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]

Here's a thumbnail sketch:

1. [redacted].

2. I discussed with Roy McLeese [redacted]

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;

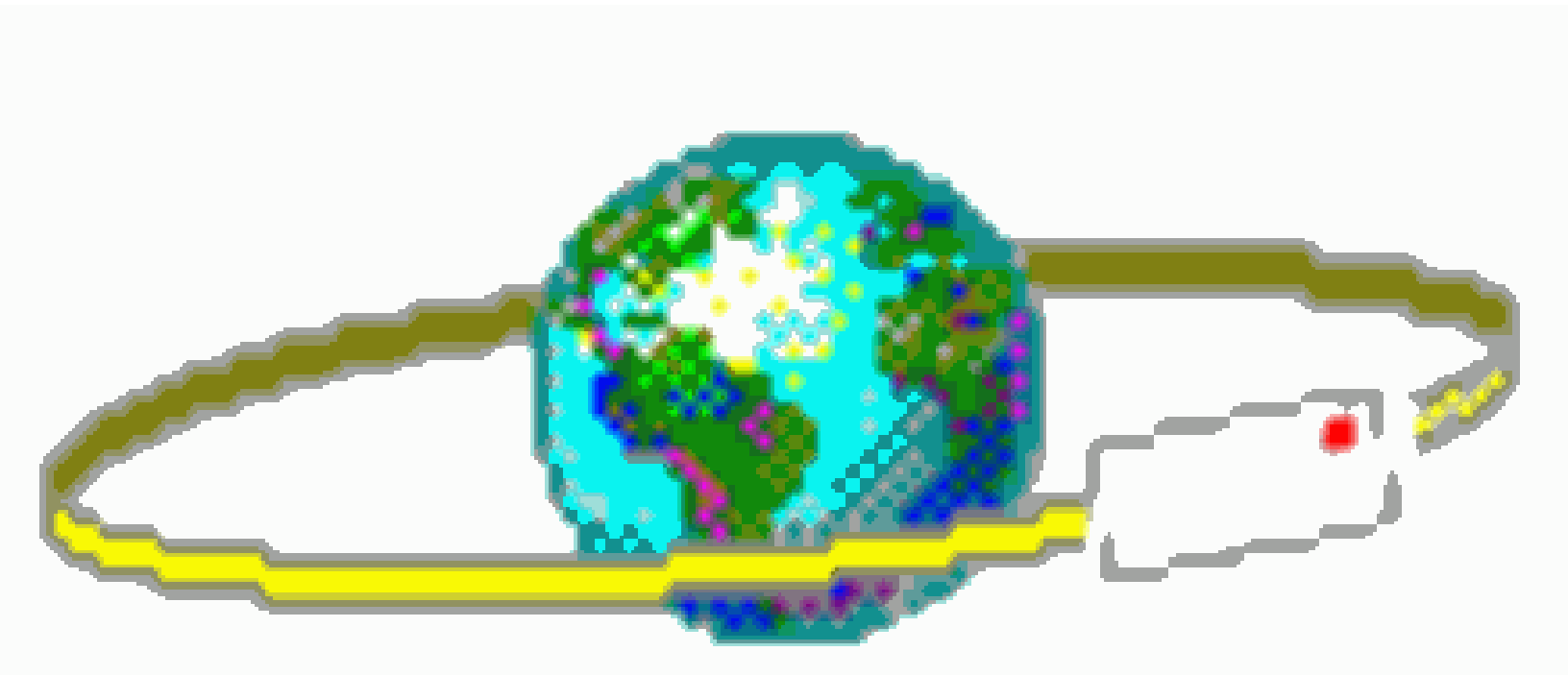
''(III) despite the use of all means available (including all available telephonic, telegraphic, and other electronic means), the other members of the Board have not been able to be contacted on the matter; and

''(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

(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. (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) [redacted]

-----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) [redacted] ?

(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) [redacted].

-----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]

[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)

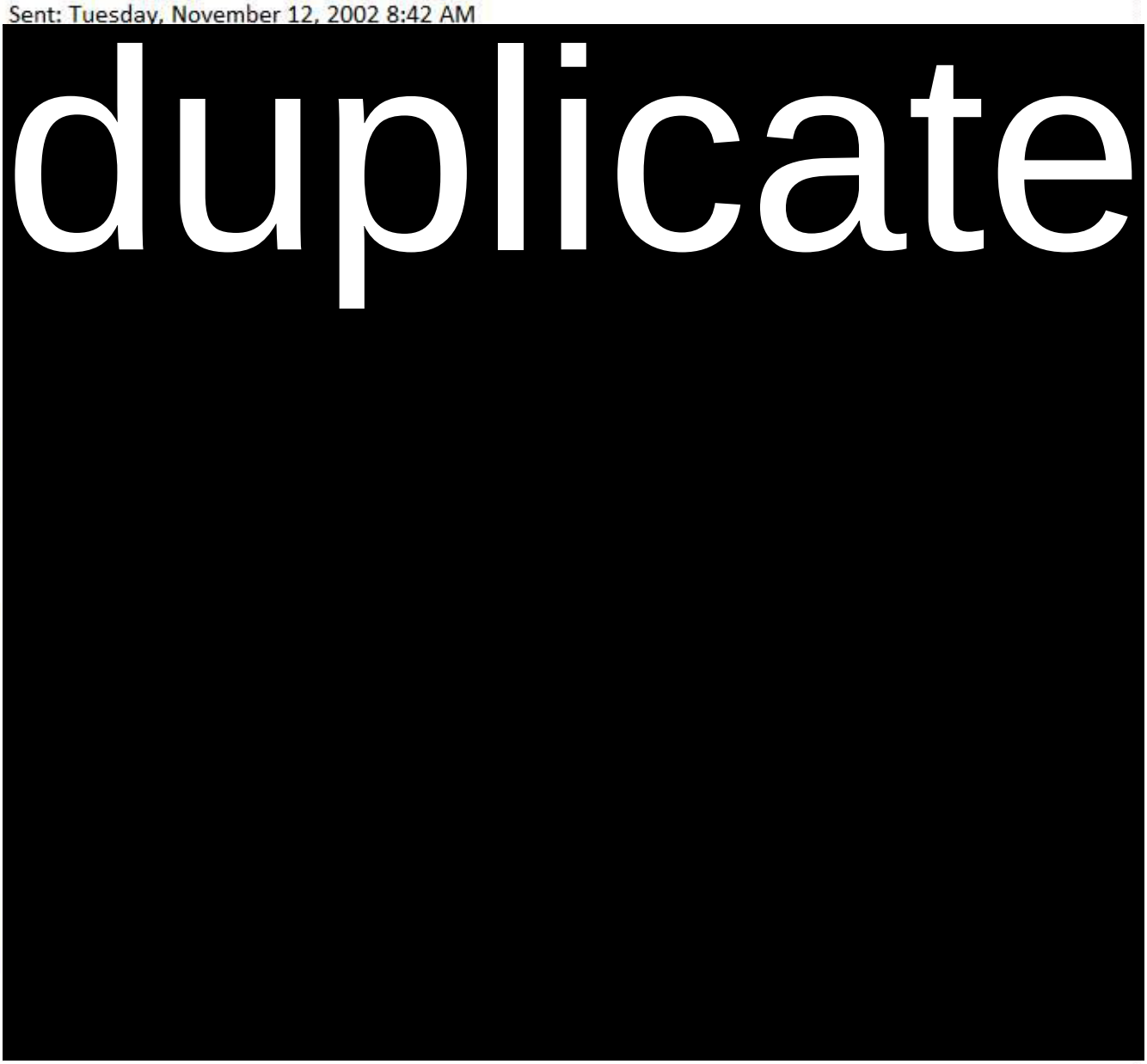
Record Type: Record

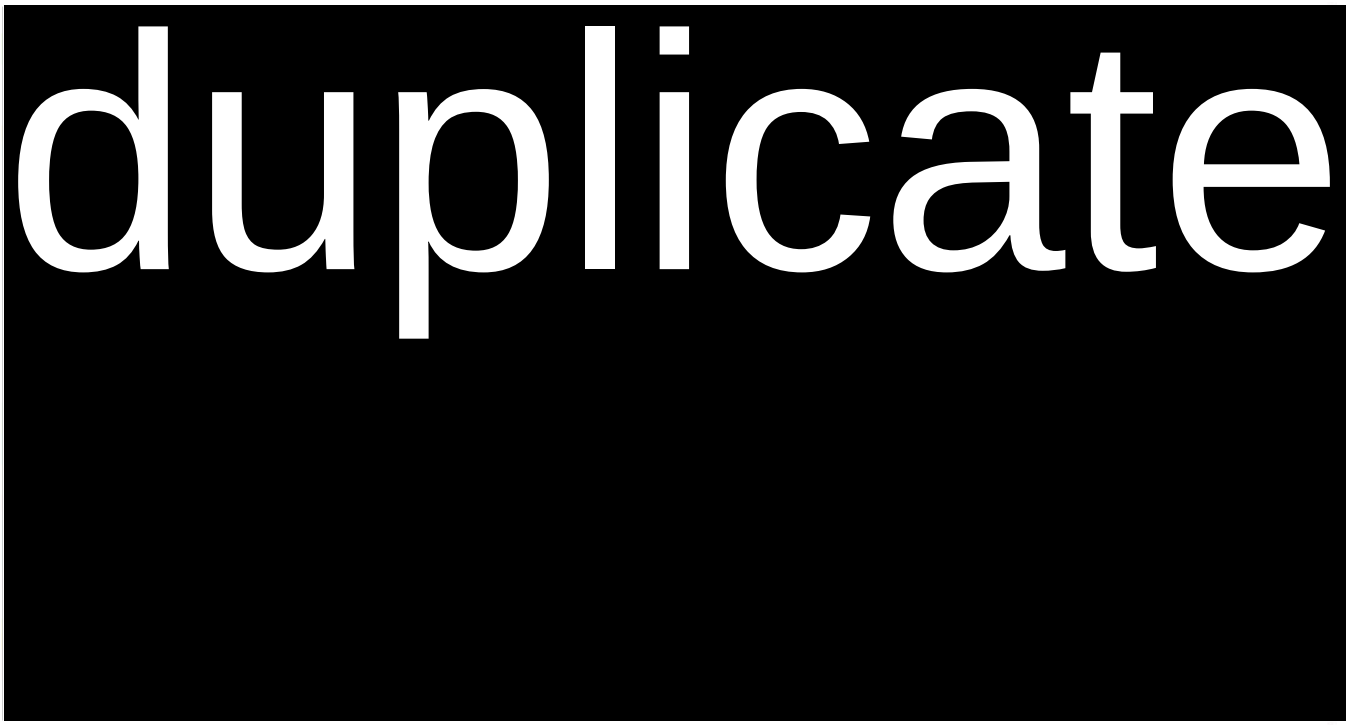
To: Brett M. Kavanaugh/WHO/EOP@EOP

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) [redacted]. Therefore, based on the reasoning of the OLC opinion below, our preliminary view is (b) (5) [redacted].

-----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) [redacted]

SUBJECT, TO, FROM, DATE:
(b) (5) [redacted]

DOCUMENT BODY:
(b) (5) [redacted]

(b) (5) [redacted]

(b) (5)

[redacted]

FOOTNOTES:

/1/ [redacted]

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 [redacted] would require [redacted]? 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; (b)(6): Barbara Ledeen (Senate)'; '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:
(b) (6)
(b) (6)

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: (b) (5)

(b) (5)

Here's our analysis:

1. (b) (5)

2. (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 (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 [redacted] (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) [redacted]."

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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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)] [redacted].

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)

(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. (b) (5)
.

-----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. (b) (5)

(b) (5)

(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

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]

   [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

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

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

[redacted]

-----Original Message-----
From: Whelan, M Edward III
Sent: Monday, April 14, 2003 10:06 AM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Subject: RE:

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

(b) (5)
. 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: (b) (5)

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 (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

(b) (5)

-----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 (b) (5) ?

(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. (b) (5)

[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] (b) (5) memo 5 19 03.doc

Can you all review this draft memo as well. Thanks.

(See attached file: [redacted] (b) (5) 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)

(b) (5)

(2) Brett asked us t (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] (b) (5) [redacted]

****

Ed: Let me add one more thought. [redacted] (b) (5)

(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

(b) (5) ?
(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)

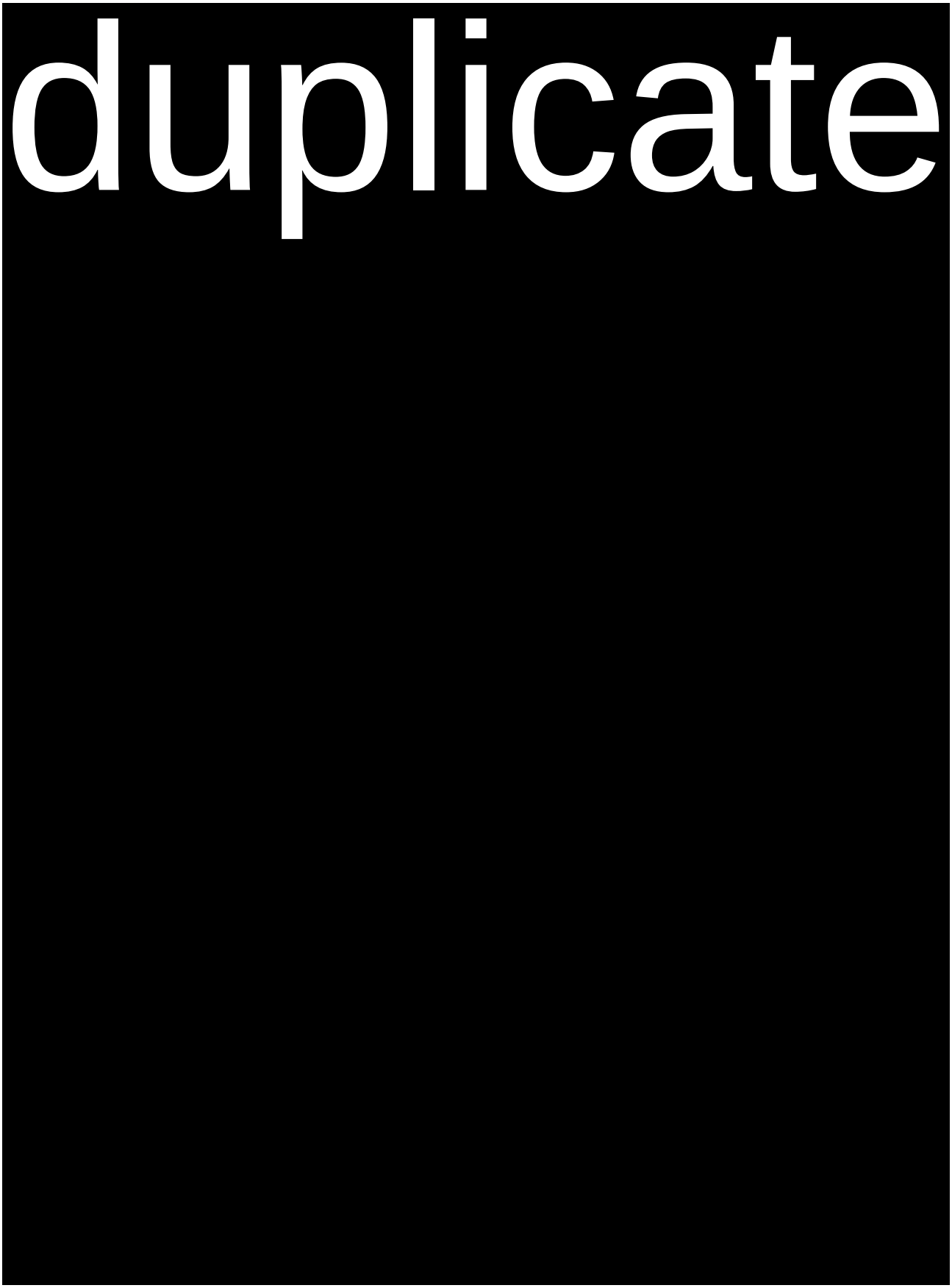
(b) (5)

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

(b) (6)

[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, [redacted] (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

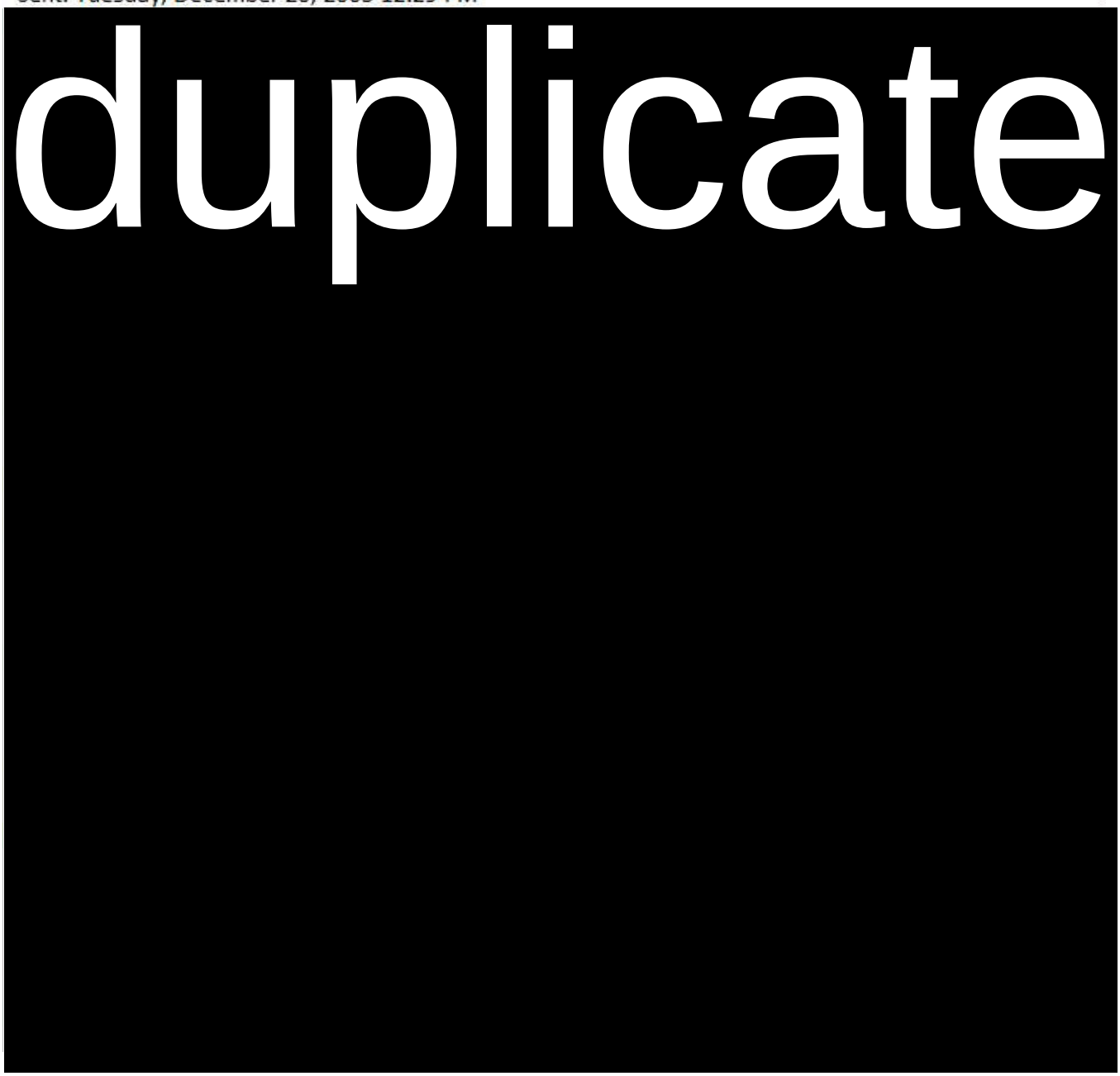
<<NSA Activities_Legal Authority_Talkers_12.20pm.doc>>

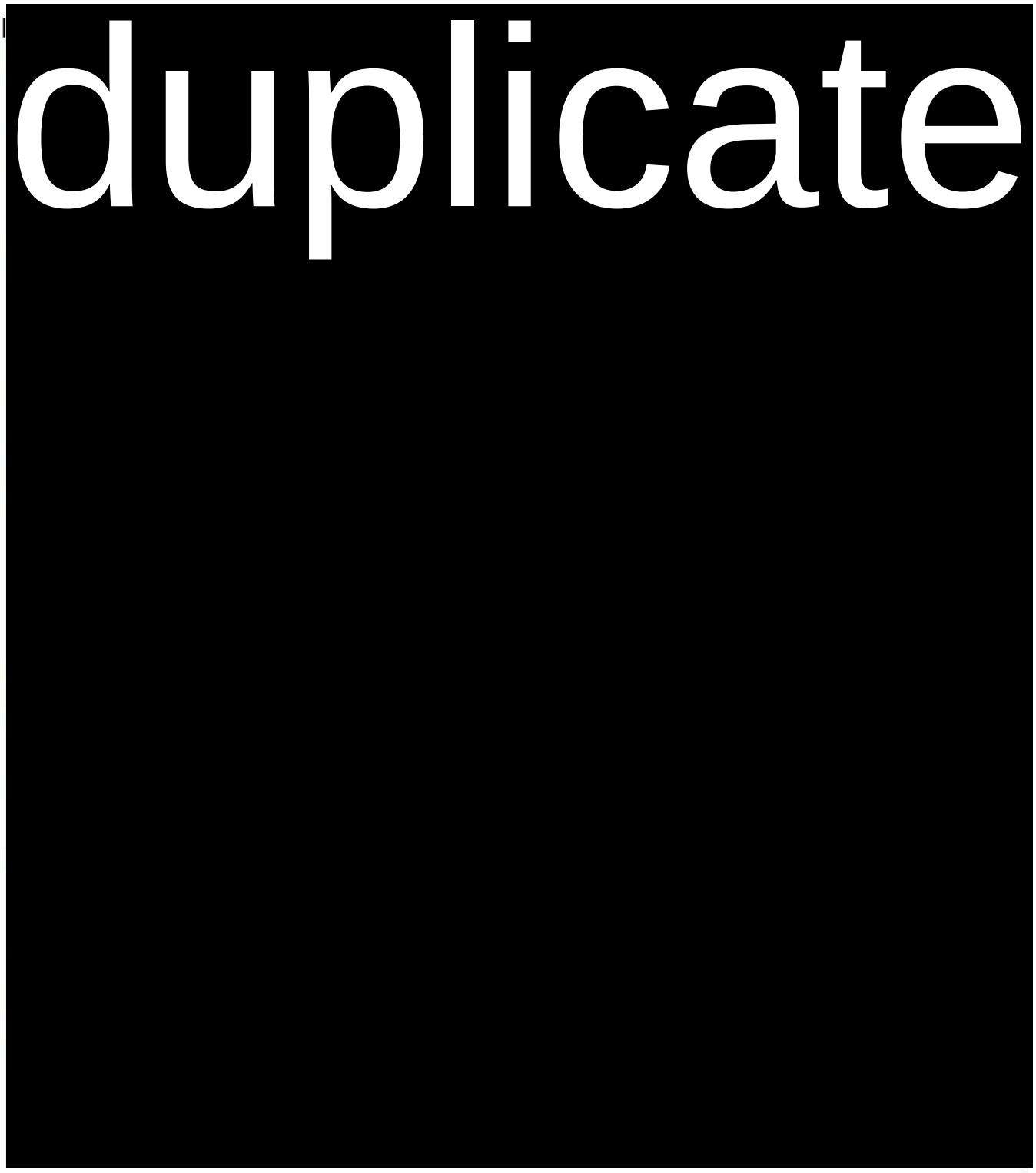
Bradbury, Steve

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





Brett_M._Kavanaugh@who.eop.gov

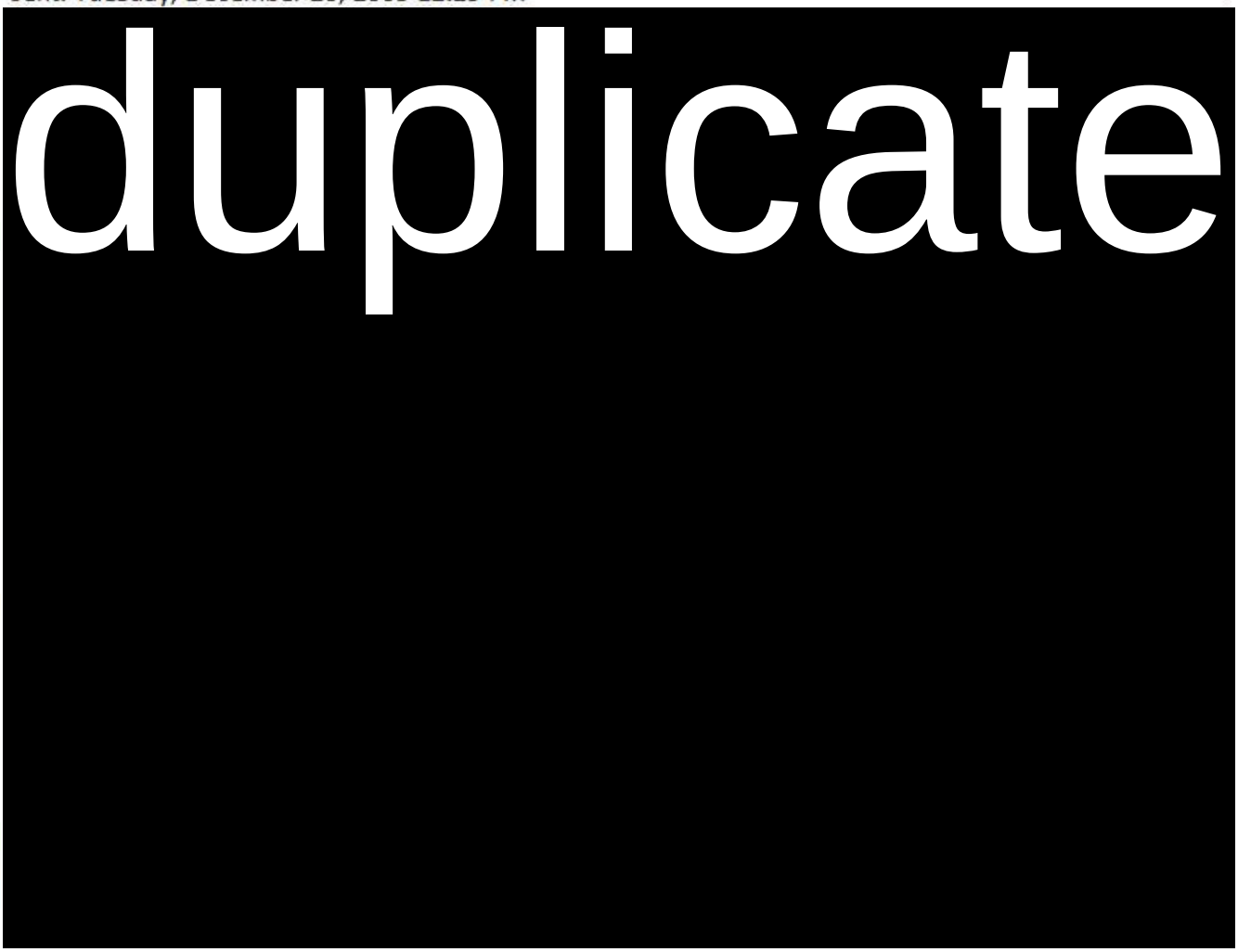
From: Brett_M._Kavanaugh@who.eop.gov
Sent: Tuesday, December 20, 2005 2:25 PM
To: Bradbury, Steve
Subject: RE: Updated NSA talking points

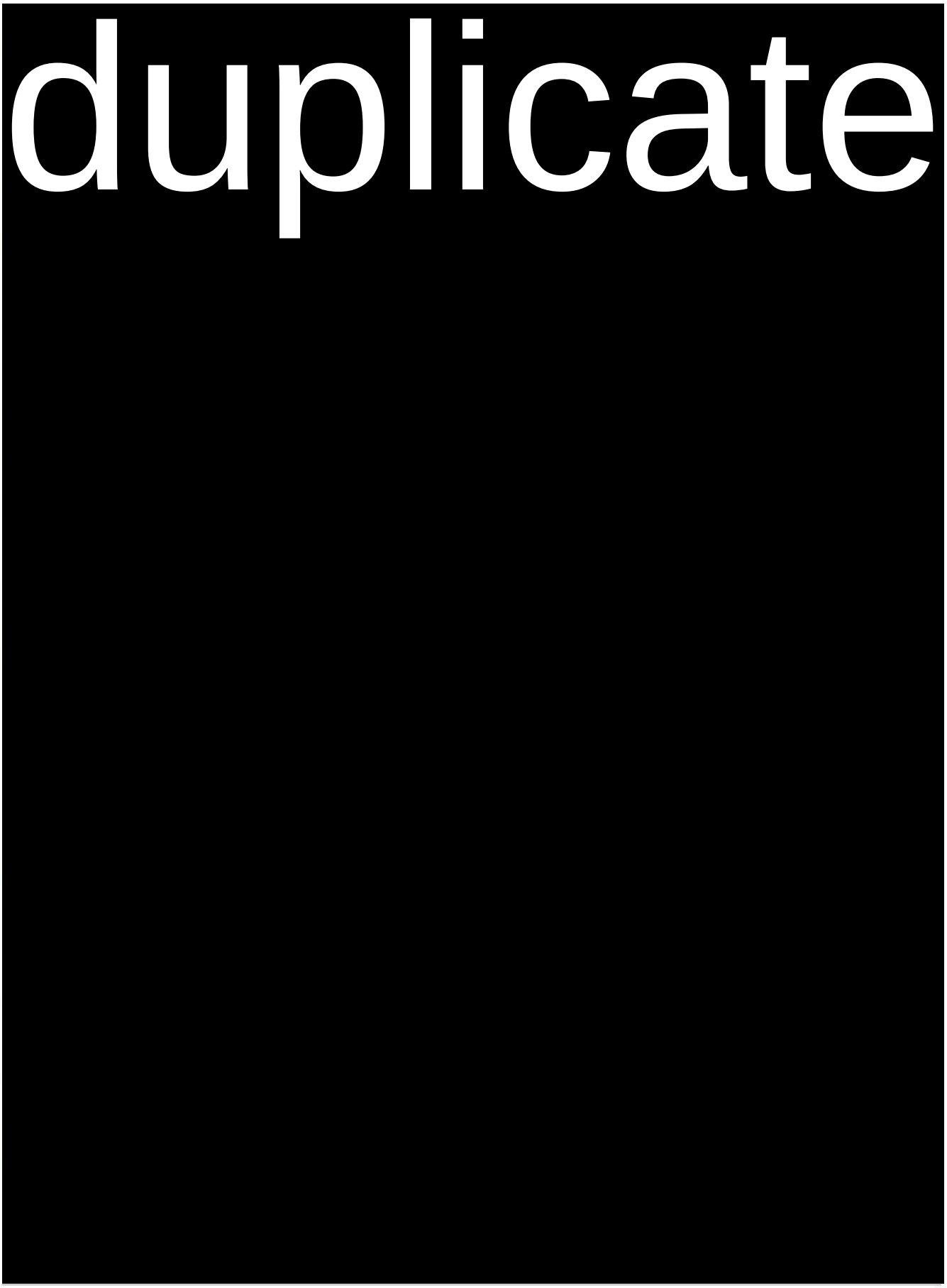
I think Harriet will talk to you about latest status.

-----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





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.

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

-- 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) [redacted] ..."

-----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) [redacted] 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

[redacted] duplicate

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.