but I look forward to Rosemary's insights on this.

Ed

-----Original Message-----
From: Helgard_C._Walker@who.eop.gov [mailto:Helgard_C._Walker@who.eop.gov]
Sent: Thursday, October 04, 2001 4:42 PM
To: Yoo, John C
Cc: Whelan, M Edward III; Hart, Rosemary
Subject: RE: Airline Loan Guarantees

Thanks, John. Ed and I have been in heavy email traffic on a related matter, [redacted] (b) (5) [redacted]. But I could still use some quick and dirty advice on this separate question, [redacted] (b) (5) [redacted].

(Embedded
image moved "Yoo, John C" <John.C.Yoo@usdoj.gov> to file: 10/04/2001 01:09:12 PM pic03958.pcx)

Record Type: Record

To: Helgard C. Walker/WHO/EOP

cc: "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov>, "Hart, Rosemary"
<Rosemary.Hart@usdoj.gov>
Subject: RE: Airline Loan Guarantees

Helgi:

I am going to refer this to Ed Whalen, who worked on the airline bailout, and Rosemary Hart, who does executive orders. They should be able to give you an answer pretty quick.

John

-----Original Message-----
From: Helgard_C._Walker@who.eop.gov [mailto:Helgard_C._Walker@who.eop.gov]
Sent: Thursday, October 04, 2001 12:50 PM
To: Yoo, John C
Subject: Re: Airline Loan Guarantees

John -

[redacted] (b) (5) [redacted]

Any problems with this? What's the best vehicle? If you could give me a quick read on this, I would greatly appreciate it.

Thanks

Thanks,
Helgi
---------- Forwarded by Helgard C. Walker/WHO/EOP on 10/04/2001 12:46 PM ----------

Helgard C. Walker
10/04/2001 12:45:29 PM

Record Type: Record

To: Rebecca A. Beynon/OMB/EOP@EOP
cc: Jay P. Lefkowitz/OMB/EOP@EOP, Joel D. Kaplan/WHO/EOP@EOP bcc: Records Management@EOP
Subject: Re: Airline Loan Guarantees (Document link: Helgard C. Walker)

I have looked at this quickly, and my assessment is that (b) (5) .

Does DOT have a proposal for us to look at? I also need to talk with my bosses to see how we think (b) (5), as well as get advice from OLC.

I will try and get this done ASAP because I always like to have matters nailed down, although I don't think it's critical that (b) (5) occur by Friday.
None of (b) (5) are going out the door anywhere for quite a while.

HCW

From: Rebecca A. Beynon on 10/04/2001 08:51:24 AM

Record Type: Record

To: Helgard C. Walker/WHO/EOP@EOP

cc: Jay Lefkowitz
Subject: Airline Loan Guarantees

Helgi - As we discussed yesterday, (b) (5)

[redacted] (b) (5) [redacted]

[redacted] Let me know what you think about this, and what steps, if any, you think are needed to be sure that [redacted] (b) (5) [redacted].

Whelan, M Edward III

From:	Whelan, M Edward III
Sent:	Wednesday, October 10, 2001 10:25 AM
To:	'Jay_P._Lefkowitz@omb.eop.gov'; 'Brett_M._Kavanaugh@who.eop.gov'
Cc:	'Rebecca_A._Beynon@omb.eop.gov'
Subject:	RE: Victim's Compensation Fund
Attachments:	airline 101001.wpd

I attach a draft opinion on this matter. My apologies if the haste shows.

I expect to be unreachable (at the Supreme Court) from around 11:00 to 12:45.

-----Original Message-----
From: Jay_P._Lefkowitz@omb.eop.gov [mailto:Jay_P._Lefkowitz@omb.eop.gov]
Sent: Tuesday, October 09, 2001 8:57 PM
To: Brett_M._Kavanaugh@who.eop.gov
Cc: Whelan, M Edward III; Rebecca_A._Beynon@omb.eop.gov;
Jay_P._Lefkowitz@omb.eop.gov; michborek@aol.com
Subject: Re: Victim's Compensation Fund

[redacted] (b) (5) [redacted].

thanks

Brett M. Kavanaugh
10/09/2001 06:47:42 PM

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP
cc: See the distribution list at the bottom of this message bcc:
Subject: Re: Victim's Compensation Fund (Document link: Jay P. Lefkowitz)

Just to be clear, [redacted] (b) (5) [redacted].

Brett M. Kavanaugh
10/09/2001 06:44:06 PM

Record Type: Record

To: Rebecca A. Beynon/OMB/EOP@EOP
cc: See the distribution list at the bottom of this message bcc: Records Management@EOP Subject: Re: Victim's Compensation Fund (Document link: Brett M. Kavanaugh)

(b) (5)

From: Rebecca A. Beynon on 10/09/2001 06:41:07 PM

Record Type: Record

To: M.Edward.Whelan@usdoj.gov @ inet, john.yoo@usdoj.gov @ inet,
jonathan.cedarbaum@usdoj.gov @ inet

cc: Jay Lefkowitz, Brett M. Kavanaugh/WHO/EOP@EOP, michborek@aol.com @ inet Subject: Victim's Compensation Fund

Ed - I'm trying to track you down right now. I left a message with Jonathan, and he said you would call when you got my message. As the voice message I left you said, (b) (5) I'll talk to you soon. Thanks very much.

RB: 202-395-3193; (b) (6) (cell); (b) (6) (home)

(b) (5)

[redacted]

Message Copied To:_____

m.edward.whelan@usdoj.gov @ inet
john.yoo@usdoj.gov @ inet
jonathan.cedarbaum@usdoj.gov @ inet
Jay P. Lefkowitz/OMB/EOP@EOP
michborek@aol.com @ inet

Message Copied To:_____

rebecca a. beynon/omb/eop@eop
m.edward.whelan@usdoj.gov @ inet
john.yoo@usdoj.gov @ inet
jonathan.cedarbaum@usdoj.gov @ inet
jay p. lefkowitz/omb/eop@eop
michborek@aol.com @ inet

Brett_M._Kavanaugh@who.eop.gov

From:	Brett_M._Kavanaugh@who.eop.gov
Sent:	Monday, October 15, 2001 7:22 PM
To:	Whelan, M Edward III
Subject:	RE: Presidential Libraries Act
Attachments:	pic24954.pcx

No.

(Embedded
image moved "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov>
to file: 10/15/2001 05:35:40 PM
pic24954.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc:
Subject: RE: Presidential Libraries Act

May Paul consult with the Archivist's office on this?

-----Original Message-----
From: Whelan, M Edward III
Sent: Monday, October 15, 2001 3:37 PM
To: 'Kavanaugh, Brett'
Subject: [redacted] (b) (5)

We don't have anything in the can on this. I've asked Paul Colborn to prepare [redacted] (b) (5) [redacted]. Let me know your deadline.

Brett_M._Kavanaugh@who.eop.gov

From:	Brett_M._Kavanaugh@who.eop.gov
Sent:	Monday, October 15, 2001 9:00 PM
To:	Whelan, M Edward III
Subject:	Re: Presidential Libraries Act
Attachments:	pic07731.pcx

this week, if possible, thanks (no on Archives consultation)

(Embedded
image moved "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov>
to file: 10/15/2001 03:36:40 PM
pic07731.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc:
Subject: Presidential Libraries Act

We don't have anything in the can on this. I've asked Paul Colborn to prepare [redacted (b) (5)] . Let me know your deadline.

Colborn, Paul P

From:	Colborn, Paul P
Sent:	Wednesday, October 17, 2001 10:05 AM
To:	'Brett_M._Kavanaugh@who.eop.gov'
Cc:	Whelan, M Edward III
Subject:	FW: (b) (5) OA
Attachments:	(b) (5) .doc

Brett: Could you please fax me (at 305-8524) the (b) (5) and (b) (5) referred to in the attached email? I already have the materials sent to Dawn Johnsen in 1994. Thanks.

-- Paul

cc: Ed

-----Original Message-----
From: Whelan, M Edward III
Sent: Tuesday, October 16, 2001 5:14 PM
To: Colborn, Paul P
Subject: FW: (b) (5) OA

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Tuesday, October 16, 2001 5:11 PM
To: Whelan, M Edward III
Subject: (b) (5) OA

---------- Forwarded by Brett M. Kavanaugh/WHO/EOP on 10/16/2001 05:10 PM ----------

Catherine S. Anderson
10/16/2001 05:09:15 PM

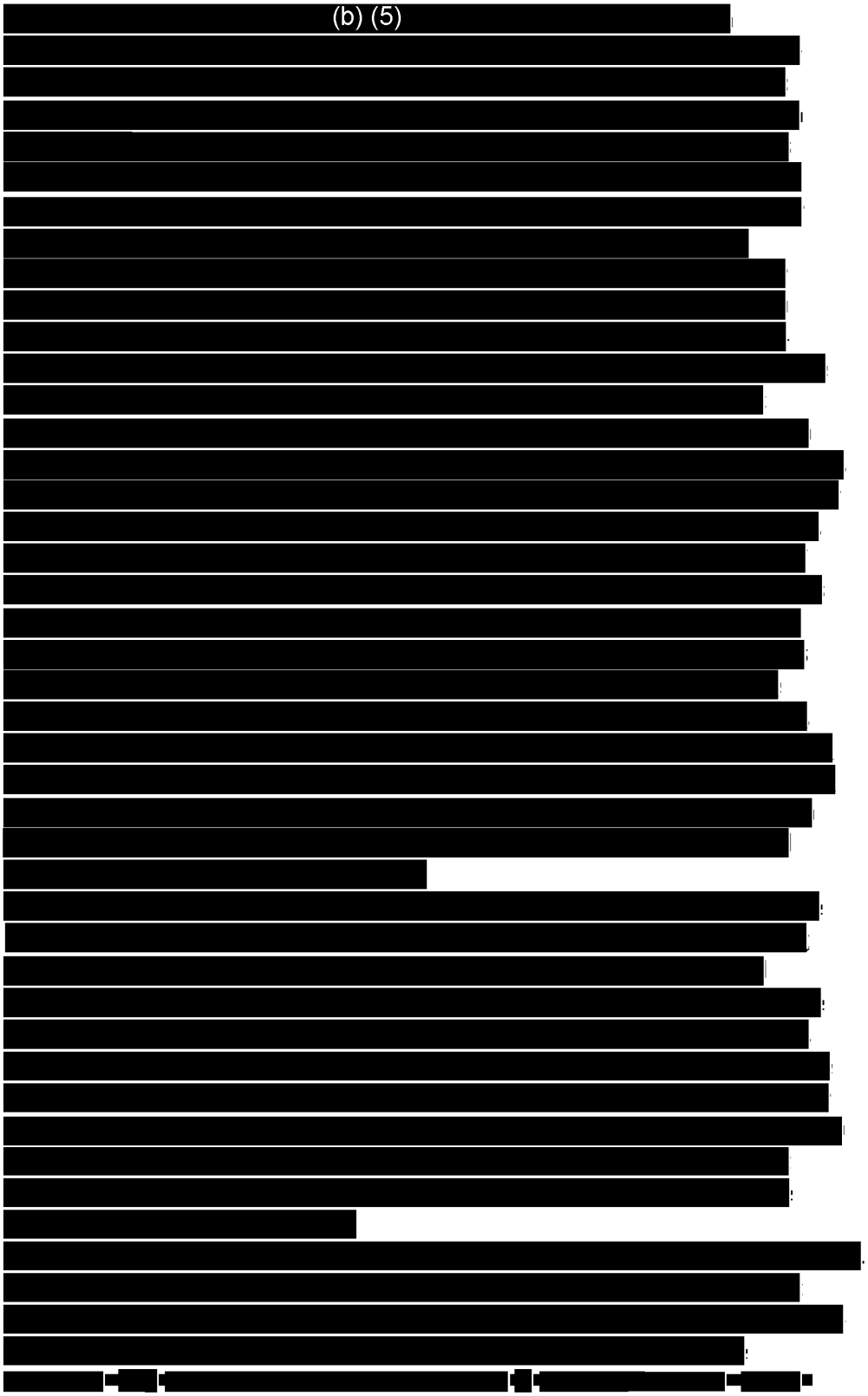
Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc:
Subject: [redacted] OA

Brett: I am sending you the following materials in response to OLC's request:

(See attached file: [redacted].doc)



[redacted]
(b) (5)
[redacted]

[redacted] In any event, to the extent that OLC does not already have copies, the materials may be helpful.

Let me know if you need any additional information. After OLC has an opportunity to review the materials, it may be helpful to meet with them to discuss further. Kate

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Wednesday, October 17, 2001 3:00 PM
To: 'Kavanaugh, Brett'
Subject: FW: Hatch Act question

Brett:

Your question whethe [redacted (b) (5)] is proving more complicated than expected. Here's a brief overview of OLC's current thinking:

1. On the one hand: [redacted (b) (5)]

2. On the other hand: [redacted (b) (5)]

I'm not sure that this is readily amenable to oral resolution. Let's discuss at your convenience.

Ed

Dinh, Viet

From: Dinh, Viet
Sent: Friday, October 19, 2001 5:42 PM
To: Whelan, M Edward III; Newstead, Jennifer
Cc: 'Brett_M._Kavanaugh@who.eop.gov'
Subject: RE: legislative tweak to 13 USC 9

No. But good idea. Should we conside [redacted (b) (5)] ?

-----Original Message-----
From: Whelan, M Edward III
Sent: Friday, October 19, 2001 4:53 PM
To: Dinh, Viet; Newstead, Jennifer
Subject: RE: legislative tweak to 13 USC 9

Does the approved legislative package do anything on 13 USC 9?

-----Original Message-----
From: Whelan, M Edward III
Sent: Thursday, October 04, 2001 1:12 PM
To: Dinh, Viet; Newstead, Jennifer
Subject: legislative tweak to 13 USC 9
Importance: High

Viet and Jennifer:

Brett Kavanaugh has asked me to pass along the following: [redacted (b) (5)]

Here's my first stab at a legislative fix:

[redacted (b) (5)]

Ed

Brett_M._Kavanaugh@who.eop.gov

From: Brett_M._Kavanaugh@who.eop.gov
Sent: Tuesday, October 23, 2001 9:48 AM
To: Whelan, M Edward III
Subject: Re: OPM reg question
Attachments: pic26953.pcx

no, [redacted] (b) (5) and (b) (5) as applied to the people identified in (b) (5)

(Embedded
image moved "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov>
to file: 10/23/2001 09:32:26 AM
pic26953.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP

cc:
Subject: OPM reg question

Is the reg that you were asking about [redacted] (b) (5) ? Or is there some separate OPM reg that addresses the same matter?

Huntington, Clare

From: Huntington, Clare
Sent: Tuesday, October 23, 2001 6:27 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Cc: Whelan, M Edward III; Bradshaw, Sheldon
Subject: (b) (5) Transportation Secretary (b) (5)

Brett,

As I mentioned on the phone this afternoon, (b) (5)

Please let me know if you have any questions.

Thanks,

Clare Huntington
514-4487

Brett_M._Kavanaugh@who.eop.gov

From: Brett_M._Kavanaugh@who.eop.gov
Sent: Wednesday, October 31, 2001 9:02 AM
To: Whelan, M Edward III
Subject: aviation security

Any thoughts?
---------- Forwarded by Brett M. Kavanaugh/WHO/EOP on 10/31/2001 07:59 AM ----------

Elizabeth S. Dougherty
10/30/2001 09:29:49 PM

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc: Joel D. Kaplan/WHO/EOP@EOP
Subject: aviation security

Hi Brett!

I don't know if you have seen [redacted] (b) (5) [redacted]

We are not sure what this means (and neither are the policy or leg folks at DOT). So we were hoping that you might look into it (with OLC and DOT's help, of course) to see just what it means to [redacted] (b) (5) [redacted] Would you mind looking into this? Please let me know if you have any questions. Thanks very much!

Huntington, Clare

From: Huntington, Clare
Sent: Wednesday, October 31, 2001 11:35 AM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Cc: Whelan, M Edward III
Subject: Aviation security proposed amendment
Attachments: Sky Marshalls memo.doc

Brett--

We have looked at the proposed amendment, "Deputization of airport screening personnel," and agree that on it's face it is unclear what the amendment would achieve. In the attached memorandum, you will see that OLC has advise (b) (5)

For your convenience, I have set forth the relevant statutory provisions below and have attached the OLC memorandum mentioned above, which was not published or distributed publicly. If you have any questions, please feel free to call me a (b) (6).

Thanks -- Clare

(b) (5)

Brett_M._Kavanaugh@who.eop.gov

From: Brett_M._Kavanaugh@who.eop.gov
Sent: Friday, November 02, 2001 9:58 AM
To: Whelan, M Edward III
Subject: Addington

Addington was [redacted] (b) (5) [redacted]; you should call him if you can to explain; thanks

Brett_M._Kavanaugh@who.eop.gov

From:	Brett_M._Kavanaugh@who.eop.gov
Sent:	Friday, November 02, 2001 12:58 PM
To:	Whelan, M Edward III
Subject:	Re: Tuesday committe hearing
Attachments:	pic23170.pcx

John would be great if you cannot do it. House Subcommittee on Government Efficiency. Horn is chair.

(Embedded
image moved "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov>
to file: 11/02/2001 11:04:43 AM
pic23170.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP

cc:
Subject: Tuesday committe hearing

If you remain of the view that I might be asked to testify on behalf of the Administration, please give me more info on this hearing (which committee, what time, precise topic, etc.) so that I can get ready.

I'll also need to have a backup plan [redacted (b) (6)]. I'll check with John Yoo. If you have anyone else in mind, let me know.

Brett_M._Kavanaugh@who.eop.gov

From:	Brett_M._Kavanaugh@who.eop.gov
Sent:	Friday, November 02, 2001 4:25 PM
To:	Whelan, M Edward III
Subject:	PRA
Attachments:	presidential records -- letter to Horn.doc; Presidential Records Act talking points November 1.doc

(See attached file: presidential records -- letter to Horn.doc)(See attached file: Presidential Records Act talking points November 1.doc)

Brett_M._Kavanaugh@who.eop.gov

From:	Brett_M._Kavanaugh@who.eop.gov
Sent:	Monday, November 5, 2001 9:10 AM
To:	Whelan, M Edward III
Subject:	Horn Testimony
Attachments:	housepra.doc; pic03985.doc

FYI; [redacted] (b) (5)

---------- Forwarded by Brett M. Kavanaugh/WHO/EOP on 11/05/2001 09:09 AM ----------

(Embedded
image moved GaryM Stern <garym.stern@nara.gov>
to file: 11/02/2001 04:24:24 PM
pic03985.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP

cc:
Subject: Horn Testimony

As we discussed, here is the current, final version of the testimony, which includes all of the OLC changes, except that, as we discussed, [redacted] (b) (5) . Please advise us asap if you want any additional changes in light of the OLC testimony.

Brett_M._Kavanaugh@who.eop.gov

From:	Brett_M._Kavanaugh@who.eop.gov
Sent:	Monday, November 05, 2001 10:10 AM
To:	Whelan, M Edward III
Subject:	Re: Judge's letter to Congressman Horn
Attachments:	Nov 2 letter to Rep Horn re Pres Records.doc

---------- Forwarded by Brett M. Kavanaugh/WHO/EOP on 11/05/2001 10:09 AM ----------

Elizabeth N. Camp
11/05/2001 10:06:49 AM

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP
cc:
bcc:
Subject: Re: Judge's letter to Congressman Horn (Document link: Brett M. Kavanaugh)

(See attached file: Nov 2 letter to Rep Horn re Pres Records.doc)

Brett M. Kavanaugh
11/05/2001 10:02:20 AM

Record Type: Record

To: Elizabeth N. Camp/WHO/EOP@EOP

cc:
Subject: Judge's letter to Congressman Horn (Document link: Elizabeth N. Camp)

can you e-mail final version so that I have a computer-file copy; thanks

November 2, 2001

Dear Chairman Horn:

I have learned that on November 6 the House Subcommittee on Government Efficiency, Financial Management, and Intergovernmental Relations will hold its previously postponed hearing on the Presidential Records Act. In advance of that hearing, we wanted to inform you of a recent development.

President Bush yesterday signed an executive order implementing section 2204(c) of the Presidential Records Act, the provision of the Act that states: "Nothing in this Act shall be construed to confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President." That statutory provision is necessary, of course, to the Act's constitutionality, for the Supreme Court held in 1977 that both former and current Presidents retain the constitutional right to assert privileges over the records of a former President, including after expiration of a 12-year period of presumptive non-disclosure. *See Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). Furthermore, Congress contemplated that such constitutional privileges would be available and could be asserted, even after expiration of the 12-year period: At the time the Act was enacted, Senator Percy stated that if a President "believe[d] that the 12-year closure period does not suffice, that President could object to the release of some document in the 13th or 15th or 20th year." Cong. Record S36844 (Oct. 13, 1978).

The Act and its legislative history, as well as the Supreme Court's decision in *Nixon v. Administrator of General Services*, obviously necessitate procedures for former and current Presidents to review Presidential records of a former President and, if they choose, to assert constitutional privileges. President Bush's order responds to that need by establishing clear and sensible procedures for former and current Presidents to exercise their rights and responsibilities in a timely manner. The order replaces an earlier executive order (Executive Order 12667 of January 18, 1989) that had established some skeletal procedures for assertion of privileges over Presidential records and had provided that the *current* President would have the primary responsibility for asserting privileges over the records of a former President. President Bush's new order supercedes that prior order both to set forth clearer procedures and to establish, consistent with the Supreme Court's decision in *Nixon v. Administrator of General Services* and with what the Administration believes to be sound policy and procedure, that *former* Presidents are to have the primary responsibility for asserting privileges over their records. Indeed, section 4 of President Bush's order, which is its most critical component, provides that the current President will defer, absent compelling circumstances, to the decisions of the former President regarding the former President's records. In sum, therefore, the new executive order grants the current President *less* relative authority over the records of a former President than did the prior executive order. We believe this point is critical to a proper understanding of the executive order, and has been largely overlooked in public commentary thus far.

In addition, President Bush's order does not purport to guide former Presidents as to their privilege assertions. Section 9 of the order provides that the order does not purport to indicate "whether and under what circumstances a former President should assert or waive any privilege." Indeed, it would have been improper, if not illegal, for President Bush to attempt to limit or override the constitutional rights and privileges of former Presidents -- rights that have been guaranteed by the Supreme Court. But it also bears mention that Section 2 of the order refers to the historical practice before enactment of the Presidential Records Act by which former Presidents, over time, have released a vast majority of their records even though under no legal obligation to do so. We anticipate that this historical practice will continue. At a minimum, contrary to the claims of some commentators, there is no logical basis for assuming that former Presidents will exercise their constitutional and statutory authority to seek withholding of *privileged* records more aggressively than earlier Presidents -- from President Washington to President Carter -- exercised their plenary and far broader authority to withhold *all* records.

Finally, you should know that the Administration consulted extensively with the National Archives and Records Administration, the Department of Justice, and former Presidents' representatives before President Bush issued this order. We benefited greatly from that consultation.

Please do not hesitate to contact me if you have any questions about the order.

Sincerely,

Alberto R. Gonzales
Counsel to the President

The Honorable Steve Horn
United States House of Representatives
Washington, DC 20515

cc: The Honorable Janice Schakowsky

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Monday, November 05, 2001 10:24 AM
To: 'Kavanaugh, Brett'
Subject: PRA redraft
Attachments: pra testimony.doc

Brett, attached is a slight redraft. A few comments:

1. [redacted] (b) (5) [redacted]. I have made revisions in several places t [redacted] (b) (5) [redacted].

2. On your comment on [redacted] (b) (5) [redacted]": [redacted] (b) (5) [redacted], I prefer my phrasing. [redacted] (b) (5) [redacted].

3. [redacted] (b) (5) [redacted].

4. I've added a sentence at the end of the next-to-last paragraph.

5. If you hav [redacted] (b) (5) [redacted] handy, could you fax it to me? I want to kno [redacted] (b) (5) [redacted].

I've left a message with Maggs.

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Monday, November 05, 2001 3:31 PM
To: 'Kavanaugh, Brett'
Subject: PRA question

(b) (5)

[redacted]. Any other thoughts?

Brett_M._Kavanaugh@who.eop.gov

From: Brett_M._Kavanaugh@who.eop.gov
Sent: Monday, November 05, 2001 3:42 PM
To: Whelan, M Edward III
Subject: Re: PRA question
Attachments: pic02683.pcx

(b) (5)

just met with Horn et al; (b) (5)

(Embedded
image moved "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov>
to file: 11/05/2001 03:30:45 PM
pic02683.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc:
Subject: PRA question

duplicate

duplicate

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Monday, November 05, 2001 4:27 PM
To: 'Kavanaugh, Brett'
Subject: FW: Tomorrow's hearing on the Presidential Records Act, Executive Order

FYI

-----Original Message-----
From: Burton, Faith
Sent: Monday, November 05, 2001 4:26 PM
To: Whelan, M Edward III; Colborn, Paul P; Thorsen, Carl
Subject: Tomorrow's hearing on the Presidential Records Act, Executive Order

Henry Ray of the Horn Subcommittee just got back to me about this hearing, which he expects will be especially well attended because of the "controversial" Executive Order. He expects that, in addition to Subcommittee Chairman Horn, RMM Schakowsky, Members Ose and Maloney will attend, as well as Chairman Burton and Full Committee RMM Waxman will attend, reportedly because they are concerned that the new EO is inconsistent with the PRA and possibly unconstitutional. The panels are planned as follows:
I. Archivist Carlin and Anna Nelson, as historian, to explain the EO and provide a policy perspective, respectively;
II. AU political science professor Mark Roselle; Ed; Peter Shane of Univ. of Pittsburgh law school and Carnegie Mellon, and possibly Scott Nelson, of the Public Citizen Litigation Group. This panel is expected to talk about the legal issues presented by the EO, although he mentioned that Roselle could be moved to the first panel.

Henry expects that Ed will likely get lots of questions about whether the EO is constitutional and consistent with the PRA. Ed and Paul [redacted (b) (5)]? They would like to get the prepared statement as soon as it's available.

I mentioned to Henry that this line-up is inconsistent with the usual protocol that all Administration witnesses appear on the first panel, but he thinks this makes more sense. (Actually, protocol is that Admin. witnesses appear on the first panel and only with other Admin. witnesses, although there have been exceptions in special situations). Please let me kno [redacted (b) (5)].

Faith

Brett_M._Kavanaugh@who.eop.gov

From: Brett_M._Kavanaugh@who.eop.gov
Sent: Tuesday, November 06, 2001 8:06 AM
To: Whelan, M Edward III
Subject: Re: PRA question
Attachments: pic28589.pcx

(b) (5)

(Embedded
image moved "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov>
to file: 11/06/2001 07:58:17 AM
pic28589.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc:
Subject: PRA question

I need to understand (b) (5)
. Is it accurate to say (b) (5)

Brett_M._Kavanaugh@who.eop.gov

From:	Brett_M._Kavanaugh@who.eop.gov
Sent:	Tuesday, November 06, 2001 8:07 AM
To:	Whelan, M Edward III
Attachments:	Letter to Horn final.doc

Do you have Judge's letter to Horn? That probably should be part of the package DOJ OLA sends up to Hill and publicly releases. We will FAX over a signed copy if you agree with that assessment (letter is attached below). Have your assistant call Elizabeth Camp at 456-2632 to get the signed copy FAXed over.

(See attached file: Letter to Horn final.doc)

November 2, 2001

Dear Chairman Horn:

I have learned that on November 6 the House Subcommittee on Government Efficiency, Financial Management, and Intergovernmental Relations will hold its previously postponed hearing on the Presidential Records Act. In advance of that hearing, we wanted to inform you of a recent development.

President Bush yesterday signed an executive order implementing section 2204(c) of the Presidential Records Act, the provision of the Act that states: "Nothing in this Act shall be construed to confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President." That statutory provision is necessary, of course, to the Act's constitutionality, for the Supreme Court held in 1977 that both former and current Presidents retain the constitutional right to assert privileges over the records of a former President, including after expiration of a 12-year period of presumptive non-disclosure. *See Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). Furthermore, Congress contemplated that such constitutional privileges would be available and could be asserted, even after expiration of the 12-year period: At the time the Act was enacted, Senator Percy stated that if a President "believe[d] that the 12-year closure period does not suffice, that President could object to the release of some document in the 13th or 15th or 20th year." Cong. Record S36844 (Oct. 13, 1978).

The Act and its legislative history, as well as the Supreme Court's decision in *Nixon v. Administrator of General Services*, obviously necessitate procedures for former and current Presidents to review Presidential records of a former President and, if they choose, to assert constitutional privileges. President Bush's order responds to that need by establishing clear and sensible procedures for former and current Presidents to exercise their rights and responsibilities in a timely manner. The order replaces an earlier executive order (Executive Order 12667 of January 18, 1989) that had established some skeletal procedures for assertion of privileges over Presidential records and had provided that the *current* President would have the primary responsibility for asserting privileges over the records of a former President. President Bush's new order supercedes that prior order both to set forth clearer procedures and to establish, consistent with the Supreme Court's decision in *Nixon v. Administrator of General Services* and with what the Administration believes to be sound policy and procedure, that *former* Presidents are to have the primary responsibility for asserting privileges over their records. Indeed, section 4 of President Bush's order, which is its most critical component, provides that the current President will defer, absent compelling circumstances, to the decisions of the former President regarding the former President's records. In sum, therefore, the new executive order grants the current President *less* relative authority over the records of a former President than did the prior executive order. We believe this point is critical to a proper understanding of the executive order, and has been largely overlooked in public commentary thus far.

In addition, President Bush's order does not purport to guide former Presidents as to their privilege assertions. Section 9 of the order provides that the order does not purport to indicate "whether and under what circumstances a former President should assert or waive any privilege." Indeed, it would have been improper, if not illegal, for President Bush to attempt to limit or override the constitutional rights and privileges of former Presidents -- rights that have been guaranteed by the Supreme Court. But it also bears mention that Section 2 of the order refers to the historical practice before enactment of the Presidential Records Act by which former Presidents, over time, have released a vast majority of their records even though under no legal obligation to do so. We anticipate that this historical practice will continue. At a minimum, contrary to the claims of some commentators, there is no logical basis for assuming that former Presidents will exercise their constitutional and statutory authority to seek withholding of *privileged* records more aggressively than earlier Presidents -- from President Washington to President Carter -- exercised their plenary and far broader authority to withhold *all* records.

Finally, you should know that the Administration consulted extensively with the National Archives and Records Administration, the Department of Justice, and former Presidents' representatives before President Bush issued this order. We benefited greatly from that consultation.

Please do not hesitate to contact me if you have any questions about the order.

Sincerely,

Alberto R. Gonzales
Counsel to the President

The Honorable Steve Horn
United States House of Representatives
Washington, DC 20515

cc: The Honorable Janice Schakowsky

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Tuesday, November 06, 2001 9:18 AM
To: 'Kavanaugh, Brett'
Subject: FW: protocol

-----Original Message-----
From: Burton, Faith
Sent: Tuesday, November 06, 2001 9:16 AM
To: Thorsen, Carl; Whelan, M Edward III
Subject: RE: protocol

Good. The current one panel plan will still leave Ed in the fray with non-governmental witnesses; Henry Ray just reported that they think Brett is OK with the current plan. FB

-----Original Message-----
From: Thorsen, Carl
Sent: Tuesday, November 06, 2001 9:13 AM
To: Burton, Faith; Whelan, M Edward III
Subject: RE: protocol

Brett is on the phone with Russell George right now. I'm going to call him directly. Will get back asap.

-----Original Message-----
From: Burton, Faith
Sent: Tuesday, November 06, 2001 8:59 AM
To: Whelan, M Edward III; Thorsen, Carl
Subject: RE: protocol

Ed, I agree with your sens [redacted (b) (5)]; I'm happy to pursue this with the Committee but WH participation in this issue will be important. I'll call Kirsten. FB

-----Original Message-----
From: Whelan, M Edward III
Sent: Tuesday, November 06, 2001 7:27 AM
To: Burton, Faith; Thorsen, Carl
Subject: protocol

Any further word on the panel structure? The White House (per Kavanaugh) as [redacted (b) (5)].
The legislative contact at the White House is Kirsten Chadwick.

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Wednesday, November 07, 2001 9:37 AM
To: 'Kavanaugh, Brett'
Subject: postscript

1. Any reactions to the Post story? Would it be worthwhile for someone t [redacted (b) (5)] ?

2. Gary Stern commented after the hearing that he think [redacted (b) (5)] .

Brett_M._Kavanaugh@who.eop.gov

From:	Brett_M._Kavanaugh@who.eop.gov
Sent:	Friday, November 09, 2001 10:15 AM
To:	Whelan, M Edward III
Cc:	Colborn, Paul P
Subject:	Re: Ose questions
Attachments:	pic23275.pcx

[redacted] (b) (5) [redacted]. for #2, make sure to cite [redacted] (b) (5) [redacted]. [redacted] (b) (5) [redacted]. will you draft up answers? let me know what you want me to do and when. thanks again.

(Embedded
image moved "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov>
to file: 11/09/2001 10:08:30 AM
pic23275.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP

cc: "Colborn, Paul P" <Paul.P.Colborn@usdoj.gov> (Receipt Notification
Requested) (IPM Return Requested)
Subject: Ose questions

I received follow-up questions from Ose and am sending them to you. Deadline for response is 11/30.

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Friday, November 09, 2001 5:36 PM
To: 'Kavanaugh, Brett'
Subject: Clinton

Just in case you haven't already seen it:

Ex-President Clinton Resigns From
Supreme Court Bar

By James Vicini

WASHINGTON (Reuters) - Former President Bill Clinton, facing the possibility of being barred from practicing law before the U.S. Supreme Court (news - web sites) because of the Monica Lewinsky scandal, has resigned instead, his lawyer said on Friday.

``Former President Clinton (news - web sites) hereby respectfully requests to resign from the bar of this court,'' his lawyer, David Kendall, said in a two-page letter to the high court's clerk. Kendall did not elaborate on why Clinton decided to resign.

Clinton's resignation from the Supreme Court bar will have little practical impact. Clinton has not practiced before the Supreme Court and was not expected to argue any cases in the future.

On Oct. 1, the Supreme Court suspended Clinton from practicing before the court and gave him 40 days to show why he should not be disbarred.

On Jan. 19, the day before leaving office, Clinton admitted giving false, evasive statements about his relationship with Lewinsky, the former White House intern. As part of a deal with the independent counsel, Clinton accepted a five-year suspension of his license to practice law in Arkansas and a $25,000 fine.

The Arkansas suspension triggered the high court case entitled, ``In the matter of discipline of Bill Clinton.''

Kendall had said in October that Clinton would fight disbarment.

In the letter filed on Friday, Kendall said Clinton had been a member in ``good standing'' of the Arkansas bar for more than 25 years and had never had public or private professional discipline imposed by any bar.

He said Clinton cooperated fully with the Arkansas Supreme Court Committee on Professional Conduct, furnishing all requested information in a timely manner.

Kendall said Clinton's conduct did not relate to a criminal conviction or to the practice of law. It occurred as a private party in a civil

proceeding, he said.

The suspension stemmed from Clinton's answers in response to questions about his relationship with Lewinsky during questioning by lawyers for Paula Jones, who had filed a sexual harassment suit against Clinton.

Kendall said Clinton agreed to the suspension and fine ``to avoid the burden of litigation for all parties, to achieve an expeditious and definite resolution and in acknowledgment that his actions merited censure.''

Kendall cited statistics showing that only four of the 570 aution, but did not impose suspension or disbarment, Kendall said.

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Wednesday, November 14, 2001 9:26 AM
To: 'Kavanaugh, Brett'
Cc: Colborn, Paul P
Subject: PRA questions

FYI: I received, and am sending you, two more sets of questions from Chairman Horn. The requested response date is Nov. 20. We'll try to have draft responses for your review by the end of the week.

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Thursday, November 15, 2001 4:56 PM
To: 'Kavanaugh, Brett'
Cc: Colborn, Paul P
Subject: RE: Horn questions

Please also take a good look at 63.

-----Original Message-----
From: Whelan, M Edward III
Sent: Wednesday, November 14, 2001 2:55 PM
To: 'Kavanaugh, Brett'
Cc: Colborn, Paul P
Subject: Horn questions

The questions from Chairman Horn that I'd ask you to take a first cut at are 1-4, 14-15, 58-59, and 69. Thanks.

Colborn, Paul P

From: Colborn, Paul P
Sent: Wednesday, November 28, 2001 9:31 AM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Cc: Whelan, M Edward III
Subject: Letter to Congress explaining why Gov. Ridge won't testify

Brett: I'd be happy to draft the letter you requested. Could you email me the latest draft of the generic letter you prepared earlier this year? Thanks.

-- Paul

cc: Ed

Colborn, Paul P

From: Colborn, Paul P
Sent: Wednesday, December 05, 2001 2:48 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Cc: Whelan, M Edward III; Bybee, Jay
Subject: FW: Assertion of executive privilege on prosecutorial decisionmaking documents
Attachments: conrad.potus4.wpd

It has come to my attention that I neglected to attach the attachment. Here it is.

-----Original Message-----
From: Colborn, Paul P
Sent: Tuesday, December 04, 2001 5:01 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Cc: Whelan, M Edward III; Bybee, Jay
Subject: Assertion of executive privilege on prosecutorial decisionmaking documents

Brett: Attached is the current draft of the AG letter to the President. As we discussed, I'm running the traps here to make certain tha [redacted (b) (5)]. But all indications so far are tha [redacted (b) (5)]. As we also discussed, I'll prepare a log of the documents. I'll try to do that tomorrow.
-- Paul
cc: Jay, Ed

Brett_M._Kavanaugh@who.eop.gov

From:	Brett_M._Kavanaugh@who.eop.gov
Sent:	Monday, December 10, 2001 9:53 AM
To:	Whelan, M Edward III
Cc:	Colborn, Paul P
Subject:	Memo

Can you all today prepare a draft memo addressed to Judge Gonzales making clear (b) (5) [redacted]. Any such memo also should make clear, of course, that (b) (5) [redacted].

Colborn, Paul P

From: Colborn, Paul P
Sent: Monday, December 10, 2001 1:51 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Cc: Bybee, Jay; Whelan, M Edward III
Subject: executive privilege claim
Attachments: conrad.potus4.wpd; conrad.documentlist.wpd

Brett, fyi, we've submitted the letter to the AG's office for his signature and expect to get it back today some time. Attached are the latest versions of the letter and list of documents.
-- Paul
cc: Jay, Ed

Colborn, Paul P

From: Colborn, Paul P
Sent: Monday, December 10, 2001 5:09 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Cc: Bybee, Jay; Whelan, M Edward III
Subject: AG letter to President on executive privilege claim

Brett: The AG has signed the letter and it is being faxed to you now. How would you like me to deliver the original? And when can we expect to get a presidential decision? The hearing is currently scheduled for Thursday morning.

-- Paul

cc: Jay, Ed

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Monday, December 10, 2001 5:24 PM
To: 'Kavanaugh, Brett'
Subject: OLC applicant

At your convenience, I would like to speak to you regardin (b) (6) f.

Colborn, Paul P

From: Colborn, Paul P
Sent: Monday, December 10, 2001 5:35 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Cc: Bybee, Jay; Whelan, M Edward III
Subject: FW: Current draft of the prepared statement for Thursday.
Attachments: ep.statement.wpd

Brett: Any comments on the attached?
-- Paul

-----Original Message-----
From: Burton, Faith
Sent: Monday, December 10, 2001 5:28 PM
To: Horowitz, Michael-CRM; Bunnell, Steve; Colborn, Paul P
Cc: Rybicki, James E
Subject: Current draft of the prepared statement for Thursday.

Colborn, Paul P

From: Colborn, Paul P
Sent: Tuesday, December 11, 2001 9:19 AM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Cc: Bybee, Jay; Whelan, M Edward III
Subject: executive privilege claim
Attachments: conrad.documentlist.wpd

Brett, per your request I'm faxing you right now the final document list. It's the same as the one I emailed you yesterday. It's also attached here.

You'll notice at the end of the draft testimony I forwarded you yesterday that there is a paragraph about the President's assertion of privilege. Legislative Affairs here has requested th (b) (5) . Although an alternative o (b) (5) is also a possibility, I recommen (b) (5) . Let me know your thoughts about this.

-- Paul

cc: Jay, Ed

Brett_M._Kavanaugh@who.eop.gov

From:	Brett_M._Kavanaugh@who.eop.gov
Sent:	Tuesday, December 11, 2001 12:44 PM
To:	Colborn, Paul P
Cc:	Bybee, Jay; Whelan, M Edward III
Subject:	RE: Executive privilege claim
Attachments:	burton memo from president.doc; burton subpoena ARG memo.doc; pic17911.doc

[redacted] (b) (5) [redacted] ?

(Embedded
image moved "Colborn, Paul P" <Paul.P.Colborn@usdoj.gov>
to file: 12/11/2001 12:36:36 PM
pic17911.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc: "Bybee, Jay" <Jay.Bybee@usdoj.gov> (Receipt Notification Requested),
"Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov> (Receipt Notification Requested)
Subject: RE: Executive privilege claim

Brett: I have revised your drafts to conform them to changes I made to the AG letter from September. The changes reflect [redacted] (b) (5) [redacted]. Because the latter memos included [redacted] (b) (5) [redacted].

Also, I emailed you yesterday of Legislative Affairs' preference for [redacted] (b) (5) [redacted]. I've now learned that their preference has become [redacted] (b) (5) [redacted]. Let's talk about this when you have a moment. You might want to discuss it directly with Dan Bryant or Carl Thorsen. This question may affect how you word [redacted] (b) (5) [redacted].

-- Paul

cc: Jay, Ed

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Tuesday, December 11, 2001 11:52 AM
To: Colborn, Paul P
Cc: Bybee, Jay; Whelan, M Edward III
Subject: Executive privilege claim

Please review as soon as possible the following draft memos from Judge Gonzales to the President and from the President to the Attorney General.
Thanks.
(See attached file: burton memo from president.doc)(See attached file: burton subpoena ARG memo.doc)

Rachel_L._Brand@who.eop.gov

From:	Rachel_L._Brand@who.eop.gov
Sent:	Wednesday, December 12, 2001 10:32 AM
To:	Whelan, M Edward III; Jan_E._Williams@who.eop.gov
Cc:	/DDV=H._Christopher_Bartolomucci@who.eop.gov/DDT=RFC-822/O=INETGW/P=GOV+DOJ/A=TELEMAIL/C=US/; Bradford_A._Berenson@who.eop.gov; Robert_W._Cobb@who.eop.gov; Courtney_S._Elwood@who.eop.gov; Noel_J._Francisco@who.eop.gov; Brett_M._Kavanaugh@who.eop.gov; Helgard_C._Walker@who.eop.gov; Rachel_L._Brand@who.eop.gov; Kyle_Sampson@who.eop.gov; Timothy_E._Flanigan@who.eop.gov; Alberto_R._Gonzales@who.eop.gov
Subject:	Chicago Tribune asks for Wilson to step down/LA Times profiles Berry
Attachments:	att1.htm; ATTACHMENT.TXT; pic16199.htm

---------- Forwarded by Rachel L. Brand/WHO/EOP on 12/12/2001 10:31 AM ----------
---

Anne Womack
12/12/2001 10:12:50 AM

Record Type: Record

To: Rachel L. Brand/WHO/EOP@EOP

cc:
Subject: Chicago Tribune asks for Wilson to step down/LA Times profiles Berry

Chi Trib is good, LAT is total in the bag for Berry...
---------- Forwarded by Anne Womack/WHO/EOP on 12/12/2001 10:12 AM ----------
-

(Embedded
image moved KArriaga@aol.com
to file: 12/12/2001 09:37:23 AM
pic16199.pcx)

Record Type: Record

To: See the distribution list at the bottom of this message

cc: See the distribution list at the bottom of this message Subject: Chicago Tribune asks for Wilson to step down/LA Times profiles Berry

Chicago Tribune

December 12, 2001 Wednesday, NORTH SPORTS FINAL EDITION

SECTION: Editorial; Pg. 30; ZONE: N

LENGTH: 353 words

HEADLINE: Berry versus Bush

BODY:
Things haven't been very civil of late at the U. S. Commission on Civil Rights.

The Bush administration wants to replace Commissioner Victoria Wilson with Peter Kirsanow, a Cleveland labor lawyer. The administration says Wilson's term is up. Commission Chairman Mary Frances Berry says it is not. Think this is a genteel dispute? Think again. Last Friday, Berry dared the Bush team to send in federal marshals to seat Kirsanow.

Instead of sending in the marshals, the administration sent Justice Department lawyers to file suit. The administration is asking the federal court to remove Wilson so that Kirsanow can replace her. Wilson was appointed by President Bill Clinton to fill in for Judge A. Leon Higginbotham, who died in December 1998.

The administration quite reasonably figured that Wilson would leave when Higginbotham's term ended on Nov. 29. Board members always have had uniform staggered terms. Four are appointed by the president and four by Congress.

Wrong, says Berry. In a little-publicized move, Congress in October 1994 changed the term of office of each commission member to six years, eliminating provisions that allowed for interim or acting terms. In a letter, Reps. John Conyers, Jr., (D.-Mich.) and Jerrold Nadler (D.-N.Y.), who helped draft the change, say they wanted to uphold the independence of the body from the whims of any particular president or party.

Berry says that's her concern, too. But her resoluteness happens to be blocking a Republican vote that would evenly split the panel.

With the panel in a continuing dispute with Florida Gov. Jeb Bush over undercounts of the state's black voters in the 2000 presidential election, it is hard to believe this feud is free of partisanship. Nor is this an "independent" body. It is a body appointed by the president and Congress.

The law may now be silent on succession, but the spirit of the law suggests its time for Wilson to step aside. Chairman Berry's credibility is at stake.
The commission can be a valuable watchdog in helping Americans to get along, but it should learn to get along with the White House.

Los Angeles Times

December 12, 2001 Wednesday Home Edition

SECTION: Part A; Part 1; Page 26; National Desk

LENGTH: 953 words

HEADLINE: The World & Nation;
;
Civil Rights Chief Shows Equality in Bedeviling Critics

BYLINE: JOHANNA NEUMAN, TIMES STAFF WRITER

DATELINE: WASHINGTON

BODY:
Most politicians sit up straighter when the White House calls—an unseen but perceptible salute to power.

Mary Frances Berry is not most politicians.

Outspoken, passionate, tenacious, she is at the moment fighting President Bush's decision to select a new member of the U.S. Commission on Civil Rights, which she chairs. In fact, she told White House Counsel Alberto R. Gonzales that if he wanted to seat a new commissioner, he had better send the U.S. marshals. The case is now in court, but the controversy has revived interest in the 63-year-old Berry, who has served on the commission for nearly half its 44-year history and has angered every administration, Republican and Democrat, since she came on board.

President Carter appointed her in 1980, and she promptly criticized him for repatriating Haitian refugees.

President Reagan tried to fire her, but she took the dismissal to court--and won.

President Clinton took a lashing from her when he withdrew his nomination of Lani Guinier to be assistant attorney general for civil rights.

And Bush saw her accuse his brother, Florida Gov. Jeb Bush, of a pattern of "injustice, ineptitude and inefficiency" that disenfranchised minority voters in the 2000 election.

Critics say her take-no-prisoners style (the online publication Salon.com has called her "a vitriolic brawler") dilutes her effectiveness and that of the commission, which has a $9-million annual budget and 80 employees but no enforcement powers.

The National Journal's Stuart Taylor says she runs the commission "as a propaganda mill for the victimology wing of the Democratic Party." Berry's fellow commissioner Abigail Thernstrom thinks that the commission's reputation is "in the basement."

But Berry, a historian and writer who was born in segregationist Nashville and survived an early childhood that she says was worthy of Charles Dickens, delights in the specter of being a proud black woman talking truth to power.

"It never occurs to me to worry about whether a president disagrees," she said in an interview. "I wish I could be more diplomatic, more measured. I'm not trying to figure out every day how to be a lightning rod. It's just that I have the courage of my convictions."

If she is rough on opponents, some might argue she has earned the privilege.
Placed in an orphanage by her mother after her father deserted the family, she says her earliest memory is hearing her brother wail for more food. She was 4 years old when her mother reclaimed the children, raising them alone while working as a beautician. Berry deduced that to get what you wanted in life, you had to fight.

She credits teachers at every level for encouraging her to achieve, especially one high school history teacher, Minerva Hawkins, who was a mother figure and friend until she died last year. "She used to say that I was a diamond in the rough, and she was still trying to rub off my rough edges," Berry said.

Perhaps as a result, there are bachelor's and master's degrees from Howard University and a doctorate in history and a law degree from the University of Michigan. Currently the Geraldine R. Segal Professor of American Social Thought at the University of Pennsylvania, Berry is a former chancellor at the University of Colorado at Boulder, where she was also a professor of history and law.

In her academic writings, as in her political appointments (she worked as an education official before being named to the commission), Berry is above all a contrarian. It seems it's not just presidents she enjoys skewering.

She was the lead author in a 1992 book, "Long Memory: The Black Experience in America," which argued that for blacks in the 1960s, "the threat of genocide was real. It was roughly comparable to the threat faced by the Jews in the 1930s."

She is proudest of a book called "Why the ERA Failed," which criticized the feminist movement for a flawed political strategy. "It's all about how the women's movement was outfoxed by [conservative] Phyllis Schlafly," she said.

She wriggles out of labels, saying she is no Democrat, not necessarily a liberal--a thorn by any other name.

And she enraged many listeners of Berkeley's KPFA-FM when, as Pacifica Foundation chairwoman, she initiated management changes that she said were aimed at wresting control of the station from "white male hippies over 50." One broadcaster was arrested on the air, accused of violating her ban on discussing the controversy on the air.

The General Accounting Office, in a 1997 audit, criticized the commission as "an agency in disarray, with limited awareness how its resources are used." Berry's defenders said the GAO was doing the bidding of Republican opponents of affirmative action.

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Her defense is Arthur S. Flemming. One of the grand old men of Republican politics, who served presidents from Herbert Hoover to Richard Nixon, Flemming was there at the creation, when President Eisenhower decided to create the commission as a means of defusing the civil rights movement that was simmering across the South.

When Carter named Berry to the commission in 1980, Flemming took her under his wing. He would take her to breakfast at the hushed Hay-Adams Hotel and school her on the ways, big and small, of Washington power. Mostly, he told her about the commission's history, about Eisenhower's table-pounding insistence that it get the facts (which is why the panel has subpoena power) and that it maintain its independence.

"No White House, no Justice Department, tells us what to do," Berry said.
"When the day comes and I'm no longer on the commission, I'll know I did what Arthur Flemming taught me: to protect the integrity of the commission."

GRAPHIC: PHOTO: "I wish I could be more diplomatic. . . . It's just that I have the courage of my convictions," says Mary Frances Berry. PHOTOGRAPHER:
Associated Press

Chicago Tribune

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GRAPHIC: PHOTO: "I wish I could be more diplomatic. . . . It's just that I have the courage of my convictions," says Mary Frances Berry.
PHOTOGRAPHER: Associated Press

Message Sent To:

Anne Womack/WHO/EOP@EOP
hfbelmar@yahoo.com
bblomquist@nationalpress.com
CKMarshall@sidley.com
Dorothy.Taft@mail.house.gov
gfeld@nrsc.org
kgambrell@upi.com
mhosen@newsweek.com

Message Copied To:

Barbara_Ledeen@src.senate.gov (Barbara Ledeen)
cloparo@sos.state.oh.us
crochester@kairos-inc.com
dkong@ap.org
thomas.ferraro@reuters.com

Colborn, Paul P

From: Colborn, Paul P
Sent: Wednesday, December 12, 2001 10:40 AM
To: Thorsen, Carl; Whelan, M Edward III
Cc: Bryant, Dan; Burton, Faith; Horowitz, Michael-CRM; Bunnell, Steve; 'brett_m._kavanaugh@who.eop.gov'; Dryden, Susan
Subject: RE: Thursday's Hearing
Attachments: burton.issue3.wpd

Issue paper 3 (attached), which we prepared for the AG in early September, presents the approach I favor regardin [redacted (b) (5)]. Slight revisions would be necessary for [redacted (b) (5)].

-----Original Message-----
From: Thorsen, Carl
Sent: Wednesday, December 12, 2001 10:22 AM
To: Thorsen, Carl; Colborn, Paul P; Whelan, M Edward III
Cc: Bryant, Dan; Burton, Faith; Horowitz, Michael-CRM; Bunnell, Steve; 'brett_m._kavanaugh@who.eop.gov'; Dryden, Susan
Subject: RE: Thursday's Hearing

I just spoke with Wilson.

We're on for tomorrow morning @ 10 am. He says the Chairman's focus for this hearing will remain on the Boston docs subpoenaed, our apparent refusal to turn them over, and how to reconcile our position with the Department's history of providing "review" accommodations. [redacted (b) (5)]
[redacted])

One panel, Horowitz is the only witness.

Also, just fyi, Jim implied that he will not be surprised if exec privilege has been asserted by tomorrow.

It would be great if by today @ 3 pm we have already nailed dow [redacted (b) (5)]. We may wan [redacted (b) (5)], but I leave that to comm. experts.

-----Original Message-----
From: Thorsen, Carl
Sent: Tuesday, December 11, 2001 5:16 PM
To: Colborn, Paul P; Whelan, M Edward III
Cc: Bryant, Dan; Burton, Faith; Horowitz, Michael-CRM; Bunnell, Steve; 'brett_m._kavanaugh@who.eop.gov'
Subject: Thursday's Hearing

Ed, Paul -

Brett and I just discussed the logistics o [redacted (b) (5)]. I suggested that it might be beneficial t [redacted (b) (5)], if its appropriate to do so. (Paul, I understood from our conversation that this has been done in the past?) Brett wanted to discuss this

with you and Ed. Could you please get in touch with him to discuss tactical options?

Also, Brett will be there from 3-4 tomorrow for the moot, so let's plan to cover this topic through discussion and q&a during that first hour. Thanks.

Carl Thorsen
Deputy Assistant Attorney General
Office of Legislative Affairs
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

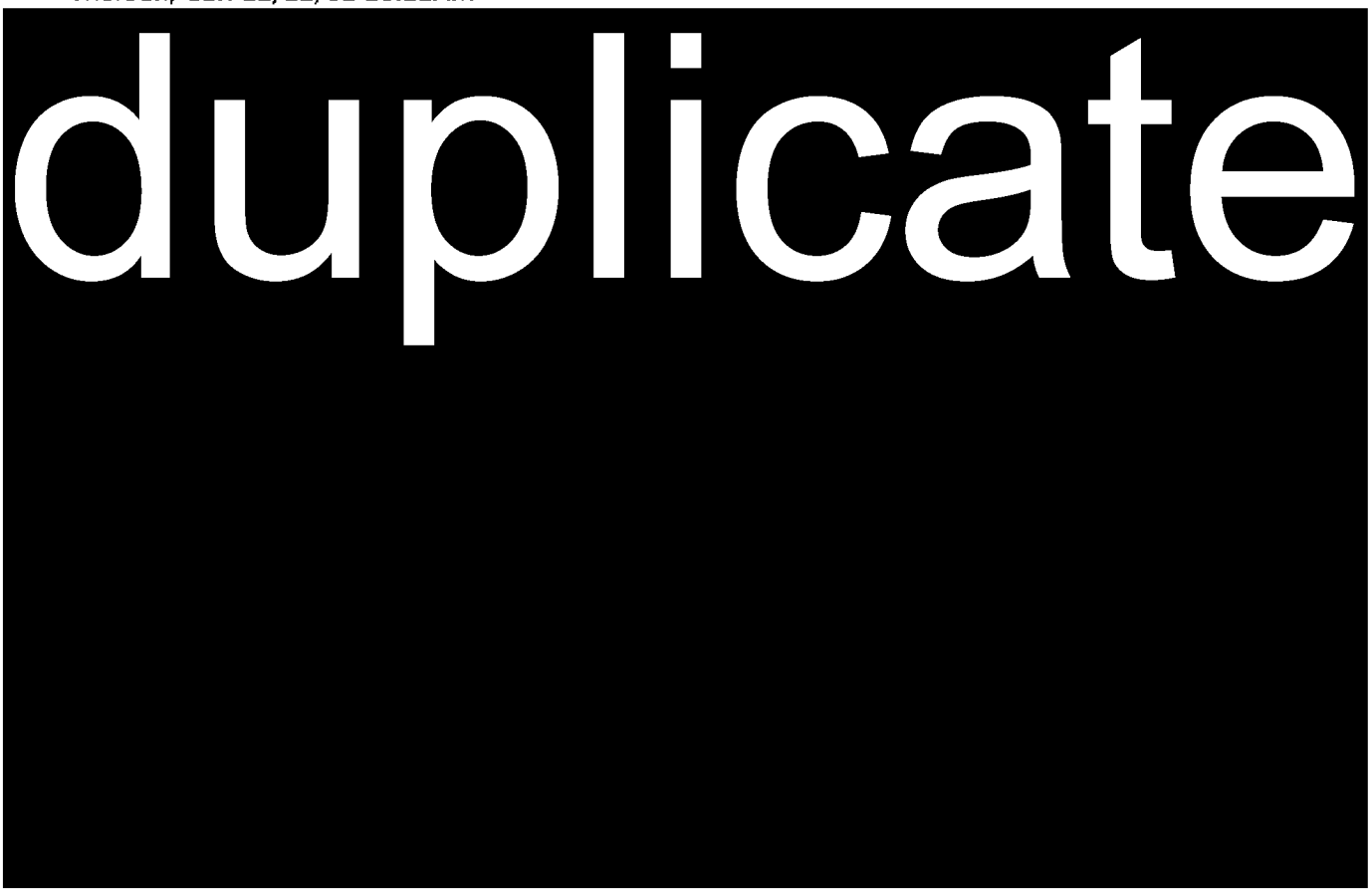
Steve Bunnell

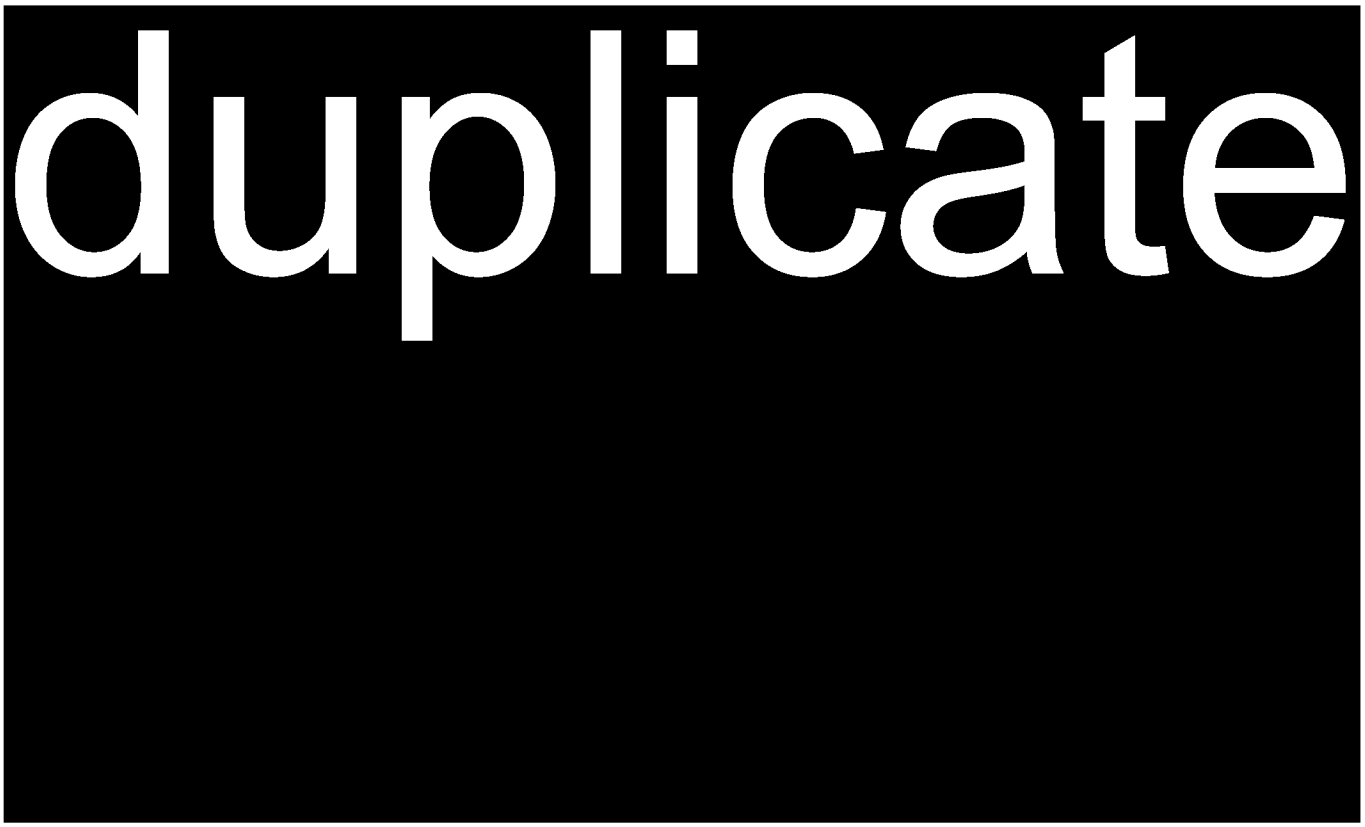
From:	Steve Bunnell
Sent:	Wednesday, December 12, 2001 10:50 AM
To:	Colborn, Paul P; Thorsen, Carl; Whelan, M Edward III; Martens, Matthew
Cc:	brett_m._kavanaugh@who.eop.gov; Burton, Faith; Bryant, Dan; Dryden, Susan; Horowitz, Michael-CRM
Subject:	RE: Thursday's Hearing
Attachments:	MEH2.test.wpd

Date: 12/12/2001 10:52 am -0500 (Wednesday)
From: Steve Bunnell
To: "PColborn".WTGATE2.CRMGW; "wCThorsen".WTGATE2.CRMGW;
"wMWhelan".WTGATE2.CRMGW; Martens, Matthew
CC: "brett_m._kavanaugh@who.eop.gov@inetgw".WTGATE2.CRMGW;
"FBurton".WTGATE2.CRMGW; "wDBryant".WTGATE2.CRMGW;
"wSDryden".WTGATE2.CRMGW; Horowitz, Michael-CRM
Subject: RE: Thursday's Hearing

Per the discussion yesterday, attached for your review and comments is my attempt at a (b) (5) version of Michael's prepared statement. For discussion at today's 3 pm meeting.

>>> Thorsen, Carl 12/12/01 10:21AM >>>





Thorsen, Carl

From: Thorsen, Carl
Sent: Wednesday, December 12, 2001 12:41 PM
To: Whelan, M Edward III
Cc: Bryant, Dan; 'brett_m._kavanaugh@who.eop.gov'
Subject: RE: Hearing

Ok. However, in our vie [redacted (b) (5)] Thanks for considering this.

-----Original Message-----
From: Whelan, M Edward III
Sent: Wednesday, December 12, 2001 12:30 PM
To: Thorsen, Carl
Subject: RE: Hearing

Thanks. We're discussing this now. [redacted (b) (5)].

-----Original Message-----
From: Thorsen, Carl
Sent: Wednesday, December 12, 2001 12:21 PM
To: Whelan, M Edward III
Subject: Hearing

Ed, a heads-up, Dan just spoke with Jay. He feels very strongly tha [redacted (b) (5)].

Carl Thorsen
Deputy Assistant Attorney General
Office of Legislative Affairs
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Steve Bunnell

From:	Steve Bunnell
Sent:	Wednesday, December 12, 2001 6:33 PM
To:	Colborn, Paul P; Thorsen, Carl; Whelan, M Edward III; Martens, Matthew
Cc:	brett_m._kavanaugh@who.eop.gov; Burton, Faith; Bryant, Dan; Dryden, Susan; Horowitz, Michael-CRM
Subject:	RE: Thursday's Hearing
Attachments:	MEH3.wpd

Date: 12/12/2001 06:35 pm -0500 (Wednesday)
From: Steve Bunnell
To: "PColborn".WTGATE2.CRMGW; "wCThorsen".WTGATE2.CRMGW;
"wMWhelan".WTGATE2.CRMGW; Martens, Matthew
CC: "brett_m._kavanaugh@who.eop.gov@inetgw".WTGATE2.CRMGW;
"FBurton".WTGATE2.CRMGW; "wDBryant".WTGATE2.CRMGW;
"wSDryden".WTGATE2.CRMGW; Horowitz, Michael-CRM
Subject: RE: Thursday's Hearing

Attached is what should be essentially the final draft of Michael's testimony. Please note I have added [redacted] . . .

>>> Thorsen, Carl 12/12/01 01:15PM >>>
My comments:

[redacted]

[redacted] -- suggest this sentence: "[redacted]"

[redacted] -- add [redacted]

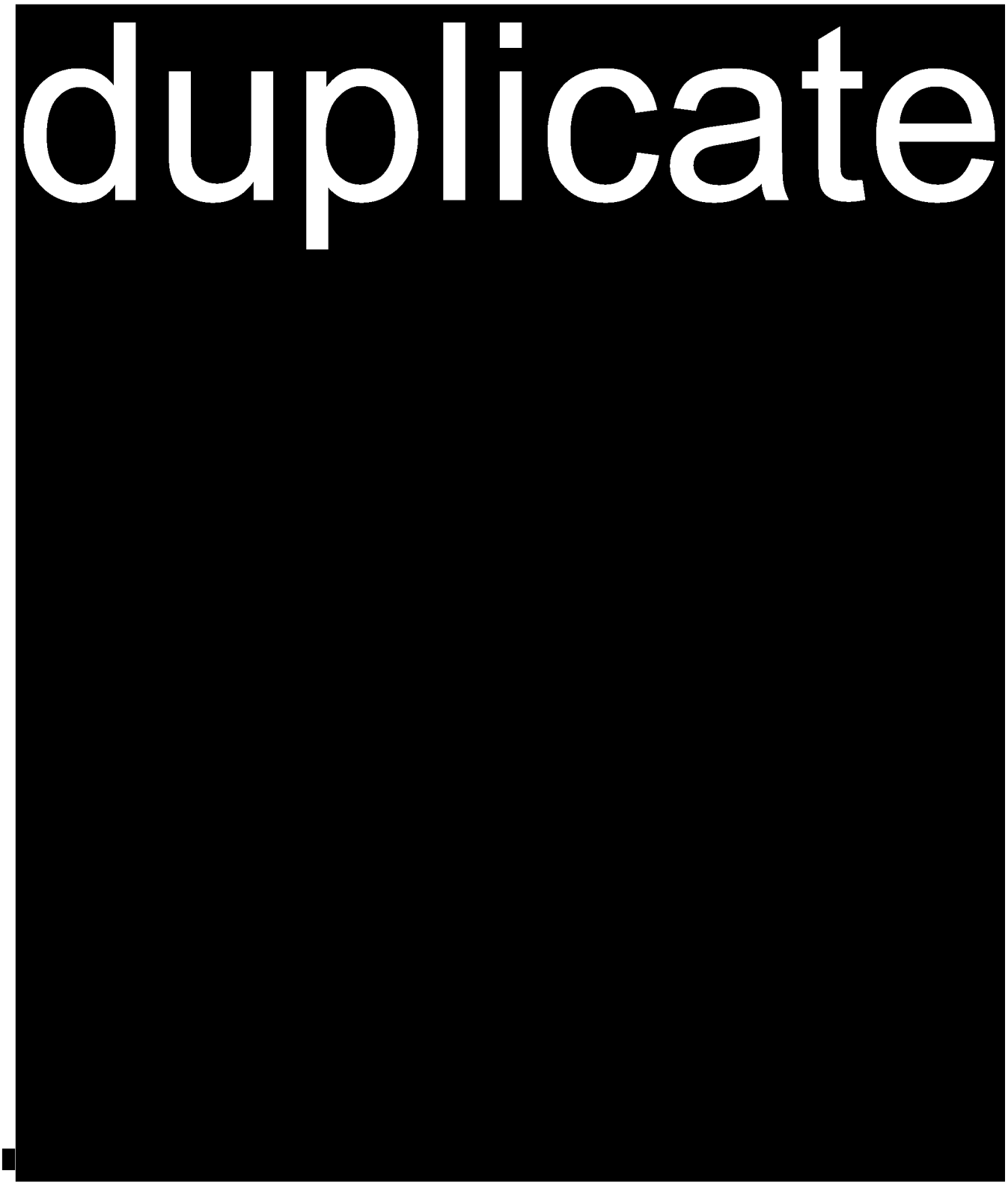
[redacted]"

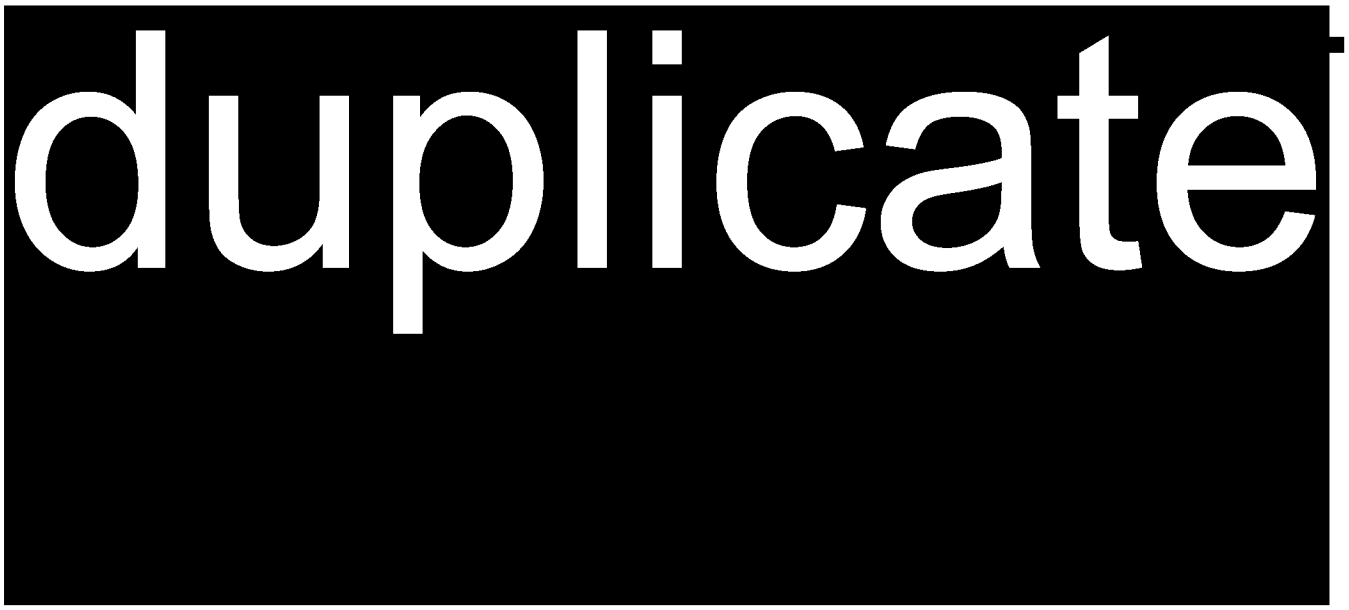
[redacted]

-----Original Message-----
From: Steve Bunnell
Sent: Wednesday, December 12, 2001 10:50 AM
To: Colborn, Paul P; Thorsen, Carl; Whelan, M Edward III; Martens,

Matthew
Cc: brett_m._kavanaugh@who.eop.gov; Burton, Faith; Bryant, Dan; Dryden, Susan; Horowitz, Michael-CRM
Subject: RE: Thursday's Hearing

Date: 12/12/2001 10:52 am -0500 (Wednesday)
From: Steve Bunnell





Thorsen, Carl

From:	Thorsen, Carl
Sent:	Friday, December 14, 2001 3:19 PM
To:	Whelan, M Edward III; Horowitz, Michael-CRM; Long, Linda E
Cc:	Bryant, Dan; Burton, Faith; 'brett_m._kavanaugh@who.eop.gov'; Wray, Chris; Herbert, James; Durham, John
Subject:	Monday and Tuesday Meetings on Boston/Burton/Exec Priv Issues

Yes.

Linda, pls. schedule in OLA conf room: Monday @ 10 am - AAG's Bryant, Chertoff, and Bybee (w/staff) and PDAG Chris Wray or his designee (we'll probably patch in Herbert and possibly Durham by conf. call for that meeting). Same group for Tuesday @ 8 am but include Tim Flannigan and Brett Kavanaugh from WH Counsel (contact Alison @ 456-2632).

Thanks.

-----Original Message-----
From: Whelan, M Edward III
Sent: Friday, December 14, 2001 3:03 PM
To: Thorsen, Carl; Horowitz, Michael-CRM
Subject: RE: Pre-meeting on Boston issue

Just to confirm my understanding: The DOJ-only pre-meeting will occur Monday at 10:00. The meeting with the White House folks will occur Tuesday at 8:00. Both meetings will occur in the OLA conference room.

-----Original Message-----
From: Thorsen, Carl
Sent: Friday, December 14, 2001 3:01 PM
To: Horowitz, Michael-CRM; Whelan, M Edward III
Subject: RE: Pre-meeting on Boston issue

sorry to create confusion. i'm trying to speed skate through my 465 unopened emails.

-----Original Message-----
From: Michael-CRM Horowitz
Sent: Friday, December 14, 2001 2:51 PM
To: Whelan, M Edward III
Cc: Thorsen, Carl; Bybee, Jay
Subject: Re: Pre-meeting on Boston issue

Date: 12/14/2001 02:53 pm -0500 (Friday)

From: Michael-CRM Horowitz
To: "wMWhelan".WTGATE2.CRMGW
CC: "wCThorsen".WTGATE2.CRMGW; "wJBybee".WTGATE2.CRMGW
Subject: Re: Pre-meeting on Boston issue

I am available and will have Val put it on my schedule and Mike's.

Colborn, Paul P

From:	Colborn, Paul P
Sent:	Friday, December 14, 2001 4:43 PM
To:	'Brett_M._Kavanaugh@who.eop.gov'
Cc:	Whelan, M Edward III
Subject:	RE: Committee interest in Boston documents
Attachments:	Bostondocs.tp3.wpd

Brett, here's the expanded version.

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Friday, December 14, 2001 2:55 PM
To: Colborn, Paul P
Subject: RE: Committee interest in Boston documents

yes, that too, thanks; left you a voice mail

(Embedded
image moved "Colborn, Paul P" <Paul.P.Colborn@usdoj.gov>
to file: 12/14/2001 02:50:01 PM
pic18247.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc:
Subject: RE: Committee interest in Boston documents

But my draft does not contain discussion of DOJ's Boston investigation and how the documents relate to that. Carl says you want that addressed too. Do you or don't you?

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Friday, December 14, 2001 2:46 PM
To: Colborn, Paul P
Subject: Re: Committee interest in Boston documents

bingo; let me know when final; thanks!

(Embedded
image moved "Colborn, Paul P" <Paul.P.Colborn@usdoj.gov> to file: 12/14/2001 01:49:40
PM pic23717.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc:
Subject: Committee interest in Boston documents

Brett: Here's my first draft of the talking points you asked for. I'm having it reviewed now for accuracy. Is this what you had in mind?
-- Paul

Colborn, Paul P

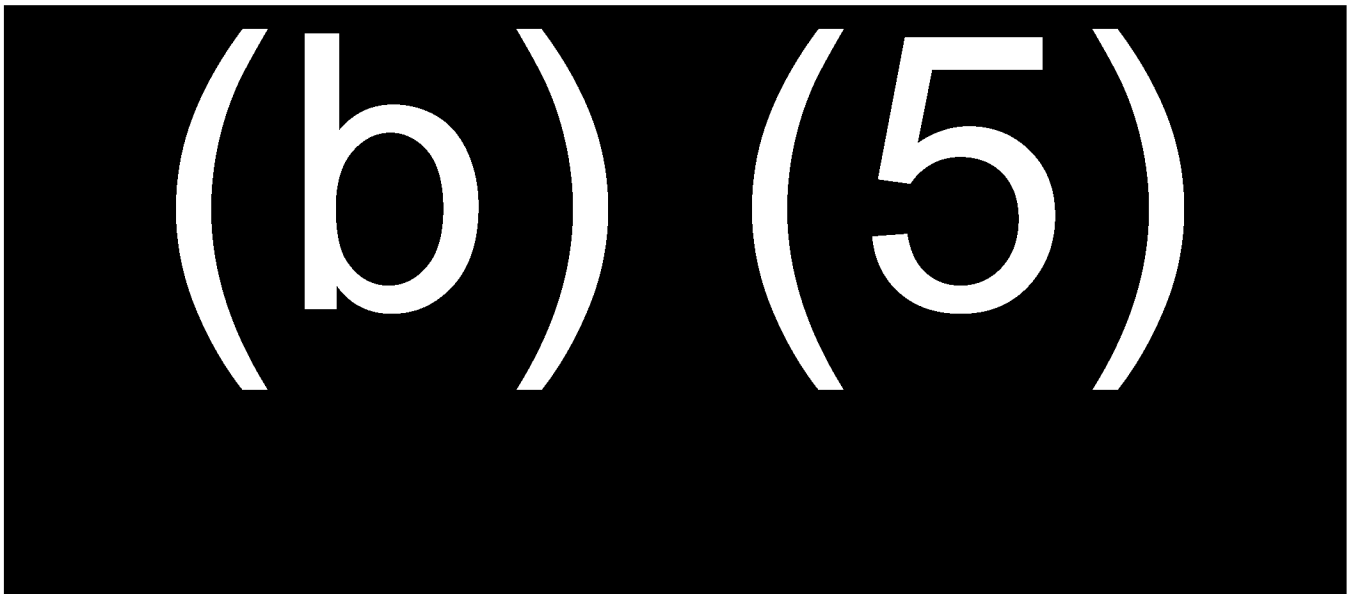
From:	Colborn, Paul P
Sent:	Tuesday, December 18, 2001 11:17 AM
To:	'Brett_M._Kavanaugh@who.eop.gov'
Cc:	Whelan, M Edward III
Subject:	RE: important: need review of draft PRA letter
Attachments:	(b) (5) .wpd

Brett, per our conversation, here are the paragraphs I wrote awhile ago on (b) (5) .

-- Paul

cc: Ed

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



Brett_M._Kavanaugh@who.eop.gov

From:	Brett_M._Kavanaugh@who.eop.gov
Sent:	Tuesday, December 18, 2001 11:29 AM
To:	Colborn, Paul P
Cc:	Whelan, M Edward III
Subject:	RE: important: need review of draft PRA letter
Attachments:	(b) (5) .wpd; pic25277.pcx

thanks; I changed that and incorporated your material

(Embedded
image moved "Colborn, Paul P" <Paul.P.Colborn@usdoj.gov>
to file: 12/18/2001 11:17:07 AM
pic25277.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

duplicate

duplicate

Colborn, Paul P

From:	Colborn, Paul P
Sent:	Tuesday, December 18, 2001 11:51 AM
To:	'Brett_M._Kavanaugh@who.eop.gov'
Cc:	Whelan, M Edward III
Subject:	RE: important: need review of draft PRA letter

Brett, in addition to the substantive comments Ed and I have given you by phone, here are a few nits:

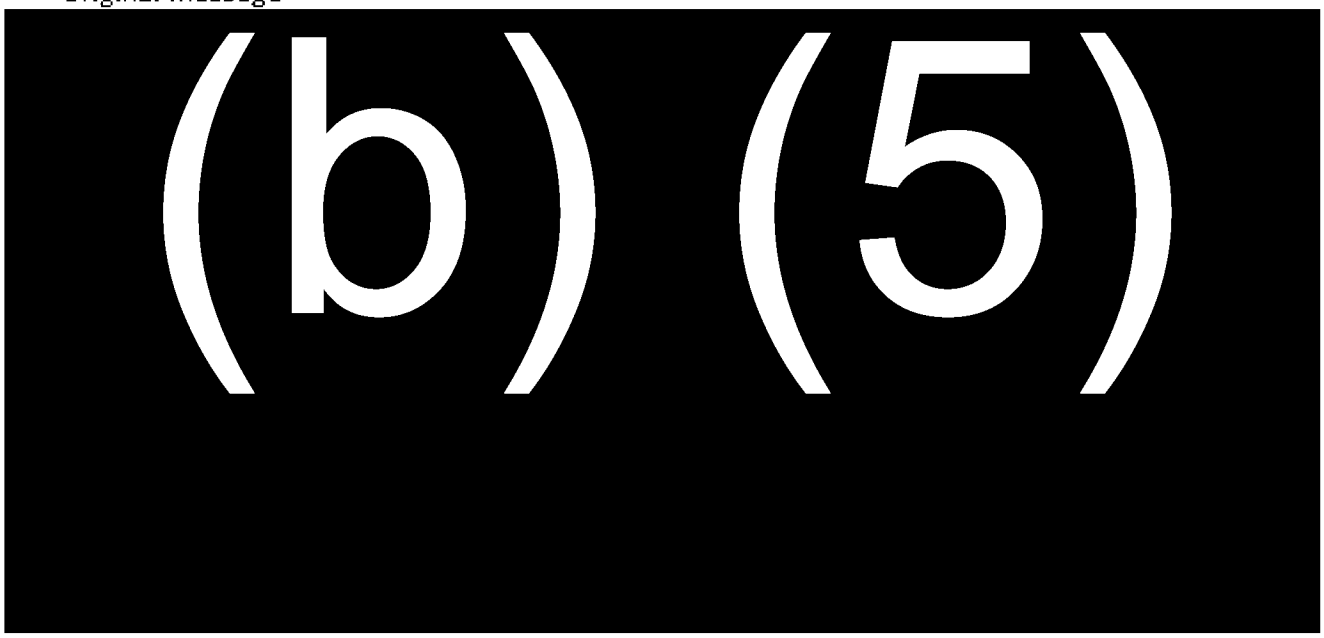
Add full cite to Nixon v. GSA in 3rd para.

In para. 7, add "whether" after "former President" in 3rd line, and change "Presidentiecords" to "Presidential records" in 3rd-to-last line.

In para. 9 ("First"), dehyphenate "long-standing"

In para. 12 ("There also"), add "to" before "take" in line 10.

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



Whelan, M Edward III

From:	Whelan, M Edward III
Sent:	Tuesday, December 18, 2001 2:08 PM
To:	'Kavanaugh, Brett'
Subject:	FW: important: need review of draft PRA letter

FYI

-----Original Message-----
From: Whelan, M Edward III
Sent: Tuesday, December 18, 2001 2:07 PM
To: Burton, Faith; Thorsen, Carl
Cc: Colborn, Paul P
Subject: FW: important: need review of draft PRA letter

Faith: Both Paul and I think that your sentence [redacted (b) (5)]. The following reflects a couple edits for your consideration: '[redacted (b) (5)]." -- Ed

-----Original Message-----
From: Burton, Faith
Sent: Tuesday, December 18, 2001 1:54 PM
To: Colborn, Paul P; Thorsen, Carl
Subject: RE: important: need review of draft PRA letter

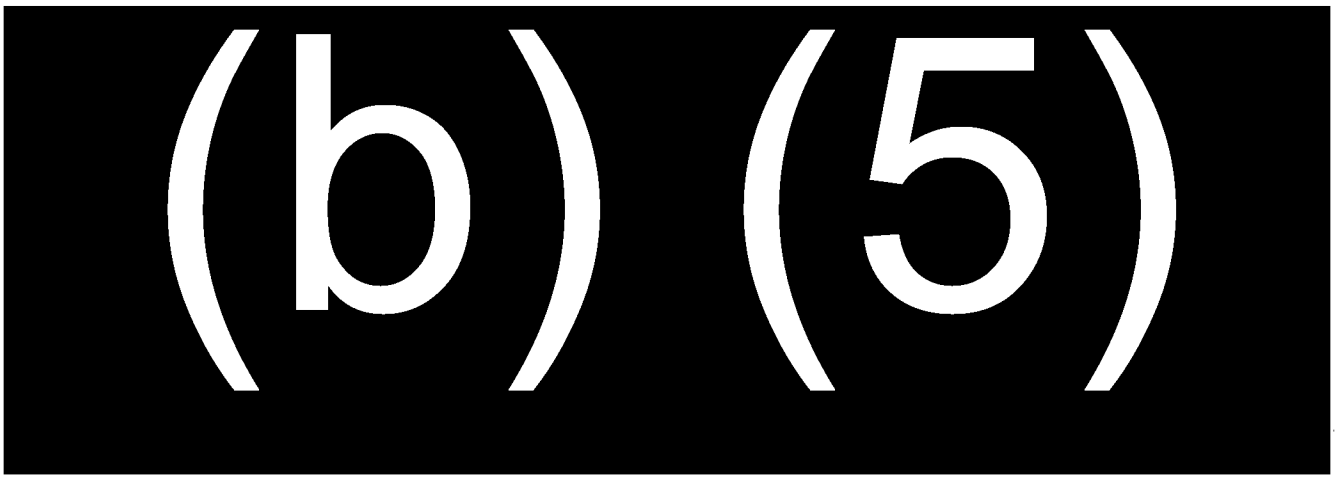
What about this? FB

-----Original Message-----
From: Colborn, Paul P
Sent: Tuesday, December 18, 2001 9:30 AM
To: Burton, Faith
Subject: FW: important: need review of draft PRA letter

Faith, please call me about this. Also, I never received the signed OLA letter to Horn and Ose declining to answer their questions. Please fax that to me asap at 58524.
-- Paul

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

[redacted (b) (5)]



Whelan, M Edward III

From: Whelan, M Edward III
Sent: Wednesday, December 19, 2001 9:23 AM
To: 'Kavanaugh, Brett'
Subject: FW: Draft letter to Burton, per our conversation
Attachments: burton.1218.rev.wpd

FYI: Here are the OLC revisions from last night [redacted (b) (5)].

-----Original Message-----
From: Colborn, Paul P
Sent: Tuesday, December 18, 2001 5:16 PM
To: Burton, Faith; Chertoff, Michael; Horowitz, Michael-CRM; Martens, Matthew; Whelan, M Edward III; Bybee, Jay; Thorsen, Carl; Durham, John; Herbert, James; Bryant, Dan
Subject: RE: Draft letter to Burton, per our conversation

Attached is OLC's suggested revision to OLA's draft. Jay Bybee was out of the office this afternoon and therefore hasn't reviewed this draft. But Ed Whelan and I thought it was important to circulate the draft today so everyone can start reviewing it.

-----Original Message-----
From: Burton, Faith
Sent: Tuesday, December 18, 2001 12:47 PM
To: Chertoff, Michael; Horowitz, Michael-CRM; Martens, Matthew; Whelan, M Edward III; Bybee, Jay; Thorsen, Carl; Colborn, Paul P; Durham, John; Herbert, James; Bryant, Dan
Subject: Draft letter to Burton, per our conversation

<< File: burton.1218.wpd >> If I've inadvertently omitted anyone from this circulation, would you please forward it to that individual; thanks. I will also share this with Beth Beers at the FBI. Faith

Brett_M._Kavanaugh@who.eop.gov

From:	Brett_M._Kavanaugh@who.eop.gov
Sent:	Wednesday, December 19, 2001 2:00 PM
To:	Whelan, M Edward III
Subject:	Draft op-ed
Attachments:	WP Gonzales Presidential Reocrds draft 2 12.18.doc

An op-ed is running tomorrow in Wash Post. Please review this draft ASAP. Thanks.

(See attached file: WP Gonzales Presidential Reocrds draft 2 12.18.doc)

Brett_M._Kavanaugh@who.eop.gov

From:	Brett_M._Kavanaugh@who.eop.gov
Sent:	Wednesday, December 19, 2001 5:54 PM
To:	Whelan, M Edward III
Subject:	FINAL CLEARANCE- SAP, H.R. 3210-Terrorism Risk Insurance Protection Act (Senate substitute)
Attachments:	HR3210 senate sap.wpd

---------- Forwarded by Brett M. Kavanaugh/WHO/EOP on 12/19/2001 05:53 PM ----------

Brett M. Kavanaugh
12/19/2001 05:48:46 PM

Record Type: Record

To: m.edward.whelan@udoj.gov @ inet

cc:
Subject: FINAL CLEARANCE- SAP, H.R. 3210-Terrorism Risk Insurance Protection Act (Senate substitute)

---------- Forwarded by Brett M. Kavanaugh/WHO/EOP on 12/19/2001 05:48 PM ----------

Danielle M. Simonetta
12/18/2001 08:34:07 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:
Subject: FINAL CLEARANCE- SAP, H.R. 3210-Terrorism Risk Insurance Protection Act (Senate substitute)

Here is the final version of the SAP on H.R. 3210, for your clearance. The SAP is written to reflect Sen.

Daschle's proposed substitute amendment (not the House version of the bill). The bill is scheduled to be considered on the floor at some point after 12:00 pm tomorrow. Therefore, please respond to me with your comments/clearance, by 11:00 am tomorrow, Wednesday, December 19th. If you have any questions, please call me.
Thanks,
Danielle
(54790)

(See attached file: HR3210 senate sap.wpd)

DRAFT - NOT FOR RELEASE

December 19, 2001
(Senate)

(b) (5)

[redacted]

[redacted]

* * * * * *

(Do Not Distribute Outside the Executive Office of the President)

This Statement of Administration Policy was developed by the Legislative Reference Division (Rodgers), in consultation with Commerce (Clark), Treasury (Dorsey), State (Faulkner), EP (Smith), NEC (Sumerlin), OVP (Addington), CEA (Furchtgott-Roth, Holtz-Eakin, Brown), BRD (Dale, Lobron, Timberlake), OIRA (Noe), OMBGC (Beynon), and HTF (Boden, Enger).

Justice did not respond to our request for views.

OMB/LA Clearance:_____

Administration Position to Date

The Administration has not taken a position on the Senate version of H.R. 3210.

On November 28, 2001, a SAP on H.R. 3210, the "Terrorism Risk Protection Act" was sent to the House Rules Committee. The SAP urged prompt passage of H.R.
3210 "as a step toward enactment of legislation to ensure the continued availability of insurance for terrorist-related acts." H.R. 3210 included provisions that limited terrorist-related litigation. The SAP expressed the Administration's concern with the repayment assessment mechanism and the administrative complexities of H.R. 3210 as a whole. The SAP also stated that "procedures for consolidation and management of mass tort litigation arising out of a terrorism incident are a necessary part of any meaningful terrorism insurance proposal, and thus a necessary condition for Administration support of any terrorism insurance bill."

Summary of Senate Manager's Amendment to H.R. 3210

The following summary is based on a draft of a manager's amendment that Treasury staff believe will be offered as a substitute for the House passed version of H.R. 3210.

The amendment would establish a temporary "Terrorism Insured Loss Shared Compensation Program" (Program) within the Department of the Treasury intended to ensure the continued availability of commercial property and casualty insurance and reinsurance for terrorism-related risks. The amendment would provide for Federal assistance for future terrorism damage if it reaches certain levels. That amount would be based on a formula, which is market share multiplied by $10 billion in the first year, and market share multiplied by $15 billion in the optional second year. For losses above this "retention level," the cost of terrorism losses would be shared. The Federal government would pay for approximately 80 percent of insurance losses below $10 billion, with the industry paying 20 percent. For losses between $10 billion and $100 billion, the split would be 90-10. The amendment would provide authority for one year to pay for certain property and casualty losses resulting from a terrorist attack; the authority could be extended for a second year.

Authority of the Secretary of the Treasury. The amendment would make the Secretary of the Treasury responsible for carrying out the program for financial assistance for commercial property and casualty insurers that would be established by the bill. The Secretary could extend the Program an additional year, expiring on December 31, 2003.

Triggering Determination and Federal Cost-Sharing for Commercial Insurers.

Under the amendment, Federal financial assistance would be triggered by a determination of the Secretary that the insured losses resulting from the event of an act of terrorism occurring during the covered period, or the aggregate insured losses resulting from multiple events of acts of terrorism all occurring during the covered period. The Secretary would have the sole authority for determining whether an occurrence or event was caused by an act of terrorism, whether insured losses from acts of terrorism were caused by one or multiple events or occurrences, and whether an act of terrorism occurred during the covered period.

The amount of Federal assistance would be based on a formula, which is the "market share" of a participating insurance company (total amount of gross property and casualty insurance premiums during the 2-year period preceding the year in which the act of terrorism occurred, as a percentage of the aggregate of all industry wide premiums) multiplied by $10 billion in the first year, and market share multiplied by $15 billion in the optional second year. For losses above the "insurance company's deductible," the cost of terrorism losses would be shared. The Federal government would pay for approximately 80 percent of insurance losses below $10 billion, with the industry paying 20 percent. For losses between $10 billion and $100 billion, the split would be 90-10. The amendment would provide authority for one year to pay for certain property and casualty losses resulting from a terrorist attack; the authority could be extended for a second year. The aggregate amount of financial assistance provided could not exceed $100 billion.

Sovereign Immunity Protections. Whenever Federal financial assistance is triggered (i.e., whenever an act of terrorism occurs), the amendment would provide for a Federal cause of action which would be the exclusive remedy for damages claimed pursuant to any acts of terrorism that caused the insured losses. These cases would be governed by the law of the State in which the act of terrorism occurred, unless such law is inconsistent with or preempted by Federal law. Under the amendment, the plaintiff may seek any form of recovery from any person, government, or other entity that was a participant in, or aider and abettor of, any act of terrorism.

Extension of Program. The Secretary could, upon making a determination that an extension of the provisions of the bill is necessary to ensure the adequate availability in the United States of commercial property and casualty insurance coverage for acts of terrorism, extend the period in which these provisions apply to a date no later than December 31, 2003.

State Preemption. Under the amendment, a commercial insurer would be considered to have complied with any State law that requires or regulates the provision of insurance coverage for acts of terrorism if the insurer provides coverage in accordance with the definitions regarding acts of terrorism under the regulations issued by the Secretary. If any provision of any State law prevents an insurer from increasing its premium rates in an amount necessary to recover any assessments pursuant to the amendment, such provision is preempted only to the extent necessary to provide for such insurer to recover such losses.

Studies and Reports. Under the amendment, no later than 9 months after the date of enactment the Secretary would be required to submit a report to Congress that would consider the impact of the Program on: (1) the availability of insurance coverage for acts of terrorism; (2) the affordability of such coverage, including the effect of such coverage of premiums; and (3) the capacity of the insurance industry to absorb future losses resulting from acts of terrorism, taking into account the profitability of the insurance industry. The Secretary would also consider the probable impact on the United States economy if the Program terminates at midnight on December 31, 2002.

Within 9 months of enactment of the amendment, the Secretary would be required to conduct a study and report to the Congress on the potential effects of acts of terrorism on the life insurance industry in

the United States and other lines of insurance coverage. The Secretary would be required to consult with the National Association of Insurance Commissioners (NAIC), representatives of the insurance industry, and other experts in the field.

Beginning 6 months after enactment of the amendment, and every 6 months thereafter, each participating insurance company would be required to submit a report to the NAIC that states the premium rates charged by that insurance company during the preceding 6-month period for insured losses covered by the Program, and includes an explanation of and justification for those rates. The NAIC would be required to forward copies of each report submitted, to the Secretary of the Treasury, the Secretary of Commerce, the Chairman of the Federal Trade Commission, and the Comptroller General of the United States.
The Secretary of the Treasury, the Secretary of Commerce, and the Chairman of the Federal Trade Commission would be required to submit a joint report to Congress and the Comptroller General of the United States summarizing and evaluating the reports forwarded by NAIC. No later than 90 days after receipt, the Comptroller General of the United States would be required to evaluate and submit a report to Congress an evaluating the reports.

Pay-As-You-Go Scoring

According to BRD (Lee), the amendment would affect direct spending and receipts; therefore, it is subject to the pay-as-you-go requirements of the Omnibus Budget Reconciliation Act of 1990. RMO staff advises that the bill could potentially have a PAYGO cost, but an OMB estimate has not been made. Cost estimates are problematic due to uncertainties involving future acts of terrorism. CBO scoring of the manager's amendment is not yet available.

LEGISLATIVE REFERENCE DIVISION
DECEMBER 18, 2001

Message Sent To:_____

Nicholas E. Calio/WHO/EOP@EOP
Joel D. Kaplan/WHO/EOP@EOP
Kristen Silverberg/WHO/EOP@EOP
Jack Howard/WHO/EOP@EOP
Ziad S. Ojakli/WHO/EOP@EOP
Matthew Kirk/WHO/EOP@EOP
Michael J. Conway/WHO/EOP@EOP
Jill Davie/WHO/EOP@EOP
Alison Jones/WHO/EOP@EOP
Ashley Holbrook/WHO/EOP@EOP
Daniel M. McCarthy/WHO/EOP@EOP
D. Marcus Sumerlin/OPD/EOP@EOP
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Allison L. Riepenhoff/WHO/EOP@EOP
Diana L. Schacht/OPD/EOP@EOP
Rebecca L. Halkias/WHO/EOP@EOP
[illegible]

Wendy J. Grubbs/WHO/EOP@EOP
Edward Ingle/WHO/EOP@EOP
Albert Hawkins/WHO/EOP@EOP
Nancy P. Dorn/WHO/EOP
Candida P. Wolff/OVP/EOP@EOP
Lauren K. Allgood/OVP/EOP@EOP
Cesar Conda/OVP/EOP@EOP
Neil S. Patel/OVP/EOP@EOP
Jonathan W. Burks/OVP/EOP@EOP
Douglas J. Holtz-Eakin/CEA/EOP@EOP
Diana E. Furchtgott-Roth/CEA/EOP@EOP
Daniel J. Bartlett/WHO/EOP@EOP
Susan B. Ralston/WHO/EOP@EOP
Harriet Miers/WHO/EOP@EOP
Stuart W. Bowen/WHO/EOP@EOP
Barbara A. Barclay/WHO/EOP@EOP
Debra D. Bird/WHO/EOP@EOP
Carolyn E. Cleveland/WHO/EOP@EOP
Karen D. Cruson/WHO/EOP@EOP
Lauren C. Lobrano/OMB/EOP@EOP
Christine C. McCarlie/OMB/EOP@EOP
Eric C. Pelletier/OMB/EOP@EOP
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Brett M. Kavanaugh/WHO/EOP@EOP
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Linda C. Luisi/NSC/EOP@EOP
George M. Andricos/NSC/EOP@EOP
John A. Cloud/NSC/EOP@EOP
John F. Sammis/NSC/EOP@EOP
Amy C. Smith/OMB/EOP@EOP

Colborn, Paul P

From:	Colborn, Paul P
Sent:	Thursday, December 20, 2001 9:16 AM
To:	'Brett_M._Kavanaugh@who.eop.gov'; Thorsen, Carl; Bryant, Dan
Cc:	Whelan, M Edward III
Subject:	RE: Burton letter
Attachments:	burton.1219.olc.wpd

Brett: Attached is the final version. I'm also faxing you a signed copy. I'll leave it to Dan or Carl to respond on the [redacted] question.
-- Paul

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Wednesday, December 19, 2001 8:46 PM
To: Thorsen, Carl; Bryant, Dan; Colborn, Paul P
Subject: Burton letter

few questions:
can someone e-mail me final version of letter to Burton? [redacted] ?

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

December 19, 2001

The Honorable Dan Burton
Chairman
Committee on Government Reform
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

I am writing to follow up regarding the Committee's subpoenas seeking prosecutorial decisonmaking memoranda in connection with the Committee's investigations of campaign finance matters, alleged false statements by an individual (Ernest Howard) in a separate investigation, and the FBI's handling of informants in Boston. The Department stands ready to work with the Committee to seek to accommodate the legitimate needs that the Committee may have for information regarding these matters.

The Department has a strong confidentiality interest in the extremely sensitive prosecutorial decisionmaking documents called for by the subpoenas. The Attorney General and other Department decisionmakers must have the benefit of candid and confidential advice and recommendations in making investigative and prosecutorial decisions. Consistent with the longstanding position of the executive branch with respect to these kinds of highly sensitive memoranda, the President has therefore asserted executive privilege with respect to the subpoenaed documents. At the same time, he has requested that the Department remain willing to work with the Committee to provide such information as the Department can, consistent with his instructions and without violating the constitutional doctrine of separation of powers.

Pursuant to longstanding executive branch policy, in responding to congressional requests for confidential information, the Department seeks in all cases to engage in an accommodation process in an effort to satisfy legitimate congressional needs while protecting executive branch confidentiality interests. The Department has already accommodated the Committee's information needs with respect to the prosecutorial memoranda relating to campaign finance and the Howard matter. We have provided briefings on the reasons for the decisions to decline prosecutions for Ernest Howard and Mark Middleton, which your August 30, 2001, letter indicated were very helpful. With regard to the Conrad collection of memoranda, on August 23, 2000,

then Attorney General Reno publicly stated the reasons for her decision not to appoint a Special Counsel and, on October 5, 2000, you questioned her about that decision in an interview on the record. Prior to these explanations, the Department had provided the underlying factual records relating to each matter, to the extent permissible under the grand jury secrecy requirements of Rule 6(e) of the Federal Rules of Criminal Procedure. In the October 2000 meeting, some information also could not be provided because of its relevance to then pending investigations.

As to the Boston matter, we believe that the Department and the Committee can work together to provide the Committee additional information without compromising the principles maintained by the executive branch. We will be prepared to make a proposal as to how further to accommodate the Committee's needs as soon as you inform us in writing of the specific needs the Committee has for additional information. See United States v. American Tel. & Tel. Co., 567 F.2d 121, 127 (D.C. Cir. 1977); Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc).

The Department has been providing an extensive body of other materials to the Committee since April 27, 2001, when we provided approximately 1178 pages in response to your request of March 30, 2001 for documents about the murder of Mr. Edward Deegan, for which Mr. Joseph Salvati and six others were convicted. Since the crime was not prosecuted federally, the FBI does not have a discrete file on the subject. Hence, the responsive documents were found in other files and some information was redacted because it pertained to other matters outside the scope of the Committee's request. In August 2001, Committee counsel reviewed unredacted copies of these documents and some pages were re-processed to restore information that was responsive to your June 5 request for documents on other Boston matters. More than 3800 pages have been produced in response to that request and the FBI is still processing responsive documents regarding the FBI's handling of informants in Boston. We expect to provide documents regarding the FBI's Top Hoodlum Program this week and to produce additional documents after the Holiday recess.

The document production process for the Boston matters has thus been proceeding since March of this year. We note, moreover, that the Committee's March and June requests did not indicate any interest in the prosecutorial decision-making memoranda and the Committee did not even request them until it subpoenaed them on September 6. The Committee then immediately scheduled for September 13 a hearing regarding its demand for these documents. When that hearing was postponed due to the events of September 11, the Department was advised that the matter would be deferred until a later time. We first learned that the Committee was renewing the matter during the week following Thanksgiving when the hearing was re-scheduled for December 6. It was postponed to December 13 at the Department's request so that Assistant Attorney General Michael Chertoff could testify, but his obligations relating to the September 11 investigation made that appearance impossible and the Chairman refused the Attorney General's request that the hearing be postponed to the week of December 17.

The Department fully respects the Committee's interest in reviewing allegations of misconduct by government employees, and we have provided, and will continue to provide, investigative records, judicial filings, and other records responsive to your requests, consistent with the accommodation process. Of course, we cannot provide grand jury information covered by Rule 6(e), electronic surveillance information subject to Title III, or information that would identify confidential informants.

Finally, as the Committee is aware, the Department is fully committed to addressing corruption in the handling of informants by the FBI in Boston and has dedicated extensive resources to that purpose. In 1999, the Justice Task Force was established to investigate law enforcement corruption relating to Messrs. James Bulger and Stephen Flemmi. The Task Force has expanded the scope of the inquiry to include allegations that FBI agents and prosecutors allowed a witness to frame Mr. Salvati and others for the Deegan murder while permitting that witness to protect another individual, who was central to the murder conspiracy. It was the Task Force that located exculpatory documents, which led to the release of Peter Limone and the dismissal of charges against Mr. Salvati and Mr. Limone. The Task Force also has obtained the indictment of former FBI Special Agent John Connolly, which is expected to go to trial early in 2002. Additionally, the United States Attorney's Office in Boston obtained indictments against Messrs. Bulger and Flemmi in 1995 and in 2000, charging them with 19 and 10 murders, respectively. The ongoing work of the Task Force and the United States Attorney's Office is dedicated to investigating and prosecuting corruption by FBI agents and prosecutors relating to the handling of informants, as well as any underlying crimes that may have been committed by those individuals. As these efforts proceed, it will be important to ensure that they are based only on the evidence and the law, free from any political influence or coercion.

We have not objected to the Committee's undertaking its own investigation and we understand that Committee staff have conducted interviews and may have undertaken other investigative steps in Boston and elsewhere. We ask that the Committee provide us with information that it believes may be relevant to potential violations of federal criminal law. We understand the Committee's interest in not deferring its own inquiry while our criminal investigations continue, and we trust that the two can continue independently, as has often happened historically.

The Department looks forward to a continued dialogue with the Committee so we can accommodate your legitimate oversight needs for information in a manner that is consistent with

our law enforcement responsibilities. We would like to resume such a constructive conversation as soon as possible.

Sincerely,

Daniel J. Bryant
Assistant Attorney General

cc: The Honorable Henry Waxman
Ranking Minority Member

Members of Committee on Government Reform

Colborn, Paul P

From: Colborn, Paul P
Sent: Thursday, December 20, 2001 9:29 AM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Cc: Whelan, M Edward III
Subject: Letter to Chairman Horn re presidential records executive order

Brett: Has the letter gone out? If so, could you fax me the signed copy at 305-8524? Thanks.
-- Paul
cc: Ed

RECORDS RELEASED 2018-08-17

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Thursday, October 24, 2002 10:57 AM
To: 'Kavanaugh, Brett'
Subject: DC law

[redacted] (b) (5)

Out of an abundance of caution, I have a call into someone at DOJ who should be able to confirm my reading of D.C. law. But if you need an answer before I hear back from him [redacted] (b) (5)

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Thursday, October 24, 2002 4:55 PM
To: 'Kavanaugh, Brett'
Subject: [redacted] (b) (5)

Here's a thumbnail sketch:

1. [redacted] (b) (5) .

2. I discussed with Roy McLeese [redacted] (b) (5)

Brett_M._Kavanaugh@who.eop.gov

From:	Brett_M._Kavanaugh@who.eop.gov
Sent:	Tuesday, November 12, 2002 8:42 AM
To:	Whelan, M Edward III
Subject:	final text
Attachments:	AYO02_952.pdf; pic09096.pcx

Your opinion should reference the sections in the final text.

---------- Forwarded by Brett M. Kavanaugh/WHO/EOP on 11/12/2002 08:44 AM ----------

Matthew Kirk
11/12/2002 07:06:46 AM

Record Type: Record

To: Brian C. Conklin/WHO/EOP@EOP

cc: Brett M. Kavanaugh/WHO/EOP@EOP, Kristen Silverberg Subject: Per your request:

---------- Forwarded by Matthew Kirk/WHO/EOP on 11/12/2002 07:12 AM ----------

(Embedded
image moved Laura_Ayoud@slc.senate.gov (Laura Ayoud)
to file: 11/11/2002 06:57:08 PM
pic09096.pcx)

Record Type: Record

To: Matthew Kirk/WHO/EOP@EOP

cc:
Subject: Per your request:

Hi Matt:
The attached is the 'final' version of the legislative text, for your review.
The actual conference report will be reprinted without a date at the bottom, but I'll do that once all of the other pieces are finished. I also did another document comparing the Oct. 17 draft (AYO02.921) to this one , so please call if you'd like me to fax over a copy of that.

Laura Ayoud
(202-224-6461)

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Terrorism Risk Insurance Act of 2002".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

TITLE I—TERRORISM INSURANCE PROGRAM

SEC. 101. CONGRESSIONAL FINDINGS AND PURPOSE.

(a) FINDINGS.—The Congress finds that—

(1) the ability of businesses and individuals to obtain property and casualty insurance at reasonable and predictable prices, in order to spread the risk of both routine and catastrophic loss, is critical to economic growth, urban development, and the construction and maintenance of public and private housing, as well as to the promotion of United States exports

and foreign trade in an increasingly interconnected world;

(2) property and casualty insurance firms are important financial institutions, the products of which allow mutualization of risk and the efficient use of financial resources and enhance the ability of the economy to maintain stability, while responding to a variety of economic, political, environmental, and other risks with a minimum of disruption;

(3) the ability of the insurance industry to cover the unprecedented financial risks presented by potential acts of terrorism in the United States can be a major factor in the recovery from terrorist attacks, while maintaining the stability of the economy;

(4) widespread financial market uncertainties have arisen following the terrorist attacks of September 11, 2001, including the absence of information from which financial institutions can make statistically valid estimates of the probability and cost of future terrorist events, and therefore the size, funding, and allocation of the risk of loss caused by such acts of terrorism;

(5) a decision by property and casualty insurers to deal with such uncertainties, either by termi-

nating property and casualty coverage for losses arising from terrorist events, or by radically escalating premium coverage to compensate for risks of loss that are not readily predictable, could seriously hamper ongoing and planned construction, property acquisition, and other business projects, generate a dramatic increase in rents, and otherwise suppress economic activity; and

(6) the United States Government should provide temporary financial compensation to insured parties, contributing to the stabilization of the United States economy in a time of national crisis, while the financial services industry develops the systems, mechanisms, products, and programs necessary to create a viable financial services market for private terrorism risk insurance.

(b) PURPOSE.—The purpose of this title is to establish a temporary Federal program that provides for a transparent system of shared public and private compensation for insured losses resulting from acts of terrorism, in order to—

(1) protect consumers by addressing market disruptions and ensure the continued widespread availability and affordability of property and casualty insurance for terrorism risk; and

(2) allow for a transitional period for the private markets to stabilize, resume pricing of such insurance, and build capacity to absorb any future losses, while preserving State insurance regulation and consumer protections.

SEC. 102. DEFINITIONS.

In this title, the following definitions shall apply:

(1) ACT OF TERRORISM.—

(A) CERTIFICATION.—The term "act of terrorism" means any act that is certified by the Secretary, in concurrence with the Secretary of State, and the Attorney General of the United States—

(i) to be an act of terrorism;

(ii) to be a violent act or an act that is dangerous to—

(I) human life;

(II) property; or

(III) infrastructure;

(iii) to have resulted in damage within the United States, or outside of the United States in the case of—

(I) an air carrier or vessel described in paragraph (5)(B); or

(II) the premises of a United States mission; and

(iv) to have been committed by an individual or individuals acting on behalf of any foreign person or foreign interest, as part of an effort to coerce the civilian population of the United States or to influence the policy or affect the conduct of the United States Government by coercion.

(B) LIMITATION.—No act shall be certified by the Secretary as an act of terrorism if—

(i) the act is committed as part of the course of a war declared by the Congress, except that this clause shall not apply with respect to any coverage for workers' compensation; or

(ii) property and casualty insurance losses resulting from the act, in the aggregate, do not exceed $5,000,000.

(C) DETERMINATIONS FINAL.—Any certification of, or determination not to certify, an act as an act of terrorism under this paragraph shall be final, and shall not be subject to judicial review.

(D) NONDELEGATION.—The Secretary may not delegate or designate to any other officer, employee, or person, any determination under this paragraph of whether, during the effective period of the Program, an act of terrorism has occurred.

(2) AFFILIATE.—The term ''affiliate'' means, with respect to an insurer, any entity that controls, is controlled by, or is under common control with the insurer.

(3) CONTROL.—An entity has ''control'' over another entity, if—

(A) the entity directly or indirectly or acting through 1 or more other persons owns, controls, or has power to vote 25 percent or more of any class of voting securities of the other entity;

(B) the entity controls in any manner the election of a majority of the directors or trustees of the other entity; or

(C) the Secretary determines, after notice and opportunity for hearing, that the entity directly or indirectly exercises a controlling influence over the management or policies of the other entity.

(4) DIRECT EARNED PREMIUM.—The term ''direct earned premium'' means a direct earned premium for property and casualty insurance issued by any insurer for insurance against losses occurring at the locations described in subparagraphs (A) and (B) of paragraph (5).

(5) INSURED LOSS.—The term ''insured loss'' means any loss resulting from an act of terrorism (including an act of war, in the case of workers' compensation) that is covered by primary or excess property and casualty insurance issued by an insurer if such loss—

(A) occurs within the United States; or

(B) occurs to an air carrier (as defined in section 40102 of title 49, United States Code), to a United States flag vessel (or a vessel based principally in the United States, on which United States income tax is paid and whose insurance coverage is subject to regulation in the United States), regardless of where the loss occurs, or at the premises of any United States mission.

(6) INSURER.—The term ''insurer'' means any entity, including any affiliate thereof—

(A) that is—

(i) licensed or admitted to engage in the business of providing primary or excess insurance in any State;

(ii) not licensed or admitted as described in clause (i), if it is an eligible surplus line carrier listed on the Quarterly Listing of Alien Insurers of the NAIC, or any successor thereto;

(iii) approved for the purpose of offering property and casualty insurance by a Federal agency in connection with maritime, energy, or aviation activity;

(iv) a State residual market insurance entity or State workers' compensation fund; or

(v) any other entity described in section 103(f), to the extent provided in the rules of the Secretary issued under section 103(f);

(B) that receives direct earned premiums for any type of commercial property and casualty insurance coverage, other than in the case of entities described in sections 103(d) and 103(f); and

(C) that meets any other criteria that the Secretary may reasonably prescribe.

(7) INSURER DEDUCTIBLE.—The term ''insurer deductible'' means—

(A) for the Transition Period, the value of an insurer's direct earned premiums over the calendar year immediately preceding the date of enactment of this Act, multiplied by 1 percent;

(B) for Program Year 1, the value of an insurer's direct earned premiums over the calendar year immediately preceding Program Year 1, multiplied by 7 percent;

(C) for Program Year 2, the value of an insurer's direct earned premiums over the calendar year immediately preceding Program Year 2, multiplied by 10 percent;

(D) for Program Year 3, the value of an insurer's direct earned premiums over the calendar year immediately preceding Program Year 3, multiplied by 15 percent; and

(E) notwithstanding subparagraphs (A) through (D), for the Transition Period, Program Year 1, Program Year 2, or Program Year 3, if an insurer has not had a full year of operations during the calendar year imme-

diately preceding such Period or Program Year, such portion of the direct earned premiums of the insurer as the Secretary determines appropriate, subject to appropriate methodologies established by the Secretary for measuring such direct earned premiums.

(8) NAIC.—The term "NAIC" means the National Association of Insurance Commissioners.

(9) PERSON.—The term "person" means any individual, business or nonprofit entity (including those organized in the form of a partnership, limited liability company, corporation, or association), trust or estate, or a State or political subdivision of a State or other governmental unit.

(10) PROGRAM.—The term "Program" means the Terrorism Insurance Program established by this title.

(11) PROGRAM YEARS.—

(A) TRANSITION PERIOD.—The term "Transition Period" means the period beginning on the date of enactment of this Act and ending on December 31, 2002.

(B) PROGRAM YEAR 1.—The term "Program Year 1" means the period beginning on

January 1, 2003 and ending on December 31, 2003.

(C) PROGRAM YEAR 2.—The term "Program Year 2" means the period beginning on January 1, 2004 and ending on December 31, 2004.

(D) PROGRAM YEAR 3.—The term "Program Year 3" means the period beginning on January 1, 2005 and ending on December 31, 2005.

(12) PROPERTY AND CASUALTY INSURANCE.—The term "property and casualty insurance"—

(A) means commercial lines of property and casualty insurance, including excess insurance, workers' compensation insurance, and surety insurance; and

(B) does not include—

(i) Federal crop insurance issued or reinsured under the Federal Crop Insurance Act (7 U.S.C. 1501 et seq.), or any other type of crop or livestock insurance that is privately issued or reinsured;

(ii) private mortgage insurance (as that term is defined in section 2 of the

Homeowners Protection Act of 1998 (12 U.S.C. 4901)) or title insurance;

(iii) financial guaranty insurance issued by monoline financial guaranty insurance corporations;

(iv) insurance for medical malpractice;

(v) health or life insurance, including group life insurance;

(vi) flood insurance provided under the National Flood Insurance Act of 1968 (42 U.S.C. 4001 et seq.); or

(vii) reinsurance or retrocessional reinsurance.

(13) SECRETARY.—The term "Secretary" means the Secretary of the Treasury.

(14) STATE.—The term "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, each of the United States Virgin Islands, and any territory or possession of the United States.

(15) UNITED STATES.—The term "United States" means the several States, and includes the territorial sea and the continental shelf of the

United States, as those terms are defined in the Violent Crime Control and Law Enforcement Act of 1994 (18 U.S.C. 2280, 2281).

(16) RULE OF CONSTRUCTION FOR DATES.—With respect to any reference to a date in this title, such day shall be construed—

(A) to begin at 12:01 a.m. on that date; and

(B) to end at midnight on that date.

SEC. 103. TERRORISM INSURANCE PROGRAM.

(a) ESTABLISHMENT OF PROGRAM.—

(1) IN GENERAL.—There is established in the Department of the Treasury the Terrorism Insurance Program.

(2) AUTHORITY OF THE SECRETARY.—Notwithstanding any other provision of State or Federal law, the Secretary shall administer the Program, and shall pay the Federal share of compensation for insured losses in accordance with subsection (e).

(3) MANDATORY PARTICIPATION.—Each entity that meets the definition of an insurer under this title shall participate in the Program.

(b) CONDITIONS FOR FEDERAL PAYMENTS.—No payment may be made by the Secretary under this section

with respect to an insured loss that is covered by an insurer, unless—

(1) the person that suffers the insured loss, or a person acting on behalf of that person, files a claim with the insurer;

(2) the insurer provides clear and conspicuous disclosure to the policyholder of the premium charged for insured losses covered by the Program and the Federal share of compensation for insured losses under the Program—

(A) in the case of any policy that is issued before the date of enactment of this Act, not later than 90 days after that date of enactment;

(B) in the case of any policy that is issued within 90 days of the date of enactment of this Act, at the time of offer, purchase, and renewal of the policy; and

(C) in the case of any policy that is issued more than 90 days after the date of enactment of this Act, on a separate line item in the policy, at the time of offer, purchase, and renewal of the policy;

(3) the insurer processes the claim for the insured loss in accordance with appropriate business

practices, and any reasonable procedures that the Secretary may prescribe; and

(4) the insurer submits to the Secretary, in accordance with such reasonable procedures as the Secretary may establish—

(A) a claim for payment of the Federal share of compensation for insured losses under the Program;

(B) written certification—

(i) of the underlying claim; and

(ii) of all payments made for insured losses; and

(C) certification of its compliance with the provisions of this subsection.

(c) MANDATORY AVAILABILITY.—

(1) INITIAL PROGRAM PERIODS.—During the period beginning on the first day of the Transition Period and ending on the last day of Program Year 2, each entity that meets the definition of an insurer under section 102—

(A) shall make available, in all of its property and casualty insurance policies, coverage for insured losses; and

(B) shall make available property and casualty insurance coverage for insured losses that

does not differ materially from the terms, amounts, and other coverage limitations applicable to losses arising from events other than acts of terrorism.

(2) PROGRAM YEAR 3.—Not later than September 1, 2004, the Secretary shall, based on the factors referred to in section 108(d)(1), determine whether the provisions of subparagraphs (A) and (B) of paragraph (1) should be extended through Program Year 3.

(d) STATE RESIDUAL MARKET INSURANCE ENTITIES.—

(1) IN GENERAL.—The Secretary shall issue regulations, as soon as practicable after the date of enactment of this Act, that apply the provisions of this title to State residual market insurance entities and State workers' compensation funds.

(2) TREATMENT OF CERTAIN ENTITIES.—For purposes of the regulations issued pursuant to paragraph (1)—

(A) a State residual market insurance entity that does not share its profits and losses with private sector insurers shall be treated as a separate insurer; and

(B) a State residual market insurance entity that shares its profits and losses with private sector insurers shall not be treated as a separate insurer, and shall report to each private sector insurance participant its share of the insured losses of the entity, which shall be included in each private sector insurer's insured losses.

(3) TREATMENT OF PARTICIPATION IN CERTAIN ENTITIES.—Any insurer that participates in sharing profits and losses of a State residual market insurance entity shall include in its calculations of premiums any premiums distributed to the insurer by the State residual market insurance entity.

(e) INSURED LOSS SHARED COMPENSATION.—

(1) FEDERAL SHARE.—

(A) IN GENERAL.—The Federal share of compensation under the Program to be paid by the Secretary for insured losses of an insurer during the Transition Period and each Program Year shall be equal to 90 percent of that portion of the amount of such insured losses that exceeds the applicable insurer deductible required to be paid during such Transition Period or such Program Year.

(B) PROHIBITION ON DUPLICATIVE COMPENSATION.—The Federal share of compensation for insured losses under the Program shall be reduced by the amount of compensation provided by the Federal Government to any person under any other Federal program for those insured losses.

(2) CAP ON ANNUAL LIABILITY.—

(A) IN GENERAL.—Notwithstanding paragraph (1) or any other provision of Federal or State law, if the aggregate insured losses exceed $100,000,000,000, during the period beginning on the first day of the Transition Period and ending on the last day of Program Year 1, or during Program Year 2 or Program Year 3 (until such time as the Congress may act otherwise with respect to such losses)—

(i) the Secretary shall not make any payment under this title for any portion of the amount of such losses that exceeds $100,000,000,000; and

(ii) no insurer that has met its insurer deductible shall be liable for the payment of any portion of that amount that exceeds $100,000,000,000.

(B) INSURER SHARE.—For purposes of subparagraph (A), the Secretary shall determine the pro rata share of insured losses to be paid by each insurer that incurs insured losses under the Program.

(3) NOTICE TO CONGRESS.—The Secretary shall notify the Congress if estimated or actual aggregate insured losses exceed $100,000,000,000 during the period beginning on the first day of the Transition Period and ending on the last day of Program Year 1, or during Program Year 2 or Program Year 3, and the Congress shall determine the procedures for and the source of any payments for such excess insured losses.

(4) FINAL NETTING.—The Secretary shall have sole discretion to determine the time at which claims relating to any insured loss or act of terrorism shall become final.

(5) DETERMINATIONS FINAL.—Any determination of the Secretary under this subsection shall be final, unless expressly provided, and shall not be subject to judicial review.

(6) INSURANCE MARKETPLACE AGGREGATE RETENTION AMOUNT.—For purposes of paragraph (7),

the insurance marketplace aggregate retention amount shall be—

(A) for the period beginning on the first day of the Transition Period and ending on the last day of Program Year 1, the lesser of—

(i) $10,000,000,000; and

(ii) the aggregate amount, for all insurers, of insured losses during such period;

(B) for Program Year 2, the lesser of—

(i) $12,500,000,000; and

(ii) the aggregate amount, for all insurers, of insured losses during such Program Year; and

(C) for Program Year 3, the lesser of—

(i) $15,000,000,000; and

(ii) the aggregate amount, for all insurers, of insured losses during such Program Year.

(7) RECOUPMENT OF FEDERAL SHARE.—

(A) MANDATORY RECOUPMENT AMOUNT.—For purposes of this paragraph, the mandatory recoupment amount for each of the periods referred to in subparagraphs (A), (B), and (C) of paragraph (6) shall be the difference between—

(i) the insurance marketplace aggregate retention amount under paragraph (6) for such period; and

(ii) the aggregate amount, for all insurers, of insured losses during such period that are not compensated by the Federal Government because such losses—

(I) are within the insurer deductible for the insurer subject to the losses; or

(II) are within the portion of losses of the insurer that exceed the insurer deductible, but are not compensated pursuant to paragraph (1).

(B) NO MANDATORY RECOUPMENT IF UNCOMPENSATED LOSSES EXCEED INSURANCE MARKETPLACE RETENTION.—Notwithstanding subparagraph (A), if the aggregate amount of uncompensated insured losses referred to in clause (ii) of such subparagraph for any period referred to in subparagraph (A), (B), or (C) of paragraph (6) is greater than the insurance marketplace aggregate retention amount under paragraph (6) for such period, the mandatory recoupment amount shall be $0.

(C) MANDATORY ESTABLISHMENT OF SURCHARGES TO RECOUP MANDATORY RECOUPMENT AMOUNT.—The Secretary shall collect, for repayment of the Federal financial assistance provided in connection with all acts of terrorism (or acts of war, in the case of workers compensation) occurring during any of the periods referred to in subparagraph (A), (B), or (C) of paragraph (6), terrorism loss risk-spreading premiums in an amount equal to any mandatory recoupment amount for such period.

(D) DISCRETIONARY RECOUPMENT OF REMAINDER OF FINANCIAL ASSISTANCE.—To the extent that the amount of Federal financial assistance provided exceeds any mandatory recoupment amount, the Secretary may recoup, through terrorism loss risk-spreading premiums, such additional amounts that the Secretary believes can be recouped, based on—

(i) the ultimate costs to taxpayers of no additional recoupment;

(ii) the economic conditions in the commercial marketplace, including the capitalization, profitability, and investment re-

turns of the insurance industry and the current cycle of the insurance markets;

(iii) the affordability of commercial insurance for small- and medium-sized businesses; and

(iv) such other factors as the Secretary considers appropriate.

(8) POLICY SURCHARGE FOR TERRORISM LOSS RISK-SPREADING PREMIUMS.—

(A) POLICYHOLDER PREMIUM.—Any amount established by the Secretary as a terrorism loss risk-spreading premium shall—

(i) be imposed as a policyholder premium surcharge on property and casualty insurance policies in force after the date of such establishment;

(ii) begin with such period of coverage during the year as the Secretary determines appropriate; and

(iii) be based on a percentage of the premium amount charged for property and casualty insurance coverage under the policy.

(B) COLLECTION.—The Secretary shall provide for insurers to collect terrorism loss

risk-spreading premiums and remit such amounts collected to the Secretary.

(C) PERCENTAGE LIMITATION.—A terrorism loss risk-spreading premium (including any additional amount included in such premium on a discretionary basis pursuant to paragraph (7)(D)) may not exceed, on an annual basis, the amount equal to 3 percent of the premium charged for property and casualty insurance coverage under the policy.

(D) ADJUSTMENT FOR URBAN AND SMALLER COMMERCIAL AND RURAL AREAS AND DIFFERENT LINES OF INSURANCE.—

(i) ADJUSTMENTS.—In determining the method and manner of imposing terrorism loss risk-spreading premiums, including the amount of such premiums, the Secretary shall take into consideration—

(I) the economic impact on commercial centers of urban areas, including the effect on commercial rents and commercial insurance premiums, particularly rents and premiums charged to small businesses, and the avail-

ability of lease space and commercial insurance within urban areas;

(II) the risk factors related to rural areas and smaller commercial centers, including the potential exposure to loss and the likely magnitude of such loss, as well as any resulting cross-subsidization that might result; and

(III) the various exposures to terrorism risk for different lines of insurance.

(ii) RECOUPMENT OF ADJUSTMENTS.—Any mandatory recoupment amounts not collected by the Secretary because of adjustments under this subparagraph shall be recouped through additional terrorism loss risk-spreading premiums.

(E) TIMING OF PREMIUMS.—The Secretary may adjust the timing of terrorism loss risk-spreading premiums to provide for equivalent application of the provisions of this title to policies that are not based on a calendar year, or to apply such provisions on a daily, monthly, or quarterly basis, as appropriate.

(f) CAPTIVE INSURERS AND OTHER SELF-INSURANCE ARRANGEMENTS.—The Secretary may, in consultation with the NAIC or the appropriate State regulatory authority, apply the provisions of this title, as appropriate, to other classes or types of captive insurers and other self-insurance arrangements by municipalities and other entities (such as workers' compensation self-insurance programs and State workers' compensation reinsurance pools), but only if such application is determined before the occurrence of an act of terrorism in which such an entity incurs an insured loss and all of the provisions of this title are applied comparably to such entities.

(g) REINSURANCE TO COVER EXPOSURE.—

(1) OBTAINING COVERAGE.—This title may not be construed to limit or prevent insurers from obtaining reinsurance coverage for insurer deductibles or insured losses retained by insurers pursuant to this section, nor shall the obtaining of such coverage affect the calculation of such deductibles or retentions.

(2) LIMITATION ON FINANCIAL ASSISTANCE.—The amount of financial assistance provided pursuant to this section shall not be reduced by reinsurance paid or payable to an insurer from other sources, except that recoveries from such other

sources, taken together with financial assistance for the Transition Period or a Program Year provided pursuant to this section, may not exceed the aggregate amount of the insurer's insured losses for such period. If such recoveries and financial assistance for the Transition Period or a Program Year exceed such aggregate amount of insured losses for that period and there is no agreement between the insurer and any reinsurer to the contrary, an amount in excess of such aggregate insured losses shall be returned to the Secretary.

(h) GROUP LIFE INSURANCE STUDY.—

(1) STUDY.—The Secretary shall study, on an expedited basis, whether adequate and affordable catastrophe reinsurance for acts of terrorism is available to life insurers in the United States that issue group life insurance, and the extent to which the threat of terrorism is reducing the availability of group life insurance coverage for consumers in the United States.

(2) CONDITIONAL COVERAGE.—To the extent that the Secretary determines that such coverage is not or will not be reasonably available to both such insurers and consumers, the Secretary shall, in consultation with the NAIC—

(A) apply the provisions of this title, as appropriate, to providers of group life insurance; and

(B) provide such restrictions, limitations, or conditions with respect to any financial assistance provided that the Secretary deems appropriate, based on the study under paragraph (1).

(i) STUDY AND REPORT.—

(1) STUDY.—The Secretary, after consultation with the NAIC, representatives of the insurance industry, and other experts in the insurance field, shall conduct a study of the potential effects of acts of terrorism on the availability of life insurance and other lines of insurance coverage, including personal lines.

(2) REPORT.—Not later than 9 months after the date of enactment of this Act, the Secretary shall submit a report to the Congress on the results of the study conducted under paragraph (1).

SEC. 104. GENERAL AUTHORITY AND ADMINISTRATION OF CLAIMS.

(a) GENERAL AUTHORITY.—The Secretary shall have the powers and authorities necessary to carry out the Program, including authority—

(1) to investigate and audit all claims under the Program; and

(2) to prescribe regulations and procedures to effectively administer and implement the Program, and to ensure that all insurers and self-insured entities that participate in the Program are treated comparably under the Program.

(b) INTERIM RULES AND PROCEDURES.—The Secretary may issue interim final rules or procedures specifying the manner in which—

(1) insurers may file and certify claims under the Program;

(2) the Federal share of compensation for insured losses will be paid under the Program, including payments based on estimates of or actual insured losses;

(3) the Secretary may, at any time, seek repayment from or reimburse any insurer, based on estimates of insured losses under the Program, to effectuate the insured loss sharing provisions in section 103; and

(4) the Secretary will determine any final netting of payments under the Program, including payments owed to the Federal Government from any insurer and any Federal share of compensation for in-

sured losses owed to any insurer, to effectuate the insured loss sharing provisions in section 103.

(c) CONSULTATION.—The Secretary shall consult with the NAIC, as the Secretary determines appropriate, concerning the Program.

(d) CONTRACTS FOR SERVICES.—The Secretary may employ persons or contract for services as may be necessary to implement the Program.

(e) CIVIL PENALTIES.—

(1) IN GENERAL.—The Secretary may assess a civil monetary penalty in an amount not exceeding the amount under paragraph (2) against any insurer that the Secretary determines, on the record after opportunity for a hearing—

(A) has failed to charge, collect, or remit terrorism loss risk-spreading premiums under section 103(e) in accordance with the requirements of, or regulations issued under, this title;

(B) has intentionally provided to the Secretary erroneous information regarding premium or loss amounts;

(C) submits to the Secretary fraudulent claims under the Program for insured losses;

(D) has failed to provide the disclosures required under subsection (f); or

(E) has otherwise failed to comply with the provisions of, or the regulations issued under, this title.

(2) AMOUNT.—The amount under this paragraph is the greater of $1,000,000 and, in the case of any failure to pay, charge, collect, or remit amounts in accordance with this title or the regulations issued under this title, such amount in dispute.

(3) RECOVERY OF AMOUNT IN DISPUTE.—A penalty under this subsection for any failure to pay, charge, collect, or remit amounts in accordance with this title or the regulations under this title shall be in addition to any such amounts recovered by the Secretary.

(f) SUBMISSION OF PREMIUM INFORMATION.—

(1) IN GENERAL.—The Secretary shall annually compile information on the terrorism risk insurance premium rates of insurers for the preceding year.

(2) ACCESS TO INFORMATION.—To the extent that such information is not otherwise available to the Secretary, the Secretary may require each insurer to submit to the NAIC terrorism risk insurance premium rates, as necessary to carry out paragraph (1), and the NAIC shall make such information available to the Secretary.

(3) AVAILABILITY TO CONGRESS.—The Secretary shall make information compiled under this subsection available to the Congress, upon request.

(g) FUNDING.—

(1) FEDERAL PAYMENTS.—There are hereby appropriated, out of funds in the Treasury not otherwise appropriated, such sums as may be necessary to pay the Federal share of compensation for insured losses under the Program.

(2) ADMINISTRATIVE EXPENSES.—There are hereby appropriated, out of funds in the Treasury not otherwise appropriated, such sums as may be necessary to pay reasonable costs of administering the Program.

SEC. 105. PREEMPTION AND NULLIFICATION OF PRE-EXISTING TERRORISM EXCLUSIONS.

(a) GENERAL NULLIFICATION.—Any terrorism exclusion in a contract for property and casualty insurance that is in force on the date of enactment of this Act shall be void to the extent that it excludes losses that would otherwise be insured losses.

(b) GENERAL PREEMPTION.—Any State approval of any terrorism exclusion from a contract for property and casualty insurance that is in force on the date of enact-

ment of this Act, shall be void to the extent that it excludes losses that would otherwise be insured losses.

(c) REINSTATEMENT OF TERRORISM EXCLUSIONS.—Notwithstanding subsections (a) and (b) or any provision of State law, an insurer may reinstate a preexisting provision in a contract for property and casualty insurance that is in force on the date of enactment of this Act and that excludes coverage for an act of terrorism only—

(1) if the insurer has received a written statement from the insured that affirmatively authorizes such reinstatement; or

(2) if—

(A) the insured fails to pay any increased premium charged by the insurer for providing such terrorism coverage; and

(B) the insurer provided notice, at least 30 days before any such reinstatement, of—

(i) the increased premium for such terrorism coverage; and

(ii) the rights of the insured with respect to such coverage, including any date upon which the exclusion would be reinstated if no payment is received.

SEC. 106. PRESERVATION PROVISIONS.

(a) STATE LAW.—Nothing in this title shall affect the jurisdiction or regulatory authority of the insurance commissioner (or any agency or office performing like functions) of any State over any insurer or other person—

(1) except as specifically provided in this title; and

(2) except that—

(A) the definition of the term ''act of terrorism'' in section 102 shall be the exclusive definition of that term for purposes of compensation for insured losses under this title, and shall preempt any provision of State law that is inconsistent with that definition, to the extent that such provision of law would otherwise apply to any type of insurance covered by this title;

(B) during the period beginning on the date of enactment of this Act and ending on December 31, 2003, rates and forms for terrorism risk insurance covered by this title and filed with any State shall not be subject to prior approval or a waiting period under any law of a State that would otherwise be applicable, except that nothing in this title affects the ability of any State to invalidate a rate as excessive,

inadequate, or unfairly discriminatory, and, with respect to forms, where a State has prior approval authority, it shall apply to allow subsequent review of such forms; and

(C) during the period beginning on the date of enactment of this Act and for so long as the Program is in effect, as provided in section 108, including authority in subsection 108(b), books and records of any insurer that are relevant to the Program shall be provided, or caused to be provided, to the Secretary, upon request by the Secretary, notwithstanding any provision of the laws of any State prohibiting or limiting such access.

(b) EXISTING REINSURANCE AGREEMENTS.—Nothing in this title shall be construed to alter, amend, or expand the terms of coverage under any reinsurance agreement in effect on the date of enactment of this Act. The terms and conditions of such an agreement shall be determined by the language of that agreement.

SEC. 107. LITIGATION MANAGEMENT.

(a) PROCEDURES AND DAMAGES.—

(1) IN GENERAL.—If the Secretary makes a determination pursuant to section 102 that an act of terrorism has occurred, there shall exist a Federal

cause of action for property damage, personal injury, or death arising out of or resulting from such act of terrorism, which shall be the exclusive cause of action and remedy for claims for property damage, personal injury, or death arising out of or relating to such act of terrorism, except as provided in subsection (b).

(2) PREEMPTION OF STATE ACTIONS.—All State causes of action of any kind for property damage, personal injury, or death arising out of or resulting from an act of terrorism that are otherwise available under State law are hereby preempted, except as provided in subsection (b).

(3) SUBSTANTIVE LAW.—The substantive law for decision in any such action described in paragraph (1) shall be derived from the law, including choice of law principles, of the State in which such act of terrorism occurred, unless such law is otherwise inconsistent with or preempted by Federal law.

(4) JURISDICTION.—For each determination described in paragraph (1), not later than 90 days after the occurrence of an act of terrorism, the Judicial Panel on Multidistrict Litigation shall designate 1 district court or, if necessary, multiple district courts of the United States that shall have original

and exclusive jurisdiction over all actions for any claim (including any claim for loss of property, personal injury, or death) relating to or arising out of an act of terrorism subject to this section. The Judicial Panel on Multidistrict Litigation shall select and assign the district court or courts based on the convenience of the parties and the just and efficient conduct of the proceedings. For purposes of personal jurisdiction, the district court or courts designated by the Judicial Panel on Multidistrict Litigation shall be deemed to sit in all judicial districts in the United States.

(5) PUNITIVE DAMAGES.—Any amounts awarded in an action under paragraph (1) that are attributable to punitive damages shall not count as insured losses for purposes of this title.

(b) EXCLUSION.—Nothing in this section shall in any way limit the liability of any government, an organization, or person who knowingly participates in, conspires to commit, aids and abets, or commits any act of terrorism with respect to which a determination described in subsection (a)(1) was made.

(c) RIGHT OF SUBROGATION.—The United States shall have the right of subrogation with respect to any

payment or claim paid by the United States under this title.

(d) RELATIONSHIP TO OTHER LAW.—Nothing in this section shall be construed to affect—

(1) any party's contractual right to arbitrate a dispute; or

(2) any provision of the Air Transportation Safety and System Stabilization Act (Public Law 107–42; 49 U.S.C. 40101 note.).

(e) EFFECTIVE PERIOD.—This section shall apply only to actions described in subsection (a)(1) that arise out of or result from acts of terrorism that occur or occurred during the effective period of the Program.

SEC. 108. TERMINATION OF PROGRAM.

(a) TERMINATION OF PROGRAM.—The Program shall terminate on December 31, 2005.

(b) CONTINUING AUTHORITY TO PAY OR ADJUST COMPENSATION.—Following the termination of the Program, the Secretary may take such actions as may be necessary to ensure payment, recoupment, reimbursement, or adjustment of compensation for insured losses arising out of any act of terrorism occurring during the period in which the Program was in effect under this title, in accordance with the provisions of section 103 and regulations promulgated thereunder.

(c) REPEAL; SAVINGS CLAUSE.—This title is repealed on the final termination date of the Program under subsection (a), except that such repeal shall not be construed—

(1) to prevent the Secretary from taking, or causing to be taken, such actions under subsection (b) of this section, paragraph (4), (5), (6), (7), or (8) of section 103(e), or subsection (a)(1), (c), (d), or (e) of section 104, as in effect on the day before the date of such repeal, or applicable regulations promulgated thereunder, during any period in which the authority of the Secretary under subsection (b) of this section is in effect; or

(2) to prevent the availability of funding under section 104(g) during any period in which the authority of the Secretary under subsection (b) of this section is in effect.

(d) STUDY AND REPORT ON THE PROGRAM.—

(1) STUDY.—The Secretary, in consultation with the NAIC, representatives of the insurance industry and of policy holders, other experts in the insurance field, and other experts as needed, shall assess the effectiveness of the Program and the likely capacity of the property and casualty insurance industry to offer insurance for terrorism risk after ter-

mination of the Program, and the availability and affordability of such insurance for various policyholders, including railroads, trucking, and public transit.

(2) REPORT.—The Secretary shall submit a report to the Congress on the results of the study conducted under paragraph (1) not later than June 30, 2005.

TITLE II—TREATMENT OF TERRORIST ASSETS

SEC. 201. SATISFACTION OF JUDGMENTS FROM BLOCKED ASSETS OF TERRORISTS, TERRORIST ORGANIZATIONS, AND STATE SPONSORS OF TERRORISM.

(a) IN GENERAL.—Notwithstanding any other provision of law, and except as provided in subsection (b), in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605(a)(7) of title 28, United States Code, the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to

the extent of any compensatory damages for which such terrorist party has been adjudged liable.

(b) PRESIDENTIAL WAIVER.—

(1) IN GENERAL.—Subject to paragraph (2), upon determining on an asset-by-asset basis that a waiver is necessary in the national security interest, the President may waive the requirements of subsection (a) in connection with (and prior to the enforcement of) any judicial order directing attachment in aid of execution or execution against any property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations.

(2) EXCEPTION.—A waiver under this subsection shall not apply to—

(A) property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations that has been used by the United States for any nondiplomatic purpose (including use as rental property), or the proceeds of such use; or

(B) the proceeds of any sale or transfer for value to a third party of any asset subject to the Vienna Convention on Diplomatic Relations

or the Vienna Convention on Consular Relations.

(c) SPECIAL RULE FOR CASES AGAINST IRAN.—Section 2002 of the Victims of Trafficking and Violence Protection Act of 2000 (Public Law 106–386; 114 Stat. 1542), as amended by section 686 of Public Law 107–228, is further amended—

(1) in subsection (a)(2)(A)(ii), by striking "July 27, 2000, or January 16, 2002" and inserting "July 27, 2000, any other date before October 28, 2000, or January 16, 2002";

(2) in subsection (b)(2)(B), by inserting after "the date of enactment of this Act" the following: "(less amounts therein as to which the United States has an interest in subrogation pursuant to subsection (c) arising prior to the date of entry of the judgment or judgments to be satisfied in whole or in part hereunder)";

(3) by redesignating subsections (d), (e), and (f) as subsections (e), (f), and (g), respectively; and

(4) by inserting after subsection (c) the following new subsection (d):

"(d) DISTRIBUTION OF ACCOUNT BALANCES AND PROCEEDS INADEQUATE TO SATISFY FULL AMOUNT OF COMPENSATORY AWARDS AGAINST IRAN.—

"(1) PRIOR JUDGMENTS.—

"(A) IN GENERAL.—In the event that the Secretary determines that 90 percent of the amounts available to be paid under subsection (b)(2) are inadequate to pay the total amount of compensatory damages awarded in judgments issued as of the date of the enactment of this subsection in cases identified in subsection (a)(2)(A) with respect to Iran, the Secretary shall, not later than 60 days after such date, make payment from such amounts available to be paid under subsection (b)(2) to each party to which such a judgment has been issued in an amount equal to a share, calculated under subparagraph (B), of 90 percent of the amounts available to be paid under subsection (b)(2) that have not been subrogated to the United States under this Act as of the date of enactment of this subsection.

"(B) CALCULATION OF PAYMENTS.—The share that is payable to a person under subparagraph (A), including any person issued a final judgment as of the date of enactment of this subsection in a suit filed on a date added by the amendment made by section 686 of Pub-

lic Law 107–228, shall be equal to the proportion that the amount of unpaid compensatory damages awarded in a final judgment issued to that person bears to the total amount of all unpaid compensatory damages awarded to all persons to whom such judgments have been issued as of the date of enactment of this subsection in cases identified in subsection (a)(2)(A) with respect to Iran.

"(2) SUBSEQUENT JUDGMENT.—

"(A) IN GENERAL.—The Secretary shall pay to any person awarded a final judgment after the date of enactment of this subsection, in the case filed on January 16, 2002, and identified in subsection (a)(2)(A) with respect to Iran, an amount equal to a share, calculated under subparagraph (B), of the balance of the amounts available to be paid under subsection (b)(2) that remain following the disbursement of all payments as provided by paragraph (1). The Secretary shall make such payment not later than 30 days after such judgment is awarded.

"(B) CALCULATION OF PAYMENTS.—To the extent that funds are available, the amount

paid under subparagraph (A) to such person shall be the amount the person would have been paid under paragraph (1) if the person had been awarded the judgment prior to the date of enactment of this subsection.

"(3) ADDITIONAL PAYMENTS.—

"(A) IN GENERAL.—Not later than 30 days after the disbursement of all payments under paragraphs (1) and (2), the Secretary shall make an additional payment to each person who received a payment under paragraph (1) or (2) in an amount equal to a share, calculated under subparagraph (B), of the balance of the amounts available to be paid under subsection (b)(2) that remain following the disbursement of all payments as provided by paragraphs (1) and (2).

"(B) CALCULATION OF PAYMENTS.—The share payable under subparagraph (A) to each such person shall be equal to the proportion that the amount of compensatory damages awarded that person bears to the total amount of all compensatory damages awarded to all persons who received a payment under paragraph (1) or (2).

"(4) STATUTORY CONSTRUCTION.—Nothing in this subsection shall bar, or require delay in, enforcement of any judgment to which this subsection applies under any procedure or against assets otherwise available under this section or under any other provision of law.

"(5) CERTAIN RIGHTS AND CLAIMS NOT RELINQUISHED.—Any person receiving less than the full amount of compensatory damages awarded to that party in a judgment to which this subsection applies shall not be required to make the election set forth in subsection (a)(2)(B) or, with respect to subsection (a)(2)(D), the election relating to relinquishment of any right to execute or attach property that is subject to section 1610(f)(1)(A) of title 28, United States Code, except that such person shall be required to relinquish rights set forth—

"(A) in subsection (a)(2)(C); and

"(B) in subsection (a)(2)(D) with respect to enforcement against property that is at issue in claims against the United States before an international tribunal or that is the subject of awards by such tribunal.

"(6) GUIDELINES FOR ESTABLISHING CLAIMS OF A RIGHT TO PAYMENT.—The Secretary may pro-

mulgate reasonable guidelines through which any person claiming a right to payment under this section may inform the Secretary of the basis for such claim, including by submitting a certified copy of the final judgment under which such right is claimed and by providing commercially reasonable payment instructions. The Secretary shall take all reasonable steps necessary to ensure, to the maximum extent practicable, that such guidelines shall not operate to delay or interfere with payment under this section.''.

(d) DEFINITIONS.—In this section, the following definitions shall apply:

(1) ACT OF TERRORISM.—The term ''act of terrorism'' means—

(A) any act or event certified under section 102(1); or

(B) to the extent not covered by subparagraph (A), any terrorist activity (as defined in section 212(a)(3)(B)(iii) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(iii))).

(2) BLOCKED ASSET.—The term ''blocked asset'' means—

(A) any asset seized or frozen by the United States under section 5(b) of the Trading

With the Enemy Act (50 U.S.C. App. 5(b)) or under sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701; 1702); and

(B) does not include property that—

(i) is subject to a license issued by the United States Government for final payment, transfer, or disposition by or to a person subject to the jurisdiction of the United States in connection with a transaction for which the issuance of such license has been specifically required by statute other than the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) or the United Nations Participation Act of 1945 (22 U.S.C. 287 et seq.); or

(ii) in the case of property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, or that enjoys equivalent privileges and immunities under the law of the United States, is being used exclusively for diplomatic or consular purposes.

(3) CERTAIN PROPERTY.—The term ''property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations'' and the term ''asset subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations'' mean any property or asset, respectively, the attachment in aid of execution or execution of which would result in a violation of an obligation of the United States under the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, as the case may be.

(4) TERRORIST PARTY.—The term ''terrorist party'' means a terrorist, a terrorist organization (as defined in section 212(a)(3)(B)(vi) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(vi))), or a foreign state designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371).

TITLE III—FEDERAL RESERVE BOARD PROVISIONS

SEC. 301. CERTAIN AUTHORITY OF THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM.

Section 11 of the Federal Reserve Act (12 U.S.C. 248) is amended by adding at the end the following new subsection:

"(r)(1) Any action that this Act provides may be taken only upon the affirmative vote of 5 members of the Board may be taken upon the unanimous vote of all members then in office if there are fewer than 5 members in office at the time of the action.

"(2)(A) Any action that the Board is otherwise authorized to take under section 13(3) may be taken upon the unanimous vote of all available members then in office, if—

"(i) at least 2 members are available and all available members participate in the action;

"(ii) the available members unanimously determine that—

"(I) unusual and exigent circumstances exist and the borrower is unable to secure adequate credit accommodations from other sources;

"(II) action on the matter is necessary to prevent, correct, or mitigate serious harm to the economy or the stability of the financial system of the United States;

"(III) despite the use of all means available (including all available telephonic, telegraphic, and other electronic means), the other members of the Board have not been able to be contacted on the matter; and

"(IV) action on the matter is required before the number of Board members otherwise required to vote on the matter can be contacted through any available means (including all available telephonic, telegraphic, and other electronic means); and

"(iii) any credit extended by a Federal reserve bank pursuant to such action is payable upon demand of the Board.

"(B) The available members of the Board shall document in writing the determinations required by subparagraph (A)(ii), and such written findings shall be included in the record of the action and in the official minutes of the Board, and copies of such record shall be provided as soon as practicable to the members of the Board who were not available to participate in the action and to the Chair-

man of the Committee on Banking, Housing, and Urban Affairs of the Senate and to the Chairman of the Committee on Financial Services of the House of Representatives.''.

Whelan, M Edward III

From:	Whelan, M Edward III
Sent:	Tuesday, November 12, 2002 3:48 PM
To:	'Brett_M._Kavanaugh@who.eop.gov'
Subject:	RE: final text
Attachments:	kavanaugh terrorism insurance.wpd

Here's a revised version. Let me know whether you expect that you'll want me to send the letter today.

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Tuesday, November 12, 2002 3:26 PM
To: Whelan, M Edward III
Subject: RE: final text

[redacted] (b) (5)

(Embedded
image moved "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov>
to file: 11/12/2002 02:23:50 PM
pic03246.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc:
Subject: RE: final text

Sorry for my confusion. I'll make the needed tweaks to the letter. [redacted] (b) (5)

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

From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Tuesday, November 12, 2002 3:19 PM
To: Whelan, M Edward III
Subject: RE: final text

The answer is no.

(Embedded
image moved "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov> to file: 11/12/2002 03:16:18 PM pic31135.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc:
Subject: RE: final text

[redacted] (b) (5) [redacted]? If the intention is that the answer should be yes, then I think that the language needs some serious tweaking. If the answer is no, then I need to make some very minor tweaks to my draft letter (i.e., [redacted] (b) (5) [redacted]).

-----Original Message-----
From: Whelan, M Edward III
Sent: Tuesday, November 12, 2002 3:01 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Subject: RE: final text

Please call. I have a question about [redacted] (b) (5) [redacted].

-----Original Message-----
From: Whelan, M Edward III
Sent: Tuesday, November 12, 2002 2:34 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Subject: RE: final text

Per your suggestion, I've added a sentence in the last paragraph. I've also made a few tweaks to the language [redacted (b) (5)]

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Tuesday, November 12, 2002 2:01 PM
To: Whelan, M Edward III
Subject: RE: final text

yes, maybe [redacted (b) (5)]?

(Embedded
image moved "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov> to file: 11/12/2002 12:51:36 PM pic30675.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc:
Subject: RE: final text

Maybe, [redacted (b) (5)]:.

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Tuesday, November 12, 2002 1:46 PM
To: Whelan, M Edward III
Subject: RE: final text

Looks good. Does it make sense to add [redacted (b) (5)]
[redacted (b) (5)]

[redacted] (b) (5)
[redacted].

(Embedded
image moved "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov> to file: 11/12/2002 10:49:46 AM pic25906.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc:
Subject: RE: final text

The usage that I'm more familiar with would be "conference report on H.R. 3210".
(That would distinguish it from the explanatory statement that accompanies the conference report.)
Any problems with that? I attach a version with only very minor revisions.

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Tuesday, November 12, 2002 10:26 AM
To: Whelan, M Edward III
Subject: RE: final text

"conference report to accompany H.R. 3210"

(Embedded
image moved "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov> to file: 11/12/2002 10:12:41 AM pic22163.pcx)

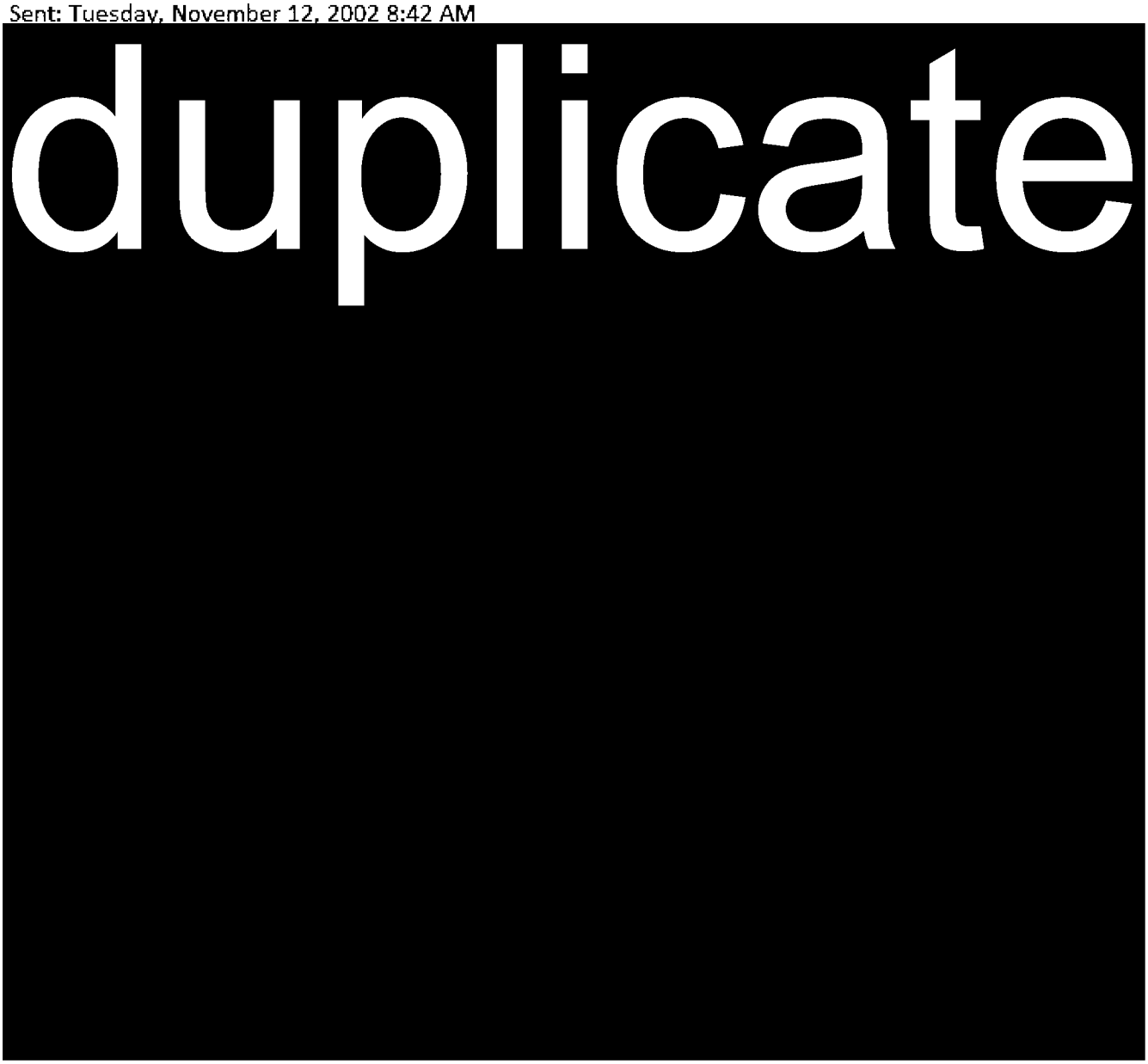
Record Type: Record

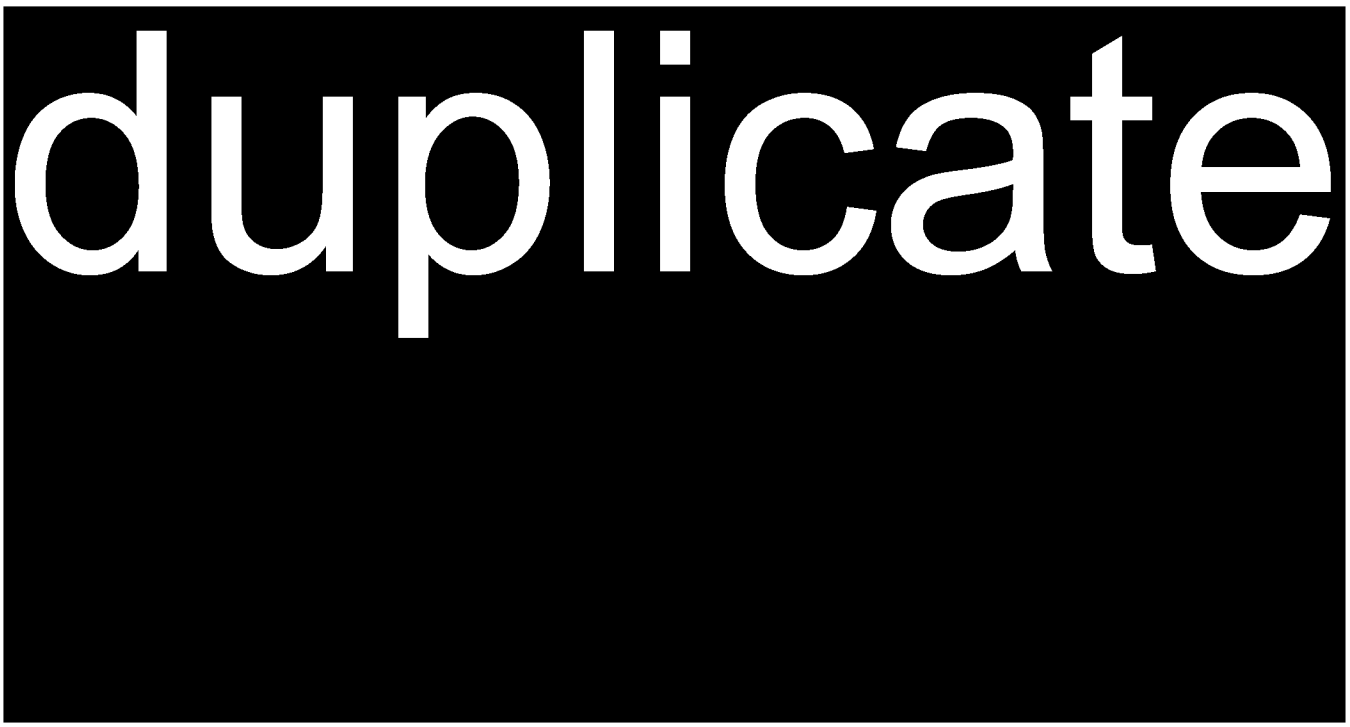
To: Brett M. Kavanaugh/WHO/EOP@EOP

cc:
Subject: RE: final text

Here's a first draft. Please confirm that the underlying bill is still S. 2600.
Also, is there some accepted name I can use for the Nov. 11 version?

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Tuesday, November 12, 2002 8:42 AM





Whelan, M Edward III

From: Whelan, M Edward III
Sent: Wednesday, November 27, 2002 9:59 AM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Subject: RE: US Code

FYI: (b) (5) . Therefore, based on the reasoning of the OLC opinion below, our preliminary view is (b) (5)

-----Original Message-----
From: Whelan, M Edward III
Sent: Tuesday, November 26, 2002 6:28 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Subject: RE: US Code

We'll try to have a preliminary answer for you on this tomorrow. In case it's of help, I include below the text of a 1953 OLC opinion. This opinion suggests (b) (5)

SUBJECT, TO, FROM, DATE:
(b) (5)

DOCUMENT BODY:
(b) (5)

(b) (5)

(b) (5)

(b) (5)

FOOTNOTES:

/1/ (b) (5)

ATTORNEY:

A.C.

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Tuesday, November 26, 2002 6:13 PM
To: Whelan, M Edward III
Subject: US Code

Can you tell me whether (b) (5) would require (b) (5) ? could use a preliminary answer on Wed.

Keefer, Wendy J

From: Keefer, Wendy J
Sent: Wednesday, December 18, 2002 2:56 PM
To: OLP-ALL; Goodling, Monica; Ciongoli, Adam; Wiggins, Mike; Jaso, Eric; Jordan, Bill; Olson, Theodore B; Duffy, Stacey; Bryant, Daniel E; Gibson, Joseph; O'Brien, Pat; Scottfinan, Nancy; Bass, Amy; Beach, Andrew; Richmond, Susan; 'Brett_M._Kavanaugh@who.eop.gov'; 'H._Christopher_Bartolomucci@who.eop.gov'; 'Jennifer_G._Newstead@who.eop.gov'; 'Bradford_A._Berenson@who.eop.gov'; 'Noel_J._Francisco@who.eop.gov'; Bybee, Jay; Bradshaw, Sheldon; [redacted]'; 'Manuel_Miranda@judiciary.senate.gov'; Daniels, Deborah; Henke, Tracy; Schauder, Andrew; Day, Lori Sharpe; Clement, Paul D; Higbee, David; Levey, Stuart; Bell, Michael J (OLA); Ho, James
Subject: Goodbye

All:

I wanted to take some time before I left today, my last day, and thank all of you for being such wonderful people and such great assets for our country. I have enjoyed working with each of you and encourage any of you to contact me if you ever make it down in the direction of Charleston. I would be happy to hear from you.

Wendy J. Keefer
Senior Counsel and Chief of Staff
Office of Legal Policy
(202) 616-2643

Forwarding Information:
[redacted]

Dinh, Viet

From: Dinh, Viet
Sent: Thursday, December 19, 2002 11:31 AM
To: Bybee, Jay; Clement, Paul D; Bradshaw, Sheldon; Benedi, Lizette D; Bryant, Dan; Collins, Dan; 'Kavanaugh, Brett'
Subject: Victims Rights Amendment
Attachments: VRA SJ Res 35 redline.wpd

The sponsors have agreed to incorporate the 180-day provision into the text of the Amendment. Attached is a suggested revision, pegged after the resolution introduced in the 106th. Jay and Sheldon, can you review and advise? Thanks.

Brett_M._Kavanaugh@who.eop.gov

From:	Brett_M._Kavanaugh@who.eop.gov
Sent:	Thursday, January 30, 2003 6:43 PM
To:	Whelan, M Edward III
Subject:	key provisions to examine

(b) (5) .

Brett_M._Kavanaugh@who.eop.gov

From: Brett_M._Kavanaugh@who.eop.gov
Sent: Thursday, January 30, 2003 8:19 PM
To: Whelan, M Edward III
Subject: from final rule
Attachments: ATTACHMENT.TXT

(b) (5)

(b) (5)

[*49108]

(b) (5)

(b) (5)

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Friday, January 31, 2003 12:22 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Subject: [redacted] (b) (5)

[redacted] (b) (5)
Here's our analysis:

1. [redacted] (b) (5)

2. [redacted] (b) (5)

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Thursday, January 30, 2003 8:40 PM
To: Whelan, M Edward III
Subject:

I interpret the provisions to mean [redacted] (b) (5)

Ciongoli, Adam

From: Ciongoli, Adam
Sent: Monday, February 10, 2003 6:02 PM
To: Yoo, John C (b)(6): A.P. Newton (personal)'; 'rdavies@greenbag.org'; 'dcox@gibsondunn.com'; 'amcbride@wrf.com'; 'lleo@fed-soc.org'; 'Brett_M._Kavanaugh@who.eop.gov'; 'H._Christopher_Bartolomucci@who.eop.gov'; 'noel.francisco@who.eop.gov'; 'Kyle.Sampson@who.eop.gov'; 'benjamin_a._powell@who.eop.gov'; 'jennifer.newstead@who.eop.gov'; 'Robert_J._Delahunty@who.eop.gov'; 'Jan_E._Williams@who.eop.gov'; 'goldsmij@dodgc.osd.mil'; (b)(6): Alex Acosta (personal)'; Nielson, Howard; Israelite, David; Kim, Elizabeth; Hruska, Andrew; Collins, Dan; Keisler, Peter D; Olson, Theodore B; Voss, Helen L; Clement, Paul D; Elwood, John; Salmons, David B; Bybee, Jay; Whelan, M Edward III; Bradshaw, Sheldon; Philbin, Patrick; Larsen, Joan; Jacob, Gregory F; Gannon, Curtis; Koester, Jennifer; Johnson, Steffen; Eisenberg, John; Rosenkranz, Nicholas Q; Berry, Matthew; Boyd, Ralph; Wiggins, Mike; 'ebirg@paulweiss.com'; Driscoll, Bob; Vu, Minh; Treene, Eric; Lelling, Andrew; Malcolm, John G; Jaso, Eric; Mandelker, Sigal; Coffin, Shannen; Flippin, Laura; Katsas, Gregory; Morrison, Richard T.; Dinh, Viet; Charnes, Adam; Willett, Don; Carrington, Michael; Chenoweth, Mark; Sales, Nathan; Benedi, Lizette D; Benczkowski, Brian A; Hall, William; Fisher, Alice
Subject: RE: Jim Ho Happy Hour

Constitution Subcommittee (b) (6) .

-----Original Message-----
From: Yoo, John C
Sent: Monday, February 10, 2003 5:59 PM
To: (b)(6): A.P. Newton (personal)'; 'rdavies@greenbag.org'; 'dcox@gibsondunn.com'; 'amcbride@wrf.com'; 'lleo@fed-soc.org'; 'Brett_M._Kavanaugh@who.eop.gov'; 'H._Christopher_Bartolomucci@who.eop.gov'; 'noel.francisco@who.eop.gov'; 'Kyle.Sampson@who.eop.gov'; 'benjamin_a._powell@who.eop.gov'; 'jennifer.newstead@who.eop.gov'; 'Robert_J._Delahunty@who.eop.gov'; 'Jan_E._Williams@who.eop.gov'; 'goldsmij@dodgc.osd.mil (b)(6): Alex Acosta (personal)t'; Ciongoli, Adam; Nielson, Howard; Israelite, David; Kim, Elizabeth; Hruska, Andrew; Collins, Dan; Keisler, Peter D; Olson, Theodore B; Voss, Helen L; Clement, Paul D; Elwood, John; Salmons, David B; Bybee, Jay; Whelan, M Edward III; Bradshaw, Sheldon; Philbin, Patrick; Larsen, Joan; Jacob, Gregory F; Gannon, Curtis; Koester, Jennifer; Johnson, Steffen; Eisenberg, John; Rosenkranz, Nicholas Q; Berry, Matthew; Boyd, Ralph; Wiggins, Mike; 'ebirg@paulweiss.com'; Driscoll, Bob; Vu, Minh; Treene, Eric; Lelling, Andrew; Malcolm, John G; Jaso, Eric; Mandelker, Sigal; Coffin, Shannen; Flippin, Laura; Katsas, Gregory; Morrison, Richard T.; Dinh, Viet; Charnes, Adam; Willett, Don; Carrington, Michael; Chenoweth, Mark; Sales, Nathan; Benedi, Lizette D; Benczkowski, Brian A; Hall, William; Fisher, Alice
Subject: Jim Ho Happy Hour

Pat Philbin and I would like to invite you to a happy hour this Thursday in honor of Jim Ho, who is leaving OLC to become Chief Counsel of the Constitution Subcommittee of the Senate Judiciary Committee (the launching pad from which others have begun their ascent toward greatness). It will be Thursday evening at the Caucus Room bar at 6:30.

John Yoo

Office of Legal Counsel
Department of Justice
202.514.2069
202.514.0539 (fax)

Joy, Sheila

From:	Joy, Sheila
Sent:	Tuesday, February 11, 2003 6:12 PM
To:	Bybee, Jay; Dinh, Viet; Charnes, Adam; Remington, Kristi L; 'Brett_M._Kavanaugh@who.eop.gov'; Benczkowski, Brian A
Subject:	FW: Bybee follow-up questions
Attachments:	tmp.htm; bybeefollowups.doc; bybeewrittenquestions.wpd; Follow Up Questions for Jay Bybee.msg

Jay, Attached are some of the follow-up questions. Please prepare a draft response as follows: repeat the question, followed by your response. Fax to OLP, can use either 4-2424 or 6-3180. Ultimately we will need a cover letter to Senator Hatch with cc to Senator Leahy. Within in the body of the letter, please reference the Senator who has sent follow-up question and to which you are responding. Thanks Sheila

-----Original Message-----
From: Stahl, Katie (Judiciary) [mailto:Katie_Stahl@Judiciary.senate.gov]
Sent: Tuesday, February 11, 2003 6:03 PM
To: Joy, Sheila
Subject: Bybee follow-up questions

Hi Sheila,

This is what I have received so far. I did receive a message from Senator Feingold stating he would need one more day to submit his questions. I'll keep you posted.

Katie

Follow-Up Questions for Jay Bybee

Background for Questions #1 through #3

Last April, the Justice Department announced that it was considering a legal opinion that apparently came from the Office of Legal Counsel, the office which you oversee, that stated that state and local police officers have the "inherent legal authority" to arrest people for civil and criminal immigration law violations. It appears now that the Justice Department has in fact accepted the OLC opinion, and has been attempting to implement it.

Despite the fact that this opinion changed the nature of law enforcement and seems to enjoy only limited legal support, it has not been made public. This means the public affected by it cannot examine it and decide for themselves whether or not they agree with its conclusions.

This new opinion is not just a departure from precedent, it is bad policy. It would increase the risk of racial profiling and civil rights abuses, against both non-citizens and citizens who are deemed not to look "American." It would also seriously undermine the ability of police departments to establish effective working relations with immigrant communities, and would deter many immigrants from reporting acts of domestic violence and other violent crime.

For these reasons, police chiefs and police associations across the country have come out against your proposal. Chief Charles Moose of Montgomery County, Maryland has said it "is against the core values of community policing: partnerships, assisting people, and being there to solve problems." Sacramento, California Police Chief Arturo Venegas has said that "to get into enforcement of immigration laws would build wedges and walls that have taken a long time to break down." In fact David Keene, chairman of the American Conservative Union and Grover Norquist, president of Americans for Tax Reform have spoken out against this policy as setting a dangerous precedent.

Question #1

Why did your office depart from the previous OLC memo, approved in 1996, which disallowed the practice of having state and local law enforcement officers make arrests for immigration violations, and what is the legal and policy basis of your determination that state and local police may enforce the nation's immigration laws?

Question #2

The war on terror has not changed what constitutes good policing: building relationships with communities and serving the public. If anything, it has made the relationship between police and the immigrant communities they serve more important to domestic security. From a law enforcement perspective, aren't the police chiefs and police associations correct that police cannot build trusting relationships with immigrant communities under your policy?

Question #3

Why has the OLC not made this important opinion public?

Background for Question #4

Education is a key to ensuring that every American has an equal opportunity to succeed. Because they help to further this goal, educational institutions are given a tax exemption under section 501 of the Tax Code. Thus, these institutions receive many of the same government services other entities do, but they effectively receive them for free.

Institutions, educational or otherwise, that discriminate based on race do not reflect our society's values and do not further the national goal of equal opportunity. We thus have no business subsidizing their discrimination with a tax exemption. The Supreme Court has said as much. In the 1983 case Bob Jones University v. United States, the Supreme Court said that the government could deny a tax exemption to educational institutions that practice racial discrimination.

I welcomed that opinion, but you seem to think it was wrongly decided. You have stated in an article in Sunstone Magazine that the government has tremendous leverage over educational and religious institutions and the denial of the section 501 tax exemption in Bob Jones illustrated "how capriciously the government may make use of the leverage."

Question #4

Do you still believe that ending discrimination at educational and religious institutions is good public policy, or is it, as you said, "capricious"?

Background for Questions #5 and #6

The Equal Protection Clause is critically important to protect the civil rights of all Americans. The promise of equal justice under law, in the end, is secured only through a judicial system that ensures that the laws are applied and enforced equally. Given the majoritarian nature of the executive and legislative branches of our federal government, it is essential that the federal judiciary scrupulously ensure the opportunity of minorities, the powerless and the disenfranchised to pursue and obtain justice.

In Romer v. Evans, the Supreme Court struck down a Colrado statute that invalidated any local ordinances that protected the rights of gays and lesbians. In 1997, you noted that it would have been logical in deciding Romer for the Supreme Court to have relied on Hunter v. Erickson. In Hunter, the Supreme Court struck down an amendment to the Akron City Charter that required any ordinance regulating use, on the basis of race, color, religion, national origin or ancestry, of real property to be first submitted to public referendum. The Supreme Court held that the amendment was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment because it "treated racial housing matters differently from other racial and housing matters."

You have suggested that the Court did not cite Hunter because it was wary of declaring sexual orientation a suspect classification, which it would have had to do had it relied on Hunter. You have further suggested that you believe that discrimination against a group defined by sexual orientation is not worthy of scrutiny under the Equal Protection Clause.

Question #5

What would be necessary to consider gays and lesbians a suspect class or quasi-suspect class under the equal protection clause?

Question #6

You have compared the Court's ruling in Romer to protecting "the illiterate" or "persons with communicable diseases." You have also defended the Defense Department's policy of performing intrusive background investigations before granting gay contractors security clearances because of their sexual orientation and you have contributed to a brief claiming that "a homosexual may be emotionally unstable." Does this brief represent your opinion of lesbian and gay people?

Questions for Jay S. Bybee, Nominee for the Ninth Circuit
Submitted by Senator Patrick Leahy

1. During your time at the Justice Department in the 1980s, you helped shape the federal government's response to a class-action lawsuit filed by survivors of the internment camps where Japanese-Americans and foreign nationals were warehoused during World War II. This horrific deprivation of civil rights was at the time implemented by the executive branch out of what they called a "military necessity."

   As you may recall, in October 2001, when you appeared before this Committee for confirmation to your current position as Assistant Attorney General for the Office of Legal Counsel (OLC), you testified about the Internment of Japanese-Americans and you recognized that "the United States made a terrible mistake during very difficult conditions." You indicated that this mistake should never be repeated. You even went so far as to promise to "bring additional sensitivity to the rights of all Americans'" and to "not trample civil rights in the pursuit of terrorism" in your role in advising the current Administration in our *current* difficult conditions. I am interested in the legal work you have been involved in since your confirmation in 2001. As you are no doubt aware, this Administration has been accused of encroaching on the civil rights of Americans in the pursuit of terrorism.

   It has been reported that OLC advised the Administration on its decision that it did not need to declare the al Qaeda and Taliban detainees prisoners of war under the Geneva Convention. Your recommendation appears to conflict with Secretary Powell, who argued that the detainees at Guantanamo Bay should be declared prisoners of war and afforded protections under the Geneva Convention. Congressional Research Services analysis supports that view: "Because the United States has argued that the intimate connection between the Taliban and Al Qaeda in part justifies the use of armed force in Afghanistan, some observers argue that Al Qaeda ... members may be entitled to treatment as prisoners of war."

   Without speaking for Secretary Powell, I suspect the State Department is concerned about the harm that this decision could have on U.S. foreign policy and national security goals -- especially combating terrorism. This decision has angered key allies, including members of the European Parliament and Organization of American States, whose help we will need to disrupt terrorist cells and interdict weapons of mass destruction. Some argue that not declaring these individuals POWs also could affect the treatment of our own soldiers if they are captured in hostile countries.

   (a) In your personal opinion, is the State Department is wrong about the need for POW status of persons detained at Guantanamo Bay?

   (b) What do you see as the strongest part of the State Department's position?

   (c) Are you concerned about the repercussions this could have on the treatment of American soldiers that are captured?

(d) What did OLC advise with regard to POW status for detainees?

2. On a related note, the Administration has taken the position that any individual whom the President declares to be an "unlawful combatant" may be detained indefinitely, without access to counsel, without having any charges brought against him. and without regard to the individual's nationality or to where he was arrested. Since we are considering you for a lifetime appointment to the bench, I am most interested in your view on the access to counsel issue.

There are few safeguards to liberty that are more fundamental than the Sixth Amendment, which guarantees the right to a lawyer throughout the criminal process, from initial detention to final appeal. Yet today, an untold number of individuals – at least some of whom are American citizens – are being held incommunicado, without access to counsel. In one case that we do know about, the Padilla case in the Southern District of New York, the defendant – a U.S. citizen – was arrested in Chicago on a material witness warrant, then transferred to a military brig after the President labeled him an "unlawful combatant." For nine months he has been denied the right to consult with a lawyer – even after a court ruled that he had a right to do so. As the head of OLC, you have no doubt played a key role in developing the Administration's policy with respect to denying legal representation for "unlawful combatants."

(a) Please explain your involvement in this issue and the legal theories that support the Justice Department's treatment of this person.

(b) Please explain your personal belief of the importance of the Sixth Amendment rights of criminal defendants.

(c) You have recently expressed your beliefs on the subject in speeches entitled "War and The Constitution" and "War and Crime in a Time of Terror" given to the Federalist Society and other groups. During these speeches you have stated that Presidents have "the option" of treating the same person either under criminal rules or under rules reserved for war because in your words these realms "are not mutually exclusive." Have you advised the Administration on the propriety of trying terrorist suspects in *military tribunals*, rather than in district court? Do you concede that this is a new view of executive power?

3. In conducting research on the recent activities of the office that you head at the Justice Department, a substantial roadblock was encountered when it was discovered that you had only published three OLC opinions since your confirmation in 2001. A recent search revealed that 1,187 OLC opinions were publicly available on-line since 1996. Clearly, these opinions were routinely published *prior* to your appointment to Assistant Attorney General.

(a) Please explain to the Committee why *under your leadership* there has been a virtual termination in the routine publication of opinions and why you have only saw fit to release three opinions?

(b) I am concerned that there is a disturbing pattern in your record of an expansive view of Executive Privilege that you do not believe the people have a right to know what the

Administration is doing, what legal rules informed their policy choices and who was consulted. What can you say to assure us that you are for public access to government and are not part of an attempt to stonewall the public to ward off scrutiny about difficult policy decisions implemented by the Administration?

4. In reviewing your record, I note that you appear to have spent much of your professional career in government working against Congress' administrative oversight efforts.

(a) For the first time in the 81-year history of the GAO, the Comptroller General of the United States went to Federal court to ask a judge to order a member of the executive branch to turn over records to Congress. Have you advised the Administration on the propriety of asserting executive privilege and refusing to produce documents to the GAO who sought to investigate how public money is spent? Please explain your reasoning.

(b) Can you give us an example of a federal court case where you thought Executive Privilege should *not* apply? How about an example of a case that upheld the denial of a FOIA request that you disagreed with?

(c) In *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, Yale Law Journal (1994), you analyze Congress' ability to enact laws that requires committees 'utilized' by the President to open their records and to open their meetings to the public. In fact, you contends that the Federal Advisory Committee Act (FACA), is an *unconstitutional encroachment by Congress on the power of the executive*. I am concerned that you have a firm ideological bias against public access to any executive decision making. What do you have to say on this subject?

5. Last year, you were called to Capitol Hill to testify before the House Government Operations Committee to explain why the Administration refused to produce documents prepared by federal prosecutors involving corrupt FBI practices in a 30-year old investigation of organized crime in New England. At this very heated hearing, you were severely criticized by Members from both sides of the aisle for the Administration's lack of disclosing virtually anything to a congressional committee who was engaged in oversight proceedings. I believe your reason for not producing the many documents requested by the Committee was that there was an on-going investigation into the mistakes made by the FBI. If that is the standard for asserting executive privilege – that there is an on-going investigation– then how will anything be discoverable regarding the mistakes made prior to September 11th?

(a) Wouldn't that standard also encourage the Administration to just keep investigating things in order to block off important disclosures directly relevant to oversight proceedings?

(b) Do you believe that Congress has a valid power of oversight and should be allowed to obtain documents from the Justice Department?

(c) In addition to disagreeing with the Supreme Court's decision in *Public Citizen v. United States*, can you please name three other recent decisions that you disagree with?

6. There has been an overwhelming wave of concern expressed about the Department of Defense's Total Information Awareness system being developed under Admiral Poindexter. I understand that some form of data mining is currently used at the Justice Department.

(a) Have you advised the Attorney General or the President on the propriety of such data mining and whether it comports with the Privacy Act? Please explain your analysis.

(b) According to a recent article in *The Nation*, law enforcement officials sought to use databases which maintain information regarding the purchase of guns to monitor the purchasing activities of suspected terrorists. The article quotes an OLC memo, which stated: "We see nothing in the NICS regulations that prohibits the FBI from deriving additional benefits from checking audit log records." Attorney General Ashcroft reportedly refused to allow these officials such access, saying: "It's my belief that the United States Congress specifically outlaws and bans the use of the NICS database - and that's the use of approved purchase records - for weapons checks on possible terrorists or on anyone else." Have you advised the Administration on the propriety of using gun purchase databases to track terrorist suspects, as reported in *The Nation*?

7. I noticed that prior to your appointment to the Justice Department you commented on the constitutionality of states' requiring fingerprints to receive a drivers license. In a Las Vegas newspaper you were quoted as saying that "The Constitution gives us a lot of leeway to decide on these issues."

(a) Have you contributed to OLC opinions or advised the Administration on the constitutionality of using biometric traits in governmental databases?

(b) Do you believe there is a constitutional right to privacy? If so, please describe what you believe to be the key elements of that right. If not, please explain.

(c) Do you support the holding of *Roe v. Wade* and a constitutionally recognized and protected right to choose?

(d) A number of lawyers designated by the Federalist Society as experts on the constitutionality of abortion are openly hostile to a woman's right to choose and believe that *Roe v. Wade* should be overruled. As a member of the Federalist Society, do you share the views of their experts in this area?

8. You have argued that the Seventeenth Amendment providing for the popular election of U.S. Senator was a significant "mistake" because it removed the state legislature's power. I am concerned that your article reflects a serious disdain for democracy. If you are appointed to the Ninth Circuit you will frequently be required to judge cases on voter initiatives and referenda, which are very popular in the western region of this country. What can you tell us to ensure us that you do not have a bias against instruments of direct-democracy like voter initiatives?

9. You have argued that the Tenth Amendment should be reinterpreted to protect states' rights from encroachments by Congress and have been critical of the Supreme Court's opinions which allowed Congress to expand its powers under the Interstate Commerce Clause. In your article "The Tenth Amendment Among the Shadows," you argue that the Court should further curtail Congress' ability to enact national standards to give states *complete control* in "family law, ordinary criminal law enforcement, and education." In your academic writing on protecting states' rights, you indicate a clear support the Supreme Court's curtailment of Congress' power to act but you do not indicate any support for restrictions on the President's power to act.

(a) Certainly, the President's implementation of regulations and executive orders also affects states' rights. Can you provide examples of executive actions that have violated states' rights?

(b) Do you agree with the President, who in his first State of the Union said that education is a top federal priority because education is the first, essential part of job creation, or do you agree with the Supreme Court majority in *United States v. Lopez*, which said that education is a "non-economic" activity and is therefore outside the federal regulatory power?

10. In response to the September 11th terrorist attacks, our government has launched a criminal investigation of unprecedented scope. The federal government has responded to the attack in not only in its military, intelligence, and national security capacity, but also in its domestic law enforcement capacity. I have been worked very closely with the Administration to pass comprehensive anti-terrorism legislation to make sure that such a tragedy never happens again. As part of this effort, I proposed creating a new federal crime to punish attacks on mass transit systems, and the Administration has suggested created new federal criminal prohibitions against the possession of biological agents or toxins by unauthorized persons and against harboring terrorists.

(a) A few years ago you gave a speech to the Nevada Inn of Court where you said: "Had the Court not struck down VAWA, then, I am afraid, there was (for those concerned about federalism) a *parade of horribles* to follow." In light of this concern, what is your position on proposals to expand federal criminal law to respond to terrorists?

(b) You recently gave a speech saying that "Federalism must step aside" to executive power when we are at war. In your view, does this exception also apply to the power of Congress? Please reconcile your answer with the speech you gave to the Federalism Society entitled "War & the Constitution: We are all Hamiltonians Now."

(c) Can you provide examples, other than the fight against terrorism where we would be constitutionally justified in establishing national standards? What about, for example, protecting citizens against discrimination? In your view, would that be a justifiable subject for Congress to legislate?

11. In 1997, you wrote that Congress has very limited power to pass criminal statutes. You supported this view with a cite to the Domestic Violence Clause of the Constitution, a little known clause in Article Four, that in your view provides "general criminal law

enforcement to the states." You also argued that even when we act under our enumerated constitutional powers, the clause created "a presumption against federal preemption, co-option and even duplication of state efforts to control [crime]." I understand from your public statements that since September 11th, a lot has changed in terms of the power of the Executive to fight the war on terrorism and I wonder if your view of the power of Congress to enact criminal statutes has also changed.

12. In your law review article, *The Equal Process Clause: A note on the (Non)Relationship Between Romer v. Evans* and *Hunter v. Erickson*, you wrote that, "If Amendment 2 violates the Equal Protection Clause, it does so because . . . homosexuals are entitled to strict or heightened scrutiny. Whether, however, homosexuals are entitled to strict or heightened scrutiny is the one thing the Court could not bear to answer."

(a) In your opinion, do you believe members of the gay and lesbian community constitute a suspect class and, as such, are entitled to heightened scrutiny? If not, why not?

(b) In *Romer v. Evans*, 517 U.S. 620 (1996), the Supreme Court invalidated "Amendment Two" because the law could not withstand even the most deferential level of review, rationality review. The majority opinion explains that the Amendment, "lacks a rational relationship to legitimate state interests," because it, "seems inexplicable by anything but animus toward the class it affects." *Romer,* 517 U.S. at 632. Yet, you seem to be implying that the Amendment can be found unconstitutional only if gays and lesbians constitute a suspect class, which you suggest they do not. How do you reconcile that argument with the *Romer* majority's position quoted above?

(c) How would you analyze a situation in which a lesbian applied for housing and was denied purely on the basis of her status as a lesbian? Would you say that she should have no recourse under the law? What about a gay man who called 911 and the police refused to respond because of his sexual orientation, as Amendment 2 seemed to allow?

(d) I am impressed by your acknowledgment that as a result of the states' failure to act, Congress amended the Constitution to pass the 14th Amendment. This "Amendment granted expanded authority to Congress and the federal courts to deal with the gross inequities in state laws." Many people argue that discrimination on the basis of sexual orientation is the same as discrimination on the basis of race or gender. In your view, does Congress have the power to enact legislation to protect gays and lesbians from discrimination on the basis of their orientation?

(e) In that same law review article, you criticized the Supreme Court's decision in *Hunter v. Erickson* which invalidated a law that restructured the political process in such a way as to make it harder for minority groups to pass anti-discrimination legislation. If the Supreme Court's analysis in that case is flawed, as you suggest, how should the courts, if at all, protect the rights of minority groups to participate equally in the political process?

(f) You have also suggested that courts should not treat legislative referenda any differently than

laws enacted by legislative officials. Do you believe that referenda raise any special concerns when it comes to protecting the rights of minorities?

13. In your article on *Romer v. Evans*, you state that

> In the recent past, when the Court has confronted such controversial questions of general interest, it has attempted to draw on our legal traditions to demonstrate the inevitability of its decision. This idea of judicial precedent possesses a certain Calvinistic fatalism: By ascribing to traditions or prior decision a power beyond the present [Supreme] Court's ability to control, precedent absolves the present Court of responsibility for the decision the Court must make.

Please explain your understanding of judicial precedent and what role it serves in both the judicial and executive branches for guiding and justifying decisions. If the role you believe it serves is different from the role you think it should serve, please explain.

14. In your article "Government Aid to Education: Paying the Fiddler," you criticize the IRS policy ultimately found constitutional by the Supreme Court in *Bob Jones University v. United States*, which denies tax exempt status to universities that employ racially discriminatory practices.

(a) Your concern is that governmental power can be used "against almost any institution in the name of any alleged 'public policy.'" As a judge, how will you differentiate among what you believe are "good" public policies versus "bad" public policies? Can you provide an example of a public policy that, in your view, would allow the government to use its power to protect marginalized groups?

(b) In criticizing the government's so-called capricious leverage, you comment on the multitude of lawsuits that have resulted. You specifically include "sexual preference" as one type of suit courts have "entertained." Does this mean that you would not support government protection against sexual-orientation discrimination?

15. I notice that you have filed at least two Supreme Court briefs on behalf of the Clarendon Foundation – one in the case challenging the Violence Against Women Act and the other challenging the Religious Freedom Restoration Act.

(a) Were you approached by the Foundation to file these Amicus Briefs or did you seek them out?

(b) Please describe the Clarendon Foundation and tell us if you share a common legal philosophy with the Foundation on issues of federalism?

(c) Since your confirmation to the Justice Department, what contact, if any, have you had with the Clarendon Foundation?

16. In the amicus brief you filed on behalf of the Clarendon Foundation on the case *United States v.*

Morrison, you take issue with the constitutionality of the Violence Against Women Act. In particular, you argue that, under the Domestic Violence Clause of the Constitution, art. IV, § 4, "Congress did not assume primary responsibility – whether exclusive or concurrent – for quelling domestic violence. Rather, its responsibility was secondary: The United States was to 'insure domestic tranquility' when the states, in their own judgment, proved incapable." 1999 WL 1186265. You go on to argue that Congress has interpreted the Commerce Clause too broadly, and that, "Congress's response to the problem of gender-based violence was simply to coopt the field nationally" and that "[t]he framers conditioned the exercise of federal power over domestic violence on the states requesting federal assistance" and that "[t]he Domestic Violence Clause thus shields the states from unwanted federal intervention." Id.

(a) Please explain how you think the Domestic Violence Clause limits the Commerce Clause, and therefore the Congress, from enacting criminal statues.

(b) What other criminal statutes do you feel run afoul of the Commerce Clause and why?

17. What can you say to assure this Committee and prospective parties that you will be a fair judge, an impartial adjudicator, who will not use the federal bench to achieve the philosophical agenda that you have been advancing as an advocate and officer of the Federalist Society?

18. President Bush previously appointed a judge to an appellate court (John Rogers) who asserted that a lower court, when faced with case law it thinks a higher court would overturn were it to consider the case, should take that responsibility upon itself and go ahead and reverse the precedent of the higher court on its own. The idea is that the Supreme Court, for instance, has rules it follows about when and whether to overturn precedent, and lower courts should follow this body of law in the same way they follow other laws of the higher court, and, therefore, a judge should reverse higher court precedent on his own when he thinks that the higher court would. Do you subscribe to this theory that lower courts should intuit when a higher court would decide to overturn its own precedent? Or do you believe that lower courts may never overturn precedents of higher courts?

Jones, Stephanie (Edwards)

From:	Jones, Stephanie (Edwards)
Sent:	Friday, July 20, 2018 8:12 AM
To:	Stahl, Katie (Judiciary)
Cc:	Arfa, Rachel (Judiciary)
Subject:	Follow Up Questions for Jay Bybee
Attachments:	tmp.htm; followup.doc

Katie - Attached are Senator Edwards' follow-up questions for Jay Bybee.

Stephanie Jones
Counsel to Sen. John Edwards
4-7420

Follow-Up Questions for Jay Bybee

1. Have you advised the administration on its Enemy Combatant policy?

2. Do you agree with the administration's stance on enemy combatants?

3. Do you believe that the administration – or any administration – should have the unfettered authority to lock up U.S. citizens, indefinitely, without charging them with any crime, with no independent review?

These questions concern your 1982 article published in Sunstone Magazine, in which you criticized the IRS decision to deny tax exempt status to Bob Jones University because of its racially discriminatory policies. Among other things, you argued that the IRS policy "illustrates well how capriciously the government may make use of its leverage." You also claimed that the IRS improperly sought to remove the University's tax immunity "because some things which BJU taught and encouraged its students to practice did not comport with social ideas currently held by others all loosely defined as 'public policy'."

I am concerned about your dismissal of the federal government's effort to combat discrimination as merely an "alleged public policy" choice rather than a legitimate governmental interest. Your implication that the compelling government interest in and a consistent bipartisan policy of prohibiting discrimination is nothing more than a "loosely defined public policy" rather than an unfaltering part of the American constitutional fabric is very troubling.

4. Do you still believe that restricting government benefits to institutions like Bob Jones University that choose to discriminate in violation of long standing governmental policy exemplified by, for example, the Civil Rights Act of 1965, is a "capricious" use of governmental power?

5. If denying tax exemption status to an institution that blatantly discriminates in its policies is a capricious use of governmental power, what would be a legitimate use of governmental leverage?

6. What criteria would you use, if confirmed to the Court of Appeals, for determining whether the conditions placed on a religious or educational institution are a legitimate exercise of governmental power or, as you suggest, simply coercive leverage that is subject to the whims and caprices of each administration?

7. What factors would you examine to determine whether a policy decision of an administration was more than a "loosely defined social idea" characterized as public policy?

8. What do you think is the proper role of the courts in such circumstances?

Katie - Attached are Senator Edwards' follow-up questions for Jay Bybee.

Stephanie Jones
Counsel to Sen. John Edwards
4-7420

Hi Sheila,

This is what I have received so far. I did receive a message from Senator Feingold stating he would need one more day to submit his questions. I'll keep you posted.

Katie

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Friday, March 07, 2003 11:02 AM
To: 'Kavanaugh, Brett'

I'm tweaking the language a bit. You might want to look at (b) (5)

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Friday, March 07, 2003 1:32 PM
To: 'Kavanaugh, Brett'
Subject: revised version

"[redacted (b) (5)]."

Let me know whether you want to talk more about this at some point.

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Wednesday, March 12, 2003 11:47 AM
To: 'Kavanaugh, Brett'
Subject: inferior officers

The answer to your question is far from settled. Here are some points for consideration:

1. (b) (5) [redacted]

2. (b) (5) [redacted]

3. (b) (5) [redacted]

4. (b) (5) [redacted]

Bumatay, Patrick J.

From:	Bumatay, Patrick J.
Sent:	Thursday, March 20, 2003 12:20 PM
To:	Charnes, Adam; Ciongoli, Adam; Comstock, Barbara; Pate, R. Hewitt; Bybee, Jay; Yoo, John C; Remington, Kristi L; Flippin, Laura; Philbin, Patrick; McCallum, Robert; Bradshaw, Sheldon; Dinh, Viet; Bartlett, Daniel J.; Beynon, Rebecca A.; Bridgeland, John M.; Christie, Ronald I.; Clark, Alicia P.; Connaughton, James; Daniels, Mitchell; Devenish, Nicolle; Dougherty, Elizabeth S.; Estes, Ashley; Falkenrath, Richard; Garrison, Stephen M.; Hennessey, Keith; Higbee, David; Jeffery, Reuben; Kaplan, Joel; Kirk, Matthew; Lefkowitz, Jay P.; Loper, Ginger G.; Martin, Catherine J.; McConnell, John P.; Mehlman, Ken; Miers, Harriet; Moy, Edmund C.; Ojakli, Ziad; Perry, Philip J.; Powell, Dina; Reed, McGavock D.; Rove, Karl C.; Russell, Richard M.; Schacht, Diana L.; Schlapp, Matthew A.; Silverberg, Kristen; Skelly, Layton; Spellings, Margaret M.; Thompson, Carol J.; Viana, Mercedes M.; Warsh, Kevin; White, Jocelyn; Williams, Jan E.; Wood, John F.; Sharp, Jess; Cabral, Raquel; Middlemas, A. Morgan; Bolten, Joshua B.; Rachel Brand; libby.camp@dhs.gov; bberenson@sidley.com; hayneswj@osdgc.osd.mil; Riepenhoff, Allison L.; Elwood, Courtney S.; rcobb@hq.nasa.gov; tflanigan@tyco.com; law-steven@dol.gov; radzely-howard@dol.gov; Walker, Helgard C.; Addington, David S.; Bartolomucci, H. Christopher; Bellinger, John B.; Brilliant, Hana F.; Bumatay, Patrick J.; Carroll, James W.; Everson, Nanette; Farrell, J. Elizabeth; Francisco, Noel J.; Ganter, Jonathan F.; Jucas, Tracy; Kavanaugh, Brett M.; McNally, Edward; Montiel, Charlotte L.; Nelson, Carolyn; Newstead, Jennifer G.; Powell, Benjamin A.; Sampson, Kyle; Ullyot, Theodore W.
Subject:	Farewell for Helgi Walker on Thursday, March 27
Attachments:	tmp.htm

> On behalf of the White House Counsel's office (with special support > from Liz Dougherty of the Domestic Policy Council), you are cordially > invited to attend a gathering in honor of our good friend and > colleague Helgi Walker, who is preparing to leave the White House for > the private sector.
>
> The festivities will be held on Thursday, March 27th from 6-8 p.m. at > the "Off the Record" bar at the Hay-Adams Hotel. Please join us in > wishing Helgi a fond farewell. We hope to see you there!
>
> Jennifer Newstead & Liz Dougherty
>

P.S. Anybody who would like to come is more than welcome -- this email group was just a start...

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Jennifer Newstead & Liz Dougherty

P.S. Anybody who would like to come is more than welcome -- this email group was just a start...

Bumatay, Patrick J.

From:	Bumatay, Patrick J.
Sent:	Wednesday, March 26, 2003 9:48 AM
To:	Charnes, Adam; Ciongoli, Adam; Comstock, Barbara; Pate, R. Hewitt; Bybee, Jay; Yoo, John C; Remington, Kristi L; Flippin, Laura; Philbin, Patrick; McCallum, Robert; Bradshaw, Sheldon; Dinh, Viet; Bumatay, Patrick J.; Bartlett, Daniel J.; Beynon, Rebecca A.; Bridgeland, John M.; Christie, Ronald I.; Clark, Alicia P.; Connaughton, James; Daniels, Mitchell; Devenish, Nicolle; Dougherty, Elizabeth S.; Estes, Ashley; Falkenrath, Richard; Garrison, Stephen M.; Hennessey, Keith; Higbee, David; Jeffery, Reuben; Kaplan, Joel; Kirk, Matthew; Lefkowitz, Jay P.; Loper, Ginger G.; Martin, Catherine J.; McConnell, John P.; Mehlman, Ken; Miers, Harriet; Moy, Edmund C.; Ojakli, Ziad; Perry, Philip J.; Powell, Dina; Reed, McGavock D.; Rove, Karl C.; Russell, Richard M.; Schacht, Diana L.; Schlapp, Matthew A.; Silverberg, Kristen; Skelly, Layton; Spellings, Margaret M.; Thompson, Carol J.; Viana, Mercedes M.; Warsh, Kevin; White, Jocelyn; Williams, Jan E.; Wood, John F.; Sharp, Jess; Cabral, Raquel; Middlemas, A. Morgan; Bolten, Joshua B.; Rachel Brand; libby.camp@dhs.gov; bberenson@sidley.com; hayneswj@osdgc.osd.mil; Riepenhoff, Allison L.; Elwood, Courtney S.; rcobb@hq.nasa.gov; tflanigan@tyco.com; law-steven@dol.gov; radzely-howard@dol.gov; Walker, Helgard C.; Addington, David S.; Bartolomucci, H. Christopher; Bellinger, John B.; Brilliant, Hana F.; Carroll, James W.; Everson, Nanette; Farrell, J. Elizabeth; Francisco, Noel J.; Ganter, Jonathan F.; Jucas, Tracy; Kavanaugh, Brett M.; McNally, Edward; Montiel, Charlotte L.; Nelson, Carolyn; Newstead, Jennifer G.; Powell, Benjamin A.; Sampson, Kyle; Ullyot, Theodore W.
Subject:	Farewell for Helgi Walker on Thursday, March 27
Attachments:	tmp.htm

Just a reminder, tomorrow is Helgi's Going Away Happy Hour. I'm trying to get a rough head count for Off the Record, so if you know you are coming please let me know.

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>
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>
>
>
>

>

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Jennifer Newstead & Liz Dougherty

P.S. Anybody who would like to come is more than welcome -- this email group was just a start...

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Friday, March 28, 2003 12:13 PM
To: 'Kavanaugh, Brett'
Subject: DOT-DOJ

We have reviewed the draft proposal for DOT [redacted (b) (5)] .

Berry, Matthew

From: Berry, Matthew
Sent: Friday, April 04, 2003 3:55 PM
To: 'brett_m._kavanaugh@who.eop.gov'
Cc: Whelan, M Edward III
Subject: DOT/DOJ (b) (5) Proposal

Brett,

At the end of this e-mail message, please find our analysis of the issue that you asked us to examine.

Matthew Berry
Office of Legal Counsel
U.S. Department of Justice
(202) 514-9700

(b) (5)

[redacted]

[redacted]

(b) (5)

Whelan, M Edward III

From:	Whelan, M Edward III
Sent:	Tuesday, April 08, 2003 6:23 PM
To:	'Brett_M._Kavanaugh@who.eop.gov'
Cc:	Gannon, Curtis; Philbin, Patrick
Subject:	RE: Iraqi amdt

Brett:

The proposed language would amend the definition of "blocked asset" to include any asset "with respect to which financial transactions are in any respect prohibited, restricted, regulated or licensed pursuant to Chapter V of Title 31 of the Code of Federal Regulations (including but not limited to Parts 515, 535, 550, 560, 575, 595, 596 and 597 of Title 31 of the Code of Federal Regulations)." Chapter V of Title 31 of the CFR sets forth OFAC regs. The particular parts specified in the parenthetical as included relate to various countries (including Iraq) and to terrorism generally.

On a quick read, we understand the proposed language to have either (or, conceivably, both) of two objectives:

1. (b) (5) [redacted].

2. Alternatively, (b) (5) [redacted]

Ed

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Tuesday, April 08, 2003 5:23 PM
To: Whelan, M Edward III
Subject: FW: Iraqi amdt

---------- Forwarded by Brett M. Kavanaugh/WHO/EOP on 04/08/2003 05:22 PM ----------

---

From: Kristen Silverberg/WHO/EOP@Exchange on 04/08/2003 05:21:57 PM

Record Type: Record

To: Jay P. Lefkowitz/OPD/EOP@Exchange, Brett M. Kavanaugh/WHO/EOP@EOP

cc:
Subject: FW: Iraqi amdt

-----Original Message-----
From: Pelletier, Eric C.
Sent: Tuesday, April 08, 2003 4:59 PM
To: Silverberg, Kristen; Bellinger, John B.; Dorn, Nancy
Cc: Keniry, Daniel ; Cox, Christopher C.; Rossman, Elizabeth L.
Subject: FW: Iraqi amdt

Below you will see a request to put a provision in dealing with Iraqi assets in the supp. This is coming from the House possibly in response to the Iranian related provision in the Senate version of the bill. [redacted] (b) (5) [redacted]. This needs to be answered in real time.

Thanks.

-----Original Message-----
From: Cox, Christopher C.
Sent: Tuesday, April 08, 2003 3:01 PM
To: Pelletier, Eric C.
Subject: Fw: Iraqi amdt

Eric, can you help me with a read on this for the Speaker? It is being considered for inclusion in the supp.

-----Original Message-----
From: "Peterlin, Margaret" <Margaret.Peterlin@mail.house.gov>@EOP
[NOTES:"Peterlin, Margaret" <Margaret.Peterlin@mail.house.gov>@EOP]
To: Cox, Christopher C. <Christopher_C._Cox@who.eop.gov>
Sent: Tue Apr 08 12:54:03 2003
Subject: Iraqi amdt

Chris,

Here is the language that we are being asked to support to help out the 200 Iraqi human shields that are affected by the E.O. Can you have someone look at it and let me know his opinion of the legal effect.

Thanks,
M

> -----Original Message-----
>
> Section 201 of the Terrorism Risk Insurance Act of 2002, Pub. L. ____, > is amended by inserting in subparagraph (d)(2)(A) after "(50 U.S.C.
> 1701; 1702)" the following phrase:
>
> ", or with respect to which financial transactions are in any respect > prohibited, restricted, regulated or licensed pursuant to Chapter V of > Title 31 of the Code of Federal Regulations (including but not limited > to Parts 515, 535, 550, 560, 575, 595, 596 and 597 of Title 31 of the > Code fo Federal Regulations);"
>
>
>

- att1.eml <<att1.eml>> (See attached file: att1.eml)

Whelan, M Edward III

From:	Whelan, M Edward III
Sent:	Thursday, April 10, 2003 11:08 AM
To:	'Kavanaugh, Brett'
Subject:	FW: anti-lobbying act question

I'm forwarding Dan's thoughts. [redacted] (b) (5) [redacted].

-----Original Message-----
From: Koffsky, Daniel L
Sent: Thursday, April 10, 2003 10:58 AM
To: Whelan, M Edward III
Subject: RE: anti-lobbying act question

Ed: I have a few thoughts. [redacted] (b) (5) [redacted]

[redacted] (b) (5) [redacted]

(b) (5) [redacted]

-----Original Message-----
From: Whelan, M Edward III
Sent: Thursday, April 10, 2003 9:48 AM
To: Koffsky, Daniel L
Subject: FW: anti-lobbying act question

Thoughts?

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Thursday, April 10, 2003 9:45 AM
To: Whelan, M Edward III
Subject: anti-lobbying act question

If the White House web site had something equivalent to the following, any problem under Anti-Lobbying Act. (b) (5) [redacted]

[redacted]

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Thursday, April 10, 2003 2:49 PM
To: 'Kavanaugh, Brett'
Subject: FW: anti-lobbying act question

fyi

-----Original Message-----
From: Koffsky, Daniel L
Sent: Thursday, April 10, 2003 2:49 PM
To: Whelan, M Edward III
Subject: RE: anti-lobbying act question

Ed: Let me add one more thought. (b) (5) [redacted]

(If you want more background, I have a CRS Report on anti-lobbying restrictions from 1995. Also, the GAO Redbook has about 40 pages on the various restrictions.) --Dan

-----Original Message-----
From: Whelan, M Edward III
Sent: Thursday, April 10, 2003 9:48 AM

duplicate

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Monday, April 14, 2003 9:33 AM
To: 'Kavanaugh, Brett'
Subject: National Mediation Board

Here is our informal advice responding to your questions:

1. (b) (5) [redacted]

2. You asked whether (b) (5) [redacted]. This question may best be addressed in two subparts:

   a. (b) (5) [redacted]?

   (b) (5) [redacted]

   b. (b) (5) [redacted]?

   (b) (5) [redacted].

   (b) (5) [redacted]

Whelan, M Edward III

From:	Whelan, M Edward III
Sent:	Monday, April 14, 2003 7:31 PM
To:	'Brett_M._Kavanaugh@who.eop.gov'
Subject:	Re: National Mediation Board

Yes. [redacted] (b) (5) [redacted] Alternatively, we could do further research into the case law.

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov <Brett_M._Kavanaugh@who.eop.gov>
To: Whelan, M Edward III <M.Edward.Whelan@USDOJ.gov>
Sent: Mon Apr 14 18:52:29 2003
Subject: Re: National Mediation Board

got your vm. [redacted] (b) (5) [redacted], I assume?

(Embedded
image moved "M.Edward.Whelan@usdoj.gov" <M.Edward.Whelan
to file: 04/14/2003 06:46:58 PM
pic17713.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc:
Subject: Re: National Mediation Board

Left voicemail for you.

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov <Brett_M._Kavanaugh@who.eop.gov>

From: Brett_M._Kavanaugh@who.eop.gov <Brett_M._Kavanaugh@who.eop.gov>
To: Whelan, M Edward III <M.Edward.Whelan@USDOJ.gov>
Sent: Mon Apr 14 18:30:22 2003
Subject: Re: National Mediation Board

(b) (5)
?

(Embedded
image moved "M.Edward.Whelan@usdoj.gov" <M.Edward.Whelan to file: 04/14/2003 05:06:04
PM pic00032.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc:
Subject: National Mediation Board

Per Joe Maher of Labor's Solicitor's Office: (b) (5)

-----Original Message-----
From: Whelan, M Edward III
Sent: Monday, April 14, 2003 10:06 AM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Subject: RE:

(b) (5)

[redacted] (b) (5) [redacted]. We have not yet independently verified this.

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Monday, April 14, 2003 9:56 AM
To: Whelan, M Edward III
Subject:

About #2b: [redacted] (b) (5) [redacted]

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Tuesday, April 15, 2003 11:22 AM
To: 'Kavanaugh, Brett'
Subject: NMB

OLC has previously opined (b) (5)

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Friday, April 18, 2003 12:16 PM
To: 'Kavanaugh, Brett'
Subject: LSC

Item 1 below recounts advice given on this matter.

-----Original Message-----
From: Koffsky, Daniel L
Sent: Friday, March 29, 2002 8:29 AM
To: Whelan, M Edward III
Subject: A Couple of Matters

Ed: This is to raise one matter and bring you up to date on another. After some research, I'm going to send you another e-mail on a third matter on which Sheldon and I have been working and which now involves (b) (5) question.

(1) Rachel Brand has asked us to confirm that, in our view, (b) (5)

(2) I reached the attorney at the Social Security Administration who had left a voice mail asking whether a (b) (5)

--Dan

Koffsky, Daniel L

From: Koffsky, Daniel L
Sent: Saturday, April 19, 2003 11:08 AM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Cc: Whelan, M Edward III
Subject: LSC
Attachments: lsc (b) (5).wpd

Brett: I'm attaching a draft opinion, written about a year and a half ago, which deals with (b) (5) at the Legal Services Corporation. --Dan

Koffsky, Daniel L

From: Koffsky, Daniel L
Sent: Saturday, April 19, 2003 5:10 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Cc: Whelan, M Edward III
Subject: RE: LSC

Brett: One other thought on [redacted] (b) (5) [redacted] –Dan

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Saturday, April 19, 2003 1:13 PM
To: Koffsky, Daniel L; Brett_M._Kavanaugh@who.eop.gov
Cc: Whelan, M Edward III
Subject: Re: LSC

Thanks.

.

----- Original Message -----
From:<Daniel.L.Koffsky@usdoj.gov>
To:Brett M. Kavanaugh/WHO/EOP@EOP
Cc:<M.Edward.Whelan@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested)
Date: 04/19/2003 11:07:50 AM

duplicate

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Tuesday, April 22, 2003 3:56 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Subject: RE: another Koffsky Q

[redacted] (b) (5) [redacted].

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Tuesday, April 22, 2003 10:37 AM
To: Whelan, M Edward III
Subject: RE: another Koffsky Q

Did they apply this also to [redacted] (b) (5) [redacted] ?

(Embedded
image moved "M.Edward.Whelan@usdoj.gov" <M.Edward.Whelan
to file: 04/10/2003 11:27:10 AM
pic02388.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc:
Subject: RE: another Koffsky Q

No. [redacted] (b) (5) [redacted]

[redacted]
(b) (5)
[redacted]

Dan Koffsky may have a few additional thoughts this afternoon.

I'll fax you a copy of the Mikva memo.

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Thursday, April 10, 2003 10:15 AM
To: Whelan, M Edward III
Subject: another Koffsky Q

Do you read law to [redacted] (b) (5) [redacted] ?

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Friday, May 16, 2003 10:00 AM
To: 'Kavanaugh, Brett'
Subject: 18 USC 603

OLC opined in 1995: Because this definition [in 5 USC 7322(1)] includes all employees in "Executive agenc(ies)," it includes in its scope (but is not limited to) all Executive Branch employees and officers, with the exception of the President, the Vice President, persons employed in or under the United States Postal Service or the Postal Rate Commission, and members of the uniformed services. /3/ Section 603 by its terms does not bar the President and the Vice President from making contributions to their own campaign committee, and Section 603(c) explicitly includes within the scope of its exception persons "employed in or under the United States Postal Service or the Postal Rate Commission." Therefore, Section 603(c) applies to the entire Executive Branch with the possible exception of members of the uniformed services.

This opinion remains in effect and is binding on the entire executive branch, including the Criminal Division. The entire text of the opinion is set forth below.

<DATE> May 5, 1995
<TO> JUDGE ABNER J. MIKVA, COUNSEL TO THE PRESIDENT
<FROM> Dawn Johnsen, Deputy Assistant Attorney General
Re: Whether 18 U.S.C. Section 603 Bars Civilian Executive Branch Employees and Officers from Making Contributions to a President's Authorized Re-election Campaign Committee.

lederman
<Attorney>
You have asked for our opinion with respect to whether 18 U.S.C. Section 603 would bar civilian Executive Branch employees and officers from making contributions to a President's authorized re-election campaign committee. For the reasons expressed below, we conclude that such employees and officers would not violate Section 603 by making such contributions, without more.

I.

Between 1980 and 1993, 18 U.S.C. Section 603 provided as follows:
(a) It shall be unlawful for an officer or employee of the United States or any department or agency thereof, or a person receiving any salary or compensation for services from money derived from the Treasury of the United States, to make any contribution within the meaning of section 301(8) of the Federal Election Campaign Act of 1971 to any other such officer, employee or person or to any Senator or Representative in, or Delegate or Resident Commissioner to, the Congress, if the person receiving such contribution is the employer or employing authority of the person making the contribution. Any person who

violates this section shall be fined not more than $5,000 or imprisoned not more than three years, or both.

(b) For purposes of this section, a contribution to an authorized committee as defined in section 302(e)(1) of the Federal Election Campaign Act of 1971 shall be considered a contribution to the individual who has authorized such committee.

See Pub. L. No. 96-187, Section 201(a)(4), 93 Stat. 1367 (1980).

As this Office explained in a 1984 Memorandum to the White House Counsel, it was far from clear whether this iteration of Section 603 did, or constitutionally could, bar all Executive Branch employees from making contributions to a President's re- election campaign committee. See Memorandum to Fred F. Fielding, Counsel to the President, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, re: Application of 18 U.S.C. Section 603 to Federal Employee Contributions to the President's Authorized Re-election Campaign Committee (Feb. 6, 1984) ("1984 Olson Memo"). We concluded that "(s)erious uncertainty exists concerning whom the statute covers, under what circumstances it was intended to be applicable, and why it was promulgated." Id. at 2. In particular, it was uncertain whether the use of the phrase "employing authority" in Section 603 was so broad as to proscribe contributions to a President's reelection campaign by all Executive Branch employees; given the President's constitutional authority as Chief Executive and as Commander-in-Chief, a plausible reading of the language of Section 603 could have prohibited most, if not all, of the more than five million Executive Branch employees and military personnel from making such contributions. See id. at 6, 33. The ambiguity of Section 603's coverage was exacerbated by the fact that there has never been a reported prosecution under Section 603 or its predecessor statutes, /1/ and by the absence of any determinative legislative history concerning application of Section 603 in the Executive Branch, see id. at 18.

In his statement upon signing into law the legislation creating the "employing authority" version of Section 603, President Carter stated that the prohibition would cause a "severe infringement of Federal employees' first amendment rights." Federal Election Campaign Act Amendments of 1979: Statement on Signing H.R. 5010 Into Law, 1 Pub. Papers of Jimmy Carter 37, 37 (Jan. 8, 1980). President Carter characterized Section 603 as "an unacceptable and unwise intrusion" on the First Amendment rights of federal employees that "raises grave constitutional concerns." Id. at 38. Accordingly, he urged that Section 603 "be promptly repealed or amended so as to remove its chilling effect on the rights of citizens to make voluntary contributions to the candidates of their choice." Id. The chief sponsors of the 1980 revision of Section 603 attempted to assure President Carter that the statute was not intended to impose such a broad prohibition, see 1984 Olson Memo at 18-20; nevertheless, prior to 1993, Congress failed to repeal the statute or amend it to reflect the narrow scope described and intended by its sponsors.

This Office also was of the opinion that, if former Section 603 were read to proscribe contributions to a President's campaign from all (or virtually all) Executive Branch employees, it would in all likelihood be unconstitutional. See id. at 35. Therefore, we opined that the statute would best be interpreted more narrowly, so as to avoid such possible constitutional infirmities. Id. at 35-39. In particular, we reasoned that

> the constitutional considerations which bear upon the phrase "employer or employing authority" as applied to the President require that the phrase be construed narrowly to apply only to those persons in Government service who may reasonably be expected to be subject to some form of subtle pressure to contribute to the President's re-election committee because of the President's status as their immediate "employer or employing authority."

Id. at 36 (emphasis added). See also id. at 3. /2/

Despite this conclusion, we nonetheless warned that "it is by no means certain that a court would adopt a construction of section 603 which prohibited contributions only when made by the President's 'inner circle' of political appointees." Id. at 39. And, because we were "unable to predict with confidence precisely how the statute would be construed by the courts," id. at 42, the White House consistently has advised Executive Branch employees not to contribute to a President's re-election campaign. See, e.g., Memorandum for the Heads of All Departments and Agencies, from C. Boyden Gray, Counsel to the President, re: 18 U.S.C. Section 603 (Nov. 15, 1991) ("regret(fully)" advising employees that though a broad reading of Section 603 "would raise grave constitutional concerns, prudence requires that any ambiguity in the language of this statute be resolved against placing any Presidential appointee or other Federal employee in the position of inadvertently violating Federal law").

II.

As part of the Hatch Act Reform Amendments of 1993 ("HARA"), Congress added a new subsection (c) to Section 603. Pub. L. No. 103-94, Section 4(b), 107 Stat. 1001, 1005 ("HARA"). 18 U.S.C. Section 603(c), which became effective on February 3, 1994, see HARA Section 12(a), 107 Stat. at 1011, provides that

> (t)he prohibition in subsection (a) shall not apply to any activity of an employee (as defined in section 7322(1) of title 5) or any individual employed in or under the United States Postal Service or the Postal Rate Commission, unless that activity is prohibited by section 7323 or 7324 of such title.

Congress's evident intent was to "conform" Section 603 to the Hatch Act, so that employees subject to the Hatch Act could not be convicted under Section 603 for engaging in activities that are not prohibited by the civil provisions of the Hatch Act itself. See, e.g., S. Rep. No. 57, 103d Cong., 1st Sess. 15-16 (1993), reprinted in 1993 U.S.C.C.A.N. 1802, 1816-17.

For present purposes, this restriction on the scope of the prohibition in Section 603(a) raises but two questions: (A) which employees and officers may be subject to the limitation in Section 603(c); and, (B) with respect to those employees and officers who are covered by Section 603, whether such persons might violate Sections 7323 and 7324 of the HARA by making contributions to a President's re-election campaign committee.

A. In addition to individuals "employed in or under the United States Postal Service or the Postal Rate Commission," to whom Section 603(c) makes explicit reference, Section 603(c) covers all persons who are defined as "employees" under the HARA, 5 U.S.C. Section 7322(1). Section 7322(1) reads:

> "(E)mployee" means any individual, other than the President and the Vice President, employed or holding office in --
>
> (A) an Executive agency other than the General

Accounting Office;
(B) a position within the competitive service which is not in an Executive agency; or
(C) the government of the District of Columbia, other than the Mayor or a member of the City Council or the Recorder of Deeds;
but does not include a member of the uniformed services.

Because this definition includes all employees in "Executive agenc(ies)," it includes in its scope (but is not limited to) all Executive Branch employees and officers, with the exception of the President, the Vice President, persons employed in or under the United States Postal Service or the Postal Rate Commission, and members of the uniformed services. /3/ Section 603 by its terms does not bar the President and the Vice President from making contributions to their own campaign committee, and Section 603(c) explicitly includes within the scope of its exception persons "employed in or under the United States Postal Service or the Postal Rate Commission." Therefore, Section 603(c) applies to the entire Executive Branch with the possible exception of members of the uniformed services. /4/ Therefore, the prohibition in Section 603(a) does not apply to any activity of such persons unless that activity is prohibited by 5 U.S.C. Sections 7323 and 7324.

B. There is nothing in Sections 7323 and 7324 that bars Executive Branch employees and officers from making contributions to a President's re-election campaign committee, without more. Indeed, the Hatch Act itself has never barred such action. Prior to the HARA, the Office of Personnel Management ("OPM") interpreted the Hatch Act to permit employees to make financial contributions to a political party or organization. See 5 C.F.R. Section 733.111(a)(8) (Jan. 1, 1994) (pre-HARA regulations). /5/ Subsequent to the HARA, OPM has reiterated this regulation, and explicitly has added that an employee may make a contribution to a campaign committee of a candidate for public office. See 5 C.F.R. Sections 734.208(a), 734.404(d) (Jan. 1, 1995) (proposed post-HARA regulations).

Therefore, because an Executive Branch employee or officer would not violate Section 7323 or Section 7324 simply by making a contribution to a President's re-election campaign committee, it follows that, pursuant to 18 U.S.C. Section 603(c), such an Executive Branch employee or officer (other than a member of the uniformed services) would not violate the criminal prohibition found in Section 603(a) simply by making such a contribution.

III.

Two caveats should be mentioned. First, there is one conceivable (albeit unlikely) circumstance under which the making of a contribution to a President's campaign committee might violate Section 7324, and therefore be subject to criminal sanctions under 18 U.S.C. Section 603. Congress indicated in section 4 of the HARA, 107 Stat. at 1005 (creating 18 U.S.C. Section 610) that "making . . . any political contribution" is "political activity." /6/ Thus, making a contribution to a President's re-election campaign committee is "political activity" under the HARA. Under Section 7324, almost all HARA- covered employees may not engage in "political activity": (i) while on duty; (ii) while in "any room or building occupied in the discharge of official duties by an individual employed or holding office in the Government of the United States or any agency or instrumentality thereof"; (iii) while wearing a uniform or official

insignia identifying the employee's office or position; or (iv) while using any vehicle owned or leased by the federal government. 5 U.S.C. Sections 7324(a)(1)-(4). /7/ It follows that an Executive Branch employee covered under Section 7324(a) could violate that provision by making a contribution to the President's campaign committee while on duty or while in a federal building -- for example, by hand-delivering a contribution to another federal employee who is an officer of that committee. In the unlikely event of such a violation of Section 7324, the employee could be subject to the criminal sanctions of Section 603, as well.

Second, it should be kept in mind that, even where Section 603 does not bar Executive Branch employees and officers from making political contributions, nonetheless there remain limitations on the solicitation of such contributions by federal employees and officers and by the President. See, e.g., 5 U.S.C. Section 7323(a)(2), 18 U.S.C. Sections 602, 607. /8/ This Opinion does not address the scope of those solicitation limitations. /9/

CONCLUSION

Civilian employees and officers in the Executive Branch would not violate 18 U.S.C. Section 603, as amended, simply by making a contribution to a President's authorized re-election campaign committee, without more.

/1/ The Criminal Division has informed us that it is unaware of any prosecutions ever being brought under Section 603.

/2/ We further explained that, under such a circumscribed reading, a "reasonable expectation of such political pressure could be argued to exist as a result of three elements in an employment relationship involving the President: (1) the President personally appoints the contributor, or employs him pursuant to his discretionary authority under 3 U.S.C. Section 105; (2) the President personally supervises the performance of the contributor; and (3) the contributor works in an office involved with the political activities of the President." Id. at 36-37.

/3/ Section 7322(1) refers to employees in "an Executive agency." "Executive agency" is defined in 5 U.S.C. Section 105 to include "Executive department(s)," "Government corporation(s)," and "independent establishment(s)." The "Executive department(s)" are defined in 5 U.S.C. Section 101 to include all Cabinet-level agencies. "Government corporation(s)" are defined in 5 U.S.C. Section 103 to include corporations owned and/or controlled by the United States. An "independent establishment" is defined in 5 U.S.C. Section 104(1) to mean, inter alia, "an establishment in the executive branch (other than the United States Postal Service or the Postal Rate Commission) which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment." We do not in this Opinion address whether any particular entity or establishment is "in the executive branch" for purposes of Title 5.

/4/ We do not address herein the status of members of the uniformed services under Section 603. We simply note that, if Section 603(c) does not apply to members of the uniformed services, then the discussion in the 1984 Olson Memo concerning the ambiguity,

constitutionality, and possible limiting constructions of Section 603 would continue to be of relevance with respect to such persons.

/5/ This interpretation conformed to the regulation promulgated by the Civil Service Commission at the dawn of the Hatch Act in 1939. See CSC v. National Ass'n of Letter Carriers, 413 U.S. 548, 584 (1973) (quoting CSC Form 1236, "Political Activity and Political Assessments of Federal Officeholders and Employees," Section 17, at 7 (1939)). Congress effectively adopted this 1939 CSC regulation as a substantive part of the Hatch Act itself. See Memorandum for James B. King, Director, Office of Personnel Management, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, re: Whether Use of Federal Payroll Allocation System by Executive Branch Employees for Contributions to Political Action Committees Would Violate the Hatch Act Reform Amendments of 1993 or 18 U.S.C. Sections 602 and 607, at 17-19 (Feb. 22, 1995) ("1995 Dellinger Memo").

/6/ "Political contribution," in turn, is defined to include "any gift . . . or deposit of money or anything of value, made for any political purpose." 5 U.S.C. Section 7322(3)(A). See also 1995 Dellinger Memo at 26-28 (discussing Congress's obvious intent that "political activity" be read as broadly as possible).

/7/ An exception to these prohibitions is made for certain employees "the duties and responsibilities of whose position(s) continue outside normal duty hours and while away from the normal duty post," and who are either (i) "employee(s) paid from an appropriation for the Executive Office of the President"; or (ii) "employee(s) appointed by the President, by and with the advice and consent of the Senate, whose position(s) (are) located within the United States, who determine() policies to be pursued by the United States in relations with foreign powers or in the nationwide administration of Federal laws." 5 U.S.C. Section 7324(b)(2). Such employees "may engage in political activity otherwise prohibited by subsection (a)," 5 U.S.C. Section 7324(b)(1), such as political activity on duty, but only "if the costs associated with that political activity are not paid for by money derived from the Treasury of the United States." Id. Section 7324(b)(1).

/8/ See 1995 Dellinger Memo at 7-12 (discussing the meaning of "solicit" in these statutes).

/9/ One clarification is worth brief mention, however. Though 18 U.S.C. Section 602(a)(4) prohibits the President, as well as other federal employees, from knowingly soliciting political contributions from other federal officers and employees, Congress intended that "(i)n order for a solicitation to be a violation of this section, it must be actually known that the person who is being solicited is a federal employee"; thus, "(m)erely mailing to a list (that) no doubt contain(s) names of federal employees is not a violation of (Section 602)." H.R. Rep. No. 422, 96th Cong., 1st Sess. 25 (1979), reprinted in 1979 U.S.C.C.A.N. 2860, 2885.

Brett_M._Kavanaugh@who.eop.gov

From:	Brett_M._Kavanaugh@who.eop.gov
Sent:	Monday, May 19, 2003 9:55 AM
To:	Whelan, M Edward III
Subject:	draft memo
Attachments:	[redacted] memo 5 19 03.doc

Can you all review this draft memo as well. Thanks.

(See attached file: [redacted] memo 5 19 03.doc)

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Monday, May 19, 2003 12:44 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Subject: RE: draft memo

The memo looks good. We have these comments (presented in the order of the memo):

1. (b) (5)).

2. (b) (5)

3. (b) (5)

4. (b) (5)

5. (b) (5)

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Monday, May 19, 2003 9:55 AM

duplicate

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Monday, May 19, 2003 2:56 PM
To: 'Kavanaugh, Brett'

Here are some typical OLC statements:

- It is a well settled principle of law, applied frequently by both the Supreme Court and the executive branch, that statutes that do not expressly apply to the President must be construed as not applying to him if such application would involve a possible conflict with his constitutional prerogatives. See, e.g., Franklin v. Massachusetts, 505 U.S. 788, 800-01 (1992).

- If Congress intends to trench upon a core Presidential power, it must do so in terms that admit of no ambiguity. See, e.g., Franklin v. Massachusetts, 112 S. Ct. 2767, 2775 (1992).

Let's talk.

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Monday, May 19, 2003 5:48 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Subject: RE: thoughts

(b) (5)

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Monday, May 19, 2003 4:35 PM
To: Whelan, M Edward III
Subject: thoughts

(b) (5)

(b) (5)

(b) (5)

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Wednesday, May 21, 2003 12:17 PM
To: 'Kavanaugh, Brett'
Subject: section 603 opinion
Attachments: kavanaugh haddon2.wpd

Attached. I've made a few other minor changes. [redacted] (b) (5) [redacted]

Whelan, M Edward III

From:	Whelan, M Edward III
Sent:	Tuesday, May 27, 2003 7:58 AM
To:	'Kavanaugh, Brett'
Subject:	FW:
Attachments:	(b) (5) .wpd

Please find attached Dan's draft, along with a couple comments below.

-----Original Message-----
From: Koffsky, Daniel L
Sent: Friday, May 23, 2003 5:31 PM
To: Whelan, M Edward III
Subject: RE:

Ed: I'm attaching a draft of the summary for which Brett asked. One issue is identified in the language that I've put in bold in the draft; another issue isn't dealt with, because it's outside what Brett requested, but I want to note it for you.

(1) (b) (5)

[redacted]

[redacted]

(b) (5)

(2) Brett asked us (b) (5)

--Dan

----Original Message-----
From: Whelan, M Edward III
Sent: Tuesday, May 20, 2003 1:30 PM
To: Koffsky, Daniel L
Subject: FW:

Would you please handle?

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Tuesday, May 20, 2003 1:16 PM
To: Whelan, M Edward III
Subject:

Can Dan do a summary of the rules and regs (as you all interpret them) applicable to (b) (5) ?

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Monday, June 02, 2003 2:32 PM
To: 'Kavanaugh, Brett'
Subject: FW: Dellinger opinion on Anti-Lobbying Act

fyi

-----Original Message-----
From: Koffsky, Daniel L
Sent: Monday, June 02, 2003 2:21 PM
To: Whelan, M Edward III
Subject: RE: Dellinger opinion on Anti-Lobbying Act

(b) (5)

(1 (b) (5)

(2 (b) (5)

(3 (b) (5)

-----Original Message-----
From: Whelan, M Edward III
Sent: Monday, June 02, 2003 1:41 PM
To: Koffsky, Daniel L
Subject: Dellinger opinion on Anti-Lobbying Act

Brett asks (b) (5)
That's correct, right?

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Monday, June 02, 2003 4:29 PM
To: 'Kavanaugh, Brett'
Subject: FW: section 623

-----Original Message-----
From: Koffsky, Daniel L
Sent: Monday, June 02, 2003 4:28 PM
To: Whelan, M Edward III
Subject: RE: section 623

Ed: The 1995 guidance doesn't say much about appropriations riders. I've copied below a couple of e-mails from April 10 that attempt to explain what the riders mean. I'm pretty sure that you forwarded at least the first of these e-mails to Brett.

(b) (5)

--Dan

Ed: I have a few thoughts. (b) (5)

[redacted]

****

Ed: Let me add one more thought. [redacted]

(If you want more background, I have a CRS Report on anti-lobbying restrictions from 1995. Also, the GAO Redbook has about 40 pages on the various restrictions.) --Dan

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

From: Whelan, M Edward III
Sent: Monday, June 02, 2003 3:03 PM
To: Koffsky, Daniel L
Subject: FW: section 623

FYI: After forwarding to Brett your e-mail on the Anti-Lobbying Act, I received (apparently in reply) the e-mail below. Would you please review?

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Monday, June 02, 2003 2:38 PM
To: Whelan, M Edward III
Subject: FW: section 623

[redacted] (b) (5) ?
[redacted] (b) (5) ?

SEC. 623. No part of any funds appropriated in this or any other Act shall be used by an agency of the executive branch, other than for normal and recognized executive-legislative relationships, for publicity or propaganda purposes, and for the preparation, distribution or use of any kit, pamphlet, booklet, publication, radio, television or film presentation designed to support or defeat legislation pending before the Congress, except in presentation to the Congress itself.

Brett_M._Kavanaugh@who.eop.gov

From:	Brett_M._Kavanaugh@who.eop.gov
Sent:	Thursday, August 28, 2003 12:14 AM
To:	Whelan, M Edward III
Subject:	RE: (b) (5) ?

Interesting. Had thought about this as well. Not sure of status.

-----Original Message-----
From: M.Edward.Whelan@usdoj.gov [mailto:M.Edward.Whelan@usdoj.gov]
Sent: Monday, August 11, 2003 8:50 AM
To: Kavanaugh, Brett M.
Subject: (b) (5) ?

D

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Friday, February 20, 2004 11:17 AM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Subject: RE:

Basically I'll be the dean of a faculty that doesn't have students and that is focused on the deeper issues underlying current controversies. At the very beginning, that will involve a lot of management, fundraising, etc., but once I get settled I should have time to do some research and writing of my own.

I don't know how familiar you are with the Center. It's a great place. George Weigel is a senior fellow there, and Eric Cohen, who I understood works closely with the President's bioethics council, heads up a burgeoning biotech program. Fr. Neuhaus (of First Things), Robby George (of Princeton), and Jeane Kirkpatrick are the most active members of the board.

Hope you're doing well.

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Friday, February 20, 2004 11:03 AM
To: Whelan, M Edward III
Subject: RE:

Excellent. What will you be doing?

-----Original Message-----
From: M.Edward.Whelan@usdoj.gov [mailto:M.Edward.Whelan@usdoj.gov]
Sent: Friday, February 20, 2004 11:02 AM
To: Kavanaugh, Brett M.
Subject:

Brett:

Just wanted to let you know that I have accepted a position as the new President of the Ethics & Public Policy Center. My last day at OLC will likely be March 19.

I hope to have the occasion to work together with you and the Administration in my new capacity.

Ed

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Wednesday, March 03, 2004 11:07 AM
To: 'Kavanaugh, Brett'

Pardon my request for a favor: I'd be very interested in a brief meeting with Karl Rove once I start at the Ethics and Public Policy Center, as I think that EPPC will be involved in lots of matters of interest to the White House. It would be ideal if I could meet with him late in the week of March 22 (my first week in the new job), but I would of course be grateful to meet with him at any time. Is that something you could help me arrange?

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Tuesday, March 16, 2004 4:57 PM
To: 'Kavanaugh, Brett'
Subject: Ruth's Chris

If you want to make sure that we're still around when you're able to come over, you're welcome to give me a call ((b) (6)) or e-mail me. N.B.: The address is 724 9th Street; it's not the one up Connecticut Ave.

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Friday, March 19, 2004 6:40 PM
To: 'ewhelan@eppc.org'
Cc: Boyle, Brian D; Bradshaw, Sheldon (CRT); Caterini, John; Clement, Paul D; Colborn, Paul P; Francisco, Noel; Gannon, Curtis; Goldsmith, Jack; Hart, Rosemary; Hofer, Patrick F.; 'Kavanaugh, Brett'; Lerner, Renee; Madan, Rafael; Nielson, Howard; Philbin, Patrick
Subject: test -- please ignore

(This is my means of transferring your e-mail addresses to my new job.)

Brian_R._Naranjo@nsc.eop.gov

From:	Brian_R._Naranjo@nsc.eop.gov
Sent:	Wednesday, December 07, 2005 4:31 PM
To:	John_B._Wiegmann@nsc.eop.gov; Harriet_Miers@who.eop.gov; Brett_M._Kavanaugh@who.eop.gov
Cc:	Bradbury, Steve; Prestes, Brian
Subject:	RE: Press Q&A re Rice Statement (b) (5)
Attachments:	tmp.htm

Brad -- I showed this to Dr. Crouch. He reviewed it, is fine with it, and asks to make sure that Ms. Miers and Mr. Bradbury are fine with it too. BRN

-----Original Message-----
From: Wiegmann, John B.
Sent: Wednesday, December 07, 2005 3:47 PM To: Wiegmann, John B.; Miers, Harriet; Kavanaugh, Brett M.; Naranjo, Brian R.
Cc: 'Steve.Bradbury@usdoj.gov'; 'Brian.Prestes@usdoj.gov' Subject: RE: Press Q&A re Rice Statement (b) (5)

Sorry, I hit the send button too fast on this. Below is a draft q&a on (b) (5) :. I need to get clearance on the substance and on its use before I send it to our press people for comment. Brian N., can you please share with JD asap?

From: Wiegmann, John B.
Sent: Wednesday, December 07, 2005 3:43 PM To: Miers, Harriet; Kavanaugh, Brett M.; Naranjo, Brian R.
Cc: 'Steve.Bradbury@usdoj.gov'; 'Brian.Prestes@usdoj.gov' Subject: Press Q&A re Rice Statement (b) (5)

Q: (b) (5) ?

A: (b) (5)

(b) (5)

- (b) (5)
- (b) (5)

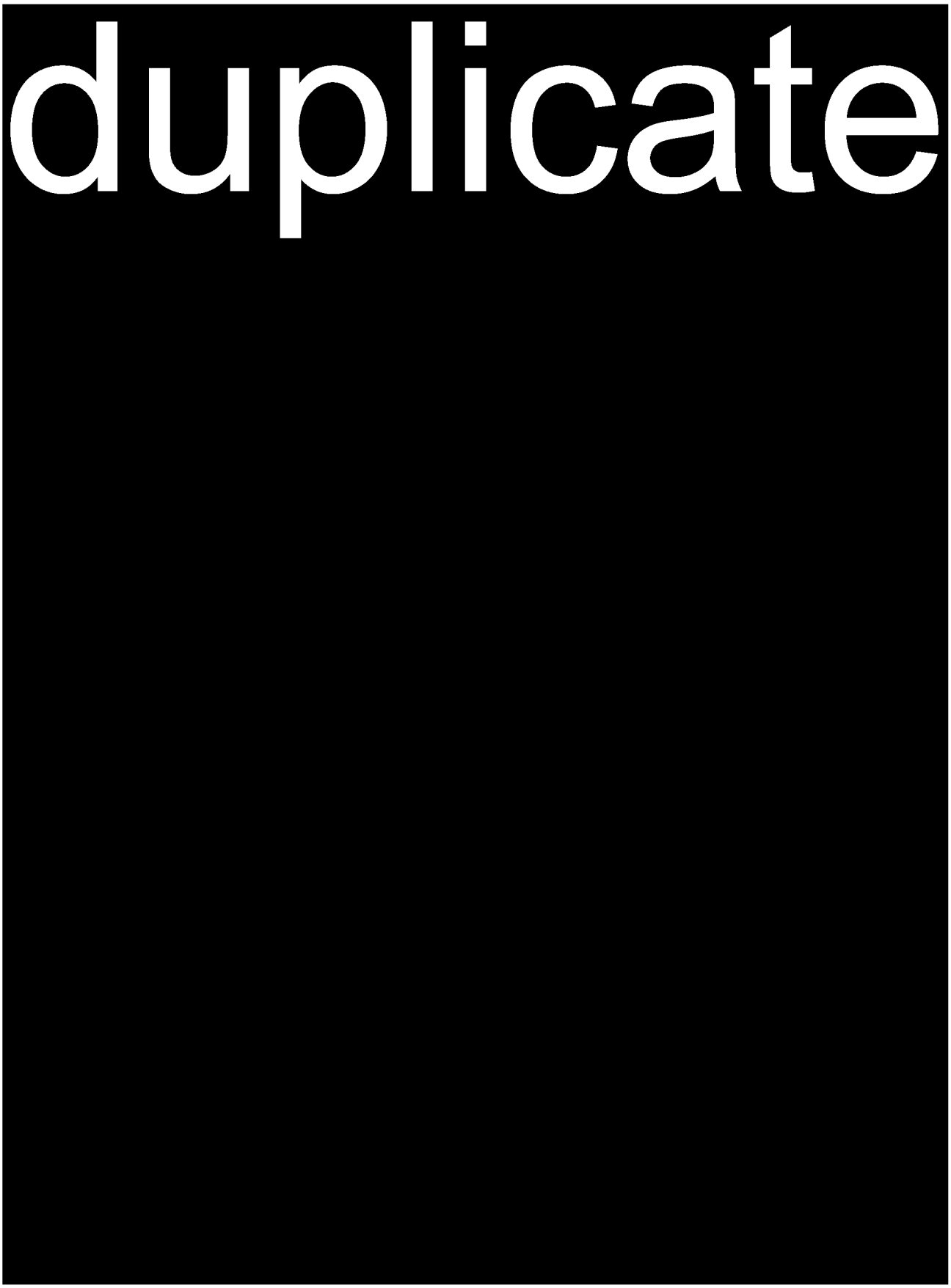
(b) (5)

Q: (b) (5) ?

A: (b) (5)

If pressed: (b) (5)

Brad -- I showed this to Dr. Crouch He reviewed it, is fine with it, and asks to make sure that Ms. Miers and Mr. Bradbury are fine with it too. BRN



duplicate

Michael_O'Neill@judiciary-rep.senate.gov

From:	Michael_O'Neill@judiciary-rep.senate.gov
Sent:	Saturday, December 10, 2005 2:54 PM
To:	Hertling, Richard; Seidel, Rebecca; McNulty, Paul J; Clement, Paul D; Sampson, Kyle; Katsas, Gregory (CIV); dave_blake@usdoj.gov; Fisher, Alice; Moschella, William; Sigal.Mandelker@usdoj.gov; Brand, Rachel; Elwood, John; Taylor, Jeffrey (OAG); Dan_Bryant@usdoj.gov; Dahl, Alexander; rene_i._augustine@who.eop.gov; Brenda_Becker@vp.senate.gov; jbrosnahan@who.eop.gov; jamie_E._Brown@who.eop.gov; Brett_M_Kavanaugh@who.eop.gov; Dabney_Friedrich@who.eop.gov; (b)(6): Douglas Ginsburg (D.C. Cir); (b)(6): Thomas Griffith (D.C. Cir.); William_K._Kelley@who.eop.gov; matthew_kirk@who.eop.gov; Rohit_Kumar@frist.senate.gov; (b)(6): Richard Leon (D.D.C.); Gary_Malphrus@opd.eop.gov; harriet.miers@who.eop.gov; kristen_silverberg@who.eop.gov; (b)(6): "thomasv3" (personal); J_E_Williams@who.eop.gov; Candida_P._Wolff@who.eop.gov
Cc:	Lissa_Camacho@judiciary-rep.senate.gov
Subject:	Christmas Party Invitation
Attachments:	tmp.htm

Happy Holidays!

You are cordially invited

to join us for a

We Can't Believe We are Bothering to do It This Late

(but we figured this counts as our Christmas card)

Holiday Open House

on December 17th, 2005

Feel free to drop by

anytime from 7:00 PM until 9:30 PM

At the Home of

Meg & Mike O'Neill

[redacted]

[redacted]

Happy Holidays!

You are cordially invited
to join us for a
We Can't Believe We are Bothering to do It This Late
(but we figured this counts as our Christmas card)

Holiday Open House

on December 17th, 2005

Feel free to drop by
anytime from 7:00 PM until 9:30 PM

At the Home of
Meg & Mike O'Neill
(b) (6)
[redacted]

Bradbury, Steve

From: Bradbury, Steve
Sent: Monday, December 19, 2005 7:44 AM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Cc: 'Harriet_Miers@who.eop.gov'
Subject: Re: Q and A for your review ...

Some suggested edits or comments: First, (b) (5) Second, there's a typo in the answer to the 2d question: (b) (5) Finally, please note that (b) (5) . I suggest something like, '(b) (5) " Thx.

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov <Brett_M._Kavanaugh@who.eop.gov>
To: Bradbury, Steve <Steve.Bradbury@SMOJMD.USDOJ.gov>
Sent: Mon Dec 19 07:08:27 2005
Subject: Q and A for your review ...

(b) (5)

(b) (5)

Bradbury, Steve

From: Bradbury, Steve
Sent: Monday, December 19, 2005 9:06 PM
To: 'Harriet_Miers@who.eop.gov'; 'Brett_M._Kavanaugh@who.eop.gov'; Sampson, Kyle; Elwood, Courtney; 'John_M._Mitnick@who.eop.gov'; 'John_B._Wiegmann@nsc.eop.gov'
Cc: Eisenberg, John
Subject: New TPs re NSA legal authority
Attachments: NSA Activities_Legal Authority_Talkers_4.doc

Attached for further staffing at WH and OAG review is a new set of talking points on the legal authority for the NSA activities, which attempts to incorporate all comments received thus far (b) (5) [redacted]. Thx. Steve

Sampson, Kyle

From:	Sampson, Kyle
Sent:	Tuesday, December 20, 2005 6:05 AM
To:	'Harriet_Miers@who.eop.gov'; Bradbury, Steve; Elwood, Courtney; John_B._Wiegmann@nsc.eop.gov; Brett_M._Kavanaugh@who.eop.gov; John_M._Mitnick@who.eop.gov
Cc:	Eisenberg, John
Subject:	RE: NSA talking points

No objection. ETA?

-----Original Message-----
From: Harriet_Miers@who.eop.gov [mailto:Harriet_Miers@who.eop.gov]
Sent: Tuesday, December 20, 2005 5:52 AM
To: Bradbury, Steve; Sampson, Kyle; Elwood, Courtney; John_B._Wiegmann@nsc.eop.gov; Brett_M._Kavanaugh@who.eop.gov; John_M._Mitnick@who.eop.gov
Cc: Eisenberg, John
Subject: RE: NSA talking points

Will look forward to getting it. Thanks.

-----Original Message-----
From: Steve.Bradbury@usdoj.gov [mailto:Steve.Bradbury@usdoj.gov]
Sent: Tuesday, December 20, 2005 5:44 AM
To: Kyle.Sampson@usdoj.gov; Courtney.Elwood@usdoj.gov; Wiegmann, John B.; Kavanaugh, Brett M.; Mitnick, John M.; Miers, Harriet
Cc: John.Eisenberg@usdoj.gov
Subject: NSA talking points

Pls hold off on further review of the revised talkers I sent last night.
I intend to rearrange the legal points (b) (5), as follows: (1) (b) (5)
(2) (b) (5)
. (3) (b) (5)
.
Absent objection to this rearrangement, I intend to push forward with it and circulate a new draft ASAP this morning. Steve

Bradbury, Steve

From: Bradbury, Steve
Sent: Tuesday, December 20, 2005 8:17 AM
To: 'Harriet_Miers@who.eop.gov'; 'Brett_M._Kavanaugh@who.eop.gov'; 'John_M._Mitnick@who.eop.gov'; 'John_B._Wiegmann@nsc.eop.gov'; Sampson, Kyle; Elwood, Courtney
Cc: Eisenberg, John
Subject: New NSA talking points -- 12/20
Attachments: NSA Activities_Legal Authority_Talkers_12_20.doc

As promised, attached are the newly reordered talking points on legal authority for the NSA activities. I think these are now ready to go, subject to any final comments. Thx

Bradbury, Steve

From: Bradbury, Steve
Sent: Tuesday, December 20, 2005 9:31 AM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Subject: RE: New NSA talking points -- 12/20

Definitely. I'm getting a number of additional good suggestions from OAG, OVP, and others at OLC. So there'll be yet a further turnaround and perhaps at that point it will be best for you to circulate for comment to Gen. Hayden. Alternatively, it's fine, if you've already done so, to circulate to him the version I sent earlier this morning. I did speak with Harriet about this. Thx.

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Tuesday, December 20, 2005 9:10 AM
To: Bradbury, Steve
Subject: RE: New NSA talking points -- 12/20

Steve: I think we should make sure General Hayden sees these before they go out. (You may receive same message from Harriet.)

-----Original Message-----
From: Steve.Bradbury@usdoj.gov [mailto:Steve.Bradbury@usdoj.gov]
Sent: Tuesday, December 20, 2005 8:17 AM

Bradbury, Steve

From: Bradbury, Steve
Sent: Tuesday, December 20, 2005 1:01 PM
To: 'Harriet_Miers@who.eop.gov'; Brett_M._Kavanaugh@who.eop.gov
Subject: RE: Updated NSA talking points

I've cut the sub-bullet you suggested and fixed the one above it (b) (5) I will leave the additional quotes out, per your comment. (b) (5) [redacted].

-----Original Message-----
From: Harriet_Miers@who.eop.gov [mailto:Harriet_Miers@who.eop.gov]
Sent: Tuesday, December 20, 2005 12:29 PM
To: Bradbury, Steve; Brett_M._Kavanaugh@who.eop.gov
Subject: RE: Updated NSA talking points

On the talking pts, I would (b) (5) [redacted]

Generally, (b) (5) [redacted]

-----Original Message-----
From: Steve.Bradbury@usdoj.gov [mailto:Steve.Bradbury@usdoj.gov]
Sent: Tuesday, December 20, 2005 12:16 PM
To: Kavanaugh, Brett M.
Cc: Miers, Harriet
Subject: RE: Updated NSA talking points

Others have suggested the same, and we'll work those in. Thx.

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Tuesday, December 20, 2005 12:07 PM
To: Bradbury, Steve
Subject: RE: Updated NSA talking points

Subject: RE: Updated NSA talking points

Will do. By the way, (b) (5) [redacted]

-----Original Message-----
From: Steve.Bradbury@usdoj.gov [mailto:Steve.Bradbury@usdoj.gov]
Sent: Tuesday, December 20, 2005 12:02 PM
To: Wiegmann, John B.; Miers, Harriet; Kavanaugh, Brett M.; Mitnick, John M.
Cc: John.Eisenberg@usdoj.gov
Subject: Updated NSA talking points

In response to several good suggestions from the AG and others in OLC, we have provided more detail and case support in the points. Brett:
You should share this updated version with Gen. Hayden, even if he saw the last version. I have also now circulated this draft to OLA, OLP, and OPA within DOJ to obtain their comments. I hope we can achieve final comfort and sign off all around early this afternoon. We are simultaneously (b) (5) [redacted] draft letter from DOJ OLA to the Hill, and I will circulate that draft shortly.
Thx.
Steve

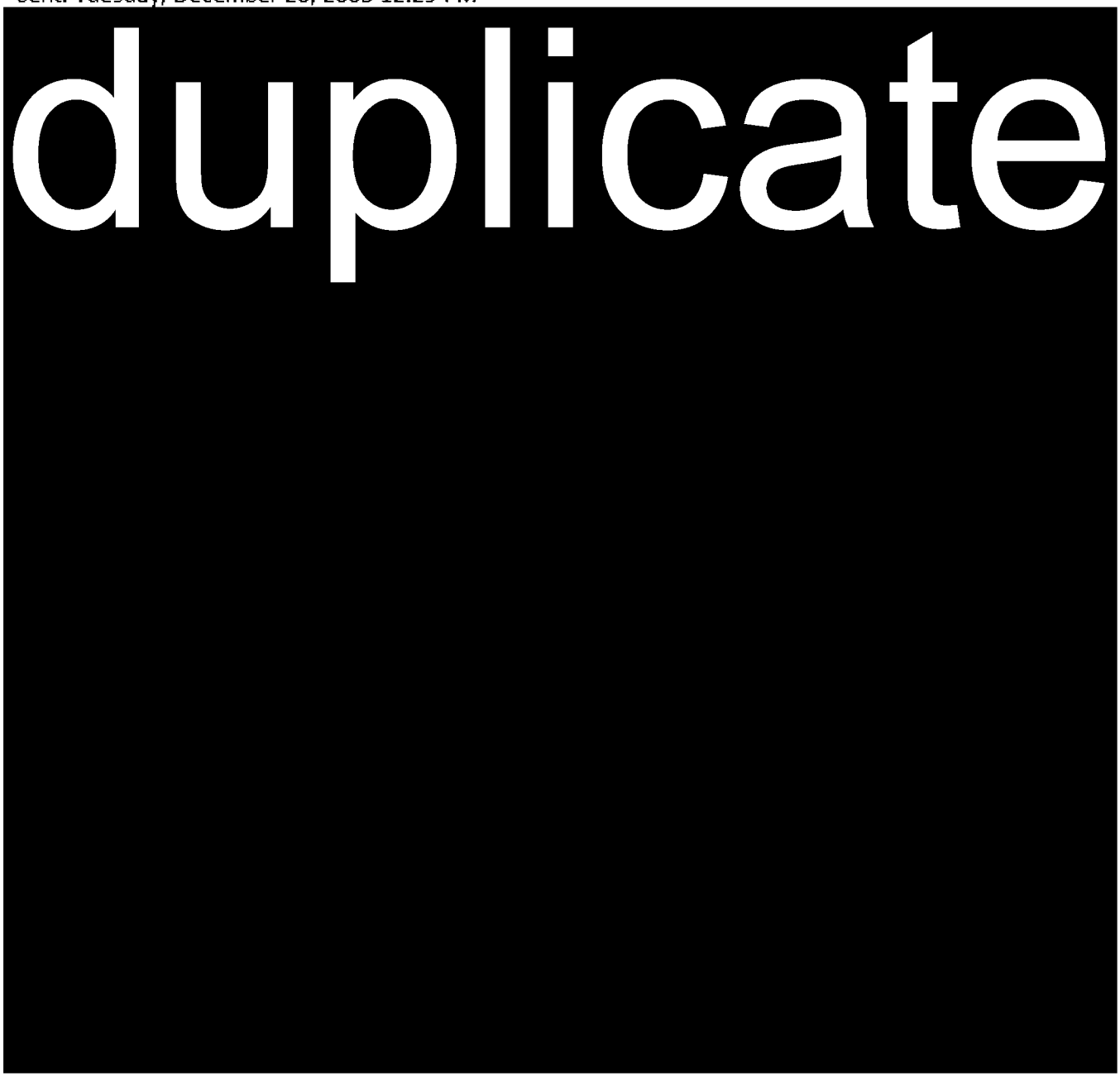
<<NSA Activities_Legal Authority_Talkers_12.20pm.doc>>

Bradbury, Steve

From: Bradbury, Steve
Sent: Tuesday, December 20, 2005 1:56 PM
To: 'Harriet_Miers@who.eop.gov'; Brett_M._Kavanaugh@who.eop.gov
Subject: RE: Updated NSA talking points

One thing I am doing is adding a short bullet [redacted] (b) (5) [redacted]

-----Original Message-----
From: Harriet_Miers@who.eop.gov [mailto:Harriet_Miers@who.eop.gov]
Sent: Tuesday, December 20, 2005 12:29 PM



duplicate

Brett_M._Kavanaugh@who.eop.gov

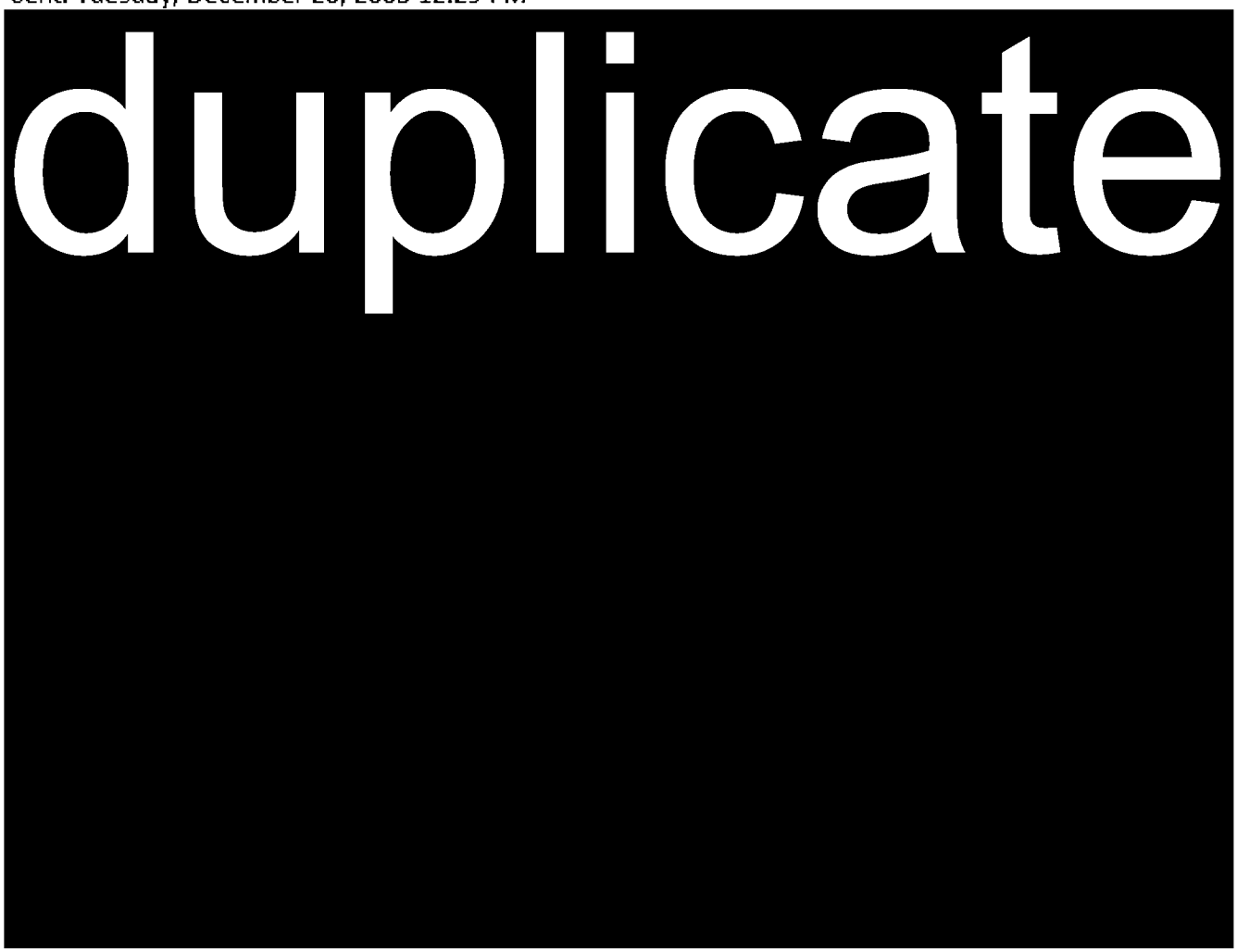
From: Brett_M._Kavanaugh@who.eop.gov
Sent: Tuesday, December 20, 2005 2:25 PM
To: Bradbury, Steve
Subject: RE: Updated NSA talking points

I think Harriet will talk to you about latest status.

-----Original Message-----
From: Steve.Bradbury@usdoj.gov [mailto:Steve.Bradbury@usdoj.gov]
Sent: Tuesday, December 20, 2005 1:58 PM
To: Miers, Harriet; Kavanaugh, Brett M.
Subject: RE: Updated NSA talking points

Brett: Do you have a sense whether Gen. Hayden or others within WH will have further comments?

-----Original Message-----
From: Harriet_Miers@who.eop.gov [mailto:Harriet_Miers@who.eop.gov]
Sent: Tuesday, December 20, 2005 12:29 PM



duplicate

William_K._Kelley@who.eop.gov

From:	William_K._Kelley@who.eop.gov
Sent:	Wednesday, December 21, 2005 4:19 PM
To:	Brett_M._Kavanaugh@who.eop.gov
Cc:	Bradbury, Steve; Harriet_Miers@who.eop.gov
Subject:	Letter Staffing
Attachments:	tmp.htm; NSALetter2.doc

Brett--Attached in the latest version of the long letter for staffing to DNI. No decision has been made as to whether or when to send the letter, but DOJ would like to be in a position to do so pretty quickly.

Brett–Attached in the latest version of the long letter for staffing to DNI. No decision has been made as to whether or when to send the letter, but DOJ would like to be in a position to do so pretty quickly.

Bradbury, Steve

From: Bradbury, Steve
Sent: Wednesday, December 21, 2005 6:52 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'; William_K._Kelley@who.eop.gov
Subject: RE: Edit from Crouch ...

Got it. Thx

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Wednesday, December 21, 2005 6:50 PM
To: Bradbury, Steve; William_K._Kelley@who.eop.gov
Subject: Edit from Crouch ...

One nit from Crouch -- in the long letter suggested removing the word "at" on page 4 between "privacy" and "interest."

Hayden coming in any moment.

Bradbury, Steve

From: Bradbury, Steve
Sent: Wednesday, December 21, 2005 6:55 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'; William_K._Kelley@who.eop.gov
Subject: RE: Hayden ...

Great. Thx

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Wednesday, December 21, 2005 6:53 PM
To: Bradbury, Steve; Brett_M._Kavanaugh@who.eop.gov;
William_K._Kelley@who.eop.gov
Subject: Hayden ...

On the talking points, end of point 2, change "[redacted (b) (5)]"

to

"[redacted (b) (5)]"

That's it. Cleared from here on my end. You will want to make sure the precise plan for release is approved by Harriet. Please send me copies of finals for my records. Thanks.

Bradbury, Steve

From: Bradbury, Steve
Sent: Wednesday, December 21, 2005 7:05 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Subject: RE: Letter ...

Okay. I'll wait to hear. Thx!

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Wednesday, December 21, 2005 7:03 PM
To: Bradbury, Steve
Subject: Letter ...

I left messages for Bill. It seems that you only have the final talkers back from him. So we need to talk to him to clear up/avoid confusion.

William_K._Kelley@who.eop.gov

From:	William_K._Kelley@who.eop.gov
Sent:	Wednesday, December 21, 2005 7:19 PM
To:	Bradbury, Steve; Brett_M._Kavanaugh@who.eop.gov
Cc:	William_K._Kelley@who.eop.gov; Harriet_Miers@who.eop.gov
Subject:	Letter
Attachments:	tmp.htm; NSALetter2.doc

Ms. Miers had me replace '(b) (5)' with '(b) (5)' in the first line of the second paragraph on the 4th page.

Ms. Miers had me replace "[redacted]" with "[redacted]" in the first line of the second paragraph on the 4th page.

William_K._Kelley@who.eop.gov

From:	William_K._Kelley@who.eop.gov
Sent:	Wednesday, December 21, 2005 7:40 PM
To:	Bradbury, Steve; Brett_M._Kavanaugh@who.eop.gov
Cc:	Harriet_Miers@who.eop.gov
Subject:	Re: Letter

I'm fine with all Brett's suggestions.

-----Original Message-----
From: Kavanaugh, Brett M. <Brett_M._Kavanaugh@who.eop.gov>
To: Kelley, William K. <William_K._Kelley@who.eop.gov>; 'Steve.Bradbury@usdoj.gov' <Steve.Bradbury@usdoj.gov>
CC: Miers, Harriet <Harriet_Miers@who.eop.gov>
Sent: Wed Dec 21 19:38:33 2005
Subject: RE: Letter

Two nits:

-- [redacted] (b) (5)

-- I think there is a missing "but" before "it expressly distinguished" at top of page 2 in discussion of Keith case.

-- Also you have JD's nit on page 4 of deleting the word "at" between "privacy" and "interest."

Thanks. Good from here.

-----Original Message-----
From: Kelley, William K.
Sent: Wednesday, December 21, 2005 7:26 PM
To: 'Steve.Bradbury@usdoj.gov'; Kavanaugh, Brett M.
Cc: Miers, Harriet
Subject: Re: Letter

Unless Brett or Harriet have edits, then yes.

-----Original Message-----
From: Steve.Bradbury@usdoj.gov <Steve.Bradbury@usdoj.gov>
To: Kavanaugh, Brett M. <Brett_M._Kavanaugh@who.eop.gov>; Kelley, William K. <William_K._Kelley@who.eop.gov>
CC: Miers, Harriet <Harriet_Miers@who.eop.gov>
Sent: Wed Dec 21 19:25:25 2005
Subject: RE: Letter

Thank you. So with these edits are we signed off?

-----Original Message-----
From: William_K._Kelley@who.eop.gov
[mailto:William_K._Kelley@who.eop.gov]
Sent: Wednesday, December 21, 2005 7:19 PM

duplicate

Bradbury, Steve

From:	Bradbury, Steve
Sent:	Wednesday, December 21, 2005 8:39 PM
To:	'Brett_M._Kavanaugh@who.eop.gov'
Cc:	'Harriet_Miers@who.eop.gov'
Subject:	Re:

Great, thx. I have some improvements to the (b) (5) language myself, which I'll go over with Bill.

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov <Brett_M._Kavanaugh@who.eop.gov>
To: Bradbury, Steve <Steve.Bradbury@SMOJMD.USDOJ.gov>
CC: Harriet_Miers@who.eop.gov <Harriet_Miers@who.eop.gov>
Sent: Wed Dec 21 20:32:33 2005
Subject: Re:

Ok by me on that change. Bill is calling you on the (b) (5) point. Thx.

-----Original Message-----
From: Steve.Bradbury@usdoj.gov <Steve.Bradbury@usdoj.gov>
To: Kavanaugh, Brett M. <Brett_M._Kavanaugh@who.eop.gov>
CC: Miers, Harriet <Harriet_Miers@who.eop.gov>
Sent: Wed Dec 21 20:20:32 2005
Subject: Re:

Great. Then still waiting for Bill's sign off on (b) (5). FYI: On second look, I don't like "(b) (5) ..." and I intend to change it back to "(b) (5) ..." Okay?

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov <Brett_M._Kavanaugh@who.eop.gov>
To: Bradbury, Steve <Steve.Bradbury@SMOJMD.USDOJ.gov>
CC: Harriet_Miers@who.eop.gov <Harriet_Miers@who.eop.gov>
Sent: Wed Dec 21 20:14:33 2005
Subject:

To confirm: Bartlett, Wolff, and Wallace are good with the letter going.

Bradbury, Steve

From: Bradbury, Steve
Sent: Wednesday, December 21, 2005 8:45 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Subject: Re:

Will do. Thx

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov <Brett_M._Kavanaugh@who.eop.gov>
To: Bradbury, Steve <Steve.Bradbury@SMOJMD.USDOJ.gov>
Sent: Wed Dec 21 20:40:27 2005
Subject:

Can you send me final finals after you talk to bill. Thanks. (And thanks for your patience.).

Harriet_Miers@who.eop.gov

From: Harriet_Miers@who.eop.gov
Sent: Wednesday, December 21, 2005 9:13 PM
To: Bradbury, Steve; Brett_M._Kavanaugh@who.eop.gov
Subject: RE:

Bravo.

-----Original Message-----
From: Steve.Bradbury@usdoj.gov [mailto:Steve.Bradbury@usdoj.gov]
Sent: Wednesday, December 21, 2005 8:52 PM
To: Kavanaugh, Brett M.; Miers, Harriet
Subject: Re:

How about: "[redacted (b) (5)] ..."

-----Original Message-----
From: Harriet_Miers@who.eop.gov <Harriet_Miers@who.eop.gov>
To: Bradbury, Steve <Steve.Bradbury@SMOJMD.USDOJ.gov>;
Brett_M._Kavanaugh@who.eop.gov <Brett_M._Kavanaugh@who.eop.gov>
Sent: Wed Dec 21 20:35:06 2005
Subject: RE:

[redacted (b) (5)] Does Bill know we are waiting on his sign off?

-----Original Message-----
From: Steve.Bradbury@usdoj.gov [mailto:Steve.Bradbury@usdoj.gov]
Sent: Wednesday, December 21, 2005 8:21 PM

duplicate

Bradbury, Steve

From:	Bradbury, Steve
Sent:	Wednesday, December 21, 2005 9:50 PM
To:	'Brett_M._Kavanaugh@who.eop.gov'
Subject:	Final letter and talkers
Attachments:	Letter_NSA Legal Authority_Final.doc; NSA Legal Authority_Final.doc

Here are the finals. We'll meet with the AG in the morning re sending the letter. Thx for all your help.

Bradbury, Steve

From: Bradbury, Steve
Sent: Wednesday, December 21, 2005 10:00 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Subject: Letter: Use this version
Attachments: Letter_NSA Legal Authority_Final.doc

Harriet asked me to add "the" before "Congress" at various points, and this final-final version does that. So pls use this one. Sorry! (And thx again.)

Bradbury, Steve

From:	Bradbury, Steve
Sent:	Thursday, December 22, 2005 11:41 AM
To:	'William_K._Kelley@who.eop.gov'; Brett_M._Kavanaugh@who.eop.gov
Subject:	RE: One more suggested edit

DOJ has not sent the TPs out yet and is still debating how it may use them and with whom. DOJ will likely go with the letter first.

-----Original Message-----
From: William_K._Kelley@who.eop.gov
[mailto:William_K._Kelley@who.eop.gov]
Sent: Thursday, December 22, 2005 11:36 AM
To: Bradbury, Steve; Brett_M._Kavanaugh@who.eop.gov
Subject: RE: One more suggested edit

No problem. I assume so.

-----Original Message-----
From: Steve.Bradbury@usdoj.gov [mailto:Steve.Bradbury@usdoj.gov]
Sent: Thursday, December 22, 2005 11:29 AM
To: Kelley, William K.; Kavanaugh, Brett M.
Subject: One more suggested edit

Will Moschella has suggested [redacted (b) (5)] I see no problem with [redacted (b) (5)]. Do you have any issue with it?
Has the WH sent the talkers out yet? Thx

Bradbury, Steve

From: Bradbury, Steve
Sent: Thursday, December 22, 2005 11:45 AM
To: 'William_K._Kelley@who.eop.gov'; 'Brett_M._Kavanaugh@who.eop.gov'; 'bwalton@who.eop.gov'; Scolinos, Tasia; Moschella, William; Sampson, Kyle; Elwood, Courtney
Cc: Eisenberg, John
Subject: PDF of slightly revised NSA talkers
Attachments: NSA Legal Authority_Final_2.pdf

This PDF version of the talkers [redacted] (b) (5) . Pls use this version in any prospective external distribution that may be approved. Thx

Bradbury, Steve

From:	Bradbury, Steve
Sent:	Thursday, December 22, 2005 1:09 PM
To:	'William_K._Kelley@who.eop.gov'; 'Harriet_Miers@who.eop.gov'; 'Brett_M._Kavanaugh@who.eop.gov'; 'John_M._Mitnick@who.eop.gov'; 'John_B._Wiegmann@nsc.eop.gov'; 'Candida_P._Wolff@who.eop.gov'
Subject:	12.22.05.NSA.letter.pdf
Attachments:	12.22.05.NSA.letter.pdf

Attached is a PDF of the signed letter from Will Moschella to the leaders of the Intel Committees re the legal authority for the NSA activities. This letter will be sent at 2pm today.

U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

December 22, 2005

The Honorable Pat Roberts
Chairman
Senate Select Committee on Intelligence
United States Senate
Washington, D.C. 20510

The Honorable John D. Rockefeller, IV
Vice Chairman
Senate Select Committee on Intelligence
United States Senate
Washington, D.C. 20510

The Honorable Peter Hoekstra
Chairman
Permanent Select Committee
on Intelligence
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Jane Harman
Ranking Minority Member
Permanent Select Committee
on Intelligence
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairmen Roberts and Hoekstra, Vice Chairman Rockefeller, and Ranking Member Harman:

As you know, in response to unauthorized disclosures in the media, the President has described certain activities of the National Security Agency ("NSA") that he has authorized since shortly after September 11, 2001. As described by the President, the NSA intercepts certain international communications into and out of the United States of people linked to al Qaeda or an affiliated terrorist organization. The purpose of these intercepts is to establish an early warning system to detect and prevent another catastrophic terrorist attack on the United States. The President has made clear that he will use his constitutional and statutory authorities to protect the American people from further terrorist attacks, and the NSA activities the President described are part of that effort. Leaders of the Congress were briefed on these activities more than a dozen times.

The purpose of this letter is to provide an additional brief summary of the legal authority supporting the NSA activities described by the President.

As an initial matter, I emphasize a few points. The President stated that these activities are "crucial to our national security." The President further explained that "the unauthorized disclosure of this effort damages our national security and puts our citizens at risk. Revealing classified information is illegal, alerts our enemies, and endangers our country." These critical national security activities remain classified. All United States laws and policies governing the protection and nondisclosure of national security information, including the information relating to the

activities described by the President, remain in full force and effect. The unauthorized disclosure of classified information violates federal criminal law. The Government may provide further classified briefings to the Congress on these activities in an appropriate manner. Any such briefings will be conducted in a manner that will not endanger national security.

Under Article II of the Constitution, including in his capacity as Commander in Chief, the President has the responsibility to protect the Nation from further attacks, and the Constitution gives him all necessary authority to fulfill that duty. *See, e.g.*, *Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863) (stressing that if the Nation is invaded, "the President is not only authorized but bound to resist by force . . . . without waiting for any special legislative authority"); *Campbell v. Clinton*, 203 F.3d 19, 27 (D.C. Cir. 2000) (Silberman, J., concurring) ("[T]he *Prize Cases* . . . stand for the proposition that the President has independent authority to repel aggressive acts by third parties even without specific congressional authorization, and courts may not review the level of force selected."); *id.* at 40 (Tatel, J., concurring). The Congress recognized this constitutional authority in the preamble to the Authorization for the Use of Military Force ("AUMF") of September 18, 2001, 115 Stat. 224 (2001) ("[T]he President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States."), and in the War Powers Resolution, *see* 50 U.S.C. § 1541(c) ("The constitutional powers of the President as Commander in Chief to introduce United States Armed Forces into hostilities[] . . . [extend to] a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.").

This constitutional authority includes the authority to order warrantless foreign intelligence surveillance within the United States, as all federal appellate courts, including at least four circuits, to have addressed the issue have concluded. *See, e.g.*, *In re Sealed Case*, 310 F.3d 717, 742 (FISA Ct. of Review 2002) ("[A]ll the other courts to have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information . . . . We take for granted that the President does have that authority . . . ."). The Supreme Court has said that warrants are generally required in the context of purely *domestic* threats, but it expressly distinguished *foreign* threats. *See United States v. United States District Court*, 407 U.S. 297, 308 (1972). As Justice Byron White recognized almost 40 years ago, Presidents have long exercised the authority to conduct warrantless surveillance for national security purposes, and a warrant is unnecessary "if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable." *Katz v. United States*, 389 U.S. 347, 363-64 (1967) (White, J., concurring).

The President's constitutional authority to direct the NSA to conduct the activities he described is supplemented by statutory authority under the AUMF. The AUMF authorizes the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks of September 11, 2001, . . . in order to prevent any future acts of international terrorism against the United States." § 2(a). The AUMF clearly contemplates action within the United States, *see also id.* pmbl. (the attacks of September 11 "render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad"). The AUMF cannot be read as limited to authorizing the use of force against Afghanistan, as some

have argued. Indeed, those who directly "committed" the attacks of September 11 resided in the United States for months before those attacks. The reality of the September 11 plot demonstrates that the authorization of force covers activities both on foreign soil and in America.

In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Supreme Court addressed the scope of the AUMF. At least five Justices concluded that the AUMF authorized the President to detain a U.S. citizen in the United States because "detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war" and is therefore included in the "necessary and appropriate force" authorized by the Congress. *Id.* at 518-19 (plurality opinion of O'Connor, J.); *see id.* at 587 (Thomas, J., dissenting). These five Justices concluded that the AUMF "clearly and unmistakably authorize[s]" the "fundamental incident[s] of waging war." *Id.* at 518-19 (plurality opinion); *see id.* at 587 (Thomas, J., dissenting).

Communications intelligence targeted at the enemy is a fundamental incident of the use of military force. Indeed, throughout history, signals intelligence has formed a critical part of waging war. In the Civil War, each side tapped the telegraph lines of the other. In the World Wars, the United States intercepted telegrams into and out of the country. The AUMF cannot be read to exclude this long-recognized and essential authority to conduct communications intelligence targeted at the enemy. We cannot fight a war blind. Because communications intelligence activities constitute, to use the language of *Hamdi*, a fundamental incident of waging war, the AUMF *clearly and unmistakably authorizes* such activities directed against the communications of our enemy. Accordingly, the President's "authority is at its maximum." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring); *see Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981); *cf. Youngstown*, 343 U.S. at 585 (noting the absence of a statute "from which [the asserted authority] c[ould] be fairly implied").

The President's authorization of targeted electronic surveillance by the NSA is also consistent with the Foreign Intelligence Surveillance Act ("FISA"). Section 2511(2)(f) of title 18 provides, as relevant here, that the procedures of FISA and two chapters of title 18 "shall be the exclusive means by which electronic surveillance . . . may be conducted." Section 109 of FISA, in turn, makes it unlawful to conduct electronic surveillance, "except as authorized by statute." 50 U.S.C. § 1809(a)(1). Importantly, section 109's exception for electronic surveillance "authorized by statute" is broad, especially considered in the context of surrounding provisions. *See* 18 U.S.C. § 2511(1) ("Except as otherwise specifically provided *in this chapter* any person who—(a) intentionally intercepts . . . any wire, oral, or electronic communication[] . . . shall be punished . . . .") (emphasis added); *id.* § 2511(2)(e) (providing a defense to liability to individuals "conduct[ing] electronic surveillance, . . . as authorized by *that Act [FISA]*") (emphasis added).

By expressly and broadly excepting from its prohibition electronic surveillance undertaken "as authorized by statute," section 109 of FISA permits an exception to the "procedures" of FISA referred to in 18 U.S.C. § 2511(2)(f) where authorized by another statute, even if the other authorizing statute does not specifically amend section 2511(2)(f). The AUMF satisfies section 109's requirement for statutory authorization of electronic surveillance, just as a majority of the Court in *Hamdi* concluded that it satisfies the requirement in 18 U.S.C. § 4001(a) that no U.S. citizen be detained by the United States "except pursuant to an Act of Congress." *See Hamdi*, 542

U.S. at 519 (explaining that "it is of no moment that the AUMF does not use specific language of detention"); *see id.* at 587 (Thomas, J., dissenting).

Some might suggest that FISA could be read to require that a subsequent statutory authorization must come in the form of an amendment to FISA itself. But under established principles of statutory construction, the AUMF and FISA must be construed in harmony to avoid any potential conflict between FISA and the President's Article II authority as Commander in Chief. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 689 (2001); *INS v. St. Cyr*, 533 U.S. 289, 300 (2001). Accordingly, any ambiguity as to whether the AUMF is a statute that satisfies the requirements of FISA and allows electronic surveillance in the conflict with al Qaeda without complying with FISA procedures must be resolved in favor of an interpretation that is consistent with the President's long-recognized authority.

The NSA activities described by the President are also consistent with the Fourth Amendment and the protection of civil liberties. The Fourth Amendment's "central requirement is one of reasonableness." *Illinois v. McArthur*, 531 U.S. 326, 330 (2001) (internal quotation marks omitted). For searches conducted in the course of ordinary criminal law enforcement, reasonableness generally requires securing a warrant. *See Bd. of Educ. v. Earls*, 536 U.S. 822, 828 (2002). Outside the ordinary criminal law enforcement context, however, the Supreme Court has, at times, dispensed with the warrant, instead adjudging the reasonableness of a search under the totality of the circumstances. *See United States v. Knights*, 534 U.S. 112, 118 (2001). In particular, the Supreme Court has long recognized that "special needs, beyond the normal need for law enforcement," can justify departure from the usual warrant requirement. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995); *see also City of Indianapolis v. Edmond*, 531 U.S. 32, 41-42 (2000) (striking down checkpoint where "primary purpose was to detect evidence of ordinary criminal wrongdoing").

Foreign intelligence collection, especially in the midst of an armed conflict in which the adversary has already launched catastrophic attacks within the United States, fits squarely within the "special needs" exception to the warrant requirement. Foreign intelligence collection undertaken to prevent further devastating attacks on our Nation serves the highest government purpose through means other than traditional law enforcement. *See In re Sealed Case*, 310 F.3d at 745; *United States v. Duggan*, 743 F.2d 59, 72 (2d Cir. 1984) (recognizing that the Fourth Amendment implications of foreign intelligence surveillance are far different from ordinary wiretapping, because they are not principally used for criminal prosecution).

Intercepting communications into and out of the United States of persons linked to al Qaeda in order to detect and prevent a catastrophic attack is clearly *reasonable*. Reasonableness is generally determined by "balancing the nature of the intrusion on the individual's privacy against the promotion of legitimate governmental interests." *Earls*, 536 U.S. at 829. There is undeniably an important and legitimate privacy interest at stake with respect to the activities described by the President. That must be balanced, however, against the Government's compelling interest in the security of the Nation, *see, e.g., Haig v. Agee*, 453 U.S. 280, 307 (1981) ("It is obvious and unarguable that no governmental interest is more compelling than the security of the Nation.") (citation and quotation marks omitted). The fact that the NSA activities are reviewed and

reauthorized approximately every 45 days to ensure that they continue to be necessary and appropriate further demonstrates the reasonableness of these activities.

As explained above, the President determined that it was necessary following September 11 to create an early warning detection system. FISA could not have provided the speed and agility required for the early warning detection system. In addition, any legislative change, other than the AUMF, that the President might have sought specifically to create such an early warning system would have been public and would have tipped off our enemies concerning our intelligence limitations and capabilities. Nevertheless, I want to stress that the United States makes full use of FISA to address the terrorist threat, and FISA has proven to be a very important tool, especially in longer-term investigations. In addition, the United States is constantly assessing all available legal options, taking full advantage of any developments in the law.

We hope this information is helpful.

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General

Eisenberg, John

From: Eisenberg, John
Sent: Thursday, December 22, 2005 5:04 PM
To: Bradbury, Steve; Sampson, Kyle; Elwood, Courtney; Scolinos, Tasia; Moschella, William; 'William_K._Kelley@who.eop.gov'; 'bwalton@who.eop.gov'; 'Brett_M._Kavanaugh@who.eop.gov'
Subject: RE: NSA legal authority talking points
Attachments: NSA Legal Authority_Final_3.pdf

There was a small error in the last version: Senate Intelligence Committee should have been House Intelligence Committee. Here's the new version.

From: Bradbury, Steve
Sent: Thursday, December 22, 2005 9:16 AM
To: Sampson, Kyle; Elwood, Courtney; Scolinos, Tasia; Moschella, William; 'William_K._Kelley@who.eop.gov'; 'bwalton@who.eop.gov'; 'Brett_M._Kavanaugh@who.eop.gov'
Cc: Eisenberg, John
Subject: NSA legal authority talking points

Here are the final talkers in PDF format.

<< File: NSA Legal Authority_Final.pdf >>

LEGAL AUTHORITY FOR THE RECENTLY DISCLOSED NSA ACTIVITIES

1. In response to unauthorized disclosures in the media, the President has described certain activities of the National Security Agency ("NSA") that he has authorized since shortly after 9/11. As described by the President, the NSA intercepts certain international communications into and out of the United States of people linked to al Qaeda or an affiliated terrorist organization. The purpose of these intercepts is to establish an early warning system to detect and prevent another catastrophic terrorist attack on the United States. Leaders of Congress from both parties were briefed on these activities more than a dozen times.

2. The President has made clear that he will use his constitutional and statutory authorities to protect the American people from further terrorist attacks. The surveillance conducted here is at the heart of the need to protect the Nation from attacks on our soil, since it involves communications into or out of the United States of persons linked to al Qaeda.

3. Under Article II of the Constitution, including in his capacity as Commander in Chief, the President has the responsibility to protect the Nation from further attacks, and the Constitution gives him all necessary authority to fulfill that duty, a point Congress recognized in the preamble to the Authorization for the Use of Military Force ("AUMF") of September 18, 2001, 115 Stat. 224 (2001): "[T]he President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States."

   A. This constitutional authority includes the authority to order foreign intelligence surveillance within the U.S. without seeking a warrant, as all federal appellate courts, including at least four circuits, to have addressed the issue have concluded. *See, e.g.*, *In re Sealed Case*, 310 F.3d 717, 742 (FISA Ct. of Review 2002) ("[A]ll the other courts to have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information . . . . We take for granted that the President does have that authority . . . ."); *United States v. Duggan*, 743 F.2d 59, 72 (2d Cir. 1984) (collecting authorities). The Supreme Court has said that warrants are generally required in the context of purely *domestic* threats, but it expressly distinguished foreign threats. *See United States v. United States District Court*, 407 U.S. 297, 308 (1972) ("*Keith*").

   B. Presidents of both parties have *consistently asserted* the authority to conduct foreign intelligence surveillance without a warrant. At the time FISA was passed, President Carter's Attorney General stated explicitly that the President would interpret FISA not to interfere with the President's constitutional powers and responsibilities. Foreign Intelligence Electronic Surveillance Act of 1978: Hearings on H.R. 5794, H.R. 9745, H.R. 7308, and H.R. 5632 Before the Subcomm. on Legislation of the House Comm. on Intelligence, 95th Cong., 2d Sess. 15 (1978) (testimony of Attorney General Griffin Bell). President Clinton's Deputy Attorney General, Jamie Gorelick, explained to the House Intelligence Committee that "[t]he Department of Justice believes, and the case law supports, that the President has inherent authority to conduct warrantless physical searches for foreign intelligence purposes, and that the President may, as has been done, delegate this authority to the Attorney General." (July 14, 1994).

C. As Justice Byron White noted almost 40 years ago, "[w]iretapping to protect the security of the Nation has been authorized by successive Presidents." *Katz v. United States*, 389 U.S. 347, 363 (1967) (White, J., concurring).

4. The President's constitutional authority to authorize the NSA activities is supplemented by statutory authority under the AUMF.

A. The AUMF authorizes the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, . . . in order to prevent any future acts of international terrorism against the United States." § 2(a). The AUMF clearly contemplates action within the U.S., *see also id.* pmbl. (the attacks of September 11 "render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad"); it is not limited to Afghanistan. Indeed, those who directly "committed" the attacks of September 11 resided in the United States for months before those attacks. The reality of the September 11 plot demonstrates that the authorization of force covers activities both on foreign soil and in America.

B. A majority of the Supreme Court has explained that the AUMF "clearly and unmistakably authorize[s]" the "fundamental incident[s] of waging war." *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (plurality opinion of O'Connor, J.); *see id.* at 587 (Thomas, J., dissenting).

C. Communications intelligence targeted at the enemy is a fundamental incident of the use of military force; we cannot fight a war blind. Indeed, throughout history, signals intelligence has formed a critical part of waging war. In the Civil War, each side tapped the telegraph lines of the other. In the World Wars, the U.S. intercepted telegrams into and out of the country. The AUMF uses expansive language that plainly encompasses the long-recognized and essential authority to conduct traditional communications intelligence targeted at the enemy.

D. Because communications intelligence activities constitute, to use the language of *Hamdi*, a fundamental incident of waging war, the AUMF *clearly and unmistakably authorizes* such activities directed against the communications of our enemy. Accordingly, the President's "authority is at its maximum." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring); *see Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981).

5. The President's authorization of targeted electronic surveillance by the NSA is consistent with the Foreign Intelligence Surveillance Act ("FISA").

A. Section 2511(2)(f) of title 18 provides that the procedures of FISA and two chapters of title 18 "shall be the exclusive means by which electronic surveillance . . . and the interception of domestic wire, oral, and electronic communications may be conducted." Section 109 of FISA, in turn, makes it unlawful to conduct electronic surveillance to obtain the content of such international communications when intercepted on cables in the U.S., "except as authorized by statute." 50 U.S.C. 1809(a)(1).

B. By expressly excepting from its prohibition electronic surveillance undertaken "as authorized by statute," section 109 of FISA permits an exception to the "procedures" of

FISA referred to in 18 U.S.C. 2511(2)(f) where authorized by another statute. The AUMF satisfies section 109's requirement for statutory authorization of electronic surveillance, just as a majority of the Court in *Hamdi* concluded that the AUMF satisfies the requirement in 18 U.S.C. 4001(a) that no U.S. citizen be detained by the United States "except pursuant to an Act of Congress." *See Hamdi*, 542 U.S. at 519 ("it is of no moment that the AUMF does not use specific language of detention"); *see id.* at 587 (Thomas, J., dissenting).

C. Even if it were also plausible to read FISA to contemplate that a subsequent statutory authorization must come in the form of an amendment to FISA itself, established principles of statutory construction require interpreting FISA to allow the AUMF to authorize necessary signals intelligence, thereby avoiding an interpretation of FISA that would raise grave constitutional questions.

6. If FISA were applied to prevent or frustrate the President's ability to create an early warning system to detect and prevent al Qaeda plots against the U.S., that application of FISA would be unconstitutional. The Court of Review that supervises the FISA court recognized as much, "taking for granted that the President does have" the authority "to conduct warrantless searches to obtain foreign intelligence information," and concluding that "FISA could not encroach on the President's constitutional power." *In re Sealed Case*, 310 F.3d 717 (FISA Ct. of Review 2002).

7. The NSA activities described by the President are fully consistent with the Fourth Amendment and the protection of civil liberties.

A. The touchstone of the Fourth Amendment is *reasonableness*.

B. The Supreme Court has long recognized that "special needs, beyond the normal need for law enforcement," will justify departure from the usual warrant requirement. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995). Courts have recognized that the Fourth Amendment implications of national security surveillance are far different from ordinary wiretapping, because they are not principally used for criminal prosecution. *See, e.g., United States v. Duggan*, 743 F.2d 59, 72 (2d Cir. 1984). *See also Katz v. United States*, 389 U.S. 347, 363-64 (White, J., concurring) (warrants not required "if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable").

C. Intercepting calls into and out of the U.S. of persons linked to al Qaeda in order to detect and prevent a catastrophic attack is such a "special need" and is clearly *reasonable* for Fourth Amendment purposes, particularly in light of the fact that the NSA activities are reviewed and reauthorized approximately every 45 days to ensure that they continue to be necessary and appropriate.

8. FISA could not have provided the speed and agility required for the early warning detection system the President determined was necessary following 9/11.

A. In any event, the United States makes use of FISA to address the terrorist threat as appropriate, and FISA has proven to be a very important tool, especially in longer-term investigations.

B. The United States is constantly assessing all available legal options, taking full advantage of any developments in the law.

9. Any legislative change, other than the AUMF, that the President might have sought specifically to create such an early warning system would have been public and would have tipped off our enemies concerning our intelligence limitations and capabilities.

RECORDS RELEASED 2018-08-31

Colborn, Paul P

From:	Colborn, Paul P
Sent:	Thursday, January 03, 2002 4:52 PM
To:	'Brett_M._Kavanaugh@who.eop.gov'
Cc:	Whelan, M Edward III
Subject:	RE: (b) (5) Office of Administration

Brett: Any chance we can meet on this subject this month before Congress returns to make our lives even busier?
-- Paul

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Tuesday, November 13, 2001 10:28 PM
To: Colborn, Paul P
Subject: Re: (b) (5) Office of Administration

We have tons of judicial interviews over next 5 days on top of a ton of other stuff. Can it wait until week of 26th?

(Embedded
image moved "Colborn, Paul P" <Paul.P.Colborn@usdoj.gov>
to file: 11/07/2001 06:00:28 PM
pic12679.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc:
Subject: (b) (5) Office of Administration

Brett, did you get my phone message from awhile ago suggesting that we have a meeting with OA? I

know you've got a lot going on. So, this is just a gentle reminder.

-- Paul

Collins, Dan

From:	Collins, Dan
Sent:	Tuesday, January 08, 2002 11:44 AM
To:	'Brett_M._Kavanaugh@who.eop.gov'
Cc:	Thorsen, Carl; Bryant, Dan; Whelan, M Edward III; Martens, Matthew; Chertoff, Michael; Horowitz, Michael-CRM; Colborn, Paul P
Subject:	RE: First draft of letter to Burton
Attachments:	letter to Burton markup.doc
Importance:	High

Brett--

I think you've done a terrific job putting together, in a short period of time, a well-written letter that hits the right tone. I just have a few suggestions, which for ease of reference, I've put in the attached red-lined version. (Please note: the changes will NOT be intelligible if you use "QuickView" to view it; it must be opened with Microsoft Word.) Some of the suggested changes are self-explanatory. For the ones that might not be, my thoughts are as follows:

1) (b) (5) [redacted]

2) (b) (5) [redacted]

3) (b) (5) [redacted]

4) (b) (5) [redacted]

5) (b) (5) [redacted]

In making my suggested edits, I am relying upon those with more knowledge of the documents than I (who are cc'ed) to confirm that the edits are correct and accurate. Please don't hesitate to speak up if there is anything that you think isn't phrased right, etc.

Thanks.

--Dan

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

From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Monday, January 07, 2002 6:59 PM
To: Thorsen, Carl
Cc: Thorsen, Carl; Bryant, Dan; Collins, Dan; Whelan, M Edward III; Martens, Matthew; Chertoff, Michael; Horowitz, Michael-CRM; Colborn, Paul P
Subject: First draft of letter to Burton

Attached is a first somewhat rough draft. I propose that everyone provide me a round of edits and comments by mid-day and that I re-circulate by mid-afternoon if possible, and that we then see where we are. Of course, getting it right needs to take precedence over this schedule, so we will just do the best we can in terms of getting it done quickly. Thanks.(See attached file: letter to Burton 1 07 02.doc)

Brett_M._Kavanaugh@who.eop.gov

From:	Brett_M._Kavanaugh@who.eop.gov
Sent:	Tuesday, January 08, 2002 1:56 PM
To:	Ciongoli, Adam; Thorsen, Carl; Bryant, Dan; Collins, Dan; Whelan, M Edward III; Martens, Matthew; Chertoff, Michael; Horowitz, Michael-CRM; Colborn, Paul P; Thorsen, Carl
Subject:	Status of draft letter to Burton

Thanks for everyone's comments. We also had many comments internally here. I will circulate a new draft later this afternoon. I think we need to move the target time for sending this to tomorrow. Thanks.

Whelan, M Edward III

From:	Whelan, M Edward III
Sent:	Tuesday, January 08, 2002 1:56 PM
To:	'Kavanaugh, Brett'
Subject:	FW: First draft of letter to Burton
Attachments:	letter to Burton 1 07 02 redlined.doc; letter to Burton 1 07 02.doc

resending

-----Original Message-----
From: Whelan, M Edward III
Sent: Tuesday, January 08, 2002 11:49 AM
To: 'Brett_M._Kavanaugh@who.eop.gov'; Thorsen, Carl
Cc: Thorsen, Carl; Bryant, Dan; Collins, Dan; Martens, Matthew; Chertoff, Michael; Horowitz, Michael-CRM; Colborn, Paul P
Subject: RE: First draft of letter to Burton

Brett:

OLC's comments are included in the attached versions (one with the redlined changes hidden, the other with them revealed). We have tried to [redacted (b) (5)], but invite attention to our effort. Most of the other changes should be self-explanatory, but we would be happy to discuss.

We have not yet seen the Burton letter to Judge Gonzales and might have additional comments after we do.

Ed

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Monday, January 07, 2002 6:59 PM

duplicate

Brett_M._Kavanaugh@who.eop.gov

From:	Brett_M._Kavanaugh@who.eop.gov
Sent:	Tuesday, January 08, 2002 7:13 PM
To:	Ciongoli, Adam; Thorsen, Carl; Bryant, Dan; Collins, Dan; Burton, Faith; Whelan, M Edward III; Martens, Matthew; Chertoff, Michael; Horowitz, Michael-CRM; Colborn, Paul P; Thorsen, Carl
Subject:	Second draft of letter to Burton
Attachments:	letter to Burton 1 08 02.doc

Please give me comments by noon tomorrow. It would be helpful to receive a single set of DOJ comments if possible. Thanks.

(See attached file: letter to Burton 1 08 02.doc)

Brett_M._Kavanaugh@who.eop.gov

From:	Brett_M._Kavanaugh@who.eop.gov
Sent:	Wednesday, January 09, 2002 5:38 PM
To:	Colborn, Paul P; Whelan, M Edward III
Subject:	FOR FINAL QUICK REVIEW
Attachments:	letter to Burton 1 09 02 530 pm.doc

call me on cell phone or at 456-2632 with any changes before 6:00. thanks.

(See attached file: letter to Burton 1 09 02 530 pm.doc)

Brett_M._Kavanaugh@who.eop.gov

From:	Brett_M._Kavanaugh@who.eop.gov
Sent:	Wednesday, January 09, 2002 6:40 PM
To:	Ciongoli, Adam; Thorsen, Carl; Bryant, Dan; Collins, Dan; Burton, Faith; Whelan, M Edward III; Martens, Matthew; Chertoff, Michael; Horowitz, Michael-CRM; Colborn, Paul P
Subject:	Third draft of letter to Burton
Attachments:	letter to Burton 1 09 02 630 pm.doc

(b) (5)

Please review carefully. The new estimated time for sending the letter is tomorrow morning. Apologies for delay, but it is obviously an important letter.

(See attached file: letter to Burton 1 09 02 630 pm.doc)

Brett_M._Kavanaugh@who.eop.gov

From:	Brett_M._Kavanaugh@who.eop.gov
Sent:	Thursday, January 10, 2002 9:00 AM
To:	Ciongoli, Adam; Thorsen, Carl; Bryant, Dan; Collins, Dan; Burton, Faith; Whelan, M Edward III; Martens, Matthew; Chertoff, Michael; Horowitz, Michael-CRM; Colborn, Paul P
Subject:	Fourth draft of letter to Burton
Attachments:	letter to Burton 1 10 02 845 am.doc

(b) (5) . Please funnel comments through Ed. (Ed, please try to call me by 10:00 a.m.) Thanks.
(See attached file: letter to Burton 1 10 02 845 am.doc)

Brett_M._Kavanaugh@who.eop.gov

From:	Brett_M._Kavanaugh@who.eop.gov
Sent:	Thursday, January 10, 2002 9:31 PM
To:	Colborn, Paul P; Whelan, M Edward III; Catherine_S._Anderson@oa.eop.gov
Subject:	(b) (5) Office of Administration

Can we meet Friday at 10 at EEOB 156 to discuss this? Or we could do a conference call with call-in numbers (that is, without speaker phones) to save you all the trip. Let me know.

Brett_M._Kavanaugh@who.eop.gov

From:	Brett_M._Kavanaugh@who.eop.gov
Sent:	Wednesday, January 16, 2002 1:53 PM
To:	Whelan, M Edward III
Subject:	RE: FEMA matter
Attachments:	pic10366.pcx

I would like to report back quickly on the initial question; maybe by end of day tomorrow on that?

(Embedded
image moved "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov>
to file: 01/16/2002 01:49:27 PM
pic10366.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc:
Subject: RE: FEMA matter

Thanks. Any deadline? Also, if you haven't done so already, please send pp. 17 et seq. of the memo.

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Wednesday, January 16, 2002 1:43 PM
To: Whelan, M Edward III
Subject: RE: FEMA matter

Per a request, we would like OLC to review FEMA procedures for this kind of matter and determine whether [redacted (b) (5)] ? If the former, [redacted (b) (5)] ?

(Embedded
image moved "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov> to file: 01/15/2002 04:06:03 PM pic12361.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc:
Subject: RE: FEMA matter

I received only the first 16 pages of the memo. Also, let's discuss, at your convenience, what you would like OLC to do on this.

-----Original Message-----
From: Whelan, M Edward III
Sent: Monday, January 14, 2002 3:25 PM
To: 'Kavanaugh, Brett'
Subject: FEMA matter

I believe you said that you would be faxing me some info on FEMA's [redacted] (b) (5) [redacted]. Just wanted you to know that I haven't received anything yet.

Kobach, Kris W

From: Kobach, Kris W
Sent: Wednesday, January 16, 2002 3:52 PM
To: Burton, Faith; Colborn, Paul P; Whelan, M Edward III; Martens, Matthew; Horowitz, Michael-CRM; Chertoff, Michael
Cc: O'Brien, Patrick; Rybicki, James E; 'Brett_M._Kavanaugh@who.eop.gov'
Subject: RE: Draft questions for hearing

I can take the first three questions.

Kris

-----Original Message-----
From: Burton, Faith
Sent: Wednesday, January 16, 2002 3:43 PM
To: Colborn, Paul P; Whelan, M Edward III; Kobach, Kris W; Martens, Matthew; Horowitz, Michael-CRM; Chertoff, Michael
Cc: O'Brien, Patrick; Rybicki, James E; 'Brett_M._Kavanaugh@who.eop.gov'
Subject: Draft questions for hearing

Who can prepare answers? << File: burton.qs.wpd >>

Brett_M._Kavanaugh@who.eop.gov

From:	Brett_M._Kavanaugh@who.eop.gov
Sent:	Thursday, January 17, 2002 2:48 PM
To:	Whelan, M Edward III
Cc:	Colborn, Paul P
Subject:	RE:
Attachments:	pic13174.pcx

funny, that was the sentence my mother seized on when she read this . . .
it was particularly nice to read the catalogue of editorial comment . . . the one substantively interesting point was that archivists believe 12 years is too short a period

(Embedded
image moved "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov>
to file: 01/17/2002 02:41:19 PM
pic13174.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc: "Colborn, Paul P" <Paul.P.Colborn@usdoj.gov> (Receipt Notification Requested)
Subject: RE:

Well, I guess the good news is that it's now in the public record that "Kavanaugh himself was intelligent, sincere, informative, and constructive."

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Thursday, January 17, 2002 2:15 PM
To: Whelan, M Edward III
Cc: Colborn, Paul P
Subject:

http://nationaljournal.com/cgi-bin/ifetch4?ENG+NJMAG+7-njmagtoc+1036541-DBSCORE+256+1+35+F+7+26+1+PD%2f01%2f12%2f2002%2d%3e01%2f12%2f2002

Brett_M._Kavanaugh@who.eop.gov

From:	Brett_M._Kavanaugh@who.eop.gov
Sent:	Friday, January 18, 2002 8:42 AM
To:	Whelan, M Edward III
Subject:	Re: Burton 1/23 hearing UPDATE

(b) (5)

---------- Forwarded by Brett M. Kavanaugh/WHO/EOP on 01/18/2002 08:40 AM ----------

Alberto R. Gonzales
01/17/2002 08:03:16 PM

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP
cc:
bcc:
Subject: Re: Burton 1/23 hearing UPDATE (Document link: Brett M. Kavanaugh)

(b) (5)

Should we mention this fact in the letter to Burton?

Colborn, Paul P

From:	Colborn, Paul P
Sent:	Friday, January 18, 2002 5:15 PM
To:	Burton, Faith; Horowitz, Michael-CRM; O'Brien, Pat; 'Brett_M._Kavanaugh@who.eop.wpd'; Chertoff, Michael; Martens, Matthew; Whelan, M Edward III; Kobach, Kris W; Collins, Daniel P
Cc:	Bryant, Dan; Thorsen, Carl
Subject:	RE: Summary of Recent Precedents
Attachments:	prosdocs.accom.wpd

Attached is my draft of [redacted] (b) (5) [redacted]. I'll plan to polish this as we get closer to whenever the rescheduled hearing is to be.

-----Original Message-----
From: Burton, Faith
Sent: Friday, January 18, 2002 12:52 PM
To: Colborn, Paul P; Horowitz, Michael-CRM; O'Brien, Pat; 'Brett_M._Kavanaugh@who.eop.wpd'; Chertoff, Michael; Martens, Matthew; Whelan, M Edward III; Kobach, Kris W; Collins, Daniel P
Cc: Long, Linda E
Subject: RE: BURTON HEARING POSTPONED?

Just confirmed with David Kass, the Burton hearing for 1/23 has been postponed, no new date yet. More later. FB

-----Original Message-----
From: Colborn, Paul P
Sent: Friday, January 18, 2002 12:44 PM
To: Horowitz, Michael-CRM; Burton, Faith; O'Brien, Pat
Subject: RE: BURTON HEARING POSTPONED?

Can OLA confirm this?

-----Original Message-----
From: Michael-CRM Horowitz
Sent: Friday, January 18, 2002 12:42 PM
To: Burton, Faith; Colborn, Paul P; O'Brien, Pat
Subject: Fwd: BURTON HEARING POSTPONED?

Date: 01/18/2002 12:46 pm -0500 (Friday)

From: Michael-CRM Horowitz
To: Burton, Faith; Colborn, Paul; O'Brien, Pat; Whelan, Edward
Subject: Fwd: BURTON HEARING POSTPONED?

fyi

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Wednesday, January 23, 2002 10:07 AM
To: 'Kavanaugh, Brett'
Subject: RE: FEMA

Brett: If you're comfortable with our answer to the threshold question, we'll move to examine the merits. If you'd like us to do that, please send us a full copy of the Latham & Watkins letter, including the attachments. (As I mentioned before, we received only the first 16 pages via fax.) If you don't want us to do any more on this, let us know. -- Ed

-----Original Message-----
From: Whelan, M Edward III
Sent: Friday, January 18, 2002 5:58 PM
To: 'Kavanaugh, Brett'
Subject: FW: FEMA

Per Dan Koffsky's analysis below, the bottom line i (b) (5)

These conclusions assume that there are not any facts of which we are unaware tha (b) (5)

-----Original Message-----
From: Koffsky, Daniel L
Sent: Friday, January 18, 2002 5:51 PM
To: Whelan, M Edward III
Subject: FEMA

(b) (5)

(b) (5)

(b) (5)

Two final points: First (b) (5)

. Second (b) (5)

Brett_M._Kavanaugh@who.eop.gov

From:	Brett_M._Kavanaugh@who.eop.gov
Sent:	Thursday, January 24, 2002 3:14 PM
To:	Whelan, M Edward III
Subject:	FEMA

You were missing the last page. It is being FAXed now. Please proceed and assess on the merits. Thanks.

Comstock, Barbara

From:	Comstock, Barbara
Sent:	Thursday, January 24, 2002 7:12 PM
To:	'Brett_M._Kavanaugh@who.eop.gov'; Thorsen, Carl
Cc:	Ciongoli, Adam; Sierra, Bryan; Bryant, Dan; Collins, Dan; Israelite, David; Herbert, James; Kobach, Kris W; Whelan, M Edward III; Martens, Matthew; Chertoff, Michael; Horowitz, Michael-CRM; O'Brien, Pat; Colborn, Paul P; 'David_W._Hobbs@who.eop.gov'
Subject:	RE: FW: New Schedule for Boston FBI-DOJ Hearings

http://www.nationalreview.com/contributors/levin012402.shtml

A nice piece from Mark Levin defending our position on Burton info et al.

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Thursday, January 24, 2002 11:39 AM
To: Thorsen, Carl
Cc: Ciongoli, Adam; Comstock, Barbara; Sierra, Bryan; Bryant, Dan; Collins, Dan; Israelite, David; Burton, Faith; Herbert, James; Kobach, Kris W; Whelan, M Edward III; Martens, Matthew; Chertoff, Michael; Horowitz, Michael-CRM; O'Brien, Pat; Colborn, Paul P; David_W._Hobbs@who.eop.gov
Subject: Re: FW: New Schedule for Boston FBI-DOJ Hearings

[redacted] (b) (5)

(Embedded
image moved "Thorsen, Carl" <Carl.Thorsen@usdoj.gov>
to file: 01/24/2002 10:56:55 AM
pic21275.pcx)

Record Type: Record

To: See the distribution list at the bottom of this message

cc: "O'Brien, Pat" <Pat.O'Brien@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested), "Bryant, Dan" <Dan.Bryant@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested) Subject: FW: New Schedule for Boston FBI-DOJ Hearings

([redacted] (b) (5) [redacted].)

>
>
> <<...OLE_Obj...>>
> For Immediate Release: Contact:
> Mark Corallo/ Beth Frigola
> January 23, 2002
> (202) 225-5074
>
>
> Committee Announces New Hearing Schedule for > Continuing Probe of Justice Department Misconduct in Boston
>
> Washington, D.C.--- Chairman Dan Burton (R-IN) today announced new dates > for a series of hearings in February as part of the Government Reform > Committee's continuing investigation into the FBI's handling of mob > informants in Boston.
>
> February 6: This hearing will focus on the President's claim of executive > privilege in response to the Committee's subpoena for documents related to > the investigation of Justice Department misconduct in Boston.
> Specifically, the Committee will explore instances in which previous > Administrations have provided similar documents to Congress.
>
> February 13 and 14: The Committee will focus on the role of federal agents > in the 1971 murder trial of notorious mob assassin Joe "The Animal" > Barboza. After the witness protection plan was created for Barboza and > after he was placed in the program, Barboza committed another murder. At > the time, California state prosecutors were alarmed by the Federal > Government's support of a well-known killer. Thirty years later, the > Committee has uncovered a wealth of evidence that the Barboza case was > just the tip of the iceberg in a thirty-year period that may be the > darkest chapter in Federal law enforcement history. Two former FBI agents > and a former federal prosecutor who participated in the trial will > testify, as will several California attorneys who were also involved.
>
> The February 14 hearing will also focus on whether the federal government > withheld exculpatory evidence during prosecutions in the 1960s and 1970s - > including death penalty cases.
>

> February 27: The Committee will consider the need for legislation to > address several issues that have arisen as a result of the Committee's > investigation. The Committee will hear testimony from lawyers familiar > with elements of the Committee's investigation. It will also hear > testimony from academics who specialize in prosecutorial misconduct.
>
> In addition, the Committee will call witnesses to testify at field > hearings in Boston in March. The dates of these hearing have yet to be > scheduled.
>
> Who: House Government Reform Committee > Dan Burton (R-IN), Chairman
>
> Where: 2154 Rayburn House Office Building
>
> When: February 6, 2002 - 10:00 a.m.
> February 13, 2002 - 10:00 a.m.
> February 14, 2002 - 10:00 a.m.
> February 27, 2002 - 10:00 a.m.
>
> February 6: "The History of Congressional Access to Deliberative > Justice Department Documents"
>
> Witnesses: Dan Bryant, Assistant Attorney General, > Office of > Legislative Affairs, Justice Department > Morton Rosenberg, Specialist in American Public Law,
>
> Congressional Research Service > Professor Mark Rozell, Catholic University of > America
>
> February 13 & 14: "The California Murder Trial of Joe 'The Animal' > Barboza : Did the Federal Government Support the Release of a Dangerous > Mafia Assassin?"
>
> Witnesses 2/13: Marteen Miller, Defense Council for Joseph > Barboza > Ed Cameron, Former Investigator, Sonoma County > District > Attorney's Office > Tim Brown, Former Investigator, Sonoma County > Sheriff's > Office > Department of Justice Representative
>
> Witnesses 2/14: Dennis Condon, FBI Special Agent (Ret.) > H. Paul Rico, FBI Special Agent (Ret.) > Honorable Edward Harrington, Senior Massachusetts
>
> District Judge, Former Attorney-in-Charge, DOJ > Organized Crime Strike Force for New England
>
> Department of Justice Representative
>
>
> February 27: "Justice Department Misconduct in Boston: Are > Legislative Solutions Required?" > Witnesses:
> Victor Garo, Esq., Attorney for Mr. Salvati > Austin McGuigan, Former Connecticut Chief State's > Attorney > Frederick M. Lawrence, Boston University Law > Professor > Stephen Duke, Yale University Law Professor
>
> - 30 -
> <<012302 FBI-DOJ Hearing Schedule revised.doc>>
>

Thorsen, Carl

From:	Thorsen, Carl
Sent:	Friday, February 01, 2002 2:44 PM
To:	Colborn, Paul P; Burton, Faith; Bryant, Dan; Whelan, M Edward III; Horowitz, Michael-CRM; Bybee, Jay
Cc:	'Brett_M._Kavanaugh@who.eop.gov'; Rybicki, James E
Subject:	RE: FW: Revised draft to Burton on precedents, etc.

(b) (5) . We need to work this out and get it sent.

-----Original Message-----
From: Colborn, Paul P
Sent: Friday, February 01, 2002 2:08 PM
To: Thorsen, Carl; Burton, Faith; Bryant, Dan; Whelan, M Edward III; Horowitz, Michael-CRM; Bybee, Jay
Cc: 'Brett_M._Kavanaugh@who.eop.gov'; Rybicki, James E
Subject: RE: FW: Revised draft to Burton on precedents, etc.

That is not correct. As my email earlier this morning said, "OLC continues to prefer the formulation that (b) (5) ." And my email later in the morning observed that (b) (5)

-----Original Message-----
From: Thorsen, Carl
Sent: Friday, February 01, 2002 1:32 PM
To: Burton, Faith; Colborn, Paul P; Bryant, Dan; Whelan, M Edward III; Horowitz, Michael-CRM
Cc: 'Brett_M._Kavanaugh@who.eop.gov'; Rybicki, James E
Subject: RE: FW: Revised draft to Burton on precedents, etc.

I'm under the impression we have internal agreement that this draft letter is ready for Dan's signature, pending WH Counsel approval. Someone pls say so if that's not correct.

-----Original Message-----
From: Burton, Faith
Sent: Friday, February 01, 2002 12:20 PM
To: Colborn, Paul P; Bryant, Dan; Bybee, Jay; Thorsen, Carl; Whelan, M Edward III; Horowitz, Michael-CRM; Chertoff, Michael
Cc: 'Brett_M._Kavanaugh@who.eop.gov'; Rybicki, James E
Subject: RE: FW: Revised draft to Burton on precedents, etc.

This version includes revised language at the end of (b) (5) discussion, based upon Kris Kobach's research, and a modest revision in the carry-over para. on p. 5, based upon comments from

the FBI.
I am out of the office this afternoon; Jim Rybicki in OLA has the attachments to this letter. Faith

-----Original Message-----
From: Colborn, Paul P
Sent: Friday, February 01, 2002 11:40 AM
To: Bryant, Dan; Bybee, Jay; Thorsen, Carl; Burton, Faith; Whelan, M
Edward III; Horowitz, Michael-CRM; Chertoff, Michael
Cc: 'Brett_M._Kavanaugh@who.eop.gov'
Subject: FW: FW: Revised draft to Burton on precedents, etc.

Here are Brett's comments on the draft. [redacted] (b) (5) [redacted]. Any thoughts on how to proceed?

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Friday, February 01, 2002 9:54 AM
To: Colborn, Paul P
Subject: Re: FW: Revised draft to Burton on precedents, etc.

1. I would make the bolded language: "[redacted] (b) (5) [redacted]"

2. [redacted] (b) (5) [redacted]

3. I continue to recommend that we delete the paragraphs re [redacted] (b) (5) [redacted].

4. In that vein, I am curious that [redacted] (b) (5) [redacted]. If so, I might delete those paragraphs as well.

(Embedded
image moved "Colborn, Paul P" <Paul.P.Colborn@usdoj.gov>
to file: 02/01/2002 09:41:36 AM
pic24548.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc:
Subject: FW: Revised draft to Burton on precedents, etc.

-----Original Message-----
From: Burton, Faith
Sent: Thursday, January 31, 2002 6:14 PM
To: Bryant, Dan; Thorsen, Carl; Colborn, Paul P; Whelan, M Edward III;
Horowitz, Michael-CRM; Chertoff, Michael
Subject: Revised draft to Burton on precedents, etc.

This version reflects my discussions with Paul and Michael this afternoon. [redacted] (b) (5) [redacted]. Comments welcome early tomorrow, please. Thanks. Faith

Rybicki, James E

From: Rybicki, James E
Sent: Sunday, February 3, 2002 1:49 PM
To: Thorsen, Carl; Burton, Faith; 'brett_m._kavanaugh@who.eop.gov'; Colborn, Paul P; Whelan, M Edward III; Horowitz, Michael-CRM; Comstock, Barbara; Sierra, Bryan; Bryant, Dan; Chertoff, Michael
Subject: 2/1/02 Letter to Chairman Burton
Attachments: 2.01.02.Burton.Pres.wpd

FYI...The attached letter from AAG Bryant was faxed to Chairman Burton (Jim Wilson) and RMM Waxman (Mike Yeager) at 7pm on Friday 2/1/02. I will have signed copies at the Monday prep session.

U.S. Department of Justice

Office of Legislative Affairs

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

The Honorable Dan Burton
Chairman
Committee on Government Reform
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This responds to your letters, dated January 29, 2002 and September 7, 2001, in connection with the Committee hearing that is now scheduled for February 6, 2002.

In advance of the hearing, I want to correct the apparent misunderstanding regarding the Administration's position on deliberative documents generally and deliberative prosecutorial documents in particular. We have no policy that bars congressional access to all deliberative documents. As Judge Gonzales's letter, dated January 10, 2002, stated:

> As a general matter, the Executive Branch will treat requests for Department of Justice deliberative documents from closed matters in the same way it treats requests for Executive Branch deliberative documents more generally: through a process of appropriate accommodation and negotiation to preserve the respective constitutional roles of the two Branches.

Our particular concern in the current controversy pertains to the narrow and especially sensitive categories of advice memoranda to the Attorney General and deliberative documents making recommendation regarding whether or not to bring criminal charges against individuals. We believe that the public interest in avoiding the politicization of the criminal justice process requires greater protection for those documents which, in turn, influences the accommodation process. This is not an "inflexible position," but rather a statement of a principled interest in ensuring the integrity of prosecutorial decision-making.

We remain prepared to work with the Committee to reach an appropriate accommodation regarding the Boston documents and hope that a meeting between Committee and Department representatives can be re-scheduled as soon as possible, and preferably before the February 6 hearing. We believe that substantial progress can be made at such a meeting in resolving the issues relating to the Committee's interest in these documents.

Turning now to the first of the numbered paragraphs of your January 29, 2002 letter: As you know, the Department has often provided Congress with access to deliberative documents of one sort or another. Consequently, it would be impossible to catalogue all of the occasions in which that has occurred. Deliberative documents take many forms and many are not particularly sensitive once a case is closed. In some instances, such materials have not been segregated from other case-related materials that are provided to congressional oversight committees. Consequently, the Department keeps no records of deliberative documents, per se, that are disclosed to congressional committees in conjunction with factual records.

Your second and third numbered paragraphs appear to seek information about the Department's internal deliberations relating to the preparation of our testimony before your Committee and the President's assertion of executive privilege. In preparing the testimony, I have consulted with Departmental components with expertise in the matters before us and, particularly with appropriate attorneys in those components. As head of the Criminal Division, Assistant Attorney General Michael Chertoff has primary responsibility for Department policies relating to criminal investigations and prosecutorial decision-making. He is best equipped to lead the Department's participation with you in an accommodation process, which we believe is the appropriate course for resolving the issues relating to these prosecutorial documents. As you recall, we asked the Committee to schedule its last hearing on this matter so that he could testify. While that did not occur, Mr. Chertoff is available next week and, as we have advised Committee staff, the Attorney General has determined that he would like Mr. Chertoff to participate as a witness at this hearing.

In response to your question about the factors that led to the recommendation to the President regarding the subpoenaed documents, the Department has concluded that the disclosure outside of the executive branch of these types of core deliberative prosecutorial documents would undermine the integrity of the prosecutorial function. We are concerned that such disclosures would chill the candid exchange of views that is essential to the criminal justice process and make it more difficult for the Attorney General and other high-level decision-makers to obtain full and frank advice from their colleagues and subordinates.

In response to your letter dated September 7, 2001, which is referenced in the fourth numbered paragraph of your January 29 letter, we have developed information relating to the numbered items in the letter. We are not in a position to provide comprehensive information about requests for deliberative prosecutorial documents prior to the Clinton Administration because the Department does not maintain records of such precedents in any readily retrievable form, but the following summaries may be helpful. We would, of course, appreciate receiving from you information about any additional precedents that you believe are relevant to your request and especially those that should be considered as we prepare for the February 6 hearing.

In 1992, the House Science, Space, and Technology Subcommittee on Investigations and Oversight initiated an inquiry into the Department's plea agreement with Rockwell International Corporation, which related to criminal violations of environmental laws at the Rocky Flats nuclear weapons facility, outside of Denver. The Subcommittee wanted information about the

Department's decision not to prosecute individuals and asked to interview the line prosecutors about those decisions. The Department made an exception to the established policy against making such individuals available to Congress with regard to two prosecutors who had answered questions from the media at a press conference on the Rocky Flats settlement. Our position, however, remained that the prosecutors could not disclose information about internal deliberations leading up to the declination decisions. When other issues regarding the Subcommittee staff interviews could not be resolved, the attorneys were subpoenaed to testify before a closed Subcommittee hearing. They provided extensive testimony but declined to answer questions seeking deliberative information.

Thereafter, Chairman Wolpe sent a letter to the President demanding that he either assert executive privilege regarding the deliberative process information or direct the Department to permit its witnesses to answer those outstanding hearing questions. When the Department did not agree to this ultimatum, the Chairman advised that he would defer contempt proceedings if the United States Attorney from Denver would testify before the Subcommittee on October 5, 1992. The United States Attorney had a long-standing family commitment on that date, which he felt obligated to fulfill, although he offered to attend on any date after October 6. The Chairman refused to reschedule the hearing, the Department determined not to seek an assertion of executive privilege, and the parties returned to the accommodation process. They finally agreed that in staff interviews, the Department attorney witnesses could disclose information about their deliberations pursuant to an agreement whereby the interviews were transcribed and transcripts could be used publicly only to refresh recollection or impeach the testimony of a witness. The deliberative prosecutorial documents were made available for use at the interviews and while staff could take notes on the documents, they could not disclose the notes publicly and the deliberative documents were returned to the Department at the conclusion of each interview. The limitations on disclosure of the interview transcripts also applied to any transcript references to the deliberative documents.

In 1980, a special Senate Judiciary Subcommittee conducted an inquiry about the Department's investigation and conclusions regarding alleged violations of the Foreign Agents Registration Act by the President's brother, Billy Carter. It appears that, while the matter was pending, then Attorney General Civiletti discussed Mr. Carter's failure to register under the Act with the President, which underscored the Committee's interest in the Department's process leading up to the declination. We understand that the Subcommittee records indicate that deliberative prosecutorial memoranda, as well as factual investigative records, were disclosed. We have not located any information indicating that the Department expressed concerns about the disclosure of the deliberative prosecutorial documents or otherwise sought an accommodation, let alone any assertion of executive privilege.

Our information regarding the General Dynamics matter, which was the subject of the Senate inquiry in 1984 that is referenced in item 5 of your September 7 letter, indicates that deliberative prosecutorial memoranda were provided to Congress. The circumstances and terms of this disclosure are unclear and I do not know whether the Department considered its implications as we have in the instant matter.

In response to the third item of your September 7 request, we have identified two instances that may be helpful. In 1909, President Theodore Roosevelt withheld information of precisely the same nature as that at issue today--information surrounding a decision whether or not to take action against the target of an investigation. The Attorney General had conducted an investigation of the U.S. Steel Corporation's acquisition of the Tennessee Coal and Iron Company two years earlier, and had declined to institute legal action against U.S. Steel. The Senate requested information regarding the reasons for his decision and any opinions written by the Attorney General or under his authority on the matter. President Roosevelt refused to provide documents regarding the Attorney General's decision not to take legal action. Roosevelt explained:

> I have thus given to the Senate all the information in the possession of the executive department which appears to me to be material or relevant, on the subject of the resolution. I feel bound, however, to add that I have instructed the Attorney-General not to respond to that portion of the resolution which calls for a statement of his reasons for nonaction. I have done so because I do not conceive it to be within the authority of the Senate to give directions of this character to the head of an executive department, or to demand from him reasons for his action. Heads of the executive departments are subject to the Constitution, and to the laws passed by the Congress in pursuance of the Constitution, and to the directions of the President of the United States, but to no other direction whatever.

In a second matter, beginning in 1957, the House Judiciary Subcommittee on Antitrust conducted an investigation regarding the Department's enforcement of consent decrees. The Department refused to make available any of its files relating to the American Telephone and Telegraph consent decree, including memoranda and recommendations from Antitrust Division staff. In refusing to disclose the documents, Deputy Attorney General William Rogers explicitly referred to President Eisenhower's rationale for asserting executive privilege with respect to Defense Department deliberations during the course of the McCarthy investigations in 1954. President Eisenhower had justified this assertion of the privilege on the grounds that "it is essential to efficient and effective administration that employees of the Executive Branch be in a position to be completely candid in advising with each other on official matters," and he had also stressed that it was necessary "to maintain the proper separation of powers between the Executive and Legislative Branches of the Government in accordance with my responsibilities and duties under the Constitution." Deputy Attorney General Rogers also stated that "the essential process of full and flexible exchange might be seriously endangered were staff members hampered by the knowledge they might at some later date be forced to explain before Congress intermediate positions taken." Three Department representatives eventually testified before the Subcommittee, but they reaffirmed the Department's policy of withholding internal deliberative documents, but the documents which were never disclosed in this matter.

The foregoing summary is by no means exhaustive, but I believe it illustrates how previous administrations have responded differently to congressional requests for deliberative prosecutorial information. Each Department has surely pursued the course it deemed necessary and appropriate in the particular circumstances it faced, as we have done in the instant matter.

Based upon the circumstances surrounding this subpoena, the President concluded that his assertion of executive privilege was the appropriate course to protect the integrity of the criminal justice process and in invoking the privilege, he requested that the Department "remain willing to work informally with the Committee to provide such information as it can, consistent with these instructions and without violating the constitutional doctrine of separation of powers." It remains our hope that you will agree to meet with us in order to engage in that informal process with regard to the Boston documents.

Lastly, in response to the fourth item in your September 7 letter, we have compiled the enclosed records, which we hope will be helpful to you. They include a published 1986 opinion of Office of Legal Counsel (OLC) Assistant Attorney General Charles Cooper, a published 1989 opinion of OLC Assistant Attorney General William Barr, a 1991 letter from Office of Legislative Affairs (OLA) Assistant Attorney General Lee Rawls to Senator Metzenbaum, and a January 27, 2000 letter from OLA Assistant Attorney General Robert Raben to Chairman John Linder of the House Rules Subcommittee on Rules and Organization of the House. These documents have informed the Department's responses to requests for deliberative prosecutorial documents and our approach to the accommodation process. We are not identifying unpublished confidential advice memoranda from OLC to the Attorney General or other executive branch officials.

I hope that this information is helpful to you. Please do not hesitate to contact me if you would like additional assistance about this or any other matter.

Sincerely,

Daniel J. Bryant
Assistant Attorney General

Enclosures

cc: The Honorable Henry Waxman
Ranking Minority Member

Brett_M._Kavanaugh@who.eop.gov

From:	Brett_M._Kavanaugh@who.eop.gov
Sent:	Tuesday, February 5, 2002 12:02 PM
To:	Burton, Faith
Cc:	Ciongoli, Adam; Thorsen, Carl; Bryant, Dan; Collins, Dan; Whelan, M Edward III; Martens, Matthew; Chertoff, Michael; Horowitz, Michael-CRM; Colborn, Paul P
Subject:	RE: Dan's DRAFT Opening Statement
Attachments:	burton.statement.wpd; ATTACHMENT.TXT; pic24388.pcx

1. I think you need to say [redacted (b) (5)]

2. In the para beginning "Second," I would delete "[redacted (b) (5)], and I would change "[redacted (b) (5)]" to "[redacted (b) (5)]."

3. In the para beginning "Third," I very much think we should delete the sentence [redacted (b) (5)]

4. In the para beginning "Fourth," I found the phrase "[redacted (b) (5)]" too vague. [redacted (b) (5)]

5. [redacted (b) (5)]

(Embedded
image moved "Burton, Faith" <Faith.Burton@usdoj.gov>

to file: 02/05/2002 10:55:40 AM
pic24388.pcx)

Record Type: Record

To: See the distribution list at the bottom of this message

cc: "Bryant, Dan" <Dan.Bryant@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested)
Subject: RE: Dan's DRAFT Opening Statement

This version incorporates the input we've received and we intend to go it as the FINAL at noon today; last call.

-----Original Message-----
From: Thorsen, Carl
Sent: Monday, February 04, 2002 8:30 PM
To: Collins, Dan; Ciongoli, Adam; Colborn, Paul P; Whelan, M Edward III; Burton, Faith; Horowitz, Michael-CRM; Martens, Matthew; Chertoff, Michael; 'brett_m._kavanaugh@who.eop.gov'
Cc: Thorsen, Carl; Bryant, Dan
Subject: Dan's DRAFT Opening Statement

<< File: dan.opening.burton.wpd >>

Attached is the updated draft reflecting input from today's moot. Please keep the edits coming.

Note: Its very possible that tomorrow morning's 10 am moot will be postponed so he can use that time to prepare and that we'll do it in the afternoon, around 5:30 pm. Faith or I will let you know first thing in the morning.

Carl Thorsen
Deputy Assistant Attorney General
Office of Legislative Affairs
U.S. Department of Justice
950 Pennsylvania Avenue, NW

[redacted]
Washington, D.C. 20530

Message Sent To:_____

"Thorsen, Carl" <Carl.Thorsen@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested)
"Collins, Dan" <Dan.Collins@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested)
"Ciongoli, Adam" <Adam.Ciongoli@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested)
"Colborn, Paul P" <Paul.P.Colborn@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested)
"Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested)
"Horowitz, Michael-CRM" <Michael.Horowitz3@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested)
"Martens, Matthew" <Matthew.Martens@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested)
"Chertoff, Michael" <Michael.Chertoff@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested)
Brett M. Kavanaugh/WHO/EOP@EOP

Rybicki, James E

From: Rybicki, James E
Sent: Tuesday, February 5, 2002 2:23 PM
To: Thorsen, Carl; Horowitz, Michael-CRM; Martens, Matthew; Burton, Faith; Colborn, Paul P; Whelan, M Edward III; 'brett_m._kavanaugh@who.eop.gov'
Subject: 2.4.02 Letter from Chairman Burton to the Attorney General
Attachments: 2.4.02.Letter.pdf

ONE HUNDRED SEVENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM
2157 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6143

MAJORITY (202) 225–5074
MINORITY (202) 225–5051
TTY (202) 225–6852

www.house.gov/reform

February 4, 2002

The Honorable John Ashcroft
Attorney General
United States Department of Justice
Washington, D.C. 20530

Dear General Ashcroft:

I write in response to the February 1, 2002, letter from Assistant Attorney General Dan Bryant. I appreciate Mr. Bryant's efforts to clarify the Justice Department's position in its dispute with the Committee. The Justice Department now appears to take the position that it does not have any policy barring the production of deliberative Justice Department documents to Congress. Rather, as explained by Mr. Bryant, some cases are particularly sensitive, and require greater protection from Congress. Mr. Bryant further states that "[t]his is not an 'inflexible position.'"

While Mr. Bryant's explanation of the Department's policy sounds very reasonable, there are several factors which give me pause. First, it deviates dramatically from the inflexible policy which the Department initially announced to me, and which in fact brought us to the current impasse. Second, the newly-articulated case-by-case analysis appears to be a smokescreen to effect the initial inflexible policy.

When I met with the Attorney General, White House Counsel Gonzales, and Justice Department staff in the Summer of 2001, we were informed that the Department would no longer produce deliberative prosecutorial documents to Congress. No exceptions were enunciated, and no "narrow and especially sensitive categories" of documents were identified. When my staff proposed a number of generous compromises with Department staff, they were rebuffed. Because the Justice Department had articulated an inflexible policy, and had expressed no interest in accommodating the Committee's need to review the documents at issue, or even discuss why the Committee wanted to review the documents, it was clear that Congress' ability to conduct effective oversight was threatened. Therefore, I issued a subpoena.

Regarding the "case-by-case" analysis, for all of the claims that the Department is engaged in accommodation with the Committee, there is no evidence that this is the case. Despite the claim that the Department will review documents on a case-by-case basis to see if they can be provided to the Committee, there is every reason to believe that the Department, in

reality, will withhold all deliberative documents from Congress in the future. Indeed, it is difficult to think of a stronger case for Congressional access to deliberative documents than the Boston case, as there is extensive evidence of Justice Department wrongdoing, and the documents at issue are an average of 22 years old. If the Department does not provide Congress with access to the Boston documents, it is clear that the Department will not provide access to deliberative documents in any case. As of today, the Department continues to refuse to allow the Committee to even review those documents. Thus, the case-by-case analysis articulated by the Justice Department on December 13, 2001, appears to be a canard.

With respect to the issue presented by the Committee's February 6, 2002, hearing, it appears that the Department's basic position is that Congressional access to deliberative Justice Department documents is so common that it would be impossible to catalogue all of the cases in which it has occurred. This position squarely contradicts statements which have been made by a number of Justice Department and White House staff over the past several months that they are simply trying to reverse bad precedents set during the Clinton Administration, and are attempting to return to the policy of the Reagan Administration. For example, when he met with me on July 18, 2001, Assistant Attorney General Michael Chertoff stated that before 1993, the Justice Department did not provide deliberative materials to Congress. When this assertion was disputed, Mr. Chertoff stated that the articulated position prior to the Clinton Administration was that the Department could not turn over deliberative memos, and conceded only that there "may have been some slippage" from that policy.

Now it appears that the Justice Department concedes that Congress has obtained access to deliberative Justice Department records, including prosecution and declination memoranda, well before the Clinton Administration. This is an important concession, as it demonstrates that the Justice Department and White House are attempting to create a new policy which reverses the clear historical record going back to the Teapot Dome scandal. Moreover, the cases cited by Mr. Bryant show that there has not been any policy against providing deliberative documents, and in fact, such documents have been provided to Congress without any objection from the Justice Department. In the Billy Carter case cited by Mr. Bryant, the Justice Department did not make any effort to resist turning over the records. In the General Dynamics case cited by Mr. Bryant, the Reagan Justice Department provided extensive deliberative documents to Congress after a cursory objection. It is difficult to dismiss the General Dynamics case by suggesting, as Mr. Bryant does, that the Reagan Administration may not have "considered its implications as we have in the instant manner." Rather, the Reagan Administration fully understood the implications of providing deliberative documents to Congress, and did so on numerous occasions.

Nevertheless, I am concerned by the apparent lack of effort made by the Department in attempting to locate relevant precedent. There are a number of other cases documented in public records where the Department apparently provided deliberative prosecutorial records to Congress. Moreover, as you likely know, in a number of cases, deliberative documents have been shared with Congress, and there is no Committee hearing or report which documents the fact that access was provided. In these cases, the fact of Congressional access is kept confidential, usually at the request of the Justice Department. I hoped that Mr. Bryant would

make an effort to speak to prior Assistant Attorneys General for Legislative Affairs to learn of such cases, and include them in his testimony.

While the Department was only able to locate three relevant cases where deliberative documents were provided to Congress, it cited two cases as examples in which executive privilege was claimed over deliberative prosecutorial documents. Neither appears to be very relevant to the issue before the Committee. While President Theodore Roosevelt did refuse to provide documents to the Senate, I hope that the Justice Department is not relying on President Roosevelt's claim as support for the action it is taking now. First, a substantial body of caselaw regarding executive privilege has developed in the last 93 years which limits the President's ability to withhold records from Congress. Second, President Roosevelt's position would deny Congress not only deliberative documents, but also any explanation from the Justice Department for its actions. This rules out any possibility of accommodation. The other case cited by the Department was not a claim of executive privilege at all. Rather, in a 1957 antitrust investigation by the House Judiciary Committee, the Justice Department simply declined to provide the records requested by the Committee. The President did not claim executive privilege.

I believe that at the conclusion of the February 6 hearing, it will be clear that there have been a substantial number of cases in which Congress has received access to deliberative prosecutorial Justice Department records, and no modern cases where such records were withheld on the basis of executive privilege. If indeed that is the case, I think it will be clear that the Administration is creating an unprecedented policy to restrict Congressional oversight of the Justice Department.

You have also requested that Mr. Chertoff testify together with Mr. Bryant at the February 6 hearing. I am not inclined to grant your request. I believe that Mr. Bryant is the Justice Department official best suited to respond to the Committee's inquiry. The February 6 hearing will focus narrowly on the question of the history of Congressional access to deliberative Justice Department records. This is an issue which primarily concerns the Office of Legislative Affairs. Indeed, staff from the Office of Legislative Affairs have been discussing this precise issue with my staff for many months. In previous administrations, staff from Mr. Bryant's office were frequently responsible for providing access to the types of documents currently under dispute. There will, however, be an occasion in the future when I will request that Mr. Chertoff and the Attorney General testify about the Justice Department's concerns.

In his February 1, 2002, letter, Mr. Bryant also asked that a meeting between Committee and Justice Department staff take place before the February 6 hearing. I would welcome such a meeting. As you know, my staff and I have met or spoken with Justice Department staff dozens of times trying to resolve this issue. I would be pleased to continue discussions in an effort to

resolve this disagreement. However, my position is unchanged – the Committee must have access to the Boston documents it has subpoenaed.

Sincerely,

Dan Burton
Chairman

cc: Members, Committee on Government Reform

Brett_M._Kavanaugh@who.eop.gov

From:	Brett_M._Kavanaugh@who.eop.gov
Sent:	Tuesday, February 5, 2002 4:09 PM
To:	Whelan, M Edward III
Subject:	Re: CA4
Attachments:	pic29365.pcx

Berenson is handling MD and NC CA4 nominations.

(Embedded
image moved "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov>
to file: 02/05/2002 03:52:38 PM
pic29365.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc:
Subject: CA4

Who in your office is handling CA4 nominations? (I have someone I'd like to recommend.)

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Tuesday, February 05, 2002 5:33 PM
To: 'Kavanaugh, Brett'
Subject: FW: Moot for Dan tonight

FYI. [redacted] (b) (5)

-----Original Message-----
From: Whelan, M Edward III
Sent: Tuesday, February 05, 2002 5:32 PM
To: Burton, Faith
Cc: Colborn, Paul P
Subject: RE: Moot for Dan tonight

Would you please let me know what this meeting is about and [redacted] (b) (5)

-----Original Message-----
From: Burton, Faith
Sent: Tuesday, February 05, 2002 5:25 PM
To: Thorsen, Carl; Colborn, Paul P; Collins, Dan; Whelan, M Edward III; Horowitz, Michael-CRM; Martens, Matthew; Chertoff, Michael; 'brett_m._kavanaugh@who.eop.gov'
Cc: Bryant, Dan
Subject: RE: Moot for Dan tonight

This meeting has been cancelled due to Dan's meeting with Burton, et al at 6 pm. More later.

-----Original Message-----
From: Thorsen, Carl
Sent: Tuesday, February 05, 2002 12:11 PM
To: Colborn, Paul P; Collins, Dan; Burton, Faith; Whelan, M Edward III; Horowitz, Michael-CRM; Martens, Matthew; Chertoff, Michael; 'brett_m._kavanaugh@who.eop.gov'
Cc: Bryant, Dan
Subject: Moot for Dan tonight

We're planning to reconvene in the OLA Conf Room from 6-8 PM.

-----Original Message-----
From: Colborn, Paul P
Sent: Tuesday, February 05, 2002 11:29 AM
To: Collins, Dan; Burton, Faith; Thorsen, Carl; Ciongoli, Adam; Whelan, M Edward III; Horowitz, Michael-CRM; Martens, Matthew; Chertoff, Michael; 'brett_m._kavanaugh@who.eop.gov'
Cc: Bryant, Dan
Subject: RE: Dan's DRAFT Opening Statement

The difficulty I have with Dan's suggested change is [redacted] (b) (5)
[redacted] Dan, would your concern be reduced if [redacted] (b) (5)
[redacted]

-----Original Message-----
From: Collins, Dan
Sent: Tuesday, February 05, 2002 11:21 AM
To: Burton, Faith; Thorsen, Carl; Ciongoli, Adam; Colborn, Paul P; Whelan, M Edward III; Horowitz, Michael-CRM;

Martens, Matthew; Chertoff, Michael; 'brett_m._kavanaugh@who.eop.gov'
Cc: Bryant, Dan
Subject: RE: Dan's DRAFT Opening Statement

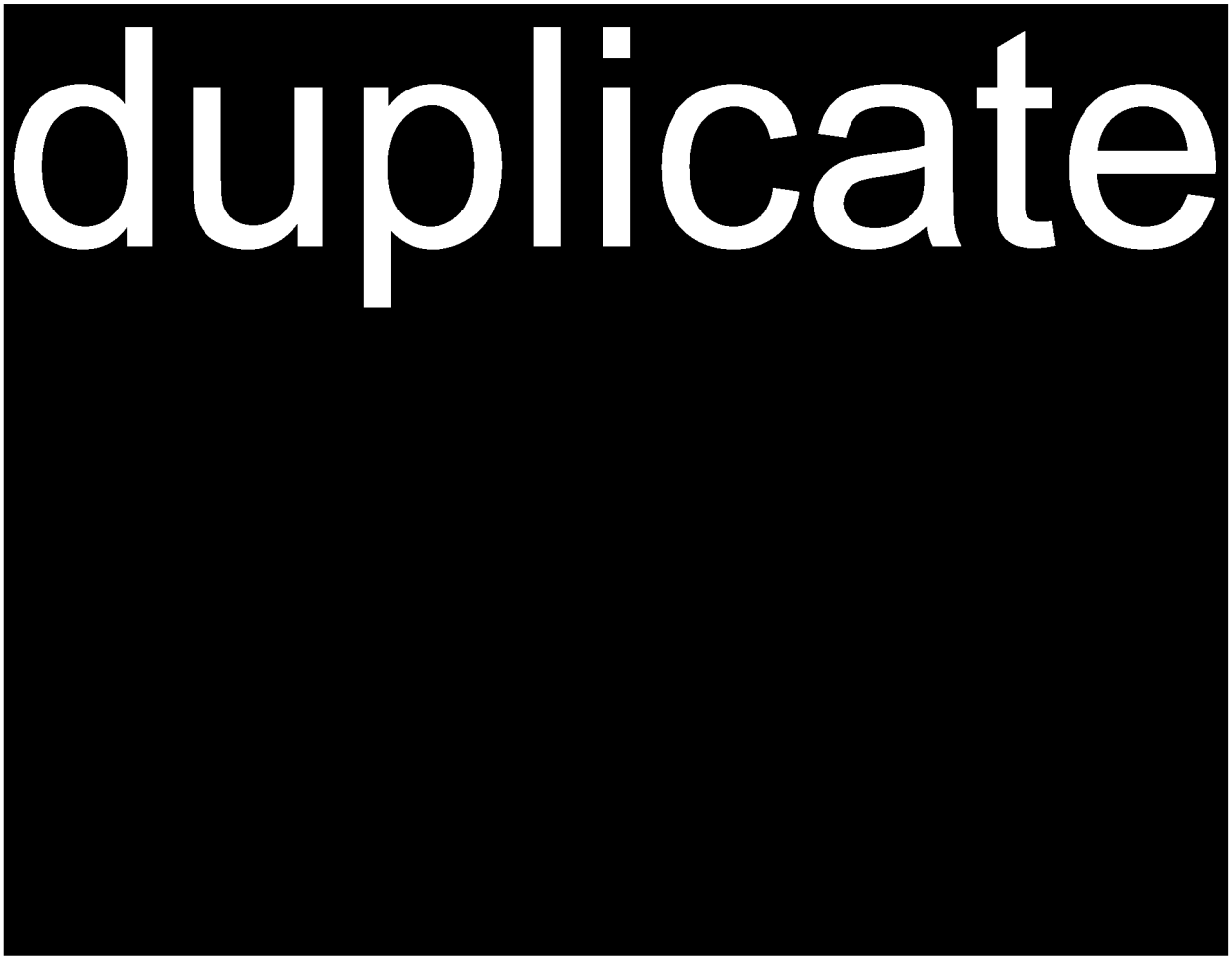
On page 2, first full paragraph [redacted (b) (5)] . Can we say instead:

[redacted (b) (5)]

In the conclusion, I'd suggest saying [redacted (b) (5)]" rather than [redacted (b)(5) (b) (5)]".

--Dan

-----Original Message-----
From: Burton, Faith
Sent: Tuesday, February 05, 2002 10:56 AM



duplicate

Colborn, Paul P

From: Colborn, Paul P
Sent: Thursday, February 07, 2002 10:14 AM
To: Burton, Faith; Collins, Dan; 'Brett_M._Kavanaugh@who.eop.gov'; Chertoff, Michael; Horowitz, Michael-CRM; Martens, Matthew; Whelan, M Edward III; Bybee, Jay
Cc: Thorsen, Carl
Subject: RE: Draft letter to Chairman Burton re next step

I'll await the call.

-----Original Message-----
From: Burton, Faith
Sent: Thursday, February 07, 2002 10:00 AM
To: Collins, Dan; 'Brett_M._Kavanaugh@who.eop.gov'; Colborn, Paul P; Chertoff, Michael; Horowitz, Michael-CRM; Martens, Matthew; Whelan, M Edward III; Bybee, Jay
Cc: Thorsen, Carl
Subject: RE: Draft letter to Chairman Burton re next step

Can we do a conference call on this at 10:15? Best way to work it on short notice is to have Brett call Carl at 4-3951 and we'll loop in OLC at 4-2048; Collins at 4-6753; and Crim at 3-8579 - is that doable for everyone?

-----Original Message-----
From: Collins, Dan
Sent: Wednesday, February 06, 2002 5:39 PM
To: Burton, Faith; 'Brett_M._Kavanaugh@who.eop.gov'; Colborn, Paul P; Chertoff, Michael; Horowitz, Michael-CRM; Martens, Matthew; Whelan, M Edward III; Bybee, Jay
Cc: Thorsen, Carl
Subject: RE: Draft letter to Chairman Burton re next step

What abou [redacted] (b) (5) [redacted]

-----Original Message-----
From: Burton, Faith
Sent: Wednesday, February 06, 2002 5:25 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'; Colborn, Paul P; Chertoff, Michael; Horowitz, Michael-CRM; Martens, Matthew; Whelan, M Edward III; Collins, Dan; 'attyadv.opca@fbi.gov'
Cc: Thorsen, Carl
Subject: Draft letter to Chairman Burton re next step

Please give me your comments by 11 a.m. << File: burton.harrington.wpd >>

Burton, Faith

From: Burton, Faith
Sent: Thursday, February 07, 2002 10:20 AM
To: Thorsen, Carl; Collins, Dan; 'Brett_M._Kavanaugh@who.eop.gov'; Colborn, Paul P; Chertoff, Michael; Horowitz, Michael-CRM; Martens, Matthew; Whelan, M Edward III; Bybee, Jay
Subject: RE: Draft letter to Chairman Burton re next step
Attachments: burton.harrington.wpd

Here's a revised version reflecting input from John Durham, who note [redacted (b) (5)]. We'll await Brett's call to begin pulling everyone else in.

-----Original Message-----
From: Thorsen, Carl
Sent: Thursday, February 07, 2002 10:04 AM
To: Collins, Dan; Burton, Faith; 'Brett_M._Kavanaugh@who.eop.gov'; Colborn, Paul P; Chertoff, Michael; Horowitz, Michael-CRM; Martens, Matthew; Whelan, M Edward III; Bybee, Jay
Subject: RE: Draft letter to Chairman Burton re next step

me too

-----Original Message-----
From: Collins, Dan
Sent: Thursday, February 07, 2002 10:03 AM
To: Burton, Faith; 'Brett_M._Kavanaugh@who.eop.gov'; Colborn, Paul P; Chertoff, Michael; Horowitz, Michael-CRM; Martens, Matthew; Whelan, M Edward III; Bybee, Jay
Cc: Thorsen, Carl
Subject: RE: Draft letter to Chairman Burton re next step

Works for me.

-----Original Message-----
From: Burton, Faith
Sent: Thursday, February 07, 2002 10:00 AM

duplicate

Colborn, Paul P

From: Colborn, Paul P
Sent: Thursday, February 07, 2002 11:09 AM
To: Burton, Faith; Collins, Dan; 'Brett_M._Kavanaugh@who.eop.gov'; Chertoff, Michael; Horowitz, Michael-CRM; Martens, Matthew; Whelan, M Edward III; Bybee, Jay; 'attyadv@opca.fbi.gov'; Durham, John; Herbert, James
Cc: Thorsen, Carl
Subject: RE: Draft letter to Chairman Burton re next step

What do people think o [redacted (b) (5)] [redacted] .

-----Original Message-----
From: Burton, Faith
Sent: Thursday, February 07, 2002 11:05 AM
To: Burton, Faith; Collins, Dan; 'Brett_M._Kavanaugh@who.eop.gov'; Colborn, Paul P; Chertoff, Michael; Horowitz, Michael-CRM; Martens, Matthew; Whelan, M Edward III; Bybee, Jay; 'attyadv@opca.fbi.gov'; Durham, John; Herbert, James
Cc: Thorsen, Carl
Subject: RE: Draft letter to Chairman Burton re next step

Here's the revised version, per our conference call. Brett, I'll send it to you in the text of my next message. << File: burton.harrington.wpd >>

-----Original Message-----
From: Burton, Faith
Sent: Thursday, February 07, 2002 10:00 AM

duplicate

Rybicki, James E

From: Rybicki, James E
Sent: Friday, February 08, 2002 5:06 PM
To: Burton, Faith; 'Brett_M._Kavanaugh@who.eop.gov'; 'attyadv.opca@fbi.gov'; Durham, John; Herbert, James; Chertoff, Michael; Martens, Matthew; Colborn, Paul P; Whelan, M Edward III
Cc: Thorsen, Carl
Subject: 2.8.02 Letter to Chairman Burton
Attachments: 2.8.02.Burton.ltr.wpd

Thorsen, Carl

From: Thorsen, Carl
Sent: Tuesday, February 12, 2002 11:12 AM
To: Burton, Faith; 'Brett_M._Kavanaugh@who.eop.gov'; Whelan, M Edward III; Colborn, Paul P; Chertoff, Michael; Horowitz, Michael-CRM; Martens, Matthew; 'attyadv.opca@fbi.gov'; Collins, Dan; Comstock, Barbara
Subject: RE: Burton Hearings this week

In his letter Burton asked that the Department witness "be prepared to provide the Department's response to the testimony and address any issues relating to the Department's continued refusal to provide the Committee access to the subpoenaed Boston documents".

(b) (5)
.

-----Original Message-----
From: Burton, Faith
Sent: Tuesday, February 12, 2002 10:44 AM
To: 'Brett_M._Kavanaugh@who.eop.gov'; Whelan, M Edward III; Colborn, Paul P; Chertoff, Michael; Horowitz, Michael-CRM; Martens, Matthew; 'attyadv.opca@fbi.gov'
Cc: Thorsen, Carl
Subject: Burton Hearings this week

Chairman Burton plans 2 days of hearings this week on the Boston FBI matter and, particularly, the Department's role in the 1971 Cal. prosecution of Barboza for a murder, which he allegedly committed (b) (3) . Harrington, Rico, and Condon testified on his behalf at sentencing to confirm threats against his life by mobster (b) (3) .
The Committee's 2/11 letter, which is being circulated now via fax, requests a DOJ witness for each day of the hearings, but our informal information indicates that a single DOJ witness on the 2nd day, who will appear alone on the 2nd panel, will suffice. More later.

Colborn, Paul P

From: Colborn, Paul P
Sent: Tuesday, February 12, 2002 4:11 PM
To: Burton, Faith; 'attyadv.opca@fbi.gov'; 'Brett_M._Kavanaugh@who.eop.gov'; Whelan, M Edward III; Collins, Dan; Chertoff, Michael; Martens, Matthew
Cc: Thorsen, Carl; Bybee, Jay
Subject: RE: Draft letter to Chairman Burton on Harrington memo

OLC suggests the following changes:

in the first sentence of the third paragraph, make "Executive Privilege" lower case

in the next sentence of that paragraph, substitute [redacted (b) (5)] " for [redacted (b) (5)] " and at the end of the sentence substitute [redacted (b) (5)] " for [redacted (b) (5)] ."

-----Original Message-----
From: Burton, Faith
Sent: Tuesday, February 12, 2002 3:49 PM
To: 'attyadv.opca@fbi.gov'; 'Brett_M._Kavanaugh@who.eop.gov'; Whelan, M Edward III; Colborn, Paul P; Collins, Dan; Chertoff, Michael; Martens, Matthew
Cc: Thorsen, Carl
Subject: Draft letter to Chairman Burton on Harrington memo

Please comment asap; we'd like to get this up today. Matt, I'm coming up to see you about docs. << File: burton.212.wpd >>

Colborn, Paul P

From: Colborn, Paul P
Sent: Tuesday, February 12, 2002 4:19 PM
To: Thorsen, Carl; Burton, Faith; 'attyadv.opca@fbi.gov'; Whelan, M Edward III; Collins, Dan; Chertoff, Michael; Martens, Matthew
Cc: 'Brett_M._Kavanaugh@who.eop.gov'; Horowitz, Michael-CRM; Bryant, Dan
Subject: RE: Draft letter to Chairman Burton on Harrington memo

Jay would like to have two prep sessions tomorrow: a meeting at 10:00 to talk about the questions that might be put to him at the hearing and an actual moot at 4:00. We'd like to do these in the OLC conference room (room 3254). Please let me know if you can attend.

-----Original Message-----
From: Thorsen, Carl
Sent: Tuesday, February 12, 2002 4:10 PM
To: Burton, Faith; 'attyadv.opca@fbi.gov'; Whelan, M Edward III; Colborn, Paul P; Collins, Dan; Chertoff, Michael; Martens, Matthew
Cc: 'Brett_M._Kavanaugh@who.eop.gov'
Subject: RE: Draft letter to Chairman Burton on Harrington memo

A couple updates:

1) 5 PM Conf. call today (DOJ components only) with Chertoff (who's in NYC) to discuss a DOJ recommendatio [redacted (b) (5)]. Could one person from each component come down to Dan Bryant's office at 5 pm, or provide a phone number and we'll attempt to patch you in.

2) Jay Bybee has been confirmed as our witness for Thursday's hearing. Ed Whelan will be in touch re. a schedule for his prep.

-----Original Message-----
From: Burton, Faith
Sent: Tuesday, February 12, 2002 3:49 PM
To: 'attyadv.opca@fbi.gov'; 'Brett_M._Kavanaugh@who.eop.gov'; Whelan, M Edward III; Colborn, Paul P; Collins, Dan; Chertoff, Michael; Martens, Matthew
Cc: Thorsen, Carl
Subject: Draft letter to Chairman Burton on Harrington memo

Please comment asap; we'd like to get this up today. Matt, I'm coming up to see you about docs. << File: burton.212.wpd >>

Brett_M._Kavanaugh@who.eop.gov

From:	Brett_M._Kavanaugh@who.eop.gov
Sent:	Tuesday, February 12, 2002 4:26 PM
To:	Burton, Faith
Cc:	Thorsen, Carl; Collins, Dan; Whelan, M Edward III; Martens, Matthew; Chertoff, Michael; Colborn, Paul P; 'attyadv.opca@fbi.gov'
Subject:	Re: Draft letter to Chairman Burton on Harrington memo
Attachments:	burton.212.wpd; ATTACHMENT.TXT; pic09506.pcx

I think the letter needs to [redacted (b) (5)]

I would delete [redacted (b) (5)]

Also, you should [redacted (b) (5)].

I thought the letter [redacted (b) (5)]

I would delete [redacted (b) (5)]

Judge Gonzales will need to see this letter; therefore, after you receive comments from all and circulate a re-draft, I will present it to him.

(Embedded
image moved "Burton, Faith" <Faith.Burton@usdoj.gov>
to file: 02/12/2002 03:49:21 PM
pic09506.pcx)

Record Type: Record

To: See the distribution list at the bottom of this message

cc: "Thorsen, Carl" <Carl.Thorsen@usdoj.gov> (Receipt Notification Requested)
(IPM Return Requested)

Subject: Draft letter to Chairman Burton on Harrington memo

Please comment asap; we'd like to get this up today. Matt, I'm coming up to see you about docs.

Message Sent To:_____

"Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested)
"Colborn, Paul P" <Paul.P.Colborn@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested)
"Collins, Dan" <Dan.Collins@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested)
"'attyadv.opca@fbi.gov'" <attyadv.opca@fbi.gov> (Receipt Notification Requested) (IPM Return Requested)
Brett M. Kavanaugh/WHO/EOP@EOP
"Chertoff, Michael" <Michael.Chertoff@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested)
"Martens, Matthew" <Matthew.Martens@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested)

Thorsen, Carl

From: Thorsen, Carl
Sent: Tuesday, February 12, 2002 4:59 PM
To: Burton, Faith; 'attyadv.opca@fbi.gov'; 'Brett_M._Kavanaugh@who.eop.gov'; Whelan, M Edward III; Colborn, Paul P; Collins, Dan; Chertoff, Michael; Martens, Matthew
Subject: RE: Draft letter to Chairman Burton on Harrington memo
Attachments: burton.212.wpd

(Quickly) edited per Brett's and OLC's suggestions. Please review.

-----Original Message-----
From: Burton, Faith
Sent: Tuesday, February 12, 2002 3:49 PM

duplicate

Thorsen, Carl

From:	Thorsen, Carl
Sent:	Tuesday, February 12, 2002 5:48 PM
To:	'Brett_M._Kavanaugh@who.eop.gov'
Cc:	Collins, Dan; Whelan, M Edward III; Martens, Matthew; Colborn, Paul P; 'attyadv.opca@fbi.gov'; Burton, Faith; Bryant, Dan; Thorsen, Carl
Subject:	Draft letter to Chairman Burton on Harrington memo
Attachments:	harrington_mem.wpd

Brett, DOJ recommends that WHC approve the attached letter.

We've been moving quickly, and our folks will continue reviewing it, but all components have agreed to this letter in concept.

Thorsen, Carl

From:	Thorsen, Carl
Sent:	Tuesday, February 12, 2002 6:43 PM
To:	'Brett_M._Kavanaugh@who.eop.gov'
Cc:	Collins, Dan; Whelan, M Edward III; Martens, Matthew; Colborn, Paul P; 'attyadv.opca@fbi.gov'; Burton, Faith; Bryant, Dan; Thorsen, Carl; Rybicki, James E
Subject:	Latest Version of the latest letter to Burton
Attachments:	harrington_mem.wpd

Brett, per your latest requested edits. Please let us know in the morning after Calio has reviewed and approved and we'll get it up there.

DOJ staff - please review this version and let me know its okay, it reflects WH changes.

Colborn, Paul P

From:	Colborn, Paul P
Sent:	Wednesday, February 13, 2002 9:42 AM
To:	'Brett_M._Kavanaugh@who.eop.gov'; Thorsen, Carl
Cc:	Thorsen, Carl; Bryant, Dan; Collins, Dan; Burton, Faith; Rybicki, James E; Whelan, M Edward III; Martens, Matthew; 'attyadv.opca@fbi.gov'; Bybee, Jay
Subject:	RE:

Brett's changes are fine with us. We think it is important to make one more change: in the final paragraph of the letter, substitute "(b) (5)" for "(b) (5)."

(b) (5)

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Wednesday, February 13, 2002 9:17 AM
To: Thorsen, Carl
Cc: Thorsen, Carl; Bryant, Dan; Collins, Dan; Burton, Faith; Rybicki, James E; Whelan, M Edward III; Martens, Matthew; Colborn, Paul P; attyadv.opca@fbi.gov
Subject:

another round of suggested edits from here:

1. Change the second sentence in second paragraph to the following: '(b) (5)

2. Change the first sentence in third full paragraph to: '(b) (5) here.]

3. Delete (b) (5). In that same sentence, change, "(b) (5)" to "(b) (5)" And also delete "(b) (5)."

4. Delete the sentence "[redacted] . . ."

5. Move the sentence [redacted].

6. In last sentence, change "[redacted]" to "[redacted]."

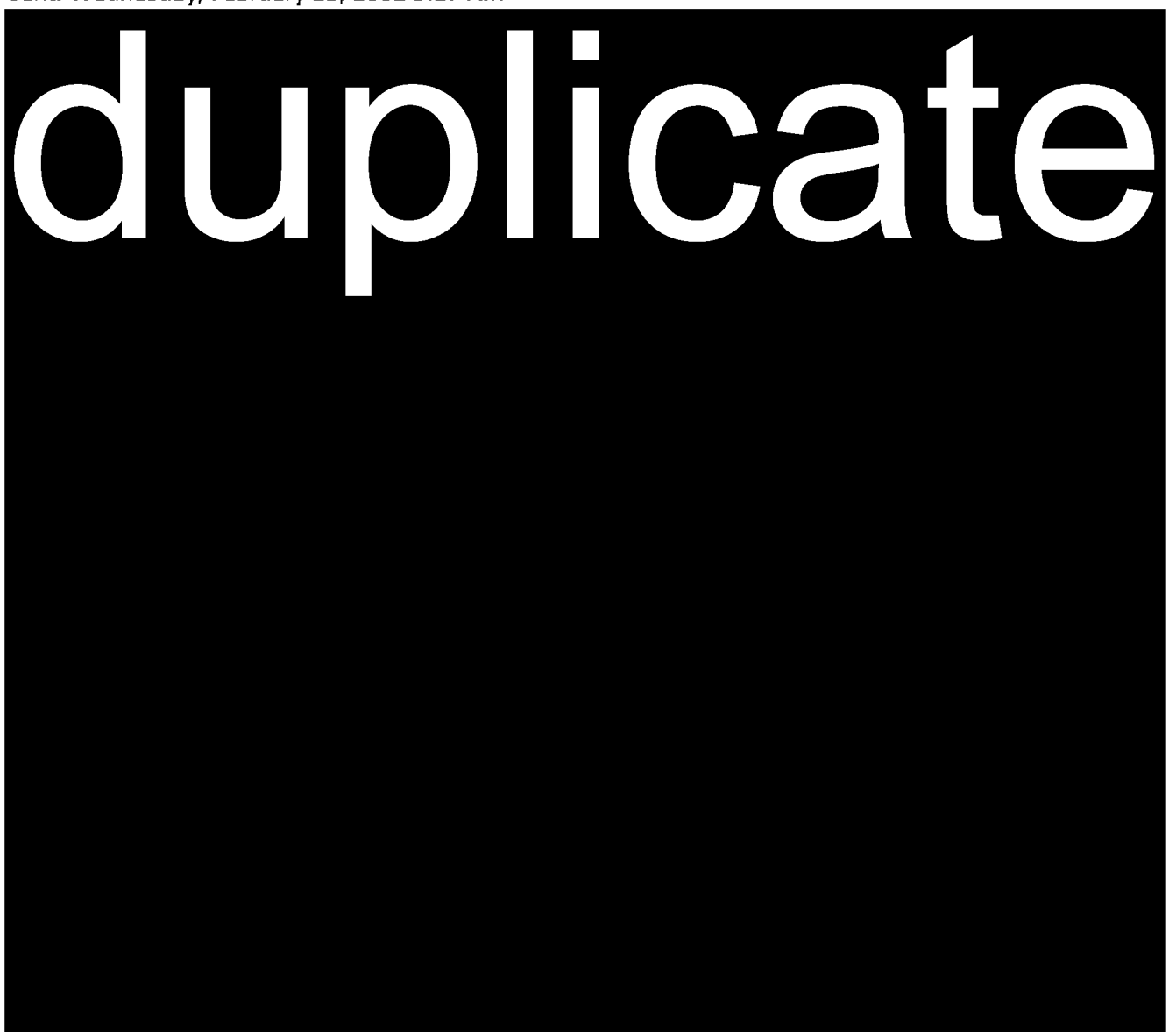
7. "[redacted].

Thorsen, Carl

From:	Thorsen, Carl
Sent:	Wednesday, February 13, 2002 9:53 AM
To:	'Brett_M._Kavanaugh@who.eop.gov'
Cc:	Bryant, Dan; Collins, Dan; Burton, Faith; Rybicki, James E; Whelan, M Edward III; Martens, Matthew; Colborn, Paul P; 'attyadv.opca@fbi.gov'
Subject:	RE:
Attachments:	harrington_mem.wpd

Edits made, including Colborn's (which I like). Please review and let me know.

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Wednesday, February 13, 2002 9:17 AM



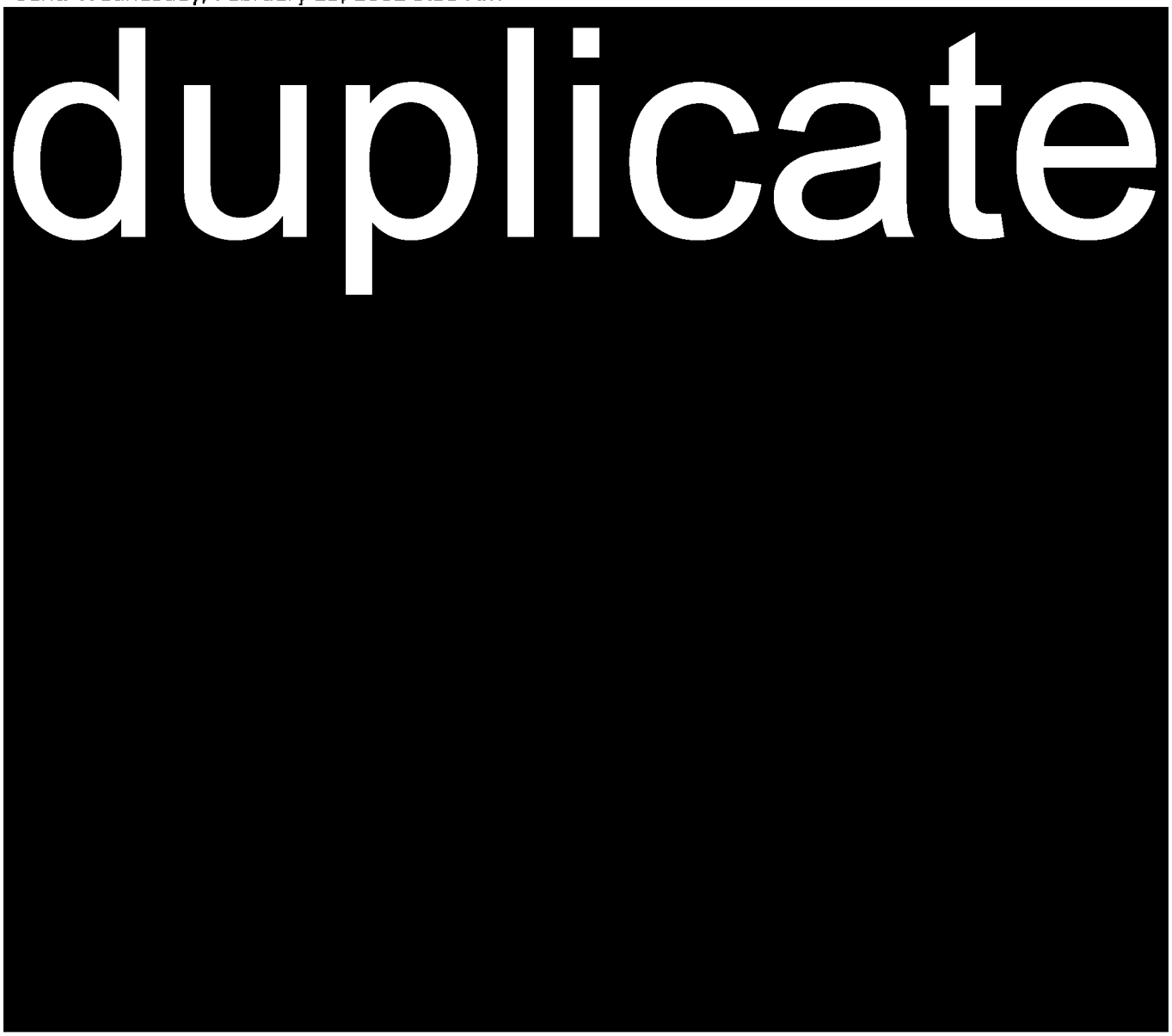
[redacted]

Colborn, Paul P

From:	Colborn, Paul P
Sent:	Wednesday, February 13, 2002 9:57 AM
To:	Thorsen, Carl; 'Brett_M._Kavanaugh@who.eop.gov'
Cc:	Bryant, Dan; Collins, Dan; Burton, Faith; Rybicki, James E; Whelan, M Edward III; Martens, Matthew; 'attyadv.opca@fbi.gov'
Subject:	RE:

I think you should substitute "(b) (5) " for "(b) (5) ;" in the (b) (5) .

-----Original Message-----
From: Thorsen, Carl
Sent: Wednesday, February 13, 2002 9:53 AM



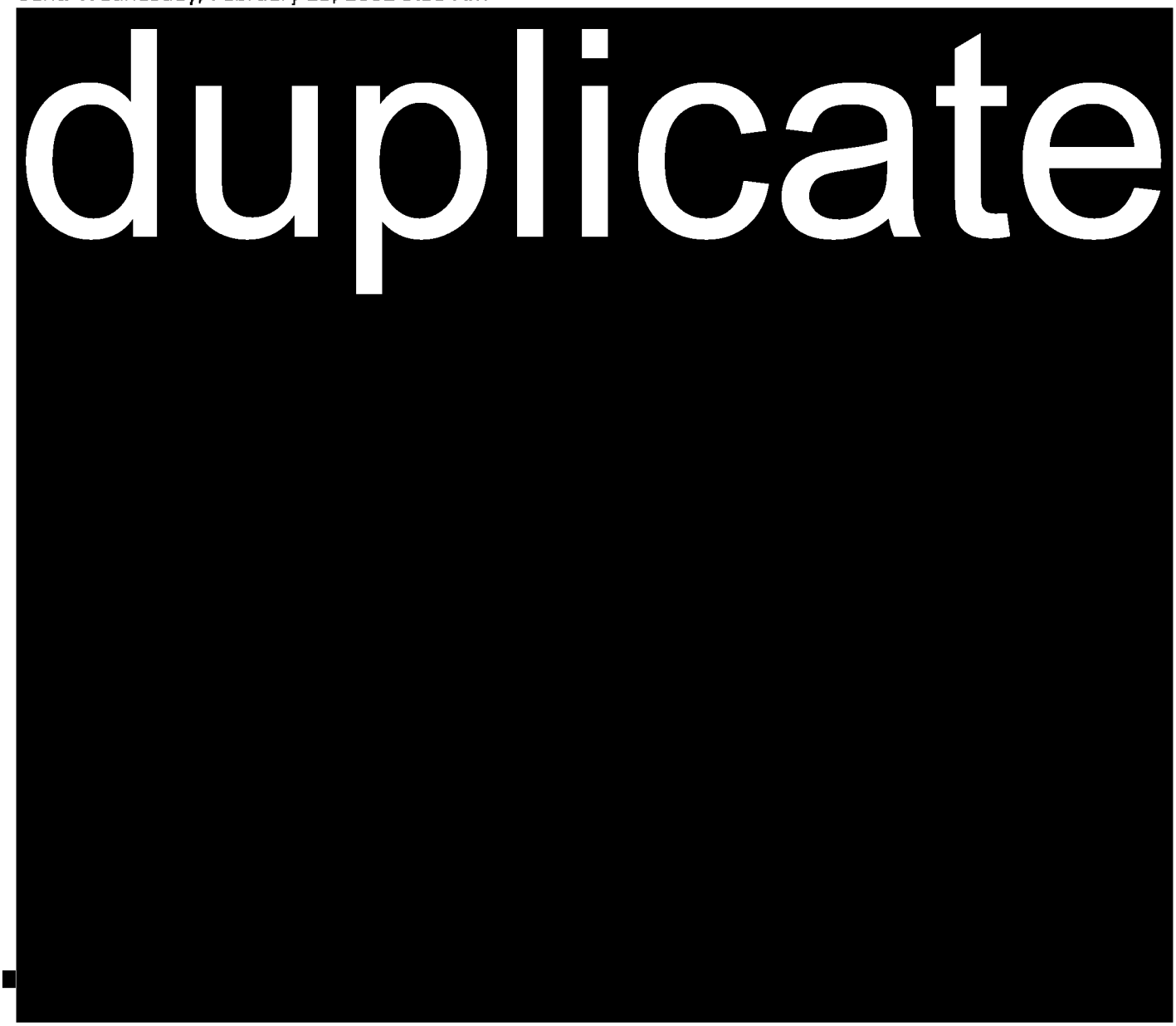
duplicate

Burton, Faith

From:	Burton, Faith
Sent:	Wednesday, February 13, 2002 11:06 AM
To:	Thorsen, Carl; 'Brett_M._Kavanaugh@who.eop.gov'
Cc:	Bryant, Dan; Collins, Dan; Rybicki, James E; Whelan, M Edward III; Martens, Matthew; Colborn, Paul P; 'attyadv.opca@fbi.gov'
Subject:	RE:

Brett, please let me know when you have sign-off on this letter; Carl has gone to the Burton hearing. Thanks.

-----Original Message-----
From: Thorsen, Carl
Sent: Wednesday, February 13, 2002 9:53 AM



duplicate

Thorsen, Carl

From: Thorsen, Carl
Sent: Wednesday, February 13, 2002 2:47 PM
To: Martens, Matthew; Colborn, Paul P; Whelan, M Edward III; Collins, Dan; Bryant, Dan; Burton, Faith; 'brett_m._kavanaugh@who.eop.gov'
Subject: Burton Review of Harrington Memo

Burton's staff just called, they asked that unless we hear back from them (after they've discussed our letter with the Chairman I presume) we bring it up at 4:30 PM today for their review. Unless someone disagrees, I'll plan to do that alone so Faith and Matt can participate in Jay's prep session.

Carl Thorsen
Deputy Assistant Attorney General
Office of Legislative Affairs
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Brett_M._Kavanaugh@who.eop.gov

From:	Brett_M._Kavanaugh@who.eop.gov
Sent:	Wednesday, February 13, 2002 6:28 PM
To:	Thorsen, Carl; Bryant, Dan; Collins, Dan; Burton, Faith; Whelan, M Edward III; Martens, Matthew; Chertoff, Michael; Colborn, Paul P; Brett_M._Kavanaugh@who.eop.gov
Cc:	Bybee, Jay
Subject:	Re: Jay Bybee's opening remarks for hearing

That is important

PPColborn@aol.com

From:	PPColborn@aol.com
Sent:	Wednesday, February 20, 2002 12:36 PM
To:	Martens, Matthew; Horowitz, Michael-CRM; Chertoff, Michael; Whelan, M Edward III; Colborn, Paul P; Burton, Faith; Collins, Dan; Thorsen, Carl; brett_m._kavanaugh@who.eop.gov
Cc:	Herbert, James; Durham, John; Bybee, Jay; Bryant, Dan
Subject:	Re: Call this morning from Jim Wilson re. documents
Attachments:	tmp.htm

[redacted] (b) (5)

Brett_M._Kavanaugh@who.eop.gov

From:	Brett_M._Kavanaugh@who.eop.gov
Sent:	Wednesday, February 20, 2002 2:30 PM
To:	Whelan, M Edward III
Subject:	RE: Call this morning from Jim Wilson re. documents
Attachments:	pic28041.pcx

I e-mailed Carl that I agree with you on this issue.

(Embedded
image moved "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov>
to file: 02/20/2002 02:08:39 PM
pic28041.pcx)

Record Type: Record

To: See the distribution list at the bottom of this message

cc: See the distribution list at the bottom of this message Subject: RE: Call this morning from Jim Wilson re. documents

(b) (5)
[redacted]

-----Original Message-----
From: Thorsen, Carl
Sent: Wednesday, February 20, 2002 1:36 PM
To: Whelan, M Edward III; Collins, Dan; Chertoff, Michael;
'brett_m._kavanaugh@who.eop.gov'; Burton, Faith; Colborn, Paul P;
Horowitz, Michael-CRM; Martens, Matthew
Cc: 'ppcolborn@aol.com'; Bryant, Dan; Bybee, Jay; Durham, John; Herbert,

James
Subject: RE: Call this morning from Jim Wilson re. documents

Valid point. [redacted] (b) (5)

-----Original Message-----
From: Whelan, M Edward III
Sent: Wednesday, February 20, 2002 1:16 PM
To: Thorsen, Carl; Collins, Dan; Chertoff, Michael; 'brett_m._kavanaugh@who.eop.gov'; Burton, Faith; Colborn, Paul P; Horowitz, Michael-CRM; Martens, Matthew
Cc: 'ppcolborn@aol.com'; Bryant, Dan; Bybee, Jay; Durham, John; Herbert, James
Subject: RE: Call this morning from Jim Wilson re. documents

[redacted] (b) (5)

-----Original Message-----
From: Thorsen, Carl
Sent: Wednesday, February 20, 2002 12:01 PM
To: Collins, Dan; Chertoff, Michael; 'brett_m._kavanaugh@who.eop.gov'; Burton, Faith; Colborn, Paul P; Whelan, M Edward III; Horowitz, Michael-CRM; Martens, Matthew
Cc: 'ppcolborn@aol.com'; Bryant, Dan; Bybee, Jay; Durham, John; Herbert, James
Subject: RE: Call this morning from Jim Wilson re. documents

[redacted] (b) (5)
?

-----Original Message-----
From: Collins, Dan
Sent: Wednesday, February 20, 2002 11:49 AM
To: Chertoff, Michael; 'brett_m._kavanaugh@who.eop.gov'; Burton, Faith; Colborn, Paul P; Thorsen, Carl; Whelan, M Edward III; Horowitz, Michael-CRM; Martens, Matthew
Cc: 'ppcolborn@aol.com'; Bryant, Dan; Bybee, Jay; Durham, John; Herbert, James
Subject: RE: Call this morning from Jim Wilson re. documents

Me too.

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

From: Michael Chertoff
Sent: Wednesday, February 20, 2002 11:45 AM
To: brett_m._kavanaugh@who.eop.gov; Burton, Faith; Colborn, Paul P; Thorsen, Carl; Collins, Dan; Whelan, M Edward III; Horowitz, Michael-CRM; Martens, Matthew
Cc: ppcolborn@aol.com; Bryant, Dan; Bybee, Jay; Durham, John; Herbert, James
Subject: RE: Call this morning from Jim Wilson re. documents

Date: 02/20/2002 11:51 am -0500 (Wednesday) From: Michael Chertoff
To: "brett_m._kavanaugh@who.eop.gov@inetgw".WTGATE2.CRMGW; "FBurton".WTGATE2.CRMGW; "PColborn".WTGATE2.CRMGW; "wCThorsen".WTGATE2.CRMGW; "wDCollins4".WTGATE2.CRMGW; "wMWhelan".WTGATE2.CRMGW; Horowitz, Michael-CRM; Martens, Matthew
CC: "ppcolborn@aol.com@inetgw".WTGATE2.CRMGW; "wDBryant".WTGATE2.CRMGW; "wJBybee".WTGATE2.CRMGW; "wJDurham".WTGATE2.CRMGW; "wJHerbert".WTGATE2.CRMGW Subject: RE: Call this morning from Jim Wilson re. documents

I agree with Ed

>>> Whelan, M Edward III 02/20/02 11:39AM >>> 1. (b) (5) .

2. (b) (5) .

-----Original Message-----
From: Burton, Faith
Sent: Wednesday, February 20, 2002 11:34 AM
To: Thorsen, Carl; Colborn, Paul P; Whelan, M Edward III; Horowitz, Michael-CRM; Martens, Matthew; Collins, Dan; 'brett_m._kavanaugh@who.eop.gov'
Cc: Bryant, Dan; Chertoff, Michael; Bybee, Jay; Durham, John; Herbert, James
Subject: RE: Call this morning from Jim Wilson re. documents

(b) (5) .

-----Original Message-----
From: Thorsen, Carl
Sent: Wednesday, February 20, 2002 11:29 AM
To: Colborn, Paul P; Whelan, M Edward III; Horowitz, Michael-CRM; Martens, Matthew; Collins, Dan; 'brett_m._kavanaugh@who.eop.gov'
Cc: Bryant, Dan; Burton, Faith; Chertoff, Michael; Bybee, Jay; Durham, John; Herbert, James
Subject: Call this morning from Jim Wilson re. documents

Jim Wilson left me a message to request a copy of the Harrington memo for use in their deposition of Condon. He indicated that they very much want a copy, but expects he knows what our position will be. He's leaving later today for this meeting, so I presume the depo is tomorrow. (b) (5) [redacted] Please advise.

Also, he indicated they'd like to meet as soon as possible this week, presumably to discuss their need for the other documents. I think its their turn to come down here and Mike C. should probably do this meeting with a few others, agreed?
When is he available?

Carl Thorsen
Deputy Assistant Attorney General
Office of Legislative Affairs
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Message Sent To:

"Thorsen, Carl" <Carl.Thorsen@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested)
"Collins, Dan" <Dan.Collins@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested)
"Burton, Faith" <Faith.Burton@usdoj.gov> (Receipt Notification Requested)
"Colborn, Paul P" <Paul.P.Colborn@usdoj.gov> (Receipt Notification Requested)
"Chertoff, Michael" <Michael.Chertoff@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested)
Brett M. Kavanaugh/WHO/EOP@EOP
"Horowitz, Michael-CRM" <Michael.Horowitz3@usdoj.gov> (Receipt Notification Requested)
"Martens, Matthew" <Matthew.Martens@usdoj.gov> (Receipt Notification Requested)

Message Copied To:_____

"Bryant, Dan" <Dan.Bryant@usdoj.gov> (Receipt Notification Requested)
"Bybee, Jay" <Jay.Bybee@usdoj.gov> (Receipt Notification Requested)
"Durham, John" <John.Durham@usdoj.gov> (Receipt Notification Requested)
"Herbert, James" <James.Herbert@usdoj.gov> (Receipt Notification Requested)
"'ppcolborn@aol.com'" <ppcolborn@aol.com> (Receipt Notification Requested)

Thorsen, Carl

From: Thorsen, Carl
Sent: Friday, February 22, 2002 10:27 AM
To: Burton, Faith; Colborn, Paul P; Whelan, M Edward III; Horowitz, Michael-CRM; Martens, Matthew; Collins, Dan; 'brett_m._kavanaugh@who.eop.gov'
Cc: Bryant, Dan; Chertoff, Michael; Bybee, Jay; Durham, John; Herbert, James
Subject: RE: Call this morning from Jim Wilson re. documents -- UPDATE

I spoke with Burton's staff to discuss their bottom line needs for possession of the Harrington memo during depositions.

They feel that the larger issue will take some time to resolve between the brances. In the meantime they propose that we send the redacted Harrington memo up immediately so they can use it in Boston today for the Condon dep, including showing it to him. They will return it to us immediately after the dep and the will agree not to use this as a precedent against us for discussing the larger issue of providing memoranda/um to them.

[redacted] (b) (5) [redacted]

-----Original Message-----
From: Burton, Faith
Sent: Wednesday, February 20, 2002 11:34 AM

[redacted] duplicate [redacted]

duplicate

Brett_M._Kavanaugh@who.eop.gov

From:	Brett_M._Kavanaugh@who.eop.gov
Sent:	Friday, February 22, 2002 12:56 PM
To:	Collins, Dan
Cc:	Thorsen, Carl; Bryant, Dan; Burton, Faith; Bybee, Jay; Whelan, M Edward III; Chertoff, Michael; Horowitz, Michael-CRM; Colborn, Paul P
Subject:	RE: Draft letter to Burton on Condon dep accommodation for review asap
Attachments:	burton.condon.wpd; ATTACHMENT.TXT; pic29807.pcx

I think Dan's suggested revision is good.

(Embedded
image moved "Collins, Dan" <Dan.Collins@usdoj.gov>
to file: 02/22/2002 12:49:52 PM
pic29807.pcx)

Record Type: Record

To: See the distribution list at the bottom of this message

cc: "Thorsen, Carl" <Carl.Thorsen@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested), "Bryant, Dan" <Dan.Bryant@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested), "Long, Linda E" <Linda.E.Long@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested)
Subject: RE: Draft letter to Burton on Condon dep accommodation for review asap

[redacted] (b) (5) [redacted] What do others think?

--Dan

-----Original Message-----
From: Burton, Faith
Sent: Friday, February 22, 2002 12:21 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'; 'attyadv.opca@fbi.gov'; Durham, John; Herbert, James; Chertoff, Michael; Horowitz, Michael-CRM; Bybee, Jay; Whelan, M Edward III; Colborn, Paul P; Collins, Dan
Cc: Thorsen, Carl; Bryant, Dan; Long, Linda E
Subject: Draft letter to Burton on Condon dep accommodation for review asap

The subject dep began at 12 noon today in Boston; our plan is to get this and the document to them by 1 p.m. Thanks. << File: burton.condon.wpd >>

Message Sent To:_____

"Burton, Faith" <Faith.Burton@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested)
"Durham, John" <John.Durham@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested)
"Herbert, James" <James.Herbert@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested)
"Bybee, Jay" <Jay.Bybee@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested)
"Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested)
"Colborn, Paul P" <Paul.P.Colborn@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested)
Brett M. Kavanaugh/WHO/EOP@EOP
"'attyadv.opca@fbi.gov'" <attyadv.opca@fbi.gov> (Receipt Notification Requested) (IPM Return Requested)
"Chertoff, Michael" <Michael.Chertoff@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested)
"Horowitz, Michael-CRM" <Michael.Horowitz3@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested)

Collins, Dan

From: Collins, Dan
Sent: Friday, February 22, 2002 1:08 PM
To: Burton, Faith; Bybee, Jay; Colborn, Paul P; 'Brett_M._Kavanaugh@who.eop.gov'; 'attyadv.opca@fbi.gov'; Durham, John; Herbert, James; Chertoff, Michael; Horowitz, Michael-CRM; Whelan, M Edward III
Cc: Thorsen, Carl; Bryant, Dan; Long, Linda E
Subject: RE: Draft letter to Burton on Condon dep accommodation for review asap

Faith--

This is the old version.

--Dan

-----Original Message-----
From: Burton, Faith
Sent: Friday, February 22, 2002 1:07 PM
To: Collins, Dan; Bybee, Jay; Colborn, Paul P; 'Brett_M._Kavanaugh@who.eop.gov'; 'attyadv.opca@fbi.gov'; Durham, John; Herbert, James; Chertoff, Michael; Horowitz, Michael-CRM; Whelan, M Edward III
Cc: Thorsen, Carl; Bryant, Dan; Long, Linda E
Subject: RE: Draft letter to Burton on Condon dep accommodation for review asap

Here's the revised version, which incorporates changes from Dan and OLC. FB << File: burton.condon.wpd >>

-----Original Message-----
From: Collins, Dan
Sent: Friday, February 22, 2002 1:05 PM
To: Bybee, Jay; Colborn, Paul P; Burton, Faith; 'Brett_M._Kavanaugh@who.eop.gov'; 'attyadv.opca@fbi.gov'; Durham, John; Herbert, James; Chertoff, Michael; Horowitz, Michael-CRM; Whelan, M Edward III
Cc: Thorsen, Carl; Bryant, Dan; Long, Linda E
Subject: RE: Draft letter to Burton on Condon dep accommodation for review asap

Please note that the version I sent erroneously left in the sentence that Jay and Paul noted should be stricken.

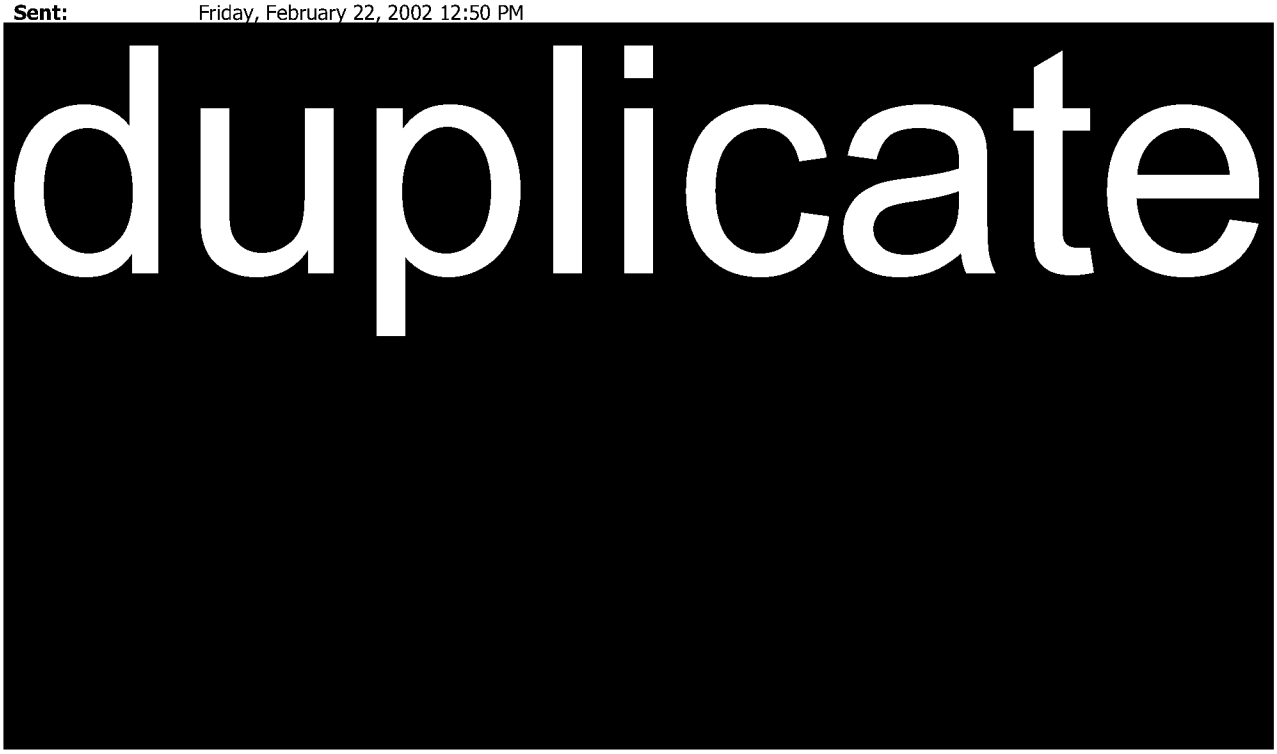
-----Original Message-----
From: Bybee, Jay
Sent: Friday, February 22, 2002 1:03 PM
To: Colborn, Paul P; Collins, Dan; Burton, Faith; 'Brett_M._Kavanaugh@who.eop.gov'; 'attyadv.opca@fbi.gov'; Durham, John; Herbert, James; Chertoff, Michael; Horowitz, Michael-CRM; Whelan, M Edward III
Cc: Thorsen, Carl; Bryant, Dan; Long, Linda E
Subject: RE: Draft letter to Burton on Condon dep accommodation for review asap

After talking with Dan and Paul, I agree that Dan's changes make sense. [redacted (b) (5)] .

-----Original Message-----
From: Colborn, Paul P
Sent: Friday, February 22, 2002 12:57 PM
To: Collins, Dan; Burton, Faith; 'Brett_M._Kavanaugh@who.eop.gov'; 'attyadv.opca@fbi.gov'; Durham, John; Herbert, James; Chertoff, Michael; Horowitz, Michael-CRM; Bybee, Jay; Whelan, M Edward III
Cc: Thorsen, Carl; Bryant, Dan; Long, Linda E
Subject: RE: Draft letter to Burton on Condon dep accommodation for review asap

Dan's changes look good to OLC.

-----Original Message-----
From: Collins, Dan
Sent: Friday, February 22, 2002 12:50 PM

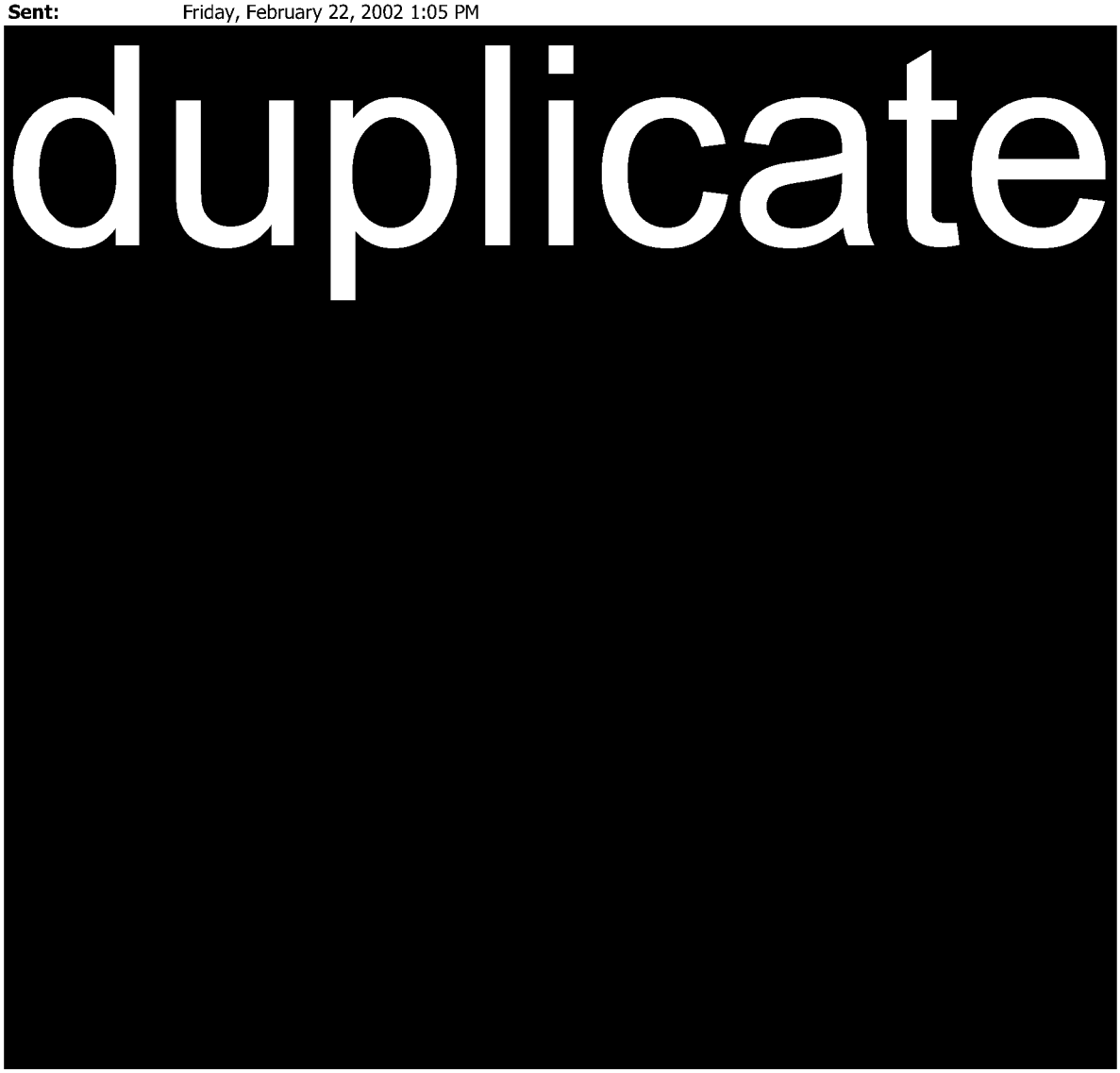


Burton, Faith

From: Burton, Faith
Sent: Friday, February 22, 2002 1:22 PM
To: Collins, Dan; Bybee, Jay; Colborn, Paul P; 'Brett_M._Kavanaugh@who.eop.gov'; 'attyadv.opca@fbi.gov'; Durham, John; Herbert, James; Chertoff, Michael; Horowitz, Michael-CRM; Whelan, M Edward III
Cc: Thorsen, Carl; Bryant, Dan; Long, Linda E
Subject: RE: Draft letter to Burton on Condon dep accommodation for review asap
Attachments: burton.condon.wpd

Revised version.

-----Original Message-----
From: Collins, Dan
Sent: Friday, February 22, 2002 1:05 PM



Whelan, M Edward III

From: Whelan, M Edward III
Sent: Tuesday, February 26, 2002 11:11 AM
To: 'Kavanaugh, Brett'
Subject: GAO/Cheney

In today's Post, Senator (and assistant majority leader) Reid is quoted as saying, "If the meetings were on the level, the vice president and the president shouldn't have anything to worry about."

(b) (5)

[redacted]

Koffsky, Daniel L

From:	Koffsky, Daniel L
Sent:	Tuesday, February 26, 2002 2:50 PM
To:	'Brett_M._Kavanaugh@who.eop.gov'
Cc:	Whelan, M Edward III
Subject:	RE: Hatch Act Coverage

Brett: The recently decided cases, unfortunately, don't add anything beyond our earlier advice. The cases [redacted (b) (5)] . -- Dan

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Wednesday, February 20, 2002 5:30 PM
To: Koffsky, Daniel L
Cc: Whelan, M Edward III
Subject: Re: Hatch Act Coverage

just curious how [redacted (b) (5)] in light of more recent case law defining these kinds of terms; if you could take a look, that would be great.

(Embedded
image moved "Koffsky, Daniel L" <Daniel.L.Koffsky@usdoj.gov>
to file: 02/20/2002 04:08:46 PM
pic24325.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc: "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested)
Subject: Hatch Act Coverage

Brett: Ed forwarded an exchange of e-mails from last fall that may address your question. Please let us know if you'd like to pursue any of these points or any additional ones. --Dan

----Original Message-----
From: Whelan, M Edward III
Sent: Thursday, October 18, 2001 3:05 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Subject: RE: FW: Hatch Act question

(b) (5)

I'll follow up with more on (b) (5).

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Thursday, October 18, 2001 12:32 PM
To: Whelan, M Edward III
Subject: RE: FW: Hatch Act question

(b) (5)

On your #2, the only question I have is (b) (5)

(Embedded
image moved "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov> to file: 10/18/2001 12:09:07 PM pic00416.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc:
Subject: RE: FW: Hatch Act question

1. (b) (5)

a. Therefore, (b) (5)

b. Conversely, (b) (5)

2. On your (b) (5) question: (b) (5)

Our initial take is (b) (5)

.

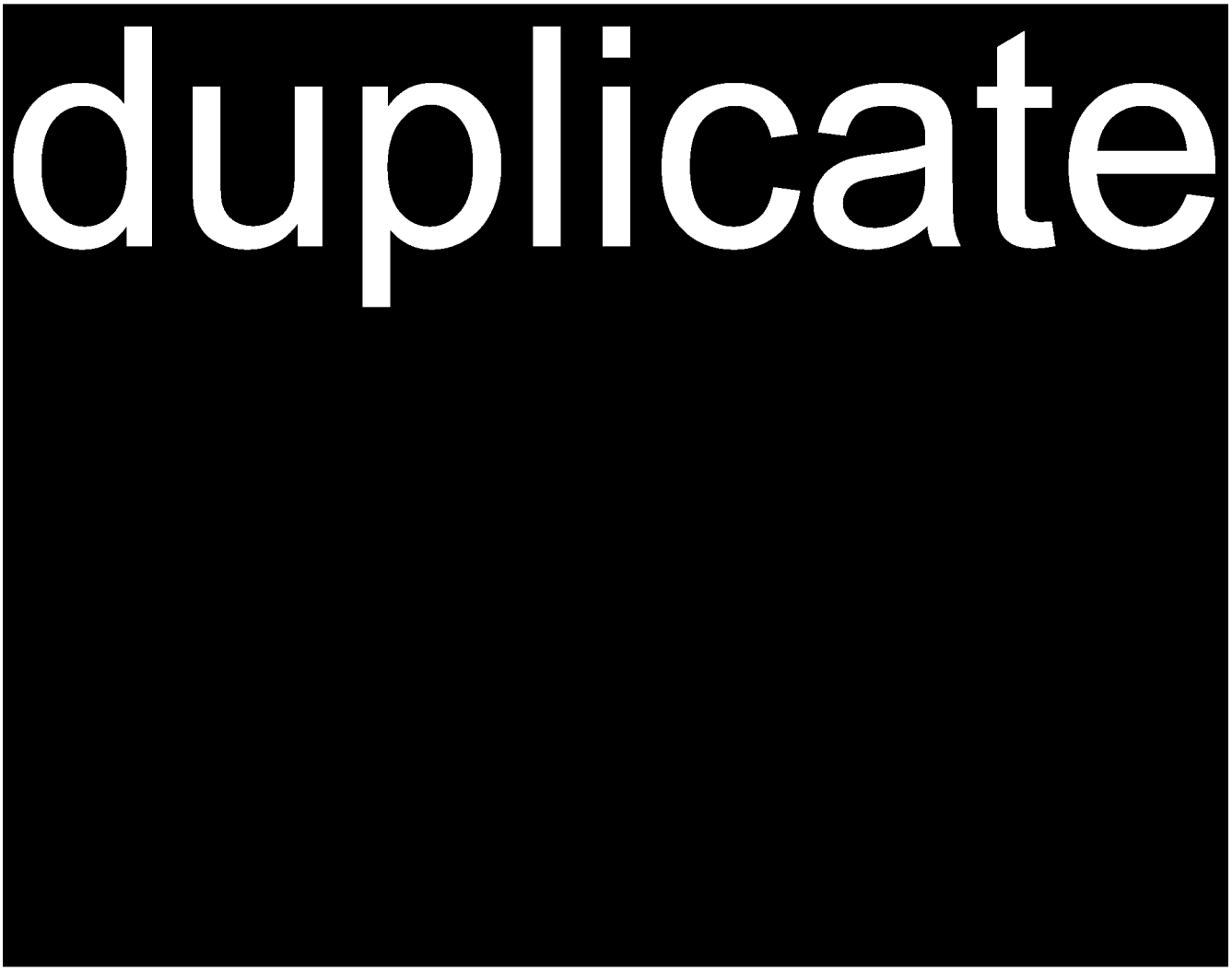
-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Wednesday, October 17, 2001 3:19 PM
To: Whelan, M Edward III
Subject: Re: FW: Hatch Act question

Is it possible (b) (5) ? Is there (b) (5) ?

(Embedded
image moved "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov> to file: 10/17/2001 02:59:36 PM pic08245.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP



Whelan, M Edward III

From: Whelan, M Edward III
Sent: Wednesday, February 27, 2002 1:04 PM
To: 'Kavanaugh, Brett'
Subject: FW: any word back from wh cnsl?

FYI

-----Original Message-----
From: Thorsen, Carl
Sent: Wednesday, February 27, 2002 12:59 PM
To: Colborn, Paul P
Cc: Whelan, M Edward III
Subject: RE: any word back from wh cnsl?

fyi the AP is running with a story that Burton intends to introduce his contempt resolution very soon. the (b) (5) .

-----Original Message-----
From: Colborn, Paul P
Sent: Wednesday, February 27, 2002 11:44 AM
To: Thorsen, Carl
Cc: Whelan, M Edward III
Subject: RE: any word back from wh cnsl?

Ed & I talked to Brett right after our meeting yesterday. He was going to talk to Tim and the Judge and get back to us. We haven't heard back yet.

-----Original Message-----
From: Thorsen, Carl
Sent: Wednesday, February 27, 2002 10:45 AM
To: Colborn, Paul P
Subject: any word back from wh cnsl?

Carl Thorsen
Deputy Assistant Attorney General
Office of Legislative Affairs
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Brett_M._Kavanaugh@who.eop.gov

From:	Brett_M._Kavanaugh@who.eop.gov
Sent:	Wednesday, February 27, 2002 1:22 PM
To:	Colborn, Paul P
Cc:	Whelan, M Edward III
Subject:	Re: FW: any word back from wh cnsl?
Attachments:	pic16087.pcx

yes, I talked to Ed.

(Embedded
image moved "Colborn, Paul P" <Paul.P.Colborn@usdoj.gov>
to file: 02/27/2002 01:09:12 PM
pic16087.pcx)

Record Type: Record

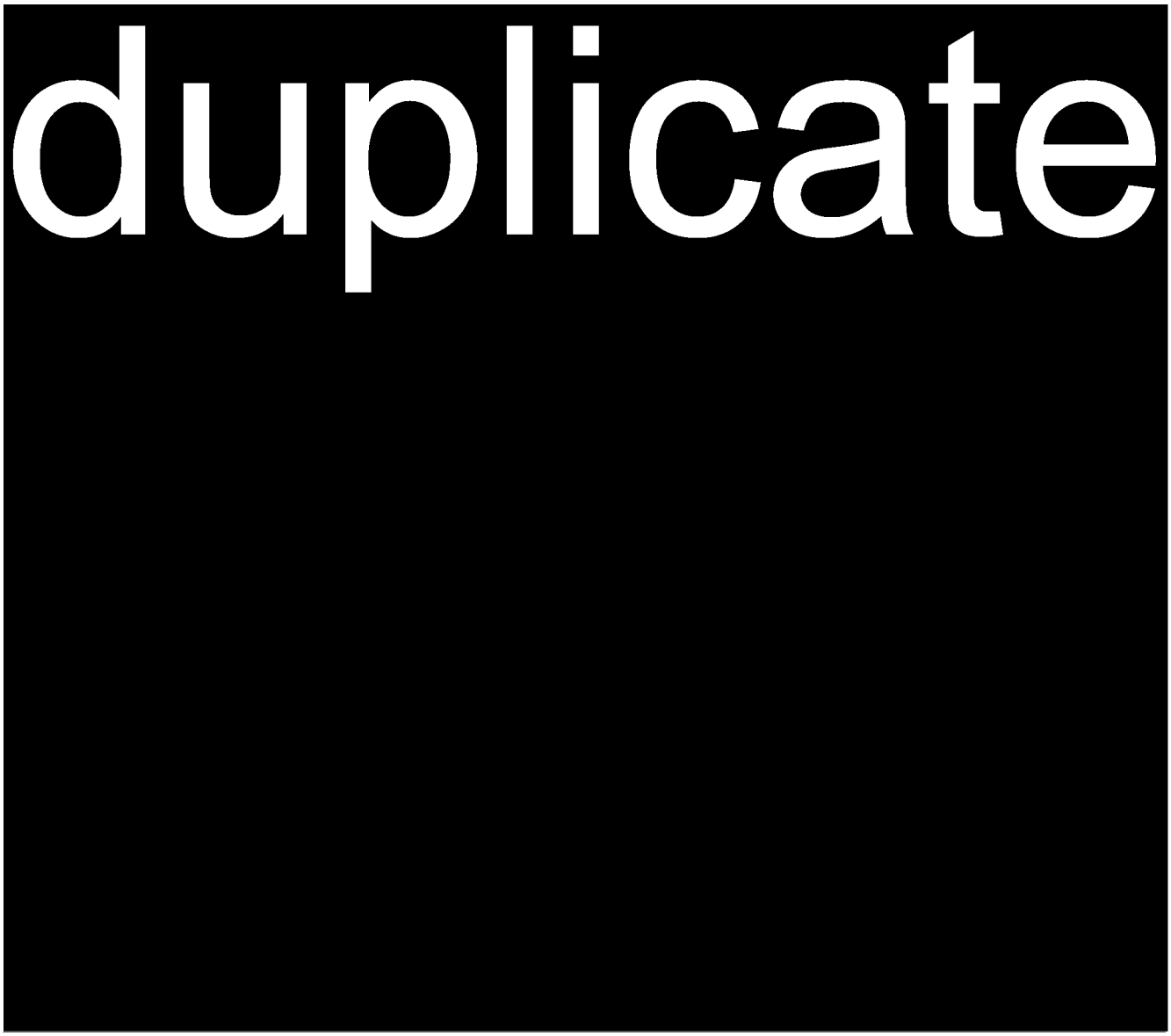
To: Brett M. Kavanaugh/WHO/EOP@EOP

cc: "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested)
Subject: FW: any word back from wh cnsl?

Brett, does your office have a reaction to [redacted] (b) (5) yet?

-----Original Message-----
From: Thorsen, Carl
Sent: Wednesday, February 27, 2002 12:59 PM

duplicate



Brett_M._Kavanaugh@who.eop.gov

From:	Brett_M._Kavanaugh@who.eop.gov
Sent:	Wednesday, February 27, 2002 2:08 PM
To:	Whelan, M Edward III
Subject:	AP - Congressman Wants FBI Records
Attachments:	ATTACHMENT.TXT

---------- Forwarded by Brett M. Kavanaugh/WHO/EOP on 02/27/2002 02:07 PM ----------

Anne Womack
02/27/2002 01:37:40 PM

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc:
Subject: AP - Congressman Wants FBI Records

---------- Forwarded by Anne Womack/WHO/EOP on 02/27/2002 01:37 PM ----------

Brian Bravo
02/27/2002 01:20:54 PM

Record Type: Record

To:

cc:
Subject: AP - Congressman Wants FBI Records

Congressman Wants FBI Records
By Melissa B. Robinson
Associated Press Writer
WASHINGTON

?? The chairman of a House committee said Wednesday he may try to hold President Bush in contempt of Congress for failing to turn over Justice Department records on the FBI's handling of mob informants in Boston in the 1960s.

Rep. Dan Burton, R-Ind., chairman of the Government Reform Committee, said during a hearing on the Boston case that his panel's legal staff "is preparing a contempt citation."

If Bush and Attorney General John Ashcroft "continue to be recalcitrant, I hope everyone on this committee will support me in getting the House to move this forward," Burton said.

It's unclear how long Burton will wait for the documents before deciding to bring the citation before his committee for consideration. If he does, and the committee approves it, he would then have to convince the House's Republican leaders to bring the citation against a GOP president to the full House for a vote.

Bush ordered Ashcroft to withhold the documents from the committee in December. He cited executive privilege, a doctrine recognized by the courts that ensures presidents can get candid advice in private without fear it will become public. Bush argued that releasing records could have a chilling effect on prosecutors' willingness to discuss criminal matters.

Committee members of both parties have argued the documents should be released to Congress so it can fulfill its responsibility of monitoring the executive branch's activities.

With regard to the Boston case, they want to ensure that past excesses of the FBI aren't repeated. Among the facts Burton's committee has learned since it began looking into the issue is the FBI's knowledge that an innocent man was convicted of a murder actually committed by an FBI informant.

Comstock, Barbara

From:	Comstock, Barbara
Sent:	Thursday, February 28, 2002 9:52 AM
To:	'Brett_M._Kavanaugh@who.eop.gov'; Whelan, M Edward III
Cc:	Thorsen, Carl; Bryant, Dan; Collins, Dan; Burton, Faith; Bybee, Jay; Martens, Matthew; Chertoff, Michael; Horowitz, Michael-CRM; Colborn, Paul P; 'David_W._Hobbs@who.eop.gov'
Subject:	RE: Burton

I agree

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Thursday, February 28, 2002 9:18 AM
To: Whelan, M Edward III
Cc: Comstock, Barbara; Thorsen, Carl; Bryant, Dan; Collins, Dan; Burton, Faith; Bybee, Jay; Martens, Matthew; Chertoff, Michael; Horowitz, Michael-CRM; Colborn, Paul P; David_W._Hobbs@who.eop.gov
Subject: RE: Burton

Unless others think differently, I tend to agree that [redacted (b) (5)]

(Embedded
image moved "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov>
to file: 02/28/2002 09:06:01 AM
pic14209.pcx)

Record Type: Record

To: "Thorsen, Carl" <Carl.Thorsen@usdoj.gov> (Receipt Notification Requested)
(IPM Return Requested), Brett M. Kavanaugh/WHO/EOP@EOP

cc: See the distribution list at the bottom of this message Subject: RE: Burton

FYI: Paul (who will not be in until mid-morning) passes along a factual correction: The meeting referred to in the 4th paragraph was on Feb. 25, not Feb. 26.

-----Original Message-----
From: Colborn, Paul P
Sent: Wednesday, February 27, 2002 6:21 PM
To: Thorsen, Carl; 'Brett_M._Kavanaugh@who.eop.gov'
Cc: Bryant, Dan; Collins, Dan; Whelan, M Edward III; Martens, Matthew; Horowitz, Michael-CRM; Bybee, Jay; 'brett_m._kavanaugh@who.eop.gov'; 'dhobbs@who.eop.gov'; Comstock, Barbara; Burton, Faith; Chertoff, Michael
Subject: RE: Burton

Brett has asked me to draft and circulate for everyone's consideration the attached letter to Burton. The letter reflects [redacted (b) (5)].

-----Original Message-----
From: Thorsen, Carl
Sent: Wednesday, February 27, 2002 4:09 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Cc: Bryant, Dan; Collins, Dan; Whelan, M Edward III; Martens, Matthew; Horowitz, Michael-CRM; Colborn, Paul P; Bybee, Jay; 'brett_m._kavanaugh@who.eop.gov'; 'dhobbs@who.eop.gov'; Comstock, Barbara
Subject: RE: Burton

Wilson has agreed to our offer to review the 5 memoranda. Majority and minority staff will get access to redacted copies under the supervision of DOJ staff and will be allowed to take notes. All copies will be returned to DOJ staff after they're done reviewing them. Wilson is comfortable with our assurance that only information which is related to an open case or required by law will be redacted, and that we'll be available to answer any questions about the redaction process thereafter. (Please note there is nothing new about this assurance.) Jim indicated that this is "wonderful news", and that he "perceives no (committee) interest in going after the other subpoenaed memoranda" and once they review these memos that "this will all go away".

Dan Bryant plans to call him later today to confirm all of this.

Working with Task Force attorneys we're in the process of finalizing redactions to be made to these documents and anticipate DOJ will be able to make them available to the Committee early next week.

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Wednesday, February 27, 2002 2:13 PM
To: Thorsen, Carl
Cc: Bryant, Dan; Collins, Dan; Whelan, M Edward III; Martens, Matthew;
Horowitz, Michael-CRM; Colborn, Paul P
Subject: Re: Burton

[redacted] (b) (5) ?
[redacted] (b) (5)
[redacted]

(Embedded
image moved "Thorsen, Carl" <Carl.Thorsen@usdoj.gov> to file: 02/27/2002 01:30:46
PM pic11260.pcx)

Record Type: Record

To: "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov> (Receipt Notification
Requested) (IPM Return Requested), "Colborn, Paul P"
<Paul.P.Colborn@usdoj.gov> (Receipt Notification Requested) (IPM Return
Requested), Brett M. Kavanaugh/WHO/EOP@EOP

cc: "Collins, Dan" <Dan.Collins@usdoj.gov> (Receipt Notification Requested)
(IPM Return Requested), "Bryant, Dan" <Dan.Bryant@usdoj.gov> (Receipt
Notification Requested) (IPM Return Requested), "Horowitz, Michael-CRM"
<Michael.Horowitz3@usdoj.gov> (Receipt Notification Requested) (IPM Return
Requested), "Martens, Matthew" <Matthew.Martens@usdoj.gov> (Receipt
Notification Requested) (IPM Return Requested) Subject: Burton

as we all know that's easier said than done.

i've provisionally let Committee staff know that the administration might very well be willing to offer review of the 5 memos w/only 6(e), open case, and T# redactions, and asked them to 1) hold off on any statements or releases and 2) think carefully about what they might be willing to offer back to us vis a

vis putting closure to the dispute over these 20 subpoenaed documents (Boston, conrad, howard, middleton).

brett, i'd like to coordinate with you and your WH legis on [redacted (b) (5)].

-----Original Message-----
From: Whelan, M Edward III
Sent: Wednesday, February 27, 2002 1:11 PM
To: Thorsen, Carl; Colborn, Paul P
Cc: Collins, Dan
Subject: RE: any word back from wh cnsl?

Just spoke with Brett. [redacted (b) (5)].

-----Original Message-----
From: Whelan, M Edward III
Sent: Wednesday, February 27, 2002 1:09 PM
To: Thorsen, Carl; Colborn, Paul P
Subject: RE: any word back from wh cnsl?

Surely Wilson knows we're addressing this. Can't we get him to agree that nothing will happen before a decision is made?

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

Message Copied To:

"Bryant, Dan" <Dan.Bryant@usdoj.gov> (Receipt Notification Requested)
"Collins, Dan" <Dan.Collins@usdoj.gov> (Receipt Notification Requested)
"Bybee, Jay" <Jay.Bybee@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested)
"Comstock, Barbara" <Barbara.Comstock@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested)
"Burton, Faith" <Faith.Burton@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested)
"Colborn, Paul P" <Paul.P.Colborn@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested)
"Martens, Matthew" <Matthew.Martens@usdoj.gov> (Receipt Notification Requested)
"Horowitz, Michael-CRM" <Michael.Horowitz3@usdoj.gov> (Receipt Notification Requested)

Brett M. Kavanaugh/WHO/EOP@EOP
David W. Hobbs/WHO/EOP@EOP
"Chertoff, Michael" <Michael.Chertoff@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested)

Comstock, Barbara

From:	Comstock, Barbara
Sent:	Thursday, February 28, 2002 10:21 AM
To:	Bryant, Dan; Whelan, M Edward III; 'Brett_M._Kavanaugh@who.eop.gov'
Cc:	Thorsen, Carl; Collins, Dan; Burton, Faith; Bybee, Jay; Martens, Matthew; Chertoff, Michael; Horowitz, Michael-CRM; Colborn, Paul P; 'David_W._Hobbs@who.eop.gov'
Subject:	RE: Burton

ditto

-----Original Message-----
From: Bryant, Dan
Sent: Thursday, February 28, 2002 10:21 AM
To: Whelan, M Edward III; 'Brett_M._Kavanaugh@who.eop.gov'
Cc: Comstock, Barbara; Thorsen, Carl; Collins, Dan; Burton, Faith; Bybee, Jay; Martens, Matthew; Chertoff, Michael; Horowitz, Michael-CRM; Colborn, Paul P; 'David_W._Hobbs@who.eop.gov'
Subject: RE: Burton

I agree.

-----Original Message-----
From: Whelan, M Edward III
Sent: Thursday, February 28, 2002 9:26 AM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Cc: Comstock, Barbara; Thorsen, Carl; Bryant, Dan; Collins, Dan; Burton, Faith; Bybee, Jay; Martens, Matthew; Chertoff, Michael; Horowitz, Michael-CRM; Colborn, Paul P; 'David_W._Hobbs@who.eop.gov'
Subject: RE: Burton

I readily defer to your judgment on this.

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Thursday, February 28, 2002 9:18 AM

duplicate

duplicate

duplicate

Goodling, Monica

From: Goodling, Monica
Sent: Thursday, February 28, 2002 11:56 AM
To: 'Brett_M._Kavanaugh@who.eop.gov'; Comstock, Barbara
Cc: Whelan, M Edward III; Thorsen, Carl; Bryant, Dan; Collins, Dan; Burton, Faith; Bybee, Jay; Martens, Matthew; Chertoff, Michael; Horowitz, Michael-CRM; Colborn, Paul P; 'David_W._Hobbs@who.eop.gov'
Subject: Burton stories

Brett - Hi, I'm the senior counsel in Barbara's office at DOJ Public Affairs. Here are some of the relevant Burton stories [redacted (b) (5)] I'll send a daily email with additions on the subject. Take care.

The Associated Press, February 27, 2002
HEADLINE: Congressman Wants FBI Records
BYLINE: MELISSA B. ROBINSON

Faced with a contempt threat, the Justice Department agreed Wednesday to give a congressional committee records on the Boston FBI's handling of mob informants in the 1960s, the committee chairman said.

"My committee has been investigating this tragic case for over a year," said House Government Reform Chairman Dan Burton. "We've finally reached an agreement with the Justice Department to see the documents we need to see to move forward with this investigation."

A department spokesman declined comment, saying he was reviewing the details.

For now, the agreement settles the showdown between Burton and the White House over its use of executive privilege to shield prosecutorial documents from congressional scrutiny. The dispute had led to charges by both Democrats and Republicans that Bush was trying to run an "imperial" presidency.

At a committee hearing Wednesday, Burton said he might try to hold President Bush in contempt because he and Attorney General John Ashcroft had yet to comply with a subpoena for the documents.

After department officials and committee aides met later, the department agreed to provide five documents in question, the aides said. The committee had sought 10 records, but four were found to be irrelevant to the case or not responsive to the subpoena. One was provided earlier.

Executive privilege is a doctrine recognized by the courts that ensures presidents can get candid advice in private without fear it will become public.

Bush invoked it in December when he ordered Ashcroft not to turn the Boston records over. He argued that releasing the records could have a chilling effect on prosecutors' willingness to discuss criminal matters.

Burton has focused on revelations that Joseph Salvati of Boston spent 30 years in prison for a murder he did not commit even though the FBI had evidence of his innocence.

LOAD-DATE: February 27, 2002

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The Associated Press, February 27, 2002
HEADLINE: Burton drafting contempt citation against Bush to get FBI records from the 1960s
BYLINE: By MELISSA B. ROBINSON, Associated Press Writer

The chairman of a House committee said Wednesday he may try to hold President Bush in contempt of Congress for failing to turn over Justice Department records on the FBI's handling of mob informants in Boston in the 1960s.

Rep. Dan Burton, R-Ind., chairman of the Government Reform Committee, said during a hearing on the Boston case that his panel's legal staff "is preparing a contempt citation."

If Bush and Attorney General John Ashcroft "continue to be recalcitrant, I hope everyone on this committee will support me in getting the House to move this forward," Burton said.

It's unclear how long Burton will wait for the documents before deciding to bring the citation before his committee for consideration. If he does, and the committee approves it, he would then have to convince the House's Republican leaders to bring the citation against a GOP president to the full House for a vote.

Bush ordered Ashcroft to withhold the documents from the committee in December. He cited executive privilege, a doctrine recognized by the courts that ensures presidents can get candid advice in private without fear it will become public.

Bush argued that releasing records could have a chilling effect on prosecutors' willingness to discuss criminal matters.

Committee members of both parties have argued the documents should be released to Congress so it can fulfill its responsibility of monitoring the executive branch's activities.

With regard to the Boston case, they want to ensure that past excesses of the FBI aren't repeated. Among the facts Burton's committee has learned since it began looking into the issue is the FBI's knowledge that an innocent man was convicted of a murder actually committed by an FBI informant.

LOAD-DATE: February 28, 2002

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The Boston Globe, February 27, 2002
SECTION: NATIONAL/FOREIGN; Pg. A3
HEADLINE: UNLIKELY FRIENDS, ENEMIES BURTON PROBE RILES BUSH, WINS

PRAISE FROM DEMOCRATS
BYLINE: By Wayne Washington, Globe Staff

WASHINGTON - Dan Burton is a conservative Republican who has been liberal in his scorn for Democrats.

Few Republicans in Congress are seen by their Democratic counterparts as more partisan, more scandal-raking than Burton, a 10-term representative from Indiana. As chairman of the House Committee on Government Reform, he has conducted hearings on Bill Clinton's White House and presidential pardons, Democratic fund-raising, and the Clinton administration's handling of the FBI raid in Waco, Texas.

So how come Massachusetts Democrats have started saying such nice things about Burton? Representative William D. Delahunt of Quincy calls him "passionate." Representative Barney Frank of Newton says some of Burton's recent actions have been "impressive."

The surprising praise stems from Burton's investigation into how the false testimony of a murderous FBI informant sent four men to prison in 1967 for slaying Edward "Teddy" Deegan in Chelsea, a crime they did not commit. Two of the men died in prison. Two served about 30 years each before their convictions were overturned.

Burton will continue digging into the case today, when another committee hearing is scheduled.

For more than a year now, the Government Reform Committee has trained a sharp focus on what the FBI knew about the informant, the lengths it went to protect him, and its willingness to allow innocent men to be imprisoned on testimony the agency knew to be false. That focus has put Burton at odds with the Justice Department and the Bush White House.

Delahunt, a former Norfolk County district attorney with an interest in the case, says he originally preferred to have the House Judiciary Committee do the investigating. Three Massachusetts congressmen - Delahunt, Frank, and Martin T. Meehan - serve on Judiciary, and they would have surely gotten involved in a Boston-related case.

Republicans control the House, however, and that panel's Republican chairman, F. James Sensenbrenner Jr. of Wisconsin, had little interest in pursuing a case that would almost certainly be a headache for the Bush administration.

To the surprise of many Democrats, Burton pressed ahead. He decided to conduct hearings and invited the Massachusetts Democrats to participate. The invitation was more than mere congressional courtesy. Delahunt, for example, was dispatched to Boston last week to take the deposition of a retired FBI agent who declined to travel to Washington to provide testimony.

Delahunt said his working relationship with Burton has been terrific. "He's treated me with respect, and we've gotten full cooperation," Delahunt said.

Mark Corallo, spokesman for the Government Reform Committee, said fairness and justice are Burton's main interests.

"Contrary to popular belief, the chairman has always believed you have to look at the issues objectively," Corallo said. Democrats "know he's still a conservative Republican, but there are instances where everybody can come together," he said.

Well, not everybody.

The Justice Department has refused to comply with a committee subpoena for FBI records in the case. President Bush has issued an order contending that executive privilege allows his administration to keep the documents secret.

That position has infuriated Burton, who contends officials at the highest levels of the FBI, including then-director J. Edgar Hoover, knew the men being convicted were not guilty.

"He knew it, and his name should not be emblazoned on the FBI's headquarters," Burton said on "60 Minutes" last month. "We ought to change the name of that building."

Such fiery rhetoric is typically aimed at Democrats.

"Burton's willingness to take on the Bush administration has been impressive," Frank said. "His willingness to go after the memory of J. Edgar Hoover is impressive."

In the past, Frank has been one of Burton's sharpest critics.

"I thought his Clinton stuff was wacky," he said. "I'm critical of his positions. I'm less critical now of his motives."

Frank said he's particularly struck by the timing of Burton's actions.

"We've been in this atmosphere where we're giving more power to law enforcement," Frank said. "We should give law enforcement more power. They're the good guys. They're protecting us. But Burton is showing what can happen when that power is abused."

Still, some Democrats squirm at the news that Burton is getting praise from members of their party. Frank said colleagues have told him, "Don't be so nice to the guy."

Frank said he and his Massachusetts colleagues are giving praise where praise is due.

"Yes, I dislike Dan Burton," Frank said. "If he went back to doing some of the Clinton stuff, I'd be critical. But what goal is served by not encouraging him to go after these FBI abuses? Why would I not want to encourage that?"

Delahunt said he has sensed no reluctance from Burton about confronting the administration.

"In my mind, Dan Burton has proven himself beyond any reasonable doubt that he's interested in the facts of this case," Delahunt said.

Corallo, the Government Reform Committee spokesman, said Burton, who spent last week at home in Indiana with his sick wife, feels vindicated by the praise of Democrats. The relationship between Burton and Democrats has gone a long way toward bridging a partisan gap that developed during the Clinton administration, Corallo said.

"When you can start smiling at each other in the halls again, that's nice," Corallo said.

GRAPHIC: PHOTO, AP PHOTO

LOAD-DATE: February 27, 2002

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Knight Ridder Washington Bureau, February 26, 2002, Tuesday
HEADLINE: Bush White House, Congress in a Tug-of-War over Balance of Power
BYLINE: By James Kuhnhenn

WASHINGTON -- The Bush White House provoked a major lawsuit and is angering even its political allies in a campaign to increase its control over federal spending and public information.

At stake are public access to White House deliberations, the fate of federal projects in communities across America, and the ever-shifting balance of power between Congress and the presidency.

Last week, the General Accounting Office, the investigative arm of Congress, sued Vice President Dick Cheney to learn who participated in meetings he chaired while formulating the administration's energy policy.

The suit was the latest move in a series of clashes that illustrate the administration's determination to reverse what it believes is a decades-long erosion of presidential authority.

Congress is fighting back on other fronts as well.

Some influential lawmakers, including senior Republicans, are bristling at efforts by the White House Office of Management and Budget to limit spending on projects in their home districts. And when the White House rejected a request by Rep. Dan Burton, R-Ind., for Justice Department documents on organized crime dating to 1967, Burton threatened to hold President Bush in contempt of Congress.

Power struggles between Congress and the White House date to the nation's founders. But the current quarrels are distinguished by the administration's unyielding stance and the bipartisan furor it has aroused.

They are especially noteworthy given a president who promised an administration characterized by openness and affability.

"It's hard to be an open populist when you're trying to protect presidential power," said Marshall Wittmann, a Republican strategist and fellow at the Hudson Institute, a conservative policy research center.

But for Cheney and Bush, fortifying the presidency is as much a policy goal as cutting taxes and building up the nation's defenses.

"One of the things that I feel an obligation on, and I know the president does, too ... is to pass on our offices in better shape than we found them," Cheney said recently on ABC's "This Week." "We are weaker today as an institution because of the unwise compromises that have been made over the last 30 or 35 years."

That view has brought the GAO lawsuit and the thundering contempt-of-Congress threat from Burton, the chairman of the House Government Reform Committee.

It has also led to a confrontation over what many lawmakers maintain is their fundamental right under the Constitution -- the power to decide how to spend taxpayers' money.

The White House and its budget office are out to limit Congress' practice of adding to spending legislation special projects for the folks back home.

Upon delivering the budget to Congress earlier this month, White House Budget Director Mitchell Daniels declared that such spending "has gotten out of hand." The administration took a swipe at Congress in the budget document, singling out an $ 80,000 grant to a Wisconsin county sheriff's department for the purchase of an Ice Angel Windsled, used for winter rescues on frozen Lake Superior.

It was no coincidence that the Republican Bush administration zeroed in on a project championed by the ranking Democrat on the Appropriations Committee, Wisconsin's David Obey. Obey was furious.

But Daniels had angered Republicans, too. To make up for a shortfall in a federal education program, he wanted to eliminate hundreds of health and education projects that members inserted into spending legislation last year.

Appropriations Committee Chairman Bill Young, R-Fla., fumed.

"All wisdom on the allocation of federal grant funding does not reside in the executive branch," he wrote Daniels on Feb. 6. "Unless the Constitution is amended, Congress will continue to exercise its discretion over federal funds and will earmark those funds for purposes we deem appropriate."

National moods, scandals and the personalities of the individuals occupying the White House have dictated the power swings from White House to Congress over the years. Congress was at its peak of power in the post-Watergate period.

"As time has passed, it has swung back to the executive," said Gary Bass, executive director of OMB Watch, a research group that advocates openness in government. "And this administration has put much greater stock in protecting executive turf."

In the end, the Bush White House may not win all these confrontations. But by drawing a line across Pennsylvania Avenue and daring Congress to cross it, Bush and Cheney have done more to assert presidential power than previous administrations.

But the White House faces significant political risks. The public may be more likely to believe that a president is hiding something rather than protecting a constitutional principle.

Among the energy industry executives who advised Cheney last year was Kenneth Lay, then Enron Corp. chairman, and a major fund-raiser for Bush's presidential campaign. By fighting the GAO, the White House gives fuel to critics who say that Cheney, a former energy company executive himself, was drafting a policy to benefit the administration's industry friends.

Others say that Enron and energy policy aside, a successful White House stand could dramatically alter how Congress performs its job as a check on the executive branch.

"This could have huge, huge policy implications," said Bass of OMB Watch. "I do believe that Cheney and the White House are pursuing a principled issue on the energy task force. ...This is beyond Enron and the work of the Cheney task force. This is an issue about executive power."

LOAD-DATE: February 26, 2002

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The Washington Post, February 26, 2002, Tuesday, Final Edition
SECTION: A SECTION; Pg. A19; WHITE HOUSE NOTEBOOK DANA MILBANK

HEADLINE: Pizza Crust, Principles and Politics
BYLINE: Dana Milbank

It was the modern political equivalent of Moses and the Burning Bush. On Inauguration Day 2001, Bush presidential aides entered the White House to discover the Miracle of the Warm Pizza Crust.

The famous crust was found, appropriately enough, in a pizza box that had been left on a desk when a Bush aide arrived for work on the new administration's first day. The discovery was included in a list of alleged vandalism of White House offices by departing Clinton aides, furnished by the Bush White House to the investigative arm of Congress, the General Accounting Office. But when presented with the warm-crust allegation, Clinton officials pointed out that no Clinton aides assigned to that office were even in the White House complex after Jan. 19 -- the day before inauguration.

This means that even if the Clinton aides left at midnight the night before and the Bush aides showed up at noon on Inauguration Day, the pizza crust stayed warm for 12 hours.

That the Bush administration would cooperate so freely in the GAO investigation of such matters as pizza temperature in the Clinton White House stands in stark contrast to the administration's stand against another GAO investigation, this one involving Vice President Cheney's energy task force. In protecting the identities and requests of outsiders who met with the task force, top White House officials have indicated they may challenge the constitutionality of the law empowering the GAO -- a move that, if successful, would pretty much put the 80-year-old office out of business.

In the GAO's Clinton vandalism probe, due to wrap up in April, the Bush administration has furnished the agency with a list of allegations.

"We are saddened that especially after the events of September 11, 2001, the White House continues to push this matter," two former Clinton aides in charge of White House administration, Mark Lindsay and Mike Malone, wrote to the GAO last month.

Lindsay and Malone pointed out some apparent flaws in the catalogue of Clinton vandalism, including the Warm Pizza Crust incident. The Bush team gave the GAO a photo of a dirty room in the White House complex, but the Clinton aides wrote that "the office featured in the photograph was vacated at least one week prior to Inauguration Day, and had been in fact completely cleaned by the morning of January 20th."

Then there was the case of Room 145 in the building next to the White House. The Bush administration said "historical artifacts" had been taken from the office. "We understand that at least one of the artifacts, an historic fireplace mirror, can be found hanging over the fireplace in [Bush] Chief of Staff [Andrew H.] Card's office," Lindsay and Malone wrote.

The GAO itself, in its suit filed last week against Cheney over the energy task force records, argues that the White House worked to "facilitate the investigation" into alleged Clinton vandalism. The suit points out that before President Bush came to office, "the executive branch has complied with countless GAO requests for information." The Clinton White House gave GAO the names of outside consultants who met with its health care task force and "thousands of documents" from a task force on trade relations with China.

Even the Nixon administration, no standard of transparency, relented during the Watergate years when the GAO wished to examine White House records. "To litigate the GAO's authority would bring only negative publicity and defeat," former Nixon counsel John Dean has said.

Apples and oranges, says the Bush White House. Previous GAO requests did not involve requests for information about meetings of the president or vice president, Bush aides say, while the current request is for meetings held by Cheney in his role as head of the task force. "This would be something we've never seen before," a senior Bush aide says.

But that principle is a bit murky. While the GAO had not previously asked the current White House for information regarding the contacts of the president or vice president, the Bush White House has been quick to relinquish to Congress such information from the Clinton White House.

Last September, Rep. Dan Burton (R-Ind.), chairman of the House Government Reform Committee, asked for e-mails from the Clinton White House to see whether campaign contributors had inappropriate influence over President Bill Clinton and Vice President Al Gore. The National Archives, noting that Bush "agreed to this release," turned over 2,000 pages of e-mails two months later, including those to Gore from his staff and between senior Gore staff.

Also last year, Bush raised no objection to handing over to Burton's committee 2,475 pages of Clinton documents related to the Marc Rich pardon -- including phone records, a list of visitors cleared to enter the White House and notes of Clinton conversations with a foreign leader.

Clinton did not object. But such flexibility was learned the hard way. Lanny Davis, who was Clinton's special counsel, says Bush is right to stiff the GAO, and Clinton was right to try to block earlier congressional "encroachments," too. Problem is, it never works.

"Been there, done that," Davis said. "We abandoned principle under the pressure of politics, and unfortunately, that's going to happen here."

LOAD-DATE: February 26, 2002

Goodling, Monica

From: Goodling, Monica
Sent: Friday, March 01, 2002 4:29 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'; Comstock, Barbara
Cc: Whelan, M Edward III; Thorsen, Carl; Bryant, Dan; Collins, Dan; Burton, Faith; Bybee, Jay; Martens, Matthew; Chertoff, Michael; Horowitz, Michael-CRM; Colborn, Paul P; 'David_W._Hobbs@who.eop.gov'
Subject: New Burton stories

Salon.com, March 2, 2002 Saturday
HEADLINE: A Democratic senator goes nuclear on the White House
BYLINE: By Jake Tapper

HIGHLIGHT:
Nevada's Harry Reid talks with Salon about why he joined the GAO lawsuit against Dick Cheney and why he called George W. Bush a liar.

BODY:

It's nuclear war. Or nuclear waste war, at any rate. It began on Feb. 15, when President Bush announced that he would formally recommend Yucca Mountain, 100 miles northwest of Las Vegas, as the site where the United States would bury its nuclear waste. And it has accelerated this week, as Sen. Harry Reid of Nevada, the No. 2 Democrat in the Senate, filed a "friend of the court" brief with the General Accounting Office's lawsuit against Vice President Dick Cheney. The GAO -- and Sen. Reid -- want to know more about the private meetings Cheney held with energy executives as the administration was developing its energy policy.

That information, Reid believes, will explain the Yucca Mountain decision. "President Bush has broken his promise," said an angry Reid shortly after the White House decision. "All Americans should be concerned, not just because he lied to me or the people of Nevada and indeed all Americans, but because the president's decision threatens American lives."

The next day, according to a knowledgeable source, White House chief of staff Andrew Card called Reid three times to discuss why the senator had called the president a liar. Reid did not return any of the calls. But Reid obviously stands by his words. During the presidential campaign, Bush assured Nevada's citizens that he would not ship nuclear waste to any proposed site "unless it's been deemed scientifically safe" -- a vow, says Reid, that he made to win Nevada, a state whose electoral votes he desperately needed (and ended up carrying by just 3.4 percent).

Nevada politicians have long fought attempts to turn their state into a dumping ground for the 77,000 tons of nuclear waste stockpiled throughout the country (as well as the 2,000 tons of new waste generated each year). Since Congress picked Nevada's Yucca Mountain as a nuclear waste site in 1987, more than $4 billion has been spent, by some estimates, on studying the suitability of the site. Energy Secretary Spencer Abraham told reporters, "It is my strong belief the science supports the safe use of this repository." But Reid cites the General Accounting Office, the Inspector General of the Department of Energy, the Inspector General of the Nuclear Regulatory

Commission, and the Nuclear Waste Technical Review Board as all having raised various concerns about the decision to proceed with the Yucca Mountain site.

The decision is anything but final; GOP Nevada Gov. Kenny Guinn has 60 days to object to the decision; he is expected to formally file his objections to the choice by April. Congress will then have approximately three months to override Guinn's objections, which promises to be a tough fight.

In the meantime, Reid is convinced that the task force list will explain what went wrong. "There is no question that Vice President Cheney met on several occasions with nuclear power executives," Reid said on Monday. He charged that after energy executives met with Cheney's task force, Bush "flip-flopped on the issue, and I think these meetings had something to do with it."

The White House vehemently denies Reid's assertions. "The president made the right decision for the country, after a thorough review by the EPA and the Department of Energy found the site to be scientifically safe," White House spokesman Scott McClellan told Salon. "As far as the issue of the lawsuit, we welcome the opportunity to fight for the important principle of the president being able to get open and candid advice to make sound public policy decisions."

On Thursday afternoon, Salon talked with Sen. Reid about the growing legal battle with the White House.

It's a fairly bold move, suing the administration. How did you make this decision?

I feel that President Bush was elected president of the United States because he carried Nevada. And he carried Nevada in an unusual way. He came to Nevada once during the entire campaign. He came to Lake Tahoe. And he refused to answer questions from reporters because of the nuclear waste issue. Al Gore was way out in front on the nuclear waste issue, and he was way out in front in state polls. So later in the campaign Bush sent Cheney to the state a couple times to say that they would be just like Clinton and Gore on the issue and the decision would be only based on sound science.

Since then there have been scientific reports about Yucca Mountain. GAO reported that there are 292 investigative reports about the site that have not been done. The Nuclear Waste Review Board has said that the science surrounding the decision to store waste at Yucca Mountain is poor. But Energy Secretary Abraham has said the opposite.

There is an absolute, determined conflict of interest at the Department of Energy because Spence Abraham gets legal advice from the law firm Winston and Strawn, which is also advising the Nuclear Energy Institute, which is the umbrella for the nuclear power industry.

Anyway, the reason I've taken this step is because I feel that the president misled the state of Nevada. He didn't tell the truth. I also believe that the meetings Vice President Cheney had with energy executives where he came up with the energy policy of this country could have been a determining factor in the recommendation President Bush gave about Yucca Mountain . We do know that Cheney met with a significant number of nuclear power generators. We want to find out who he met with, what happened in the meetings, what they discussed.

The Democrats in the Senate and the House have been criticized by some commentators for being timid in their criticisms of Bush and Cheney. You, on the other hand, are suing them.

Here's how I feel about that: I know a war is going on. I understand that; I appreciate that.

And I think the Democratic leadership has been coming together to try to solve our problems. But despite the war going on, this is not a dictatorship. The government is three separate but equal branches of government. I have just as much of a right to speak out as the president does. The fact that he's popular right now doesn't mean I won't speak out about things I disagree with him on.

What's been the reaction from your fellow Democrats to the lawsuit?

I have heard from my friends in just the last few days. They've told me that they're glad I did it. It's kind of "Follow me, I'm right behind ya."

Any reaction from Republican colleagues?

I haven't had any of those coming over and patting me on the back.

There are risks involved in suing the administration. You might be known as litigious. Might be dismissed that way. Have any political consultants expressed to you a fear of your becoming the **Dan Burton** of the Senate?

No, that doesn't bother me. I'm a lawyer; I've been to court lots and lots of times. It was my business 20 years ago. I try to be judicious when I criticize courts or when I attempt in some manner to use the courts.

Do you actually suspect that something fishy occurred during those energy task force meetings?

Of course I do, absolutely. I think this administration is so tight with the oil companies and the powerful utilities in our nation that we have an energy policy that's been dictated through Cheney that is now the word on the street that the administration is pushing. Sure it's fishy. Why are they refusing to give us this information? If it isn't fishy then it appears fishy just because they won't give us the stuff.

Now Bush supporters behind the scenes are arguing that Congress has exempted itself from many of the laws requiring the disclosure of deliberative advice, the Freedom of Information Act, and other sunshine laws that require politicians to disclose whom they get advice from. Is it fair to ask the White House to live up to a standard from which Congress exempted itself?

This is such an old-fashioned statement. It sounds like they've gone back and picked a page or two from Newt Gingrich's notebook. We're a separate but equal branch of government. The president has the right through his tremendous powers to do all kinds of things when it comes to rulemaking and meetings held. And we have the right to ask about it. For them to ask why don't we disclose is so amateurish it's hardly worth a retort. The White House considers itself to be fighting for a principle, that the president ought to be able to receive open and candid advice without interference from others. That they should be able to make public policy decisions free from politics.

There's no question that the president and the vice president receive tons of private information to help them develop policy. Either one-on-one people come to see them, or from their staff after people come to visit with their staff.

But here it's a different situation. The president of the United States set up an energy task force to come up with an energy plan for the nation. He assigned as the head of that Cheney. You remember the bucket of tears they cried when Hillary Clinton was coming up with the healthcare

policy and she was forced to turn over her records. You can't speak out of both sides of your mouth on this. What's good for the goose is good for the gander.

It's totally different from information they receive to come up with the policy for Afghanistan. It's different than the policy as to what he's doing with the Cabinet and those meetings -- those are private. We understand that. But this is different, this is a task force.

An argument I've heard you make is that the action of shipping nuclear waste across the country -- requiring maybe 100,000 trucks going through 42 states -- is dangerous. But others argue that tons of high-level, highly radioactive nuclear waste have been shipped cross-country without incident. Have there been incidents that alarm you?

There are a number of examples of environmental groups following these trucks, knowing where they are, and they easily could have done something mischievous or something very bad to these trucks. Frankly I can't think of any incidents with high-level nuclear waste but we recently had one with low-level nuclear waste in West Wendover on the Utah-Nevada border. A truck was leaking nuclear waste; it just happens. And that example is one we know about; there are a number we don't know about because they keep 'em quiet. There was a serious incident they found with nuclear waste being shipped from West Valley, N.Y. So the answer is yes, I know of incidents.

And go back a few short months ago. There was a tunnel in Baltimore that caught fire and burned for a week. Trains go through that; that was a train tunnel. This will be 77,000 spent fuel rods going through the country. With Sept. 11, with terrorists looking for targets of opportunity, this will be thousands of trucks and thousands of trains and thousands of targets of opportunity. We know you can pierce one of these canisters with a military weapon, one that an individual can fire.

But is keeping the waste where it is necessarily any safer? There are 131 nuclear power plants in 39 states. "More than 161 million people live within 75 miles of one or more of these sites," Abraham said, arguing that it would be better to secure the waste in one location than in 131 different locations.

This guy's a Harvard Law grad; he should go work on his script a little better. He uses this argument, that we've gotta have it in one site instead of 130. But we're always gonna have those 130 sites - they're still producing energy! They're not going to go away. This is simply foolish.

Another thing these people, these Harvard lawyers, say is, "Well then what should we do with it?" Leave it where it is. These are dry cast storage containers that are easy to secure, and cheap to secure for the next 100 years. I'm confident that then the great scientific minds of America can determine something over the next few decades as to what to do with the spent fuel rods.

The one question you haven't asked me is, am I afraid of White House retribution. Of course I am but you do what you have to sometimes.

One last one then. Your state went for Bush in 2000. You think that will happen in 2004?

Not a chance. And we've got one more electoral vote now. He doesn't care; he doesn't need Nevada anymore -- I guess that's the reasoning. But he would not be president without having carried Nevada.

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Howey Political Report (3/1) joined ABC News correspondent Jackie Judd for an interview of Rep. Dan Burton, Chairman of the House Government Reform Committee. Asked by Judd if he has requested that the Administration relent in its opposition to releasing Justice Department documents relating to possible FBI corruption in mafia informant cases, Burton said, "Oh, have I ever. I've had the Justice Department before my committee I think two or three times now. I contacted and talked with Mr. Gonzalez, chief counsel to the President. I've met with Attorney General Ashcroft and his chief lieutenants over at the Justice Department. I think all presidents don't like the thought of Congress looking over their shoulder." Asked about the Administration's secrecy, Burton said, "I think they're going too far. I have very high regard for President Bush. I think he's doing a good job with the war and getting the economy moving again. But he's getting some very bad advice on executive privilege and the use of his executive power." Asked if there was "irony" in the fact that he is "proving you're an equal opportunity bitch," Burton said, "No. I think I have a death wish. I don't think I want anybody to like me." Asked by HPR's Brian Howey about the White House's lawsuit with the General Accounting Office, Burton said, "It looks like they're trying to keep something from the public. I don't think they have anything to hide, but that doubt is there. The Democrats are not going to let up on that. The war may wind down and people are going to start looking at the economy, unless there's another terrorist attack. If the Democrats keep beating on that drum, it could be a major factor in the election. I want there to be openness. President Bush senior, his popularity was about 90 percent after the Gulf War. He lost. This is three years from the next election. The President's popularity is sky high, but that could change in 30 days. I think they're building up a lot of good will, but could go down if the American people start to distrust him. I don't want that to happen." Asked how much longer he planned to remain in Congress, Burton said, "I'm one of the senior members on International Relations. We have a new procedure now for picking a new chairman. They are elected by the caucus. Henry Hyde had told me he's going to run one more term and I would like to be considered for the chairmanship."

LOAD-DATE: March 1, 2002
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THE HARTFORD COURANT, February 28, 2002
SECTION: MAIN; Pg. A1
HEADLINE: CONGRESS HEARS A SORDID FBI TALE
BYLINE: EDMUND H. MAHONY; Courant Staff Writer

A former chief Connecticut prosecutor, in testimony that at times was taunting and at others dripped with sarcasm, told Congress Wednesday that groundbreaking organized crime investigations were sabotaged by renegade FBI agents.

Austin J. McGuigan, chief state's attorney from 1978 to 1985, described to stunned members of the House Committee on Government Reform how gangsters penetrated the state's fledgling parimutuel gambling industry in the 1970s and '80s, then murdered potential witnesses to throw investigators off the track.

McGuigan's most compelling testimony concerned his belief that corrupt FBI agents working

in Boston deliberately withheld evidence from state and local authorities around the country in an effort to destroy investigations associated with the jai alai industry -- and protect the killers, who were their informants.

"It is clear that major organized crime figures operating as informants were permitted to engage in racketeering activities with a wink from, if not the tacit approval of, federal agents," McGuigan said.

Over the past year, committee members have learned during hearings that one of those agents, H. Paul Rico, who retired from the FBI in 1975, was hired a year later as vice president and director of security for World Jai Alai of Miami, which operated jai alai frontons in south Florida and Hartford.

During an appearance before the committee last spring, an unrepentant Rico argued with members when confronted with evidence that he helped frame four innocent men for murder. During a second appearance earlier this month, he invoked the Fifth Amendment and declined to answer questions. On Wednesday, McGuigan reserved some of his sharpest sarcasm for Rico, who he said allowed mobsters to be employed by World Jai Alai, contrary to his apparent duties as security director.

"I was somewhat puzzled by that," McGuigan said, adding that "quite frankly, from our perspective, organized crime was being made to feel at home by World Jai Alai."

McGuigan and a few other veteran organized crime investigators have spoken privately for years about the bizarre set of circumstances surrounding mob penetration of Connecticut's jai alai industry. But listeners couldn't believe that the FBI, an institution then long judged to be above reproach, was behind it all.

McGuigan said that when three key witnesses in the jai alai cases were murdered in the 1980s, he would have laughed off any suggestion that one day he would be asked to address Congress on the subject.

"We thought the bad guys had won," he said. "To me, today, it is touching that I'm here and that so many people who worked so long to uncover the truth have passed away and have not seen justice done."

After nearly a year of hearings into improper behavior involving FBI agents and their informants, members of the committee gave McGuigan a warm reception.

"I consider these hearings some of the most important hearings that Congress can have," said Rep. Christopher Shays, R-4th District.

Previous efforts to examine the mob penetration of the jai alai industry have sputtered because of the difficulty of keeping track of the wide cast of characters.

As McGuigan, who in 1973 became the first Connecticut prosecutor with statewide jurisdiction over organized crime and corruption, testified about his experience, committee members listened raptly, sometimes goggle-eyed. Chairman **Dan Burton,** R-Ind., periodically interrupted to demand relevant documents from the Department of Justice.

In a related development, Burton announced late Wednesday that he had reached an agreement with the Bush administration that will allow his committee to review Justice Department documents related to its investigation of FBI misconduct in Boston.

In December, President Bush asserted executive privilege to block the committee from reviewing internal Justice Department documents, sparking a face-off over the constitutionality of congressional oversight. Bush argued that congressional review of deliberative documents could lead to political second-guessing of decisions in criminal matters.

Internal FBI memos and other federal documents the committee and others already have obtained back up McGuigan's central contention -- that mobsters from Boston's Winter Hill Gang tried to take over World Jai Alai in order to skim profits. At the center of the plot were the Winter Hill Gang's co-leaders, James "Whitey" Bulger and Stephen "The Rifleman" Flemmi.

Bulger and Flemmi were multiple murderers who also served, collectively for decades, as top informants for the FBI's Boston office. Rico was instrumental in recruiting Flemmi as an informant. Recently, a special Justice Department task force indicted Bulger and Flemmi for the three jai alai murders, including that of World Jai Alai owner Roger Wheeler Sr. of Tulsa, Okla.

A compelling body of evidence gathered by the committee and others suggests that some FBI agents in Boston obstructed investigations -- including those involving jai alai -- to protect Bulger and Flemmi from arrest. McGuigan said Bulger and Flemmi were part of a "war on organized crime that went amok."

"Violent crimes, including murders by so-called informants, were ignored at the whim of law enforcement agents who were, apparently, accountable to no one," McGuigan said. "In the name of intelligence-gathering, state and local prosecutions of violent criminals were undermined and investigations were betrayed."

When Connecticut investigators began following organized crime into World Jai Alai, agents in Boston withheld crucial information, McGuigan said. Moreover, he said, they tipped off targets of the investigation. Finally when potential witnesses began being killed, he said, federal authorities in Boston undercut Connecticut investigators.

At one point, McGuigan said, Rico, using information from police sources in Boston, tipped off an investigative target to information collected by the Connecticut State Police. The target was John B. Callahan, a reputed Winter Hill associate who became president of World Jai Alai and was later murdered in Florida. Callahan's body was dumped at the Miami airport on the day McGuigan and state police detectives arrived, hoping to persuade him to cooperate.

"They tanked our investigation," McGuigan said. "I realized we weren't playing for the same team."

Rep. William Delahunt, D-Mass., asked if McGuigan began to smell a rat: "Did the smell become more putrid at that point?"

"Yes," McGuigan said. "It was troubling."

McGuigan said charges probably never would have been filed in the jai alai murders if Flemmi had not been arrested in 1995 and used his informant status as a defense.

"These are murders that seemed unsolvable, and it seemed the coverup had succeeded," McGuigan said, "until ... Flemmi decided to claim that he had a free pass on the crime train, because of his status as an FBI informant."

GRAPHIC: PHOTO 1: COLOR, Associated Press; PHOTOS 2-5: (b&w) mugs; PHOTO 1:

AUSTIN J. MCGUIGAN / FORMER CONNECTICUT CHIEF STATE'S ATTORNEY, LEFT, TESTIFYING WEDNESDAY. PHOTO 2: BULGER; PHOTO 3: CALLAHAN; PHOTO 4: FLEMMI; PHOTO 5: WHEELER

LOAD-DATE: February 28, 2002
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United Press International, February 28, 2002, Thursday
HEADLINE: Justice relents on FBI files
BYLINE: By P. MITCHELL PROTHERO

The Justice Department has agreed to allow investigators from a House committee access to some documents related to FBI criminal investigations.

After President Bush claimed executive privilege in December, the House Government Reform Committee threatened to hold the administration in contempt of Congress.

Most of the documents relate to several FBI scandals concerning the use of informants in organized crime investigations in New England during the 1960s and 1970s.

"I want to thank the attorney general and the White House for working with us as we have been trying to uncover the corruption that existed in the Boston FBI for four decades and do our part to right a tragic wrong," said Committee Chairman **Dan Burton,** R-Ind.

The committee had subpoenaed as many as 15 documents and prosecution memos involving the use of testimony by Joe "The Animal" Barboza in several Mafia trials in the late 1960s and the use of two Boston mobsters as confidential informants, James "Whitey" Bulger and Steve "The Rifleman" Flemmi, from 1975 to 1995.

Bulger and Flemmi are suspected of having ordered or committed as many as 20 slayings during that period as the men allegedly consolidated control over the Boston organized crime community, despite working with the FBI.

Burton has demanded any documents that discuss the decision by the Justice Department not to prosecute the men until 1995 despite the widespread belief they were using their FBI relationship to help the criminal enterprise.

In a related case being looked at by investigators, it appears the FBI knowingly allowed four men to be convicted in 1967 of a murder, despite clear evidence the men were not involved.

In the Senate, Sens. Charles Grassley, R-Iowa; and Patrick Leahy, D-Vt., have introduced legislation to increase oversight of the FBI and to give the Justice Department inspector general the authority to investigate abuses within the bureau.

LOAD-DATE: March 1, 2002

Brett_M._Kavanaugh@who.eop.gov

From:	Brett_M._Kavanaugh@who.eop.gov
Sent:	Thursday, March 07, 2002 2:00 PM
To:	Whelan, M Edward III
Subject:	Exemption !(6)

What is the potential applicability of this FOIA exemption to documents that [redacted] (b) (5) [redacted].?

Koffsky, Daniel L

From:	Koffsky, Daniel L
Sent:	Friday, March 08, 2002 12:03 PM
To:	'Brett_M._Kavanaugh@who.eop.gov'
Cc:	Whelan, M Edward III
Subject:	RE: different subject

Brett: I'll fax you our 1995 guidelines on 18 U.S.C. 1913. (b) (5) [redacted] --Dan

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Friday, March 08, 2002 10:22 AM
To: Koffsky, Daniel L
Subject: different subject

can you confirm for me that (b) (5) [redacted].

Brett_M._Kavanaugh@who.eop.gov

From: Brett_M._Kavanaugh@who.eop.gov
Sent: Monday, March 11, 2002 11:41 AM
To: Whelan, M Edward III
Subject: RE: Burton
Attachments: pic16976.pcx

(b) (5) .

(Embedded
image moved "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov>
to file: 03/11/2002 09:57:42 AM
pic16976.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc:
Subject: RE: Burton

(b) (5) ? Please let us know what you'd like.

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Saturday, March 09, 2002 3:26 PM
To: Whelan, M Edward III
Cc: Timothy_E._Flanigan@who.eop.gov
Subject: Burton

Ed:
As we had discussed previously, we think it would be appropriate for OLC to prepare a

memorandum that [redacted] (b) (5)

[redacted]

This is obviously not urgent. Thanks.

Colborn, Paul P

From: Colborn, Paul P
Sent: Wednesday, March 13, 2002 12:33 PM
To: Comstock, Barbara
Cc: Thorsen, Carl; 'Brett_M._Kavanaugh@who.eop.gov'; Whelan, M Edward III
Subject: Press inquiry on Burton matter

Barbara, fyi, I have received a voice mail message from Vanessa Blum at Legal Times (b) (6)), asking me to talk to her, on or off the record, about the resolution of the Burton matter and the background of the dispute. She said she is working on a Thursday afternoon deadline. I do not plan to return the call, and if she calls again, I'll just refer the call to Public Affairs.

-- Paul

Colborn, Paul P

From:	Colborn, Paul P
Sent:	Wednesday, March 20, 2002 1:34 PM
To:	'Brett_M._Kavanaugh@who.eop.gov'
Cc:	Whelan, M Edward III
Subject:	RE: IMPORTANT re talking pts on having Gov. Ridge testify
Attachments:	ridgetestimony.paragraph.wpd

Brett, how's the attached look? Ed, I'm sending this now because I promised to get this to Brett before lunch, and I've just learned you've gone to lunch. Thus, you've not seen this latest draft. Please let us know when you get back if you would suggest any changes.

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Wednesday, March 20, 2002 11:59 AM
To: Colborn, Paul P
Subject: RE: IMPORTANT re talking pts on having Gov. Ridge testify

thanks; whenever you have something, just e-mail. I assume there is (i) [redacted (b) (5)] and (ii) [redacted (b) (5)].

(Embedded
image moved "Colborn, Paul P" <Paul.P.Colborn@usdoj.gov>
to file: 03/20/2002 11:22:40 AM
pic29103.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc:

Subject: RE: IMPORTANT re talking pts on having Gov. Ridge testify

Yes, I'll turn to that right now. Should have something for you by noon.

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Wednesday, March 20, 2002 11:11 AM
To: Colborn, Paul P
Subject: IMPORTANT re talking pts on having Gov. Ridge testify

Can you draft a paragraph that accomplishes the following:

(b) (5)

Koffsky, Daniel L

From: Koffsky, Daniel L
Sent: Monday, April 15, 2002 12:58 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Cc: Whelan, M Edward III
Subject: Question About Leave

Brett: You asked Ed abou [redacted] (b) (5) [redacted]

Some general principles: [redacted] (b) (5) [redacted]

[redacted]

I'm not sure whether you're considering the issue only for the White House or also more generally for executive branch agencies. [redacted] (b) (5) [redacted] Here a a few thoughts: [redacted]
(b) (5)
[redacted]

(b) (5)

--Dan

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Wednesday, April 24, 2002 4:07 PM
To: 'Kavanaugh, Brett'
Cc: Colborn, Paul P
Subject: T/c with Barbara Kahloe

FYI: Barbara Kahloe (sp?) of Ose's staff called me. (That's what I get for answering my own phone.) As you indicated, she asked whether legislation that revoked EO2 that in turn had revoked EO1 would resurrect EO1. I told her that I was not authorized to provide advice to Congress, and she was fine with that. She also opined that the experience with federalism EOs -- where, apparently, EO3, by revoking EO2, resurrected EO1 -- supported her view that EO1 would be resurrected. ((b) (5) .)

Barbara also said that Ose has a lot of problems with Horn's approach and thinks it would be cleaner to just revoke the Bush EO. She also thought the hearing disclosed a lot of problems with the Horn bill.

Colborn, Paul P

From:	Colborn, Paul P
Sent:	Wednesday, May 01, 2002 5:47 PM
To:	'Brett_M._Kavanaugh@who.eop.gov'; Whelan, M Edward III
Subject:	RE: Draft letter to Horn re PRA executive privilege bill

I'll take a crack at another paragraph or two tomorrow.

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Wednesday, May 01, 2002 3:17 PM
To: Whelan, M Edward III
Cc: Colborn, Paul P
Subject: RE: Draft letter to Horn re PRA executive privilege bill

my goal was to see what it would look like in a draft and then do a side by side to compare and then discuss? (b) (5)

(Embedded
image moved "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov>
to file: 05/01/2002 03:01:08 PM
pic08428.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc: "Colborn, Paul P" <Paul.P.Colborn@usdoj.gov> (Receipt Notification
Requested) (IPM Return Requested)
Subject: RE: Draft letter to Horn re PRA executive privilege bill

Brett: (b) (5)

[redacted]

Can we as an interim measure [redacted] ? -- Ed

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Wednesday, May 01, 2002 2:47 PM
To: Colborn, Paul P
Cc: Whelan, M Edward III
Subject: Re: Draft letter to Horn re PRA executive privilege bill

Two immediate comments: First, I like it. Second, can you prepare an alternative draft that [redacted] ?

(Embedded
image moved "Colborn, Paul P" <Paul.P.Colborn@usdoj.gov> to file: 05/01/2002 02:20:22
PM pic27534.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc: "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov> (Receipt Notification
Requested) (IPM Return Requested)
Subject: Draft letter to Horn re PRA executive privilege bill

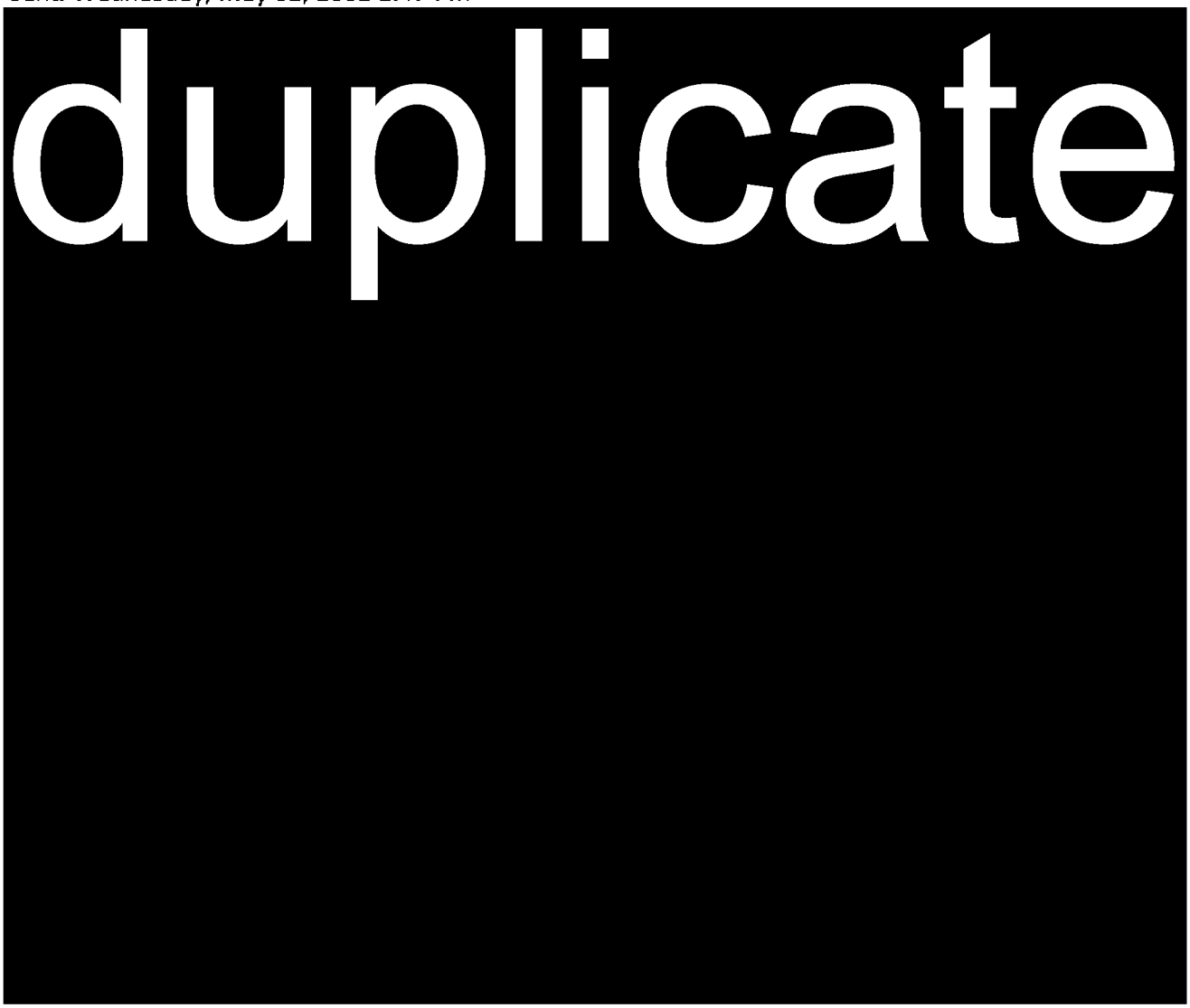
Brett: Here's a draft that Ed and I have prepared. Comments?
-- Paul
cc: Ed

Colborn, Paul P

From:	Colborn, Paul P
Sent:	Friday, May 03, 2002 10:42 AM
To:	'Brett_M._Kavanaugh@who.eop.gov'
Cc:	Whelan, M Edward III
Subject:	RE: Draft letter to Horn re PRA executive privilege bill
Attachments:	pra.hornbill.letter.alt.wpd

Brett, attached is the alternative draft you requested.

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Wednesday, May 01, 2002 2:47 PM



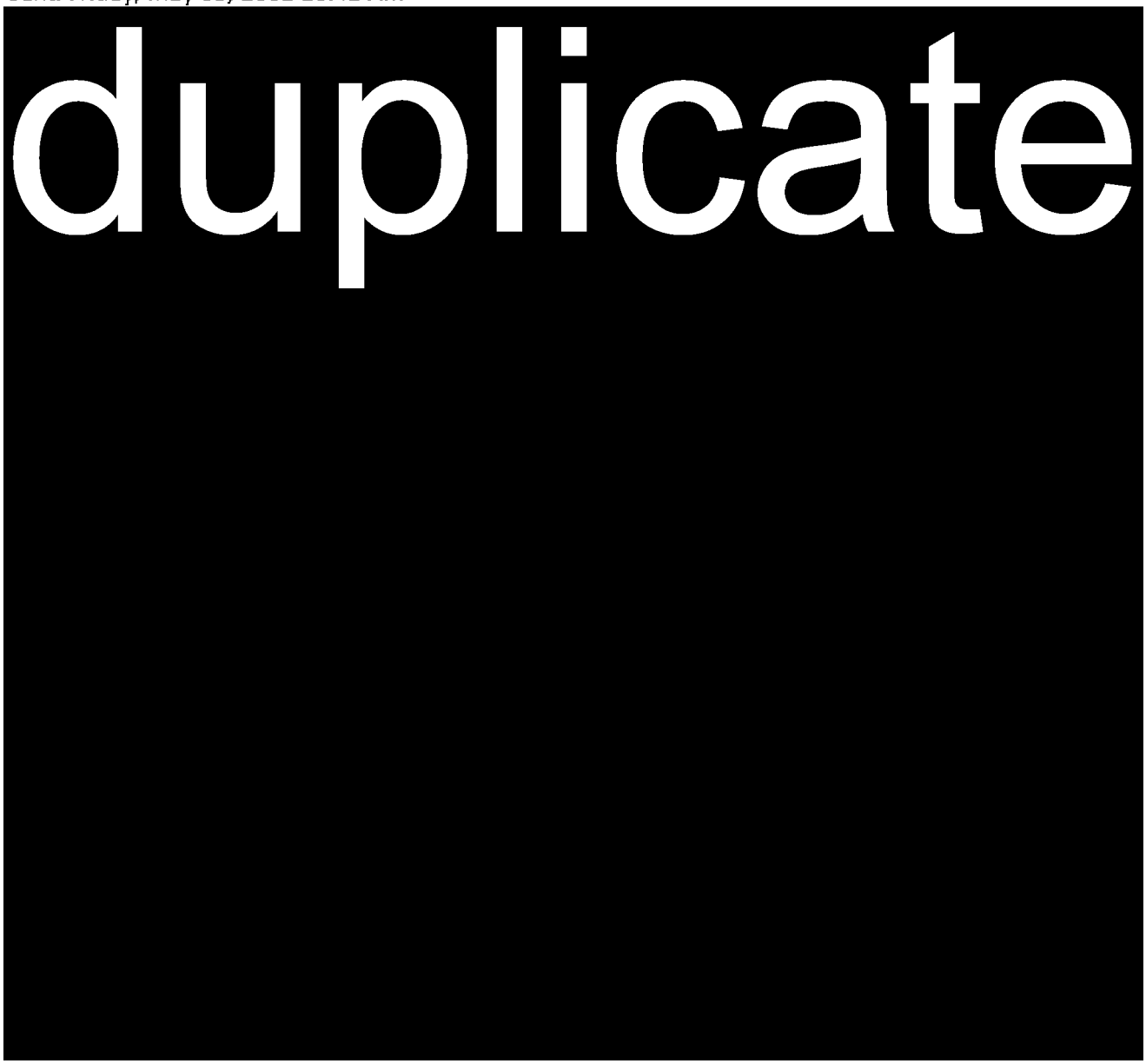
duplicate

Whelan, M Edward III

From:	Whelan, M Edward III
Sent:	Monday, May 06, 2002 10:05 AM
To:	'Brett_M._Kavanaugh@who.eop.gov'
Cc:	Colborn, Paul P
Subject:	RE: Draft letter to Horn re PRA executive privilege bill

Brett: Please let us know which version you prefer and any additional changes that should be made. In light of Thursday's markup and the need to run the letter through the OMB process, we probably ought to finalize our review as soon as possible. -- Ed

-----Original Message-----
From: Colborn, Paul P
Sent: Friday, May 03, 2002 10:42 AM



duplicate

O'Brien, Pat

From:	O'Brien, Pat
Sent:	Monday, May 13, 2002 11:23 AM
To:	Bybee, Jay; Yoo, John C; Dinh, Viet; Brett Kavanaugh (E-mail); Bradford A. Berenson (E-mail); Kyle Sampson (E-mail); Higbee, David; Ciongoli, Adam; Day, Lori Sharpe
Subject:	FW: Arab Lawyers

Ed Haden passed this observation along after speaking to a group of Arab Lawyers. It may be helpful to those involved in the judicial selection and public outreach process.

-----Original Message-----
From: Ed Haden [mailto:Ed_Haden@judiciary.senate.gov]
Sent: Monday, May 13, 2002 11:15 AM
To: O'Brien, Pat
Subject: Arab Lawyers

Pat:

Please forward this to the appropriate person. FYI

On Friday, May 10, 2002, I gave a talk to approximately 10 lawyers from the Arab countries of Jordan, Tunisia, Kuwait, Yemen, Lebanon, etc. The State Department set up a "Rule of Law" seminar series for these lawyers who were selected by our embassies over there as prominent citizens. In any event, these lawyers were interested in only one thing: the oath that federal judges take. "To whom to the judges take an oath? The President?" "Who administers the oath?" "Since the Senate can impeach a judge, are judges under the influence of the Senate?" "Where is the oath administered?"

I informed them that in America, judges take their oath to the Constitution, not to the President. There is no "King's Bench" in America. Indeed, several presidents have lost important cases in the federal courts. Oath's are usually administered by another judge at the court house at which the judge will preside.

Ed

Whelan, M Edward III

From:	Whelan, M Edward III
Sent:	Monday, May 13, 2002 2:24 PM
To:	'Brett_M._Kavanaugh@who.eop.gov'
Cc:	Colborn, Paul P
Subject:	RE: DRAFT letter to Shays

One big question and a few smaller comments:

[redacted] (b) (5) [redacted].

6th para.: (a) order" s/b "Order" in 2 places; (b) in last line, add "and incumbent" after "former"

8th para.: In last sentence change "current" to "incumbent" and "unilateral" to "unreviewable".

Next-to-last para.: change "Act" to "PRA"

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Monday, May 13, 2002 1:45 PM
To: Colborn, Paul P
Cc: Whelan, M Edward III
Subject: DRAFT letter to Shays

We met with Congressman Shays on Friday. He strongly indicated a desire to help, but wanted some assurance on time frames. See what you think of the attached, which borrows heavily from first half of draft DOJ views letter, but adds a few points.

(See attached file: letter to shays 5 13 02.doc)

(Embedded
image moved "Colborn, Paul P" <Paul.P.Colborn@usdoj.gov>
to file: 05/13/2002 11:09:49 AM
pic02820.pcx)

Record Type: Record

To: "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested), Brett M. Kavanaugh/WHO/EOP@EOP

cc:
Subject: RE: Horn bill/committee jurisdiction

Brett: Ed and I were just talking and wondering what's happening on clearance of our letter. I'm checking with OLA on this, but do you know anything? Also, any progress on whether the letter will include (b) (5) ?
As far as I know, markup is still this Thursday.

-----Original Message----
From: Whelan, M Edward III
Sent: Thursday, May 09, 2002 5:20 PM
To: 'Kavanaugh, Brett'
Cc: Colborn, Paul P
Subject: Horn bill/committee jurisdiction

In response to your questions:

1. (b) (5)

2. (b) (5)

3. (b) (5)

Whelan, M Edward III

From:	Whelan, M Edward III
Sent:	Friday, May 17, 2002 5:40 PM
To:	'Brett_M._Kavanaugh@who.eop.gov'
Subject:	RE: Hatch Act Coverage

We had hoped to have our thoughts to you this afternoon, but it looks like it won't be until Monday. I assume from our discussion that that's okay; if it's not, let me know.

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Wednesday, May 15, 2002 12:30 PM
To: Koffsky, Daniel L
Cc: Whelan, M Edward III
Subject: Re: Hatch Act Coverage

I continue to have further questions about (b) (5)

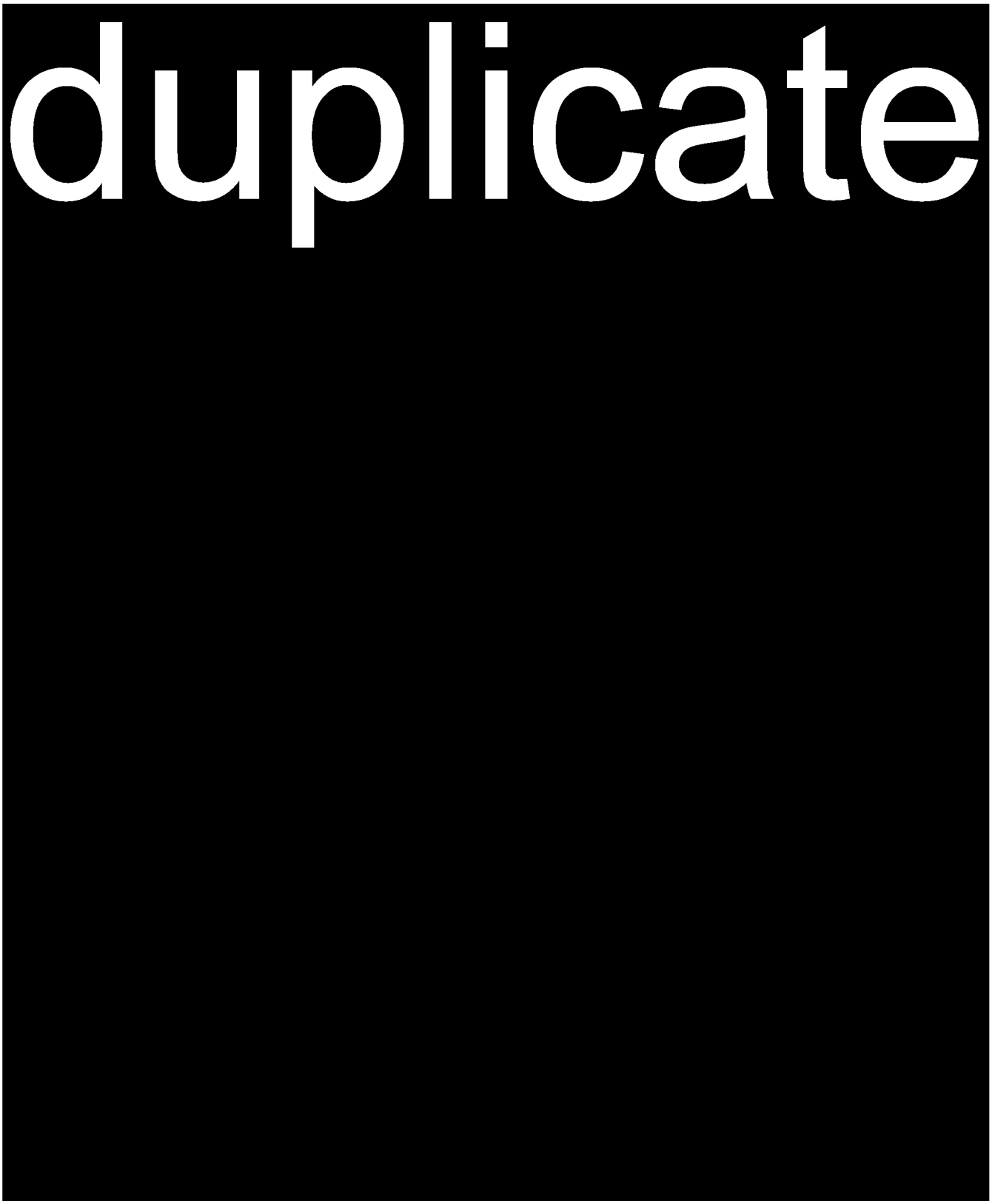
(Embedded
image moved "Koffsky, Daniel L" <Daniel.L.Koffsky@usdoj.gov>
to file: 02/20/2002 04:08:46 PM
pic30945.pcx)

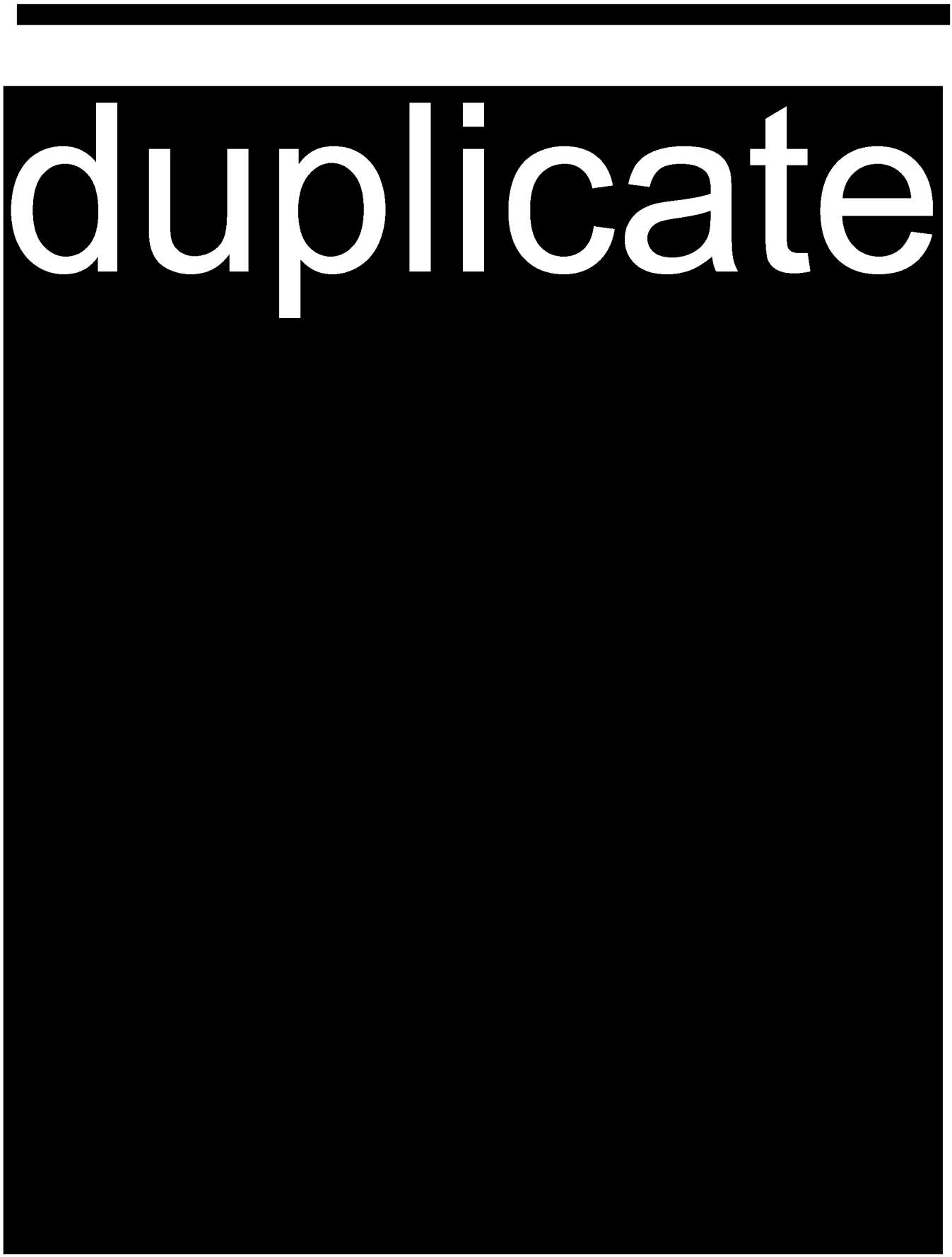
Record Type: Record

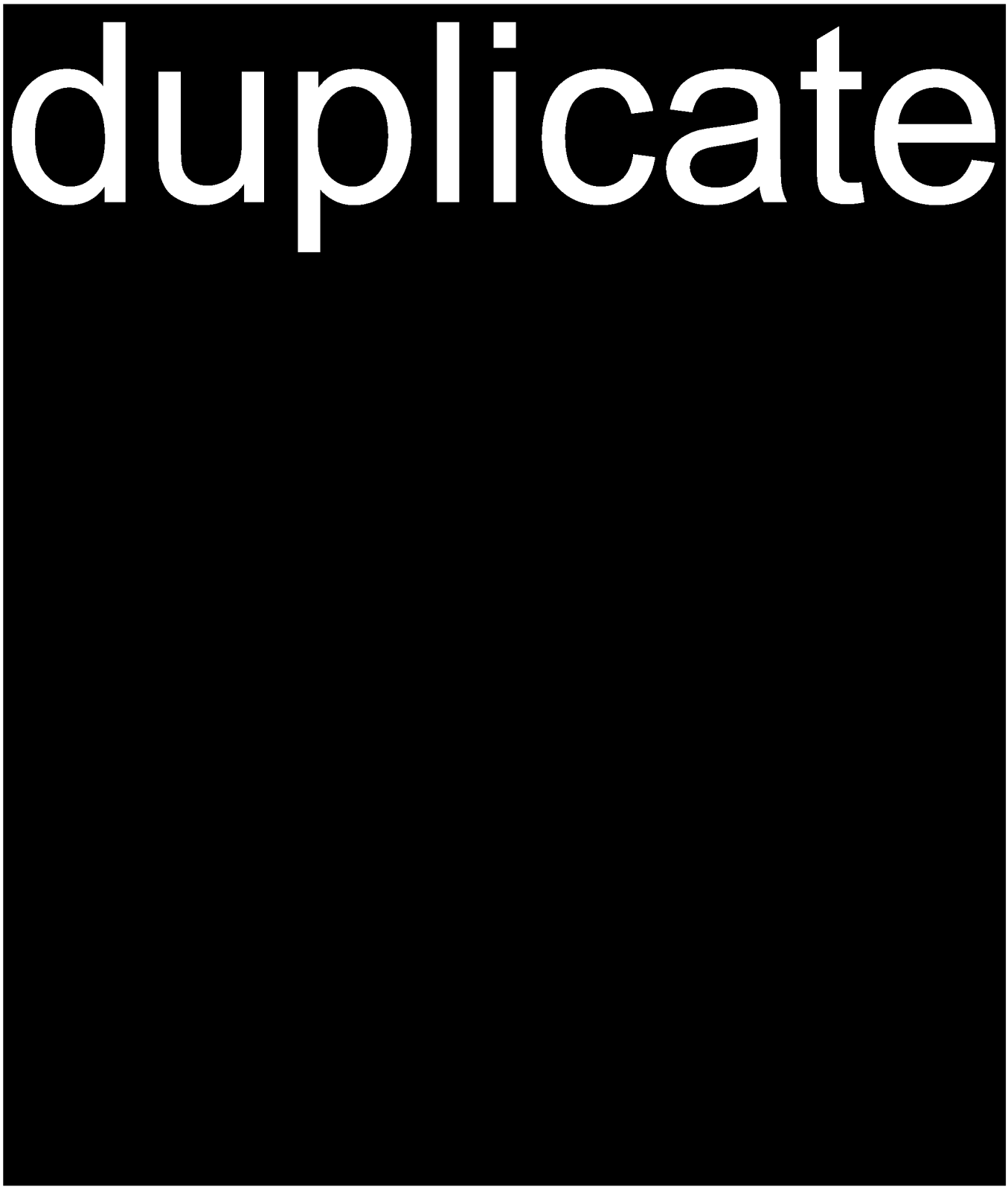
To: Brett M. Kavanaugh/WHO/EOP@EOP

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc: "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested)
Subject: Hatch Act Coverage







Brett_M._Kavanaugh@who.eop.gov

From:	Brett_M._Kavanaugh@who.eop.gov
Sent:	Monday, May 20, 2002 10:31 AM
To:	Whelan, M Edward III; Colborn, Paul P
Subject:	Amendments
Attachments:	att1.htm; H4187_005.PDF; H4187_006.PDF; H4187_007.PDF; H4187_008.PDF; pic28150.pcx

---------- Forwarded by Brett M. Kavanaugh/WHO/EOP on 05/20/2002 10:31 AM ----------

(Embedded
image moved "Dhillon, Uttam" <Uttam.Dhillon@mail.house.gov>
to file: 05/17/2002 03:55:47 PM
pic28150.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc:
Subject: Amendments

Brett,

Attached are four amendments. They have been vetted and formatted by the House Legislative Counsel so they are ready to go. All a Member needs to do to become the author of an amendment is to call Hank Savage in the Legislative Counsel's Office and give Hank the identifying number that appears at the top of the each amendment. Hank's number is (202) 225-6060.

Let us know if we can be of any further assistance.

Uttam Dhillon
Policy Director
House Policy Committee
2471 Rayburn Building
Washington, D.C. 20515

(202) 225-8605
<http://policy.house.gov/> http://policy.house.gov

Brett,

Attached are four amendments. They hav e been vetted and formatted by the House Legislative Counsel so they are ready to go. All a Member needs to do to become the author of an amendment is to call Hank Savage in the Legislative Counsel's Office and give Hank the identifying number that appears at the top of the each amendment. Hank's number is (202) 225-6060.

Let us know if we can be of any further assistance.

Uttam Dhillon
Policy Director
House Policy Committee
2471 Rayburn Building
Washington, D.C. 20515
(202) 225-8605
http://policy.house.gov

H.R. 4187

AMENDMENT OFFERED BY

TO THE AMENDMENT IN THE NATURE OF A SUBSTITUTE

Page 5, line 3, after the comma insert the following: "and, to the extent inconsistent with the amendments made by this Act, the regulations promulgated by the Archivist pursuant to section 2206 of title 44, United States Code,".

Explanation of amendment: The purpose of the amendment is to ensure that the existing regulations under the Presidential Records Act, like the existing Executive Order, have no legal force or effect to the extent they are inconsistent with the Presidential Act Amendments of 2002.

H.R. 4187

AMENDMENT OFFERED BY

TO THE AMENDMENT IN THE NATURE OF A SUBSTITUTE

Page 4, after line 20, insert the following:

(3) Section 2206 of title 44, United States Code, is amended by inserting after the first sentence the following: "The exclusion in section 553(a)(1) of such title for military or foreign affairs functions of the United States shall not be considered to prevent the Archivist from promulgating regulations under this chapter concerning the assertion of a constitutionally based privilege against disclosure that is based on or relates to a military or foreign affairs matter.".

H.R. 4187

AMENDMENT OFFERED BY

TO THE AMENDMENT IN THE NATURE OF A SUBSTITUTE

Page 5, before line 1, insert the following:

SEC. . PROTECTION OF PERSONAL INFORMATION.

(a) IN GENERAL.—Chapter 22 of title 44, United States Code, is further amended by adding at the end the following:

"§ 2209. Protection of personal information

"(a) Nothing in this chapter shall be considered to require the release to the public of any sensitive personal information concerning any individual who is not an officer or employee of the executive branch of the Government.

"(b) The Archivist shall, by not later than 10 days before releasing a record that the Archivist determines may contain information referred to in subsection (a), provide to any such individual whose sensitive personal information will be released the following information in writing:

"(1) The date the record is expected to be released.

"(2) The name of each person to which the record will be released.

"(3) The general nature of the sensitive personal information contained in the record.

"(c) Upon the request of such individual, or upon the determination of the Archivist, the Archivist may redact any sensitive personal information the Archivist considers necessary to protect the civil liberties of the individual whose personal information is redacted.

"(d) The Archivist shall promulgate under section 2206 regulations necessary to carry out this section.

"(e) As used in this section, the term 'sensitive personal information' means non-public, personally identifiable information regarding an individual that the individual could reasonably be expected to seek to keep private, including an indivdiual's—

"(A) home address;

"(B) personal phone number;

"(C) personal medical information;

"(D) personal electronic mail address;

"(E) social security number;

"(F) personal financial information; and

"(G) tax returns and information derived therefrom.".

(e) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 22 of title 44, United States Code, is further amended by adding at the end the following:

"Sec. 2209. Protection of personal information.".

H.R. 4187

AMENDMENT OFFERED BY

TO THE AMENDMENT IN THE NATURE OF A SUBSTITUTE

Page 3, after line 13, insert the following:

"(3) This section shall not be construed to require the disclosure of any information that, in the judgment of a former President or the incumbent President—

"(A) may compromise intelligence or counter-intelligence sources or methods; or

"(B) may jeopardize the life of a witness or informant, or of an officer, employee, or agent of the United States.

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Monday, May 20, 2002 6:09 PM
To: 'Kavanaugh, Brett'
Cc: Koffsky, Daniel L
Subject: Hatch Act

Brett:

Here's a quick sketch of our thinking on the issues you raised:

1. (b) (5) [redacted].

2. (b) (5) [redacted]

To be clear: (b) (5) [redacted]

Ed

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Monday, June 03, 2002 2:52 PM
To: Dinh, Viet; Bryant, Dan; Clement, Paul D; Willett, Don; Colborn, Paul P; 'Brett_M._Kavanaugh@who.eop.gov'; Goodling, Monica
Subject: RE: Estrada letter.

Looks fine to me. One very minor change that I'd propose is to change [redacted (b) (5)].

Also [redacted (b) (5)]

-----Original Message-----
From: Dinh, Viet
Sent: Monday, June 03, 2002 2:07 PM
To: Bryant, Dan; Clement, Paul D; Willett, Don; Whelan, M Edward III; Colborn, Paul P; 'Brett_M._Kavanaugh@who.eop.gov'; Goodling, Monica
Subject: Estrada letter.

As we discussed last Friday, enclosed please find a slightly revised letter from dan bryant to chairman leahy. We would like to get this out ASAP this afternoon. Please comment by 3:00 if possible.

<< File: Estrada response letter.wpd >>

Brett_M._Kavanaugh@who.eop.gov

From:	Brett_M._Kavanaugh@who.eop.gov
Sent:	Monday, June 10, 2002 3:17 PM
To:	Whelan, M Edward III
Cc:	Koffsky, Daniel L
Subject:	RE: Grants and Travel
Attachments:	pic30261.pcx

Thw question is for [redacted (b) (5)].

(Embedded
image moved "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov>
to file: 06/10/2002 02:53:57 PM
pic30261.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc: "Koffsky, Daniel L" <Daniel.L.Koffsky@usdoj.gov> (Receipt Notification
Requested) (IPM Return Requested)
Subject: RE: Grants and Travel

See (2) below for our admittedly noncommittal advice from three months ago. Dan is looking again at this.

-----Original Message-----
From: Koffsky, Daniel L
Sent: Friday, March 08, 2002 8:57 AM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Cc: Whelan, M Edward III
Subject: Grants and Travel

Brett: Ed passed on your questions about [redacted (b) (5)] We think we can answer the first question. On the

second, we want to give you some provisional thoughts, which may give you some ideas about how we can resolve the issue.

(1) (b) (5) [redacted]

(2) (b) (5) [redacted]

I'll fax you the memorandum on grant announcements and the two memoranda on travel costs. Then maybe you, Ed, and I can talk about next steps.

O'Brien, Pat

From: O'Brien, Pat
Sent: Tuesday, June 11, 2002 1:36 PM
To: Yoo, John C; Bryant, Dan; Bybee, Jay; Brett Kavanaugh (E-mail); Bradford A. Berenson (E-mail)
Cc: Bryant, Dan
Subject: briefing on the Padilla case

Senate Judiciary has requested a briefing on the decision to certify Padilla/ Abdullah al Mujahir as an "enemy combatant." [redacted] (b) (5) [redacted] . Could you begin to think through how we could accomodate such briefing requests re Padilla? Please emial me back with your thoughts. Thanks, Pat

Pat O'Brien
Deputy Assistant Attorney General
Office of Legislative Affairs
U.S. Dept. of Justice
phone (202) 616-6186
fax (202) 514-9149
Pat.O'Brien@usdoj.gov

Dinh, Viet

From: Dinh, Viet
Sent: Friday, September 06, 2002 9:09 AM
To: Bybee, Jay; Collins, Dan; Clement, Paul D; 'Kavanaugh, Brett'
Cc: Stephens, Jay B; Keisler, Peter D
Subject: VRA (Ugh) Possible Solution (Hurray)

I do not want to jinx it, but I think we may have a happy solution for all on the 180 days issue. Senators Kyl and Feinstein have to confer (yesterday was not a good day for across-the-isle outreach) on a way I proposed to accomodate the Department's view. If not, I have a revised draft letter that synthesizes both Jay Bybee's and Dan Collins' views. Thanks for your patience.

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Monday, September 30, 2002 6:02 PM
To: 'Kavanaugh, Brett'
Subject: FW: Judge-Determined Punitive Damages

FYI. Per message below, we have a clear answer to your first question: (b) (5) . I understood from your message that this was the question you were most interested in. On your secondary question - (b) (5) -- we don't have a clear answer yet, though we share your suspicion tha (b) (5) . We'll try to make more progress on this.

-----Original Message-----
From: Gannon, Curtis
Sent: Monday, September 30, 2002 5:23 PM
To: Whelan, M Edward III
Subject: Judge-Determined Punitive Damages

Ed,

(b) (5) , the Court said the following:

III

(b) (5)

(b) (5)

[redacted]

(b) (5)

[redacted]

[redacted] (bold emphases added).

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Wednesday, October 02, 2002 3:32 PM
To: 'Kavanaugh, Brett'
Subject: pending matters

Just wanted to doublecheck on two matters that are rather in limbo now. In particular, I want to make sure that we are on the same wavelength as to what we are (or, more precisely, are not) currently doing.

1. (b) (5) [redacted]

2. (b) (5) [redacted] We are awaiting further word from you on whether to do more on this.

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Thursday, October 03, 2002 1:39 PM
To: 'Kavanaugh, Brett'
Subject: FW: Mens rea short of intent

For what it's worth:

-----Original Message-----
From: Gannon, Curtis
Sent: Thursday, October 03, 2002 1:01 PM
To: Whelan, M Edward III
Subject: RE: Mens rea short of intent

I agree with all three of those things.

[redacted] (b) (5) [redacted].

-----Original Message-----
From: Whelan, M Edward III
Sent: Thursday, October 03, 2002 12:30 PM
To: Gannon, Curtis
Subject: RE: Mens rea short of intent

Please tell me whether I have this right:

1. [redacted] (b) (5) [redacted]

2. [redacted] (b) (5) [redacted].

3. [redacted] (b) (5) [redacted]

-----Original Message-----
From: Gannon, Curtis
Sent: Thursday, October 03, 2002 11:31 AM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Cc: Whelan, M Edward III
Subject: Mens rea short of intent

Brett,

Ed passed along to me your questio [redacted] (b) (5) [redacted]. After conducting a quick canvass of case law and secondary sources, and discussing this with Ed [redacted] (b) (5) [redacted]

[redacted]

(b) (5)

[redacted]

[redacted]

[redacted]

Please let me know if we may provide further assistance on this point.

Curtis Gannon
514-4089

Gannon, Curtis

From: Gannon, Curtis
Sent: Friday, October 04, 2002 12:03 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Cc: Whelan, M Edward III
Subject: [redacted] (b) (5)

Brett,

[redacted] (b) (5)

(b) (5)

Curtis E. Gannon
Attorney-Adviser
Office of Legal Counsel
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530
(202) 514-4089

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Friday, October 04, 2002 8:53 AM
To: Gannon, Curtis; Whelan, M Edward III
Subject: New rush question

Can you compose a list (need not be exhaustive) of (b) (5)
Thanks. Need whatever you can get by about noon.
This is for (b) (5).

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Tuesday, October 08, 2002 2:57 PM
To: 'Kavanaugh, Brett'
Subject: RE: punitive damages
Attachments: punitives.wpd

Please use attached version instead. (It contains very minor citechecking corrections.)

-----Original Message-----
From: Whelan, M Edward III
Sent: Tuesday, October 08, 2002 2:37 PM
To: 'Kavanaugh, Brett'
Subject: punitive damages

Attached is a one-pager of points to advocate. << File: punitives.wpd >> Let me know if this serves your purposes.

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Thursday, October 10, 2002 9:54 AM
To: 'Kavanaugh, Brett'
Subject: [redacted]

You asked about [redacted] Here are the basic principles:

1. [redacted]

2. [redacted]

3. [redacted]

I hope this answers your questions.

Whelan, M Edward III

From:	Whelan, M Edward III
Sent:	Friday, October 11, 2002 9:35 AM
To:	'Brett_M._Kavanaugh@who.eop.gov'
Cc:	Gannon, Curtis
Subject:	RE: terrorism insurance question

In response to your voicemail: (b) (5)

I'll focus more on H.R. 3210 and let you know if my views change, but I thought you'd want this tentative read.

-----Original Message-----
From: Whelan, M Edward III
Sent: Thursday, October 10, 2002 1:27 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Subject: RE: terrorism insurance question

(b) (5)

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Thursday, October 10, 2002 12:41 PM
To: Whelan, M Edward III
Subject: Re: terrorism insurance question

On the broader question, (b) (5) ? Also, we need a tentative answer a little more quickly.

(Embedded
image moved "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov>
to file: 10/10/2002 10:21:08 AM
pic14240.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc: "Gannon, Curtis" <Curtis.Gannon@usdoj.gov> (Receipt Notification
Requested) (IPM Return Requested)
Subject: terrorism insurance question

I don't mean to provide an overly hasty answer to your question, but as I understand that you may be in the process of negotiating further changes to the legislative language, you might be interested in the following observation:

[redacted] (b) (5)

Gannon, Curtis

From: Gannon, Curtis
Sent: Friday, October 11, 2002 9:52 AM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Cc: Whelan, M Edward III
Subject: [redacted] (b) (5) Laws

Brett,

Ed passed along to me your question abou [redacted] (b) (5)

As always, please let us know if we may provide further assistance

Curtis E. Gannon
Attorney-Adviser
Office of Legal Counsel
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530
(202) 514-4089

Brett_M._Kavanaugh@who.eop.gov

From:	Brett_M._Kavanaugh@who.eop.gov
Sent:	Sunday, October 13, 2002 3:26 PM
To:	Gannon, Curtis
Cc:	Whelan, M Edward III
Subject:	Re: (b) (5) Laws
Attachments:	ATTACHMENT.TXT; pic15055.pcx

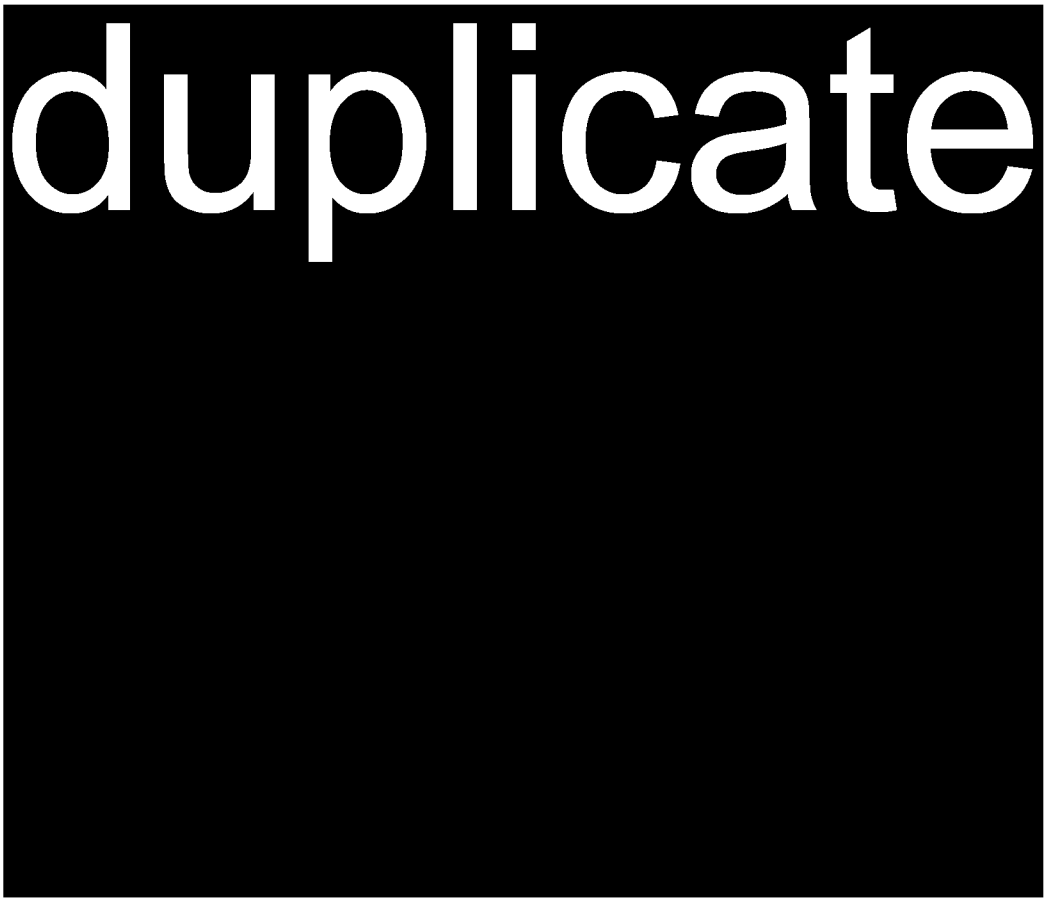
Thank you very much Curtis. All very helpful. As you can tell from Post story Sat on the negotiations, this issue is in play. Thanks.

(Embedded
image moved "Gannon, Curtis" <Curtis.Gannon@usdoj.gov>
to file: 10/11/2002 09:52:09 AM
pic15055.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

duplicate



Gannon, Curtis

From: Gannon, Curtis
Sent: Wednesday, October 16, 2002 9:25 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Cc: Whelan, M Edward III
Subject: R (b) (5) Laws

Brett,

In general, all of your examples are true. If you scroll down to your original email below, you will see my brief, interlineated annotations confirming the law in each state you listed.

(b) (5)

Curtis E. Gannon

Attorney-Adviser
Office of Legal Counsel
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530
(202) 514-4089

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Wednesday, October 16, 2002 12:24 PM
To: Gannon, Curtis
Subject: Another . . .

We need to confirm this for a Presidential announcement/decision. Anyway you could backstop this information?

(b) (5)

[redacted]

(b) (5)

Whelan, M Edward III

From: Whelan, M Edward III
Sent: Thursday, October 17, 2002 1:50 PM
To: 'Kavanaugh, Brett'

Here's a hasty first draft. I'm going to try to think of some case cites for window-dressing. I welcome your comments.

(b) (5)

[redacted]

RECORDS RELEASED 2018-09-14

William_K._Kelley@who.eop.gov

From:	William_K._Kelley@who.eop.gov
Sent:	Thursday, December 22, 2005 5:49 PM
To:	Bradbury, Steve; Brett_M._Kavanaugh@who.eop.gov
Attachments:	tmp.htm; NSA (b) (5) .final.doc

Attached is the final of the (b) (5) talker for DOJ to finalize and distribute. Steve, can you send back a pdf? Thanks.

duplicate

Bradbury, Steve

From:	Bradbury, Steve
Sent:	Thursday, December 22, 2005 6:41 PM
To:	'William_K._Kelley@who.eop.gov'
Cc:	'Brett_M._Kavanaugh@who.eop.gov'
Subject:	PDF of (b) (5) talkers
Attachments:	NSA (b) (5) final.pdf

Bill: As you requested, PDF of the final (b) (5) talkers. Steve

Harriet_Miers@who.eop.gov

From:	Harriet_Miers@who.eop.gov
Sent:	Saturday, December 24, 2005 9:15 AM
To:	Bradbury, Steve; Brett_M._Kavanaugh@who.eop.gov; William_K._Kelley@who.eop.gov
Subject:	Re: New article

Have seen it.

-----Original Message-----
From: Steve.Bradbury@usdoj.gov <Steve.Bradbury@usdoj.gov>
To: Miers, Harriet <Harriet_Miers@who.eop.gov>; Kavanaugh, Brett M. <Brett_M._Kavanaugh@who.eop.gov>; Kelley, William K. <William_K._Kelley@who.eop.gov>
Sent: Sat Dec 24 08:33:42 2005
Subject: New article

There's a new article by Risen and Lichtblau in today's NYT.

William_K._Kelley@who.eop.gov

From: William_K._Kelley@who.eop.gov
Sent: Friday, January 06, 2006 6:15 PM
To: Bradbury, Steve; Elwood, John; Harriet_Miers@who.eop.gov; David_S._Addington@ovp.eop.gov; Brett_M._Kavanaugh@who.eop.gov
Subject: RE: (b) (5) Talkers.doc

I agree with Harriet that (b) (5) . In addition:

Paragraph 1: (b) (5) ."

Paragraph 6: (b) (5) . Finally, the last sentence is a run-on, which should be separated into two sentences.

-----Original Message-----
From: Miers, Harriet
Sent: Friday, January 06, 2006 5:48 PM
To: 'Steve.Bradbury@usdoj.gov'; Kelley, William K.; Addington, David S.; Kavanaugh, Brett M.
Subject: RE: (b) (5) Talkers.doc

Should there be (b) (5) ?

-----Original Message-----
From: Steve.Bradbury@usdoj.gov [mailto:Steve.Bradbury@usdoj.gov]
Sent: Friday, January 06, 2006 5:18 PM
To: Kelley, William K.; Addington, David S.; Kavanaugh, Brett M.; Kyle.Sampson@usdoj.gov; Courtney.Elwood@usdoj.gov; Mitnick, John M.; Miers, Harriet
Cc: John.Elwood@usdoj.gov; William.Moschella@usdoj.gov; Brian.Roehrkasse@usdoj.gov
Subject: (b) (5) Talkers.doc

As promised, here are some talkers responding to (b) (5) . I am also copying DOJ's Offices of Leg Affairs and Public Affairs. They will coordinate with you and WH Communications before sharing outside. I'm running now to a meeting at the Sit Room. Thx.

Bradbury, Steve

From:	Bradbury, Steve
Sent:	Saturday, January 07, 2006 8:45 AM
To:	'Harriet_Miers@who.eop.gov'; 'Katie_Levinson@who.eop.gov'; 'Dana_M._Perino @who.eop.gov'; 'Brett_M._Kavanaugh@who.eop.gov'; 'John_M._Mitnick@who.eo p.gov'
Subject:	Re: (b) (5) Talkers.doc

Pls note that (b) (5) .

-----Original Message-----
From: Bradbury, Steve <Steve.Bradbury@SMOJMD.USDOJ.gov>
To: 'Harriet_Miers@who.eop.gov' <Harriet_Miers@who.eop.gov>; 'Katie_Levinson@who.eop.gov' <Katie_Levinson@who.eop.gov>; 'Dana_M._Perino@who.eop.gov' <Dana_M._Perino@who.eop. gov>; 'Brett_M._Kavanaugh@who.eop.gov' <Brett_M._Kavanaugh@who.eop.g ov>; 'John_M._Mitnick@who.eop.gov' <John_M._Mitnick@who.eop.gov>
Sent: Sat Jan 07 08:38:30 2006
Subject: Re: (b) (5) Talkers.doc

(b) (5) .

-----Original Message-----
From: Harriet_Miers@who.eop.gov <Harriet_Miers@who.eop.gov>
To: Bradbury, Steve <Steve.Bradbury@SMOJMD.USDOJ.gov>; Katie_Levinson@who.eop.gov <Katie_Levinson@who.eop.gov>; Dana_M._Perino@who.eop.gov <Dana_M._Perino@who.eop.gov>; Brett_M._Kavanaugh@who.eop.gov <Brett_M._Kavanaugh@who.eop.gov>; John_M._Mitnick@who.eop.gov <John_M._Mitnick@who.eop.gov>
Sent: Sat Jan 07 08:34:13 2006
Subject: RE: (b) (5) Talkers.doc

(b) (5) .

-----Original Message-----
From: Levinson, Katie
Sent: Saturday, January 07, 2006 8:29 AM
To: Perino, Dana M.; Miers, Harriet; Kavanaugh, Brett M.; 'Steve.Bradbury@usdoj.gov'; Mitnick, John M.
Subject: Re: (b) (5) Talkers.doc

(b) (5)

-----Original Message-----
From: Perino, Dana M. <Dana_M._Perino@who.eop.gov>
To: Miers, Harriet <Harriet_Miers@who.eop.gov>; Kavanaugh, Brett M. <Brett_M._Kavanaugh@who.eop.gov>; 'Steve.Bradbury@usdoj.gov' <Steve.Bradbury@usdoj.gov>; Mitnick, John M. <John_M._Mitnick@who.eop.gov>
CC: Levinson, Katie <Katie_Levinson@who.eop.gov>
Sent: Sat Jan 07 07:53:42 2006
Subject: Re: (b) (5) Talkers.doc

(b) (5)

-----Original Message-----
From: Miers, Harriet <Harriet_Miers@who.eop.gov>
To: Kavanaugh, Brett M. <Brett_M._Kavanaugh@who.eop.gov>; 'Steve.Bradbury@usdoj.gov' <Steve.Bradbury@usdoj.gov>; Mitnick, John M. <John_M._Mitnick@who.eop.gov>
CC: Perino, Dana M. <Dana_M._Perino@who.eop.gov>
Sent: Sat Jan 07 07:47:11 2006
Subject: RE: (b) (5) Talkers.doc

That was my understanding. (b) (5) .

-----Original Message-----
From: Kavanaugh, Brett M.
Sent: Saturday, January 07, 2006 7:40 AM
To: 'Steve.Bradbury@usdoj.gov'; Mitnick, John M.; Miers, Harriet
Subject: RE: (b) (5) Talkers.doc

Am I right in assuming (b) (5) ?

-----Original Message-----
From: Steve.Bradbury@usdoj.gov [mailto:Steve.Bradbury@usdoj.gov]
Sent: Friday, January 06, 2006 8:44 PM
To: Mitnick, John M.; Miers, Harriet; Kavanaugh, Brett M.
Subject: (b) (5) Talkers.doc

Attached are revised talkers that incorporate WHC comments. John Elwood earlier sent a copy of these revised talkers to Bill Kelley. Thx.

<<(b) (5) Talking Points.doc>>

Bradbury, Steve

From:	Bradbury, Steve
Sent:	Saturday, January 07, 2006 9:13 AM
To:	'Katie_Levinson@who.eop.gov'; 'Dana_M._Perino@who.eop.gov'; 'Harriet_Miers @who.eop.gov'; 'Brett_M._Kavanaugh@who.eop.gov'; 'John_M._Mitnick@who.eo p.gov'
Cc:	'Debbie_S._Fiddelke@who.eop.gov'; Moschella, William; Scolinos, Tasia; Roehrkasse, Brian
Subject:	Re: (b) (5) Talkers.doc

Copying Will Moschella, Tasia Scolinos, and Tasia's Deputy Brian Roehrkasse on this message for contact purposes. They can also be reached at any time through the Justice Command Center at 514-5000. Thx

-----Original Message-----
From: Katie_Levinson@who.eop.gov <Katie_Levinson@who.eop.gov>
To: Bradbury, Steve <Steve.Bradbury@SMOJMD.USDOJ.gov>; Dana_M._Perino@who.eop.gov <Dana_M._Perino@who.eop.gov>; Harriet_Miers@who.eop.gov <Harriet_Miers@who.eop.gov>; Brett_M._Kavanaugh@who.eop.gov <Brett_M._Kavanaugh@who.eop.gov>; John_M._Mitnick@who.eop.gov <John_M._Mitnick@who.eop.gov>
CC: Debbie_S._Fiddelke@who.eop.gov <Debbie_S._Fiddelke@who.eop.gov>
Sent: Sat Jan 07 09:01:19 2006
Subject: Re: (b) (5) Talkers.doc

Deb - can your shop handle? I only have member cell phones with me on bberry (b) (5) .

-----Original Message-----
From: Perino, Dana M. <Dana_M._Perino@who.eop.gov>
To: Miers, Harriet <Harriet_Miers@who.eop.gov>; Levinson, Katie <Katie_Levinson@who.eop.gov>; Kavanaugh, Brett M. <Brett_M._Kavanaugh@who.eop.gov>; 'Steve.Bradbury@usdoj.gov' <Steve.Bradbury@usdoj.gov>; Mitnick, John M. <John_M._Mitnick@who.eop.gov>
Sent: Sat Jan 07 08:59:14 2006
Subject: Re: (b) (5) Talkers.doc

I can help coordinate with doj - katie, do you hapen to have contact info for their staff?

-----Original Message-----
From: Miers, Harriet <Harriet_Miers@who.eop.gov>
To: Levinson, Katie <Katie_Levinson@who.eop.gov>; Perino, Dana M. <Dana_M._Perino@who.eop.gov>; Kavanaugh, Brett M. <Brett_M._Kavanaugh@who.eop.gov>; 'Steve.Bradbury@usdoj.gov' <Steve.Bradbury@usdoj.gov>; Mitnick, John M. <John_M._Mitnick@who.eop.gov>
Sent: Sat Jan 07 08:34:13 2006

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duplicate

Katie_Levinson@who.eop.gov

From:	Katie_Levinson@who.eop.gov
Sent:	Saturday, January 07, 2006 10:38 AM
To:	Bradbury, Steve; Debbie_S._Fiddelke@who.eop.gov; John_M._Mitnick@who.eop.gov; Brett_M._Kavanaugh@who.eop.gov; Harriet_Miers@who.eop.gov; Dana_M._Perino@who.eop.gov
Cc:	Moschella, William; Scolinos, Tasia; Roehrkasse, Brian; Jamie_E._Brown@who.eop.gov
Subject:	Re: (b) (5) Talkers.doc

Can you call me? 494-4745

-----Original Message-----
From: Fiddelke, Debbie S. <Debbie_S._Fiddelke@who.eop.gov>
To: 'Steve.Bradbury@usdoj.gov' <Steve.Bradbury@usdoj.gov>; Mitnick, John M. <John_M._Mitnick@who.eop.gov>; Kavanaugh, Brett M. <Brett_M._Kavanaugh@who.eop.gov>; Miers, Harriet <Harriet_Miers@who.eop.gov>; Perino, Dana M. <Dana_M._Perino@who.eop.gov>; Levinson, Katie <Katie_Levinson@who.eop.gov>
CC: 'William.Moschella@usdoj.gov' <William.Moschella@usdoj.gov>; 'Tasia.Scolinos@usdoj.gov' <Tasia.Scolinos@usdoj.gov>; 'Brian.Roehrkasse@usdoj.gov' <Brian.Roehrkasse@usdoj.gov>; Brown, Jamie E. <Jamie_E._Brown@who.eop.gov>
Sent: Sat Jan 07 10:36:54 2006
Subject: Re: (b) (5) Talkers.doc

(b) (5)
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-----Original Message-----
From: Steve.Bradbury@usdoj.gov <Steve.Bradbury@usdoj.gov>
To: Mitnick, John M. <John_M._Mitnick@who.eop.gov>; Kavanaugh, Brett M. <Brett_M._Kavanaugh@who.eop.gov>; Miers, Harriet <Harriet_Miers@who.eop.gov>; Perino, Dana M. <Dana_M._Perino@who.eop.gov>; Levinson, Katie <Katie_Levinson@who.eop.gov>
CC: William.Moschella@usdoj.gov <William.Moschella@usdoj.gov>; Tasia.Scolinos@usdoj.gov <Tasia.Scolinos@usdoj.gov>; Brian.Roehrkasse@usdoj.gov <Brian.Roehrkasse@usdoj.gov>; Fiddelke, Debbie S. <Debbie_S._Fiddelke@who.eop.gov>
Sent: Sat Jan 07 09:12:17 2006

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Bradbury, Steve

From:	Bradbury, Steve
Sent:	Saturday, January 07, 2006 10:38 AM
To:	'Harriet_Miers@who.eop.gov'; 'Brett_M._Kavanaugh@who.eop.gov'; 'John_M._Mitnick@who.eop.gov'; Elwood, John; Moschella, William; Scolinos, Tasia; Roehrkasse, Brian
Cc:	'Katie_Levinson@who.eop.gov'; 'Dana_M._Perino@who.eop.gov'; 'Debbie_S._Fiddelke@who.eop.gov'; Eisenberg, John
Subject:	Fw: (b)(5) talkers
Attachments:	tmp.htm; (b)(5) Talking Points.doc

Here are the same talkers with two typos corrected.

-----Original Message-----
From: (b)(6) Steve Bradbury (personal) <(b)(6) Steve Bradbury (personal)>
To: Bradbury, Steve <Steve.Bradbury@SMOJMD.USDOJ.gov>
Sent: Sat Jan 07 10:25:13 2006
Subject: (b)(5) talkers

Debbie_S._Fiddelke@who.eop.gov

From:	Debbie_S._Fiddelke@who.eop.gov
Sent:	Saturday, January 07, 2006 10:41 AM
To:	Bradbury, Steve; Katie_Levinson@who.eop.gov; Harriet_Miers@who.eop.gov; Dana_M._Perino@who.eop.gov; Brett_M._Kavanaugh@who.eop.gov; John_M._Mitnick@who.eop.gov
Cc:	Michael_Allen@nsc.eop.gov
Subject:	Re: (b) (5) Talkers.doc

Yes, sorry thought this was Alito related. Michael and I will handle.

-----Original Message-----
From: Levinson, Katie <Katie_Levinson@who.eop.gov>
To: Miers, Harriet <Harriet_Miers@who.eop.gov>; Perino, Dana M. <Dana_M._Perino@who.eop.gov>; Kavanaugh, Brett M. <Brett_M._Kavanaugh@who.eop.gov>; 'Steve.Bradbury@usdoj.gov' <Steve.Bradbury@usdoj.gov>; Mitnick, John M. <John_M._Mitnick@who.eop.gov>
CC: Allen, Michael <Michael_Allen@nsc.eop.gov>; Fiddelke, Debbie S. <Debbie_S._Fiddelke@who.eop.gov>
Sent: Sat Jan 07 10:36:15 2006
Subject: Re: (b) (5) Talkers.doc

Was just on another email chain with Dan. Can WH leg affairs take lead in getting talkers to staff? Copying Michael Allen and Deb.

-----Original Message-----
From: Miers, Harriet <Harriet_Miers@who.eop.gov>
To: Perino, Dana M. <Dana_M._Perino@who.eop.gov>; Levinson, Katie <Katie_Levinson@who.eop.gov>; Kavanaugh, Brett M. <Brett_M._Kavanaugh@who.eop.gov>; 'Steve.Bradbury@usdoj.gov' <Steve.Bradbury@usdoj.gov>; Mitnick, John M. <John_M._Mitnick@who.eop.gov>
Sent: Sat Jan 07 09:22:22 2006
Subject: RE: (b) (5) Talkers.doc

Dan was thinking (b) (5).

-----Original Message-----
From: Perino, Dana M.
Sent: Saturday, January 07, 2006 8:59 AM

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Harriet_Miers@who.eop.gov

From:	Harriet_Miers@who.eop.gov
Sent:	Saturday, January 07, 2006 12:40 PM
To:	Bradbury, Steve; Katie_Levinson@who.eop.gov; Michael_Allen@nsc.eop.gov; Dana_M._Perino@who.eop.gov; Brett_M._Kavanaugh@who.eop.gov; John_M._Mitnick@who.eop.gov
Cc:	Debbie_S._Fiddelke@who.eop.gov; Matthew_Kirk@who.eop.gov
Subject:	RE: (b) (5) Talkers.doc

Yes, I am in favor (b) (5) .

-----Original Message-----
From: Levinson, Katie
Sent: Saturday, January 07, 2006 12:39 PM
To: Allen, Michael; Miers, Harriet; Perino, Dana M.; Kavanaugh, Brett M.; 'Steve.Bradbury@usdoj.gov'; Mitnick, John M.
Cc: Fiddelke, Debbie S.; Kirk, Matthew
Subject: Re: (b) (5) Talkers.doc

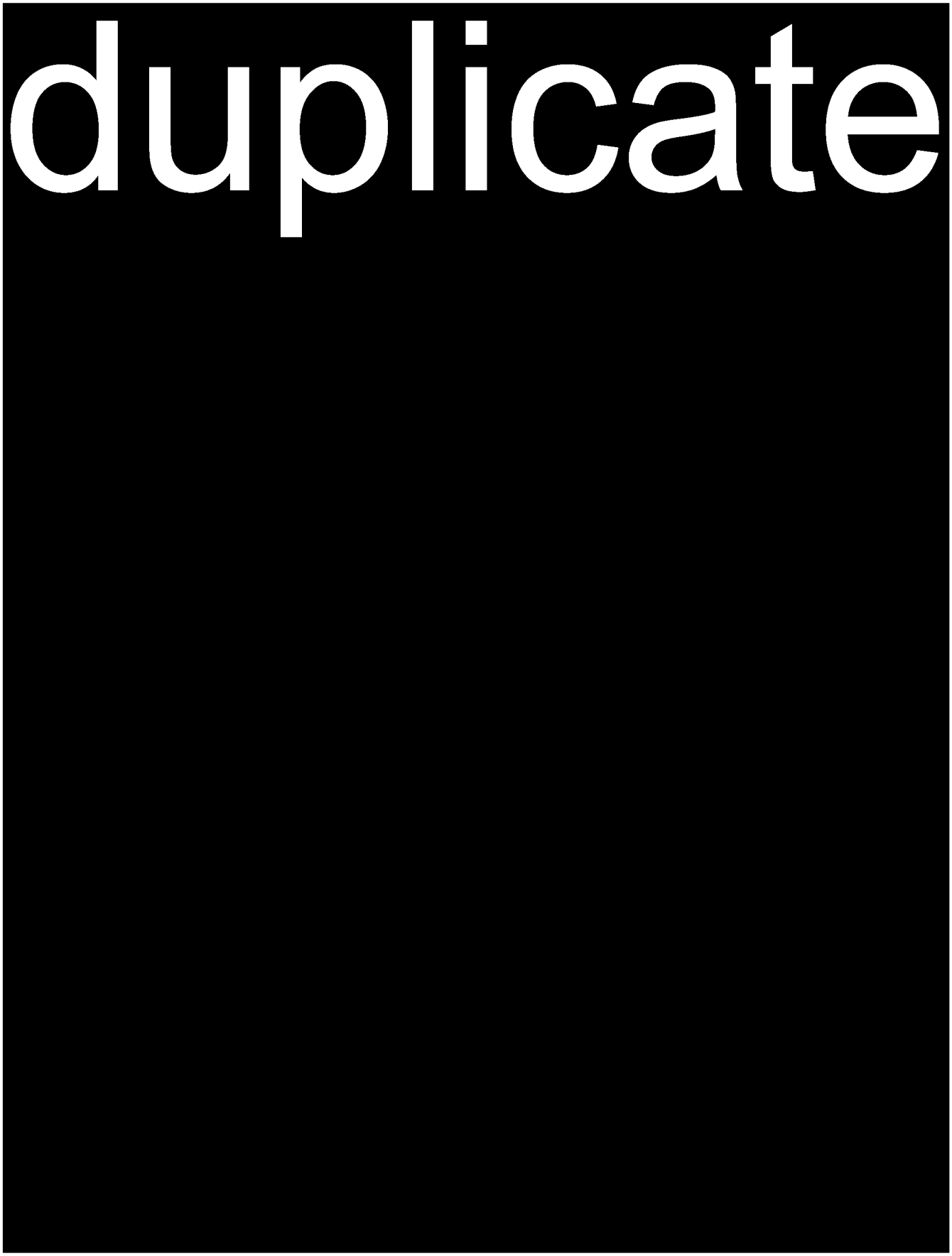
Dan's rec is yes, but he defers to Harriet.

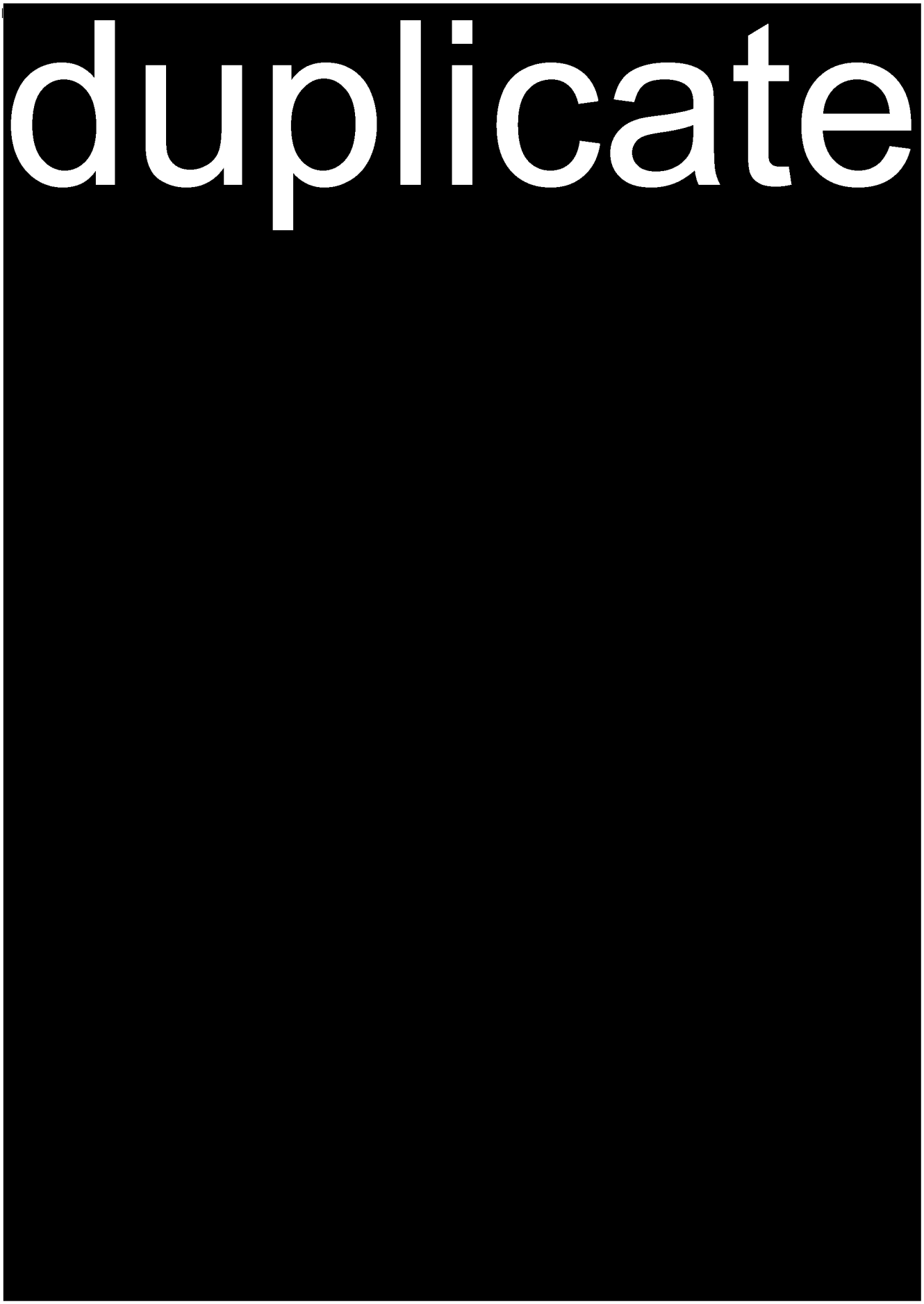
-----Original Message-----
From: Allen, Michael <Michael_Allen@nsc.eop.gov>
To: Levinson, Katie <Katie_Levinson@who.eop.gov>; Miers, Harriet <Harriet_Miers@who.eop.gov>; Perino, Dana M. <Dana_M._Perino@who.eop.gov>; Kavanaugh, Brett M. <Brett_M._Kavanaugh@who.eop.gov>; 'Steve.Bradbury@usdoj.gov' <Steve.Bradbury@usdoj.gov>; Mitnick, John M. <John_M._Mitnick@who.eop.gov>
CC: Fiddelke, Debbie S. <Debbie_S._Fiddelke@who.eop.gov>; Kirk, Matthew <Matthew_Kirk@who.eop.gov>
Sent: Sat Jan 07 12:27:04 2006
Subject: Re: (b) (5) Talkers.doc

(b) (5)
?

-----Original Message-----
From: Levinson, Katie <Katie_Levinson@who.eop.gov>
To: Miers, Harriet <Harriet_Miers@who.eop.gov>; Perino, Dana M. <Dana_M._Perino@who.eop.gov>; Kavanaugh, Brett M. <Brett_M._Kavanaugh@who.eop.gov>; 'Steve.Bradbury@usdoj.gov' <Steve.Bradbury@usdoj.gov>; Mitnick, John M. <John_M._Mitnick@who.eop.gov>

CC: Allen, Michael <Michael_Allen@nsc.eop.gov>; Fiddelke, Debbie S. <Debbie_S._Fiddelke@who.eop.gov>
Sent: Sat Jan 07 10:36:15 2006





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Harriet_Miers@who.eop.gov

From:	Harriet_Miers@who.eop.gov
Sent:	Saturday, January 07, 2006 12:41 PM
To:	Bradbury, Steve; Matthew_Kirk@who.eop.gov; Katie_Levinson@who.eop.gov; Michael_Allen@nsc.eop.gov; Dana_M._Perino@who.eop.gov; Brett_M._Kavanaugh@who.eop.gov; John_M._Mitnick@who.eop.gov
Cc:	Debbie_S._Fiddelke@who.eop.gov
Subject:	RE: (b) (5) Talkers.doc

And I defer to others as to the best way but I would make sure the info gets to him.

-----Original Message-----
From: Kirk, Matthew
Sent: Saturday, January 07, 2006 12:40 PM
To: Levinson, Katie; Allen, Michael; Miers, Harriet; Perino, Dana M.; Kavanaugh, Brett M.; 'Steve.Bradbury@usdoj.gov'; Mitnick, John M.
Cc: Fiddelke, Debbie S.
Subject: RE: (b) (5) Talkers.doc

I am happy to (b) (5) ,

Matt

-----Original Message-----
From: Levinson, Katie
Sent: Saturday, January 07, 2006 12:39 PM

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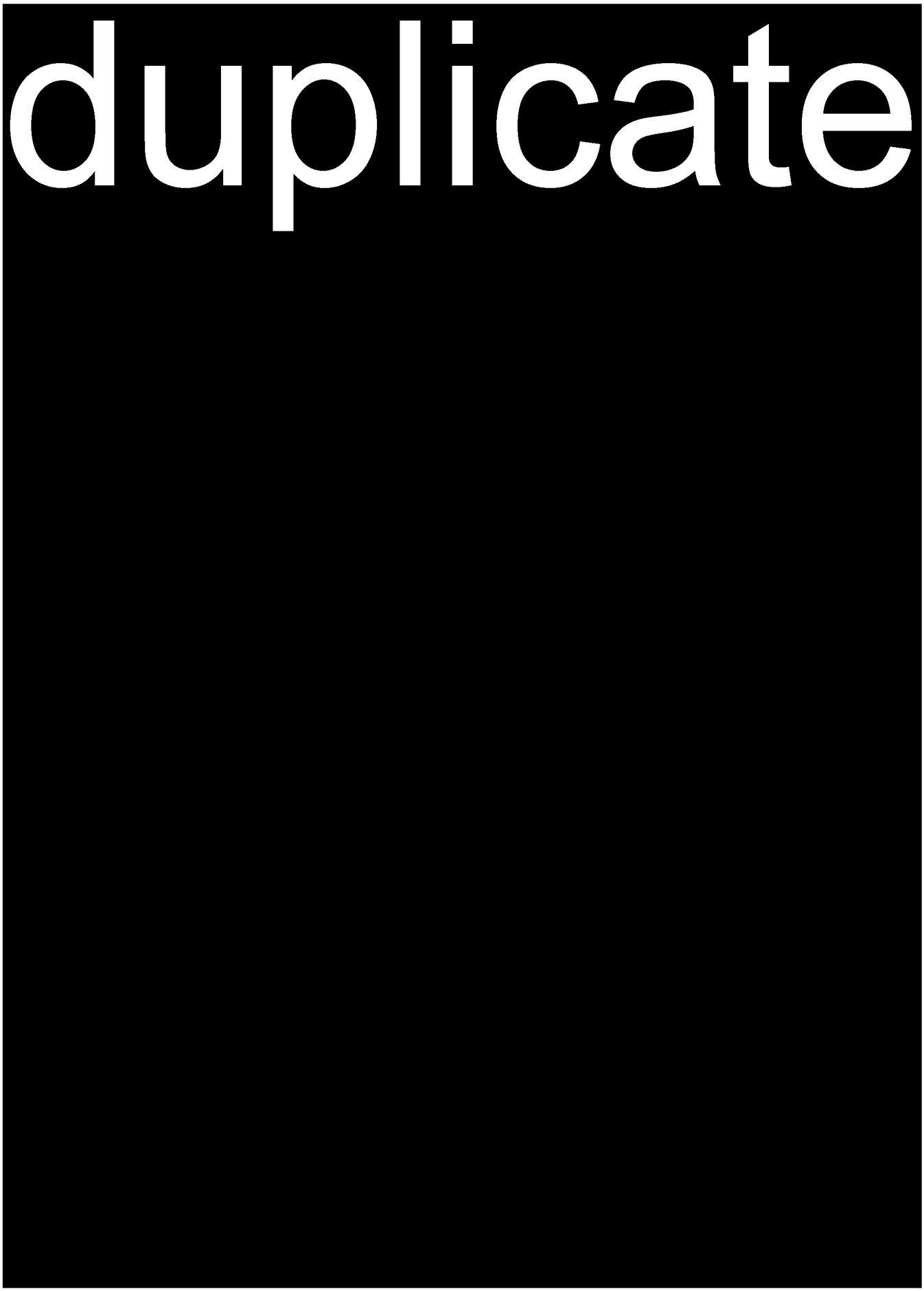

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Bradbury, Steve

From: Bradbury, Steve
Sent: Tuesday, January 10, 2006 5:39 PM
To: 'Harriet_Miers@who.eop.gov'; William_K._Kelley@who.eop.gov; David_S._Addington@ovp.eop.gov; 'John_M._Mitnick@who.eop.gov'; 'John_B._Wiegmann@nsc.eop.gov'
Cc: 'Brett_M._Kavanaugh@who.eop.gov'; 'Brett_C._Gerry@who.eop.gov'
Subject: White Paper re NSA activities
Attachments: Surveillance Authorities_1_10 (1).doc

Attached is a current, revised draft of our white paper addressing more fully the legal basis for the NSA activities described by the President. We would like to finalize this white paper by the beginning of next week. Your comments are welcome.

Bradbury, Steve

From: Bradbury, Steve
Sent: Thursday, January 12, 2006 5:22 PM
To: 'Harriet_Miers@who.eop.gov'; David_S._Addington@ovp.eop.gov; William_K._Kelley@who.eop.gov; 'John_M._Mitnick@who.eop.gov'; 'John_B._Wiegmann@nsc.eop.gov'
Cc: 'Brett_C._Gerry@who.eop.gov'; 'Brett_M._Kavanaugh@who.eop.gov'
Subject: Draft white paper re NSA activities described by the President
Attachments: Surveillance Authorities_1_12_pm.doc

Attached is the current, revised draft of the white paper addressing the legal authorities supporting the NSA activities described by the President. Our intent is to finalize this paper by 1/16 for possible distribution by the AG early next week. Your comments are most welcome. Thx.

Gorsuch, Neil M

From:	Gorsuch, Neil M
Sent:	Monday, January 16, 2006 11:58 AM
To:	'Brett_C._Gerry@who.eop.gov'; Moschella, William; Scolinos, Tasia; McCallum, Robert (SMO); Sampson, Kyle; Roehrkasse, Brian; Harriet_Miers@who.eop.gov
Cc:	Elwood, John; David_S._Addington@ovp.eop.gov; Brett_M._Kavanaugh@who.eop.gov
Subject:	RE: USA Today update

[redacted] (b) (5)

-----Original Message-----
From: Brett_C._Gerry@who.eop.gov [mailto:Brett_C._Gerry@who.eop.gov]
Sent: Monday, January 16, 2006 11:50 AM
To: Moschella, William; Scolinos, Tasia; McCallum, Robert (SMO); Gorsuch, Neil M; Sampson, Kyle; Roehrkasse, Brian; Harriet_Miers@who.eop.gov
Cc: Elwood, John; David_S._Addington@ovp.eop.gov; Brett_M._Kavanaugh@who.eop.gov
Subject: Re: USA Today update

[redacted] (b) (5)

-----Original Message-----
From: Miers, Harriet <Harriet_Miers@who.eop.gov>
To: 'Neil.Gorsuch@usdoj.gov' <Neil.Gorsuch@usdoj.gov>; Robert.McCallum@usdoj.gov <Robert.McCallum@usdoj.gov>; Kyle.Sampson@usdoj.gov <Kyle.Sampson@usdoj.gov>; William.Moschella@usdoj.gov <William.Moschella@usdoj.gov>; Tasia.Scolinos@usdoj.gov <Tasia.Scolinos@usdoj.gov>; Brian.Roehrkasse@usdoj.gov <Brian.Roehrkasse@usdoj.gov>
CC: John.Elwood@usdoj.gov <John.Elwood@usdoj.gov>; Addington, David S. <David_S._Addington@ovp.eop.gov>; Gerry, Brett C. <Brett_C._Gerry@who.eop.gov>; Kavanaugh, Brett M. <Brett_M._Kavanaugh@who.eop.gov>
Sent: Mon Jan 16 11:30:43 2006
Subject: RE: USA Today update

I hate to add to the work here, but I asked Steve Hadley to review the draft and his doing so reminded me why we have staffing requirements. He had three comments that we need to consider, and through his comments pointed out the need for general staffing. So I am copying Brett Kavanaugh to make sure

he is aware of the development of this op ed. Steve's three thoughts were:

1. (b) (5) [redacted]

2. (b) (5) [redacted] I think Brett G and Brett K and I assume others have the specifics on this analysis.

3. (b) (5) [redacted]

-----Original Message-----
From: Neil.Gorsuch@usdoj.gov [mailto:Neil.Gorsuch@usdoj.gov]
Sent: Monday, January 16, 2006 11:08 AM
To: Neil.Gorsuch@usdoj.gov; Robert.McCallum@usdoj.gov; Kyle.Sampson@usdoj.gov; William.Moschella@usdoj.gov; Tasia.Scolinos@usdoj.gov; Brian.Roehrkasse@usdoj.gov
Cc: John.Elwood@usdoj.gov; Addington, David S.; Miers, Harriet; Gerry, Brett C.
Subject: RE: USA Today update

Brett Gerry had an excellent suggestion for the penultimate paragraph that both strengthens its message and reduces words (by 4). The suggested revision is attached for your consideration.

-----Original Message-----
From: Gorsuch, Neil M
Sent: Monday, January 16, 2006 10:27 AM
To: McCallum, Robert (SMO); Sampson, Kyle; Moschella, William; Scolinos, Tasia; Roehrkasse, Brian
Cc: 'Harriet_Miers@who.eop.gov'; 'Brett_C._Gerry@who.eop.gov'; 'David_S._Addington@ovp.eop.gov'; Elwood, John
Subject: RE: USA Today update

I must say that it's mighty tough to find any fat in John's excellent work. I have managed in the attached to eke some to get a (b) (5) version down to 377 words and pass it along for the group's consideration. It also seeks to incorporate Harriet's suggestions.
(Getting a (b) (5) version to 350 should be very easy, but it would be nice if we could (b) (5) [redacted]). NMG

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

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

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

I have three general comments to the drafts which are very good. First, (b) (5) [redacted]. I also think there should be (b) (5) [redacted]. Finally, (b) (5) [redacted]

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

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

> -----Original Message-----
> From: Elwood, John
> Sent: Sunday, January 15, 2006 10:20 PM
> To: ' (Harriet_Miers@who.eop.gov)'; McCallum, Robert (SMO); Gorsuch,
> Neil M; Sampson, Kyle; 'Brett_C._Gerry@who.eop.gov';
> 'David_S._Addington@ovp.eop.gov'; 'Dana_M._Perino@who.eop.gov';
> Moschella, William
> Cc: Scolinos, Tasia; Roehrkasse, Brian
> Subject: USA Today update
>
> (b) (5) [redacted] I have gotten the (b) (5) version of the op-ed
> down to the current target (350 words).
>
> I've gotten the (b) (5) version of the op-ed down to 403 words.
> We're checking to see whether USA Today will extend the word count in
> view of the number and complexity of issues. If not, I'll find
> another 53 words that don't need to be said.
>
> I've attached copies of the (b) (5) op-eds to this
> e-mail. In case you're reading this on blackberry, I've cut and
> pasted the (b) (5) version into the body of the e-mail below. This

> incorporates all comments I've received so far.
>
> Thanks! << File: USA Today op-ed (v2.8) ((b) (5)).doc >> << File:
> USA Today op-ed (v2.8) ((b) (5)).doc >>
>
> DRAFT OP-ED==========
>

(b) (5)

(b) (5)

Scolinos, Tasia

From:	Scolinos, Tasia
Sent:	Monday, January 16, 2006 12:07 PM
To:	Gorsuch, Neil M; 'Harriet_Miers@who.eop.gov'; Moschella, William; McCallum, Robert (SMO); Sampson, Kyle; Roehrkasse, Brian
Cc:	Elwood, John; 'David_S._Addington@ovp.eop.gov'; 'Brett_C._Gerry@who.eop.gov'; 'Brett_M._Kavanaugh@who.eop.gov'
Subject:	Re: USA Today update

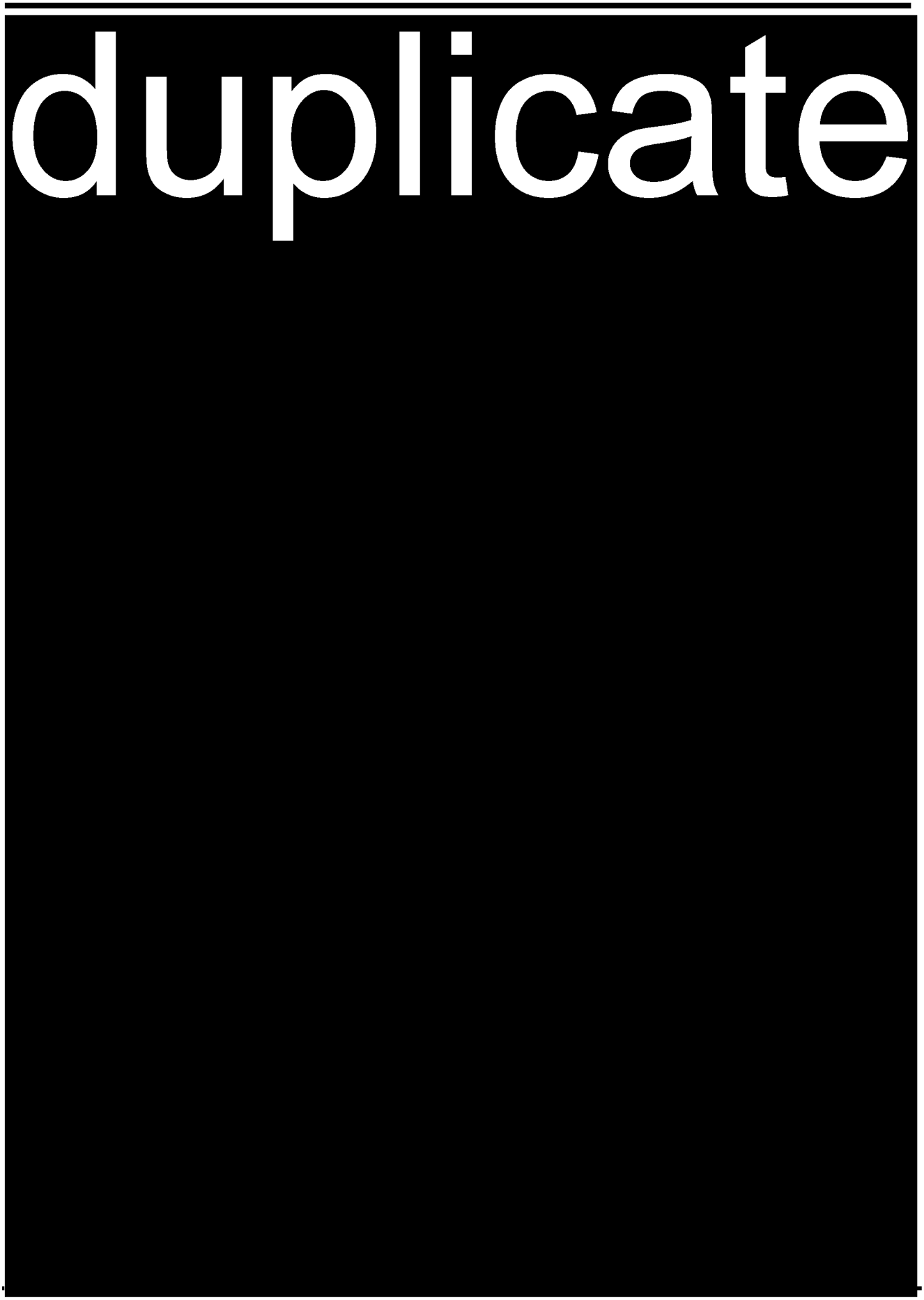
That is correct. We have directed reporters to them on this issue in the past and they are on the record with very strong statements supporting our interpretation.

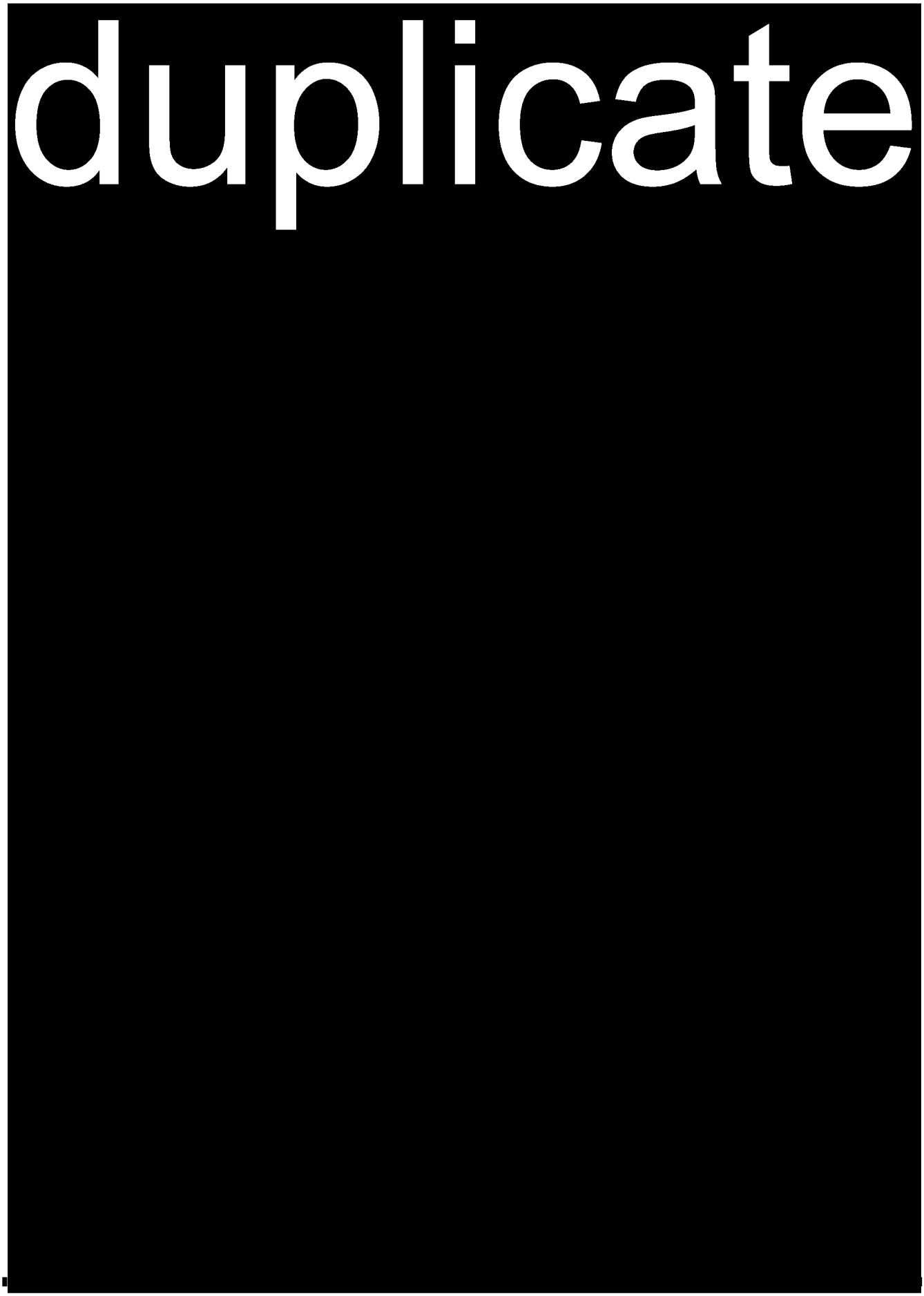
Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Gorsuch, Neil M <Neil.Gorsuch@SMOJMD.USDOJ.gov>
To: 'Harriet_Miers@who.eop.gov' <Harriet_Miers@who.eop.gov>; Moschella, William <William.Moschella@SMOJMD.USDOJ.gov>; Scolinos, Tasia <Tasia.Scolinos@SMOJMD.USDOJ.gov>; McCallum, Robert (SMO) <Robert.McCallum@SMOJMD.USDOJ.gov>; Sampson, Kyle <Kyle.Sampson@SMOJMD.USDOJ.gov>; Roehrkasse, Brian <Brian.Roehrkasse@SMOJMD.USDOJ.gov>
CC: Elwood, John <John.Elwood@SMOJMD.USDOJ.gov>; David_S._Addington@ovp.eop.gov <David_S._Addington@ovp.eop.gov>; Brett_C._Gerry@who.eop.gov <Brett_C._Gerry@who.eop.gov>; Brett_M._Kavanaugh@who.eop.gov <Brett_M._Kavanaugh@who.eop.gov>
Sent: Mon Jan 16 11:39:31 2006
Subject: RE: USA Today update

On #3, both Sen. Kyl and Graham are on record publicly stating that their legislation affects lawsuits "retroactively." Will and Tasia may be able to add more.

-----Original Message-----
From: Harriet_Miers@who.eop.gov [mailto:Harriet_Miers@who.eop.gov]
Sent: Monday, January 16, 2006 11:31 AM





duplicate

duplicate

Roehrkasse, Brian

From:	Roehrkasse, Brian
Sent:	Monday, January 16, 2006 1:21 PM
To:	Gorsuch, Neil M; McCallum, Robert (SMO); Elwood, John; Scolinos, Tasia; 'Brett_C._Gerry@who.eop.gov'; Moschella, William; 'Harriet_Miers@who.eop.gov'; 'David_S._Addington@ovp.eop.gov'; Sampson, Kyle; 'Brett_M._Kavanaugh@who.eop.gov'
Subject:	Re: USA Today update

USA Today has decided to kill another element on their editorial page and will now grant us 430-440 words. This will also give us a little more time. Please circulate a final draft by no later 3:30.

Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Gorsuch, Neil M <Neil.Gorsuch@SMOJMD.USDOJ.gov>
To: McCallum, Robert (SMO) <Robert.McCallum@SMOJMD.USDOJ.gov>; Elwood, John <John.Elwood@SMOJMD.USDOJ.gov>; Scolinos, Tasia <Tasia.Scolinos@SMOJMD.USDOJ.gov>; 'Brett_C._Gerry@who.eop.gov' <Brett_C._Gerry@who.eop.gov>; Roehrkasse, Brian <Brian.Roehrkasse@SMOJMD.USDOJ.gov>; Moschella, William <William.Moschella@SMOJMD.USDOJ.gov>; 'Harriet_Miers@who.eop.gov' <Harriet_Miers@who.eop.gov>; 'David_S._Addington@ovp.eop.gov' <David_S._Addington@ovp.eop.gov>; Sampson, Kyle <Kyle.Sampson@SMOJMD.USDOJ.gov>; 'Brett_M._Kavanaugh@who.eop.gov' <Brett_M._Kavanaugh@who.eop.gov>
Sent: Mon Jan 16 12:40:30 2006
Subject: RE: USA Today update

Will make sure these get in (not only do they clarify, they help reduce word count). John Elwood and Tasia Scolinos will pull the trigger here at DoJ after we get everyone's sign off at WH.

-----Original Message-----
From: McCallum, Robert (SMO)
Sent: Monday, January 16, 2006 12:34 PM
To: Gorsuch, Neil M; Elwood, John; Scolinos, Tasia; 'Brett_C._Gerry@who.eop.gov'; Roehrkasse, Brian; Moschella, William; 'Harriet_Miers@who.eop.gov'; 'David_S._Addington@ovp.eop.gov'; Sampson, Kyle; 'Brett_M._Kavanaugh@who.eop.gov'
Subject: RE: USA Today update

I like the revised draft. I have three suggested edits as follows:

[redacted] (b) (5) [redacted]

[redacted]

(b) (5)

Obviously, none are critical to my signing it. Who will pull the trigger on it in final? Robt.

-----Original Message-----
From: Gorsuch, Neil M
Sent: Monday, January 16, 2006 12:09 PM
To: Elwood, John; McCallum, Robert (SMO); Scolinos, Tasia; Brett_C._Gerry@who.eop.gov; Roehrkasse, Brian; McCallum, Robert (SMO); Moschella, William; Harriet_Miers@who.eop.gov; David_S._Addington@ovp.eop.gov; Sampson, Kyle; Brett_M._Kavanaugh@who.eop.gov
Subject: FW: USA Today update

At Brett and Harriet's suggestion, full version of a suggested draft, including Brett Gerry's great suggestion, follows in bb-friendly format below. It is 379 words. Per Brian R. of our press office, USA Today informs that it will "work with us" on words beyond the 350 limit it previously set, but the paper indicates that the sooner it has the document the more likely it will be able to work with us as other articles will come in later. Brian R. recommends getting a final to him by 2-ish. NMG

===

(b) (5)

[redacted]

-----Original Message-----
From: McCallum, Robert (SMO)
Sent: Monday, January 16, 2006 10:43 AM
To: Gorsuch, Neil M
Subject: RE: USA Today update

I thought yours was better than mine although great minds obviously think alike. [redacted]
Robt.

-----Original Message-----
From: Gorsuch, Neil M
Sent: Monday, January 16, 2006 10:41 AM
To: McCallum, Robert (SMO)
Subject: RE: USA Today update

Sorry, didn't see this before sending my draft! [redacted]

-----Original Message-----
From: McCallum, Robert (SMO)
Sent: Monday, January 16, 2006 10:24 AM
To: Scolinos, Tasia; Elwood, John; 'Harriet_Miers@who.eop.gov'
Cc: 'Brett_C._Gerry@who.eop.gov'; 'David_S._Addington@ovp.eop.gov'; Gorsuch, Neil M; Sampson, Kyle; Moschella, William; Roehrkasse, Brian
Subject: RE: USA Today update

Gentlepersons: I have made various edits below for your consideration, trying to incorporate Harriet's comments, cut some words, etc. [redacted] No pride of authorship precludes rejection of these edits, other suggestions, etc. I am in the office for the day and can be reached by phone or email. Robt.

[redacted]

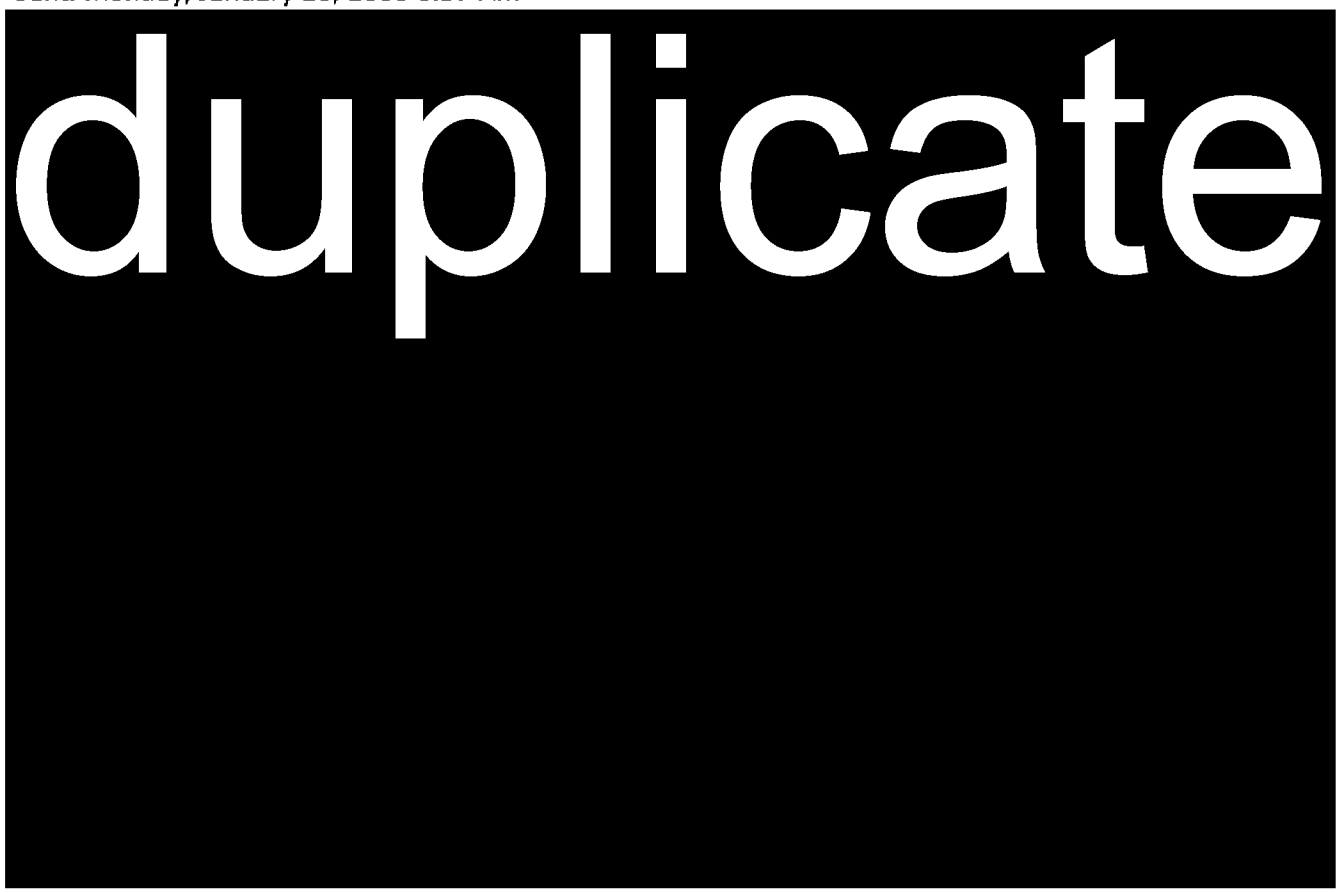
(b) (5)

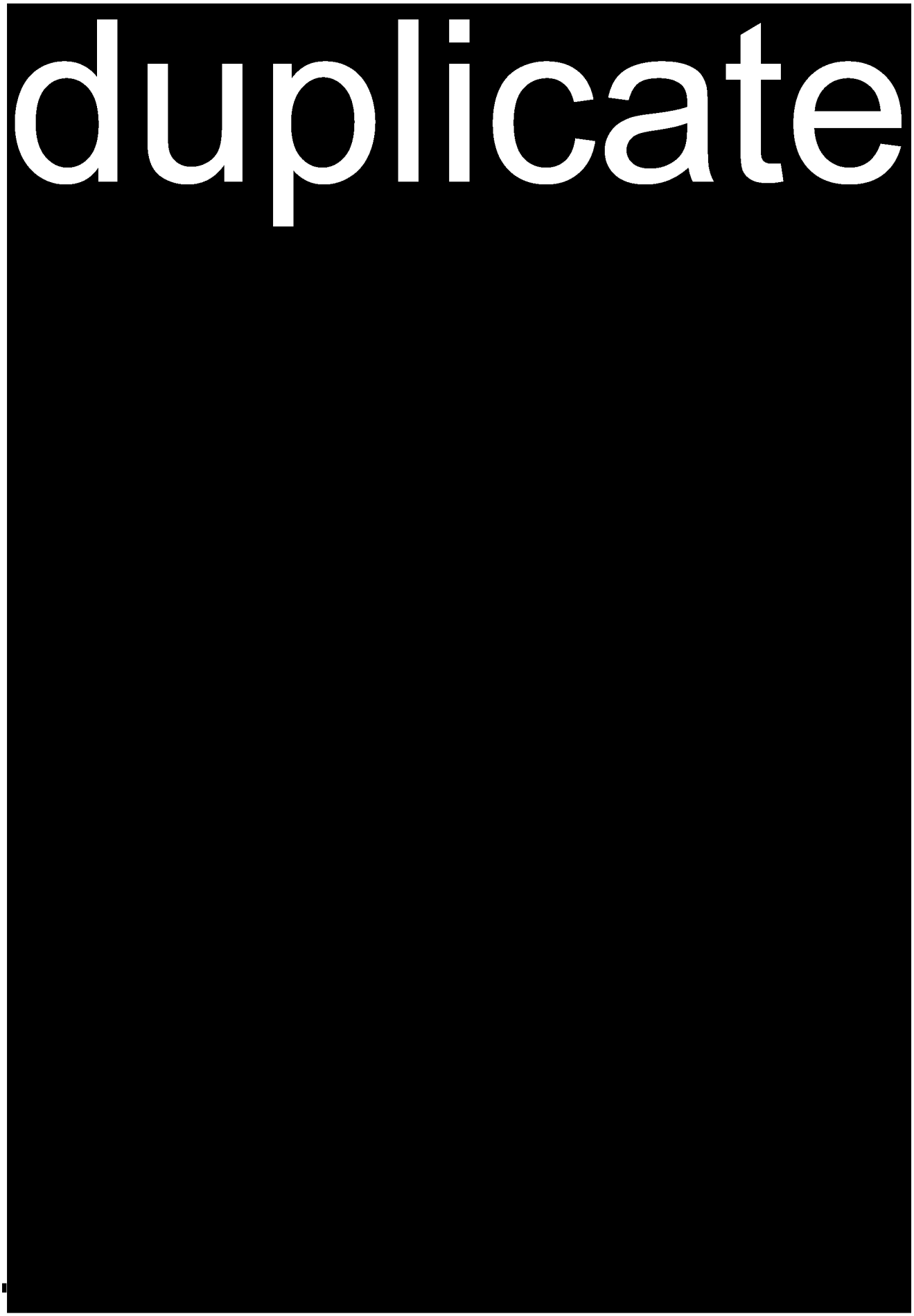
[redacted]

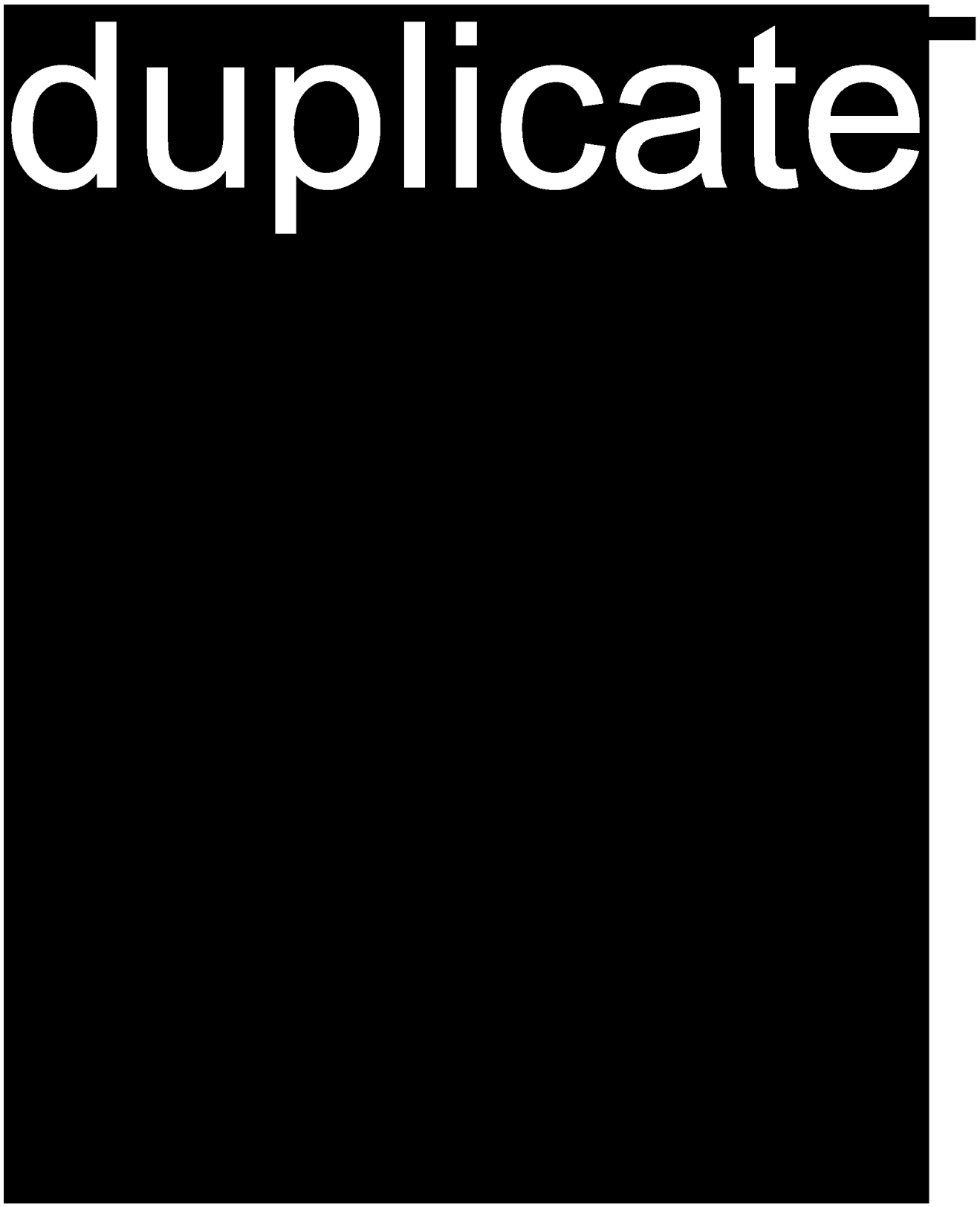
[redacted]

[redacted]

-----Original Message-----
From: McCallum, Robert (SMO)
Sent: Monday, January 16, 2006 8:57 AM







McCallum, Robert (SMO)

From: McCallum, Robert (SMO)
Sent: Monday, January 16, 2006 2:06 PM
To: Gorsuch, Neil M; 'Brett_M._Kavanaugh@who.eop.gov'; 'Harriet_Miers@who.eop.gov'; 'Brett_C._Gerry@who.eop.gov'; Sampson, Kyle; Elwood, Courtney; Scolinos, Tasia; Roehrkasse, Brian; Moschella, William
Cc: Elwood, John
Subject: RE: LATEST version of USA Today

I like it and have no additional edits. Great work. Robt.

From: Gorsuch, Neil M
Sent: Monday, January 16, 2006 2:01 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'; 'Harriet_Miers@who.eop.gov'; 'Brett_C._Gerry@who.eop.gov'; Sampson, Kyle; Elwood, Courtney; McCallum, Robert (SMO); Scolinos, Tasia; Roehrkasse, Brian; Moschella, William
Cc: Elwood, John
Subject: LATEST version of USA Today

Given that we now have 430 words to work with, John Elwood and I have sought to restore a few choice passages from earlier drafts you've seen (eg (b) (5)) without creating anything substantively "new." This version is at 429 words and is both attached and printed below for bb. Please let us know if there are any final changes as soon as possible. We need to get this to Brian by 3:30.

<< File: USA Today op-ed ((b) (5)) NMG 2.doc >>
==

(b) (5)

[redacted]

(b) (5)

Elwood, John

From:	Elwood, John
Sent:	Monday, January 16, 2006 3:56 PM
To:	'Brett_M._Kavanaugh@who.eop.gov'; Gorsuch, Neil M
Subject:	RE: cutting 10 words ...

Not yet.

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov [mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Monday, January 16, 2006 3:53 PM
To: Gorsuch, Neil M; Elwood, John
Subject: RE: cutting 10 words ...

Have you heard from her?

-----Original Message-----
From: Neil.Gorsuch@usdoj.gov [mailto:Neil.Gorsuch@usdoj.gov]
Sent: Monday, January 16, 2006 3:34 PM
To: John.Elwood@usdoj.gov; Kavanaugh, Brett M.
Subject: Re: cutting 10 words ...

Thanks, Brett.

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov <Brett_M._Kavanaugh@who.eop.gov>
To: Gorsuch, Neil M <Neil.Gorsuch@SMOJMD.USDOJ.gov>; Elwood, John
<John.Elwood@SMOJMD.USDOJ.gov>
Sent: Mon Jan 16 15:29:53 2006
Subject: RE: cutting 10 words ...

Checking now with HM.

-----Original Message-----
From: John.Elwood@usdoj.gov [mailto:John.Elwood@usdoj.gov]
Sent: Monday, January 16, 2006 3:16 PM
To: Neil.Gorsuch@usdoj.gov; Kavanaugh, Brett M.
Subject: RE: cutting 10 words ...

Brett:

We're supposed to get this to DOJ's Office of Public Affairs by 3:30.
Let me know if you or Harriet have any final comments. Thank you.

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

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Monday, January 16, 2006 2:43 PM
To: Gorsuch, Neil M
Cc: Scolinos, Tasia; Elwood, John
Subject: RE: cutting 10 words ...

Waiting to get final word from Harriet. Thanks.

-----Original Message-----
From: Neil.Gorsuch@usdoj.gov [mailto:Neil.Gorsuch@usdoj.gov]
Sent: Monday, January 16, 2006 2:13 PM
To: Kavanaugh, Brett M.
Cc: John.Elwood@usdoj.gov; Tasia.Scolinos@usdoj.gov
Subject: RE: cutting 10 words ...

Brett, With Robert's ok we are (hopefully) finished on this end. We will wait to hear from you, however, before giving Tasia's shop the all clear. Thanks! NMG

Gorsuch, Neil M

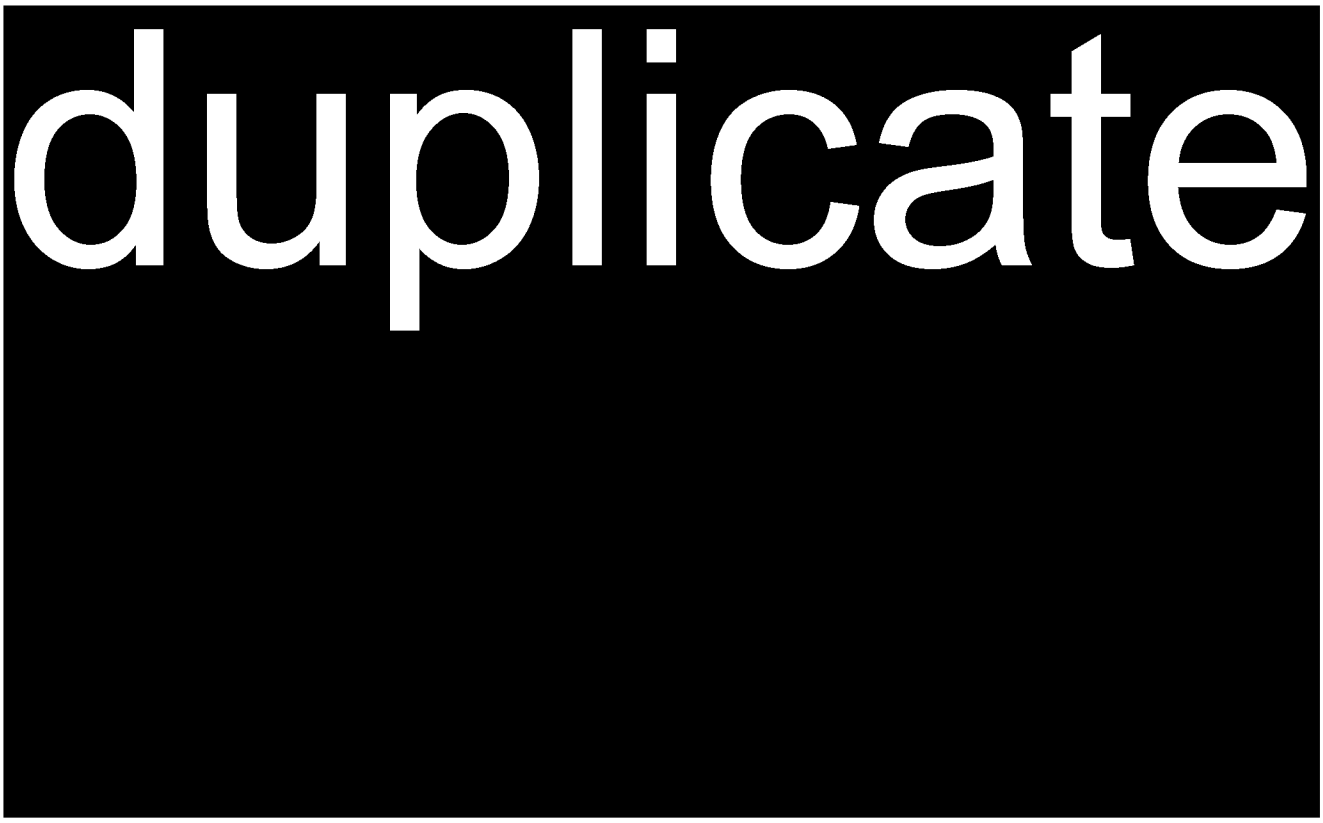
From: Gorsuch, Neil M
Sent: Monday, January 16, 2006 3:57 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'; Elwood, John
Subject: Re: cutting 10 words ...

Thanks for helping push this across the finish line.

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov <Brett_M._Kavanaugh@who.eop.gov>
To: Gorsuch, Neil M <Neil.Gorsuch@SMOJMD.USDOJ.gov>; Elwood, John <John.Elwood@SMOJMD.USDOJ.gov>
Sent: Mon Jan 16 15:54:14 2006
Subject: RE: cutting 10 words ...

Good to go per Harriet.

-----Original Message-----
From: Neil.Gorsuch@usdoj.gov [mailto:Neil.Gorsuch@usdoj.gov]
Sent: Monday, January 16, 2006 3:34 PM



Elwood, John

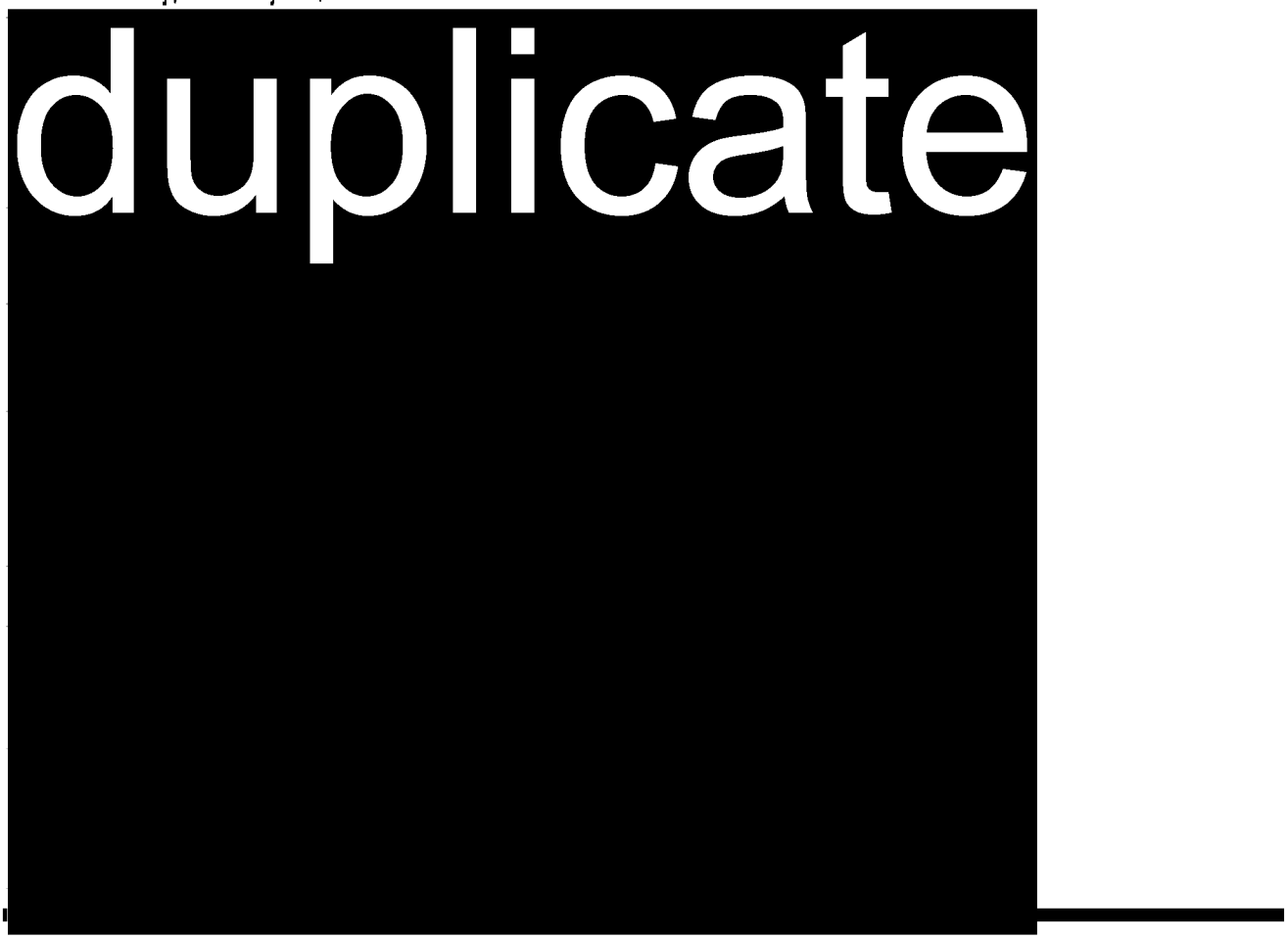
From: Elwood, John
Sent: Monday, January 16, 2006 4:01 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'; Gorsuch, Neil M
Subject: RE: cutting 10 words ...

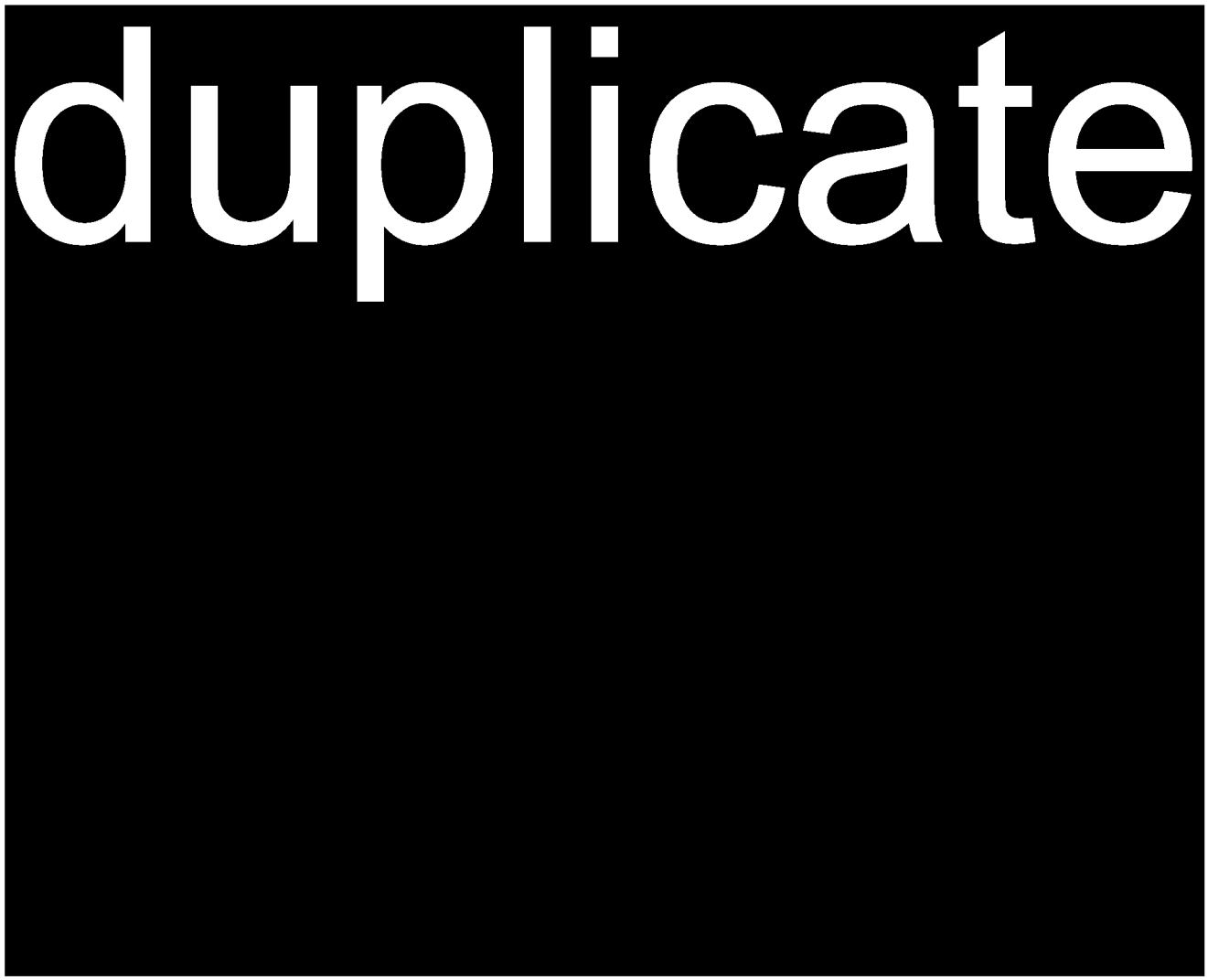
Will do.

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov [mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Monday, January 16, 2006 3:58 PM
To: Gorsuch, Neil M; Elwood, John; Brett_M._Kavanaugh@who.eop.gov
Subject: RE: cutting 10 words ...

Got one more comment that [redacted (b) (5)] Up to you.

-----Original Message-----
From: Kavanaugh, Brett M.
Sent: Monday, January 16, 2006 3:54 PM





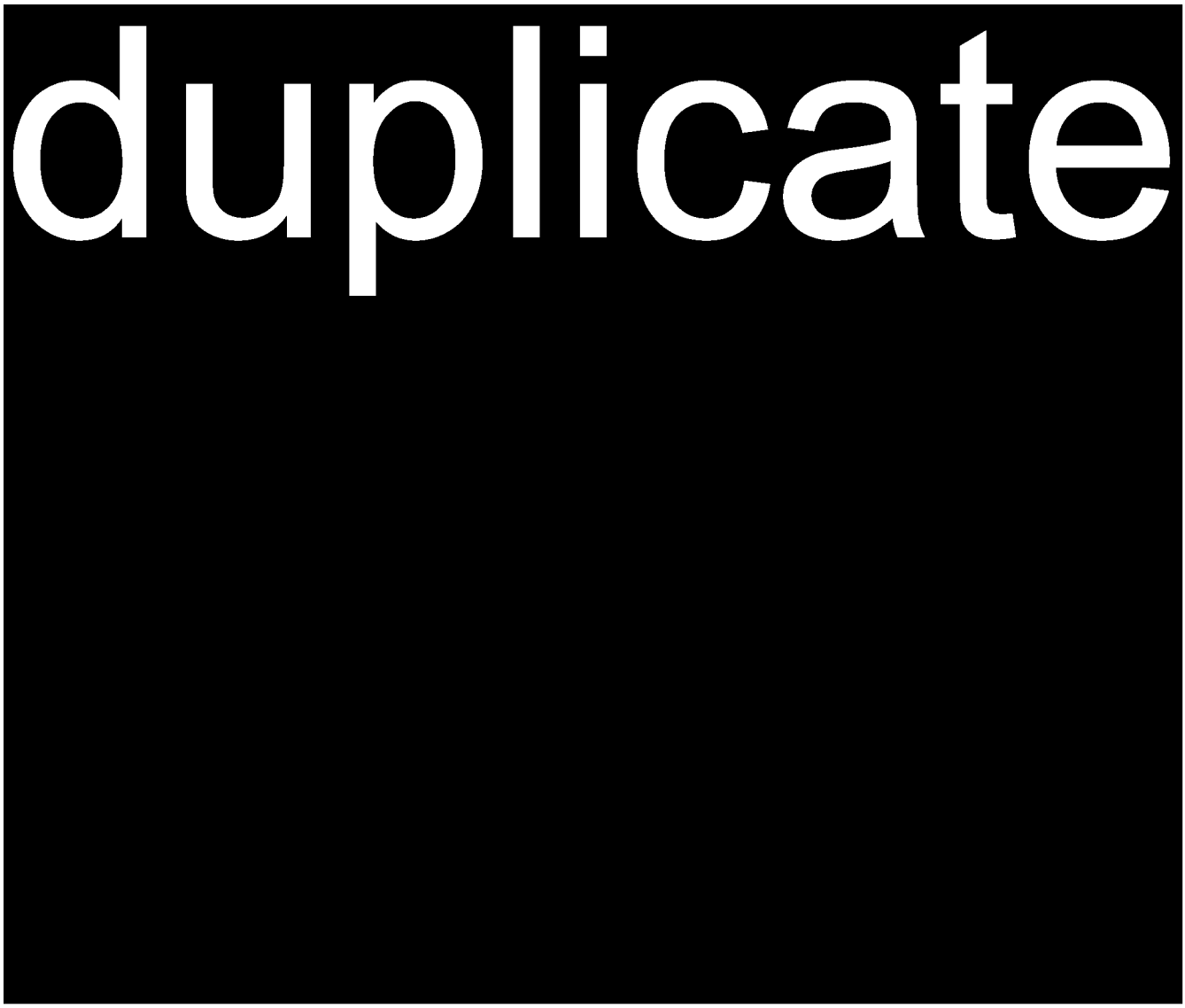
Elwood, John

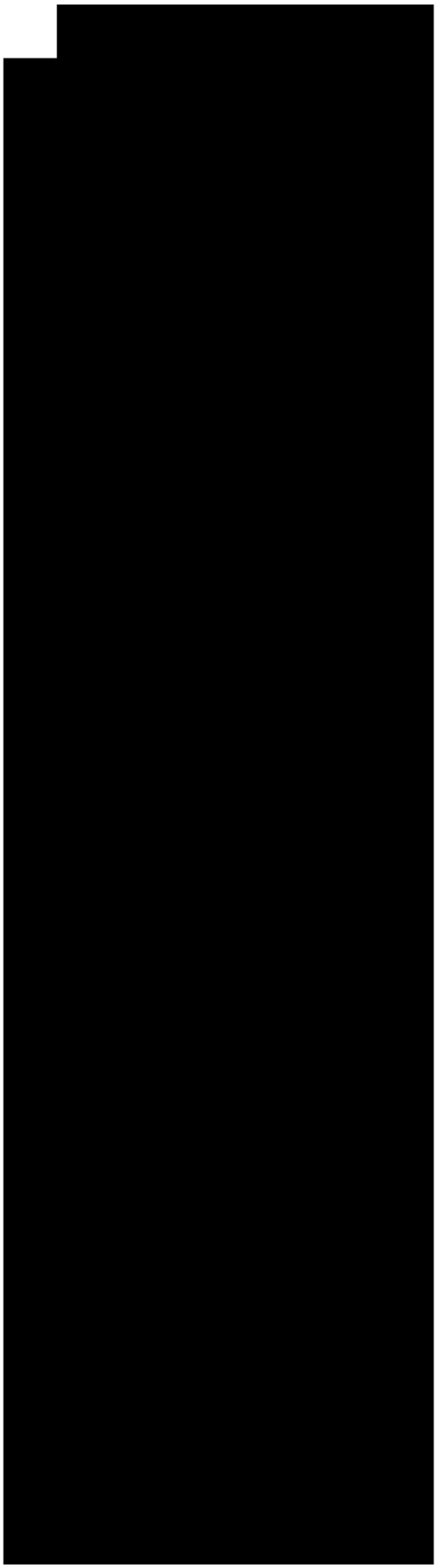
From: Elwood, John
Sent: Monday, January 16, 2006 4:03 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'; Gorsuch, Neil M
Subject: RE: cutting 10 words ...

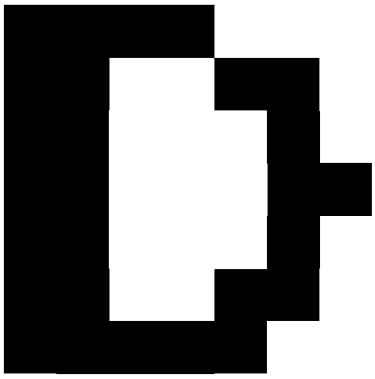
Good catch. (b) (5)
.

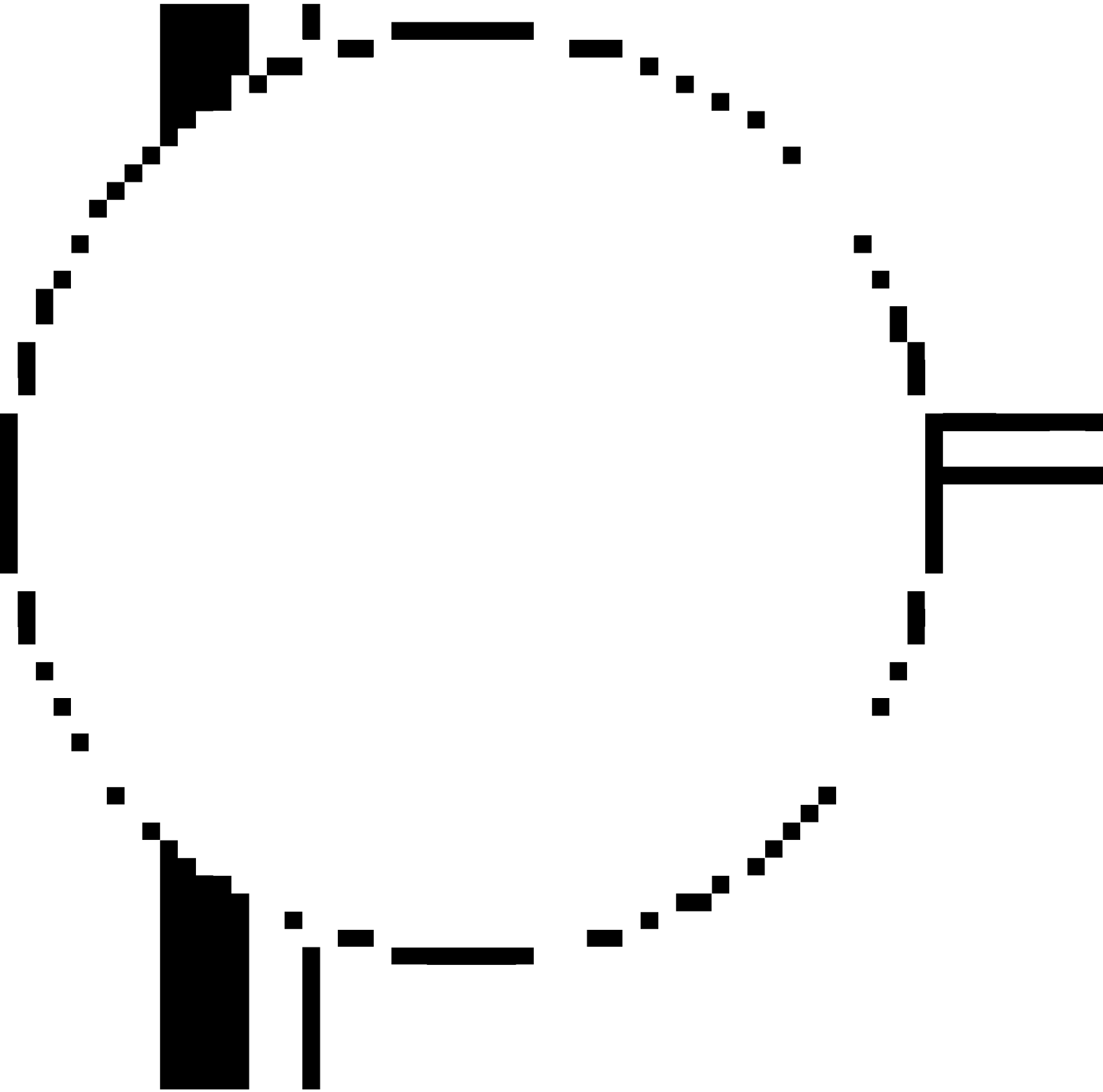
-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov [mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Monday, January 16, 2006 3:58 PM

duplicate









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 The New Republic Online

WHAT IF WIRETAPPING WORKS?

Wire Trap

by Richard A. Posner

Post date: 01.26.06

Issue date: 02.06.06

<!--[if !vml]--><!--[endif]-->he revelation by *The New York Times* that the National Security Agency (NSA) is conducting a secret program of electronic surveillance outside the framework of the Foreign Intelligence Surveillance Act (FISA) has sparked a hot debate in the press and in the blogosphere. But there is something odd about the debate: It is aridly legal. Civil libertarians contend that the program is illegal, even unconstitutional; some want President Bush impeached for breaking the law. The administration and its defenders have responded that the program is perfectly legal; if it does violate FISA (the administration denies that it does), then, to that extent, the law is unconstitutional. This legal debate is complex, even esoteric. But, apart from a handful of not very impressive anecdotes (did the NSA program really prevent the Brooklyn Bridge from being destroyed by *blowtorches*?), there has been little discussion of the program's concrete value as a counterterrorism measure or of the inroads it has or has not made on liberty or privacy.

Not only are these questions more important to most people than the legal questions; they are fundamental to those questions. Lawyers who are busily debating legality without first trying to assess the consequences of the program have put the cart before the horse. Law in the United States is not a Platonic abstraction but a flexible tool of social policy. In analyzing all but the simplest legal questions, one is well advised to begin by asking what social policies are at stake. Suppose the NSA program is vital to the nation's defense, and its impingements on civil liberties are slight. That would not prove the program's legality, because not every good thing is legal; law and policy are not perfectly aligned. But a conviction that the program had great merit would shape and hone the legal inquiry. We would search harder for grounds to affirm its legality, and, if our search were to fail, at least we would know how to change the law--or how to change the program to make it comply with the law--without destroying its effectiveness. Similarly, if the program's contribution to national security were negligible--as we learn, also from the *Times*, that some FBI personnel are indiscreetly whispering--and it is undermining our civil liberties, this would push the legal analysis in the opposite direction.

Ronald Dworkin, the distinguished legal philosopher and constitutional theorist, wrote in *The New York Review of Books* in the aftermath of the September 11 attacks that "we cannot allow our Constitution and our shared sense of decency to become a suicide pact." He would doubtless have said the same thing about FISA. If you approach legal issues in that spirit rather than in the spirit of *ruat caelum fiat iusticia* (let the heavens fall so long as justice is done), you will want to know how close to suicide a particular legal interpretation will bring you before you decide whether to embrace it. The legal critics of the surveillance program have not done this, and the defenders have for the most part been content to play on the critics' turf.

<!--[if !vml]--><!--[endif]-->ashington, D.C., which happens to be the home of The New Republic, could be destroyed by an atomic bomb the size of a suitcase. Portions of the city could be rendered uninhabitable, perhaps for decades, merely by the explosion of a conventional bomb that had been coated with radioactive material. The smallpox virus--bioengineered to make it even more toxic and the vaccine against it ineffectual, then aerosolized and sprayed in a major airport--could kill millions of people. Our terrorist enemies have the will to do such things. They may soon have the means as well. Access to weapons of mass destruction is becoming ever easier. With the September 11 attacks now more than four years in the past, forgetfulness and complacency are the order of the day. Are we safer today, or do we just feel safer? The terrorist leaders, scattered by our invasion of Afghanistan and by our stepped-up efforts at counterterrorism (including the NSA program), may even now be regrouping and preparing an attack that will produce destruction on a scale to dwarf September 11. Osama bin Laden's latest audiotape claims that Al Qaeda is planning new attacks on the United States.

The next terrorist attack (if there is one) will likely be mounted, as the last one was, from within the United States but orchestrated by leaders safely ensconced abroad. So suppose the NSA learns the phone number of a suspected terrorist in a foreign country. If the NSA just wants to listen to his calls to others abroad, fisa doesn't require a warrant. But it does if either (a) one party to the call is in the United States and the interception takes place here or (b) the party on the U.S. side of the conversation is a "U.S person"--primarily either a citizen or a permanent resident. If both parties are in the United States, *no* warrant can be issued; interception is prohibited. The problem with fisa is that, in order to get a warrant, the government must have grounds to believe the "U.S. person" it wishes to monitor is a foreign spy or a terrorist. Even if a person is here on a student or tourist visa, or on no visa, the government can't get a warrant to find out whether he is a terrorist; it must already have a reason to believe he is one.

As far as an outsider can tell, the NSA program is designed to fill these gaps by conducting warrantless interceptions of communications in which one party is in the United States (whether or not he is a "U.S. person") and the other party is abroad and suspected of being a terrorist. But there may be more to the program. Once a phone number in the United States was discovered to have been called by a terrorist suspect abroad, the NSA would probably want to conduct a computer search of all international calls to and from that local number for suspicious patterns or content. A computer search does not invade privacy or violate fisa, because a computer program is not a sentient being. But, if the program picked out a conversation that seemed likely to have intelligence value and an intelligence officer wanted to scrutinize it, he would come up against fisa's limitations. One can imagine an even broader surveillance program, in which *all* electronic communications were scanned by computers for suspicious messages that would then be scrutinized by an intelligence officer, but, again, he would be operating outside the framework created by fisa.

The benefits of such programs are easy to see. At worst, they might cause terrorists to abandon or greatly curtail their use of telephone, e-mail, and other means of communicating electronically with people in the United States. That would be a boon to us, because it is far more difficult for terrorist leaders to orchestrate an attack when communicating by courier. At best, our enemies might continue communicating electronically in the mistaken belief that, through use of code words or electronic encryption, they could thwart the NSA.

So the problem with fisa is that the surveillance it authorizes is unusable to discover who is a terrorist, as distinct from eavesdropping on known terrorists--yet the former is the more urgent task. Even to conduct fisa-compliant surveillance of non-U.S. persons, you have to know beforehand whether they are agents of a terrorist group, when what you really want to know is who those agents are.

Fisa's limitations are borrowed from law enforcement. When crimes are committed, there are usually suspects, and electronic surveillance can be used to nail them. In counterterrorist intelligence, you don't know whom to suspect--you need surveillance to find out. The recent leaks from within the FBI, expressing skepticism about the NSA program, reflect the FBI's continuing inability to internalize intelligence values. Criminal investigations are narrowly focused and usually fruitful. Intelligence is a search for the needle in the haystack. FBI agents don't like being asked to chase down clues gleaned from the NSA's interceptions, because 99 out of 100 (maybe even a higher percentage) turn out to lead nowhere. The agents think there are better uses of their time. Maybe so. But maybe we simply don't have enough

intelligence officers working on domestic threats.

<!--[if !vml]--><!--[endif]-->have no way of knowing how successful the NSA program has been or will be, though, in general, intelligence successes are underreported, while intelligence failures are fully reported. What seems clear is that fisa does not provide an adequate framework for counterterrorist intelligence. The statute was enacted in 1978, when apocalyptic terrorists scrambling to obtain weapons of mass destruction were not on the horizon. From a national security standpoint, the statute might as well have been enacted in 1878 to regulate the interception of telegrams. In the words of General Michael Hayden, director of NSA on September 11 and now the principal deputy director of national intelligence, the NSA program is designed to "detect and prevent," whereas "fisa was built for long-term coverage against known agents of an enemy power."

In the immediate aftermath of the September 11 attacks, Hayden, on his own initiative, expanded electronic surveillance by NSA without seeking fisa warrants. The United States had been invaded. There was fear of follow-up attacks by terrorists who might already be in the country. Hayden's initiative was within his military authority. But, if a provision of fisa that allows electronic surveillance without a warrant for up to 15 days following a declaration of war is taken literally (and I am not opining on whether it should or shouldn't be; I am not offering any legal opinions), Hayden was supposed to wait at least until September 14 to begin warrantless surveillance. That was the date on which Congress promulgated the Authorization for Use of Military Force, which the administration considers a declaration of war against Al Qaeda. Yet the need for such surveillance was at its most acute on September 11. And, if a war is raging inside the United States on the sixteenth day after an invasion begins and it is a matter of military necessity to continue warrantless interceptions of enemy communications with people in the United States, would anyone think the 15-day rule prohibitive?

We must not ignore the costs to liberty and privacy of intercepting phone calls and other electronic communications. No one wants strangers eavesdropping on his personal conversations. And wiretapping programs have been abused in the past. But, since the principal fear most people have of eavesdropping is what the government might do with the information, maybe we can have our cake and eat it, too: Permit surveillance intended to detect and prevent terrorist activity but flatly forbid the use of information gleaned by such surveillance for any purpose other than to protect national security. So, if the government discovered, in the course of surveillance, that an American was not a terrorist but was evading income tax, it could not use the discovery to prosecute him for tax evasion or sue him for back taxes. No such rule currently exists. But such a rule (if honored) would make more sense than requiring warrants for electronic surveillance.

Once you grant the legitimacy of surveillance aimed at detection rather than at gathering evidence of guilt, requiring a warrant to conduct it would be like requiring a warrant to ask people questions or to install surveillance cameras on city streets. Warrants are for situations where the police should not be allowed to do something (like search one's home) without particularized grounds for believing that there is illegal activity going on. That is too high a standard for surveillance designed to learn rather than to prove.

RICHARD A. POSNER is a federal circuit judge and the author of the forthcoming *Uncertain Shield: The U.S. Intelligence System in the Throes of Reform.*

RELATED LINKS

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Bush officials are frequently misunderstood. Allow them to

Con Text
Bush's new strategy for defending the war? Take

clarify Democratic quotes out of context

Bradbury, Steve

From: Bradbury, Steve
Sent: Tuesday, January 31, 2006 5:46 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'; 'Raul_F._Yanes [redacted (b) (6)]'
Cc: Harriet_Miers@who.eop.gov; Brett_C._Gerry@who.eop.gov; 'William_K._Kelley@who.eop.gov'; Sampson, Kyle; Eisenberg, John; Elwood, Courtney
Subject: AG's prepared statement & responses to Sen. Specter re NSA hearing
Attachments: Prepared_Statement_1_31.doc; Specter_Response_1_31_am3.doc

Attached for staffing purposes are drafts of (1) the Attorney General's prepared (written) statement for the February 6 Senate Judiciary Committee hearing on the NSA activities and (2) responses to the written questions posed by Chairman Specter in anticipation of the hearing. We intend [redacted (b) (5)]

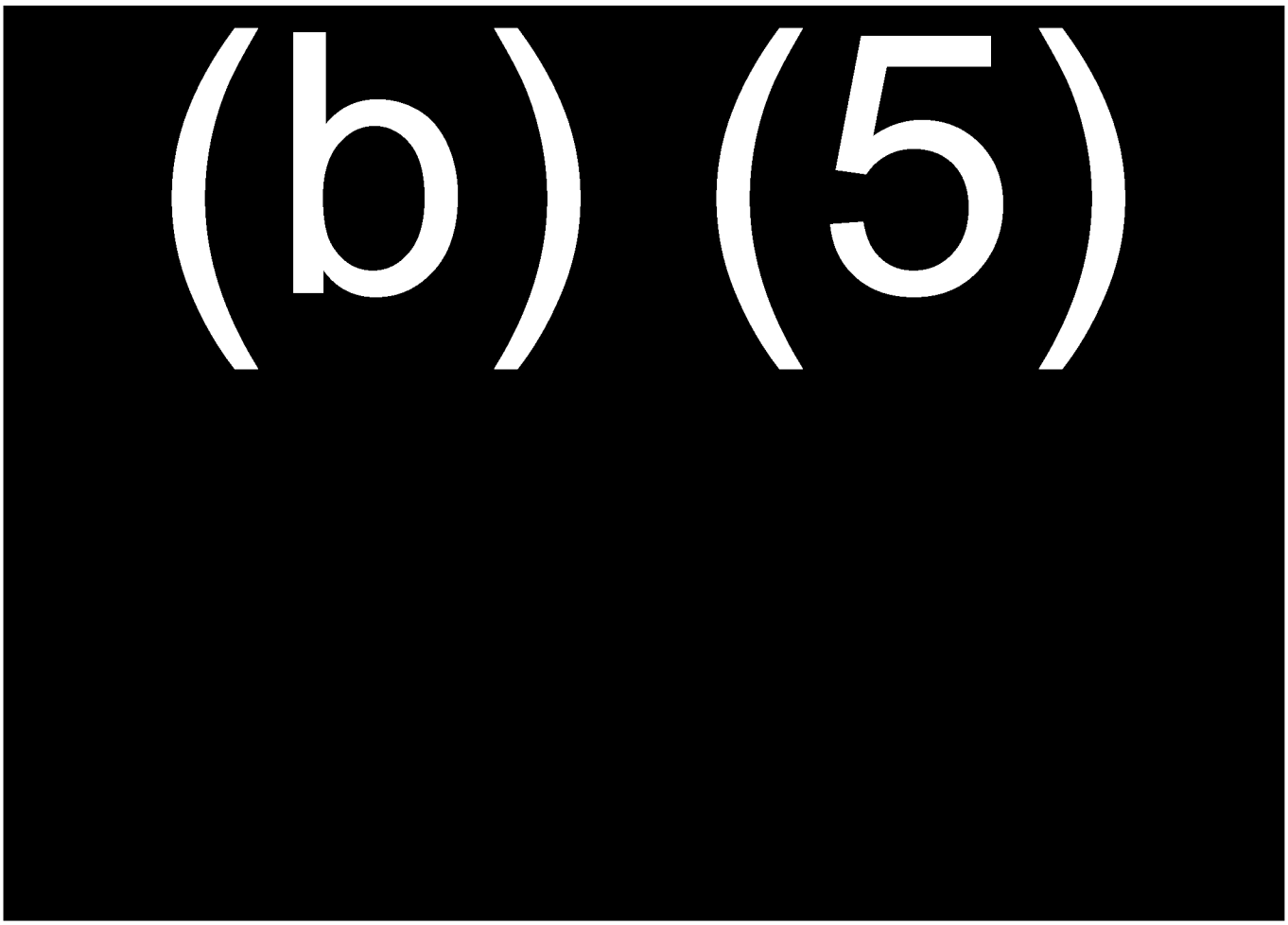
Raul_F._Yanes@ (b) (6)

From:	Raul_F._Yanes@ (b) (6)
Sent:	Wednesday, February 01, 2006 11:54 AM
To:	Bradbury, Steve; Brett_M._Kavanaugh@who.eop.gov
Cc:	Sampson, Kyle; Eisenberg, John; Elwood, Courtney; Harriet_Miers@who.eop.gov; Brett_C._Gerry@who.eop.gov; William_K._Kelley@who.eop.gov
Subject:	RE: AG's prepared statement & responses to Sen. Specter re NSA hearing

We will be clearing this through OMB's usual process.

-----Original Message-----
From: Steve.Bradbury@usdoj.gov [mailto:Steve.Bradbury@usdoj.gov]
Sent: Tuesday, January 31, 2006 5:47 PM

duplicate



-----Original Message-----
From: Miers, Harriet
Sent: Tuesday, May 02, 2006 7:50 PM
To: Perino, Dana M.; 'tasia.scolinos@usdoj.gov'; Gerry, Brett C.; Brown, Jamie E.
Cc: Mamo, Jeanie S.; 'Steve.Bradbury@usdoj.gov'; Kelley, William K.; Kavanaugh, Brett M.
Subject: RE: Boston globe

(b) (5)
[redacted]
.

-----Original Message-----
From: Perino, Dana M.
Sent: Tuesday, May 02, 2006 7:41 PM
To: 'tasia.scolinos@usdoj.gov'; Gerry, Brett C.; Miers, Harriet; Brown, Jamie E.
Cc: Mamo, Jeanie S.
Subject: Boston globe

[redacted] (b) (5) [redacted] Here are his additional questions:

How about real answers to questions such as:

- How can Bush assert that he believes the Constitution forbids Congress from giving executive branch officials the power to act independently of his direction (whistleblower provisions, empowering inspectors and researchers to do things without political interference), given a long line of precedents in which the Supreme Court has upheld such laws (Morrison, Humphrey's Executor, etc)? Same thing on flagging the affirmative action provisions - especially after the '03 Michigan Law School decision?

- In what way is Bush not using this tool as an override-proof line-item veto, given his otherwise inexplicable failure to veto a single bill over the past 5+ years unlike every other president in modern history (including Reagan/Bush41/Clinton)? If that is how it's functioning, under what constitutional theory is that justifiable?

- If that's not it, then what is the real explanation for why Bush is doing this so much more frequently than any predecessor? The talking point that previous administrations have also done this is not an answer, because it's a question of degree. He's broken all records - by far. And he's never issued a veto. Something new and important is obviously happening. What is it, and why?

Etc.

Bradbury, Steve

From:	Bradbury, Steve
Sent:	Friday, May 05, 2006 2:38 PM
To:	'Brett_M._Kavanaugh@who.eop.gov'
Cc:	Macklin, Kristi R
Subject:	FW: (b) (5) issues ...
Attachments:	tmp.htm; (b) (5) Final.doc

Brett: Attached is summary of (b) (5) cases and materials. I hope this is helpful.

-----Original Message-----
From: Macklin, Kristi R
Sent: Friday, May 05, 2006 2:18 PM
To: Bradbury, Steve
Subject: FW: (b) (5) issues ...

Do you have any recommendations?

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov [mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Friday, May 05, 2006 2:14 PM
To: Brett_C._Gerry@who.eop.gov
Cc: Macklin, Kristi R
Subject: (b) (5) issues ...

(b) (5)

duplicate

Macklin, Kristi R

From:	Macklin, Kristi R
Sent:	Friday, May 05, 2006 4:17 PM
To:	Macklin, Kristi R; Brand, Rachel; Cook, Elisebeth C; Jaffer, Jamil N; Sampson, Kyle; 'Neomi_J._Rao@who.eop.gov'; 'Grant_Dixton@who.eop.gov'; 'Brett_C._Gerry@who.eop.gov'; 'Chris Bartolomucci (HBartolomucci@HHLAW.com)'; 'Brian.Benczkowski@mail.house.gov'; 'Raul_F._Yanes@omb.eop.gov'; Richard Klingler (Richard_D._Klingler@who.eop.gov); Bradbury, Steve
Cc:	'William_K._Kelley@who.eop.gov'; 'Brett_M._Kavanaugh@who.eop.gov'; John Persinger (John_M._Persinger@who.eop.gov); 'Kristen_K._Slaughter@who.eop.gov'
Subject:	RE: BK Moot - revised
Attachments:	BK Moots.doc

Attached is a revised chart noting the addition of Steve Bradbury and Richard Klingler. The moot times are included on the chart. The moots will be held in Room 180 of the EEOB each day. Over the weekend, if you are driving and are not a WH passholder (and have already provided me with your information), please enter at 17th and E - you will be able to park on State Place, which will be the first driveway after entering the gate on the left. My cell phone number i (b) (6) .

BK Moots: 180 EEOB

Saturday: 11:00 – 2:00	**Sunday: 1:30 -4:30**	**Monday: 11:00 – 2:00**
Kristi (b) (5)	Kristi (b) (5)	Kristi (b) (5)
Beth (b) (5)	Beth (b) (5)	Beth (b) (5)
	Rachel (b) (5)	Rachel (b) (5)
Jamil (b) (5)		
		Kyle (b) (5)
	Neomi (b) (5)	Neomi (b) (5)
Grant (b) (5)		
Steve Bradbury (b) (5)		
	Brett (b) (5)	Brett (b) (5)
		Richard Klingler (b) (5)
		Raul (b) (5)
	Chris B. (b) (5)	
Brian (b) (5)	Brian (b) (5)	

Format: We'll plan on doing 10 minute rounds, probably with 2 rounds each. You should cover the topic you are assigned but can ask additional questions on other topic areas if time allows. You should stay out of other participants' topics, but can follow up on other Senators questions on your time. Please don't jump in on another questioner. If you see a big gap in topics, let me know.

(b) (5)

- [redacted] (b) (5)
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- [redacted] (b) (5)
- [redacted]
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- [redacted] (b) (5)
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[redacted]

- [redacted]
- [redacted]

[redacted] (b) (5)

- [redacted]
- [redacted]
- [redacted]

Bradbury, Steve

From: Bradbury, Steve
Sent: Friday, May 05, 2006 5:08 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Cc: Macklin, Kristi R
Subject: Presidental Signing Statements
Attachments: Presidential Signing Statements (5-5-2006).pdf

Brett: [redacted] (b) (5) [redacted]. Please note that DOJ is sharing these talking points with reporters and others outside the Executive Branch. Steve

PRESIDENTIAL SIGNING STATEMENTS

Like many Presidents before him, President Bush has issued statements on signing legislation into law. Presidents have used these "signing statements" for a variety of purposes. Sometimes Presidents use signing statements to explain to the public, and more particularly to interested constituencies, what the President understands to be the likely effects of the bill.

Presidents throughout history also have issued what some have called "constitutional" signing statements, and it is this use of the signing statement that has recently been the subject of public attention. Presidents are sworn to "preserve, protect, and defend the Constitution," and thus are responsible for ensuring that the manner in which they enforce acts of Congress is consistent with America's founding document. Presidents have long used signing statements for the purpose of "informing Congress and the public that the Executive believes that a particular provision would be unconstitutional in certain of its applications," Office of Legal Counsel, *The Legal Significance of Presidential Signing Statements*, 17 Op. O.L.C. 131, 131 (1993) (*available at* http://www.usdoj.gov/olc/signing.htm); Office of Legal Counsel, *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 202 (1994) ("[E]very President since Eisenhower has issued signing statements in which he stated that he would refuse to execute unconstitutional provisions") (*available at* http://www.usdoj.gov/olc/nonexcut.htm), or for stating that the President will interpret or execute provisions of a law in a manner that would avoid constitutional infirmities. As Assistant Attorney General Walter Dellinger noted early during the Clinton Administration, "[s]igning statements have *frequently* expressed the President's intention to construe or administer a statute in a particular manner (*often* to save the statute from unconstitutionality)." 17 Op. O.L.C. at 132 (emphasis added).

President Bush, like many of his predecessors dating back at least to President James Monroe, has issued constitutional signing statements. The constitutional concerns identified in these statements often concern provisions of law that could be read to infringe explicit constitutional provisions (such as the Recommendations Clause, the Presentment Clauses, and the Appointments Clause) or to violate specific constitutional holdings of the Supreme Court. Common examples are provided below.

President Bush's use of "signing statements" is consistent with tradition.

- Presidents have issued constitutional signing statements since the early years of the Republic. One scholar identifies President James Monroe as the first to issue a constitutional signing statement, when he stated that he would construe a statutory provision in a manner that did not conflict with his prerogative to appoint officers. *See* Christopher Kelley, *A Comparative Look at the Constitutional Signing Statement* 5 (2003) (*available at* http://mpsa.indiana.edu/conf2003papers/1031858822). Louis Fisher of the Congressional Research Service notes that in 1830, Andrew Jackson "signed a bill and simultaneously sent to Congress a message" setting forth his interpretation "that restricted the reach of

the statute." 17 Op. O.L.C. at 138 (quoting Louis Fisher, *Constitutional Conflicts between Congress and the President* 128 (3d ed. 1991)). Assistant Attorney General Dellinger conducted a thorough study and concluded that "signing statements of this kind can be found as early as the Jackson and Tyler Administrations, and later Presidents, including Lincoln, Andrew Johnson, Theodore Roosevelt, Wilson, Franklin Roosevelt, Truman, Eisenhower, Lyndon Johnson, Nixon, Ford and Carter, also engaged in the practice." 17 Op. O.L.C. at 138.

- In recent presidencies, the use of the constitutional signing statement has become more common. While the task of counting signing statements is inexact because of difficulties in characterizing some statements, Presidents Reagan, George H.W. Bush, Clinton, and George W. Bush have issued constitutional signing statements with respect to similar numbers of laws. According to one scholar, President Reagan issued constitutional signing statements with respect to 71 laws; George H.W. Bush, 146; Clinton, 105. *See* Kelley, *supra*, at 18. By our count, President Bush has issued such statements with respect to 104 laws as of January of this year.

The practice of issuing signing statements does not, as some critics have charged, mean that a President has acted contrary to law.

- The practice is consistent with, and derives from, the President's constitutional obligations, and is an ordinary part of a respectful constitutional "dialogue" between the Branches.

- The Constitution requires the President to take an oath to "preserve, protect, and defend the Constitution," and directs him to "take care that the Laws be faithfully executed." When Congress passes legislation containing provisions that could be construed or applied in certain cases in a manner as contrary to well settled constitutional principles, the President can and should take steps to ensure that such laws are interpreted and executed in a manner consistent with the Constitution.

    - The Constitution contemplates that Presidents interpret laws in the course of implementing them. The Supreme Court specifically has stated that the President has the power to "supervise and guide [Executive officers'] construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone," *Myers v. United States*, 272 U.S. 52, 135 (1926); *see also Bowsher v. Synar*, 478 U.S. 714, 733 (1986) ("Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law.").

- Employing signing statements to advise Congress of constitutional objections is actually *more respectful* of Congress's role as an equal branch of government than the alternatives proposed by some critics.

    - Recent administrations, including the Reagan, George H.W. Bush, and Clinton Administrations, consistently have taken the position that "the Constitution provides [the President] with the authority to decline to enforce a clearly unconstitutional law." 17 Op. O.L.C. at 133 (opinion of Assistant Attorney General Dellinger) (noting that understanding is "consistent with the view of the Framers" and has been endorsed by many members of the Supreme Court); 18 Op. O.L.C. at 199 (opinion of Assistant Attorney General Dellinger) (noting that "consistent and substantial executive practice" since "at least 1860 assert[s] the President's authority to decline to effectuate enactments that the President views as unconstitutional"); *Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation*, 4A Op. O.L.C. 55, 59 (1980) (opinion of Benjamin R. Civiletti, Attorney General to President Carter) ("the President's constitutional duty does not require him to execute unconstitutional statutes"); *see also* 2 Debates in the Several State Conventions on the Adoption of the Federal Constitution 446 (2d ed. 1836) (noting that just as judges have a duty "to pronounce [an unconstitutional law] void . . . In the same manner, the President of the United States could . . . refuse to carry into effect an act that violates the Constitution.") (statement of James Wilson, signer of Constitution from Pennsylvania). Rather than tacitly placing limitations on the enforcement of provisions (or declining to enforce them), as has been done in the past, signing statements promote a constitutional dialogue with Congress by openly stating the interpretation that the President will give certain provisions.

    - It is not the case, as some have suggested, that the President's only option when confronting a bill containing a provision that is constitutionally problematic is to veto the bill. Presidents Jefferson (*e.g.*, the Louisiana Purchase), Lincoln, Theodore Roosevelt, Wilson, Franklin Roosevelt, Truman, Eisenhower, Kennedy, Lyndon Johnson, Ford, and Carter have signed legislation rather than vetoing it despite concerns that the legislation posed constitutional concerns. *See* 17 Op. O.L.C. at 132 nn.3 & 5, 134, 138; *see INS v. Chadha*, 462 U.S. 919, 942 n.13 (1983) ("it is not uncommon for Presidents to approve legislation containing parts which are objectionable on constitutional grounds").

- Compared to vetoing a bill, giving constitutionally infirm provisions a "saving" interpretation through a signing statement gives fuller effect to the wishes of Congress by giving complete effect to the vast majority of a law's provisions. This approach is not, as some have suggested, an affront to Congress. Instead, it gives effect to the well established legal presumption that Congress did not enact an unconstitutional provision. As Assistant Attorney General Dellinger explained, this practice is "analogous to the Supreme Court's practice of construing statutes, where possible, to avoid holding them unconstitutional." A veto, by comparison, would render all of Congress's work a nullity, even if, as is often the case, the constitutional concerns involve relatively minor provisions of major legislation.

- This approach is also fully consistent with past practice. As Assistant Attorney General Dellinger explained early during the Clinton Administration: "In light of our constitutional history, we do not believe that the President is under any duty to veto legislation containing a constitutionally infirm provision." Rather, giving problematic provisions a "saving" construction in a signing statement "serve[s] legitimate and defensible purposes." 17 Op. O.L.C. at 137; *see also* 18 Op. O.L.C. at 202-203 ("the President has the authority to sign legislation containing desirable elements while refusing to execute a constitutionally defective position").

Many of President Bush's constitutional signing statements have sought to preserve three specific constitutional provisions that are sometimes overlooked in the legislative process: the Recommendations Clause; the Presentment Clauses; and the Appointments Clause. While critics claim that the President has used signing statements in "unprecedented fashion," his constitutional signing statements are completely consistent with those of his predecessors.

- **Recommendations Clause**. Presidents commonly have raised objections when Congress purports to *require* the President to submit legislative recommendations, because the Constitution vests the President with discretion to do so when he sees fit, stating that he "shall from time to time . . . recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient." U.S. Const., Art. II, § 3, cl. 1.

    - President Bush raised this objection 55 times in his 104 constitutional signing statements.
    - Bush: "To the extent that provisions of the Act, such as sections 614 and 615, purport to require or regulate submission by executive branch officials of legislative recommendations to the Congress, the executive branch shall construe such provisions in a manner consistent with the President's constitutional authority to

supervise the unitary executive branch and to submit for congressional consideration such measures as the President judges necessary and expedient." *Statement on Signing the Intelligence Authorization Act for Fiscal Year 2005* (Dec. 23, 2004).

- Clinton: "Because the Constitution preserves to the President the authority to decide whether and when the executive branch should recommend new legislation, Congress may not require the President or his subordinates to present such recommendations (section 6). I therefore direct executive branch officials to carry out these provisions in a manner that is consistent with the President's constitutional responsibilities." *Statement on Signing the Shark Finning Prohibition Act* (Dec. 26, 2000).

- **Presentment Clauses/Bicameralism/*INS v. Chadha*.** Presidents commonly raise objections when Congress purports to authorize a single House of Congress to take action on a matter in violation of the well established rule, embodied in the Supreme Court's decision in *INS v. Chadha*, 462 U.S. 919, 958 (1983), that Congress can act only by "passage by a majority of both Houses and presentment to the President." *See* U.S. Const., Art. I, § 7 (requiring that bills and resolutions pass both Houses before being presented to the President).

    - President Bush raised this objection 44 times in his 104 constitutional signing statements.
    - Bush: "The executive branch shall construe certain provisions of the Act that purport to require congressional committee approval for the execution of a law as calling solely for notification, as any other construction would be inconsistent with the constitutional principles enunciated by the Supreme Court of the United States in *INS v. Chadha*." *Statement on Signing the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act* (Dec. 30, 2005).
    - Clinton: "There are provisions in the Act that purport to condition my authority or that of certain officers to use funds appropriated by the Act on the approval of congressional committees. My Administration will interpret such provisions to require notification only, since any other interpretation would contradict the Supreme Court ruling in *INS v. Chadha*." *Statement on Signing the Consolidated Appropriations Act, FY 2001* (Dec. 21, 2000).

- **Appointments Clause.** The Appointments Clause of the Constitution, U.S. Const., Art. II, § 2, provides that the President, with the advice and consent of the Senate, shall appoint principal officers of the United States (heads of agencies, for example); and that "inferior officers" can be appointed *only* by the President, by the heads of "Departments" (agencies), or by the courts. Presidents commonly raise an objection when Congress purports to restrict the President's ability to

appoint officers, or to vest entities other than the President, agency heads, or courts with the power to appoint officers.

- President Bush raised this objection 19 times in his 104 constitutional signing statements.
- Bush: "The executive branch shall construe the described qualifications and lists of nominees under section 4305(b) as recommendations only, consistent with the provisions of the Appointments Clause of the Constitution." *Statement on Signing the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users* (Aug. 10, 2005).
- Clinton: "Under section 332(b)(1) of the bill, the President would be required to make such appointments from lists of candidates recommended by the National Association of Insurance Commissioners. The Appointments Clause, however, does not permit such restrictions to be imposed upon the President's power of appointment. I therefore do not interpret the restrictions of section 332(b)(1) as binding and will regard any such lists of recommended candidates as advisory only." *Statement on Signing Legislation To Reform the Financial System* (Nov. 12, 1999).

Many of President Bush's constitutional signing statements have sought to preserve the confidentiality of national security information.

- The Supreme Court has held that the Constitution gives the President authority to control the access of Executive Branch officials to classified information. The President's "authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information flows primarily from this constitutional investment of power in the President and *exists quite apart from any explicit congressional grant.*" *Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988). Presidents commonly have issued signing statements when newly enacted provisions might be construed to involve the disclosure of sensitive information.

  - President Bush raised this objection 60 times in his 104 constitutional signing statements.
  - Bush: "Sections 2(5) and 2(6) of the Act purport to require the annual report of the Secretary of the Treasury to include a description of discussions between the United States and Mexican governments. In order to avoid intrusion into the President's negotiating authority and ability to maintain the confidentiality of diplomatic negotiations, the executive branch will not interpret this provision to require the disclosure of either the contents of diplomatic communications or specific plans for particular negotiations in the future." *Statement on Signing Legislation on*

Amendments to the Mexico-United States Agreement on the Border Environment Cooperation Commission and the North American Development Bank (Apr. 5, 2004).

- Clinton: "A number of other provisions of this bill raise serious constitutional concerns. Because the President is the Commander in Chief and the Chief Executive under the Constitution, the Congress may not interfere with the President's duty to protect classified and other sensitive national security information or his responsibility to control the disclosure of such information by subordinate officials of the executive branch (sections 1042, 3150, and 3164) . . . . To the extent that these provisions conflict with my constitutional responsibilities in these areas, I will construe them where possible to avoid such conflicts, and where it is impossible to do so, I will treat them as advisory. I hereby direct all executive branch officials to do likewise." *Statement on Signing the National Defense Authorization Act for Fiscal Year 2000* (Oct. 5, 1999).
- Eisenhower: "I have signed this bill on the express premise that the three amendments relating to disclosure are not intended to alter and cannot alter the recognized Constitutional duty and power of the Executive with respect to the disclosure of information, documents, and other materials. Indeed, any other construction of these amendments would raise grave Constitutional questions under the historic Separation of Powers Doctrine." Pub. Papers of Dwight D. Eisenhower 549 (1959).

President Bush also has used signing statements to safeguard the President's well-established role in the Nation's foreign affairs and the President's wartime power. These signing statements also are in keeping with the practice of his predecessors.

- While some critics have argued that President Bush has increased the use of Presidential signing statements, any such increase must be viewed in light of current events and the legislative response to those events. While President Bush has issued numerous signing statements of this sort, the significance of legislation affecting national security has increased markedly since the September 11th attacks and Congress's authorization of the use of military force against the terrorists who perpetrated those attacks. Even before the War on Terror, President Clinton issued numerous such statements. One scholar identified this objection as the most common use of the constitutional signing statements by Presidents Clinton and George H.W. Bush, because it is in this area "where presidential power is at its zenith." Kelley, *supra*, at 18.

    - Bush: "Section 107 of the Act purports to direct negotiations with foreign governments and international organizations. The executive branch shall implement section 107 in a manner consistent with the Constitution's grant to the President of the

authority to conduct the foreign affairs of the United States." *Statement on Signing the North Korean Human Rights Act of 2004* (Oct. 18, 2004).

- Bush: "The executive branch shall construe subsection 1025(d) of the Act, which purports to determine the command relationships among certain elements of the U.S. Navy forces, as advisory, as any other construction would conflict with the President's constitutional authority as Commander in Chief." *Statement on Signing the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act, 2005* (May 11, 2005).
- Clinton: "Section 610 of the Commerce/Justice/State appropriations provision prohibits the use of appropriated funds for the participation of U.S. armed forces in a U.N. peacekeeping mission under foreign command unless the President's military advisers have recommended such involvement and the President has submitted such recommendations to the Congress. The 'Contributions for International Peacekeeping Activities' provision requires a report to the Congress prior to voting for a U.N. peacekeeping mission. These provisions unconstitutionally constrain my diplomatic authority and my authority as Commander in Chief, and I will apply them consistent with my constitutional responsibilities." *Statement on Signing the Omnibus Consolidated and Emergency Supplemental Appropriations Act* (Oct. 23, 1998).
- Clinton: "I also oppose language in the Act related to the Kyoto Protocol. . . . My Administration's objections to these and other language provisions have been made clear in previous statements of Administration policy. I direct the agencies to construe these provisions to be consistent with the President's constitutional prerogatives and responsibilities and where such a construction is not possible, to treat them as not interfering with those prerogatives and responsibilities." *Statement on Signing the Departments of Commerce, Justice, State, the Judiciary, and Related Agencies Appropriations Act* (Dec. 21, 2000).
- Carter: Congress "cannot mandate the establishment of consular relations at a time and place unacceptable to the President." *Statement on Signing the FY 1980-81 Department of State Appropriations Act*, *see* 2 Pub. Papers of Jimmy Carter 1434 (1979).
- Nixon: Mansfield Amendment setting a final date for the withdrawal of U.S. Forces from Indochina was "without binding force or effect." Pub. Papers of Richard Nixon 1114 (1971).
- Truman: "I do not regard this provision [involving loans to Spain] as a directive, which would be unconstitutional, but instead as an authorization, in addition to the authority already in existence under which loans to Spain may be made." *Statement on Signing*

the General Appropriations Act of 1951, Pub. Papers of Harry S. Truman 616 (1950).

- Wilson: Expressed an intention not to enforce a provision on the grounds it was unconstitutional because doing so "would amount to nothing less than the breach or violation" of some thirty-two treaties. Louis Fisher, *Constitutional Conflicts between Congress and the President* 134 (4th ed. 1997).

Brett_M._Kavanaugh@who.eop.gov

From:	Brett_M._Kavanaugh@who.eop.gov
Sent:	Friday, May 12, 2006 4:36 PM
To:	Bradbury, Steve
Subject:	RE:

Steve: Belated thanks for this kind email. I am glad to be on to the next step!

-----Original Message-----
From: Steve.Bradbury@usdoj.gov [mailto:Steve.Bradbury@usdoj.gov]
Sent: Tuesday, May 09, 2006 6:00 PM
To: Kavanaugh, Brett M.
Subject:

Brett: Congratulations on successfully completing a second hearing.
You did a great job today!

Brett_M._Kavanaugh@who.eop.gov

From: Brett_M._Kavanaugh@who.eop.gov
Sent: Monday, May 29, 2006 3:11 PM
To: Bradbury, Steve
Subject: RE: The Newest Judge on the D.C. Circuit

Steve:

Thanks for the kind words. I have appreciated and learned from the work ethic, sound judgment, and intellectual integrity you have demonstrated in your work at K&E and in the government. I look forward to seeing you soon.

Brett

-----Original Message-----
From: Steve.Bradbury@usdoj.gov [mailto:Steve.Bradbury@usdoj.gov]
Sent: Friday, May 26, 2006 12:00 PM
To: Kavanaugh, Brett M.
Subject: FW: The Newest Judge on the D.C. Circuit

Congratulations to you, Brett, and to us all!!! Phenomenal news for the Republic!!!

From: Elwood, John
Sent: Friday, May 26, 2006 11:54 AM
To: OLC_Attorneys
Subject: The Newest Judge on the D.C. Circuit

http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm
.cfm?congress=109&session=2&vote=00159

RECORDS RELEASED 2018-09-17

Bradbury, Steve

From: Bradbury, Steve
Sent: Thursday, January 19, 2006 12:17 PM
To: 'benjamin.powell@dni.gov'; 'BellingerJB@state.gov'; 'hayneswj [redacted]'; Dan_Bartlett@who.eop.gov; 'Harriet_Miers@who.eop.gov'; Raul_F._Yanes [redacted]; 'John_B._Wiegmann@nsc.eop.gov'; 'John_M._Mitnick@who.eop.gov' [redacted]; 'Brett_M._Kavanaugh@who.eop.gov'; 'Brett_C._Gerry@who.eop.gov'; William_K._Kelley@who.eop.gov
Cc: Sampson, Kyle; Scolinos, Tasia; Moschella, William; Roehrkasse, Brian
Subject: DOJ white paper on NSA activities
Attachments: White Paper on NSA Legal Authorities.pdf

Attached is an advance copy in PDF form of the DOJ white paper discussing the legal authorities for the NSA activities described by the President. The Attorney General will be sending this paper to Congress this afternoon and it will thereafter be publicly released.

U.S. Department of Justice

Washington, D.C. 20530

January 19, 2006

LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT

As the President has explained, since shortly after the attacks of September 11, 2001, he has authorized the National Security Agency ("NSA") to intercept international communications into and out of the United States of persons linked to al Qaeda or related terrorist organizations. The purpose of these intercepts is to establish an early warning system to detect and prevent another catastrophic terrorist attack on the United States. This paper addresses, in an unclassified form, the legal basis for the NSA activities described by the President ("NSA activities").

SUMMARY

On September 11, 2001, the al Qaeda terrorist network launched the deadliest foreign attack on American soil in history. Al Qaeda's leadership repeatedly has pledged to attack the United States again at a time of its choosing, and these terrorist organizations continue to pose a grave threat to the United States. In response to the September 11th attacks and the continuing threat, the President, with broad congressional approval, has acted to protect the Nation from another terrorist attack. In the immediate aftermath of September 11th, the President promised that "[w]e will direct every resource at our command—every means of diplomacy, every tool of intelligence, every tool of law enforcement, every financial influence, and every weapon of war—to the destruction of and to the defeat of the global terrorist network." President Bush Address to a Joint Session of Congress (Sept. 20, 2001). The NSA activities are an indispensable aspect of this defense of the Nation. By targeting the international communications into and out of the United States of persons reasonably believed to be linked to al Qaeda, these activities provide the United States with an early warning system to help avert the next attack. For the following reasons, the NSA activities are lawful and consistent with civil liberties.

The NSA activities are supported by the President's well-recognized inherent constitutional authority as Commander in Chief and sole organ for the Nation in foreign affairs to conduct warrantless surveillance of enemy forces for intelligence purposes to detect and disrupt armed attacks on the United States. The President has the chief responsibility under the Constitution to protect America from attack, and the Constitution gives the President the authority necessary to fulfill that solemn responsibility. The President has made clear that he will exercise all authority available to him, consistent with the Constitution, to protect the people of the United States.

In the specific context of the current armed conflict with al Qaeda and related terrorist organizations, Congress by statute has confirmed and supplemented the President's recognized authority under Article II of the Constitution to conduct such warrantless surveillance to prevent further catastrophic attacks on the homeland. In its first legislative response to the terrorist attacks of September 11th, Congress authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" of September 11th in order to prevent "any future acts of international terrorism against the United States." Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (Sept. 18, 2001) (reported as a note to 50 U.S.C.A. § 1541) ("AUMF"). History conclusively demonstrates that warrantless communications intelligence targeted at the enemy in time of armed conflict is a traditional and fundamental incident of the use of military force authorized by the AUMF. The Supreme Court's interpretation of the AUMF in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), confirms that Congress in the AUMF gave its express approval to the military conflict against al Qaeda and its allies and thereby to the President's use of all traditional and accepted incidents of force in this current military conflict—including warrantless electronic surveillance to intercept enemy communications both at home and abroad. This understanding of the AUMF demonstrates Congress's support for the President's authority to protect the Nation and, at the same time, adheres to Justice O'Connor's admonition that "a state of war is not a blank check for the President," *Hamdi*, 542 U.S. at 536 (plurality opinion), particularly in view of the narrow scope of the NSA activities.

The AUMF places the President at the zenith of his powers in authorizing the NSA activities. Under the tripartite framework set forth by Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring), Presidential authority is analyzed to determine whether the President is acting in accordance with congressional authorization (category I), whether he acts in the absence of a grant or denial of authority by Congress (category II), or whether he uses his own authority under the Constitution to take actions incompatible with congressional measures (category III). Because of the broad authorization provided in the AUMF, the President's action here falls within category I of Justice Jackson's framework. Accordingly, the President's power in authorizing the NSA activities is at its height because he acted "pursuant to an express or implied authorization of Congress," and his power "includes all that he possesses in his own right plus all that Congress can delegate." *Id.* at 635.

The NSA activities are consistent with the preexisting statutory framework generally applicable to the interception of communications in the United States—the Foreign Intelligence Surveillance Act ("FISA"), as amended, 50 U.S.C. §§ 1801-1862 (2000 & Supp. II 2002), and relevant related provisions in chapter 119 of title 18.[1] Although FISA generally requires judicial approval of electronic surveillance, FISA also contemplates that Congress may authorize such surveillance by a statute other than FISA. *See* 50 U.S.C. § 1809(a) (prohibiting any person from intentionally "engag[ing] . . . in electronic surveillance under color of law except as authorized

[1] Chapter 119 of title 18, which was enacted by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. §§ 2510-2521 (2000 & West Supp. 2005), is often referred to as "Title III."

by statute"). The AUMF, as construed by the Supreme Court in *Hamdi* and as confirmed by the history and tradition of armed conflict, is just such a statute. Accordingly, electronic surveillance conducted by the President pursuant to the AUMF, including the NSA activities, is fully consistent with FISA and falls within category I of Justice Jackson's framework.

Even if there were ambiguity about whether FISA, read together with the AUMF, permits the President to authorize the NSA activities, the canon of constitutional avoidance requires reading these statutes in harmony to overcome any restrictions in FISA and Title III, at least as they might otherwise apply to the congressionally authorized armed conflict with al Qaeda. Indeed, were FISA and Title III interpreted to impede the President's ability to use the traditional tool of electronic surveillance to detect and prevent future attacks by a declared enemy that has already struck at the homeland and is engaged in ongoing operations against the United States, the constitutionality of FISA, as applied to that situation, would be called into very serious doubt. In fact, if this difficult constitutional question had to be addressed, FISA would be unconstitutional as applied to this narrow context. Importantly, the FISA Court of Review itself recognized just three years ago that the President retains constitutional authority to conduct foreign surveillance apart from the FISA framework, and the President is certainly entitled, at a minimum, to rely on that judicial interpretation of the Constitution and FISA.

Finally, the NSA activities fully comply with the requirements of the Fourth Amendment. The interception of communications described by the President falls within a well-established exception to the warrant requirement and satisfies the Fourth Amendment's fundamental requirement of reasonableness. The NSA activities are thus constitutionally permissible and fully protective of civil liberties.

BACKGROUND

A. THE ATTACKS OF SEPTEMBER 11, 2001

On September 11, 2001, the al Qaeda terrorist network launched a set of coordinated attacks along the East Coast of the United States. Four commercial jetliners, each carefully selected to be fully loaded with fuel for a transcontinental flight, were hijacked by al Qaeda operatives. Two of the jetliners were targeted at the Nation's financial center in New York and were deliberately flown into the Twin Towers of the World Trade Center. The third was targeted at the headquarters of the Nation's Armed Forces, the Pentagon. The fourth was apparently headed toward Washington, D.C., when passengers struggled with the hijackers and the plane crashed in Shanksville, Pennsylvania. The intended target of this fourth jetliner was evidently the White House or the Capitol, strongly suggesting that its intended mission was to strike a decapitation blow on the Government of the United States — to kill the President, the Vice President, or Members of Congress. The attacks of September 11th resulted in approximately 3,000 deaths — the highest single-day death toll from hostile foreign attacks in the Nation's history. These attacks shut down air travel in the United States, disrupted the Nation's financial markets and government operations, and caused billions of dollars in damage to the economy.

On September 14, 2001, the President declared a national emergency "by reason of the terrorist attacks at the World Trade Center, New York, New York, and the Pentagon, and the continuing and immediate threat of further attacks on the United States." Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001). The same day, Congress passed a joint resolution authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" of September 11th, which the President signed on September 18th. AUMF § 2(a). Congress also expressly acknowledged that the attacks rendered it "necessary and appropriate" for the United States to exercise its right "to protect United States citizens both at home and abroad," and in particular recognized that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." *Id.* pmbl. Congress emphasized that the attacks "continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States." *Id.* The United States also launched a large-scale military response, both at home and abroad. In the United States, combat air patrols were immediately established over major metropolitan areas and were maintained 24 hours a day until April 2002. The United States also immediately began plans for a military response directed at al Qaeda's base of operations in Afghanistan. Acting under his constitutional authority as Commander in Chief, and with the support of Congress, the President dispatched forces to Afghanistan and, with the assistance of the Northern Alliance, toppled the Taliban regime.

As the President made explicit in his Military Order of November 13, 2001, authorizing the use of military commissions to try terrorists, the attacks of September 11th "created a state of armed conflict." Military Order § l(a), 66 Fed. Reg. 57,833 (Nov. 13, 2001). Indeed, shortly after the attacks, NATO—for the first time in its 46-year history—invoked article 5 of the North Atlantic Treaty, which provides that an "armed attack against one or more of [the parties] shall be considered an attack against them all." North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246; *see also* Statement by NATO Secretary General Lord Robertson (Oct. 2, 2001), *available at* http://www.nato.int/docu/speech/2001/s011002a.htm ("[I]t has now been determined that the attack against the United States on 11 September was directed from abroad and shall therefore be regarded as an action covered by Article 5 of the Washington Treaty . . . ."). The President also determined in his Military Order that al Qaeda and related terrorists organizations "possess both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented, will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States Government," and concluded that "an extraordinary emergency exists for national defense purposes." Military Order, § l(c), (g), 66 Fed. Reg. at 57,833-34.

B. THE NSA ACTIVITIES

Against this unfolding background of events in the fall of 2001, there was substantial concern that al Qaeda and its allies were preparing to carry out another attack within the United States. Al Qaeda had demonstrated its ability to introduce agents into the United States undetected and to perpetrate devastating attacks, and it was suspected that additional agents were

likely already in position within the Nation's borders. As the President has explained, unlike a conventional enemy, al Qaeda has infiltrated "our cities and communities and communicated from here in America to plot and plan with bin Laden's lieutenants in Afghanistan, Pakistan and elsewhere." Press Conference of President Bush (Dec. 19, 2005), *available at* http://www.white-house.gov/news/releases/2005/12/20051219-2.html ("President's Press Conference"). To this day, finding al Qaeda sleeper agents in the United States remains one of the paramount concerns in the War on Terror. As the President has explained, "[t]he terrorists want to strike America again, and they hope to inflict even more damage than they did on September the 11th." *Id.*

The President has acknowledged that, to counter this threat, he has authorized the NSA to intercept international communications into and out of the United States of persons linked to al Qaeda or related terrorist organizations. The same day, the Attorney General elaborated and explained that in order to intercept a communication, there must be "a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda." Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence, *available at* http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html (Dec. 19, 2005) (statement of Attorney General Gonzales). The purpose of these intercepts is to establish an early warning system to detect and prevent another catastrophic terrorist attack on the United States. The President has stated that the NSA activities "ha[ve] been effective in disrupting the enemy, while safeguarding our civil liberties." President's Press Conference.

The President has explained that the NSA activities are "critical" to the national security of the United States. *Id.* Confronting al Qaeda "is not simply a matter of [domestic] law enforcement"—we must defend the country against an enemy that declared war against the United States. *Id.* To "effectively detect enemies hiding in our midst and prevent them from striking us again . . . we must be able to act fast and to detect conversations [made by individuals linked to al Qaeda] so we can prevent new attacks." *Id.* The President pointed out that "a two-minute phone conversation between somebody linked to al Qaeda here and an operative overseas could lead directly to the loss of thousands of lives." *Id.* The NSA activities are intended to help "connect the dots" between potential terrorists. *Id.* In addition, the Nation is facing "a different era, a different war . . . people are changing phone numbers . . . and they're moving quick[ly]." *Id.* As the President explained, the NSA activities "enable[] us to move faster and quicker. And that's important. We've got to be fast on our feet, quick to detect and prevent." *Id.* "This is an enemy that is quick and it's lethal. And sometimes we have to move very, very quickly." *Id.* FISA, by contrast, is better suited "for long-term monitoring." *Id.*

As the President has explained, the NSA activities are "carefully reviewed approximately every 45 days to ensure that [they are] being used properly." *Id.* These activities are reviewed for legality by the Department of Justice and are monitored by the General Counsel and Inspector General of the NSA to ensure that civil liberties are being protected. *Id.* Leaders in Congress from both parties have been briefed more than a dozen times on the NSA activities.

C. THE CONTINUING THREAT POSED BY AL QAEDA

Before the September 11th attacks, al Qaeda had promised to attack the United States. In 1998, Osama bin Laden declared a "religious" war against the United States and urged that it was the moral obligation of all Muslims to kill U.S. civilians and military personnel. *See* Statement of Osama bin Laden, Ayman al-Zawahiri, et al., *Fatwah Urging Jihad Against Americans*, published in Al-Quds al-'Arabi (Feb. 23, 1998) ("To kill the Americans and their allies—civilians and military—is an individual duty for every Muslim who can do it in any country in which it is possible to do it, in order to liberate the al-Aqsa Mosque and the holy mosque from their grip, and in order for their armies to move out of all the lands of Islam, defeated and unable to threaten any Muslim."). Al Qaeda carried out those threats with a vengeance; they attacked the U.S.S. Cole in Yemen, the United States Embassy in Nairobi, and finally the United States itself in the September 11th attacks.

It is clear that al Qaeda is not content with the damage it wrought on September 11th. As recently as December 7, 2005, Ayman al-Zawahiri professed that al Qaeda "is spreading, growing, and becoming stronger," and that al Qaeda is "waging a great historic battle in Iraq, Afghanistan, Palestine, and even in the Crusaders' own homes." Ayman al-Zawahiri, videotape released on Al-Jazeera television network (Dec. 7, 2005). Indeed, since September 11th, al Qaeda leaders have repeatedly promised to deliver another, even more devastating attack on America. *See, e.g.*, Osama bin Laden, videotape released on Al-Jazeera television network (Oct. 24, 2004) (warning United States citizens of further attacks and asserting that "your security is in your own hands"); Osama bin Laden, videotape released on Al-Jazeera television network (Oct. 18, 2003) ("We, God willing, will continue to fight you and will continue martyrdom operations inside and outside the United States . . . ."); Ayman Al-Zawahiri, videotape released on the Al-Jazeera television network (Oct. 9, 2002) ("I promise you [addressing the 'citizens of the United States'] that the Islamic youth are preparing for you what will fill your hearts with horror"). Given that al Qaeda's leaders have repeatedly made good on their threats and that al Qaeda has demonstrated its ability to insert foreign agents into the United States to execute attacks, it is clear that the threat continues. Indeed, since September 11th, al Qaeda has staged several large-scale attacks around the world, including in Indonesia, Madrid, and London, killing hundreds of innocent people.

ANALYSIS

I. THE PRESIDENT HAS INHERENT CONSTITUTIONAL AUTHORITY TO ORDER WARRANTLESS FOREIGN INTELLIGENCE SURVEILLANCE

As Congress expressly recognized in the AUMF, "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States," AUMF pmbl., especially in the context of the current conflict. Article II of the Constitution vests in the President all executive power of the United States, including the power to act as Commander in Chief of the Armed Forces, *see* U.S. Const. art. II, § 2, and authority over the conduct of the Nation's foreign affairs. As the Supreme Court has explained, "[t]he President is the sole organ of the nation in its external relations, and its sole representative with

foreign nations." *United States v. Curtiss-Wright Export Corp.,* 299 U.S. 304, 319 (1936) (internal quotation marks and citations omitted). In this way, the Constitution grants the President inherent power to protect the Nation from foreign attack, *see, e.g.*, *The Prize Cases,* 67 U.S. (2 Black) 635, 668 (1863), and to protect national security information, *see, e.g.*, *Department of the Navy v. Egan,* 484 U.S. 518, 527 (1988).

To carry out these responsibilities, the President must have authority to gather information necessary for the execution of his office. The Founders, after all, intended the federal Government to be clothed with all authority necessary to protect the Nation. *See, e.g., The Federalist* No. 23, at 147 (Alexander Hamilton) (Jacob E. Cooke ed. 1961) (explaining that the federal Government will be "cloathed with all the powers requisite to the complete execution of its trust"); *id.* No. 41, at 269 (James Madison) ("Security against foreign danger is one of the primitive objects of civil society . . . . The powers requisite for attaining it must be effectually confided to the federal councils."). Because of the structural advantages of the Executive Branch, the Founders also intended that the President would have the primary responsibility and necessary authority as Commander in Chief and Chief Executive to protect the Nation and to conduct the Nation's foreign affairs. *See, e.g.*, *The Federalist* No. 70, at 471-72 (Alexander Hamilton); *see also Johnson v. Eisentrager,* 339 U.S. 763, 788 (1950) ("this [constitutional] grant of war power includes all that is necessary and proper for carrying these powers into execution") (citation omitted). Thus, it has been long recognized that the President has the authority to use secretive means to collect intelligence necessary for the conduct of foreign affairs and military campaigns. *See, e.g.*, *Chicago & S. Air Lines v. Waterman S.S. Corp.,* 333 U.S. 103, 111 (1948) ("The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world."); *Curtiss-Wright,* 299 U.S. at 320 ("He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials."); *Totten v. United States,* 92 U.S. 105, 106 (1876) (President "was undoubtedly authorized during the war, as commander-in-chief . . . to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy").

In reliance on these principles, a consistent understanding has developed that the President has inherent constitutional authority to conduct warrantless searches and surveillance within the United States for foreign intelligence purposes. Wiretaps for such purposes thus have been authorized by Presidents at least since the administration of Franklin Roosevelt in 1940. *See, e.g., United States v. United States District Court,* 444 F.2d 651, 669-71 (6th Cir. 1971) (reproducing as an appendix memoranda from Presidents Roosevelt, Truman, and Johnson). In a Memorandum to Attorney General Jackson, President Roosevelt wrote on May 21, 1940:

> You are, therefore, authorized and directed in such cases as you may approve, after investigation of the need in each case, to authorize the necessary investigation agents that they are at liberty to secure information by listening devices directed to the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies. You are requested furthermore to limit these investigations so conducted to a minimum and limit them insofar as

possible to aliens.

Id. at 670 (appendix A). President Truman approved a memorandum drafted by Attorney General Tom Clark in which the Attorney General advised that "it is as necessary as it was in 1940 to take the investigative measures" authorized by President Roosevelt to conduct electronic surveillance "in cases vitally affecting the domestic security." *Id.* Indeed, while FISA was being debated during the Carter Administration, Attorney General Griffin Bell testified that "the current bill recognizes no inherent power of the President to conduct electronic surveillance, and I want to interpolate here to say that *this does not take away the power [of] the President under the Constitution*." Foreign Intelligence Electronic Surveillance Act of 1978: Hearings on H.R. 5764, H.R. 9745, H.R. 7308, and H.R. 5632 Before the Subcomm. on Legislation of the House Comm. on Intelligence, 95th Cong., 2d Sess. 15 (1978) (emphasis added); *see also Katz v. United States*, 389 U.S. 347, 363 (1967) (White, J., concurring) ("Wiretapping to protect the security of the Nation has been authorized by successive Presidents."); *cf.* Amending the Foreign Intelligence Surveillance Act: Hearings Before the House Permanent Select Comm. on Intelligence,103d Cong. 2d Sess. 61 (1994) (statement of Deputy Attorney General Jamie S. Gorelick) ("[T]he Department of Justice believes, and the case law supports, that the President has inherent authority to conduct warrantless physical searches for foreign intelligence purposes . . . .").

The courts uniformly have approved this longstanding Executive Branch practice. Indeed, every federal appellate court to rule on the question has concluded that, even in peacetime, the President has inherent constitutional authority, consistent with the Fourth Amendment, to conduct searches for foreign intelligence purposes without securing a judicial warrant. *See In re Sealed Case,* 310 F.3d 717, 742 (Foreign Intel. Surv. Ct. of Rev. 2002) ("[A]ll the other courts to have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information . . . . *We take for granted that the President does have that authority and, assuming that is so, FISA could not encroach on the President's constitutional power.*") (emphasis added); *accord, e.g., United States v. Truong Dinh Hung,* 629 F.2d 908 (4th Cir. 1980); *United States v. Butenko,* 494 F.2d 593 (3d Cir. 1974) (en banc); *United States v. Brown,* 484 F.2d 418 (5th Cir. 1973). *But cf. Zweibon v. Mitchell,* 516 F.2d 594 (D.C. Cir. 1975) (en banc) (dictum in plurality opinion suggesting that a warrant would be required even in a foreign intelligence investigation).

In *United States v. United States District Court,* 407 U.S. 297 (1972) (the "*Keith*" case), the Supreme Court concluded that the Fourth Amendment's warrant requirement applies to investigations of wholly *domestic* threats to security—such as domestic political violence and other crimes. But the Court in the *Keith* case made clear that it was not addressing the President's authority to conduct *foreign* intelligence surveillance without a warrant and that it was expressly reserving that question: "[T]he instant case requires no judgment on the scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country." *Id.* at 308; *see also id.* at 321-22 & n.20 ("We have not addressed, and express no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents."). That *Keith* does not apply in the context of protecting against a foreign attack has been confirmed by the lower courts. After *Keith*, each of the three courts of appeals

that have squarely considered the question have concluded—expressly taking the Supreme Court's decision into account—that the President has inherent authority to conduct warrantless surveillance in the foreign intelligence context. *See, e.g.*, *Truong Dinh Hung,* 629 F.2d at 913-14; *Butenko*, 494 F.2d at 603; *Brown*, 484 F.2d 425-26.

From a constitutional standpoint, foreign intelligence surveillance such as the NSA activities differs fundamentally from the domestic security surveillance at issue in *Keith*. As the Fourth Circuit observed, the President has uniquely strong constitutional powers in matters pertaining to foreign affairs and national security. "Perhaps most crucially, the executive branch not only has superior expertise in the area of foreign intelligence, it is also constitutionally designated as the pre-eminent authority in foreign affairs." *Truong,* 629 F.2d at 914; *see id.* at 913 (noting that "the needs of the executive are so compelling in the area of foreign intelligence, unlike the area of domestic security, that a uniform warrant requirement would . . . unduly frustrate the President in carrying out his foreign affairs responsibilities"); *cf. Haig v. Agee,* 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.").[2]

The present circumstances that support recognition of the President's inherent constitutional authority to conduct the NSA activities are considerably stronger than were the circumstances at issue in the earlier courts of appeals cases that recognized this power. All of the cases described above addressed inherent executive authority under the foreign affairs power to conduct surveillance in a peacetime context. The courts in these cases therefore had no occasion even to consider the fundamental authority of the President, as Commander in Chief, to gather intelligence in the context of an ongoing armed conflict in which the United States already had suffered massive civilian casualties and in which the intelligence gathering efforts at issue were specifically designed to thwart further armed attacks. Indeed, intelligence gathering is particularly important in the current conflict, in which the enemy attacks largely through clandestine activities and which, as Congress recognized, "pose[s] an unusual and extraordinary threat," AUMF pmbl.

Among the President's most basic constitutional duties is the duty to protect the Nation from armed attack. The Constitution gives him all necessary authority to fulfill that responsibility. The courts thus have long acknowledged the President's inherent authority to take action to protect Americans abroad, *see, e.g., Durand v. Hollins,* 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (No. 4186), and to protect the Nation from attack, *see, e.g., The Prize Cases,* 67 U.S. at 668. *See generally Ex parte Quirin,* 317 U.S. 1, 28 (1942) (recognizing that

[2] *Keith* made clear that one of the significant concerns driving the Court's conclusion in the domestic security context was the inevitable connection between perceived threats to domestic security and political dissent. As the Court explained: "Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.'" *Keith,* 407 U.S. at 314; *see also id.* at 320 ("Security surveillances are especially sensitive because of the inherent vagueness of the domestic security concept, the necessarily broad and continuing nature of intelligence gathering, and the temptation to utilize such surveillances to oversee political dissent."). Surveillance of domestic groups raises a First Amendment concern that generally is not present when the subjects of the surveillance are foreign powers or their agents.

the President has authority under the Constitution "to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war," including "important incident[s] to the conduct of war," such as "the adoption of measures by the military command . . . to repel and defeat the enemy"). As the Supreme Court emphasized in the *Prize Cases*, if the Nation is invaded, the President is "bound to resist force by force"; "[h]e must determine what degree of force the crisis demands" and need not await congressional sanction to do so. *The Prize Cases,* 67 U.S. at 670; *see also Campbell v. Clinton,* 203 F.3d 19, 27 (D.C. Cir. 2000) (Silberman, J., concurring) ("[T]he *Prize Cases* . . . stand for the proposition that the President has independent authority to repel aggressive acts by third parties even without specific congressional authorization, and courts may not review the level of force selected."); *id.* at 40 (Tatel, J., concurring) ("[T]he President, as commander in chief, possesses emergency authority to use military force to defend the nation from attack without obtaining prior congressional approval."). Indeed, "in virtue of his rank as head of the forces, [the President] has certain powers and duties with which Congress cannot interfere." *Training of British Flying Students in the United States,* 40 Op. Att'y Gen. 58, 61 (1941) (Attorney General Robert H. Jackson) (internal quotation marks omitted). In exercising his constitutional powers, the President has wide discretion, consistent with the Constitution, over the methods of gathering intelligence about the Nation's enemies in a time of armed conflict.

II. THE AUMF CONFIRMS AND SUPPLEMENTS THE PRESIDENT'S INHERENT POWER TO USE WARRANTLESS SURVEILLANCE AGAINST THE ENEMY IN THE CURRENT ARMED CONFLICT

In the Authorization for Use of Military Force enacted in the wake of September 11th, Congress confirms and supplements the President's constitutional authority to protect the Nation, including through electronic surveillance, in the context of the current post-September 11th armed conflict with al Qaeda and its allies. The broad language of the AUMF affords the President, at a minimum, discretion to employ the traditional incidents of the use of military force. The history of the President's use of warrantless surveillance during armed conflicts demonstrates that the NSA surveillance described by the President is a fundamental incident of the use of military force that is necessarily included in the AUMF.

A. THE TEXT AND PURPOSE OF THE AUMF AUTHORIZE THE NSA ACTIVITIES

On September 14, 2001, in its first legislative response to the attacks of September 11th, Congress gave its express approval to the President's military campaign against al Qaeda and, in the process, confirmed the well-accepted understanding of the President's Article II powers. *See* AUMF § 2(a).[3] In the preamble to the AUMF, Congress stated that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States," AUMF pmbl., and thereby acknowledged the President's inherent constitutional authority to defend the United States. This clause "constitutes an extraordinarily

[3] America's military response began before the attacks of September 11th had been completed. *See The 9/11 Commission Report* 20 (2004). Combat air patrols were established and authorized "to engage inbound aircraft if they could verify that the aircraft was hijacked." *Id.* at 42.

sweeping recognition of independent presidential *constitutional* power to employ the war power to combat terrorism." Michael Stokes Paulsen, Youngstown *Goes to War,* 19 Const. Comment. 215, 252 (2002). This striking recognition of presidential authority cannot be discounted as the product of excitement in the immediate aftermath of September 11th, for the same terms were repeated by Congress more than a year later in the Authorization for Use of Military Force Against Iraq Resolution of 2002. Pub. L. No. 107-243, pmbl., 116 Stat. 1498, 1500 (Oct. 16, 2002) ("[T]he President has authority under the Constitution to take action in order to deter and prevent acts of international terrorism against the United States . . . ."). In the context of the conflict with al Qaeda and related terrorist organizations, therefore, Congress has acknowledged a broad executive authority to "deter and prevent" further attacks against the United States.

The AUMF passed by Congress on September 14, 2001, does not lend itself to a narrow reading. Its expansive language authorizes the President "to use *all necessary and appropriate force* against those nations, organizations, or persons *he determines* planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." AUMF § 2(a) (emphases added). In the field of foreign affairs, and particularly that of war powers and national security, congressional enactments are to be broadly construed where they indicate support for authority long asserted and exercised by the Executive Branch. *See, e.g., Haig v. Agee*, 453 U.S. 280, 293-303 (1981); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543-45 (1950); *cf. Loving v. United States,* 517 U.S. 748, 772 (1996) (noting that the usual "limitations on delegation [of congressional powers] do not apply" to authorizations linked to the Commander in Chief power); *Dames & Moore v. Regan*, 453 U.S. 654, 678-82 (1981) (even where there is no express statutory authorization for executive action, legislation in related field may be construed to indicate congressional acquiescence in that action). Although Congress's war powers under Article I, Section 8 of the Constitution empower Congress to legislate regarding the raising, regulation, and material support of the Armed Forces and related matters, rather than the prosecution of military campaigns, the AUMF indicates Congress's endorsement of the President's use of his constitutional war powers. This authorization transforms the struggle against al Qaeda and related terrorist organizations from what Justice Jackson called "a zone of twilight," in which the President and the Congress may have concurrent powers whose "distribution is uncertain," *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring), into a situation in which the President's authority is at is maximum because "it includes all that he possesses in his own right plus all that Congress can delegate," *id.* at 635. With regard to these fundamental tools of warfare—and, as demonstrated below, warrantless electronic surveillance against the declared enemy is one such tool—the AUMF places the President's authority at its zenith under *Youngstown*.

It is also clear that the AUMF confirms and supports the President's use of those traditional incidents of military force against the enemy, wherever they may be on United States soil or abroad. The nature of the September 11th attacks launched on United States soil by foreign agents secreted in the United States necessitates such authority, and the text of the AUMF confirms it. The operative terms of the AUMF state that the President is authorized to use force "in order to prevent any future acts of international terrorism against the United States," *id.*, an objective which, given the recent attacks within the Nation's borders and the continuing use of air defense throughout the country at the time Congress acted, undoubtedly

contemplated the possibility of military action within the United States. The preamble, moreover, recites that the United States should exercise its rights "to protect United States citizens both *at home* and abroad." *Id.* pmbl. (emphasis added). To take action against those linked to the September 11th attacks involves taking action against individuals within the United States. The United States had been attacked on its own soil—not by aircraft launched from carriers several hundred miles away, but by enemy agents who had resided in the United States for months. A crucial responsibility of the President—charged by the AUMF and the Constitution—was and is to identify and attack those enemies, especially if they were in the United States, ready to strike against the Nation.

The text of the AUMF demonstrates in an additional way that Congress authorized the President to conduct warrantless electronic surveillance against the enemy. The terms of the AUMF not only authorized the President to "use all necessary and appropriate force" against those responsible for the September 11th attacks; it also authorized the President to "determine[]" the persons or groups responsible for those attacks and to take all actions necessary to prevent further attacks. AUMF § 2(a) ("the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons *he determines* planned, authorized, committed, or aided the terrorist attacks that occurred on September 11th, 2001, or harbored such organizations or persons") (emphasis added). Of vital importance to the use of force against the enemy is locating the enemy and identifying its plans of attack. And of vital importance to identifying the enemy and detecting possible future plots was the authority to intercept communications to or from the United States of persons with links to al Qaeda or related terrorist organizations. Given that the agents who carried out the initial attacks resided in the United States and had successfully blended into American society and disguised their identities and intentions until they were ready to strike, the necessity of using the most effective intelligence gathering tools against such an enemy, including electronic surveillance, was patent. Indeed, Congress recognized that the enemy in this conflict poses an "unusual and extraordinary threat." AUMF pmbl.

The Supreme Court's interpretation of the scope of the AUMF in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), strongly supports this reading of the AUMF. In *Hamdi*, five members of the Court found that the AUMF authorized the detention of an American within the United States, notwithstanding a statute that prohibits the detention of U.S. citizens "except pursuant to an Act of Congress," 18 U.S.C. § 4001(a). *See Hamdi*, 542 U.S. at 519 (plurality opinion); *id.* at 587 (Thomas, J., dissenting). Drawing on historical materials and "longstanding law-of-war principles," *id.* at 518-21, a plurality of the Court concluded that detention of combatants who fought against the United States as part of an organization "known to have supported" al Qaeda "is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." *Id.* at 518; *see also id.* at 587 (Thomas, J., dissenting) (agreeing with the plurality that the joint resolution authorized the President to "detain those arrayed against our troops"); *accord Quirin*, 317 U.S. at 26-29, 38 (recognizing the President's authority to capture and try agents of the enemy in the United States even if they had never "entered the theatre or zone of active military operations"). Thus, even though the AUMF does not say anything expressly about detention, the Court nevertheless found that it satisfied section 4001(a)'s requirement that detention be congressionally authorized.

The conclusion of five Justices in *Hamdi* that the AUMF incorporates fundamental "incidents" of the use of military force makes clear that the absence of any specific reference to signals intelligence activities in the resolution is immaterial. *See Hamdi,* 542 U.S. at 519 ("[I]t is of no moment that the AUMF does not use specific language of detention.") (plurality opinion). Indeed, given the circumstances in which the AUMF was adopted, it is hardly surprising that Congress chose to speak about the President's authority in general terms. The purpose of the AUMF was for Congress to sanction and support the military response to the devastating terrorist attacks that had occurred just three days earlier. Congress evidently thought it neither necessary nor appropriate to attempt to catalog every specific aspect of the use of the forces it was authorizing and every potential preexisting statutory limitation on the Executive Branch. Rather than engage in that difficult and impractical exercise, Congress authorized the President, in general but intentionally broad terms, to use the traditional and fundamental incidents of war and to determine how best to identify and engage the enemy in the current armed conflict. Congress's judgment to proceed in this manner was unassailable, for, as the Supreme Court has recognized, even in normal times involving no major national security crisis, "Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take." *Dames & Moore*, 453 U.S. at 678. Indeed, Congress often has enacted authorizations to use military force using general authorizing language that does not purport to catalogue in detail the specific powers the President may employ. The need for Congress to speak broadly in recognizing and augmenting the President's core constitutional powers over foreign affairs and military campaigns is of course significantly heightened in times of national emergency. *See Zemel v. Rusk,* 381 U.S. 1, 17 (1965) ("[B]ecause of the changeable and explosive nature of contemporary international relations . . . Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas.").

Hamdi thus establishes the proposition that the AUMF "clearly and unmistakably" authorizes the President to take actions against al Qaeda and related organizations that amount to "fundamental incident[s] of waging war." *Hamdi*, 542 U.S. at 519 (plurality opinion); *see also id.* at 587 (Thomas, J., dissenting). In other words, "*[t]he clear inference is that the AUMF authorizes what the laws of war permit.*" Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2048, 2092 (2005) (emphasis added). Congress is presumed to be aware of the Supreme Court's precedents. Indeed, Congress recently enacted legislation in response to the Court's decision in *Rasul v. Bush*, 542 U.S. 466 (2004)—which was issued the same day as the *Hamdi* decision—removing habeas corpus jurisdiction over claims filed on behalf of confined enemy combatants held at Guantanamo Bay. Congress, however, has not expressed any disapproval of the Supreme Court's commonsense and plain-meaning interpretation of the AUMF in *Hamdi*.[4]

[4] This understanding of the AUMF is consistent with Justice O'Connor's admonition that "a state of war is not a blank check for the President," *Hamdi*, 542 U.S. at 536 (plurality opinion). In addition to constituting a fundamental and accepted incident of the use of military force, the NSA activities are consistent with the law of armed conflict principle that the use of force be necessary and proportional. *See* Dieter Fleck, *The Handbook of Humanitarian Law in Armed Conflicts* 115 (1995). The NSA activities are proportional because they are minimally invasive and narrow in scope, targeting only the international communications of persons reasonably believed to be linked to al Qaeda, and are designed to protect the Nation from a devastating attack.

B. WARRANTLESS ELECTRONIC SURVEILLANCE AIMED AT INTERCEPTING ENEMY COMMUNICATIONS HAS LONG BEEN RECOGNIZED AS A FUNDAMENTAL INCIDENT OF THE USE OF MILITARY FORCE

The history of warfare—including the consistent practice of Presidents since the earliest days of the Republic—demonstrates that warrantless intelligence surveillance against the enemy is a fundamental incident of the use of military force, and this history confirms the statutory authority provided by the AUMF. Electronic surveillance is a fundamental tool of war that must be included in any natural reading of the AUMF's authorization to use "all necessary and appropriate force."

As one author has explained:

> It is *essential* in warfare for a belligerent to be as fully informed as possible about the enemy—his strength, his weaknesses, measures taken by him and measures contemplated by him. This applies not only to military matters, but . . . anything which bears on and is material to his ability to wage the war in which he is engaged. *The laws of war recognize and sanction this aspect of warfare.*

Morris Greenspan, *The Modern Law of Land Warfare* 325 (1959) (emphases added); *see also* Memorandum for Members of the House Permanent Select Comm. on Intel., from Jeffrey H. Smith, *Re: Legal Authorities Regarding Warrantless Surveillance of U.S. Persons* 6 (Jan. 3, 2006) ("Certainly, the collection of intelligence is understood to be necessary to the execution of the war."). Similarly, article 24 of the Hague Regulations of 1907 expressly states that "the employment of measures necessary for obtaining information about the enemy and the country [is] considered permissible." *See also* L. Oppenheim, *International Law* vol. II § 159 (7th ed. 1952) ("War cannot be waged without all kinds of information, about the forces and the intentions of the enemy . . . . To obtain the necessary information, it has always been considered lawful to employ spies . . . ."); Joseph R. Baker & Henry G. Crocker, *The Laws of Land Warfare* 197 (1919) ("Every belligerent has a right . . . to discover the signals of the enemy and . . . to seek to procure information regarding the enemy through the aid of secret agents."); *cf.* J.M. Spaight, *War Rights on Land* 205 (1911) ("[E]very nation employs spies; were a nation so quixotic as to refrain from doing so, it might as well sheathe its sword for ever. . . . Spies . . . are indispensably necessary to a general; and, other things being equal, that commander will be victorious who has the best secret service.") (internal quotation marks omitted).

In accordance with these well-established principles, the Supreme Court has consistently recognized the President's authority to conduct intelligence activities. *See, e.g., Totten v. United States,* 92 U.S. 105, 106 (1876) (recognizing President's authority to hire spies); *Tenet v. Doe*, 544 U.S. 1 (2005) (reaffirming *Totten* and counseling against judicial interference with such matters); *see also Chicago & S. Air Lines v. Waterman S.S. Corp.,* 333 U.S. 103, 111 (1948) ("The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports neither are not and ought not to be published to the world."); *United States v. Curtiss-Wright Export Corp.,* 299 U.S. 304, 320 (1936) (The President "has his confidential sources of information. He has his agents in the form of diplomatic,

consular, and other officials."). Chief Justice John Marshall even described the gathering of intelligence as a military duty. *See Tatum v. Laird,* 444 F.2d 947, 952-53 (D.C. Cir. 1971) ("As Chief Justice John Marshall said of Washington, 'A general must be governed by his intelligence and must regulate his measures by his information. It is his duty to obtain correct information . . . . '") (quoting Foreword, U.S. Army Basic Field Manual, Vol. X, circa 1938), *rev'd on other grounds*, 408 U.S. 1 (1972).

The United States, furthermore, has a long history of wartime surveillance—a history that can be traced to George Washington, who "was a master of military espionage" and "made frequent and effective use of secret intelligence in the second half of the eighteenth century." Rhodri Jeffreys-Jones, *Cloak and Dollar: A History of American Secret Intelligence* 11 (2002); *see generally id.* at 11-23 (recounting Washington's use of intelligence); *see also Haig v. Agee*, 471 U.S. 159, 172 n.16 (1981) (quoting General Washington's letter to an agent embarking upon an intelligence mission in 1777: "The necessity of procuring good intelligence, is apparent and need not be further urged."). As President in 1790, Washington obtained from Congress a "secret fund" to deal with foreign dangers and to be spent at his discretion. Jeffreys-Jones, *supra*, at 22. The fund, which remained in use until the creation of the Central Intelligence Agency in the mid-twentieth century and gained "longstanding acceptance within our constitutional structure," *Halperin v. CIA,* 629 F.2d 144, 158-59 (D.C. Cir. 1980), was used "for all purposes to which a secret service fund should or could be applied for the public benefit," including "for persons sent publicly and secretly to search for important information, political or commercial," *id.* at 159 (quoting Statement of Senator John Forsyth, Cong. Debates 295 (Feb. 25, 1831)). *See also Totten,* 92 U.S. at 107 (refusing to examine payments from this fund lest the publicity make a "secret service" "impossible").

The interception of communications, in particular, has long been accepted as a fundamental method for conducting wartime surveillance. *See, e.g.*, Greenspan, *supra*, at 326 (accepted and customary means for gathering intelligence "include air reconnaissance and photography; ground reconnaissance; observation of enemy positions; *interception of enemy messages, wireless and other*; examination of captured documents; . . . and interrogation of prisoners and civilian inhabitants") (emphasis added). Indeed, since its independence, the United States has intercepted communications for wartime intelligence purposes and, if necessary, has done so within its own borders. During the Revolutionary War, for example, George Washington received and used to his advantage reports from American intelligence agents on British military strength, British strategic intentions, and British estimates of American strength. *See* Jeffreys-Jones, *supra*, at 13. One source of Washington's intelligence was intercepted British mail. *See* Central Intelligence Agency, *Intelligence in the War of Independence* 31, 32 (1997). In fact, Washington himself proposed that one of his Generals "contrive a means of opening [British letters] without breaking the seals, take copies of the contents, and then let them go on." *Id.* at 32 ("From that point on, Washington was privy to British intelligence pouches between New York and Canada."); *see generally* Final Report of the Select Committee to Study Governmental Operations with respect to Intelligence Activities (the "Church Committee"), S. Rep. No. 94-755, at Book VI, 9-17 (Apr. 23, 1976) (describing Washington's intelligence activities).

More specifically, warrantless electronic surveillance of wartime communications has been conducted in the United States since electronic communications have existed, *i.e.,* since at least the Civil War, when "[t]elegraph wiretapping was common, and an important intelligence source for both sides." G.J.A. O'Toole, *The Encyclopedia of American Intelligence and Espionage* 498 (1988). Confederate General J.E.B. Stuart even "had his own personal wiretapper travel along with him in the field" to intercept military telegraphic communications. Samuel Dash, et al., *The Eavesdroppers* 23 (1971); *see also* O'Toole, *supra*, at 121, 385-88, 496-98 (discussing Civil War surveillance methods such as wiretaps, reconnaissance balloons, semaphore interception, and cryptanalysis). Similarly, there was extensive use of electronic surveillance during the Spanish-American War. *See* Bruce W. Bidwell, *History of the Military Intelligence Division, Department of the Army General Staff:* 1775-1941, at 62 (1986). When an American expeditionary force crossed into northern Mexico to confront the forces of Pancho Villa in 1916, the Army "frequently intercepted messages of the regime in Mexico City or the forces contesting its rule." David Alvarez, *Secret Messages* 6-7 (2000). Shortly after Congress declared war on Germany in World War I, President Wilson (citing only his constitutional powers and the joint resolution declaring war) ordered the censorship of messages sent outside the United States via submarine cables, telegraph, and telephone lines. *See* Exec. Order No. 2604 (Apr. 28, 1917). During that war, wireless telegraphy "enabled each belligerent to tap the messages of the enemy." Bidwell, *supra*, at 165 (quoting statement of Col. W. Nicolai, former head of the Secret Service of the High Command of the German Army, *in* W. Nicolai, *The German Secret Service* 21 (1924)).

As noted in Part I, on May 21, 1940, President Roosevelt authorized warrantless electronic surveillance of persons suspected of subversive activities, including spying, against the United States. In addition, on December 8, 1941, the day after the attack on Pearl Harbor, President Roosevelt gave the Director of the FBI "temporary powers to direct all news censorship and to *control all other telecommunications traffic* in and out of the United States." Jack A. Gottschalk, *"Consistent with Security". . . . A History of American Military Press Censorship,* 5 Comm. & L. 35, 39 (1983) (emphasis added). *See* Memorandum for the Secretaries of War, Navy, State, and Treasury, the Postmaster General, and the Federal Communications Commission from Franklin D. Roosevelt (Dec. 8, 1941). President Roosevelt soon supplanted that temporary regime by establishing an office for conducting such electronic surveillance in accordance with the War Powers Act of 1941. *See* Pub. L. No. 77-354, § 303, 55 Stat. 838, 840-41 (Dec. 18, 1941); Gottschalk, 5 Comm. & L. at 40. The President's order gave the Government of the United States access to "communications by mail, cable, radio, or other means of transmission passing between the United States and any foreign country." *Id. See also* Exec. Order No. 8985, § 1, 6 Fed. Reg. 6625, 6625 (Dec. 19, 1941). In addition, the United States systematically listened surreptitiously to electronic communications as part of the war effort. *See* Dash, *Eavesdroppers* at 30. During World War II, signals intelligence assisted in, among other things, the destruction of the German U-boat fleet by the Allied naval forces, *see id.* at 27, and the war against Japan, *see* O'Toole, *supra*, at 32, 323-24. In general, signals intelligence "helped to shorten the war by perhaps two years, reduce the loss of life, and make inevitable an eventual Allied victory." Carl Boyd, *American Command of the Sea Through Carriers, Codes, and the Silent Service: World War II and Beyond* 27 (1995); *see also* Alvarez, *supra*, at 1 ("There can be little doubt that signals intelligence contributed significantly to the

military defeat of the Axis."). Significantly, not only was wiretapping in World War II used "extensively by military intelligence and secret service personnel in combat areas abroad," but also "by the FBI and secret service in this country." Dash, *supra*, at 30.

In light of the long history of prior wartime practice, the NSA activities fit squarely within the sweeping terms of the AUMF. The use of signals intelligence to identify and pinpoint the enemy is a traditional component of wartime military operations—or, to use the terminology of *Hamdi,* a "fundamental and accepted . . . incident to war," 542 U.S. at 518 (plurality opinion)—employed to defeat the enemy and to prevent enemy attacks in the United States. Here, as in other conflicts, the enemy may use public communications networks, and some of the enemy may already be in the United States. Although those factors may be present in this conflict to a greater degree than in the past, neither is novel. Certainly, both factors were well known at the time Congress enacted the AUMF. Wartime interception of international communications made by the enemy thus should be understood, no less than the wartime detention at issue in *Hamdi,* as one of the basic methods of engaging and defeating the enemy that Congress authorized in approving "*all* necessary and appropriate force" that the President would need to defend the Nation. AUMF § 2(a) (emphasis added).

* * *

Accordingly, the President has the authority to conduct warrantless electronic surveillance against the declared enemy of the United States in a time of armed conflict. That authority derives from the Constitution, and is reinforced by the text and purpose of the AUMF, the nature of the threat posed by al Qaeda that Congress authorized the President to repel, and the long-established understanding that electronic surveillance is a fundamental incident of the use of military force. The President's power in authorizing the NSA activities is at its zenith because he has acted "pursuant to an express or implied authorization of Congress." *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

III. THE NSA ACTIVITIES ARE CONSISTENT WITH THE FOREIGN INTELLIGENCE SURVEILLANCE ACT

The President's exercise of his constitutional authority to conduct warrantless wartime electronic surveillance of the enemy, as confirmed and supplemented by statute in the AUMF, is fully consistent with the requirements of the Foreign Intelligence Surveillance Act ("FISA").[5] FISA is a critically important tool in the War on Terror. The United States makes full use of the authorities available under FISA to gather foreign intelligence information, including authorities to intercept communications, conduct physical searches, and install and use pen registers and trap and trace devices. While FISA establishes certain procedures that must be followed for these authorities to be used (procedures that usually involve applying for and obtaining an order from a special court), FISA also expressly contemplates that a later legislative enactment could

[5] To avoid revealing details about the operation of the program, it is assumed for purposes of this paper that the activities described by the President constitute "electronic surveillance," as defined by FISA, 50 U.S.C. § 1801(f).

authorize electronic surveillance outside the procedures set forth in FISA itself. The AUMF constitutes precisely such an enactment. To the extent there is any ambiguity on this point, the canon of constitutional avoidance requires that such ambiguity be resolved in favor of the President's authority to conduct the communications intelligence activities he has described. Finally, if FISA could not be read to allow the President to authorize the NSA activities during the current congressionally authorized armed conflict with al Qaeda, FISA would be unconstitutional as applied in this narrow context.

A. THE REQUIREMENTS OF FISA

FISA was enacted in 1978 to regulate "electronic surveillance," particularly when conducted to obtain "foreign intelligence information," as those terms are defined in section 101 of FISA, 50 U.S.C. § 1801. As a general matter, the statute requires that the Attorney General approve an application for an order from a special court composed of Article III judges and created by FISA—the Foreign Intelligence Surveillance Court ("FISC"). *See* 50 U.S.C. §§ 1803-1804. The application must demonstrate, among other things, that there is probable cause to believe that the target is a foreign power or an agent of a foreign power. *See id.* § 1805(a)(3)(A). It must also contain a certification from the Assistant to the President for National Security Affairs or an officer of the United States appointed by the President with the advice and consent of the Senate and having responsibilities in the area of national security or defense that the information sought is foreign intelligence information and cannot reasonably be obtained by normal investigative means. *See id.* § 1804(a)(7). FISA further requires the Government to state the means that it proposes to use to obtain the information and the basis for its belief that the facilities at which the surveillance will be directed are being used or are about to be used by a foreign power or an agent of a foreign power. *See id.* § 1804(a)(4), (a)(8).

FISA was the first congressional measure that sought to impose restrictions on the Executive Branch's authority to engage in electronic surveillance for foreign intelligence purposes, an authority that, as noted above, had been repeatedly recognized by the federal courts. *See* Americo R. Cinquegrana, *The Walls (and Wires) Have Ears: The Background and First Ten Years of the Foreign Intelligence Surveillance Act of 1978*, 137 U. Penn. L. Rev. 793, 810 (1989) (stating that the "status of the President's inherent authority" to conduct surveillance "formed the core of subsequent legislative deliberations" leading to the enactment of FISA). To that end, FISA modified a provision in Title III that previously had disclaimed any intent to have laws governing wiretapping interfere with the President's constitutional authority to gather foreign intelligence. Prior to the passage of FISA, section 2511(3) of title 18 had stated that "[n]othing contained in this chapter or in section 605 of the Communications Act of 1934 . . . shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities." 18 U.S.C. § 2511(3) (1970). FISA replaced that provision with an important, though more limited, preservation of authority for the President. *See* Pub. L. No. 95-511, § 201(b), (c), 92 Stat. 1783, 1797 (1978), codified at 18 U.S.C. § 2511(2)(f) (West Supp. 2005) (carving out from statutory regulation only the acquisition of intelligence information from "international or foreign communications" and

"foreign intelligence activities . . . involving a foreign electronic communications system" as long as they are accomplished "utilizing a means other than electronic surveillance as defined in section 101" of FISA). Congress also defined "electronic surveillance," 50 U.S.C. § 1801(f), carefully and somewhat narrowly.[6]

In addition, Congress addressed, to some degree, the manner in which FISA might apply after a formal declaration of war by expressly allowing warrantless surveillance for a period of fifteen days following such a declaration. Section 111 of FISA allows the President to "authorize electronic surveillance without a court order under this subchapter to acquire foreign intelligence information for a period not to exceed fifteen calendar days following a declaration of war by the Congress." 50 U.S.C. § 1811.

The legislative history of FISA shows that Congress understood it was legislating on fragile constitutional ground and was pressing or even exceeding constitutional limits in regulating the President's authority in the field of foreign intelligence. The final House Conference Report, for example, recognized that the statute's restrictions might well impermissibly infringe on the President's constitutional powers. That report includes the extraordinary acknowledgment that "[t]he conferees agree that the establishment by this act of exclusive means by which the President may conduct electronic surveillance does not foreclose a different decision by the Supreme Court." H.R. Conf. Rep. No. 95-1720, at 35, *reprinted in* 1978 U.S.C.C.A.N. 4048, 4064. But, invoking Justice Jackson's concurrence in the *Steel Seizure* case, the Conference Report explained that Congress intended in FISA to exert whatever power Congress constitutionally had over the subject matter to restrict foreign intelligence surveillance and to leave the President solely with whatever inherent constitutional authority he might be able to invoke against Congress's express wishes. *Id.* The Report thus explains that "[t]he intent of the conferees is to apply the standard set forth in Justice Jackson's concurring opinion in the Steel Seizure Case: 'When a President takes measures incompatible with the express or implied

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[6] FISA's legislative history reveals that these provisions were intended to exclude certain intelligence activities conducted by the National Security Agency from the coverage of FISA. According to the report of the Senate Judiciary Committee on FISA, "this provision [referencing what became the first part of section 2511(2)(f)] is designed to make clear that the legislation does not deal with international signals intelligence activities as currently engaged in by the National Security Agency and electronic surveillance conducted outside the United States." S. Rep. No. 95-604, at 64 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3904, 3965. The legislative history also makes clear that the definition of "electronic surveillance" was crafted for the same reason. *See id.* at 33-34, 1978 U.S.C.C.A.N. at 3934-36. FISA thereby "adopts the view expressed by the Attorney General during the hearings that enacting statutory controls to regulate the National Security Agency and the surveillance of Americans abroad raises problems best left to separate legislation." *Id.* at 64, 1978 U.S.C.C.A.N. at 3965. Such legislation placing limitations on traditional NSA activities was drafted, but never passed. *See* National Intelligence Reorganization and Reform Act of 1978: Hearings Before the Senate Select Committee on Intelligence, 95th Cong., 2d Sess. 999-1007 (1978) (text of unenacted legislation). And Congress understood that the NSA surveillance that it intended categorically to exclude from FISA could include the monitoring of international communications into or out of the United States of U.S. citizens. The report specifically referred to the Church Committee report for its description of the NSA's activities, S. Rep. No. 95-604, at 64 n.63, 1978 U.S.C.C.A.N. at 3965-66 n.63, which stated that "the NSA intercepts messages passing over international lines of communication, some of which have one terminal within the United States. Traveling over these lines of communication, especially those with one terminal in the United States, are messages of Americans . . . ." S. Rep. 94-755, at Book II, 308 (1976). Congress's understanding in the legislative history of FISA that such communications could be intercepted outside FISA procedures is notable.

will of Congress, his power is at the lowest ebb, for then he can rely only upon his own constitutional power minus any constitutional power of Congress over the matter.'" *Id.* (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 637 (1952) (Jackson, J., concurring)); *see also* S. Rep. No. 95-604, at 64, *reprinted in* 1978 U.S.C.C.A.N. at 3966 (same); *see generally* Elizabeth B. Bazen et al., Congressional Research Service, *Re: Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information* 28-29 (Jan. 5, 2006). It is significant, however, that Congress did not decide conclusively to continue to push the boundaries of its constitutional authority in wartime. Instead, Congress reserved the question of the appropriate procedures to regulate electronic surveillance in time of war, and established a fifteen-day period during which the President would be permitted to engage in electronic surveillance without complying with FISA's express procedures and during which Congress would have the opportunity to revisit the issue. *See* 50 U.S.C. § 1811; H.R. Conf. Rep. No. 95-1720, at 34, *reprinted in* 1978 U.S.C.C.A.N. at 4063 (noting that the purpose of the fifteen-day period following a declaration of war in section 111 of FISA was to "allow time for consideration of any amendment to this act that may be appropriate during a wartime emergency").

B. FISA CONTEMPLATES AND ALLOWS SURVEILLANCE AUTHORIZED "BY STATUTE"

Congress did not attempt through FISA to prohibit the Executive Branch from using electronic surveillance. Instead, Congress acted to bring the exercise of that power under more stringent congressional control. *See, e.g.*, H. Conf. Rep. No. 95-1720, at 32, *reprinted in* 1978 U.S.C.C.A.N. 4048, 4064. Congress therefore enacted a regime intended to supplant the President's reliance on his own constitutional authority. Consistent with this overriding purpose of bringing the use of electronic surveillance under *congressional* control and with the commonsense notion that the Congress that enacted FISA could not bind future Congresses, FISA expressly contemplates that the Executive Branch may conduct electronic surveillance outside FISA's express procedures if and when a subsequent statute authorizes such surveillance.

Thus, section 109 of FISA prohibits any person from intentionally "engag[ing] . . . in electronic surveillance under color of law *except as authorized by statute*." 50 U.S.C. § 1809(a)(1) (emphasis added). Because FISA's prohibitory provision broadly exempts surveillance "authorized by statute," the provision demonstrates that Congress did not attempt to regulate through FISA electronic surveillance authorized by Congress through a subsequent enactment. The use of the term "statute" here is significant because it strongly suggests that *any* subsequent authorizing statute, not merely one that amends FISA itself, could legitimately authorize surveillance outside FISA's standard procedural requirements. *Compare* 18 U.S.C. § 2511(1) ("Except as otherwise specifically provided *in this chapter* any person who (a) intentionally intercepts . . . any wire, oral, or electronic communication[] . . . shall be punished . . . .") (emphasis added); *id.* § 2511(2)(e) (providing a defense to liability to individuals "conduct[ing] electronic surveillance, . . . as authorized by *that Act [FISA]*") (emphasis added). In enacting FISA, therefore, Congress contemplated the possibility that the President might be permitted to conduct electronic surveillance pursuant to a later-enacted statute that did not

incorporate all of the procedural requirements set forth in FISA or that did not expressly amend FISA itself.

To be sure, the scope of this exception is rendered less clear by the conforming amendments that FISA made to chapter 119 of title 18—the portion of the criminal code that provides the mechanism for obtaining wiretaps for law enforcement purposes. Before FISA was enacted, chapter 119 made it a criminal offense for any person to intercept a communication except as specifically provided in that chapter. *See* 18 U.S.C. § 2511(1)(a), (4)(a). Section 201(b) of FISA amended that chapter to provide an exception from criminal liability for activities conducted pursuant to FISA. Specifically, FISA added 18 U.S.C. § 2511(2)(e), which provides that it is not unlawful for "an officer, employee, or agent of the United States . . . to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, as authorized by that Act." *Id.* § 2511(2)(e). Similarly, section 201(b) of FISA amended chapter 119 to provide that "procedures in this chapter [or chapter 121 (addressing access to stored wire and electronic communications and customer records)] and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire, oral, and electronic communications may be conducted." *Id.* § 2511(2)(f) (West Supp. 2005).[7]

The amendments that section 201(b) of FISA made to title 18 are fully consistent, however, with the conclusion that FISA contemplates that a subsequent statute could authorize electronic surveillance outside FISA's express procedural requirements. Section 2511(2)(e) of title 18, which provides that it is "not unlawful" for an officer of the United States to conduct electronic surveillance "as authorized by" FISA, is best understood as a safe-harbor provision. Because of section 109, the protection offered by section 2511(2)(e) for surveillance "authorized by" FISA extends to surveillance that is authorized by any other statute and therefore excepted from the prohibition of section 109. In any event, the purpose of section 2511(2)(e) is merely to make explicit what would already have been implicit—that those authorized by statute to engage in particular surveillance do not act unlawfully when they conduct such surveillance. Thus, even if that provision had not been enacted, an officer conducting surveillance authorized by statute (whether FISA or some other law) could not reasonably have been thought to be violating Title III. Similarly, section 2511(2)(e) cannot be read to require a result that would be manifestly unreasonable—exposing a federal officer to criminal liability for engaging in surveillance authorized by statute, merely because the authorizing statute happens not to be FISA itself.

Nor could 18 U.S.C. § 2511(2)(f), which provides that the "procedures in this chapter . . . and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance . . . may be conducted," have been intended to trump the commonsense approach of section 109 and preclude a subsequent Congress from authorizing the President to engage in electronic surveillance through a statute other than FISA, using procedures other than those outlined in FISA or chapter 119 of title 18. The legislative history of section 2511(2)(f) clearly indicates an intent to prevent the President from engaging in surveillance except as

[7] The bracketed portion was added in 1986 amendments to section 2511(2)(f). *See* Pub. L. No. 99-508 § 101(b)(3), 100 Stat. 1848, 1850.

authorized by Congress, *see* H.R. Conf. Rep. No. 95-1720, at 32, *reprinted in* 1978 U.S.C.C.A.N. 4048, 4064, which explains why section 2511(2)(f) set forth all then-existing statutory restrictions on electronic surveillance. Section 2511(2)(f)'s reference to "exclusive means" reflected the state of statutory authority for electronic surveillance in 1978 and cautioned the President not to engage in electronic surveillance outside congressionally sanctioned parameters. It is implausible to think that, in attempting to limit the *President's* authority, Congress also limited its own future authority by barring subsequent Congresses from authorizing the Executive to engage in surveillance in ways not specifically enumerated in FISA or chapter 119, or by requiring a subsequent Congress specifically to amend FISA and section 2511(2)(f). There would be a serious question as to whether the Ninety-Fifth Congress could have so tied the hands of its successors. *See, e.g.*, *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810) (noting that "one legislature cannot abridge the powers of a succeeding legislature"); *Reichelderfer v. Quinn*, 287 U.S. 315, 318 (1932) ("[T]he will of a particular Congress . . . does not impose itself upon those to follow in succeeding years"); *Lockhart v. United States*, 126 S. Ct. 699, 703 (2005) (Scalia, J., concurring) (collecting precedent); 1 W. Blackstone, Commentaries on the Laws of England 90 (1765) ("Acts of parliament derogatory from the power of subsequent parliaments bind not"). In the absence of a clear statement to the contrary, it cannot be presumed that Congress attempted to abnegate its own authority in such a way.

Far from a clear statement of congressional intent to bind itself, there are indications that section 2511(2)(f) cannot be interpreted as requiring that *all* electronic surveillance and domestic interception be conducted under FISA's enumerated procedures or those of chapter 119 of title 18 until and unless those provisions are repealed or amended. Even when section 2511(2)(f) was enacted (and no subsequent authorizing statute existed), it could not reasonably be read to preclude all electronic surveillance conducted outside the procedures of FISA or chapter 119 of title 18. In 1978, use of a pen register or trap and trace device constituted electronic surveillance as defined by FISA. *See* 50 U.S.C. §§ 1801(f), (n). Title I of FISA provided procedures for obtaining court authorization for the use of pen registers to obtain foreign intelligence information. But the Supreme Court had, just prior to the enactment of FISA, held that chapter 119 of title 18 did not govern the use of pen registers. *See United States v. New York Tel. Co.*, 434 U.S. 159, 165-68 (1977). Thus, if section 2511(2)(f) were to be read to permit of no exceptions, the use of pen registers for purposes other than to collect foreign intelligence information would have been unlawful because such use would not have been authorized by the "exclusive" procedures of section 2511(2)(f), *i.e.*, FISA and chapter 119. But no court has held that pen registers could not be authorized outside the foreign intelligence context. Indeed, FISA appears to have recognized this issue by providing a defense to liability for any official who engages in electronic surveillance under a search warrant or court order. *See* 50 U.S.C. § 1809(b). (The practice when FISA was enacted was for law enforcement officers to obtain search warrants under the Federal Rules of Criminal Procedure authorizing the installation and use of pen registers. *See S. 1667, A Bill to Amend Title 18, United States Code, with Respect to the Interception of Certain Communications, Other Forms of Surveillance, and for Other Purposes: Hearing Before the Subcomm. On Patents, Copyrights and Trademarks of the Senate*

Comm. on the Judiciary, 99th Cong. 57 (1985) (prepared statement of James Knapp, Deputy Assistant Attorney General, Criminal Division)).[8]

In addition, section 2511(2)(a)(ii) authorizes telecommunications providers to assist officers of the Government engaged in electronic surveillance when the Attorney General certifies that "no warrant or court order is required by law [and] that all statutory requirements have been met." 18 U.S.C. § 2511(2)(a)(ii).[9] If the Attorney General can certify, in good faith, that the requirements of a subsequent statute authorizing electronic surveillance are met, service providers are affirmatively and expressly authorized to assist the Government. Although FISA does allow the Government to proceed without a court order in several situations, *see* 50 U.S.C. § 1805(f) (emergencies); *id.* § 1802 (certain communications between foreign governments), this provision specifically lists only Title III's emergency provision but speaks generally to Attorney General certification. That reference to Attorney General certification is consistent with the historical practice in which Presidents have delegated to the Attorney General authority to approve warrantless surveillance for foreign intelligence purposes. *See, e.g.*, *United States v. United States District Court,* 444 F.2d 651, 669-71 (6th Cir. 1971) (reproducing as an appendix memoranda from Presidents Roosevelt, Truman, and Johnson). Section 2511(2)(a)(ii) thus suggests that telecommunications providers can be authorized to assist with warrantless electronic surveillance when such surveillance is authorized by law outside FISA.

In sum, by expressly and broadly excepting from its prohibition electronic surveillance undertaken "as authorized by statute," section 109 of FISA permits an exception to the "procedures" of FISA referred to in 18 U.S.C. § 2511(2)(f) where authorized by another statute, even if the other authorizing statute does not specifically amend section 2511(2)(f).

C. THE AUMF IS A "STATUTE" AUTHORIZING SURVEILLANCE OUTSIDE THE CONFINES OF FISA

The AUMF qualifies as a "statute" authorizing electronic surveillance within the meaning of section 109 of FISA.

First, because the term "statute" historically has been given broad meaning, the phrase "authorized by statute" in section 109 of FISA must be read to include joint resolutions such as

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[8] Alternatively, section 109(b) may be read to constitute a "procedure" in FISA or to incorporate procedures from sources other than FISA (such as the Federal Rules of Criminal Procedure or state court procedures), and in that way to satisfy section 2511(2)(f). But if section 109(b)'s defense can be so read, section 109(a) should also be read to constitute a procedure or incorporate procedures not expressly enumerated in FISA.

[9] Section 2511(2)(a)(ii) states:

> Notwithstanding any other law, providers of wire or electronic communication service, . . . are authorized by law to provide information, facilities, or technical assistance to persons authorized by law to intercept . . . communications or to conduct electronic surveillance, as defined [by FISA], if such provider . . . has been provided with . . . a certification in writing by [specified persons proceeding under Title III's emergency provision] or the Attorney General of the United States that no warrant or court order is required by law, that all statutory requirements have been met, and that the specific assistance is required.

the AUMF. *See American Fed'n of Labor v. Watson*, 327 U. S. 582, 592-93 (1946) (finding the term "statute" as used in 28 U.S.C. § 380 to mean "a compendious summary of various enactments, by whatever method they may be adopted, to which a State gives her sanction"); Black's Law Dictionary 1410 (6th ed. 1990) (defining "statute" broadly to include any "formal written enactment of a legislative body," and stating that the term is used "to designate the legislatively created laws in contradistinction to court decided or unwritten laws"). It is thus of no significance to this analysis that the AUMF was enacted as a joint resolution rather than a bill. *See, e.g., Ann Arbor R.R. Co. v. United States*, 281 U.S. 658, 666 (1930) (joint resolutions are to be construed by applying "the rules applicable to legislation in general"); *United States ex rel. Levey v. Stockslager*, 129 U.S. 470, 475 (1889) (joint resolution had "all the characteristics and effects" of statute that it suspended); *Padilla ex rel. Newman v. Bush,* 233 F. Supp. 2d 564, 598 (S.D.N.Y 2002) (in analyzing the AUMF, finding that there is "no relevant constitutional difference between a bill and a joint resolution"), *rev'd sub nom. on other grounds, Rumsfeld v. Padilla*, 352 F.3d 695 (2d Cir. 2003), *rev'd*, 542 U.S. 426 (2004); *see also* Letter for the Hon. John Conyers, Jr., U.S. House of Representatives, from Prof. Laurence H. Tribe at 3 (Jan. 6, 2006) (term "statute" in section 109 of FISA "of course encompasses a joint resolution presented to and signed by the President").

Second, the longstanding history of communications intelligence as a fundamental incident of the use of force and the Supreme Court's decision in *Hamdi v. Rumsfeld* strongly suggest that the AUMF satisfies the requirement of section 109 of FISA for statutory authorization of electronic surveillance. As explained above, it is not necessary to demarcate the outer limits of the AUMF to conclude that it encompasses electronic surveillance targeted at the enemy. Just as a majority of the Court concluded in *Hamdi* that the AUMF authorizes detention of U.S. citizens who are enemy combatants without expressly mentioning the President's long-recognized power to detain, so too does it authorize the use of electronic surveillance without specifically mentioning the President's equally long-recognized power to engage in communications intelligence targeted at the enemy. And just as the AUMF satisfies the requirement in 18 U.S.C. § 4001(a) that no U.S. citizen be detained "except pursuant to an Act of Congress," so too does it satisfy section 109's requirement for statutory authorization of electronic surveillance.[10] In authorizing the President's use of force in response to the September 11th attacks, Congress did not need to comb through the United States Code looking for those restrictions that it had placed on national security operations during times of peace and designate with specificity each traditional tool of military force that it sought to authorize the President to use. There is no historical precedent for such a requirement: authorizations to use

[10] It might be argued that Congress dealt more comprehensively with electronic surveillance in FISA than it did with detention in 18 U.S.C. § 4001(a). Thus, although Congress prohibited detention "except pursuant to an Act of Congress," it combined the analogous prohibition in FISA (section 109(a)) with section 2511(2)(f)'s exclusivity provision. *See* Letter to the Hon. Bill Frist, Majority Leader, U.S. Senate, from Professor Curtis A. Bradley *et al.* at 5 n.6 (Jan. 9, 2006) (noting that section 4001(a) does not "attempt[] to create an exclusive mechanism for detention"). On closer examination, however, it is evident that Congress has regulated detention far more meticulously than these arguments suggest. Detention is the topic of much of the Criminal Code, as well as a variety of other statutes, including those providing for civil commitment of the mentally ill and confinement of alien terrorists. The existence of these statutes and accompanying extensive procedural safeguards, combined with the substantial constitutional issues inherent in detention, *see, e.g.*, *Hamdi*, 542 U.S. at 574-75 (Scalia, J., dissenting), refute any such argument.

military force traditionally have been couched in general language. Indeed, prior administrations have interpreted joint resolutions declaring war and authorizing the use of military force to authorize expansive collection of communications into and out of the United States.[11]

Moreover, crucial to the Framers' decision to vest the President with primary constitutional authority to defend the Nation from foreign attack is the fact that the Executive can act quickly, decisively, and flexibly as needed. For Congress to have a role in that process, it must be able to act with similar speed, either to lend its support to, or to signal its disagreement with, proposed military action. Yet the need for prompt decisionmaking in the wake of a devastating attack on the United States is fundamentally inconsistent with the notion that to do so Congress must legislate at a level of detail more in keeping with a peacetime budget reconciliation bill. In emergency situations, Congress must be able to use broad language that effectively sanctions the President's use of the core incidents of military force. That is precisely what Congress did when it passed the AUMF on September 14, 2001—just three days after the deadly attacks on America. The Capitol had been evacuated on September 11th, and Congress was meeting in scattered locations. As an account emerged of who might be responsible for these attacks, Congress acted quickly to authorize the President to use "all necessary and appropriate force" against the enemy that he determines was involved in the September 11th attacks. Under these circumstances, it would be unreasonable and wholly impractical to demand that Congress specifically amend FISA in order to assist the President in defending the Nation. Such specificity would also have been self-defeating because it would have apprised our adversaries of some of our most sensitive methods of intelligence gathering.[12]

Section 111 of FISA, 50 U.S.C. § 1811, which authorizes the President, "[n]otwithstanding any other law," to conduct "electronic surveillance without a court order under this subchapter to acquire foreign intelligence information for a period not to exceed fifteen calendar days following a declaration of war by Congress," does not require a different reading of the AUMF. *See also id.* § 1844 (same provision for pen registers); *id.* § 1829 (same provision for physical searches). Section 111 cannot reasonably be read as Congress's final word on electronic surveillance during wartime, thus permanently limiting the President in all

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[11] As noted above, in intercepting communications, President Wilson relied on his constitutional authority and the joint resolution declaring war and authorizing the use of military force, which, as relevant here, provided "that the President [is] authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial German Government; and to bring the conflict to a successful termination all of the resources of the country are hereby pledged by the Congress of the United States." Joint Resolution of Apr. 6, 1917, ch. 1, 40 Stat. 1. The authorization did not explicitly mention interception of communications.

[12] Some have suggested that the Administration declined to seek a specific amendment to FISA allowing the NSA activities "because it was advised that Congress would reject such an amendment," Letter to the Hon. Bill Frist, Majority Leader, U.S. Senate, from Professor Curtis A. Bradley *et al.* 4 & n.4 (Jan. 9, 2005), and they have quoted in support of that assertion the Attorney General's statement that certain Members of Congress advised the Administration that legislative relief "would be difficult, if not impossible." *Id.* at 4 n.4. As the Attorney General subsequently indicated, however, the difficulty with such specific legislation was that it could not be enacted "without compromising the program." *See* Remarks by Homeland Security Secretary Chertoff and Attorney General Gonzales on the USA PATRIOT Act (Dec. 21, 2005), *available at* http://www.dhs.gov/dhspublic/display?content=5285.

circumstances to a mere fifteen days of warrantless military intelligence gathering targeted at the enemy following a declaration of war. Rather, section 111 represents Congress's recognition that it would likely have to return to the subject and provide additional authorization to conduct warrantless electronic surveillance outside FISA during time of war. The Conference Report explicitly stated the conferees' "inten[t] that this [fifteen-day] period will allow time for consideration of any amendment to this act that may be appropriate during a wartime emergency." H.R. Conf. Rep. No. 95-1720, at 34, *reprinted in* 1978 U.S.C.C.A.N. at 4063. Congress enacted section 111 so that the President could conduct warrantless surveillance while Congress considered supplemental wartime legislation.

Nothing in the terms of section 111 disables Congress from authorizing such electronic surveillance as a traditional incident of war through a broad, conflict-specific authorization for the use of military force, such as the AUMF. Although the legislative history of section 111 indicates that in 1978 some Members of Congress believed that any such authorization would come in the form of a particularized amendment to FISA itself, section 111 does not require that result. Nor could the Ninety-Fifth Congress tie the hands of a subsequent Congress in this way, at least in the absence of far clearer statutory language expressly requiring that result. *See supra*, pp. 21-22; *compare, e.g.*, War Powers Resolution, § 8, 50 U.S.C. § 1547(a) ("Authority to introduce United States Armed Forces into hostilities . . . shall not be inferred . . . from any provision of law . . . unless such provision specifically authorizes [such] introduction . . . and states that it is intended to constitute specific statutory authorization within the meaning of this chapter."); 10 U.S.C. § 401 (stating that any other provision of law providing assistance to foreign countries to detect and clear landmines shall be subject to specific limitations and may be construed as superseding such limitations "only if, and to the extent that, such provision specifically refers to this section and specifically identifies the provision of this section that is to be considered superseded or otherwise inapplicable"). An interpretation of section 111 that would disable Congress from authorizing broader electronic surveillance in that form can be reconciled neither with the purposes of section 111 nor with the well-established proposition that "one legislature cannot abridge the powers of a succeeding legislature." *Fletcher v. Peck*, 10 U.S. (6 Cranch) at 135; *see supra* Part II.B. For these reasons, the better interpretation is that section 111 was not intended to, and did not, foreclose Congress from using the AUMF as the legal vehicle for supplementing the President's existing authority under FISA in the battle against al Qaeda.

The contrary interpretation of section 111 also ignores the important differences between a formal declaration of war and a resolution such as the AUMF. As a historical matter, a formal declaration of war was no longer than a sentence, and thus Congress would not expect a declaration of war to outline the extent to which Congress authorized the President to engage in various incidents of waging war. Authorizations for the use of military force, by contrast, are typically more detailed and are made for the *specific purpose* of reciting the manner in which Congress has authorized the President to act. Thus, Congress could reasonably expect that an authorization for the use of military force would address the issue of wartime surveillance, while a declaration of war would not. Here, the AUMF declares that the Nation faces "an unusual and extraordinary threat," acknowledges that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States," and

provides that the President is authorized "to use all necessary and appropriate force" against those "he determines" are linked to the September 11th attacks. AUMF pmbl., § 2. This sweeping language goes far beyond the bare terms of a declaration of war. *Compare*, *e.g.*, Act of Apr. 25, 1898, ch. 189, 30 Stat. 364 ("First. That war be, and the same is hereby declared to exist . . . between the United States of America and the Kingdom of Spain.").

Although legislation that has included a declaration of war has often also included an authorization of the President to use force, these provisions are separate and need not be combined in a single statute. *See*, *e.g.*, *id.* ("Second. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several states, *to such extent as may be necessary to carry this Act into effect*.") (emphasis added). Moreover, declarations of war have legal significance independent of any additional authorization of force that might follow. *See*, *e.g.*, Louis Henkin, *Foreign Affairs and the U.S. Constitution* 75 (2d ed. 1996) (explaining that a formal state of war has various legal effects, such as terminating diplomatic relations, and abrogating or suspending treaty obligations and international law rights and duties); *see also id.* at 370 n.65 (speculating that one reason to fight an undeclared war would be to "avoid the traditional consequences of declared war on relations with third nations or even . . . belligerents").

In addition, section 111 does not cover the vast majority of modern military conflicts. The last declared war was World War II. Indeed, the most recent conflict prior to the passage of FISA, Vietnam, was fought without a formal declaration of war. In addition, the War Powers Resolution, enacted less than five years before FISA, clearly recognizes the distinctions between formal declarations of war and authorizations of force and demonstrates that, if Congress had wanted to include such authorizations in section 111, it knew how to do so. *See, e.g.*, 50 U.S.C. § 1544(b) (attempting to impose certain consequences 60 days after reporting the initiation of hostilities to Congress "unless the Congress . . . has declared war *or has enacted a specific authorization for such use*" of military force) (emphasis added). It is possible that, in enacting section 111, Congress intended to make no provision for even the temporary use of electronic surveillance without a court order for what had become the legal regime for most military conflicts. A better reading, however, is that Congress assumed that such a default provision would be unnecessary because, if it had acted through an authorization for the use of military force, the more detailed provisions of that authorization would resolve the extent to which Congress would attempt to authorize, or withhold authorization for, the use of electronic surveillance.[13]

[13] Some have pointed to the specific amendments to FISA that Congress made shortly after September 11th in the USA PATRIOT Act, Pub. L. No. 107-56, §§ 204, 218, 115 Stat. 272, 281, 291 (2001), to argue that Congress did not contemplate electronic surveillance outside the parameters of FISA. *See* Memorandum for Members of the House Permanent Select Comm. on Intel. from Jeffrey H. Smith, *Re: Legal Authorities Regarding Warrantless Surveillance of U.S. Persons* 6-7 (Jan. 3, 2006). The USA PATRIOT Act amendments, however, do not justify giving the AUMF an unnaturally narrow reading. The USA PATRIOT Act amendments made important corrections in the general application of FISA; they were not intended to define the precise incidents of military force that would be available to the President in prosecuting the current armed conflict against al Qaeda and its allies. Many removed long-standing impediments to the effectiveness of FISA that had contributed to the

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The broad text of the AUMF, the authoritative interpretation that the Supreme Court gave it in *Hamdi*, and the circumstances in which it was passed demonstrate that the AUMF is a statute authorizing electronic surveillance under section 109 of FISA. When the President authorizes electronic surveillance against the enemy pursuant to the AUMF, he is therefore acting at the height of his authority under *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

D. THE CANON OF CONSTITUTIONAL AVOIDANCE REQUIRES RESOLVING IN FAVOR OF THE PRESIDENT'S AUTHORITY ANY AMBIGUITY ABOUT WHETHER FISA FORBIDS THE NSA ACTIVITIES

As explained above, the AUMF fully authorizes the NSA activities. Because FISA contemplates the possibility that subsequent statutes could authorize electronic surveillance without requiring FISA's standard procedures, the NSA activities are also consistent with FISA and related provisions in title 18. Nevertheless, some might argue that sections 109 and 111 of FISA, along with section 2511(2)(f)'s "exclusivity" provision and section 2511(2)(e)'s liability exception for officers engaged in FISA-authorized surveillance, are best read to suggest that FISA requires that subsequent authorizing legislation specifically amend FISA in order to free the Executive from FISA's enumerated procedures. As detailed above, this is not the better reading of FISA. But even if these provisions were ambiguous, any doubt as to whether the AUMF and FISA should be understood to allow the President to make tactical military decisions to authorize surveillance outside the parameters of FISA must be resolved to avoid the serious constitutional questions that a contrary interpretation would raise.

It is well established that the first task of any interpreter faced with a statute that may present an unconstitutional infringement on the powers of the President is to determine whether the statute may be construed to avoid the constitutional difficulty. "[I]f an otherwise acceptable

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maintenance of an unnecessary "wall" between foreign intelligence gathering and criminal law enforcement; others were technical clarifications. *See In re Sealed Case,* 310 F.3d 717, 725-30 (Foreign Int. Surv. Ct. Rev. 2002). The "wall" had been identified as a significant problem hampering the Government's efficient use of foreign intelligence information well before the September 11th attacks and in contexts unrelated to terrorism. *See, e.g., Final Report of the Attorney General's Review Team on the Handling of the Los Alamos National Laboratory Investigation* 710, 729, 732 (May 2000); General Accounting Office, *FBI Intelligence Investigations: Coordination Within Justice on Counterintelligence Criminal Matters Is Limited* (GAO-01-780) 3, 31 (July 2001). Finally, it is worth noting that Justice Souter made a similar argument in *Hamdi* that the USA PATRIOT Act all but compelled a narrow reading of the AUMF. *See* 542 U.S. at 551 ("It is very difficult to believe that the same Congress that carefully circumscribed Executive power over alien terrorists on home soil [in the USA PATRIOT Act] would not have meant to require the Government to justify clearly its detention of an American citizen held on home soil incommunicado."). Only Justice Ginsburg joined this opinion, and the position was rejected by a majority of Justices.

Nor do later amendments to FISA undermine the conclusion that the AUMF authorizes electronic surveillance outside the procedures of FISA. Three months after the enactment of the AUMF, Congress enacted certain "technical amendments" to FISA which, *inter alia*, extended the time during which the Attorney General may issue an emergency authorization of electronic surveillance from 24 to 72 hours. *See* Intelligence Authorization Act for Fiscal Year 2002, Pub. L. No. 107-108, § 314, 115 Stat. 1394, 1402 (2001). These modifications to FISA do not in any way undermine Congress's previous authorization in the AUMF for the President to engage in electronic surveillance outside the parameters of FISA in the specific context of the armed conflict with al Qaeda.

construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems." *INS v. St. Cyr,* 533 U.S. 289, 299-300 (2001) (citations omitted); *Ashwander v. TVA,* 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring). Moreover, the canon of constitutional avoidance has particular importance in the realm of national security, where the President's constitutional authority is at its highest. *See Department of the Navy v. Egan*, 484 U.S. 518, 527, 530 (1988); William N. Eskridge, Jr., *Dynamic Statutory Interpretation* 325 (1994) (describing "[s]uper-strong rule against congressional interference with the President's authority over foreign affairs and national security"). Thus, courts and the Executive Branch typically construe a general statute, even one that is written in unqualified terms, to be implicitly limited so as not to infringe on the President's Commander in Chief powers.

Reading FISA to prohibit the NSA activities would raise two serious constitutional questions, both of which must be avoided if possible: (1) whether the signals intelligence collection the President determined was necessary to undertake is such a core exercise of Commander in Chief control over the Armed Forces during armed conflict that Congress cannot interfere with it at all and (2) whether the particular restrictions imposed by FISA are such that their application would impermissibly impede the President's exercise of his constitutionally assigned duties as Commander in Chief. Constitutional avoidance principles require interpreting FISA, at least in the context of the military conflict authorized by the AUMF, to avoid these questions, if "fairly possible." Even if Congress intended FISA to use the full extent of its constitutional authority to "occupy the field" of "electronic surveillance," as FISA used that term, during peacetime, the legislative history indicates that Congress had not reached a definitive conclusion about its regulation during wartime. *See* H.R. Conf. Rep. No. 95-1720, at 34, *reprinted in* 1978 U.S.C.C.A.N. at 4063 (noting that the purpose of the fifteen-day period following a declaration of war in section 111 of FISA was to "allow time for consideration of any amendment to this act that may be appropriate during a wartime emergency"). Therefore, it is not clear that Congress, in fact, intended to test the limits of its constitutional authority in the context of wartime electronic surveillance.

Whether Congress may interfere with the President's constitutional authority to collect foreign intelligence information through interception of communications reasonably believed to be linked to the enemy poses a difficult constitutional question. As explained in Part I, it had long been accepted at the time of FISA's enactment that the President has inherent constitutional authority to conduct warrantless electronic surveillance for foreign intelligence purposes. Congress recognized at the time that the enactment of a statute purporting to eliminate the President's ability, even during peacetime, to conduct warrantless electronic surveillance to collect foreign intelligence was near or perhaps beyond the limit of Congress's Article I powers. The NSA activities, however, involve signals intelligence performed in the midst of a congressionally authorized armed conflict undertaken to prevent further hostile attacks on the United States. The NSA activities lie at the very core of the Commander in Chief power, especially in light of the AUMF's explicit authorization for the President to take *all* necessary and appropriate military action to stop al Qaeda from striking again. The constitutional principles at stake here thus involve not merely the President's well-established inherent

authority to conduct warrantless surveillance for foreign intelligence purposes during peacetime, but also the powers and duties expressly conferred on him as Commander in Chief by Article II.

Even outside the context of wartime surveillance of the enemy, the source and scope of Congress's power to restrict the President's inherent authority to conduct foreign intelligence surveillance is unclear. As explained above, the President's role as sole organ for the Nation in foreign affairs has long been recognized as carrying with it preeminent authority in the field of national security and foreign intelligence. The source of this authority traces to the Vesting Clause of Article II, which states that "[t]he executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1. The Vesting Clause "has long been held to confer on the President plenary authority to represent the United States and to pursue its interests outside the borders of the country, subject only to limits specifically set forth in the Constitution itself and to such statutory limitations as the Constitution permits Congress to impose by exercising one of its enumerated powers." *The President's Compliance with the "Timely Notification" Requirement of Section 501(b) of the National Security Act,* 10 Op. O.L.C. 159, 160-61 (1986) ("*Timely Notification Requirement Op.*").

Moreover, it is clear that some presidential authorities in this context are beyond Congress's ability to regulate. For example, as the Supreme Court explained in *Curtiss-Wright,* the President "*makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it." 299 U.S. at 319. Similarly, President Washington established early in the history of the Republic the Executive's absolute authority to maintain the secrecy of negotiations with foreign powers, even against congressional efforts to secure information. *See id.* at 320-21. Recognizing presidential authority in this field, the Executive Branch has taken the position that "congressional legislation authorizing extraterritorial diplomatic and intelligence activities is superfluous, and . . . statutes infringing the President's inherent Article II authority would be unconstitutional." *Timely Notification Requirement Op.*, 10 Op. O.L.C. at 164.

There are certainly constitutional limits on Congress's ability to interfere with the President's power to conduct foreign intelligence searches, consistent with the Constitution, within the United States. As explained above, intelligence gathering is at the heart of executive functions. Since the time of the Founding it has been recognized that matters requiring secrecy—and intelligence in particular—are quintessentially executive functions. *See, e.g., The Federalist No. 64*, at 435 (John Jay) (Jacob E. Cooke ed. 1961) ("The convention have done well therefore in so disposing of the power of making treaties, that although the president must in forming them act by the advice and consent of the senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest."); *see also Timely Notification Requirement Op.*, 10 Op. O.L.C. at 165; *cf. New York Times Co. v. United States,* 403 U.S. 713, 729-30 (1971) (Stewart, J., concurring) ("[I]t is the constitutional duty of the Executive — as a matter of sovereign prerogative and not as a matter of law as the courts know law — through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the field of international relations and national defense.").

Because Congress has rarely attempted to intrude in this area and because many of these questions are not susceptible to judicial review, there are few guideposts for determining exactly where the line defining the President's sphere of exclusive authority lies. Typically, if a statute is in danger of encroaching upon exclusive powers of the President, the courts apply the constitutional avoidance canon, if a construction avoiding the constitutional issue is "fairly possible." *See, e.g., Egan,* 484 U.S. at 527, 530. The only court that squarely has addressed the relative powers of Congress and the President in this field suggested that the balance tips decidedly in the President's favor. The Foreign Intelligence Surveillance Court of Review recently noted that all courts to have addressed the issue of the President's inherent authority have "held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information." *In re Sealed Case,* 310 F.3d 717, 742 (Foreign Intel. Surv. Ct. of Rev. 2002). On the basis of that unbroken line of precedent, the court "[took] for granted that the President does have that authority," and concluded that, "assuming that is so, FISA could not encroach on the President's constitutional power." *Id.*[14] Although the court did not provide extensive analysis, it is the only judicial statement on point, and it comes from the specialized appellate court created expressly to deal with foreign intelligence issues under FISA.

But the NSA activities are not simply exercises of the President's general foreign affairs powers. Rather, they are primarily an exercise of the President's authority as Commander in Chief during an armed conflict that Congress expressly has authorized the President to pursue. The NSA activities, moreover, have been undertaken specifically to prevent a renewed attack at the hands of an enemy that has already inflicted the single deadliest foreign attack in the Nation's history. The core of the Commander in Chief power is the authority to direct the Armed Forces in conducting a military campaign. Thus, the Supreme Court has made clear that the "President alone" is "constitutionally invested with the entire charge of hostile operations." *Hamilton v. Dillin,* 88 U.S. (21 Wall.) 73, 87 (1874); *The Federalist* No. 74, at 500 (Alexander Hamilton). "As commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy." *Fleming v. Page,* 50 U.S. (9 How.) 603, 615 (1850). As Chief Justice Chase explained in 1866, although Congress has authority to legislate to support the prosecution of a war, Congress may not "*interfere[] with the command of the forces and the conduct of campaigns.* That power and duty belong to the President as commander-in-chief." *Ex parte Milligan,* 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring in judgment) (emphasis added).

The Executive Branch uniformly has construed the Commander in Chief and foreign affairs powers to grant the President authority that is beyond the ability of Congress to regulate. In 1860, Attorney General Black concluded that an act of Congress, if intended to constrain the President's discretion in assigning duties to an officer in the army, would be unconstitutional:

As commander-in-chief of the army it is your right to decide according to your

[14] In the past, other courts have declined to express a view on that issue one way or the other. *See, e.g., Butenko,* 494 F.2d at 601 ("We do not intimate, at this time, any view whatsoever as the proper resolution of the possible clash of the constitutional powers of the President and Congress.").

> own judgment what officer shall perform any particular duty, and as the supreme executive magistrate you have the power of appointment. Congress could not, if it would, take away from the President, or in anywise diminish the authority conferred upon him by the Constitution.

Memorial of Captain Meigs, 9 Op. Att'y Gen. 462, 468 (1860). Attorney General Black went on to explain that, in his view, the statute involved there could probably be read as simply providing "a recommendation" that the President could decline to follow at his discretion. *Id.* at 469-70.[15]

Supreme Court precedent does not support claims of congressional authority over core military decisions during armed conflicts. In particular, the two decisions of the Supreme Court that address a conflict between asserted wartime powers of the Commander in Chief and congressional legislation and that resolve the conflict in favor of Congress—*Little v. Barreme,* 6 U.S. (2 Cranch) 170 (1804), and *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952)—are both distinguishable from the situation presented by the NSA activities in the conflict with al Qaeda. Neither supports the constitutionality of the restrictions in FISA as applied here.

Barreme involved a suit brought to recover a ship seized by an officer of the U.S. Navy on the high seas during the so-called "Quasi War" with France in 1799. The seizure had been based upon the officer's orders implementing an act of Congress suspending commerce between the United States and France and authorizing the seizure of American ships bound *to* a French port. The ship in question was suspected of sailing *from* a French port. The Supreme Court held that the orders given by the President could not authorize a seizure beyond the terms of the

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[15] Executive practice recognizes, consistent with the Constitution, some congressional control over the Executive's decisions concerning the Armed Forces. *See, e.g.*, U.S. Const. art. I, § 8, cl. 12 (granting Congress power "to raise and support Armies"). But such examples have not involved congressional attempts to regulate the actual conduct of a military campaign, and there is no comparable textual support for such interference. For example, just before World War II, Attorney General Robert Jackson concluded that the Neutrality Act prohibited President Roosevelt from selling certain armed naval vessels and sending them to Great Britain. *See Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers,* 39 Op. Att'y Gen. 484, 496 (1940). Jackson's apparent conclusion that Congress could control the President's ability to transfer war material does not imply acceptance of direct congressional regulation of the Commander in Chief's control of the means and methods of engaging the enemy in conflict. Similarly, in *Youngstown Sheet & Tube Co. v. Sawyer,* the Truman Administration readily conceded that, if Congress had prohibited the seizure of steel mills by statute, Congress's action would have been controlling. *See* Brief for Petitioner at 150, *Youngstown*, 343 U.S. 579 (1952) (Nos. 744 and 745). This concession implies nothing concerning congressional control over the methods of engaging the enemy.

Likewise, the fact that the Executive Branch has, at times, sought congressional ratification after taking unilateral action in a wartime emergency does not reflect a concession that the Executive lacks authority in this area. A decision to seek congressional support can be prompted by many motivations, including a desire for political support. In modern times, several administrations have sought congressional authorization for the use of military force while preserving the ability to assert the unconstitutionality of the War Powers Resolution. *See, e.g., Statement on Signing the Resolution Authorizing the Use of Military Force Against Iraq,* 1 Pub. Papers of George Bush 40 (1991) ("[M]y request for congressional support did not . . . constitute any change in the long-standing positions of the executive branch on either the President's constitutional authority to use the Armed Forces to defend vital U.S. interests or the constitutionality of the War Powers Resolution."). Moreover, many actions for which congressional support has been sought — such as President Lincoln's action in raising an Army in 1861 — quite likely fall primarily under Congress's core Article I powers.

statute and therefore that the seizure of the ship not in fact bound *to* a French port was unlawful. *See* 6 U.S. at 177-78. Although some commentators have broadly characterized *Barreme* as standing for the proposition that Congress may restrict by statute the means by which the President can direct the Nation's Armed Forces to carry on a war, the Court's holding was limited in at least two significant ways. First, the operative section of the statute in question applied only to *American* merchant ships. *See id.* at 170 (quoting Act of February 9, 1799). Thus, the Court simply had no occasion to rule on whether, even in the limited and peculiar circumstances of the Quasi War, Congress could have placed some restriction on the orders the Commander in Chief could issue concerning direct engagements with enemy forces. Second, it is significant that the statute in *Barreme* was cast expressly, not as a limitation on the conduct of warfare by the President, but rather as regulation of a subject within the core of Congress's enumerated powers under Article I—the regulation of foreign commerce. *See* U.S. Const., art. I, § 8, cl. 3. The basis of Congress's authority to act was therefore clearer in *Barreme* than it is here.

Youngstown involved an effort by the President—in the face of a threatened work stoppage—to seize and to run steel mills. Congress had expressly considered the possibility of giving the President power to effect such a seizure during national emergencies. It rejected that option, however, instead providing different mechanisms for resolving labor disputes and mechanisms for seizing industries to ensure production vital to national defense.

For the Court, the connection between the seizure and the core Commander in Chief function of commanding the Armed Forces was too attenuated. The Court pointed out that the case did not involve authority over "day-to-day fighting in a theater of war." *Id.* at 587. Instead, it involved a dramatic extension of the President's authority over military operations to exercise control over an industry that was vital for producing equipment needed overseas. Justice Jackson's concurring opinion also reveals a concern for what might be termed foreign-to-domestic presidential bootstrapping. The United States became involved in the Korean conflict through President Truman's unilateral decision to commit troops to the defense of South Korea. The President then claimed authority, based upon this foreign conflict, to extend presidential control into vast sectors of the domestic economy. Justice Jackson expressed "alarm[]" at a theory under which "a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture." *Id.* at 642.

Moreover, President Truman's action extended the President's authority into a field that the Constitution predominantly assigns to Congress. *See id.* at 588 (discussing Congress's commerce power and noting that "[t]he Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control"); *see also id.* at 643 (Jackson, J., concurring) (explaining that Congress is given express authority to "'raise and *support* Armies'" and "'to *provide* and *maintain* a Navy'") (quoting U.S. Const. art. I, § 8, cls. 12, 13). Thus, *Youngstown* involved an assertion of executive power that not only stretched far beyond the

President's core Commander in Chief functions, but that did so by intruding into areas where Congress had been given an express, and apparently dominant, role by the Constitution.[16]

The present situation differs dramatically. The exercise of executive authority involved in the NSA activities is not several steps removed from the actual conduct of a military campaign. As explained above, it is an essential part of the military campaign. Unlike the activities at issue in *Youngstown*, the NSA activities are directed at the enemy, and not at domestic activity that might incidentally aid the war effort. And assertion of executive authority here does not involve extending presidential power into areas reserved for Congress. Moreover, the theme that appeared most strongly in Justice Jackson's concurrence in *Youngstown*—the fear of presidential bootstrapping—does not apply in this context. Whereas President Truman had used his inherent constitutional authority to commit U.S. troops, here Congress expressly provided the President sweeping authority to use "all necessary and appropriate force" to protect the Nation from further attack. AUMF § 2(a). There is thus no bootstrapping concern.

Finally, *Youngstown* cannot be read to suggest that the President's authority for engaging the enemy is less extensive inside the United States than abroad. To the contrary, the extent of the President's Commander in Chief authority necessarily depends on where the enemy is found and where the battle is waged. In World War II, for example, the Supreme Court recognized that the President's authority as Commander in Chief, as supplemented by Congress, included the power to capture and try agents of the enemy in the United States, even if they never had "entered the theatre or zone of active military operations." *Quirin,* 317 U.S. at 38.[17] In the present conflict, unlike in the Korean War, the battlefield was brought to the United States in the most literal way, and the United States continues to face a threat of further attacks on its soil. In short, therefore, *Youngstown* does not support the view that Congress may constitutionally prohibit the President from authorizing the NSA activities.

The second serious constitutional question is whether the particular restrictions imposed by FISA would impermissibly hamper the President's exercise of his constitutionally assigned duties as Commander in Chief. The President has determined that the speed and agility required to carry out the NSA activities successfully could not have been achieved under FISA.[18] Because the President also has determined that the NSA activities are necessary to the defense of

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[16] *Youngstown* does demonstrate that the mere fact that Executive action might be placed in Justice Jackson's category III does not obviate the need for further analysis. Justice Jackson's framework therefore recognizes that Congress might impermissibly interfere with the President's authority as Commander in Chief or to conduct the Nation's foreign affairs.

[17] It had been recognized long before *Youngstown* that, in a large-scale conflict, the area of operations could readily extend to the continental United States, even when there are no major engagements of armed forces here. Thus, in the context of the trial of a German officer for spying in World War I, it was recognized that "[w]ith the progress made in obtaining ways and means for devastation and destruction, the territory of the United States was certainly within the field of active operations" during the war, particularly in the port of New York, and that a spy in the United States might easily have aided the "hostile operation" of U-boats off the coast. *United States ex rel. Wessels v. McDonald,* 265 F. 754, 764 (E.D.N.Y. 1920).

[18] In order to avoid further compromising vital national security activities, a full explanation of the basis for the President's determination cannot be given in an unclassified document.

the United States from a subsequent terrorist attack in the armed conflict with al Qaeda, FISA would impermissibly interfere with the President's most solemn constitutional obligation—to defend the United States against foreign attack.

Indeed, if an interpretation of FISA that allows the President to conduct the NSA activities were not "fairly possible," FISA would be unconstitutional as applied in the context of this congressionally authorized armed conflict. In that event, FISA would purport to *prohibit* the President from undertaking actions necessary to fulfill his constitutional obligation to protect the Nation from foreign attack in the context of a congressionally authorized armed conflict with an enemy that has already staged the most deadly foreign attack in our Nation's history. A statute may not "*impede* the President's ability to perform his constitutional duty," *Morrison v. Olson*, 487 U.S. 654, 691 (1988) (emphasis added); *see also id.* at 696-97, particularly not the President's most solemn constitutional obligation—the defense of the Nation. *See also In re Sealed Case*, 310 F.3d at 742 (explaining that "FISA could not encroach on the President's constitutional power").

Application of the avoidance canon would be especially appropriate here for several reasons beyond the acute constitutional crises that would otherwise result. First, as noted, Congress did not intend FISA to be the final word on electronic surveillance conducted during armed conflicts. Instead, Congress expected that it would revisit the subject in subsequent legislation. Whatever intent can be gleaned from FISA's text and legislative history to set forth a comprehensive scheme for regulating electronic surveillance during peacetime, that same intent simply does not extend to armed conflicts and declared wars.[19] Second, FISA was enacted during the Cold War, not during active hostilities with an adversary whose mode of operation is to blend in with the civilian population until it is ready to strike. These changed circumstances have seriously altered the constitutional calculus, one that FISA's enactors had already recognized might suggest that the statute was unconstitutional. Third, certain technological changes have rendered FISA still more problematic. As discussed above, when FISA was enacted in 1978, Congress expressly declined to regulate through FISA certain signals intelligence activities conducted by the NSA. *See supra*, at pp. 18-19 & n.6.[20] These same factors weigh heavily in favor of concluding that FISA would be unconstitutional as applied to the current conflict if the canon of constitutional avoidance could not be used to head off a collision between the Branches.

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[19] FISA exempts the President from its procedures for fifteen days following a congressional declaration of war. *See* 50 U.S.C. § 1811. If an adversary succeeded in a decapitation strike, preventing Congress from declaring war or passing subsequent authorizing legislation, it seems clear that FISA could not constitutionally continue to apply in such circumstances.

[20] Since FISA's enactment in 1978, the means of transmitting communications has undergone extensive transformation. In particular, many communications that would have been carried by wire are now transmitted through the air, and many communications that would have been carried by radio signals (including by satellite transmissions) are now transmitted by fiber optic cables. It is such technological advancements that have broadened FISA's reach, not any particularized congressional judgment that the NSA's traditional activities in intercepting such international communications should be subject to FISA's procedures. A full explanation of these technological changes would require a discussion of classified information.

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As explained above, FISA is best interpreted to allow a statute such as the AUMF to authorize electronic surveillance outside FISA's enumerated procedures. The strongest counterarguments to this conclusion are that various provisions in FISA and title 18, including section 111 of FISA and section 2511(2)(f) of title 18, together require that subsequent legislation must reference or amend FISA in order to authorize electronic surveillance outside FISA's procedures and that interpreting the AUMF as a statute authorizing electronic surveillance outside FISA procedures amounts to a disfavored repeal by implication. At the very least, however, interpreting FISA to allow a subsequent statute such as the AUMF to authorize electronic surveillance without following FISA's express procedures is "fairly possible," and that is all that is required for purposes of invoking constitutional avoidance. In the competition of competing canons, particularly in the context of an ongoing armed conflict, the constitutional avoidance canon carries much greater interpretative force.[21]

IV. THE NSA ACTIVITIES ARE CONSISTENT WITH THE FOURTH AMENDMENT

The Fourth Amendment prohibits "unreasonable searches and seizures" and directs that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and

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[21] If the text of FISA were clear that nothing other than an amendment to FISA could authorize additional electronic surveillance, the AUMF would impliedly repeal as much of FISA as would prevent the President from using "all necessary and appropriate force" in order to prevent al Qaeda and its allies from launching another terrorist attack against the United States. To be sure, repeals by implication are disfavored and are generally not found whenever two statutes are "capable of co-existence." *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1018 (1984). Under this standard, an implied repeal may be found where one statute would "unduly interfere with" the operation of another. *Radzanower v. Touche Ross & Co.,* 426 U.S. 148, 156 (1976). The President's determination that electronic surveillance of al Qaeda outside the confines of FISA was "necessary and appropriate" would create a clear conflict between the AUMF and FISA. FISA's restrictions on the use of electronic surveillance would preclude the President from doing what the AUMF specifically authorized him to do: use all "necessary and appropriate force" to prevent al Qaeda from carrying out future attacks against the United States. The ordinary restrictions in FISA cannot continue to apply if the AUMF is to have its full effect; those constraints would "unduly interfere" with the operation of the AUMF.

Contrary to the recent suggestion made by several law professors and former government officials, the ordinary presumption against implied repeals is overcome here. *Cf.* Letter to the Hon. Bill Frist, Majority Leader, U.S. Senate, from Professor Curtis A. Bradley et al. at 4 (Jan. 9, 2006). First, like other canons of statutory construction, the canon against implied repeals is simply a presumption that may be rebutted by other factors, including conflicting canons. *Connecticut National Bank v. Germain,* 503 U.S. 249, 253 (1992); *see also Chickasaw Nation v. United States,* 534 U.S. 84, 94 (2001); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001). Indeed, the Supreme Court has declined to apply the ordinary presumption against implied repeals where other canons apply and suggest the opposite result. *See Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 765-66 (1985). Moreover, *Blackfeet* suggests that where the presumption against implied repeals would conflict with other, more compelling interpretive imperatives, it simply does not apply at all. *See* 471 U.S. at 766. Here, in light of the constitutional avoidance canon, which imposes the overriding imperative to use the tools of statutory interpretation to avoid constitutional conflicts, the implied repeal canon either would not apply at all or would apply with significantly reduced force. Second, the AUMF was enacted during an acute national emergency, where the type of deliberation and detail normally required for application of the canon against implied repeals was neither practical nor warranted. As discussed above, in these circumstances, Congress cannot be expected to work through every potential implication of the U.S. Code and to define with particularity each of the traditional incidents of the use of force available to the President.

particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. The touchstone for review of government action under the Fourth Amendment is whether the search is "reasonable." *See, e.g., Vernonia Sch. Dist. v. Acton,* 515 U.S. 646, 653 (1995).

As noted above, *see* Part I, all of the federal courts of appeals to have addressed the issue have affirmed the President's inherent constitutional authority to collect foreign intelligence without a warrant. *See In re Sealed Case,* 310 F.3d at 742. Properly understood, foreign intelligence collection in general, and the NSA activities in particular, fit within the "special needs" exception to the warrant requirement of the Fourth Amendment. Accordingly, the mere fact that no warrant is secured prior to the surveillance at issue in the NSA activities does not suffice to render the activities unreasonable. Instead, reasonableness in this context must be assessed under a general balancing approach, "'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *United States v. Knights*, 534 U.S. 112, 118-19 (2001) (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)). The NSA activities are reasonable because the Government's interest, defending the Nation from another foreign attack in time of armed conflict, outweighs the individual privacy interests at stake, and because they seek to intercept only international communications where one party is linked to al Qaeda or an affiliated terrorist organization.

A. THE WARRANT REQUIREMENT OF THE FOURTH AMENDMENT DOES NOT APPLY TO THE NSA ACTIVITIES

In "the criminal context," the Fourth Amendment reasonableness requirement "usually requires a showing of probable cause" and a warrant. *Board of Educ. v. Earls,* 536 U.S. 822, 828 (2002). The requirement of a warrant supported by probable cause, however, is not universal. Rather, the Fourth Amendment's "central requirement is one of reasonableness," and the rules the Court has developed to implement that requirement "[s]ometimes . . . require warrants." *Illinois v. McArthur*, 531 U.S. 326, 330 (2001); *see also, e.g., Earls*, 536 U.S. at 828 (noting that the probable cause standard "is peculiarly related to criminal investigations and may be unsuited to determining the reasonableness of administrative searches where the Government seeks to prevent the development of hazardous conditions") (internal quotation marks omitted).

In particular, the Supreme Court repeatedly has made clear that in situations involving "special needs" that go beyond a routine interest in law enforcement, the warrant requirement is inapplicable. *See Vernonia,* 515 U.S. at 653 (there are circumstances "'when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable'") (quoting *Griffin* v. *Wisconsin,* 483 U.S. 868, 873 (1987)); *see also McArthur,* 531 U.S. at 330 ("When faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable."). It is difficult to encapsulate in a nutshell all of the different circumstances the Court has found to qualify as "special needs" justifying warrantless searches. But one application in which the Court has found the warrant requirement inapplicable is in circumstances in which the Government faces

an increased need to be able to react swiftly and flexibly, or when there are at stake interests in public safety beyond the interests in ordinary law enforcement. One important factor in establishing "special needs" is whether the Government is responding to an emergency that goes beyond the need for general crime control. *See In re Sealed Case*, 310 F.3d at 745-46.

Thus, the Court has permitted warrantless searches of property of students in public schools, *see New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) (noting that warrant requirement would "unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools"), to screen athletes and students involved in extracurricular activities at public schools for drug use, *see Vernonia*, 515 U.S. at 654-55; *Earls*, 536 U.S. at 829-38, to conduct drug testing of railroad personnel involved in train accidents, *see Skinner v. Railway Labor Executives' Ass'n,* 489 U.S. 602, 634 (1989), and to search probationers' homes, *see Griffin*, 483 U.S. 868. Many special needs doctrine and related cases have upheld *suspicionless* searches or seizures. *See, e.g., Illinois v. Lidster*, 540 U.S. 419, 427 (2004) (implicitly relying on special needs doctrine to uphold use of automobile checkpoint to obtain information about recent hit-and-run accident); *Earls*, 536 U.S. at 829-38 (suspicionless drug testing of public school students involved in extracurricular activities); *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 449-55 (1990) (road block to check all motorists for signs of drunken driving); *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976) (road block near the border to check vehicles for illegal immigrants); *cf. In re Sealed Case*, 310 F.3d at 745-46 (noting that suspicionless searches and seizures in one sense are a greater encroachment on privacy than electronic surveillance under FISA because they are not based on any particular suspicion, but "[o]n the other hand, wiretapping is a good deal more intrusive than an automobile stop accompanied by questioning"). To fall within the "special needs" exception to the warrant requirement, the purpose of the search must be distinguishable from ordinary general crime control. *See, e.g., Ferguson v. Charleston*, 532 U.S. 67 (2001); *City of Indianapolis v. Edmond,* 531 U.S. 32, 41 (2000).

Foreign intelligence collection, especially in the midst of an armed conflict in which the adversary has already launched catastrophic attacks within the United States, fits squarely within the area of "special needs, beyond the normal need for law enforcement" where the Fourth Amendment's touchstone of reasonableness can be satisfied without resort to a warrant. *Vernonia*, 515 U.S. at 653. The Executive Branch has long maintained that collecting foreign intelligence is far removed from the ordinary criminal law enforcement action to which the warrant requirement is particularly suited. *See, e.g.*, Amending the Foreign Intelligence Surveillance Act: Hearings Before the House Permanent Select Comm. on Intelligence,103d Cong. 2d Sess. 62, 63 (1994) (statement of Deputy Attorney General Jamie S. Gorelick) ("[I]t is important to understand that the rules and methodology for criminal searches are inconsistent with the collection of foreign intelligence and would unduly frustrate the President in carrying out his foreign intelligence responsibilities. . . . [W]e believe that the warrant clause of the Fourth Amendment is inapplicable to such [foreign intelligence] searches."); *see also In re Sealed Case*, 310 F.3d 745. The object of foreign intelligence collection is securing information necessary to protect the national security from the hostile designs of foreign powers like al Qaeda and affiliated terrorist organizations, including the possibility of another foreign attack on the United States. In foreign intelligence investigations, moreover, the targets of surveillance

often are agents of foreign powers, including international terrorist groups, who may be specially trained in concealing their activities and whose activities may be particularly difficult to detect. The Executive requires a greater degree of flexibility in this field to respond with speed and absolute secrecy to the ever-changing array of foreign threats faced by the Nation.[22]

In particular, the NSA activities are undertaken to prevent further devastating attacks on our Nation, and they serve the highest government purpose through means other than traditional law enforcement.[23] The NSA activities are designed to enable the Government to act quickly and flexibly (and with secrecy) to find agents of al Qaeda and its affiliates—an international terrorist group which has already demonstrated a capability to infiltrate American communities without being detected—in time to disrupt future terrorist attacks against the United States. As explained by the Foreign Intelligence Surveillance Court of Review, the nature of the "emergency" posed by al Qaeda "takes the matter out of the realm of ordinary crime control." *In re Sealed Case*, 310 F.3d at 746. Thus, under the "special needs" doctrine, no warrant is required by the Fourth Amendment for the NSA activities.

B. THE NSA ACTIVITIES ARE REASONABLE

As the Supreme Court has emphasized repeatedly, "[t]he touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Knights*, 534 U.S. at 118-19 (quotation marks omitted); *see also Earls,* 536 U.S. at 829. The Supreme Court has found a search reasonable when, under the totality of the circumstances, the importance of the governmental interests outweighs the nature and quality of the intrusion on the individual's Fourth Amendment interests. *See Knights*, 534 U.S. at 118-22. Under the standard

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[22] Even in the domestic context, the Supreme Court has recognized that there may be significant distinctions between wiretapping for ordinary law enforcement purposes and domestic national security surveillance. *See United States v. United States District Court,* 407 U.S. 297, 322 (1972) ("*Keith*") (explaining that "the focus of domestic [security] surveillance may be less precise than that directed against more conventional types of crime" because often "the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government's preparedness for some possible future crisis or emergency"); *see also United States v. Duggan*, 743 F.2d 59, 72 (2d Cir. 1984) (reading *Keith* to recognize that "the governmental interests presented in national security investigations differ substantially from those presented in traditional criminal investigations"). Although the Court in *Keith* held that the Fourth Amendment's warrant requirement does apply to investigations of purely *domestic* threats to national security—such as domestic terrorism, it suggested that Congress consider establishing a lower standard for such warrants than that set forth in Title III. *See id.* at 322-23 (advising that "different standards" from those applied to traditional law enforcement "may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of the Government for intelligence information and the protected rights of our citizens"). *Keith*'s emphasis on the need for flexibility applies with even greater force to surveillance directed at *foreign* threats to national security. *See* S. Rep. No. 95-701, at 16 ("Far more than in domestic security matters, foreign counterintelligence investigations are 'long range' and involve 'the interrelation of various sources and types of information.'") (quoting *Keith*, 407 U.S. at 322). And flexibility is particularly essential here, where the purpose of the NSA activities is to prevent another armed attack against the United States.

[23] This is not to say that traditional law enforcement has no role in protecting the Nation from attack. The NSA activities, however, are not directed at bringing criminals to justice but at detecting and preventing plots by a declared enemy of the United States to attack it again.

balancing of interests analysis used for gauging reasonableness, the NSA activities are consistent with the Fourth Amendment.

With respect to the individual privacy interests at stake, there can be no doubt that, as a general matter, interception of telephone communications implicates a significant privacy interest of the individual whose conversation is intercepted. The Supreme Court has made clear at least since *Katz v. United States,* 389 U.S. 347 (1967), that individuals have a substantial and constitutionally protected reasonable expectation of privacy that their telephone conversations will not be subject to governmental eavesdropping. Although the individual privacy interests at stake may be substantial, it is well recognized that a variety of governmental interests—including routine law enforcement and foreign-intelligence gathering—can overcome those interests.

On the other side of the scale here, the Government's interest in engaging in the NSA activities is the most compelling interest possible—securing the Nation from foreign attack in the midst of an armed conflict. One attack already has taken thousands of lives and placed the Nation in state of armed conflict. Defending the Nation from attack is perhaps the most important function of the federal Government—and one of the few express obligations of the federal Government enshrined in the Constitution. *See* U.S. Const. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, *and shall protect each of them against Invasion . . . .*") (emphasis added); *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863) ("If war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force."). As the Supreme Court has declared, "[i]t is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig v. Agee,* 453 U.S. 280, 307 (1981).

The Government's overwhelming interest in detecting and thwarting further al Qaeda attacks is easily sufficient to make reasonable the intrusion into privacy involved in intercepting one-end foreign communications where there is "a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda." Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence, *available at* http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html (Dec. 19, 2005) (statement of Attorney General Gonzales); *cf. Edmond*, 531 U.S. at 44 (noting that "the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack" because "[t]he exigencies created by th[at] scenario[] are far removed" from ordinary law enforcement). The United States has already suffered one attack that killed thousands, disrupted the Nation's financial center for days, and successfully struck at the command and control center for the Nation's military. And the President has stated that the NSA activities are "critical" to our national security. Press Conference of President Bush (Dec. 19, 2005). To this day, finding al Qaeda sleeper agents in the United States remains one of the preeminent concerns of the war on terrorism. As the President has explained, "[t]he terrorists want to strike America again, and they hope to inflict even more damage than they did on September 11th." *Id.*

Of course, because the magnitude of the Government's interest here depends in part upon the threat posed by al Qaeda, it might be possible for the weight that interest carries in the balance to change over time. It is thus significant for the reasonableness of the NSA activities that the President has established a system under which he authorizes the surveillance only for a limited period, typically for 45 days. This process of reauthorization ensures a periodic review to evaluate whether the threat from al Qaeda remains sufficiently strong that the Government's interest in protecting the Nation and its citizens from foreign attack continues to outweigh the individual privacy interests at stake.

Finally, as part of the balancing of interests to evaluate Fourth Amendment reasonableness, it is significant that the NSA activities are limited to intercepting international communications where there is a reasonable basis to conclude that one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization. This factor is relevant because the Supreme Court has indicated that in evaluating reasonableness, one should consider the "efficacy of [the] means for addressing the problem." *Vernonia*, 515 U.S. at 663; *see also Earls,* 536 U.S. at 834 ("Finally, this Court must consider the nature and immediacy of the government's concerns and the efficacy of the Policy in meeting them."). That consideration does not mean that reasonableness requires the "least intrusive" or most "narrowly tailored" means for obtaining information. To the contrary, the Supreme Court has repeatedly rejected such suggestions. *See, e.g., Earls,* 536 U.S. at 837 ("[T]his Court has repeatedly stated that reasonableness under the Fourth Amendment does not require employing the least intrusive means, because the logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers.") (internal quotation marks omitted); *Vernonia,* 515 U.S. at 663 ("We have repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment."). Nevertheless, the Court has indicated that some consideration of the efficacy of the search being implemented—that is, some measure of fit between the search and the desired objective—is relevant to the reasonableness analysis. The NSA activities are targeted to intercept international communications of persons reasonably believed to be members or agents of al Qaeda or an affiliated terrorist organization, a limitation which further strongly supports the reasonableness of the searches.

In sum, the NSA activities are consistent with the Fourth Amendment because the warrant requirement does not apply in these circumstances, which involve both "special needs" beyond the need for ordinary law enforcement and the inherent authority of the President to conduct warrantless electronic surveillance to obtain foreign intelligence to protect our Nation from foreign armed attack. The touchstone of the Fourth Amendment is reasonableness, and the NSA activities are certainly reasonable, particularly taking into account the nature of the threat the Nation faces.

CONCLUSION

For the foregoing reasons, the President — in light of the broad authority to use military force in response to the attacks of September 11th and to prevent further catastrophic attack expressly conferred on the President by the Constitution and confirmed and supplemented by

Congress in the AUMF—has legal authority to authorize the NSA to conduct the signals intelligence activities he has described. Those activities are authorized by the Constitution and by statute, and they violate neither FISA nor the Fourth Amendment.

BellingerJB@state.gov

From: BellingerJB@state.gov
Sent: Thursday, January 19, 2006 1:22 PM
To: (b)(3) 50 USC § 3024(m)(1) @dni.gov
Cc: Moschella, William; Scolinos, Tasia; Bradbury, Steve; Sampson, Kyle; Roehrkasse, Brian; Harriet_Miers@who.eop.gov; John_B._Wiegmann@nsc.eop.gov; John_M._Mitnick@who.eop.gov; (b)(3) 50 USC § 3605; Brett_C._Gerry@who.eop.gov; Raul_F._Yanes@ (b) (6) ; hayneswi (b) (6) ; benjamin.powell@dni.gov; William_K._Kelley@who.eop.gov; Brett_M._Kavanaugh@who.eop.gov; Dan_Bartlett@who.eop.gov
Subject: RE: DOJ white paper on NSA activities

(b) (5) .

-----Original Message-----
From: Benjamin [mailto:(b)(3) 50 USC § 3024(m)(1) @dni.gov]
Sent: Thursday, January 19, 2006 1:20 PM
To: Bellinger, John B(Legal)
Cc: Steve.Bradbury@usdoj.gov; Harriet_Miers@who.eop.gov; John_B._Wiegmann@nsc.eop.gov; John_M._Mitnick@who.eop.gov; (b)(3) 50 USC § 3605; Brett_C._Gerry@who.eop.gov; Raul_F._Yanes@omb.eop.gov; hayneswi (b) (6) ; benjamin.powell@dni.gov; William_K._Kelley@who.eop.gov; Brett_M._Kavanaugh@who.eop.gov; Dan_Bartlett@who.eop.gov; Kyle.Sampson@usdoj.gov; Tasia.Scolinos@usdoj.gov; William.Moschella@usdoj.gov; Brian.Roehrkasse@usdoj.gov
Subject: Re: DOJ white paper on NSA activities

John -- (b) (5) ? Ben

Bellinger, John B(Legal) wrote:

>Thanks Steve.
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> (b) (5) .
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(b) (5)
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(b) (5)
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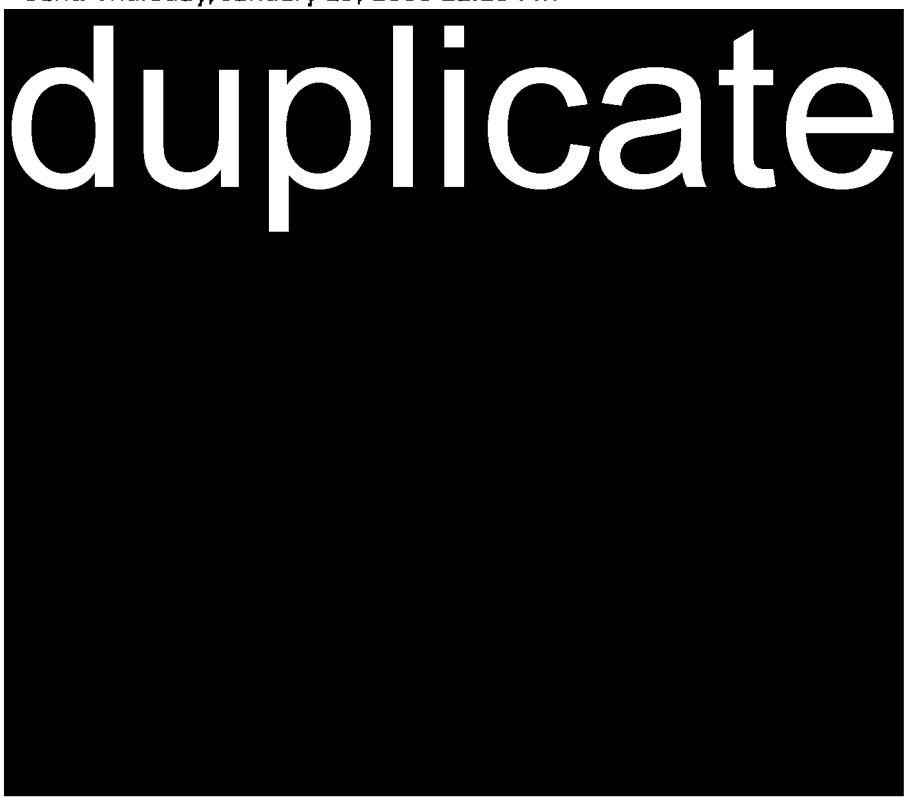
>-----Original Message-----
>From: Steve.Bradbury@usdoj.gov [mailto:Steve.Bradbury@usdoj.gov]
>Sent: Thursday, January 19, 2006 12:16 PM



Harriet_Miers@who.eop.gov

From:	Harriet_Miers@who.eop.gov
Sent:	Sunday, January 22, 2006 4:31 PM
To:	Brand, Rachel; Bradbury, Steve; (b)(3) 50 USC § 3024(m)(1) @dni.gov; Matthew_T._McDonald@who.eop.gov; Brett_C._Gerry@who.eop.gov; Brett_M._Kavanaugh@who.eop.gov; Brett_M._Kavanaugh@who.eop.gov
Subject:	RE: comment

I will ask Matt by way of this email, (b) (5) . Perhaps we can turn the (b) (5) document around early tomorrow.

-----Original Message-----
From: Benjamin [mailto:(b)(3) 50 USC § 3024(m)(1) @dni.gov]
Sent: Sunday, January 22, 2006 4:26 PM
To: McDonald, Matthew T.; Gerry, Brett C.; rachel.brand@usdoj.gov; Miers, Harriet; Kavanaugh, Brett M.; Steve.Bradbury@usdoj.gov; Kavanaugh, Brett M.
Subject: comment

I think we can (b) (5) .

I would cite in particular the following:

(b) (5)

(b) (5)

Harriet_Miers@who.eop.gov

From:	Harriet_Miers@who.eop.gov
Sent:	Sunday, January 22, 2006 4:31 PM
To:	Brand, Rachel; Bradbury, Steve; Matthew_T._McDonald@who.eop.gov; (b)(3) 50 USC § 3024(m)(1) @dni.gov; Brett_C._Gerry@who.eop.gov; Brett_M._Kavanaugh@who.eop.gov; Brett_M._Kavanaugh@who.eop.gov
Subject:	RE: comment

Looks like it is ok!

-----Original Message-----
From: McDonald, Matthew T.
Sent: Sunday, January 22, 2006 4:27 PM
To: 'Benjamin'; Gerry, Brett C.; rachel.brand@usdoj.gov; Miers, Harriet; Kavanaugh, Brett M.; Steve.Bradbury@usdoj.gov; Kavanaugh, Brett M.
Subject: RE: comment

Perfect. We will add that.

-----Original Message-----
From: Benjamin [mailto:(b)(3) 50 USC § 3024(m)(1) @dni.gov]
Sent: Sunday, January 22, 2006 4:26 PM

(b)(3) 50 USC § 3024(m)(1) @dni.gov

From:	(b)(3) 50 USC § 3024(m)(1) @dni.gov
Sent:	Monday, January 23, 2006 9:26 AM
To:	Martinson, Wanda; Bradbury, Steve; Brand, Rachel; Sampson, Kyle; Elwood, Courtney; Dan_Bartlett@who.eop.gov; Brett_M._Kavanaugh@who.eop.gov; Harriet_Miers@who.eop.gov; William_K._Kelley@who.eop.gov; David_S._Addington@ovp.eop.gov; BellingerJB@state.gov; Michael_Drummond@who.eop.gov; Dana_M._Perino@who.eop.gov; Heather_M._Roebke@who.eop.gov; Michael_Allen@nsc.eop.gov; Shannen_W._Coffin@ovp.eop.gov; Brett_C._Gerry@who.eop.gov; (b)(3) 50 USC § 3024(m)(1) @dni.gov; Scott_McClellan@who.eop.gov; Matthew_T._McDonald@who.eop.gov; Christal_R._West@who.eop.gov; Candida_P._Wolff@who.eop.gov
Subject:	[Fwd: Final Version of the Speech]
Attachments:	tmp.htm; NatlPressClub--23Jan--0915.doc

final version prepared for delivery.

-------- Original Message --------
Subject: Final Version of the Speech
Date: Mon, 23 Jan 2006 09:16:26 -0500
From: (b)(3) 50 USC § 3024(m)(1) @dni.gov>
To: (b)(3) 50 USC § 3024(m)(1) @dni.gov>, (b)(3) 50 USC § 3024(m)(1) @dni.gov>, (b)(3) 50 USC § 3024(m)(1) @dni.gov>, (b)(3) 50 USC § 3024(m)(1) @dni.gov>, (b)(3) 50 USC § 3024(m)(1) @dni.gov>, Benjamin Powell <benjamin.powell@dni.gov>, (b)(3) 50 USC § 3024(m)(1) @dni.gov>, (b)(3) 50 USC § 3024(m)(1) @dni.gov>

Principal Deputy Director of National Intelligence
Address to the National Press Club
23 January 2006

Good morning. I'm happy to be here to talk a bit about what American intelligence and especially NSA have been doing to defend the Nation.

I'm here today not only as Ambassador Negroponte's deputy in the Office of the Director of National Intelligence. I'm also here as the former Director of the National Security Agency, a post I took in March of 1999 and left only last spring.

Serious issues have been raised in recent weeks. And discussion of serious issues should be based on facts. There is a lot of information out there—some of it is frankly inaccurate, much of it is simply misunderstood. I'm here to tell the American people what NSA has been doing and why. And, perhaps more importantly, what it has not been doing.

Admittedly, this is a little hard to do while protecting our country's intelligence sources and methods. And people in my line of work generally don't like to talk about what they've done until it's a subject on the History Channel.

But let me make one thing very clear: as challenging as this might be, this is the speech I want to give. I much prefer being here with you today telling you about the things we have done when there hasn't been an attack on the US Homeland.

This is a far easier presentation to make than the ones I had to give four years ago—telling audiences like you *what we hadn't done* in the days and months leading up to the tragic events of September 11th. Today's story is not an easy one to tell in this kind of unclassified environment, but it is by far the brief I prefer to present.

We all have searing memories of the morning of September 11th. I know I do: making a decision to evacuate non-essential workers at NSA while the situation was still unclear; seeing the NSA counter terrorist shop in tears while black out curtains were being stapled to walls around their windows; like many of you, asking my wife to find our kids and then hanging up the phone on her.

Another memory comes from two days later when I addressed the NSA workforce to lay out our mission in a new environment. It was a short video talk beamed throughout our headquarters at Fort Meade and globally. Most of what I said was what anyone would expect. I tried to inspire. Our work was important and the Nation was relying on us. I tried to comfort. Look on the bright side I said to them: right now a quarter billion Americans wished they had your job…being able to go after the enemy. I ended the talk by trying to give perspective. I noted that all free peoples have had to balance the demands of

liberty with the demands of security. Historically we Americans had planted our flag well down the spectrum toward liberty. Here was our challenge. "We were going to keep America free," I said, "by making Americans feel safe again."

But to start the story with that Thursday, September 13th is misleading, because it is really near the end of the first reel of this movie. To understand that moment and that statement, you would have to know a little bit about what had happened to the National Security Agency in the preceding years.

NSA intercepts communications and it does so for only one purpose: to protect the lives, the liberties and the well being of the citizens of the United States from those who would do us harm. By the late 1990s, that job was becoming increasingly more difficult. The explosion of modern communications in terms of volume, variety and velocity threatened to overwhelm us.

The Agency took a lot of criticism in those days—that it was going deaf; that it was ossified in its thinking; that it had not and could not keep up with the changes in modern communications. All that was only reinforced when all the computer systems at Fort Meade went dark for three days in January of 2000 and we couldn't quickly or easily explain why.

Those were interesting times. As we were being criticized for being incompetent and going deaf, others seemed to be claiming that we were omniscient and reading your e-mails.

The Washington Post and New Yorker Magazine during that time incorrectly wrote that, "NSA has turned from eavesdropping on the Communists to eavesdropping on businesses and private citizens," and that, "NSA has the ability to extend its eavesdropping network without limits." We were also referred to as "a global spying network that can eavesdrop on every single phone call, fax, or e-mail, anywhere on the planet."

I used those quotes in a speech I gave at American University in February 2000. The great "urban legend" then was something called Echelon and the false accusation that NSA was using its capabilities to advance American corporate interests: signals intelligence for General Motors or something like that. With these kinds of charges, the turf back then feels familiar now: how could we prove a negative (that we weren't doing certain things) without revealing the appropriate things we were doing that kept America safe.

You see, NSA had (and has) an existential problem. In order to protect American lives and liberties it has to be two things: powerful in its capabilities and secretive in its methods. And we exist in a political culture that distrusts two things most of all: power and secrecy.

Modern communications didn't make this any easier. Gone were the days when "signals of interest" went along a dedicated microwave link between strategic rocket forces headquarters in Moscow to an ICBM base in western Siberia. By the late nineties, what NSA calls "targeted communications"—things like al Qa'ida communications—co-existed out there in a great global web with your phone calls and my e-mails. NSA needed the power to pick out the one and the discipline to leave the others alone.

So this question of security and liberty wasn't a new one for us in September 2001. We always have had this question: how do we balance the legitimate need for foreign intelligence with our responsibility to protect individual privacy rights? It is a question drilled into every employee of NSA from day one, and it shapes every decision about how NSA operates.

September 11th didn't change that. But it did change some things.

This ability to intercept communications, commonly referred to as Signals Intelligence (SIGINT), is a complex business with operational, technological and legal imperatives often intersecting and overlapping. There is routinely some freedom of action—within the law—to adjust operations. After the attacks I exercised some options I always had that collectively better prepared us to defend the Homeland.

Let me talk about this for a minute. Because a big gap in understanding is what's standard—what does NSA do routinely?

Where we set the threshold for what constituted "inherent foreign intelligence value" in reports involving a US person, for example, shapes the level of some of our collection and reporting. The American SIGINT system in the normal course of its foreign intelligence activities inevitably captures this kind of information—information to, from or about what we call a US person (by the way, that routinely includes anyone in the United States, citizen or not.) So, for example, because they were in the United States Mohammad Atta and his fellow 18 hijackers were presumed to be protected persons.

"Inherent foreign intelligence value" is one of the metrics we must use to ensure that we conform to the 4th Amendment's "reasonableness" standard when it comes to protecting the privacy of that person. If the US person information isn't relevant, the data is suppressed or what we call minimized. The individual is not mentioned, or if he is, he is referred to as US person number one. If the US person is actually the named terrorist, well, that could be a different matter.

The standard by which we decided that—the standard of what was relevant and valuable, and therefore what was reasonable—would understandably change as smoke billowed from two American cities and a Pennsylvania farm field, and we acted accordingly. To somewhat oversimplify

the question of inherent intelligence value—to just use an example—we had a different view of Zacarias Moussaoui's computer hard drive after the attacks than we had before.

This is not unlike what happened in other areas. Prior to September 11th airline passengers were screened in one way. After September 11th, we changed how we screened passengers. Similarly, although prior to September 11th certain communications weren't considered valuable intelligence, it became immediately clear after September 11 that intercepting and reporting these same communications were, in fact, critical to defending the homeland.

These decisions were easily within my authorities as Director of NSA under an executive order, known as Executive Order 12333, that was signed in 1981—an Executive Order that has governed NSA for nearly a quarter century.

Let me summarize: in the days after 9-11, NSA was using used its authorities and its judgment to appropriately respond to the most catastrophic attack on the Homeland in the history of the Nation.

That shouldn't be a headline, but as near as I can tell, these actions on my part have created some of the noise in recent press coverage. Let me be clear on this point--except that they involved NSA, these programs were not related to the authorization that the President has recently talked about. I asked to update the Congress on what NSA had been doing and I briefed the entire House Intelligence Committee on the 1st of October 2001 on what we had done under NSA's previously existing authorities.

As part of our adjustments, we also turned on the spigot of NSA reporting to FBI in an unprecedented way. We found that we were giving them too much data in too raw a form. We recognized it almost immediately—a question of weeks—and made adjustments.

This flow of data to the FBI has also become part of the current background noise. Despite reports in the press of "thousands of tips a month," our reporting has not even approached that kind of pace.

I actually find all of this a little odd. After all the findings of the 9-11 Commission and other bodies about the failure to *share* intelligence, I'm up here feeling like I have to explain pushing data to those who might be able to use it.

And it is the nature of intelligence that many tips lead nowhere but you have to go down some blind alleys to find the tips that pay off.

Beyond the authorities that I exercised under the standing executive order, as the war on terror has moved forward we have aggressively used FISA warrants. The Act and the Court have provided us with important tools and we

make full use of them. Published numbers show us using the Court at record rates and the results have been outstanding.

But the revolution in telecommunications technology has extended the actual impact of the FISA regime far beyond what Congress could ever have anticipated in 1978. And I don't think that anyone could make the claim that the FISA statute is optimized to deal with a 9/11 or to deal with a lethal enemy who likely already had combatants inside the United States.

I testified in open session to the House Intelligence Committee in April of the year 2000. At the time I created some looks of disbelief when I said that if Usama bin Ladin crossed the bridge from Niagara Falls, Ontario to Niagara Falls, New York, there were provisions of US law that would kick in, offer him protections and affect how NSA could now cover him. At the time I was just using this as a stark hypothetical. Seventeen months later this was about life and death.

So we now come to one additional piece of NSA's authorities: these are the activities whose existence the President confirmed several weeks ago. The authorization was based on an intelligence community assessment of a serious and continuing threat to the homeland. The lawfulness of the actual authorization was reviewed by lawyers at the Department of Justice and the White House and was approved by the Attorney General.

There is a certain sense of sufficiency here: authorized by the President, duly ordered, its lawfulness attested to by the Attorney General, and its content briefed to the Congressional leadership.

But we all have a personal responsibility. And in the end, NSA would have to implement this--and every operational decision the Agency makes is made with the full involvement of its legal office.

NSA professional career lawyers—and the Agency has a lot of them—have a well-deserved reputation. They're good. They know the law. And they don't let the Agency take many close pitches.

And so, even though I knew that program had been reviewed by the White House and the Department of Justice, I asked the three most senior and experienced lawyers in NSA. Our enemy in the global war on terrorism doesn't divide the United States from the rest of the world. The global telecommunications system doesn't make that distinction either. Our laws do—and should. How did these activities square with these facts? They reported back that they supported the lawfulness of the program—supported, not acquiesced. This was very important to me.

A veteran NSA lawyer, now retired, told me that a correspondent had suggested to him recently that all of the lawyers connected with this program had been very careful from the outset because they knew there would be a "day of reckoning." The NSA lawyer replied that that had not been the case. NSA had been so careful, he said—and I'm using his words here--because in this very focused, limited program NSA had to ensure that it dealt with privacy interests in an appropriate manner.

In other words, our lawyers weren't careful out of fear. They were careful out of a heartfelt and principled view that NSA operations had to be consistent with bedrock legal protections.

In early October 2001 I gathered key members of the NSA work force in our conference room and introduced our new operational authorities to them. With the historic culture at NSA being what it was (and is), I had to do this personally. I told them what we were going to do and why. I also told them that we were going to carry out the program and not go one step further. NSA's legal and operational leadership then went into the details of our new task.

The 9-11 Commission criticized our ability to link things happening in the United States with things that were happening elsewhere. In that light, there are no communications more important to the safety of the Homeland than those affiliated with al Qa'ida with one end in the United States. The President's authorization allows us to track this kind of call more comprehensively and more efficiently.

The trigger is quicker and a bit softer than it is for a FISA warrant but the intrusion into privacy is also limited—only international calls and only those we have a reasonable basis to believe involve al Qa'ida or one of its affiliates. The purpose of all of this is not to collect reams of intelligence but to detect and prevent attacks.

The Intelligence Community has neither the time, the resources, nor the legal authority to read communications that aren't likely to protect us, and NSA has no interest in doing so.

These are communications that we have reason to believe are al Qa'ida communications, a judgment made by the American intelligence professionals (not political appointees) most trained to understand al Qa'ida tactics, communications and aims.

Their work is actively overseen by the most intense oversight regime in the history of the National Security Agency. The Agency's conduct of the program is thoroughly reviewed by the NSA's General Counsel and Inspector General. The program has also been reviewed by the Department of Justice for compliance with the President's authorization.

Oversight also includes an aggressive training program to ensure that all activities are consistent with the letter and intent of the authorization and with the preservation of civil liberties.

Let me also talk for a minute about what this program is not. It is not a driftnet over Dearborn or Lackawanna or Fremont grabbing conversations that we then sort out by these alleged keyword searches or data mining tools or other devices that so-called experts keep talking about. This is targeted and focused.

This is not about intercepting conversations between people in the United States. This is *hot pursuit* of communications entering or leaving the United States involving someone we believe is associated with al Qa'ida.

We bring to bear all the technology we can to ensure that this is so. And if there were an anomaly and we discovered there had been an inadvertent intercept of a domestic-to-domestic call, that intercept would be destroyed and not reported but the incident—the inadvertent collection—would be recorded and reported. But that's a normal NSA procedure—for at least a quarter century.

And, as we always do when dealing with US person information, US identities are expunged when they are not essential to understanding the intelligence value of reports. Again, that's a normal NSA procedure.

So let me make this clear. When you are talking to your daughter away at State college, this program *cannot* intercept your conversations. And when she takes a semester abroad to complete her Arabic studies, this program *will* not intercept your conversations.

Let me emphasize one more thing that this program is not. Look, I know how hard it is to write a headline that is accurate, short and grabbing. But we should really shoot for all three attributes.

"Domestic Spying" doesn't really make it. One end of any call targeted under this program is always outside the United States. I have flown a lot in this country and I've taken hundreds of *domestic* flights. I have never boarded a domestic flight in this country and landed in Waziristan.

In the same way—and I am speaking illustratively here—if NSA had intercepted al Qa'ida ops chief Khalid Sheik Mohammed in Karachi talking to Mohammed Atta in Laurel, Maryland in say July of 2001…if NSA had done that and the results had been made public, I'm convinced that the crawler on all the 7/24 news networks would not have been: NSA domestic spying!

Had this program been in effect prior to 9-11, it is my professional judgment that we would have detected some of the 9-11 al Qa'ida operatives in the United States, and we would have identified them as such.

I've said earlier that this program has been successful. Clearly not every lead pans out, from this or any other source, but this program has given us information that we would not otherwise have been able to get. It's impossible for me to talk about this more in any public way without alerting our enemies to our tactics or what we have learned. I can't give details without increasing the danger to Americans. On one level I wish that I could, but I can't.

Our enemy has made his intentions clear. He has declared war on us. Since September 11th al Qa'ida and its affiliates have continued to announce their intention and continue to act on their clearly stated goal of attacking America. They have succeeded against our friends in London, Madrid, Bali, Amman, Istanbul and elsewhere. They desperately want to succeed against us.

The 9-11 Commission told us that "Bin Laden and Islamist terrorists mean exactly what they say: to them America is the font of all evil, the 'head of the snake', and it must be converted or destroyed." Bin Laden reminded us of this intention as recently as last Thursday.

The people at NSA, and the rest of the Intelligence Community, are committed to defend us against this evil and to do it in a way consistent with our values.

[We know that we can only do our jobs if we have the trust of the American people. And we can only have your trust if we are careful about how we use our tools and resources. That sense of care is part of the fabric of the intelligence community—it helps defines who we are.]

I recently went out to Fort Meade to talk to the work force involved in this program. They know what they have contributed and they know the care with which it has been done. Even in today's heated environment, the only concern expressed to me was continuing their work in the defense of the nation, and doing so in a manner that honors the law and the Constitution.

As I was talking with them I looked out over their heads to see a large sign fixed to one of the pillars that breaks up their office space. The sign is visible from almost all of the work area. It's yellow with bold black letters. The title is readable from 50 feet: "What Constitutes a US Person." And that is followed by an explanation of the criteria.

That has always been the fundamental tenet of privacy for NSA. And here it was, in the center of a room, guiding the actions of a workforce determined to prevent another attack on the United States.

Security and liberty. The people at NSA know what their job is.

I know what my job is, too. I learned a lot from NSA and its culture during my time there. But I come from a culture, too. I have been a military officer for nearly 37 years and from the start I have taken an oath to protect and defend the Constitution of the United States. I would never violate that Constitution nor would I abuse the rights of the American people. As Director I was the one responsible to ensure that this program was limited in its scope and disciplined in its application.

American intelligence and especially American SIGINT is the front line of defense in dramatically changed circumstances, circumstances in which—if we fail to do our job well and completely—more Americans will almost certainly die. The speed of operations, the ruthlessness of our enemy, the pace of modern communications has called on us to do things and do them in ways never before required. We have worked hard to find innovative ways to protect the American people and the liberties we hold dear. And in doing so we have not forgotten who we are.

final version prepared for delivery.

duplicate

(b)(3) 50 USC § 3024(m)(1) @dni.gov

From: (b)(3) 50 USC § 3024(m)(1) @dni.gov
Sent: Monday, January 23, 2006 7:37 PM
To: Bradbury, Steve; Sampson, Kyle; Brett_C._Gerry@who.eop.gov; Brett_M._Kavanaugh@who.eop.gov; William_K._Kelley@who.eop.gov; Harriet_Miers@who.eop.gov; David_S._Addington@ovp.eop.gov
Subject: know AG speech is being revised (b) (5)

one point that I think may resonate in a speech is (b) (5)

So one "take away" could be (b) (5)

just a thought for your consideration. . . no response needed..

Bradbury, Steve

From:	Bradbury, Steve
Sent:	Monday, January 23, 2006 9:50 PM
To:	'(b)(3) 50 USC § 3024(m)(1), (b)(6)'; Sampson, Kyle; Elwood, Courtney; Scolinos, Tasia
Cc:	(b)(3) 50 USC § 3024(m)(1) @dni.gov; (b)(3) 50 USC § 3024(m)(1) @dni.gov; (b)(3) 50 USC § 3024(m)(1) @dni.gov; (b)(3) 50 USC § 3024(m)(1) @dni.gov; Brett_C._Gerry@who.eop.gov; (b)(6) Michael Hayden (personal); (b)(3) 50 USC § 3024(m)(1) @dni.gov; 'Brett_M._Kavanaugh@who.eop.gov'; Dan_Bartlett@who.eop.gov; Moschella, William; McNeil, Tucker (OPA); Nichols, Grant W; Bradbury, Steve
Subject:	Draft 7 of AG speech
Attachments:	NSA Speech Draft 7_1 23pm.doc

Here's the new version of the AG's speech, incorporating all comments, including AG and WH comments, received by 9:45 pm. Very important for General Hayden to review closely and provide any comments he may have, if possible, by 8:00 am. The AG is scheduled to give the speech at 10:30 in the morning. Thx

(b)(6) Michael Hayden (personal)

From: (b)(6) Michael Hayden (personal)

Sent: Monday, January 23, 2006 10:26 PM

To: Scolinos, Tasia; Bradbury, Steve; Sampson, Kyle; Elwood, Courtney; (b)(3) 50 USC § 3024(m)(1), (b)(6)

Cc: Moschella, William; McNeil, Tucker (OPA); Nichols, Grant W; (b)(3) 50 USC § 3024(m)(1)@dni.gov; (b)(3) 50 USC § 3024(m)(1)@dni.gov; (b)(3) 50 USC § 3024(m)(1)@dni.gov; (b)(3) 50 USC § 3024(m)(1)@dni.gov; Dan_Bartlett@who.eop.gov; Brett_M._Kavanaugh@who.eop.gov; Brett_C._Gerry@who.eop.gov

Subject: Re: Draft 7 of AG speech

Attachments: tmp.htm

Got it. I'll take a look.

MVH

Got it. I'll take a look.

MVH

[redacted]@dni.gov

From: [redacted]@dni.gov
Sent: Tuesday, January 24, 2006 12:02 AM
To: Bradbury, Steve; [redacted]
Cc: McNeil, Tucker (OPA); Nichols, Grant W; [redacted]@dni.gov; [redacted]@dni.gov; [redacted]@dni.gov; Brett_M._Kavanaugh@who.eop.gov; Brett_C._Gerry@who.eop.gov
Subject: Re: Draft 7 of AG speech

Steve - looks good to me. A few very minor nits I can provide in morning and you probably will have already caught them anyways.

Have not spoken to general about draft 7 so this does not reflect his input.

----- Original Message -----
From: "Steve.Bradbury@usdoj.gov" [Steve.Bradbury@usdoj.gov]
Sent: 01/23/2006 09:50 PM

duplicate

Bradbury, Steve

From:	Bradbury, Steve
Sent:	Tuesday, January 24, 2006 10:05 AM
To:	'Harriet_Miers@who.eop.gov'; 'Brett_C._Gerry@who.eop.gov'; 'Brett_M._Kavanaugh@who.eop.gov'
Cc:	'Benjamin.Powell@DNI.gov'; 'William_K._Kelley@who.eop.gov'
Subject:	Fw: AS PREPARED FOR DELIVERY: NSA Speech
Attachments:	NSA Speech - as prepared for delivery.doc
Importance:	High

-----Original Message-----
From: Nichols, Grant W <Grant.W.Nichols@SMOJMD.USDOJ.gov>
To: Sampson, Kyle <Kyle.Sampson@SMOJMD.USDOJ.gov>; Elwood, Courtney <Courtney.Elwood@SMOJMD.USDOJ.gov>; Roper, Matt M <Matt.M.Roper@SMOJMD.USDOJ.gov>; Nowacki, John <John.Nowacki@SMOJMD.USDOJ.gov>; Peterson, Evan <Evan.Peterson@SMOJMD.USDOJ.gov>; Bradbury, Steve <Steve.Bradbury@SMOJMD.USDOJ.gov>
CC: Scolinos, Tasia <Tasia.Scolinos@SMOJMD.USDOJ.gov>; Roehrkasse, Brian <Brian.Roehrkasse@SMOJMD.USDOJ.gov>; McNeil, Tucker (OPA) <Tucker.McNeil@SMOJMD.USDOJ.gov>; Sours, Raquel <Raquel.Sours@SMOJMD.USDOJ.gov>
Sent: Tue Jan 24 09:51:00 2006
Subject: AS PREPARED FOR DELIVERY: NSA Speech

Topic: NSA Speech
Date: Tuesday, January 24, 2006 -- 10:30 AM

Please let me know if you have any questions. Thank you.

Grant
(202) 514-5611 - office
(b) (6) - cell

PREPARED REMARKS FOR
ATTORNEY GENERAL ALBERTO R. GONZALES
AT
THE GEORGETOWN UNIVERSITY LAW CENTER

"Intercepting Al Qaeda: A Lawful and Necessary Tool for Protecting America"

WASHINGTON, D.C.
TUESDAY, JANUARY 24th, 2006

Thank you, Dean.

Just after dawn on September 11th, 2001, I flew out of Dulles Airport less than an hour before the departure from the same airport of American Airlines Flight 77, the plane that was hijacked and crashed into the Pentagon later that morning. When I arrived in Norfolk, Virginia, to give a speech, the North Tower of the World Trade Center had been hit. By the end of my remarks, both the North and South Towers stood shrouded in smoke and flames with many desperate people jumping to their deaths, some 90 stories below. I spent much of the rest of that horrible day trying to get back to Washington to assist the President in my role as White House Counsel.

Everyone has a story from that morning. Up and down the East Coast, men and women were settling into their desks, coming home from a graveyard shift, or taking their children to school. And across the rest of the country, Americans were waking up to smoldering ruins and the images of ash covered faces. We remember where we were, what we were doing … and how we felt on that terrible morning, as 3,000 innocent men, women, and children died, without warning, without being able

to look into the faces of their loved ones and say goodbye . . . all killed just for being Americans.

The open wounds so many of us carry from that day are the backdrop to the current debate about the National Security Agency's terrorist surveillance program. This program, described by the President, is focused on international communications where experienced intelligence experts have reason to believe that at least one party to the communication is a member or agent of al Qaeda or a terrorist organization affiliated with al Qaeda. This program is reviewed and reauthorized by the President approximately every 45 days. The leadership of Congress, including the leaders of the Intelligence Committees of both Houses of Congress, have been briefed about this program more than a dozen times since 2001.

A word of caution here. This remains a highly classified program. It remains an important tool in protecting America. So my remarks today speak only to those activities confirmed publicly by the President, and not to other purported activities described in press reports. These press accounts are in almost every case, in one way or another, misinformed, confusing, or wrong. And unfortunately, they have caused concern over the potential breadth of what the President has actually authorized.

It seems that everyone who has heard of the President's actions has an opinion – as well we should regarding matters of national security, separation of powers, and civil liberties. Of course, a few critics are interested only in political gains. Other doubters hope the President will do everything he can to protect our country, but they worry about the appropriate checks upon a Commander in Chief's ability to monitor the enemy in a time of war.

Whatever your opinion, this much is clear: No one is above the law. We are all bound by the Constitution, and no matter the pain and anger we feel from the attacks, we must all abide by the Constitution. During my confirmation hearing, I said that, quote, "we are very, very mindful of Justice O'Connor's statement in the 2004 Hamdi decision that a state of war is not a blank check for the President of the United States with respect to the rights of American citizens. I understand that and I agree with that." Close quote. The President takes seriously his obligations to protect the American people and to protect the Constitution, and he is committed to upholding both of those obligations.

I've noticed that through all of the noise on this topic, very few have asked that the terrorist surveillance program be stopped. The American people are, however, asking two important questions: Is this program necessary? And is it lawful? The answer to each is yes.

***

The question of necessity rightly falls to our nation's military leaders. You've heard the President declare: We are a nation at war.

And in this war, our military employs a wide variety of tools and weapons to defeat the enemy. General Mike Hayden, Principal Deputy Director of National Intelligence and former Director of the NSA, laid out yesterday why a terrorist surveillance program that allows us to quickly collect important information about our enemy is so vital and necessary to the War on Terror.

The conflict against al Qaeda is, in fundamental respects, a war of information. We cannot build walls thick enough, fences high enough, or systems strong enough to keep our enemies out of our open and welcoming country. Instead, as the bipartisan 9/11 and WMD Commissions have urged, we must understand better who they are and what they're doing – we have to collect more dots, if you will, before we can "connect the dots." This program to surveil al Qaeda is a necessary weapon as we fight to detect and prevent another attack before it happens. I feel confident that is what the American people expect … and it's what the terrorist surveillance program provides.

As General Hayden explained yesterday, many men and women who shoulder the daily burden of preventing another terrorist attack here at home are convinced of the necessity of this surveillance program.

***

Now, the legal authorities. As Attorney General, I am primarily concerned with the legal basis for these necessary military activities. I expect that as lawyers and law students, you are too.

The Attorney General of the United States is the chief legal advisor for the Executive Branch. Accordingly, from the outset, the Justice Department thoroughly examined this program against al Qaeda, and concluded that the President is acting within his power in authorizing it. These activities are lawful. The Justice Department is not alone in reaching that conclusion. Career lawyers at the NSA and the NSA's Inspector General have

been intimately involved in reviewing the program and ensuring its legality.

The terrorist surveillance program is firmly grounded in the President's constitutional authorities. No other public official – no mayor, no governor, no member of Congress -- is charged by the Constitution with the primary responsibility for protecting the safety of all Americans – and the Constitution gives the President all authority necessary to fulfill this solemn duty.

It has long been recognized that the President's constitutional powers include the authority to conduct warrantless surveillance aimed at detecting and preventing armed attacks on the United States. Presidents have uniformly relied on their inherent power to gather foreign intelligence for reasons both diplomatic and military, and the federal courts have consistently upheld this longstanding practice.

If this is the case in ordinary times, it is even more so in the present circumstances of our armed conflict with al Qaeda and its allies. The terrorist surveillance program was authorized in response to the deadliest foreign attack on American soil, and it is designed solely to prevent the next attack. After all, the goal of our enemy is to blend in with our civilian population in order to plan and carry out future attacks within America. We cannot forget that the 9/11 hijackers were in our country, living in our communities.

The President's authority to take military action—including the use of communications intelligence targeted at the enemy—does not come merely from his inherent constitutional powers. It comes directly from Congress as well.

Just a few days after the events of September 11th, Congress enacted a joint resolution to support and authorize a military response to the attacks on American soil. In this resolution, the Authorization for Use of Military Force, Congress did two important things. First, it expressly recognized the President's "authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." Second, it supplemented that authority by authorizing the President to, quote, "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" in order to prevent further attacks on the United States.

The Resolution means that the President's authority to use military force against those terrorist groups is at its maximum because he is acting with the express authorization of Congress. Thus, were we to employ the three-part framework of Justice Jackson's concurring opinion in the Youngstown Steel Seizure case, the President's authority falls within Category One, and is at its highest. He is acting "pursuant to an express or implied authorization of Congress," and the President's authority "includes all that he possesses in his own right [under the Constitution] plus all that Congress can" confer on him.

In 2004, the Supreme Court considered the scope of the Force Resolution in 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.

In that case, the Supreme Court confirmed that the expansive language of the Resolution —"*all* necessary and appropriate force"—ensures that the congressional

authorization extends to traditional incidents of waging war. And, just like the detention of enemy combatants approved in *Hamdi*, the use of communications intelligence to prevent enemy attacks is a fundamental and well-accepted incident of military force.

This fact is borne out by history. This Nation has a long tradition of wartime enemy surveillance—a tradition that can be traced to George Washington, who made frequent and effective use of secret intelligence, including the interception of mail between the British and Americans.

And for as long as electronic communications have existed, the United States has conducted surveillance of those communications during wartime—all without judicial warrant. In the Civil War, for example, telegraph wiretapping was common, and provided important intelligence for both sides. In World War I, President Wilson ordered the interception of all cable communications between the United States and Europe; he inferred the authority to do so from the Constitution and from a general congressional authorization to use military force that did not mention anything about such surveillance. So too in World War II; the day after the attack on Pearl Harbor, President Roosevelt authorized the interception of all communications traffic into and out of the United States. The terrorist surveillance program, of course, is far more focused, since it involves only the interception of international communications that are linked to al Qaeda or its allies.

Some have suggested that the Force Resolution did not authorize intelligence collection inside the United States. That contention cannot be squared with the reality of the 9/11 attacks, which gave rise to the Resolution, and with the language of the

authorization itself, which calls on the President to protect Americans both "at home and abroad" and to take action to prevent further terrorist attacks "against the United States." It's also contrary to the history of wartime surveillance, which has often involved the interception of enemy communications into and out of the United States.

Against this backdrop, the NSA's focused terrorist surveillance program falls squarely within the broad authorization of the Resolution even though, as some have argued, the Resolution does not expressly mention surveillance. The Resolution also doesn't mention detention of enemy combatants. But we know from the Supreme Court's decision in *Hamdi* that such detention is authorized. Justice O'Connor reasoned: "Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war…Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here."

As Justice O'Connor recognized, it does not matter that the Force Resolution nowhere specifically refers to the detention of U.S. citizens as enemy combatants. Nor does it matter that individual Members of Congress may not have specifically intended to authorize such detention. The same is true of electronic surveillance. It is a traditional incident of war and, thus, as Justice O'Connor said, it is "of no moment" that the Resolution does not explicitly mention this activity.

These omissions are not at all surprising. In enacting the Force Resolution, Congress made no attempt to catalog every aspect of the use of force it was authorizing.

Instead, following the model of past military force authorizations, Congress—in general, but broad, terms—confirmed the President's authority to use all traditional and legitimate incidents of military force to identify and defeat the enemy. In doing so, Congress must be understood to have intended that the use of electronic surveillance against the enemy is a fundamental component of military operations.

***

Some contend that even if the President has constitutional authority to engage in the surveillance of our enemy in a time of war, that authority has been constrained by Congress with the passage in 1978 of the Foreign Intelligence Surveillance Act. Generally, FISA requires the government to obtain an order from a special FISA court before conducting electronic surveillance. It is clear from the legislative history of FISA that there were concerns among Members of Congress about the constitutionality of FISA itself.

For purposes of this discussion, because I cannot discuss operational details, I'm going to assume here that intercepts of al Qaeda communications under the terrorist surveillance program fall within the definition of "electronic surveillance" in FISA.

The FISA Court of Review, the special court of appeals charged with hearing appeals of decisions by the FISA court, stated in 2002 that, quote, "[w]e take for granted that the President does have that [inherent] authority" and, "assuming that is so, FISA could not encroach on the President's constitutional power." We do not have to decide whether, when we are at war and there is a vital need for the terrorist

surveillance program, FISA unconstitutionally encroaches – or places an unconstitutional constraint upon – the President's Article II powers. We can avoid that tough question because Congress gave the President the Force Resolution, and that statute removes any possible tension between what Congress said in 1978 in FISA and the President's constitutional authority today.

Let me explain by focusing on certain aspects of FISA that have attracted a lot of attention and generated a lot of confusion in the last few weeks.

First, FISA, of course, allows Congress to respond to new threats through separate legislation. FISA bars persons from intentionally "engag[ing] . . . in electronic surveillance under color of law *except as authorized by statute*." For the reasons I have already discussed, the Force Resolution provides the relevant statutory authorization for the terrorist surveillance program. *Hamdi* makes it clear that the broad language in the Resolution can satisfy a requirement for specific statutory authorization set forth in another law.

***Hamdi* involved a statutory prohibition on all detention of U.S. citizens except as authorized "pursuant to an Act of Congress." Even though the detention of a U.S. citizen involves a deprivation of liberty, and even though the Force Resolution says nothing on its face about detention of U.S. citizens, a majority of the members of the Court nevertheless concluded that the Resolution satisfied the statutory requirement. The same is true, I submit, for the prohibition on warrantless electronic surveillance in FISA.**

You may have heard about the provision of FISA that allows the President to conduct warrantless surveillance for 15 days following a declaration of war. That provision shows that Congress knew that warrantless surveillance would be essential in wartime. But no one could reasonably suggest that all such critical military surveillance in a time of war would end after only 15 days.

Instead, the legislative history of this provision makes it clear that Congress elected NOT TO DECIDE how surveillance might need to be conducted in the event of a particular armed conflict. Congress expected that it would revisit the issue in light of events and likely would enact a special authorization during that 15-day period. That is exactly what happened three days after the attacks of 9/11, when Congress passed the Force Resolution, permitting the President to exercise "all necessary and appropriate" incidents of military force.

Thus, it is simply not the case that Congress in 1978 anticipated all the ways that the President might need to act in times of armed conflict to protect the United States. FISA, by its own terms, was not intended to be the last word on these critical issues.

Second, some people have argued that, by their terms, Title III and FISA are the "exclusive means" for conducting electronic surveillance. It is true that the law says that Title III and FISA are "the exclusive means by which electronic surveillance . . . may be conducted." But, as I have said before, FISA itself says elsewhere that the government cannot engage in electronic surveillance "except as authorized by statute." It is noteworthy that, FISA did not say "the government cannot engage in electronic surveillance 'except as authorized by FISA

and Title III.'" No, it said, except as authorized by statute -- any statute. And, in this case, that other statute is the Force Resolution.

Even if some might think that's not the only way to read the statute, in accordance with long recognized canons of construction, FISA must be interpreted in harmony with the Force Resolution to allow the President, as Commander in Chief during time of armed conflict, to take the actions necessary to protect the country from another catastrophic attack. So long as such an interpretation is "fairly possible," the Supreme Court has made clear that it must be adopted, in order to avoid the serious constitutional issues that would otherwise be raised.

Third, I keep hearing, "Why not FISA?" "Why didn't the President get orders from the FISA court approving these NSA intercepts of al Qaeda communications?"

We have to remember that we're talking about a wartime foreign intelligence program. It is an "early warning system" with only one purpose: To detect and prevent the next attack on the United States from foreign agents hiding in our midst. It is imperative for national security that we can detect RELIABLY, IMMEDIATELY, and WITHOUT DELAY whenever communications associated with al Qaeda enter or leave the United States. That may be the only way to alert us to the presence of an al Qaeda agent in our country and to the existence of an unfolding plot.

Consistent with the wartime intelligence nature of this program, the optimal way to achieve the necessary speed and agility is to leave the decisions about particular intercepts to the judgment of professional intelligence officers, based on the best

available intelligence information. They can make that call quickly. If, however, those same intelligence officers had to navigate through the FISA process for each of these intercepts, that would necessarily introduce a significant factor of DELAY, and there would be critical holes in our early warning system.

Some have pointed to the provision in FISA that allows for so-called "emergency authorizations" of surveillance for 72 hours without a court order. There's a serious misconception about these emergency authorizations. People should know that we do not approve emergency authorizations without knowing that we will receive court approval within 72 hours. FISA requires the Attorney General to determine IN ADVANCE that a FISA application for that particular intercept will be fully supported and will be approved by the court before an emergency authorization may be granted. That review process can take precious time.

Thus, to initiate surveillance under a FISA emergency authorization, it is not enough to rely on the best judgment of our intelligence officers alone. Those intelligence officers would have to get the sign-off of lawyers at the NSA that all provisions of FISA have been satisfied, then lawyers in the Department of Justice would have to be similarly satisfied, and finally as Attorney General, I would have to be satisfied that the search meets the requirements of FISA. And we would have to be prepared to follow up with a full FISA application within the 72 hours.

A typical FISA application involves a substantial process in its own right: The work of several lawyers; the preparation of a legal brief and supporting declarations; the approval of a Cabinet-level officer; a certification from the National Security

Adviser, the Director of the FBI, or another designated Senate-confirmed officer; and, finally, of course, the approval of an Article III judge.

We all agree that there should be appropriate checks and balances on our branches of government. The FISA process makes perfect sense in almost all cases of foreign intelligence monitoring in the United States. Although technology has changed dramatically since FISA was enacted, FISA remains a vital tool in the War on Terror, and one that we are using to its fullest and will continue to use against al Qaeda and other foreign threats. But as the President has explained, the terrorist surveillance program operated by the NSA requires the maximum in speed and agility, since even a very short delay may make the difference between success and failure in preventing the next attack. And we cannot afford to fail.

***

Finally, let me explain why the NSA's terrorist surveillance program fully complies with the Fourth Amendment, which prohibits unreasonable searches and seizures.

The Fourth Amendment has never been understood to require warrants in all circumstances. For instance, before you get on an airplane, or enter most government buildings, you and your belongings may be searched without a warrant. There are also searches at the border or when you've been pulled over at a checkpoint designed to identify folks driving while under the influence. Those searches do not violate the Fourth Amendment because they involve "special needs" beyond routine law enforcement. The Supreme Court has repeatedly held that these

circumstances make such a search reasonable even without a warrant.

The terrorist surveillance program is subject to the checks of the Fourth Amendment, and it clearly fits within this "special needs" category. This is by no means a novel conclusion. The Justice Department during the Clinton Administration testified in 1994 that the President has inherent authority under the Constitution to conduct foreign intelligence searches of the private homes of U.S. citizens in the United States without a warrant, and that such warrantless searches are permissible under the Fourth Amendment.

The key question, then, under the Fourth Amendment is not whether there was a warrant, but whether the search was reasonable. This requires balancing privacy with the government's interests – and ensuring that we maintain appropriate safeguards. We've done that here.

No one takes lightly the concerns that have been raised about the interception of communications inside the United States. But this terrorist surveillance program involves intercepting the international communications of persons reasonably believed to be members or agents of al Qaeda or affiliated terrorist organizations. This surveillance is narrowly focused and fully consistent with the traditional forms of enemy surveillance found to be necessary in all previous armed conflicts. The authorities are reviewed approximately every 45 days to ensure that the al Qaeda threat to the national security of this nation continues to exist. Moreover, the standard applied – "reasonable basis to believe" – is essentially the same as the traditional Fourth Amendment probable cause standard. As the

Supreme Court has stated, "The substance of all the definitions of probable cause is a reasonable ground for belief of guilt."

If we conduct this *reasonable* surveillance – while taking special care to preserve civil liberties as we have – we can all continue to enjoy our rights and freedoms for generations to come.

****

I close with a reminder that just last week, al Jazeera aired an audio tape in which Osama bin Laden promised a new round of attacks on the United States. Bin Laden said the proof of his promise is, and I quote, "the explosions you have seen in the capitals of European nations." He continued, quote, "The delay in similar operations happening in America has not been because of failure to break through your security measures. The operations are under preparation and you will see them in your homes the minute they are through with preparations." Close quote.

We've seen and heard these types of warnings before. And we've seen what the result of those preparations can be – thousands of our fellow citizens who perished in the attacks of 9/11.

This Administration has chosen to act now to prevent the next attack, rather than wait until it is too late. This Administration has chosen to utilize every necessary and lawful tool at its disposal. It is hard to imagine a President who wouldn't elect to use these tools in defense of the American people – in fact, I think it would be irresponsible to do otherwise.

The terrorist surveillance program is both necessary and lawful. Accordingly, the President has done with this lawful authority the only responsible thing: use it. He has exercised, and will continue to exercise, his authority to protect Americans and the cherished freedoms of the American people.

Thank you. May God continue to bless the United States of America.

###

(b)(3) 50 USC § 3024(m)(1) @dni.gov

From: (b)(3) 50 USC § 3024(m)(1) @dni.gov
Sent: Thursday, January 26, 2006 2:25 PM
To: Brand, Rachel; Bradbury, Steve; Sampson, Kyle; Michael_Allen@nsc.eop.gov; (b)(3) 50 USC § 3024(m)(1), (b)(6); (b)(3) 50 USC § 3024(m)(1) @dni.gov; (b)(3) 50 USC § 3024(m)(1) @dni.gov; William_K._Kelley@who.eop.gov; David_S._Addington@ovp.eop.gov; Raul_F._Yanes@ (b) (6) ; (b)(3) 50 USC § 3024(m)(1) @dni.gov; Brett_M._Kavanaugh@who.eop.gov; Shannen_W._Coffin@ovp.eop.gov; Dana_M._Perino@who.eop.gov
Subject: Posner
Attachments: tmp.htm; tmp.gif; tmp.gif; tmp.gif; tmp.gif; tmp.gif; tmp.gif; tmp.gif

fyi.

<http://www.tnr.com/sam/public/click.mhtml/498/0>

<http://www.tnr.com/>

WHAT IF WIRETAPPING WORKS?

Wire Trap
by Richard A. Posner
Post date: 01.26.06
Issue date: 02.06.06

he revelation by The New York Times that the National Security Agency (NSA) is conducting a secret program of electronic surveillance outside the framework of the Foreign Intelligence Surveillance Act (fisa) has sparked a hot debate in the press and in the blogosphere. But there is something odd about the debate: It is aridly legal. Civil libertarians contend that the program is illegal, even unconstitutional; some want President Bush impeached for breaking the law. The administration and its defenders have responded that the program is perfectly legal; if it does violate fisa (the administration denies that it does), then, to that extent, the law is unconstitutional. This legal debate is complex, even esoteric. But, apart from a handful of not very impressive anecdotes (did the NSA program really prevent the Brooklyn Bridge from being destroyed by blowtorches?), there has been little discussion of the program's concrete value as a counterterrorism measure or of the inroads it has or has not made on liberty or privacy.

Not only are these questions more important to most people than the legal questions; they are fundamental to those questions. Lawyers who are busily debating legality without first trying to assess the consequences of the program have put the cart before the horse. Law in

the United States is not a Platonic abstraction but a flexible tool of social policy. In analyzing all but the simplest legal questions, one is well advised to begin by asking what social policies are at stake. Suppose the NSA program is vital to the nation's defense, and its impingements on civil liberties are slight. That would not prove the program's legality, because not every good thing is legal; law and policy are not perfectly aligned. But a conviction that the program had great merit would shape and hone the legal inquiry. We would search harder for grounds to affirm its legality, and, if our search were to fail, at least we would know how to change the law—or how to change the program to make it comply with the law--without destroying its effectiveness. Similarly, if the program's contribution to national security were negligible--as we learn, also from the Times, that some FBI personnel are indiscreetly whispering--and it is undermining our civil liberties, this would push the legal analysis in the opposite direction.

Ronald Dworkin, the distinguished legal philosopher and constitutional theorist, wrote in The New York Review of Books in the aftermath of the September 11 attacks that "we cannot allow our Constitution and our shared sense of decency to become a suicide pact." He would doubtless have said the same thing about fisa. If you approach legal issues in that spirit rather than in the spirit of ruat caelum fiat iusticia (let the heavens fall so long as justice is done), you will want to know how close to suicide a particular legal interpretation will bring you before you decide whether to embrace it. The legal critics of the surveillance program have not done this, and the defenders have for the most part been content to play on the critics' turf.

ashington, D.C., which happens to be the home of The New Republic, could be destroyed by an atomic bomb the size of a suitcase. Portions of the city could be rendered uninhabitable, perhaps for decades, merely by the explosion of a conventional bomb that had been coated with radioactive material. The smallpox virus--bioengineered to make it even more toxic and the vaccine against it ineffectual, then aerosolized and sprayed in a major airport--could kill millions of people. Our terrorist enemies have the will to do such things. They may soon have the means as well. Access to weapons of mass destruction is becoming ever easier. With the September 11 attacks now more than four years in the past, forgetfulness and complacency are the order of the day. Are we safer today, or do we just feel safer? The terrorist leaders, scattered by our invasion of Afghanistan and by our stepped-up efforts at counterterrorism (including the NSA program), may even now be regrouping and preparing an attack that will produce destruction on a scale to dwarf September 11. Osama bin Laden's latest audiotape claims that Al Qaeda is planning new attacks on the United States.

The next terrorist attack (if there is one) will likely be mounted, as the last one was, from within the United States but orchestrated by

leaders safely ensconced abroad. So suppose the NSA learns the phone number of a suspected terrorist in a foreign country. If the NSA just wants to listen to his calls to others abroad, fisa doesn't require a warrant. But it does if either (a) one party to the call is in the United States and the interception takes place here or (b) the party on the U.S. side of the conversation is a "U.S person"--primarily either a citizen or a permanent resident. If both parties are in the United States, no warrant can be issued; interception is prohibited. The problem with fisa is that, in order to get a warrant, the government must have grounds to believe the "U.S. person" it wishes to monitor is a foreign spy or a terrorist. Even if a person is here on a student or tourist visa, or on no visa, the government can't get a warrant to find out whether he is a terrorist; it must already have a reason to believe he is one.

As far as an outsider can tell, the NSA program is designed to fill these gaps by conducting warrantless interceptions of communications in which one party is in the United States (whether or not he is a "U.S. person") and the other party is abroad and suspected of being a terrorist. But there may be more to the program. Once a phone number in the United States was discovered to have been called by a terrorist suspect abroad, the NSA would probably want to conduct a computer search of all international calls to and from that local number for suspicious patterns or content. A computer search does not invade privacy or violate fisa, because a computer program is not a sentient being. But, if the program picked out a conversation that seemed likely to have intelligence value and an intelligence officer wanted to scrutinize it, he would come up against fisa's limitations. One can imagine an even broader surveillance program, in which all electronic communications were scanned by computers for suspicious messages that would then be scrutinized by an intelligence officer, but, again, he would be operating outside the framework created by fisa.

The benefits of such programs are easy to see. At worst, they might cause terrorists to abandon or greatly curtail their use of telephone, e-mail, and other means of communicating electronically with people in the United States. That would be a boon to us, because it is far more difficult for terrorist leaders to orchestrate an attack when communicating by courier. At best, our enemies might continue communicating electronically in the mistaken belief that, through use of code words or electronic encryption, they could thwart the NSA.

So the problem with fisa is that the surveillance it authorizes is unusable to discover who is a terrorist, as distinct from eavesdropping on known terrorists--yet the former is the more urgent task. Even to conduct fisa-compliant surveillance of non-U.S. persons, you have to know beforehand whether they are agents of a terrorist group, when what you really want to know is who those agents are.

Fisa's limitations are borrowed from law enforcement. When crimes are

committed, there are usually suspects, and electronic surveillance can be used to nail them. In counterterrorist intelligence, you don't know whom to suspect--you need surveillance to find out. The recent leaks from within the FBI, expressing skepticism about the NSA program, reflect the FBI's continuing inability to internalize intelligence values. Criminal investigations are narrowly focused and usually fruitful. Intelligence is a search for the needle in the haystack. FBI agents don't like being asked to chase down clues gleaned from the NSA's interceptions, because 99 out of 100 (maybe even a higher percentage) turn out to lead nowhere. The agents think there are better uses of their time. Maybe so. But maybe we simply don't have enough intelligence officers working on domestic threats.

have no way of knowing how successful the NSA program has been or will be, though, in general, intelligence successes are underreported, while intelligence failures are fully reported. What seems clear is that fisa does not provide an adequate framework for counterterrorist intelligence. The statute was enacted in 1978, when apocalyptic terrorists scrambling to obtain weapons of mass destruction were not on the horizon. From a national security standpoint, the statute might as well have been enacted in 1878 to regulate the interception of telegrams. In the words of General Michael Hayden, director of NSA on September 11 and now the principal deputy director of national intelligence, the NSA program is designed to "detect and prevent," whereas "fisa was built for long-term coverage against known agents of an enemy power."

In the immediate aftermath of the September 11 attacks, Hayden, on his own initiative, expanded electronic surveillance by NSA without seeking fisa warrants. The United States had been invaded. There was fear of follow-up attacks by terrorists who might already be in the country. Hayden's initiative was within his military authority. But, if a provision of fisa that allows electronic surveillance without a warrant for up to 15 days following a declaration of war is taken literally (and I am not opining on whether it should or shouldn't be; I am not offering any legal opinions), Hayden was supposed to wait at least until September 14 to begin warrantless surveillance. That was the date on which Congress promulgated the Authorization for Use of Military Force, which the administration considers a declaration of war against Al Qaeda. Yet the need for such surveillance was at its most acute on September 11. And, if a war is raging inside the United States on the sixteenth day after an invasion begins and it is a matter of military necessity to continue warrantless interceptions of enemy communications with people in the United States, would anyone think the 15-day rule prohibitive?

We must not ignore the costs to liberty and privacy of intercepting phone calls and other electronic communications. No one wants strangers eavesdropping on his personal conversations. And wiretapping programs

have been abused in the past. But, since the principal fear most people have of eavesdropping is what the government might do with the information, maybe we can have our cake and eat it, too: Permit surveillance intended to detect and prevent terrorist activity but flatly forbid the use of information gleaned by such surveillance for any purpose other than to protect national security. So, if the government discovered, in the course of surveillance, that an American was not a terrorist but was evading income tax, it could not use the discovery to prosecute him for tax evasion or sue him for back taxes. No such rule currently exists. But such a rule (if honored) would make more sense than requiring warrants for electronic surveillance.

Once you grant the legitimacy of surveillance aimed at detection rather than at gathering evidence of guilt, requiring a warrant to conduct it would be like requiring a warrant to ask people questions or to install surveillance cameras on city streets. Warrants are for situations where the police should not be allowed to do something (like search one's home) without particularized grounds for believing that there is illegal activity going on. That is too high a standard for surveillance designed to learn rather than to prove.

Richard A. Posner <http://www.tnr.com/showBio.mhtml?pid=62> is a federal circuit judge and the author of the forthcoming Uncertain Shield: The U.S. Intelligence System in the Throes of Reform.

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Brett_C._Gerry@who.eop.gov

From:	Brett_C._Gerry@who.eop.gov
Sent:	Sunday, February 05, 2006 11:10 AM
To:	Sampson, Kyle
Cc:	Bradbury, Steve; Harriet_Miers@who.eop.gov; Brett_M._Kavanaugh@who.eop.gov; (b)(3) 50 USC § 3024(m)(1) @dni.gov
Subject:	Fw: More comments

Kyle-

Some additional wh comments below. Also, one more general comment I received: (b) (5) [redacted]

Brett

-----Original Message-----
From: Brett Gerry <(b)(6) Brett Gerry (personal)>
To: Gerry, Brett C. <Brett_C._Gerry@who.eop.gov>
Sent: Sun Feb 05 10:59:55 2006
Subject: More comments

Some more WH comments on the AG's opening remarks:

1. (b) (5) [redacted]

2. (b) (5) [redacted]

3. (b) (5) [redacted]

4. (b) (5) [redacted]

5. (b) (5) [redacted]

[redacted] (b) (5)

6. [redacted] (b) (5)

7. [redacted] (b) (5)

8. [redacted] (b) (5)

Bradbury, Steve

From: Bradbury, Steve
Sent: Thursday, February 23, 2006 11:31 AM
To: 'Harriet_Miers@who.eop.gov'; (b)(3) 50 USC s.3024(m)(1) @dni.gov; 'Brett_C._Gerry@who.eop.gov'; 'Brett_M._Kavanaugh@who.eop.gov'; 'Michael_Allen@nsc.eop.gov'
Cc: Sampson, Kyle; Elwood, Courtney; Moschella, William; Baker, James; Elwood, John; Eisenberg, John
Subject: Revised AG letter to SJC
Attachments: SJC Letter_2 23 06 Draft_v8.doc

Attached for WH TSP staffing is a draft letter from the AG to the Senate Judiciary Committee responding to questions posed by the Senators and clarifying certain of the AG's answers at the 2/6 hearing. Please provide any comments today. The AG would like to send this letter up to the Hill by tomorrow. Please note that this draft incorporates comments received from ODNI. Thx. Steve

(b)(3) 50 USC § 3605

From: (b)(3) 50 USC § 3605

Sent: Thursday, February 23, 2006 5:58 PM

To: Moschella, William; (b)(3) 50 USC § 3024(m)(1) @dni.gov

Cc: Scolinos, Tasia; Bradbury, Steve; Elwood, John; Elwood, Courtney; (b)(3) 50 USC § 3024(m)(1) @dni.gov; (b)(3) 50 USC § 3605; (b)(3) 50 USC § 3605; (b)(3) 50 USC § 3605; (b)(3) 50 USC § 3507, (b)(6); dsadoff@nsc.eop.gov; (b)(3) 50 USC § 3024(m)(1) dni.gov; Brett_C._Gerry@who.eop.gov; ryanes@ (b) (6) ; jjukes@ (b) (6) ; jwiegmann@nsc.eop.gov; dfiddelke@who.eop.gov; (b)(3) 50 USC § 3507, (b)(6); smithjm (b) (6) ; gary.testut (b) (6) ; Michael_Allen@nsc.eop.gov; valerie.caproni@ic.fbi.gov; Eleni.Kalisch@ic.fbi.gov; Shannen_W._Coffin@ovp.eop.gov; (b)(3) 50 USC § 3024(m)(1) @dni.gov; (b)(3) 50 USC § 3024(m)(1) dni.gov; (b)(3) 50 USC § 3024(m)(1) dni.gov; (b)(3) 50 USC § 3024(m)(1) @dni.gov; Brett_M._Kavanaugh@who.eop.gov

Subject: RE: Draft AG Letter to Judiciary

Attachments: tmp.htm

For Steve Bradbury (fyi to others)

NSA appreciates the opportunity to comment on the draft AG responses to QFRs from the Senate Judiciary hearing. We have some comments to offer that we feel are (b) (5) . We made significant progress on pulling together our comments today and will get you something early tomorrow. We are mindful that you want to send up the answers tomorrow and will work hard so you can accomplish that.

(b)(3) 50 USC § 3605
Associate General Counsel (Legislation)
(b)(3) 50 USC § 3605

-----Original Message-----
From: Benjamin Powell [mailto:(b)(3) 50 USC § 3024(m)(1) @dni.gov]
Sent: Thursday, February 23, 2006 12:08 PM
To: William Moschella
Cc: Darlene Connelly; (b)(3) 50 USC § 3605; (b)(3) 50 USC § 3605; (b)(3) 50 USC § 3605; (b)(3) 50 USC § 3605; (b)(3) 50 USC § 3507, (b)(6); dsadoff@nsc.eop.gov; 'Judith A. Emmel'; Gerry, Brett C.; ryanes@ (b) (6) ; jjukes@ (b) (6) jwiegmann@nsc.eop.gov; dfiddelke@who.eop.gov; (b)(3) 50 USC § 3507, (b)(6); smithjm (b) (6) ; gary.testut (b) (6) ; Steve.Bradbury@usdoj.gov; John.Elwood@usdoj.gov; Allen, Michael; Courtney.Elwood@usdoj.gov; Tasia Scolinos; Valerie Caproni; Kalisch, Eleni P.; Coffin, Shannen W.; (b)(3) 50 USC § 3024(m)(1) ; (b)(3) 50 USC § 3024(m)(1) ; (b)(3) 50 USC § 3024(m)(1) ; (b)(3) 50 USC § 3024(m)(1) ; Kavanaugh, Brett M.
Subject: Draft AG Letter to Judiciary

See attached letter. Please provide comments to Steve Bradbury at DOJ.
They would appreciate comments by today. His email is:

Steve.Bradbury@usdoj.gov

-------- Original Message --------
Subject: Revised AG letter to SJC
Date: Thu, 23 Feb 2006 11:31:45 -0500 (EST)
From: Steve.Bradbury@usdoj.gov <mailto:Steve.Bradbury@usdoj.gov>
<Steve.Bradbury@usdoj.gov>

duplicate

(b)(3) 50 USC § 3605

From: (b)(3) 50 USC § 3605

Sent: Friday, February 24, 2006 12:35 PM

To: Moschella, William; (b)(3) 50 USC § 3024(m)(1) @dni.gov

Cc: Scolinos, Tasia; Bradbury, Steve; Elwood, John; Elwood, Courtney; (b)(3) 50 USC § 3024(m)(1) @dni.gov; (b)(3) 50 USC § 3605; (b)(3) 50 USC § 3605; (b)(3) 50 USC § 3605; (b)(3) 50 USC § 3507, (b)(6); dsadoff@nsc.eop.gov; (b)(3) 50 USC § 3024(m)(1) dni.gov; Brett_C._Gerry@who.eop.gov; ryanes@ (b) (6) ; jjukes@ (b) (6) ; jwiegmann@nsc.eop.gov; dfiddelke@who.eop.gov; (b)(3) 50 USC § 3507, (b)(6); smithjm (b) (6) ; gary.testut (b) (6) ; Michael_Allen@nsc.eop.gov; valerie.caproni@ic.fbi.gov; Eleni.Kalisch@ic.fbi.gov; Shannen_W._Coffin@ovp.eop.gov; (b)(3) 50 USC § 3024(m)(1) @dni.gov; (b)(3) 50 USC § 3024(m)(1) dni.gov; (b)(3) 50 USC § 3024(m)(1) dni.gov; (b)(3) 50 USC § 3024(m)(1) @dni.gov; Brett_M._Kavanaugh@who.eop.gov; (b)(3) 50 USC § 3605

Subject: RE: Draft AG Letter to Judiciary

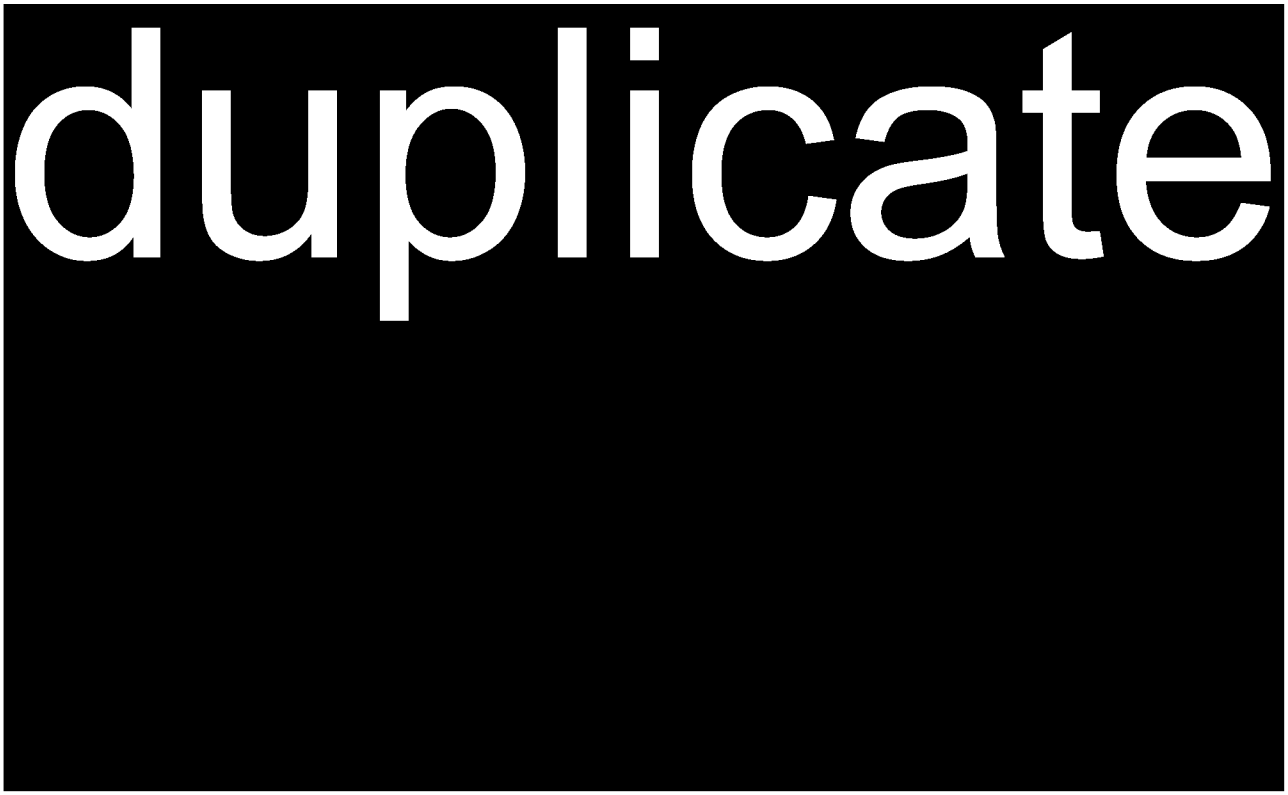
Attachments: tmp.htm; Draft-AG Response to Specter QFRs-24 Feb 06.doc

Steve and John (cc to the rest)

Here are NSA's comments on the AG's answers to Chairman Specter.

(b)(3) 50 USC § 3605

-----Original Message-----
From: Benjamin Powell [mailto:(b)(3) 50 USC § 3024(m)(1) @dni.gov]
Sent: Thursday, February 23, 2006 12:08 PM



Steve and John (cc to the rest)

Here are NSA's comments on the AG's answers to Chairman Specter.

(b)(3) 50 USC § 3605

Bradbury, Steve

From:	Bradbury, Steve
Sent:	Wednesday, March 01, 2006 9:32 AM
To:	'(b)(3) 50 USC § 3024(m)(1) @dni.gov'; 'Michael_Allen@nsc.eop.gov'; Brett_C._Gerry@who.eop.gov; 'Harriet_Miers@who.eop.gov'; 'Brett_M._Kavanaugh@who.eop.gov'
Cc:	'(b)(3) 50 USC § 3024(m)(1) @dni.gov'; '(b)(3) 50 USC § 3024(m)(1) @dni.gov'; Sampson, Kyle; Elwood, Courtney; Scolinos, Tasia; Elwood, John; Eisenberg, John; Edney, Michael; Willen, Brian
Subject:	DOJ letters to hill
Attachments:	2.28.06.AG responses to 2.6.QFRs.pdf; 2.28.06.response to Feinstein pre-hearing questions.pdf; Responses to Sen. Feinstein's Questions (2 28 06).pdf

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

The Attorney General

Washington, D.C.

February 28, 2006

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

Dear Chairman Specter:

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

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

Additional Information Requested by Senators at February 6th Hearing

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

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

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

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

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

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

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

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

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

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

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

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

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

Clarification of Certain Responses

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

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

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

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

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

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

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

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

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

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

Sincerely,

Alberto R. Gonzales

cc: The Honorable Patrick Leahy
Ranking Member

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

February 28, 2006

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

Dear Senator Feinstein:

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

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

Sincerely,

William E. Moschella
Assistant Attorney General

Enclosure

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

The Honorable Patrick J. Leahy
Ranking Minority Member

RESPONSES TO QUESTIONS FROM SENATOR FEINSTEIN

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

- **Who in the Administration contacted Senator Daschle with this request?**

- **Please provide copies of any communication reflecting this request, as well as any documents reflecting the legal reasoning which supported this request for additional language.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[3] **U.S. Constitution, Article I, Section 7.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The quotation to which your question refers is not from an interview on CNN, but is a quotation reported on the CNN Website that is attributed to the Attorney General's remarks at Georgetown University on January 24, 2006. *See* http://www.cnn.com/2006/POLITICS/01/24/nsa.strategy/index.html. The prepared text of that speech accurately reflects that "[t]he *leadership of* Congress, *including the leaders of the Intelligence Committees of both Houses of Congress*, have been briefed about this program more than a dozen times since 2001." *See* http://www.usdoj.gov/ag/speeches/2006/ag_speech_0601242.html (emphasis added). Similarly, during a January 16, 2006, interview on CNN, the Attorney General accurately stated that "we have briefed *certain members of* Congress regarding the operations of these activities and have given examples of where these authorities, where the activities under this program have been extremely helpful in protecting America." *See* http://archives.cnn.com/TRANSCRIPTS/0601/16/lkl.01.html (emphasis added). The Attorney General has not asserted that every Member of Congress was briefed on the Terrorist Surveillance Program, or that you specifically have been briefed on it. However, in accordance with long-standing practice regarding exceptionally sensitive intelligence matters, the Department believes that the briefing of congressional leaders satisfies the Administration's responsibility to keep Congress apprised of the Terrorist Surveillance Program. This view is shared by the Administration and by the Chairmen of both the House and Senate Intelligence Committees. *See* Letter from the Honorable Peter Hoekstra, Chairman, House Permanent Select Committee on Intelligence, to Daniel Mulholland, Director, Congressional Research Service at 1-3 (Feb. 1, 2006); Letter from the Honorable Pat Roberts, Chairman Senate Committee on Intelligence, to the Honorable Arlen Specter and the Honorable Patrick Leahy at 16-17 (Feb. 3, 2006).

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

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

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

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

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

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

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

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

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

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

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

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

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

The Terrorist Surveillance Program targets communications only where one party is outside the United States and where there are reasonable grounds to believe that at least one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization. The "reasonable grounds to believe" standard is essentially a "probable cause" standard of proof. *See Maryland v. Pringle*, 540 U.S. 366, 371 (2003) ("We have stated . . . that '[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt.'"). The critical advantage offered by the Terrorist Surveillance Program compared to FISA is *who* makes the probable cause determination and how many layers of review will occur *before* surveillance begins. Under the Terrorist Surveillance Program, professional intelligence officers, who are experts on al Qaeda and its tactics (including its use of communication systems), with appropriate and rigorous oversight, make the decisions about which international communications should be intercepted. Relying on the best available intelligence, these officers determine before intercepting any communications whether there are "reasonable grounds to believe" that at least one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization. By contrast, even the most expedited traditional FISA process would involve review by NSA intelligence officers, NSA lawyers, Justice Department lawyers, and the Attorney General before even emergency surveillance would begin. In the narrow context of defending the Nation in this congressionally authorized armed conflict with al Qaeda, we must allow these highly trained intelligence experts to use their skills and knowledge to protect us.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. If so, has such authority been exercised?

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

1. If so, has such authority been exercised?

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

1. If so, has such authority been exercised?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- **Is this statement accurate?**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Bradbury, Steve

From: Bradbury, Steve
Sent: Wednesday, March 01, 2006 2:43 PM
To: (b)(3) 50 USC § 3024(m)(1) @dni.gov'; (b)(3) 50 USC § 3605'; 'Harriet_Miers@who.eop.gov'; Brett_C._Gerry@who.eop.gov; 'Brett_M._Kavanaugh@who.eop.gov'; 'Shannen_W._Coffin@ovp.eop.gov'
Cc: Sampson, Kyle; Elwood, Courtney; Moschella, William; Elwood, John; Eisenberg, John; Edney, Michael; Willen, Brian
Subject: Draft DOJ responses to SJC QFRs re NSA hearing
Attachments: Joint Qs of SJC Democrats_3 1 06 v2.doc

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

Harriet_Miers@who.eop.gov

From:	Harriet_Miers@who.eop.gov
Sent:	Thursday, May 11, 2006 9:04 PM
To:	Scolinos, Tasia; Bradbury, Steve; Elwood, John; Roehrkasse, Brian; Kenneth_A._Lisaius@who.eop.gov; Dana_M._Perino@who.eop.gov
Cc:	Eisenberg, John; Brett_C._Gerry@who.eop.gov; [redacted]@dni.gov; Dan_Bartlett@who.eop.gov; Brett_M._Kavanaugh@who.eop.gov; William_K._Kelley@who.eop.gov; Joel_D._Kaplan@who.eop.gov; Michael_Allen@nsc.eop.gov
Subject:	RE: Talking Points
Attachments:	[redacted] Talkers (5-11-06).doc

One additional change.... [redacted] Additionally, Ben Powell had some interesting suggestions about [redacted]. I will ask him to send his comments around if he would like to do so.

-----Original Message-----
From: John.Elwood@usdoj.gov [mailto:John.Elwood@usdoj.gov]
Sent: Thursday, May 11, 2006 8:53 PM
To: Brian.Roehrkasse@usdoj.gov; Steve.Bradbury@usdoj.gov; Tasia.Scolinos@usdoj.gov; Lisaius, Kenneth A.; Perino, Dana M.
Cc: John.Eisenberg@usdoj.gov; Miers, Harriet; Gerry, Brett C.
Subject: RE: Talking Points

I understand that Steve has had a conversation with Harriet and that these are cleared for use. Thank you.

-----Original Message-----
From: Roehrkasse, Brian
Sent: Thursday, May 11, 2006 7:19 PM
To: Elwood, John; Bradbury, Steve; Scolinos, Tasia; 'Kenneth_A._Lisaius@who.eop.gov'; 'Dana_M._Perino@who.eop.gov'
Cc: Eisenberg, John; 'Brett_C._Gerry@who.eop.gov'
Subject: RE: Talking Points

OK - I assume these are now cleared by OLC/DOJ. Has the WH cleared?

-----Original Message-----
From: Elwood, John
Sent: Thursday, May 11, 2006 7:14 PM
To: Bradbury, Steve; Roehrkasse, Brian; Scolinos, Tasia; 'Kenneth_A._Lisaius@who.eop.gov'; 'Dana_M._Perino@who.eop.gov'
Cc: Eisenberg, John; 'Brett_C._Gerry@who.eop.gov'

Subject: RE: Talking Points

I would propose using these talking points, which are revised from Draft #4.

-----Original Message-----
From: Bradbury, Steve
Sent: Thursday, May 11, 2006 7:12 PM
To: Roehrkasse, Brian; Scolinos, Tasia; 'Kenneth_A._Lisaius@who.eop.gov'; 'Dana_M._Perino@who.eop.gov'
Cc: Eisenberg, John; 'Brett_C._Gerry@who.eop.gov'; Elwood, John
Subject: RE: Talking Points

Pls include John Elwood in these messages. Thx

-----Original Message-----
From: Roehrkasse, Brian
Sent: Thursday, May 11, 2006 7:10 PM
To: Scolinos, Tasia; Bradbury, Steve; 'Kenneth_A._Lisaius@who.eop.gov'; 'Dana_M._Perino@who.eop.gov'
Cc: Eisenberg, John; 'Brett_C._Gerry@who.eop.gov'; Eisenberg, John
Subject: RE: Talking Points

Not to confuse things anymore, but assuming that DRAFT 4 is the latest and final draft, (b) (5) [redacted]

-----Original Message-----
From: Scolinos, Tasia
Sent: Thursday, May 11, 2006 7:05 PM
To: Roehrkasse, Brian; Bradbury, Steve; 'Kenneth_A._Lisaius@who.eop.gov'; 'Dana_M._Perino@who.eop.gov'
Cc: Eisenberg, John; 'Brett_C._Gerry@who.eop.gov'; Eisenberg, John
Subject: RE: Talking Points

Just so we are clear, the Draft #4 Legal Authority Talking Points are cleared and we are just waiting for additional Q and A's from OLC?

-----Original Message-----
From: Roehrkasse, Brian
Sent: Thursday, May 11, 2006 6:35 PM
To: Bradbury, Steve; Scolinos, Tasia; 'Kenneth_A._Lisaius@who.eop.gov'; 'Dana_M._Perino@who.eop.gov'
Cc: Eisenberg, John; 'Brett_C._Gerry@who.eop.gov'; Eisenberg, John
Subject: RE: Talking Points

Are the legal authority points the draft 4 from the correspondence at 4:06 below or are there new points?

points?

-----Original Message-----
From: Roehrkasse, Brian
Sent: Thursday, May 11, 2006 4:06 PM
To: 'Harriet_Miers@who.eop.gov'; Dana_M._Perino@who.eop.gov; William_K._Kelley@who.eop.gov; Brett_C._Gerry@who.eop.gov
Cc: Scolinos, Tasia; Dan_Bartlett@who.eop.gov; Catherine_Martin@who.eop.gov; Michele_A._Davis@nsc.eop.gov; Tony_Snow@who.eop.gov; Bradbury, Steve; Eisenberg, John
Subject: RE: Need whc help

That is correct. We made a few minor edits to (b) (5) : and OLC changed the sentence (b) (5)

-----Original Message-----
From: Bradbury, Steve
Sent: Thursday, May 11, 2006 6:33 PM
To: Scolinos, Tasia; 'Kenneth_A._Lisaius@who.eop.gov'; 'Dana_M._Perino@who.eop.gov'
Cc: Eisenberg, John; Roehrkasse, Brian; 'Brett_C._Gerry@who.eop.gov'; Eisenberg, John
Subject: RE: Talking Points

John Elwood and John Eisenberg are working on the Q&As right now and will get them back around ASAP. There are legal authority talking points, which I believe are final. The core of those talkers are incorporated into the Q&As, I believe.

-----Original Message-----
From: Scolinos, Tasia
Sent: Thursday, May 11, 2006 6:27 PM
To: 'Kenneth_A._Lisaius@who.eop.gov'; Dana_M._Perino@who.eop.gov
Cc: Eisenberg, John; Bradbury, Steve; Roehrkasse, Brian; Brett_C._Gerry@who.eop.gov
Subject: RE: Talking Points

I just want to be clear on this point because DOJ is under the impression that we are waiting for final WH clearance on the talking points.

-----Original Message-----
From: Kenneth_A._Lisaius@who.eop.gov [mailto:Kenneth_A._Lisaius@who.eop.gov]
Sent: Thursday, May 11, 2006 6:19 PM
To: Scolinos, Tasia; Dana_M._Perino@who.eop.gov
Subject: FW: Talking Points

From: Persinger, John M.
Sent: Thursday, May 11, 2006 6:18 PM
To: Lisaius, Kenneth A.

Subject: Talking Points

Bill said Justice is still finalizing the Talking Points.
They know they are urgent but Bill does not have a specific timeline.

Roehrkasse, Brian

From:	Roehrkasse, Brian
Sent:	Friday, May 12, 2006 8:43 AM
To:	Scolinos, Tasia; Bradbury, Steve; Elwood, John; Kenneth_A._Lisaius@who.eop.gov; Dana_M._Perino@who.eop.gov; Brett_C._Gerry@who.eop.gov; Eisenberg, John
Cc:	(b)(3) 50 USC § 3024(m)(1) @dni.gov; Dan_Bartlett@who.eop.gov; Brett_M._Kavanaugh@who.eop.gov; William_K._Kelley@who.eop.gov; Joel_D._Kaplan@who.eop.gov; Michael_Allen@nsc.eop.gov; Sampson, Kyle; Moschella, William; Tony_Snow@who.eop.gov; 'Harriet_Miers@who.eop.gov'; Scolinos, Tasia
Subject:	FINAL DRAFT Q&A/Talking Points
Attachments:	(b) (5) Talkers Final Draft.doc
Importance:	High

I have reformatted last night's final draft Q & A for ease of reading including combining questions 2 and 3 since they have the same answer. (b) (5) . Please let me know if these are the final Q & As.

Thanks.

William_K._Kelley@who.eop.gov

From:	William_K._Kelley@who.eop.gov
Sent:	Friday, May 12, 2006 9:14 AM
To:	Scolinos, Tasia; Bradbury, Steve; Elwood, John; Eisenberg, John; Roehrkasse, Brian; Kenneth_A._Lisaius@who.eop.gov; Dana_M._Perino@who.eop.gov; Brett_C._Gerry@who.eop.gov
Cc:	Sampson, Kyle; Moschella, William; Harriet_Miers@who.eop.gov; Michael_Allen@nsc.eop.gov; (b)(3) 50 USC § 3024(m)(1) @dni.gov; Dan_Bartlett@who.eop.gov; Brett_M._Kavanaugh@who.eop.gov; Joel_D._Kaplan@who.eop.gov; Tony_Snow@who.eop.gov
Subject:	Re: FINAL DRAFT Q&A/Talking Points

Fine by me.

-----Original Message-----
From: Brian.Roehrkasse@usdoj.gov <Brian.Roehrkasse@usdoj.gov>
To: Tasia.Scolinos@usdoj.gov <Tasia.Scolinos@usdoj.gov>; Steve.Bradbury@usdoj.gov <Steve.Bradbury@usdoj.gov>; John.Elwood@usdoj.gov <John.Elwood@usdoj.gov>; John.Eisenberg@usdoj.gov <John.Eisenberg@usdoj.gov>; Lisaius, Kenneth A. <Kenneth_A._Lisaius@who.eop.gov>; Perino, Dana M. <Dana_M._Perino@who.eop.gov>; Gerry, Brett C. <Brett_C._Gerry@who.eop.gov>
CC: Kyle.Sampson@usdoj.gov <Kyle.Sampson@usdoj.gov>; William.Moschella@usdoj.gov <William.Moschella@usdoj.gov>; Miers, Harriet <Harriet_Miers@who.eop.gov>; Tasia.Scolinos@usdoj.gov <Tasia.Scolinos@usdoj.gov>; Allen, Michael <Michael_Allen@nsc.eop.gov>; (b)(3) 50 USC § 3024(m)(1) @dni.gov <(b)(3) 50 USC § 3024(m)(1) @dni.gov>; Bartlett, Dan <Dan_Bartlett@who.eop.gov>; Kavanaugh, Brett M. <Brett_M._Kavanaugh@who.eop.gov>; Kelley, William K. <William_K._Kelley@who.eop.gov>; Kaplan, Joel <Joel_D._Kaplan@who.eop.gov>; Snow, Tony <Tony_Snow@who.eop.gov>
Sent: Fri May 12 08:42:14 2006

duplicate

Dan_Bartlett@who.eop.gov

From:	Dan_Bartlett@who.eop.gov
Sent:	Friday, May 12, 2006 9:31 AM
To:	Scolinos, Tasia; Bradbury, Steve; Elwood, John; Roehrkasse, Brian; Harriet_Miers@who.eop.gov; Kenneth_A._Lisaius@who.eop.gov; Dana_M._Perino@who.eop.gov
Cc:	Eisenberg, John; Brett_C._Gerry@who.eop.gov; (b)(3) 50 USC § 3024(m)(1) @dni.gov; Brett_M._Kavanaugh@who.eop.gov; William_K._Kelley@who.eop.gov; Joel_D._Kaplan@who.eop.gov; Michael_Allen@nsc.eop.gov
Subject:	FINAL TALKING POINTS
Attachments:	(b) (5) Talkers.Final (5-11-06).doc

Please use these.