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PRESERVING THE RULE OF LAW IN THE FIGHT AGAINST TERRORISM

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BEFORE THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

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PRESERVING THE RULE OF LAW IN THE FIGHT AGAINST TERRORISM

TUESDAY, OCTOBER 2, 2007

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, Pursuant to notice, at 10:09 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Feinstein, Feingold, Schumer, Cardin, Whitehouse, Specter, and Sessions.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. I just want you to know, not only do I have your book, but I read it. Look at the tags.

Mr. GOLDSMITH. Thank you, Senators.

Senator SPECTER. I don't need tags. I remember it all.

[Laughter.]

Chairman LEAHY. I do. I do need them because I don't remember as well. I apologize for being late. I periodically get these nosebleeds and it started at the worst darned time this morning.

But the subject of today's hearing is one of the most fundamental tests that we face as a Nation: can we maintain respect for the rule of law and our Constitution in time of crises? I think the administration failed the test. The attacks of September 11th shook the Nation. The grave threat from international terrorism that we experienced that day remains real, and our government does have the responsibility to protect against further attack. Everybody agrees on that.

But that's not its only responsibility. The government also has to protect our security without doing harm to the liberties we value and the vibrant system of checks and balances that the founders created to preserve those liberties.

But rather than working to preserve those checks and our constitutional balance, this administration set out to accomplish a radical realignment of the powers of the government. SCO was an unprecedented expansion of executive authority. The administration has used the threat of terrorism to justify this expansion, but its genesis was well before September 11th.

The reason why it's important to look at using this as an excuse to do away with our liberties—we will face the threat of terrorists throughout our lifetime, and our children's lifetime, both abroad and at home. One of the greatest terrorist attacks in this country

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was Timothy McVeigh in Oklahoma City, a former member of our own armed services and an American citizen.

Now, key members of this administration have long held the view that the President should not be encumbered, not by laws, not by Congress, not by the courts. To accomplish this vision of executive power, the White House set out to limit knowledge of important legal decisions to a tiny, powerful cabal of like-minded lawyers. The group was led by Alberto Gonazales as the counsel to the President, and by the counsel to the Vice President and now his Chief of Staff, David Addington.

If you might disagree with these lawyers, then you weren't allowed in the discussion. Of course, Congress, at all costs, was to be denied any input into critical decisions. Now, there is no doubt that the secrecy and insularity and unilateralism are powerful tools that have been used before to expand executive authority, and secrecy, insularity, and unilateralism have become the hallmark of this administration's dealings with Congress, with our allies, and with the wider world.

We have begun to see the great cost this has exacted on American values and constitutional principles in our standing as we pursue our national interests around the world. We see in our system a detention that, rather than being above reproach, an example to the world, has lost credibility with our allies, and worse than that has become a powerful rhetorical tool for our enemies.

We see it in the terrible abuses of Abu Ghraib, which stained us as a country, and which were the direct results of a lack of clarity and restraint in the rules about interrogation. No matter what we do now to correct it, those pictures will be used against the United States by the people who do not support us for years and years to come.

We see that the President chose to violate a surveillance law rather than to come to Congress to get it changed, sowing seeds of distrust and suspicion for himself, and no doubt for many Presidents to come. We see it in the President's cavalier use of his pardon power to override a jury verdict that convicted a top White House aide of lying to a grand jury and the FBI.

We see it in the White House's efforts to corrupt Federal law enforcement by the unprecedented mass firing of U.S. Attorneys who this President had appointed in order to install cronies and loyalists, and we see it generally in a deplorable lack of respect for the liberty of Americans.

Now, our witness today, Professor Jack Goldsmith, was invited, briefly, into this powerful inner circle of lawyers. He was a conservative lawyer who, by reading his book, shares many of this administration's views about legal policy to fight terrorism. I suspect that if Mr. Goldsmith and I sat down, we'd find we disagree on a number of issues. I also suspect we'd find we do agree on many others.

But when Mr. Goldsmith because head of the Justice Department's Office of Legal Counsel, he was dismayed by what he saw. The Office of Legal Counsel, or we call it OLC, is small, but it is a critical department, a critical office within the Justice Department. It's the office that gives legal advice to the rest of the executive branch so that the President can, as the Constitution requires, carry out an obligation to faithfully execute the laws.

But Mr. Goldsmith found OLC opinions that, in his words, were "deeply flawed, sloppily reasoned, over broad" and "incautious in asserting extraordinary constitutional authorities on behalf of the President." He decided to fix them. So, I thank Mr. Goldsmith for standing up and insisting on putting things right. This was an act of courage. He suffered searing criticism and many personal misgivings.

As both Senator Specter and I have noted, the book, The Terror Presidency, that he wrote is a rare window into this crucial period. I'm not here to do a book-selling tour, but I found it very, very interesting. I also found it a rather chilling account of what you saw when you were at OLC.

I'm going to recommend it to the next Attorney General. I'm going to recommend it to whomever the Republican Party and the Democratic Party nominate as our candidates for President, if they'll take the time to read it, so the same mistakes won't be made by whoever is the next President.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Senator Specter?

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you, Mr. Chairman, for scheduling this hearing. I commend you, Professor Goldsmith, for writing a very important book. It is a survey of the critical issues which have faced the country for several decades now, the threat of terrorism. And as you have noted, there has to be a very careful analysis of the threat, how we meet the threat, and how we do that and, at the same time, preserving our commitment to civil rights.

This committee has been very supportive of the executive power in the enactment, recommendation, or passing out of committee the PATRIOT Act and the PROTECT America Act. But at the same time, we have also, I think, been diligent in taking a look at very critical issues of civil liberties as a counterbalance to what the executive has done. That is the traditional role of the Congress.

In your book, you have treated the major issues. When you write about what happened in your disagreement with some executive branch members, it is very different from what former Attorney General Gonzales told this committee when he said there was no disagreement within the executive branch.

You, on the other hand, point out in your book that when you told Attorney General Gonzales and Vice President Cheney's counsel that you could no longer certify the legality of "an important counterterrorism initiative", that the Vice President's lawyer responded, as you put it, angrily: "If you rule that way, the blood of 100,000 people who die in the next attack will be on your hands," hardly a situation where there's no disagreement within the executive branch.

This committee has been especially concerned about what the administration has done on habeas corpus, and also concerned about what the Congress has done on habeas corpus. I noted in your book that you said, upon seeing *Hamdi*, the subject, the individual in a very important Supreme Court decision, a man who was detailed,

you wrote: "Something seemed wrong. It seemed unnecessarily extreme to hold a 22-year-old foot soldier in a remote wing of a rundown prison in a tiny cell, isolated from almost all human contact and with no access to a lawyer. This is what habeas corpus is for," as you wrote it. I believe the Supreme Court will reinstate habeas corpus, and that's a subject we'll get into in the course of the hearing today.

Another issue which has received—on the habeas corpus matter, this committee has acted, as we did on the terrorist surveillance program, and held five hearings on that subject, oversight hearings, in the 109th Congress. On habeas corpus, Senator Leahy and I have had legislation. It grew from 48 votes to 56 the last time it came before the Senate. I think if we bring it up again, we will reinstate habeas corpus. At least, that will be the will of the Senate. What the President will do by way of a veto is probably predictable. Our action may not be necessary if the Supreme Court acts.

Then you pick up the question of the signing statements, where the President agreed with Senator McCain as to the scope of interrogation. Then after he signed the bill, issued a signing statement about "the law might violate his Commander-in-Chief powers" and he might not always act in compliance with it.

Again, legislation has been introduced to give the Congress standing to go to court, to overturn the President's signing statements, because not withstanding what the statute says before signed, the executive branch will follow the instructions of the President.

Well, in the midst of all of this we are aware of the grave difficulties that the executive branch faces in meeting the threat of terrorism and staying on the correct side of the law. I thought your quotations of CIA Director Hayden were very interesting, where you quote Director Hayden saying that he was "troubled if not using the full authority allowed by law". After 9/11, he was going to "live on the edge". The analogy was that he would take his spikes to a position where they would have chalk on them, he would go right up to the line, and that your job was to make sure the President could act right up to the line.

I was interested in your comment that when FBI Director Mueller presents to the President daily the threat list, that he gives him a matrix. The matrix includes warnings, as you note, extracted from tens of billions of foreign phone calls and e-mails that fly around the world. That is a facet that very few understand, when you talk of tens of billions of phone calls analyzed in time for an overnight report, showing the difficulties of our intelligence system in tracking the threats.

Well, this is an ongoing problem. We want to have an executive, a President with sufficient power, but we want to have a President who still recognizes fundamental constitutional rights. The oversight by this committee, I think, is very, very important in maintaining that balance, so I'm pleased that we have such a knowledgeable witness here today to shed some light on the important subject. I seldom disagree with Senator Leahy, but I think your book is going to be a best seller, especially after it's promo'ed on C–SPAN.

Chairman LEAHY. I didn't say it wasn't going to be, but neither you nor I have the authority of an Oprah Winfrey to promote books.

[Laughter.]

Senator SPECTER. Well, I know I don't, but I wouldn't say that about you, Mr. Chairman.

Chairman LEAHY. Professor Goldsmith, please raise your right hand.

[Whereupon, the witness was duly sworn.]

Chairman LEAHY. Thank you.

Professor, please go ahead. Again, I apologize for the delay in starting. Go ahead with whatever statement you want, and then we'll open it up to questions.

STATEMENT OF JACK LANDMAN GOLDSMITH, HENRY L. SHATTUCK PROFESSOR OF LAW, HARVARD LAW SCHOOL, CAMBRIDGE, MASSACHUSETTS

Mr. GOLDSMITH. Thank you, Mr. Chairman, Senator Specter, and members of the committee, for inviting me today. I submitted a written statement and I'm not going to go through that. I'm just going to make a few brief remarks.

Chairman LEAHY. That will be part of the record.

Mr. GOLDSMITH. Thank you.

[The prepared statement of Mr. Goldsmith appears as a submission for the record.]

Mr. GOLDSMITH. And thank you for your kind words about my book.

So the topic of today's hearing is preserving the rule of law in the fight against terrorism. This is something that I've thought a lot about in the last three or 4 years, both in my time in the government and my time reflecting on my time in the government as a law professor.

The first institution that must be focused on, obviously, in answering this question is the presidency, the President, because the President, under the Constitution, has two duties that are relevant here. First, he has the duty to keep the country safe. It's the President's responsibility in the first instance to keep the country safe and to protect national security. And the President also has a duty to take care that the laws are faithfully executed, so he has a duty to comply with the law.

And sometimes, often, it's difficult to do both. Not impossible, but difficult. Related to those two duties there were, in my experience, to pressures that were constantly at play and at fight with one another behind the Bush administration's counterterrorism policies.

The first pressure was, as Senator Specter alluded to, the extraordinary pressure to prevent a second attack on the homeland. It is hard to overstate how frightening it is to read the threat reports that the President reads every day, not only because of what they portend, but also because, as the 9/11 Commission said and as many people have said, the government lacks the full information that it thinks it needs to thwart the terrorists. It doesn't always have the information that it needs to take the steps to check the terrorist threat.

The combination of these fearful threat reports and the enormous and grave responsibility that the executive branch has for preventing a second attack, and the sometimes lack of information and tools necessary to thwart the attack, or at least it seems that way, leads the administration to—and I think any presidency.

I think this was true of President Lincoln and President Roosevelt as well in analogous circumstances—push as hard as it can to do everything it can to prevent another attack, and that includes operating right up to the edge of the law, when it's appropriate, when it's thought that that's useful and helpful to stop a terrorist attack.

So on the one hand there's this unrelenting pressure to do everything possible to stop another attack, and there's the knowledge that when an attack comes, the President's going to be responsible and there's going to be another 9/11 Commission, and the 9/11 Commission is going to find the needle in the haystack that the executive branch missed and blame the President for not taking steps to stop the attack. That's on the one hand.

On the other hand, there's the law and the need to comply with the law. In my experience, people in the administration, throughout the administration, did try to comply with the law. Some people had, as we can probably discuss this morning, different views of what the law required, but some people said that the Bush administration has been indifferent to law, but in my experience it's been preoccupied with law. There are lawyers in every meeting related to counterterrorism policy.

The Department of Justice has probably issued more opinions related to this war than all of its opinions related to wars in the past. So at the same time that the administration is pushed to try to stop the attack, it finds itself bumping up against laws, lots of laws, sometimes criminal laws, and sometimes vague criminal laws that, frankly, frighten people because they don't want to go beyond the laws and they worry about being prosecuted, or going to jail, or being investigated down the road.

So these are the tensions that I saw playing out every day: this fear of another attack which led the administration to do as much as it could; this fear of violating the law, which was a cause of the pre-9/11 lawyer-induced risk aversion that many people complained about. Trying to manage that tension of complying with the law, sometimes vague laws, and keeping the country safe is very, very difficult. It is the central challenge of the topic of this hearing, which is abiding by the rule of law in the fight against terrorism.

In my statement I talked about some of the lessons—eight lessons that I think—at least eight lessons that can be learned from the effort to manage this tension, and frankly some mistakes in managing this tension in the last 6 years.

So I just want to close by saying—I won't repeat those here because there's not time, but I just want to close by saying this is not a problem that just faces this presidency. This is a problem that Lincoln faced, and it's a problem that Roosevelt faced. It's a problem that President Kennedy faced. It's a problem that a lot of Presidents have faced, and it's a problem that the next President is going to face, and Presidents for the foreseeable future. It seems to me that the first steps that the country needs to take—there are

two steps, at least, basic steps that the country needs to take in managing this problem.

The first, is to acknowledge the problem and acknowledge the difficult position that the executive branch is sometimes in. The second, and main lesson, I think, over the last 6 years is that the institutions of our government have to work together to manage the problem. It's nothing something that one institution alone can do.

Thank you, sir.

Chairman LEAHY. Thank you, Professor. In fact, your last comment—I find myself more and more, in holding these hearings, that we're doing it really for the next President. In some ways, I think one of the reasons the hearings have been as substantive is that we realize that we are at a time when nobody knows who the next President will be, or what political party the next President will be from.

I do have a somewhat disturbing thought, that this administration doesn't listen very much to what's going on in these hearings. Certainly the former Attorney General gave that impression, although the American public did, thus, he's gone. But you're absolutely right in your history.

The history of Lincoln and habeas corpus during the Civil War certainly—even now they're beginning to declassify some of the things from World War II, the Cuban Missile Crisis, and others. But throughout it all, the American public thought that basic rights were going to be there and you could raise questions.

Now, you talk in your book about your efforts at OLC to put the President's program of warrantless wiretapping—and we refer to it as TSP—on what you call a legal footing. You describe it as a legal mess. You say fixing it was, to use your words, "by far the hardest challenge you face in government."

You also say, in connection with the TSP, that David Addington and other top administration officials dealt with FISA, the Foreign Intelligence Surveillance Act, the way they dealt with other laws they didn't like: they blew through them in secret based on flimsy legal opinions that they guided closely so no one could question the legal basis for the operations. In other words, we'll decide we don't have to follow the law, but we're not going to tell you why we decided we don't have to follow the law, so you can't really disagree with us.

Now, I know most details about TSP and the legal issues that you address remain classified, but the matter is of great importance to this committee and the American people. I do not want you—obviously, in an open session we're not going to ask you to go into anything classified, but try to give the kind of detail you can in open session.

Is it fair to say that, in your opinion, the warrantless wire tapping program, or at least significant parts of it, were either illegal or without a legal basis?

Mr. GOLDSMITH. Thank you, Senator. As I said in my book, there were—in my opinion it was a legal mess. It was the biggest legal mess I've ever encountered. And the answer to your question is, with regard—I don't want to get into labels as to—I'm worried about whatever label we attach to things, because as we've seen in

prior hearings, some people think certain labels refer to different things, and I can't talk about the things that the labels are referring to. But I will say that there were certain aspects of programs related to the TSP that I could not find legal support for.

Chairman LEAHY. Well, did you make others in the Justice Department or the White House aware of your views, that you did not find these aspects legal?

Mr. GOLDSMITH. Yes, sir.

Chairman LEAHY. What happened then? Did they immediately embrace you and say, we'll walk with you into the sunshine?

Mr. GOLDSMITH. No, that is not what happened. The senior leadership in the Department agreed with me and the White House didn't.

Chairman LEAHY. Well, let me ask you about this. You say the senior leadership agreed with you. Did you believe that—and maybe I should preface it this way. As you know, FISA, the Foreign Intelligence Surveillance Act, has been amended more than 30 times, 7 or 8 times since 9/11, and in all but one instance with strong bipartisan support of the Congress. Did you believe that it would have been possible to accomplish what the administration wanted to do legally if they had been willing to work with the FISA court and Congress?

Mr. GOLDSMITH. Yes, sir, I do.

Chairman LEAHY. See, that, to me, is sort of the tragedy of the whole thing. We've had all these investigations. We've had people who have been forced out of office. We've had others who have resigned rather than answer subpoenas, and we still have a lot of subpoenas out. We have a concern among many in the court whether this administration followed the law, and yet with any kind of cooperation it could have been done. I, along with Senator Specter, have reviewed the program that we're talking about. There's no question in my mind we could have written the FISA Act in such a way, legally, to do it.

Now, you write about the extraordinary secrecy with which the administration treated legal opinions related to terrorism. You say that the group was allowed to see opinions about the warrantless surveillance program. It was so small that not even the NSA's, the National Security Agency, General Counsel, the chief lawyer, in other words, for the agency that operated the program, was permitted to see the legal justification for the program.

Why the extreme secrecy? In other words, the person who has to make the legal determination for the NSA, whether they could do it, is told, yes, you can do it because it's legal, but we're not going to tell you why.

Mr. GOLDSMITH. So the question is why the extreme secrecy? Well, there are two possible explanations. One possible explanation, the reason for the secrecy was to make sure that the information did not leak to the public. The second possible explanation was that they did not want the legal analysis scrutinized by anyone even inside the executive branch.

With regard to a lot of the secrecy with some of the issues, I wasn't sure which of the two interpretations was correct, but I think it can only be the latter, that they just didn't want the opinion scrutinized with regard to the TSP matter.

Chairman LEAHY. Was that because they didn't think that it would stand up to legal scrutiny?

Mr. GOLDSMITH. I don't know.

Chairman LEAHY. Did it have a negative effect on the quality of the legal advice the administration was getting?

Mr. GOLDSMITH. There's no doubt that the extreme secrecy, not showing—not getting feedback from experts, and not showing it to experts, and not getting a variety of views, even inside the executive branch, led to a lot of mistakes.

Chairman LEAHY. When you write "OLC", I'm trying to think who did have access and legal jurisdiction. Did it include the head of OIPR? That's the office in charge of intelligence and FISA policy.

Mr. GOLDSMITH. I believe so, by the time I arrived.

Chairman LEAHY. Did it include the Deputy Attorney General, James Comey?

Mr. GOLDSMITH. It did eventually, yes, sir.

Chairman LEAHY. It did eventually?

Mr. GOLDSMITH. Yes, sir.

Chairman LEAHY. It didn't initially?

Mr. GOLDSMITH. No, sir.

Chairman LEAHY. And the Deputy Attorney General, who has to act on such things if the Attorney General is out of pocket or in the hospital—

Mr. GOLDSMITH. Right. Right. It was one of the things that I insisted on, and with the approval of the Attorney General, after I started working on the issues.

Chairman LEAHY. Now, this committee has requested access to these legal opinions on a number of occasions. We're doing this to carry out our legislative responsibilities. We've even subpoenaed them. Do you believe these documents would be useful to this committee as we try to legislate on electronic surveillance?

Mr. GOLDSMITH. I think it would be useful. I don't know if you'd need to have the documents, but I certainly think it would be useful to understand the legal analysis of the executive branch, so you can understand how the laws you enact will be interpreted.

Chairman LEAHY. Thank you.

In just a moment we're going to go to Senator Specter, then to Senator Feinstein, Senator Sessions, Senator Feingold, Senator Schumer, Senator Cardin, and others if they come in.

Go ahead.

Senator SPECTER. Professor Goldsmith, on the terrorist surveillance program, you say that there were some aspects that you could not find legal. What can you tell us about he incident in Attorney General Ashcroft's hospital room? You write in your book that Mrs. Ashcroft stuck out her tongue at Attorney General Gonzales and Chief of Staff Andrew Card when they left the room. What happened to provoke that?

Mr. GOLDSMITH. Just to make the record clear, that particular statement is not from my book, sir. It's from an interview, I believe. But I did say that, certainly. So would you like to know about what happened in the hospital room?

Senator SPECTER. That's a starter.

Mr. GOLDSMITH. OK. Well, I'll start, and if you want more detail I can try to give it to you. The issue was a very highly classified

program on which I had advised—that I had been reviewing as the head of the Office of Legal Counsel, and I had been—kept the Deputy Attorney General, once he was read in, and the Attorney General informed.

Senator SPECTER. So what constitutional legal principle did you think was violated by the program?

Mr. GOLDSMITH. What I said was—again, with the hospital scene—I can't talk about what that program was. I can't—others have said that it was the TSP program. I'm just going to call it a highly classified program, if I could. But do you want me to—do you want to know about—I'm not allowed, also, either to get into the legal analysis. The government has forbidden me from talking about the legal analysis.

Senator SPECTER. Now, wait a minute. You might not be able to tell us about classified material. You might not be able to tell us about what you told the President or his subordinates. But I think you can tell us what constitutional law principle was violated.

Mr. GOLDSMITH. Well, that's—unfortunately the executive branch has taken the view, and unfortunately I'm bound by this by contract and law.

Senator SPECTER. That you can't even say what constitutional law principle was violated?

Mr. GOLDSMITH. They've told me that I'm not allowed to talk about the legal analysis.

Senator SPECTER. OK. Let's move to something perhaps you can talk about. You wrote in your book that when you saw *Hamdi* you said to yourself, "that's what I thought habeas corpus was for." Is there any doubt that a constitutional right to habeas corpus is as broad as the statutory right to habeas corpus, as defined and amplified by Justice Stevens in *Rasul*?

Mr. GOLDSMITH. I'm not sure that that's always true, Senator. I'm not sure. I mean, Congress might enact a statute—a statutory habeas jurisdiction that went further, for example, extra-territorially.

Senator SPECTER. OK. Never mind the theory.

Mr. GOLDSMITH. OK.

Senator SPECTER. How about in *Rasul*? As to *Rasul*—

Mr. GOLDSMITH. Are you asking me—

Senator SPECTER. Didn't Stevens in the court say, going back to "John at Runnymede", as he put it, and the tradition of habeas corpus? Of course, Attorney General Gonzales said habeas corpus wasn't in the Constitution. May the record show a smile. You can at least smile. Even though the Constitution says you can suspend habeas corpus only in time of invasion or rebellion.

But as to *Rasul*, wasn't the court saying—didn't the court say that the constitutional right to habeas corpus was as broad as the statutory right?

Mr. GOLDSMITH. I believe that—well, I would say this, that the *Rasul* court definitely extended—interpreted the statutory habeas corpus jurisdiction to extend to Guantanamo Bay. I don't think—it did talk about the constitutional right to habeas corpus, but I don't believe that it ever said—it may have, I don't recall—that the two were co-extensive. But if you're asking me whether I think the Writ of Habeas—the constitutional writ extends to—I'm not sure

quite what the question is, Senator. About the scope of the constitutional habeas corpus?

Senator SPECTER. The question again, to repeat it, is didn't Justice Stevens in *Rasul* say, as applied to *Rasul*, that the constitutional right was co-terminus with the statutory right?

Mr. GOLDSMITH. That's not exactly the way I would have read it. I think that the holding of the opinion was about the statutory right.

Senator SPECTER. Now answer my question.

Mr. GOLDSMITH. I don't believe—I don't recall him saying—I know he discussed the constitutional right. I know that the court held that the statutory right—

Senator SPECTER. You don't recall? Would you take another look at the case and give us a written response?

Mr. GOLDSMITH. Yes, sir.

Senator SPECTER. OK.

On signing statements, you reference Senator McCain's agreement with the President, and then the President issuing a signing statement saying that it might infringe on his Article 2 powers and he might not observe it as it would apply prohibiting cruel, inhuman, or degrading treatment, that that would not be a definition he would stand by.

The President did the same thing after we carefully negotiated the PATRIOT Act as to the oversight that this committee would have, and then he issued a signing statement saying he felt free to disregard that commitment.

Legislation is pending to give the Congress standing to go to court to get the court to say that the President's signing statement is inconsistent with the constitutional provision which says legislation is presented and he either signs it or vetoes it. Do you think that that is a sound approach to try to deal with that issue?

Mr. GOLDSMITH. I don't necessarily think it's a sound approach, Senator. I'm not sure that such legislation would be constitutional because I'm not sure there—there's actually a case in controversy if the President—because you don't know whether the President—it's just a statement. You don't know whether the President's acting on it or not.

I will say that I think that that signing statement was extremely imprudent after there had been—as I talk about in my book, after there had been these negotiations and there seemed to have been an agreement on this very difficult issue, to turn around and suggest that it wouldn't be applied in some circumstances struck me as extremely imprudent.

But signing statements don't necessarily have any effect, they're just statements. What matters is—and in my experience, what matters is whether the signing statement gets turned into a directive to the bureaucracy to act in a certain way.

Senator SPECTER. Well, Professor Goldsmith, how can you say a signing statement has no effect when the vast executive branch employees are directed to follow it, and if they do follow it, where the legislation prohibits interrogation which is cruel, inhuman, or degrading, but they are following orders and are protected?

Mr. GOLDSMITH. Senator, as I was saying, it's not the case that every signing statement—indeed, in my experience most signing

statements—were not operationalized into action at the bureaucratic level.

Senator SPECTER. How do you know that?

Mr. GOLDSMITH. Just, in my experience at the Office of Legal Counsel, that was what I witnessed.

Senator SPECTER. I have one final question. That is, you talk about retroactive discipline and that the executive branch officials—that they might be summoned into a court and face enormous attorneys' fees, face their reputation—and are not as brave as General Hayden. As you characterized him, he's going to have white chalk on his spikes because he's going to go right up to the line.

But to what extent can you specify the intensity of that concern by the executive branch officials to be worried about whether they'll be subpoenaed, as Kissinger was, or hauled into court—some foreign court, perhaps—as a violation of human rights?

Mr. GOLDSMITH. In my experience as head of the Office of Legal Counsel, worry that some court, or judge, or prosecutor, or investigator down the road would interpret these criminal laws differently than the administration did and hold them criminally liable, was a central, prevalent concern in the administration.

Senator SPECTER. A real fear?

Mr. GOLDSMITH. A real fear. Yes, sir.

Senator SPECTER. Thank you very much, Professor Goldsmith.

Mr. GOLDSMITH. Thank you.

Chairman LEAHY. Senator Feinstein?

Senator FEINSTEIN. Thank you very much, Mr. Chairman. And thank you very much for coming, Mr. Goldsmith.

I want to begin going back to page 142 of your book where you describe the fact that you were there for 6 weeks and an attorney by the name of Philbin, who you very much respected, told you that there were some opinions that were controversial, and out of those opinions which you read there were essentially two: one was the Bybee terror memo, and the second was a memo from you to Jim Haynes.

Both of these memos, I believe, took our country down a very dark path, a path on which we are still walking. You end the section with this on page 144: "The message of the August 1, 2002 OLC opinion was indeed clear: violent acts aren't necessarily torture. If you do torture, you probably have a defense. And even if you don't have a defense, the torture law doesn't apply if you act under color of Presidential authority.

CIA interrogators and their supervisors, under pressure to get information about the next attack, viewed the opinion as a 'golden shield', as one CIA official later called it, that provided enormous comfort. Describe that time to us. Describe, if you can, why wasn't the UCMJ the effective vehicle? Why was it so necessary to go beyond that?

Mr. GOLDSMITH. To go beyond the UCMJ?

Senator FEINSTEIN. Yes.

Mr. GOLDSMITH. Well, I think that the UCMJ only applies to the military.

Senator FEINSTEIN. I understand that.

Mr. GOLDSMITH. Right. Oh, I see.

Senator FEINSTEIN. But taking the basic tenet—

Mr. GOLDSMITH. So why didn't we apply the—

Senator FEINSTEIN. Yes. Yes.

Mr. GOLDSMITH.—UCMJ to the other agencies of the government, and why didn't we use the military standards and limitations on—

Senator FEINSTEIN. That's correct.

Mr. GOLDSMITH. Right.

Senator FEINSTEIN. Which have clearly met the Common Article 3—

Mr. GOLDSMITH. Right.

Senator FEINSTEIN.—as well as the convention against torture.

Mr. GOLDSMITH. So this is speculation, because I wasn't there in 2002. But—in the summer of 2002. But I believe that the answer is what I said at the beginning, which is that—and this is basically what George Tenant said in his memoir, that there was enormous pressure to get information. In the summer of 2002, the threat reports were the most frightening ones since 9/11. They had in custody a top Al Qaeda official.

I'm just telling you what's in George Tenant's memoir. They thought that they needed to do everything they could to try to get that information, because as someone told me at the time, they were sure there were going to be bodies in the streets of Washington and they thought that the person had that information, and so I think that they thought that they needed to push as far as they could go under the law.

Senator FEINSTEIN. What did you think when you heard that?

Mr. GOLDSMITH. When I heard that this was their—and this is me speculating based on what—the kinds of arguments I heard once I got there. I mean, I appreciated—the executive branch, I appreciate, and in some sense shared, the unbelievable pressure to do everything possible to keep Americans safe. It was a good faith belief. It was genuine concern, it was genuine fear. It was grave responsibility, and that's what led them to push to the edges of the law. And it's an understandable sentiment and it's a sentiment that many other Presidents have shared. The difficulty was how they went about doing it, I think.

Senator FEINSTEIN. Well, if you take that to its logical continuum, we are now faced with an incarceration facility in Guantanamo, outside of the mainland of the United States but U.S. territory, effectively where somebody can be held essentially forever without seeing a lawyer, as both Senators Leahy and Specter have been so eloquent about, essentially suspending the constitutional right of habeas corpus. How do you view that? What would you suggest to us, legally, be done?

Mr. GOLDSMITH. Thank you, Senator. A couple of things. First, it was the Congress, actually, that eliminate the statutory habeas corpus jurisdiction. The court, in *Rasul*, held that habeas corpus—

Senator FEINSTEIN. Are you speaking about the Military Commissions bill?

Mr. GOLDSMITH. Yes, I am.

Senator FEINSTEIN. Which some of us did not vote for.

Mr. GOLDSMITH. The Military Commissions Act. I don't know who voted for it, but I'm just telling you it was the Congress that

eliminated statutory habeas corpus jurisdiction over Guantanamo. Here's what I think should be done about it, for what it's worth. We have a very serious problem. We've got dangerous terrorists that, if we release, they will do bad things to the country. That's what the executive genuinely believes, and I believe them.

And we're trying to use a military system that was basically designed for a different kind of war, which is military detention, based just on, basically, group membership. The detainees do have a lot more procedures than the laws of war require, frankly. They do have lawyers in review in habeas corpus. They've been given lawyers. At least in the fights for habeas corpus, they've been given lawyers. They have direct review to the DC Circuit, and they have other rights.

But I agree with you. I don't think this is enough. And I also don't think it's enough just for Congress to restore habeas corpus, because all that does—with regard to the detainees in Guantanamo, I think the Congress needs to step up to the plate and craft a system, a fair, safe, secure system, of long-term detention akin to other forms of long-term administrative detention.

I do not believe that Congress should just shift the responsibility for making the very hard tradeoffs it's going to take to craft such a system to the courts, which is in effect what you do when you say to the courts, you decide this either on direct review under the Detainee Treatment Act, or you decide this under habeas corpus. I think that's the role.

Justice O'Connor spoke eloquently about this in her West Point speech when she said that it's not the Supreme Court's job to do counterterrorism policy. So I believe that it's a perfect opportunity for Congress to step up to the plate, not just on habeas corpus, but on the substance of the type of detention regime we need—the kind of sensible and durable detention regime we need going forward.

Senator FEINSTEIN. Thank you. When testifying before the committee, Kyle Sampson stated that he had a conversation with the Office of Legal Counsel about whether immigration judge appointments were subject to the civil service that are applicable to other positions, and he said he did. He said he thought he spoke with you on this topic. Did he?

Mr. GOLDSMITH. With me?

Senator FEINSTEIN. Yes.

Mr. GOLDSMITH. I do not recall that. And he might have, but I have no recollection of that.

Senator FEINSTEIN. So you're saying he did not talk with you?

Mr. GOLDSMITH. I'm saying I do not remember him talking to me about that.

Senator FEINSTEIN. OK.

Would you please go to the hospital room that Senator Specter started to ask you about and quickly give us a statement of facts as you saw them, and exactly what happened, what your concern was, and why you were there?

Mr. GOLDSMITH. Yes. It was a classified program that my office had been reviewing around the clock for several months. There was a—the program had to be authorized on Thursday, March 11th. The week before, after months of work, I determined that I could not find a legal basis for certain aspects of the program. I had been

informing the Attorney General and the Deputy Attorney General for a while about this.

At about the time I made this decision, the Attorney General became very ill, so Jim Comey became the Acting Attorney General. To make a long story short, he advised the White House about the Justice Department's decision. Just fast-forwarding to Wednesday, what happened was, as Jim Comey testified, he got word that two people from the White House, Judge Gonzales and Andrew Card, were coming to seek to, in effect, have the Attorney General overrule Jim Comey.

And so Jim Comey rushed to the hospital. He, through the command center at the Justice Department, contacted me since it was my legal analysis, essentially, that was at the bottom of all this. I rushed to the hospital. We rushed into the room. We arrived a few minutes before Mr. Card and Mr. Gonzales did. I'm rushing through this quickly, but I'm happy to tell you more details if you'd like.

The Attorney General looked terrible. I hadn't seen him in a week, but he'd lost a lot of weight. I believe he'd had an operation the day before. He looked very weak, very tired, and ashen and he didn't seem to have any strength at all. But a couple of minutes after we entered the room, Mr. Gonzales and Mr. Card entered the room. Only Mr. Gonzales spoke.

He asked the—Mr. Ashcroft—he asked how he was doing, and then he asked—he basically said he was there to seek authorization for the program, at which point Attorney General Ashcroft sort of lifted himself off the bed, and color came into his cheeks and he sort of came to life, and he gave just a couple of minutes' speech in which he said that he didn't—in which he said he shared the Justice Department's concerns, the concerns that Mr. Comey and I had conveyed.

He said he didn't appreciate being visited in the hospital under these circumstances, and he said that Mr. Comey, in any event, was the Acting Attorney General. That was it. He fell back into the bed and looked terrible again. Then the two gentlemen left the room.

Chairman LEAHY. Thank you.

Senator FEINSTEIN. My time is up.

Chairman LEAHY. Just so I make sure I fully understand this, he made it very, very clear that Mr. Comey was the Acting Attorney General?

Mr. GOLDSMITH. Yes.

Chairman LEAHY. And under the law, do you have any question but that he was Acting Attorney General in these circumstances? An ill, hospitalized Attorney General, that this is exactly the circumstance where the Deputy becomes the Attorney General as far as all legal abilities?

Mr. GOLDSMITH. Yes. Yes. That's correct, sir.

Chairman LEAHY. Thank you.

Senator Sessions?

Senator SESSIONS. Did Attorney General Ashcroft continue that view, that the Department of Justice's view was justified?

Mr. GOLDSMITH. To my knowledge, yes, sir.

Senator SESSIONS. I think so, too. My impression is, and I've said about the new Attorney General nominee, what is so critical at this juncture in our country's history is an Attorney General who can articulate to the White House if they're overreaching or in error, and then if they do things that are correct, to effectively defend them before the Congress and the court of public opinion. I have been troubled that we have not had that, and I'm hoping the new Attorney General nominee can fulfill that role.

Mr. Goldsmith, with regard to your comments about getting up to the—utilizing going up to the line, it's a phrase I've used in our committee. The President looked the American people in the eye and said, "I'm going to use every power I've been given to defend this country." Of course, that does not mean he's entitled to break the law. I know you agree, and I certainly agree. But I do agree that at the time of the 9/11 attacks, we were there and we were facing utilizing the full powers given to the executive branch, law enforcement, the CIA, and our military was legitimate.

With regard to prisoner interrogations, prior to *Hamdan*, wasn't it reasonable to conclude that the Geneva Conventions did not apply to persons who were unlawful combatants?

Mr. GOLDSMITH. I believe that it was. Yes, sir.

Senator SESSIONS. So I think, Mr. Chairman and others, we need to remember that. We are now—in the Armed Services Committee, we have got a team of investigators going back and investigating military personnel and interrogators based on standards that became clear by the Supreme Court later, but weren't clearly particularly at the time. Prior to that, Congress had spoken with regard to torture and what was permissible and not permissible, had it not, Mr. Goldsmith?

Mr. GOLDSMITH. Yes, sir. There was a criminal torture statute.

Senator SESSIONS. In fact, my understanding is, the Chairman and others voted for it in 1994, before I came to this Senate, and it declared that torture meant acting under cover of law, specifically intended to inflict severe physical or mental pain or suffering, and that mental pain or suffering means prolonged mental harm caused or resulting from intentional threats and so forth, and threat of imminent death, and those kinds of things.

So it was pretty clear that with regard to a reasonable interpretation of what should be done with those who are unlawful combatants, not wearing uniforms, using bombs, killing people, innocent men, women and children as a matter of policy, would that have been the controlling authority if the Geneva Conventions didn't apply?

Mr. GOLDSMITH. It was the controlling authority at the extreme, depending on who was doing what and where. There may have been other authorities, but that was the controlling—

Senator SESSIONS. Perhaps the authority depending on where. But the Congress had spoken on that.

Mr. GOLDSMITH. Congress has spoken—

Senator SESSIONS. This was a congressional definition and prohibition of what torture was, and it didn't prohibit any stress being placed on prisoners, it didn't prohibit segregation of prisoners. It prohibited severe physical or mental pain and suffering. So now if that's the situation—

Chairman LEAHY. I'm sorry. I didn't know whether the Professor answered the question.

Mr. GOLDSMITH. I didn't know that there was a question. I'm sorry.

Senator SESSIONS. Well, would you agree or disagree—

Mr. GOLDSMITH. That's what the statute says. Yes, sir.

Senator SESSIONS. Right. So now you make such a good point in your book and in your statement about people being second guessed. You note this in your statement: "Many people believe the Bush administration had been indifferent to these legal constraints in the fight against terrorism. In my experience, the opposite is true. The administration has paid scrupulous attention to law."

The CIA had more than 100 lawyers. Everybody was worried about being a harbor for some spectacle committee and having to defend all this, so this is what they do. So let me go back to the question, and rightly or wrongly, morally or immorally, the controlling statute, it appeared until *Hamdan*, which made Common Article 3 of the Geneva Conventions applicable even to unlawful combatants, was a standard, I suppose, our CIA and military knew they could not exceed. That was crystal clear, was it not?

Mr. GOLDSMITH. Yes, it was.

Senator SESSIONS. And with regard to what happened in Abu Ghraib and that kind of thing, do you find any legal justification for the activities that were so publicly exposed in Abu Ghraib?

Mr. GOLDSMITH. No, sir.

Senator SESSIONS. Nobody could justify that, and nobody did justify that, to your knowledge, in the administration?

Mr. GOLDSMITH. No one tried to defend it. No, sir.

Senator SESSIONS. And, in fact, the people who did that have been prosecuted and sent to jail. So I guess I want to think a little bit about those agents and all trying to protect America, trying to interrogate people who may be in the middle of plotting an attack that could lead to the death of thousands. If they were to utilize these—what appeared to be their legal authority, they still had, in your opinion, fears that they would be embarrassed, or even prosecuted, or criticized afterwards?

Mr. GOLDSMITH. This was something that I experienced every day. And the reason was because, for example, there was this pressure to go up to the edge of the law. The law was not always clear. So depending on where you settled the line, there was a worry that a future prosecutor or court might reach a different conclusion. And I might add, this is exactly the complaint—I mean, I quote in my statement from Senator Graham, him criticizing the risk-averse lawyers at the CIA in 2002 that were holding back the CIA from doing what was necessary and might have prevented 9/11.

The thing I worry about a lot, is that we're going to see cycles like this where the CIA and other agencies are chilled from being as aggressive as they can for fear of retroactive discipline, so they pull back, as they did before 9/11, when everyone agreed that they were risk-averse, and then something bad happens and they're pushed and pressured to go right up to the edge, and then the situation changes and it's a very difficult position for the counterterrorism officials to be in.

Senator SESSIONS. So your suggestion to us is that the President should be more open with the Congress, that Congress should be more objective in its analysis and less partisan, and we ought to develop clear standards so that those we send out in harm's way to serve our country can have confidence that what they're doing is legal today and won't be second-guessed in the future?

Mr. GOLDSMITH. That sounds like a wonderful prescription. Yes, sir.

Senator SESSIONS. Thank you.

Chairman LEAHY. But it was determined necessary to rescind the torture memo. Is that correct?

Mr. GOLDSMITH. I did, yes, sir. Because—well, yes, sir.

Senator SESSIONS. Well, could I, since you raise that, Mr. Chairman? On the question of that memorandum, you simply concluded it allowed more pain and mental stress than you believe the statute allowed. Is that correct?

Mr. GOLDSMITH. Yes, sir.

Senator SESSIONS. Not that the fundamental principle of the memorandum was flawed.

Mr. GOLDSMITH. Well—

Senator SESSIONS. That there was powers to go beyond.

Chairman LEAHY. There was. I got the impression that it was withdrawn because it was flawed.

Mr. GOLDSMITH. May I answer this?

Chairman LEAHY. Sure.

Mr. GOLDSMITH. I concluded—first of all, let me say that I would not have withdrawn any memorandum of my predecessors unless they were severely flawed, because the Office of Legal Counsel has a very powerful norm of stare decisis, which means basically that we stand by our old opinions, and it wasn't my job to come in there and start re-thinking everything that had been decided before.

The main thing I worry about was basically what happened, that the language was so over-broad, unnecessary, extreme, and unnecessarily extreme for the techniques that I knew were going on, that I didn't know what else might be done in the name of the opinion that I didn't know about that would later be thought to be OK by the Justice Department. So, that was my basic reasoning in a nutshell.

Chairman LEAHY. Well said. But the point is—

Senator SESSIONS. Mr. Chairman, I would just want—- the point was that he believed the memorandum allowed more stress on the prisoner than the statute allowed, and he disagreed with the previous interpretation.

Chairman LEAHY. Well, I think we'll let Professor Goldsmith answer stand and not the interpretation either by the Senator from Alabama or by the Chairman.

Senator SESSIONS. Fair enough.

Chairman LEAHY. I am perfectly willing to accept your answer. Set that clock back up. I apologize. Senator Feingold has been waiting patiently.

Senator FEINGOLD. Thank you. Thank you, Mr. Chairman.

Thank you, Professor, for being here and for your candor and for your very important testimony today. Let me ask you a few questions. When you were serving the administration, were you aware

of any classified intelligence programs implicating the rights of Americans that were not briefed to the so-called Gang of Eight, the leaders of the House and Senate and the leaders of the Intelligence Committee?

Mr. GOLDSMITH. I do not know. I just don't have the information, Senator. I know that there were briefings on—I think that there were briefings on every classified program to Members of Congress on the Intelligence Committee, on the leadership, on every program that I was briefed into. I'm not sure when they began. I'm not sure how extensive they are. I'm not sure what the content of the briefing was. I never attended one.

Senator FEINGOLD. You're aware of the distinction, obviously, between briefings that just go to the Gang of Eight and to the full committee.

Mr. GOLDSMITH. Oh, I'm sorry. You're talking about the entire committee?

Senator FEINGOLD. Well, no. You're right, at first I was talking about the Gang of Eight. But let me ask the following question: were there any such programs that were not briefed to the full Intelligence Committee?

Mr. GOLDSMITH. Yes, sir, I believe that there were.

Senator FEINGOLD. Are you able to say at all what they are?

Mr. GOLDSMITH. No, sir. I mean, I can't talk about—

Senator FEINGOLD. That is classified?

Mr. GOLDSMITH. I believe it is.

Senator FEINGOLD. OK.

There's been a great deal of debate about the law that Congress passed in August to amend FISA, and many experts have cautioned that the law could be read to grant very broad authority to the executive branch, far beyond what was intended. Administration officials have testified and sent letters to Congress arguing that those broad interpretations of the law are a stretch and that they would not read the law so expansively. Of course, any Member of Congress appreciates those kinds of assurances, but I believe that Congress should write the laws as it wants them to be interpreted, not as they hope it will be interpreted.

In your book, you suggest that the job of an administration lawyer working on terrorism or intelligence issues is to find a legal justification, perhaps any legal justification, for proposed programs that are presented to him or her. The experiences you recount in your book suggest that if we write a statute in a way that grants more authority than we intend, it's quite possible that at some point the law will be read in its broadest form. Do you agree that this is something Congress should take into account when drafting statutes in this area?

Mr. GOLDSMITH. Well, first of all, let me say, sir, on the premise to your question, I don't think I said that the job of the administration lawyer was to find—oh. There was a passage in which I attributed to some people the view that the lawyer's job was to find any justification possible. That was not my view.

And as to your question whether Congress should worry about, and consider, and take into account how the executive branch interprets the laws it passes, the answer is, absolutely, yes, you should, because presumably you hope to achieve certain things and

you'd like to know how the language that you enact is going to be interpreted and enforced. And, so, yes.

Senator FEINGOLD. And even though you may not have endorsed the notion of trying to find any justification, I take it your experience is that there was a fair bit of that going on in parts of the administration that you witnessed. Correct?

Mr. GOLDSMITH. There was certainly pressure to go as far as the law would require, and some people—I was speaking rhetorically in that passage in the book about the general atmosphere.

Senator FEINGOLD. You mention in your written testimony the requirement of the National Security Act that Congress be notified of any covert actions. I have two questions about this. First, do you agree that congressional notification is a legally binding requirement? And second, is it legally permissible to notify only the Gang of Eight rather than the full Intelligence Committee about a program that is not a covert action or about a program that is hidden for reasons of political or legal sensitivity?

Mr. GOLDSMITH. The first question, is it a legal requirement to notify the Intelligence Committee for covert operations? Yes, it's absolutely clearly a requirement, one of the most important reforms of the 1970's and 1980's. The second issue is a complicated legal question which I used to know more about than I do, and I hesitate to answer because I just haven't studied it in a while.

Senator FEINGOLD. Fair enough.

Let me ask you about another aspect of your book. You recount in your book a meeting in February, 2004 at the White House where Vice President Cheney's counsel, David Addington, stated: "We're one bomb away from getting rid of that obnoxious court", referring to the FISA court. What was your reaction when he said that?

Mr. GOLDSMITH. Believe it or not, I didn't have much of a reaction because I'd heard things like that before. And believe it or not, I would have felt that responsibility and fear had he said nothing to me. So it was emblematic of the kinds of pressure that everyone felt in the administration, but it wasn't—by the time that I heard that statement it didn't move me as much as you might have though because I had already been moved by the fear that everyone felt, and we all felt the sense that if we tied the President's hands, that we would in some sense be responsible if something really bad happened.

This is one of the things I really struggled with because, you know, I was taking actions in the Department of Justice. My colleagues and I were doing things that were limiting what the President could do, or at least saying that he had to try another method to be able to do what he wanted to do, and we all worried very, very much that people were going to end up being killed by it.

And if that had happened, I would be here on this green felt table and people would be saying—I worried that people would be saying, you know, you legalistic, pin-headed lawyer, you. Look, you told the President he couldn't do something and a lot of people got killed. And—

Senator FEINGOLD. Well, of course I share that concern. But what I'm particularly interested in, is did you share the view of the FISA court as being an "obnoxious court"?

Mr. GOLDSMITH. No, sir. I do not.

Senator FEINGOLD. And to what extent would—

Mr. GOLDSMITH. In my experience it's a—

Senator FEINGOLD. To what extent did you feel that was the view with those you were working with?

Mr. GOLDSMITH. I'm sorry. I misunderstood your question.

Senator FEINGOLD. The first question was your view. Now I want to know what you heard from others.

Mr. GOLDSMITH. There was a hostility to the FISA court and to the FISA mechanism. And the idea was, as I talk about in my book, that the FISA court and the FISA system was going to do something to limit the President that would keep people from being killed. But there was definitely—I mean, that statement says it all, really. I can't add to the statement.

Senator FEINGOLD. When you left government in 2004, were there any remaining OLC opinions still in effect about which you had concerns but were unable to correct, whether for lack of resources, or time, or due to other factors?

Mr. GOLDSMITH. There were no major issues that I hadn't taken steps to try to fix. I wasn't able, in the time I had remaining in June of 2004, to write the replacement opinions on torture and related issues, but I had withdrawn those and we were in the process of doing that when I left. But there were no other major issues that I can recall where I had similar concerns.

Senator FEINGOLD. Did those replacement memos get done?

Mr. GOLDSMITH. Yes, sir. The one that I know about was published in December of 2004, 6 months later.

Senator FEINGOLD. Thank you, sir.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much.

Senator Schumer?

Senator SCHUMER. Thank you, Mr. Chairman. Thank you for holding this hearing. I want to thank Mr. Goldsmith, and congratulate you, Mr. Goldsmith, on your bravery within the administration, your attempts to uphold the rule of law.

While there are many matters on which you and I surely disagree, I commend you for doing something to return the administration to the path of law and away from governing by fiat. Of course, I know when you first went to my alma mater, Harvard Law School, you were protested by the left, and now I guess they would admit that they were wrong, I hope.

I want to commend you, particularly for your role in standing up to the White House in March of 2004 when you, Jim Comey, and others had to race to the hospital room of John Ashcroft to prevent a true miscarriage of justice. I know Senator Feinstein has walked you through that. It seems to me almost the exact same recollection that Jim Comey had, with the exception that you included facial gestures in your testimony.

But I want to ask just a couple of questions about that. Is it true that you were prepared to resign over the White House's threat to continue with the TSP program, despite your inability to certify its legality?

Mr. GOLDSMITH. Yes, sir.

Senator SCHUMER. Do you have any idea who sent Alberto Gonzales and Andy Card to John Ashcroft's hospital room?

Mr. GOLDSMITH. My recollection is the same as Mr. Comey's. He recalled that it was the President, and that's my recollection as well. But I'm not 100 percent certain about that.

Senator SCHUMER. Do you know of the Vice President had any role in that?

Mr. GOLDSMITH. I do not know.

Senator SCHUMER. OK.

Did you keep notes of your recollection of the March 10th hospital visit?

Mr. GOLDSMITH. Yes, sir, I did. I wrote down contemporaneous notes and I wrote notes throughout the next couple of weeks.

Senator SCHUMER. Why?

Mr. GOLDSMITH. Just to have. They were extraordinary events and I wanted there to be a—as I recall they're not very good notes, but I wanted there to be some kind of a record somewhere.

Senator SCHUMER. Right. Could you provide those to the committee?

Mr. GOLDSMITH. They're not in my possession. They're in the Department of Justice.

Senator SCHUMER. I see. Thank you.

Jim Comey testified that during the weeks after the hospital visit there were discussions about changes to be made to the classified program that was the subject of the visit. During that time period was the classified program operating without any legal basis?

Mr. GOLDSMITH. That's a complicated question. I'm trying to figure out how much I can say in answering that question without revealing classified information. I guess all I can say is this. It might not be a satisfactory answer. And by the way, I would love to be able to talk in closed session about some of these issues if it can be arranged, and if you want me to, and if the executive branch lets me.

I guess I can just say this. I thought that during that period, that there was a legal basis for the transition period. I just have to leave it at that.

Senator SCHUMER. OK. Thank you.

Let's go to the TSP program itself. One of the lessons you say we should learn from the past 6 years is that there should be full and open discussion among administration lawyers about ensuring that the rule of law is upheld. That's always been one of my criteria. I think there should be full and open discussion, exception when it's classified information, with the American people and with the Congress. It works. The founding fathers were just very smart about all this.

Now, you suggest that dangerously few people even within the Bush administration were provided the legal analysis underlying the program. For example, the NSA's General Counsel didn't have it. Even the Attorney General did not have all the information he needed. This is astonishing. The Attorney General of the United States was himself out of the loop on this.

Given how little the legal opinions were circulated within the administration, what do you make of the statement by former Attor-

ney General Gonzales that were was no serious internal dissent about the TSP program?

Mr. GOLDSMITH. This is a difficult question to answer, because of what I mentioned much earlier in my testimony. These labels—there are labels for things, and then there are underlying realities, and it's very difficult to talk about this in an unclassified setting.

I would just say that there were—as I say in my book and as others have acknowledged, there were enormous disagreements about many aspects related to the TSP.

Senator SCHUMER. Let me tell you, I sat here and asked the Attorney General those questions. He was not giving that impression at all.

Mr. GOLDSMITH. Well, let me just say in his defense, this is the point about labels. There's a technical interpretation of what he said that is true, but it's very difficult to talk about it. There's confusion about what the labels refer to, and it's very difficult to talk about it in an unclassified setting. I could certainly explain it to you in much greater detail in a closed session.

Senator SCHUMER. Well, that will be up to the Chairman and the administration, which might not let you testify even if we wanted to.

Chairman LEAHY. Well, on that, and on my time, not on Senator Schumer's time, if you were to testify before this committee, subject to a subpoena, if you requested one in closed session. you're not talking about anything that would fall under any version of executive privilege, are you?

Mr. GOLDSMITH. It might, Senator. It might. I don't know. I'd have to study it. I mean, we'd have to be more concrete about what opinions and what you wanted to know. I can't answer a question like that in the abstract.

Chairman LEAHY. We may have my staff and Senator Specter's staff work with you on this issue, and if we need to go into closed session we will. I certainly would meet with Senator Schumer, and any other Senator who wished in that regard.

Senator Schumer?

Senator SCHUMER. Thanks, Mr. Chairman.

Chairman LEAHY. I apologize for the interruption. We'll give you extra time.

Senator SCHUMER. Yes. I think it's been very interesting. Thank you.

So can you tell us, to the best of your knowledge and recollection, who was read into the program, and when? In other words, who got this legal analysis?

Mr. GOLDSMITH. I'm sorry, Senator. Which legal analysis?

Senator SCHUMER. The analysis justifying the TSP program the way they constructed it.

Mr. GOLDSMITH. Really, all I can tell you is who was read into the program in the Justice Department, and when I was there. It was me, the Attorney General, the head of OIPR, Jim Baker, and subsequently Deputy Attorney General Comey.

Senator SCHUMER. Right. Was there anyone who should have been read into the program who was excluded?

Mr. GOLDSMITH. Well, I certainly had a bit of—there was a little bit of a struggle getting Mr. Comey read into the program.

Senator SCHUMER. Really?

Mr. GOLDSMITH. And after that, I wanted to—

Senator SCHUMER. He was only Deputy Attorney General, right?

Mr. GOLDSMITH. Right. And I certainly wanted to have more help from my lawyers in trying to figure out an enormously complicated issue. It was very challenging, obviously, because I had a lot of other things going on and there were very few lawyers that were able to work on it.

Senator SCHUMER. Did you see any legal reason why Comey shouldn't be read into the program or is it possible they just didn't want to hear his answer?

Mr. GOLDSMITH. I don't know what their reasons were. The stated reasons were because of the importance of secrecy. But they ultimately read him in.

Senator SCHUMER. OK. I'll just say that doesn't stand up. Not what you said, but what they said.

Just about your book—and I have a limited amount of time here. I apologize. Three questions about it: did anyone try to prevent you from writing this book; have you experienced any recriminations for writing this book; and did anyone try to prevent you from disclosing some of the information in the book on the ground that it was covered by executive privilege?

Mr. GOLDSMITH. So, I'm sorry. To prevent me from writing, recriminations—

Senator SCHUMER. Prevention from writing the book, recriminations, and dissent or attempt to prevent you from disclosing some of the information because it was covered by executive privilege.

Mr. GOLDSMITH. OK. The answer to the first question is, no, no one tried to prevent me from writing the book. Second, I don't believe I've suffered recriminations. Third, on—the third question again, please?

Senator SCHUMER. Executive privilege. Anyone try to stop any of the information from coming out on the grounds of executive privilege?

Mr. GOLDSMITH. There were discussions that I had with the Justice Department on that issue which they have asked me to keep confidential, which I'm quite happy to tell you if I can in written answers. Maybe I can ask them and see if they mind.

Senator SCHUMER. OK. But I'm not asking you the details. I'm just asking you a conclusion.

Mr. GOLDSMITH. There were some conversations about it. Yes, sir.

Senator SCHUMER. Was there anything that you wanted to write that didn't end up being written because of executive privilege?

Mr. GOLDSMITH. Well, I put a lot of self- constraints on myself, and there were a lot of things that I didn't talk about in the book for a variety of reasons having to do with matters related to privilege. But, no. The answer to that question is, no, there's nothing that I wanted to put in the book that's not in there. I had it also pre-cleared by the government for classified information, of course.

Senator SCHUMER. Right. OK.

Could I just ask you to do this in writing? Because my time is running out, and the Chairman's been generous. You wrote that some of the OLC opinions you read when you came into office were

"deeply flawed and sloppily reasoned". Those are your words. Could you please identify—in writing, I'll ask—all of the opinions you believe that were deeply flawed? Please tell us how many of those were withdrawn, corrected, or otherwise modified. OK.

Thank you, Mr. Chairman.

Chairman LEAHY. Can you do that, Professor?

Mr. GOLDSMITH. I'll have to think about it. I'll try. I'll give some kind of an answer to that. I'm not sure how much detail it can be.

Senator SCHUMER. Thank you.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

Senator Cardin? You've been very patient. And after you, Senator Whitehouse.

Senator CARDIN. Thank you. Thank you, Mr. Chairman.

Mr. Goldsmith, thank you for your appearance here today. We appreciate your testimony.

I just want to followup very quickly on one of Senator Schumer's questions. When you said that the book was "pre-cleared", were there changes in the book as a result of the pre-clearance process?

Mr. GOLDSMITH. No, sir.

Senator CARDIN. I want to get to the—

Mr. GOLDSMITH. Let me correct that, sir. There were two words that someone asked me to take out, which I thought was perfectly appropriate. And we didn't reach the question of whether it was classified or not, but I took them out. And then I was asked to use aliases in certain contexts, and I did that. But nothing of substance.

Senator CARDIN. Just as a matter of interest, how long did the pre-clearance process take you to complete?

Mr. GOLDSMITH. It took about—approximately 13 or 14 weeks. Maybe 12 weeks. Something like that.

Senator CARDIN. Let me get to your testimony and your statement which I find to be perhaps the most concerning, and that is the administration's concern that by involving Congress it would be counter to their position of inherent power, and then working with Congress might restrict some of their power, and your observations that you thought that was the wrong policy by the administration, but you sort of indicate their position.

Then we go one step further in your response to Senator Feingold's question and your comments about the staff person for the Vice President, the disdain for the judicial branch of government and the FISA courts. This past week, I had representatives that were in and concerned about what's happening in the Russian federation today with the independence of their courts and the fear by their government that they can't allow an independent court because it could jeopardize the stability of their government.

I would just get your observations. Are we moving so far down the road that our democracy that does depend upon an independent judiciary—I can understand some of the fights between Congress and the executive branch, and I agree with you and certainly disagree with the administration. But I would hope we all would want to make sure there's an independent judiciary here.

I'm somewhat surprised by the attitude within the administration. Admiral McConnell just recently testified before our com-

mittee as to, he thought the FISA court struck the right balance. He's the person responsible for gathering information and he supported the FISA court.

It seems like one of our main disagreements in the Protect America Act of 2007 is the role that the FISA court should play. So I would just get your observations as being a major player at the Justice Department. Are we getting so dangerous that we don't see what's happening to our own country?

Mr. GOLDSMITH. I hope not, sir. I don't believe so. I think it's very important that we have an independent judiciary, and I believe that we do have an independent judiciary, in particular with regard to the FISC, the FISA court. I think they've played an enormously important role in the last 6 years in so many ways, some of which are known, some of which aren't known.

Now, that doesn't mean that the role of the FISA court, under the 1978 law, was perfect for the 2001 situation. But I do think that there is a role for an independent FISA court in general, certainly. I don't think that there's real danger of it. The FISA court has actually been quite independent.

Senator CARDIN. I understand it's been independent. But it seems like this administration would be just as happy if there were no FISA courts and no requirement to have to go to court to get subpoenas. They've certainly tried to develop programs to deal with that, and you were outspoken and concerned about it. So we hear about certain things, but some things we may not hear about. I just am concerned about how far we've gone.

And let me give you just a practical example. Let's talk about Gitmo Bay—Guantanamo Bay, for just one moment. There's a reason for us to be concerned about these unlawful combatants. They had intelligence information and they were dangerous people. So you look at, what are the legal restrictions on us detaining them, what are our country values in regards to detaining them, and what impact will it have on the United States internationally?

At least that's what I would hope was the analysis they went through. Initially, our main concern was to get intelligence information in order to protect our country, as you already have indicated. Is there any credible argument today that those who were detained at Guantanamo Bay still have intelligence information that requires extraordinary procedures in order to try to make sure we remain safe?

Mr. GOLDSMITH. I'm not really the right person to answer that question. I'm sorry. I don't know exactly who's down there, and I don't know when they've arrived or what intelligence information they may have. I'm sorry. I just am not—

Senator CARDIN. But you had to give legal opinions during this period of time, and I assume the intelligence value of those detained was part of that process. After 4 years, I think most people in the intelligence business would tell you there isn't much left. It seems to me that our objective now is almost pretrial detention. We don't want to let them go, and we don't want to try them. I understand they're dangerous people, but we have certain principles in our country about those who we detain who we believe are criminals, which is basically what we have now in Guantanamo Bay.

So it seems to me we change the argument in order to try to get the result that this administration wants, that is, to detain people without rights because they're dangerous, even though they should be somehow integrated into some justice system where they have broader rights than we've given them.

Mr. GOLDSMITH. Well, my—OK. Let's see if I can comment on that, Senator. A lot of things to say. I think that the main rationale for detaining prisoners in Guantanamo is a preventive detention regime because they're dangerous. That is the traditional justification in war time for detaining members of the enemy. There's nothing—by itself, there's nothing controversial or extraordinary about detaining members of the enemy until the war is over. That is classically what war does, classically what the laws of war provide.

The problem is, in this war there are lots of concerns we don't usually have in other wars, about the endless nature of the war, about the fact that the enemy does not appear in uniform so there might be mistakes, mistakes that are compounded by the indefinite nature of the detention.

But I don't think it's right to treat them just through the criminal system. I don't think that's possible. I think that imposes enormous costs on fighting the war. I do think we need to come up with a more elaborate, successful, long-term institution that would justify detaining dangerous terrorists.

Senator CARDIN. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

Senator Whitehouse?

Senator WHITEHOUSE. Thank you, Mr. Chairman.

I have two questions, Mr. Goldsmith. One relates to the famous, or infamous, night at the hospital that Senator Schumer has brought to the world's attention through the testimony of Deputy Attorney General Comey. It has to do with some of the individuals who were involved that night and how they reacted.

You've described, in your book, Deputy Attorney General Comey as a "seasoned prosecutor who thinks clearly in times of crisis, who possesses a keen sense of proportion that is the mark of good judgment", and who was, you said, "the most level-headed person I knew in government."

Mr. GOLDSMITH. Yes, sir. That's my belief.

Senator WHITEHOUSE. Yes. And Bob Mueller was also engaged in the activities that night. I view him as of similar stature and nature. Do you also?

Mr. GOLDSMITH. Yes, sir. I have great admiration for Mr. Mueller.

Senator WHITEHOUSE. So here you have a couple of serious, cool, calm, collected, experienced grown-ups, and the way they reacted that night was for Deputy Attorney General Comey to rush to the hospital with his emergency lights on. I think he said it was the only time he'd used his emergency lights to get anyplace during the time he was Deputy Attorney General. He testified to us that he took the stairs at a dead run.

At the same time, the Director of the FBI was calling the FBI agents guarding the Attorney General of the United States to say, don't leave them alone in the room with the Attorney General, referring to the White House counsel and the White House Chief of

Staff. Don't let them throw the Deputy Attorney General out of the room, as if he had to sort of countermand.

There is a sense of urgency, and almost emergency, that those actions display that I—where did that come from?

Mr. GOLDSMITH. The sense of urgency on behalf of Mr. Comey and Mr. Mueller?

Senator WHITEHOUSE. Yes.

Mr. GOLDSMITH. I think—

Senator WHITEHOUSE. You were close to that situation.

Mr. GOLDSMITH. Sure. I think it—

Senator WHITEHOUSE. What was it that—

Mr. GOLDSMITH. I think, fundamentally—

Senator WHITEHOUSE.—that caused him to run, and calling FBI agents to—

Mr. GOLDSMITH. Fundamentally, I'm just going to tell you what Mr. Comey said in his testimony. That is, as Mr. Comey said in his testimony, he worried that in this hugely important, highly consequential area that had been subject of months and months of work inside the Justice Department, he worried that, as he put it, the White House was going to take advantage of a very sick man. And with regard to this extraordinarily important issue, that—in ways that seemed inappropriate and just baffling, frankly. That's all I can say.

Senator WHITEHOUSE. Meaning what? What do you mean, "take advantage of"? This was the most level-headed guy you saw in government.

Mr. GOLDSMITH. Right.

Senator WHITEHOUSE. He's climbing the hospital stairs at a dead run.

Mr. GOLDSMITH. I think that they thought that they were going to try—that Mr. Comey believed, as turned out to be the case, that the White House was going to try to get the incapacitated Attorney General to approve this program. I'm sorry. I didn't understand the question. Is that an answer to your question?

Senator WHITEHOUSE. I think so. I'm trying to get kind of the flavor of the evening that dictated that level of urgency and activity.

Mr. GOLDSMITH. It was quite an evening.

Senator WHITEHOUSE. I mean, the Deputy Attorney General deals with significant, urgent matters all the time, but only once did he put on his emergency beacon, only once did he—

Mr. GOLDSMITH. This was a hugely important issue inside the government. That's all I can say. It was a hugely important issue, independent of the hospital. Hugely important. Hugely consequential issue for everyone involved, and the stakes were enormously high. And on top of that, there was this attempt to go see the Attorney General. I think that's the background that led him there at such a quick pace.

Senator WHITEHOUSE. So is it fair to say that the Deputy Attorney General and the Director of the FBI felt that something so nefarious would happen if the White House counsel and White House Chief of Staff were left alone with the incapacitated Attorney General, that it militated taking the stairs at a dead run and racing through Washington with emergency lights on?

Mr. GOLDSMITH. I can't speak for Mr. Mueller as much as I can with Mr. Comey, because I spent a lot more time with him. And I shouldn't speak for either one, actually. But I will say that, certainly as Mr. Comey said, I believe, in his testimony, it was thought to have been extremely inappropriate.

Senator WHITEHOUSE. I'm sorry. Say it again.

Mr. GOLDSMITH. That it was thought to have been extremely inappropriate.

Senator WHITEHOUSE. Turning to the Department of Justice for a minute, in your testimony you talk about the powerful internal norms of detachment and professionalism that help guide OLC. You identified a number of practices that existed to help OLC avoid errors and to compensate for the fact that its opinions are not subject to the same critical scrutiny of adversary process and dissent that characterizes the judiciary. You indicated that had these norms and practices been followed, OLC would have avoided some, and perhaps most, of the mistakes that it made.

You recommend that Presidents and Attorneys General should insist that OLC follow its traditional normals and practices, even in times of crisis. It is my sense from my experience with the Department that this whole concept of the Department's internal norms and practices is not unique to OLC. Indeed, norms and practices that protect the Department's integrity and protect its independence pervade the Department. Do you agree with that point?

Mr. GOLDSMITH. Certainly. Yes, sir. Absolutely. I was talking about something I had the most experience of, which was OLC. But that's absolutely true in my experience of the Department more generally.

Senator WHITEHOUSE. Now, it's my sense from what we've seen out of the Department recently, not just in OLC but throughout the Department, a lot of those norms and practices have been bypassed, degraded, rewritten, ignored, and that it would be a very healthy exercise for the Department, now under new leadership, to go through and assess those norms and practices and see which ones have been degraded and restore them.

A little bit—I've used the example before, if a ship runs aground or catches fire, the firs thing that the captain does is stop the water coming in and put out the fire. But the next thing is to call for a damage report. I'm wondering what your thoughts are on whether the Department should do a fairly thorough scrub of the norms and practices to see which ones have been either violated, degraded, or written out of practice and restore them—you know, a systematic assessment of this.

Mr. GOLDSMITH. It's a good question, sir. Let me say two things in response. First, I think that, boy, the lessons that we've learned in the last 6 years, just to reiterate what I said in my statement, this is crucially important to the Office of Legal Counsel.

Second of all, I do think it would be—I mean, certainly a prudent practice for the new Attorney General to examine these norms and practices and see which ones work, and which ones haven't worked, and which ones aren't being complied with. I think it's absolutely crucial to the proper running of the Department.

Senator WHITEHOUSE. OK. That's helpful. I appreciate it.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you, Senator Whitehouse.

Just a couple of things occurred to me. There's a small group of lawyers, as you said, responsible for crafting a legal policy for terrorism. If I've got it right, it's David Addington, Alberto Gonzales, John Yoo. You characterized him as having an extreme view of executive power. They believe the President's Commander-in-Chief authority allows him to do whatever necessary to protect the country in an emergency, and that we've been in a state of emergency since 9/11.

Of course, some would argue that it's been a state of emergency since 9/11, and we'll always be in a state of emergency as long as we live. But they also believe that it harms the presidency and the country if the executive branch accepts any limit on the President's prerogatives, such as working with the Congress or the courts. Have I described that view correctly?

Mr. GOLDSMITH. I missed the last part of it, sir. I understand the first part.

Chairman LEAHY. That it would harm the presidency and the country—

Mr. GOLDSMITH. Yes.

Chairman LEAHY.—if the executive branch accepts any limits on the President's prerogative, such as working with the Congress or the courts.

Mr. GOLDSMITH. I obviously don't want to attribute that view to everyone, but it was certainly a powerful view in discussions about legal policy issues that, working with Congress, threatened or raised the possibility that Congress would not approve what the President wanted to do or would put some constraints on the President in a way that would tie the President's hands, that would keep the President from keeping the country safe. That was a view that was—

Chairman LEAHY. What effect does asserting this kind of extreme authority have on the President's terrorism policies overall? Does it help or hurt them?

Mr. GOLDSMITH. As I explain in my book at length, I think it's been, on the whole, hurtful.

Chairman LEAHY. Now, you point out in your book, and you have in your testimony, about receiving some harsh personal criticism for not supporting a legal opinion and giving the White House the answer it wanted. You also rather tellingly, in the back of the book, refer to President Nixon and former Attorney General Richardson and that dialog. But you point out what David Addington told you, the blood of 100,000 people who die in the next attack would be on your hands if you persisted in your legal conclusion.

I find just about every time anybody raises questions about what they're doing, it comes out from the administration that you're either for the terrorists or you're against the terrorists, and we're not going to accept any kind of an argument. We heard this drumbeat of fear when we considered the Military Commissions Act last year.

We heard it again this year. Even though we had agreed on a change in FISA, at the very last minute the Director of National Intelligence backed out of that agreement and the drumbeat started from the White House: we've got to stop the terrorists. Is this

really an appropriate tactic? I mean, does stirring up fear at this time—I hate to use a cliché, but don't you run into "crying wolf"?

Mr. GOLDSMITH. Senator, I'm not sure I can fully answer that question because I wasn't, obviously, privy to the negotiations between the Congress and the White House. I will say two things, and they're kind of on the opposite poles. One, is that when I was on the inside of the government I did not think that the government was exaggerating the threat.

I thought, if anything, it was understating the threat publicly. All I can tell you is, in my experience when I was inside the government, the government was much more concerned, fearful, and anxious about the threat and its ability to stop it than it was conveying publicly.

Now, that's what I think, based on my experiences. I have no idea. I just don't know whether the government was giving you its candid views or—

Chairman LEAHY. I didn't state the question quite clearly enough.

Mr. GOLDSMITH. I'm sorry.

Chairman LEAHY. No, it would be my fault. But what I'm saying—I suspect. There is a threat. I've read a lot of things that NSA and the CIA have received, things that have not been made public, and I understand that.

What I'm concerned about, is that every time somebody raises a disagreement, or even suggests there's a better way of doing something, does it really help the discussion to fall back on, we're facing a terrible threat, you either do it our way or you're basically supporting the people who are making the threat?

Mr. GOLDSMITH. That does not sound like a very useful thing to say, sir. I think the basic view on all of these issues is consistent with the demands—legitimate demands—of secrecy. The more deliberation and the more viewpoints we get, the better.

Chairman LEAHY. For example, the administration is now requesting that Congress pass legislation that retroactively immunizes any telecommunication carriers that helped the government implement the TSP, the warrantless wire tapping. I realize we're not going to go into the details of that.

Don't you think that if the Congress is asked to retroactively immunize companies, that we ought to at least know what legal justification was used for them to work with the government on the same steps that we're now asked to immunize?

Mr. GOLDSMITH. That sounds like a perfectly sensible request to me, sir.

Chairman LEAHY. Thank you.

If you have OLC opinions that are going to be the basis of legislation, shouldn't the Congress see those opinions if they're asked to legislate based on them?

Mr. GOLDSMITH. Putting the question that way, of Congress is asked to legislate based on legal analysis, then they should see the legal analysis in some form before they legislate, I assume. I don't know exactly what issues you're talking about, but that makes perfect sense to me. Not necessarily to see the documents. I don't know. There are other ways of conveying legal analysis.

But it seems to me from the perspective of someone in Congress, if you're asked to legislate on an issue that turns on the interpretation of the executive, that you need to know how the executive is going to interpret the law and it's a perfectly sensible thing to ask.

Chairman LEAHY. Thank you.

Senator Specter?

Senator SPECTER. Thank you, Mr. Chairman.

Professor Goldsmith, you disagreed, to your credit, with the earlier interpretation of Office of Legal Counsel when you took the position to change the definition of interrogation, where the predecessor had said to be defined as torture it "must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."

Has that standard been abandoned in practice?

Mr. GOLDSMITH. I don't know whether it's been abandoned in practice. It was certainly abandoned in the subsequent decision of the Office of Legal Counsel that my successor, Den Levin, issued. In an opinion to Deputy Attorney General Comey in December of 2004, he repudiated that standard.

Senator SPECTER. The legislation to which the President attached the signing statement prohibited interrogation which was "cruel, inhuman, or degrading". Is that standard consistent with what the Office of Legal Counsel now says is appropriate?

Mr. GOLDSMITH. I'm not sure what the Office of Legal Counsel now says is appropriate. The opinion I was referring to was a December 2004 opinion just on the torture statute, and it did not interpret that standard. I am not privy to how OLC has interpreted that standard.

Senator SPECTER. Do you recollect what standard you wrote as legal counsel, as Assistant Attorney General, Office of Legal Counsel?

Mr. GOLDSMITH. Interpreting that standard? I'm not—

Senator SPECTER. Interpreting the torture standard.

Mr. GOLDSMITH. The torture standard. You're talking about the torture statute as opposed to the McCain amendment, "cruel, inhuman, and degrading treatment" language? I'm not sure which one you're asking me about.

Senator SPECTER. Well, we have the language which Senator McCain and the President agreed to prohibiting interrogation which was cruel, inhuman, or degrading.

Mr. GOLDSMITH. Right.

Senator SPECTER. The President said he felt free to disregard that—

Mr. GOLDSMITH. Right. Right.

Senator SPECTER.—on his powers as Commander-in-Chief.

Mr. GOLDSMITH. Right.

Senator SPECTER. What standard, if you know, is—

Mr. GOLDSMITH. I don't know. That happened—

Senator SPECTER.—the administration applying?

Mr. GOLDSMITH. I do not know, sir. That happened after I left.

Senator SPECTER. All right.

Mr. GOLDSMITH. Sorry.

Senator SPECTER. So when you were Assistant Attorney General for Office of Legal Counsel, did you articulate a standard of propriety for interrogation?

Mr. GOLDSMITH. I certainly considered the issue and I don't believe I ever reached a decision on the merits of what that standard meant. No, sir. I'm sure I didn't, actually.

Senator SPECTER. I'm sorry. I didn't hear that.

Mr. GOLDSMITH. I did not. No, sir.

Senator SPECTER. You have noted the difficulty that the President faces when he gets the matrix on a daily basis of extracting warnings from tens of billions of phone calls and e-mails that fly around the world. How is that manageable, and how does that work?

Mr. GOLDSMITH. That gets me quickly into areas that I'm both incompetent to discuss, and is probably classified. I just—I saw the product. I didn't see the process behind it.

Senator SPECTER. Well, a plea of incompetency will suffice.

[Laughter.]

It will be sufficient. You don't have to plead classified information.

Mr. GOLDSMITH. I'll just plead incompetence then, sir.

Senator SPECTER. I don't accept the plea of incompetency, by the way.

Mr. GOLDSMITH. Well, I don't—I mean, you're talking about the process whereby our government collects information from around the world and it ends up in a threat matrix in the morning for the President to see? I actually don't—I mean, I actually really can't tell you much about that.

Senator SPECTER. Well, those facts which you have in your book show the scope of the difficulty in dealing with terrorism.

Mr. GOLDSMITH. It's very hard.

Senator SPECTER. And when I noted that, I wondered if it encroached upon classified information, even to comment about the number of calls which are—

Mr. GOLDSMITH. If that statement was in my book it was cleared by the government and they determined that it wasn't classified.

Senator SPECTER. You note in your book that the Federal Government ignored what you considered to be bin Laden's 1996 declaration of war, and had pursued for 8 years following the bombing of the Trade Towers in 1993 until 9/11/2001 a law enforcement approach as opposed to the declaration of war, and that, as you characterized it, the administration at that time was timid, reluctant to really take the kind of bold steps which were necessary. Do you think we have outlived that kind of timidity?

Mr. GOLDSMITH. Well, certainly after 9/11 the risk aversion and the timidity that characterized the fight against terrorism was no longer acceptable, and certainly after 9/11 that attitude is no longer acceptable. We have not had that attitude. The President has not had that attitude. Am I understanding your question correctly?

Senator SPECTER. What's that?

Mr. GOLDSMITH. Am I understanding your question correctly?

Senator SPECTER. Well, the question is whether we are not timid anymore. You have described what you called as "retroactive discipline"—

Mr. GOLDSMITH. Right.

Senator SPECTER.—about concerns that officials have about being sued or about being held accountable in some court.

Mr. GOLDSMITH. Yes, sir.

Senator SPECTER. Are we past that stage?

Mr. GOLDSMITH. No, sir, we're not. Not at all. You know, basically, inside the administration—this is how I started my testimony. Inside the administration, every day there's this fight between wanting to do everything you can and people being afraid that they're going to violate the law. We are definitely not past the timidity, and anxiety, and really risk aversion in the face of the law, even though at the same time the government is obviously being very aggressive, and trying to manage those two pressures is very hard.

Could legislation help if Congress were to pass a standard, perhaps a good faith standard, no liability, or would that be outweighed if Spain or Belgium decides to invoke a violation of rights against humanity?

Mr. GOLDSMITH. I think that there's nothing much we can do to stop foreign courts from trying to, if they want, prosecute our officials. I do think that there are things Congress could do to tamp down the extraordinary anxiety that people in the intelligence community feel about making sure they comply with the law.

Senator SPECTER. Well, what could Congress do, if anything, on that subject?

Mr. GOLDSMITH. There are lots of things they could do. One, is legislative very clearly, which is easier said than done, I realize. Two, is to try to come up with mechanisms of accountability that aren't necessarily tied to criminal prosecution, that are tied to reporting, oversight, and something like that.

Three, perhaps have some kind of a safe harbor or good-faith immunity or something like that. I haven't thought about that as much. But the main concerns, in my experience, are criminal prohibitions on intelligence officials that are not precise and in which there's pressure to go into the gray area, but obviously pressure against going into the gray area for fear of the law.

As I said in my statement, we ask people in the CIA to take out liability insurance for future prosecution. It's just a standard part of the way they operate out there. That's a crazy signal to send, in my opinion, for people that the country's asking to take steps at the edge of the law to keep us safe.

Senator SPECTER. Well, that is something I think that Congress ought to consider. Would you be willing to think about it some more—

Mr. GOLDSMITH. Yes, sir.

Senator SPECTER.—and give us a recommendation as to what we might do?

Mr. GOLDSMITH. Yes, sir. I will. Thank you.

Senator SPECTER. Thank you very much, Professor Goldsmith.

Mr. GOLDSMITH. Thank you.

Senator SPECTER. Thank you, Mr. Chairman.

Chairman LEAHY. You know, I would certainly be willing to consider legislation, but it's very difficult with an administration that: 1) won't tell you what it's doing; 2) won't tell you what it bases

what it's doing on; 3) even if they negotiate—on the rare instances they'd actually talk to you about the legislation and even negotiate with it and agree to it, they often change their mind at the last minute and come up with something entirely different than what they've agreed to, and say you're favoring the terrorists if you don't go along with them.

And last, upon the rare occasions where they actually sat down and worked something out, then they, as they did with torture, put a signing statement saying, but we don't have to follow this if we don't want to. I agree with you on the idea that liability insurance seems an awful thing to ask of people, and I know many, many people in the CIA. I've talked with many all the time. I know they're very dedicated to this country.

But I might add that at some point this administration has got to realize they're one of three equal branches of government, and the idea that they do not have to in any way work with the Congress on these issues does a terrible disservice not only to the country, but to those CIA agents you're talking about.

The legislation could be written. I suspect Senator Specter and I could, in a matter of hours, write the legislation necessary. But there's no incentive to do so when the administration says it's a one-way street and we're not even going to tell you what's going on.

Mr. GOLDSMITH. Could I just comment on that, sir.

Chairman LEAHY. Sure.

Mr. GOLDSMITH. I mean, I just want to reiterate, I think that if you think you could reach agreement on that, I think—or something like that, listen, the people in the intelligence agencies, in my experience, they really want to do the right thing. They really want to comply with the law. As Mr. Shoyer said, you can't go to the bathroom in the CIA without talking to a lawyer.

But they're under pressure to do things to keep us safe, and there are these vague criminal prohibitions. I really think that if we could do something to take that kind of corrosive pressure off of them, while of course coming up with mechanisms to make sure they comply with the law, I think it would be enormously valuable.

Chairman LEAHY. Professor Goldsmith, I agree with you completely.

Mr. GOLDSMITH. I know. I'm just—

Chairman LEAHY. But, unfortunately, we can't get anybody down at 1600 Pennsylvania Avenue to work with us on this in an open and honest fashion. What happened under the FISA negotiations where they, at the very last second, changed the position they had taken, changed the position they had agreed to, reduces credibility up here. Possibly with the new Attorney General we may have that. That certainly is one of the questions, and when we have the hearing we'll ask him.

But this administration makes it very difficult to protect those CIA agents, or others, simply because they have destroyed a great deal of trust of people, I might say, on both sides of the aisle who could be helpful. But I do thank you for being here. I am going to leave, but I'm going to turn it over to Senator Whitehouse. I thank you for coming. I mean that seriously. You went there to serve your country. I believe you did, because you kept your conscience. That's

the most important thing any one of us can do in serving our country.

Mr. GOLDSMITH. Thank you, Senator.

Senator WHITEHOUSE [presiding]. Thank you, Chairman.

Mr. Goldsmith, I just had one other question that I wanted to go over with you. It comes from your book, and it connects back to the conversation that you just had with the distinguished Ranking Member, Senator Specter, related to the torture standard of "pain equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."

As you point out, that was an unfamiliar legal framework. Could you tell us where it was adopted from?

Mr. GOLDSMITH. I'm not going to get the details of this exactly right. I could look in my book and get it. But it came from a health care benefit statute and it was designed, as I recall, to—I might not get this exactly right. To try to define the circumstances under which there was an emergency situation warranting health care benefits. Is that right? I think that's right.

Senator WHITEHOUSE. I think that's right. Completed unrelated to the historic norms governing torture.

Mr. GOLDSMITH. It wasn't related to the torture statute. Now, you know, usually—I think. I don't know, but I think the lawyers who were doing that, they looked around the U.S. Code to try to—"severe pain"—the phrase "severe pain" is very hard to figure out what that means in the abstract. So I think it was OK to look around other parts of the U.S. Code. I don't think that was the best analogy.

Senator WHITEHOUSE. Indeed. The "pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death" would presumably be a level of pain greater than that applied with, for instance, cigarette burns, which was one of the—you know, sort of from the bad movies of my childhood, how people were tortured and tormented by evildoers.

But clearly, being burned with cigarettes would not be equivalent to organ failure, or impairment of bodily function, or death. So it left a pretty broad window for things that I think the average American would consider to be abusive.

Mr. GOLDSMITH. This is one of the concerns I have with the opinion, sir.

Senator WHITEHOUSE. Yes. All right. Well, I will not keep you longer. I appreciate very much your testimony. You and I probably disagree about a great number of things, but what has impressed me about your testimony, what has impressed me about your book, what has impressed me about your service is that you very clearly see the law as a thing that has substance, and shape, and form, and significance, and it's not just, to you, a big grab-bag of terminology that you pull out in order to achieve the result that you want. I think if more people thought that way, we would have less disagreement and more productive legislation and government, both. So, I thank you for that and I thank you for your testimony.

I would like to ask that the record stay open for a week to accommodate the questions for the record that you were asked. If you

could get the answers in within a week, is that reasonable? Would you like more?

Mr. GOLDSMITH. Could I have a little bit more time, please? I've got a very busy—

Senator WHITEHOUSE. You tell me.

Mr. GOLDSMITH. A couple of weeks, please.

Senator WHITEHOUSE. Three weeks.

Mr. GOLDSMITH. Thank you.

Senator WHITEHOUSE. OK. There it is. Thank you.

Mr. GOLDSMITH. Thank you. Thank you, Senator.

Senator WHITEHOUSE. We're adjourned.

[Whereupon, at 12:04 p.m. the hearing was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Senate Judiciary Committee
Hearing on "Preserving the Rule of Law in the Fight Against Terrorism"
Tuesday October 2, 2007

Questions Submitted by Chairman Patrick Leahy

1. After the events in Attorney General Ashcroft's hospital room that you and former Deputy Attorney General Comey have described to this Committee, you were one of close to 30 people from the Justice Department prepared to resign. What exactly was the reason you were prepared to resign after those events? Why did you ultimately decide not to resign at that time?

Answer: I was prepared to resign because I believed the White House misled me about its intentions to comply with the Department of Justice's legal advice, because I believed the White House acted in disregard of DOJ's legal advice, and because the circumstances surrounding the March 2004 events caused a breakdown in trust between DOJ and the White House. I decided not to resign for two reasons. First, the Attorney General's Chief of Staff asked me not to resign until the Attorney General had an opportunity to consider doing so. Second, after the White House changed course I still planned to resign but I was advised, and I worried, that doing so might cause sensitive national security information to leak.

2. In answer to a question from Senator Specter, you said the government had "forbidden" you from discussing the legal analysis related to the TSP. Who from the Administration relayed this message to you? In your opinion, could aspects of the legal analysis be discussed in an unclassified setting without harming national security? Did the government also forbid you from discussing the legal analysis with members of this Committee in a classified setting?

Answer: Sarah Roland from the Department of Justice informed me that I could not discuss legal analysis related to the TSP. Aspects of the legal analysis might be discussable in an unclassified setting without harming national security, but I am not sure. The government did not tell me, one way or the other, whether I would be forbidden from discussing the legal analysis with members of this Committee in a classified setting.

3. You testified that initially, former Deputy Attorney General James Comey was not read into the TSP and that you had a struggle to get him access. Do you recall when Mr. Comey was finally permitted to be briefed on the program? Do you believe the delay in briefing Mr. Comey had a negative impact on the program and the quality of legal advice the Administration received?

Answer: I do not recall precisely when Mr. Comey was read in. It was sometime in the winter of 2004. I do not believe the delay had a negative impact on the program and the quality of legal advice the Administration received.

39358.001

4. You stated that the Administration directed you not to testify about certain issues during our hearing. If this restriction were removed, do you believe there are other matters to which you could testify in open or closed hearing that would be useful to this Committee in carrying out its oversight and legislative responsibilities, particularly on the subject of preserving the rule of law in the fight against terrorism?

Answer: I am not sure whether what I might say would be useful to this Committee.

5. A recent New York Times article reports that secret Office of Legal Counsel opinions from 2005 addressed interrogation techniques and found that a number of specific harsh techniques, used alone or in combination, are lawful. What is your reaction to the existence of these opinions? From what you know of the opinions, do they cause you any concern? If so, why?

Answer: The *New York Times* story does not provide me enough information to draw any informed conclusions.

39358.002

Senator Edward M. Kennedy
Questions for the Record
From Senate Judiciary Committee hearing on "Preserving the Rule of Law in the Fight Against Terrorism"
Held on October 2, 2007

To Professor Jack Landman Goldsmith

1. In your book and in your testimony, you criticized the Administration's failure to work with Congress. You described numerous instances in which you and others urged the White House to go to Congress about a controversial policy, only to be rejected by officials such as David Addington, who insisted on a "go-it-alone" approach.

Your book and your testimony explain how this approach was both unnecessary and unwise, and has caused a number of harms. "Political disagreement and debate are strengths of a democracy in wartime," you write, "for they allow the country's leadership to develop a fuller picture of legal, practical and strategic questions, and to learn about and correct its errors." Political dialogue also gives Americans a voice in their own government. Yet, the Bush Administration has consistently stifled disagreement and debate and shut out its critics.

Questions:

- **Since the Administration has so often refused to cooperate with Congress, or even to keep us informed about what it is doing, how can we best exercise our oversight and lawmaking responsibilities?**

Answer: If an administration does not cooperate with or inform Congress, Congress can use political tools to ensure that it gets the cooperation and information it needs to exercise its constitutional responsibilities.

- **Your book explains that there are numerous reasons for the Administration's go-it-alone approach. You said that top officials in the White House have an "unquestioned commitment to a peculiar conception of executive power," have "found it much easier" to avoid debate rather than engage in it, and have an unhealthy obsession with secrecy. From what you said, it sounds as if this Administration will never commit to working responsibly with Congress. Is this correct?**

Answer: I do not believe this is correct. Recently the administration seems to be working responsibly with Congress.

2. In your written testimony, you stated, "Many people believe that the Bush administration has been indifferent to . . . legal constraints in the fight against terrorism. In my experience, the opposite is true: the administration has paid scrupulous attention to law."

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I found this a curious statement, given what you had said in your book. For example, your book explains that:

- the OLC was under heavy pressure to justify what the President wanted to do, and the "President and Vice President always made clear that a central administration priority was to maintain and expand the President's formal legal powers";
- the OLC "took shortcuts in its opinion-writing procedures," so as to "control outcomes in the opinions and minimize resistance to them";
- numerous OLC opinions were "deeply flawed: sloppily reasoned, overbroad, and incautious";
- the President's "War Council" "wrote opinion after opinion approving every aspect of the administration's aggressive antiterrorism efforts";
- John Yoo had "extraordinary influence within the administration," because his astonishingly broad views on executive power told the White House what it wanted to hear;
- the Administration refused to work with Congress, even though doing so would have put its antiterrorism policies "on a sounder legal footing";
- you faced major challenges in trying to "put[] the [Terrorist Surveillance Program] legally aright" after the Administration had kept it secret from Congress and the FISA court;
- the President used signing statements in unprecedented ways that are "antithetical" to our historical and constitutional traditions; and
- the White House "used lawyers . . . as a sword to silence or discipline" those who were nervous about implementing its most controversial policies.

You also described how, following the OLC's determination that violations of the Geneva Conventions in Iraq could be punishable under the U.S. war crimes statute, David Addington yelled at you: "The President has already decided that terrorists do not receive Geneva Conventions protections. You cannot question his decision." On other occasions when you tried to explain why an Executive policy was illegal, you were overruled and berated in the same way.

Here is how you described the Administration's approach to electronic surveillance: "After 9/11 . . . top officials in the administration dealt with FISA the way they dealt with other laws they didn't like: they blew through them in secret based on flimsy legal opinions that they guarded closely so no one could question the legal basis of the operations."

Frankly, this does not sound like an administration that "has paid scrupulous attention to law."

From your account, it sounds like the exact opposite is true: White House officials have consistently manipulated or ignored the law to suit their own ends, and the main reason they've paid attention to the law is to cover themselves. It is hard to come away from your book without concluding that this Administration is not committed to the rule of law.

Question:

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- **Do you believe that the Administration has been committed to the rule of law—not just as a means to justify their policies, but as a bedrock principle that makes this Nation better and stronger?**

Answer: I do not agree with all of these characterizations of my book, *The Terror Presidency*. As I explained in the book, I believe the administration, far from being indifferent to law, was preoccupied with law. As I also explain in my book, I disagreed with some of the administration's legal contentions and some of its approaches to ascertaining and complying with the law.

3. Your book explains how you felt you had no choice but to withdraw two OLC opinions from 2002 and 2003 on the use of torture in interrogation, because they were so fundamentally flawed. These opinions were classified, but leaks have exposed them to the public and inspired worldwide outrage and condemnation. Leaks have also recently shed some light on the President's "Terrorist Surveillance Program" to eavesdrop on Americans without a warrant. This secret policy has likewise led to mass shock and outrage.

But there is a large amount that we still do not know. For instance, even as the Administration insists that FISA must be reformed, it has failed to provide Congress with adequate information about its activities, the legal justifications for those activities, or the FISA Court opinions that we are told make new legislation necessary.

Questions:

- **In the same chapter of your book in which you described the OLC opinions you withdrew because they were so flagrantly erroneous, you wrote that each of the government's most sensitive counterterrorism programs "had been approved by OLC and backed by an OLC opinion." Without revealing any classified information, can you tell us about the nature and quality of these other OLC opinions?**

Answer: No, I cannot.

- **Can you comment generally on the mass of OLC antiterrorism opinions that remain secret? Can we expect to find the same sort of sloppy and self-serving analysis in all of the OLC opinions used by the Administration to justify its most controversial activities?**

Answer: No, I cannot.

4. Last Thursday, the *New York Times* alerted the nation to two more secret "torture memos" from the Office of Legal Counsel. These memos, issued in 2005, have led to new outrage. The first reportedly authorized harsh interrogation techniques to be used "in combination" to create a more extreme overall effect. The second declared that none of the

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CIA's interrogation methods violated the ban on "cruel, inhuman, and degrading" treatment that Congress was about to pass.

Part of the outrage over these new memos concerns their substance. From what we know of their contents, both seem to take a distorted view of the law. They essentially say that nothing the Administration does to obtain terrorist information can qualify as cruel, inhuman, or degrading. Part of the outrage concerns the way in which these opinions were issued. At a time when the Office of Legal Counsel was claiming publicly that it had put things right after withdrawing the infamous Bybee memo, it was secretly issuing these two new memos that appear to contain similarly extreme analysis.

Questions:

- **Why did the Administration issue these two memos in 2005 authorizing harsh interrogation techniques, after the withdrawal of the 2002 Bybee memo and the public issuance of a less extreme opinion? Was the Administration attempting to mislead the public and reinstate its earlier position on torture?**

Answer: Because I was not in the government at this time, I do not know how many opinions were issued, or why they were issued.

- **From what you know of the 2005 opinions, can you comment on their legal merits? Is their analysis consistent with the positions you took as head of the Office?**

Answer: It is impossible to tell from newspaper reports,

- **The Administration is now refusing to share these memos with members of Congress. Particularly since the Administration made a big show of publicly issuing the replacement torture memo—presumably in an effort to subdue criticism—is it appropriate to refuse to share the later memos with Congress, either in a classified context or otherwise?**

Answer: I believe that OLC should make every effort to publish its opinions or, if opinions are classified and related to intelligence, to show the opinions to the intelligence committees. I believe it is the President's prerogative not to disclose these opinions. And I believe it is the Congress's prerogative to use political pressure to try to force the Executive to disclose the opinions.

5. The author of the 2005 torture memos was Steven J. Bradbury, who has been the acting head of the Office of Legal Counsel since February 2005. In late June 2005, he was formally nominated to take over the position.

Along with the existence of the new torture memos, it has recently been revealed in the press that Mr. Bradbury was given a "tryout" before he was officially nominated to lead the Office. His nomination was delayed while the White House "decided to watch Bradbury for a month or two," according to a Justice Department official. "He was sort of on trial." The

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purpose of this tryout seems to have been to see if Mr. Bradbury would be sufficiently accommodating to the President's desires—rather than stand up for the rule of law.

As the *New York Times* notes, "While waiting to learn whether he would be nominated to head the Office of Legal Counsel, Mr. Bradbury was in an awkward position, knowing that a decision contrary to White House wishes could kill his chances." It was during this trial period that Mr. Bradbury authored at least one and possibly both of the new torture memos that have just come to light.

Questions:

- **What do you think about the recent revelation that Stephen Bradbury was on a "tryout" before he was nominated to head the Office?**

Answer: I do not have enough information to assess the claim. I hired Mr. Bradbury to be my Deputy and during my time in office I found him to be a fine lawyer and a person of integrity.

  - **What does that say about the relationship between the White House and the Department of Justice?**

Answer: Since I do not know whether the claim is true I cannot answer this question.

  - **What does it say about the Administration's commitment to the rule of law?**

Answer: Since I do not know whether the claim is true I cannot answer this question.

- **Professor Sandy Levinson recently wrote: "If one believes that the OLC is in fact to have some quasi-independent role in offering an honest and disinterested view regarding highly controversial issues, then one might want to make sure that there is at least a modicum of job security attached to the position. . . . What we are seeing, incidentally, is a more and more open fight between 'rule of law' conservatives, including Jack Goldsmith and Doug Kmeic, and 'anything the President wants to do, so long as it's accompanied by the magic words "national security," is automatically authorized by the Constitution,' typified, of course, by David Addington, John Yoo, and, it appears, Mr. Bradbury."**

  - **Is this an accurate characterization of the legal fights that have occurred within this Administration? Have the "rule of law" conservatives like you and James Comey now been entirely pushed out?**

Answer: I do not think this is an entirely accurate characterization. As I explain in my book, I think the differences among lawyers in the administration resulted more from a clash of perspectives about Executive power and about the prudence of working with Congress and other institutions of our government. I was not "pushed out"; I resigned voluntarily.

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6. David Addington plays a very large role in your book. Mr. Addington's job title is technically Counsel to the Vice President, but from your account, it appears that he helped shape all of the Administration's most sensitive and controversial antiterrorism legal policies.

In this capacity, Mr. Addington appears to have taken over certain duties traditionally left to the Attorney General and the White House Counsel. In one passage, you note: "The new arrangement . . . made Addington an altogether different type of Vice President's Counsel, one who received all of the important governmental documents that went to Alberto Gonzales, and one who was always in the room when Gonzales was discussing an important legal issue. Of probably a hundred meetings in Gonzales's office to discuss national security issues, I recall only one when Addington was not there."

In other passages, you describe Addington as the de facto leader of the unofficial "War Council," a "secretive five-person group with great influence over the administration's antiterrorism policies." Although John Yoo also played an important role on this Council, "Addington's hard-line nonaccomodation stance always prevailed when the lawyers met to discuss legal policy issues." You report that Mr. Yoo frequently told you "stories about Addington slaying the legal wimps in the administration who stood as an obstacle to the President's aggressive antiterrorism policies."

With regard to Mr. Addington's views, you make clear that he is an extreme proponent of executive power, secrecy, and unilateralism. You describe his unwavering "commitment to expanding presidential power" and to the "unitary executive" theory. You indicate his contempt for the Foreign Intelligence Surveillance Act, noting that he was "the chief legal architect of the Terrorist Surveillance Program" and that he once remarked to you, "We're one bomb away from getting rid of that obnoxious [FISA] court." You note that "Addington's hostility to working with Congress was mild compared to his hostility to accommodating the concerns of allies and international organizations." And you reveal that Addington demanded "strict enforcement of the party line on promotions in the Justice Department," such as when he blocked the promotion of Patrick Philbin because Mr. Philbin had not been sufficiently accommodating in agreeing with all that the White House wanted to do.

You also say that you thought some of Mr. Addington's legal judgments were "crazy." For example, he clearly endorsed the OLC interrogation memos, which were so deeply flawed that you felt you had no choice but to withdraw them. Several times, as your book describes, Mr. Addington berated you for coming to a legal conclusion that did not coincide with what the President wanted to hear.

Questions:

- **It is remarkable to learn from your book that the Counsel to the Vice President has played such a central and radical role in shaping antiterrorism legal policy. Is it appropriate that Mr. Addington wields so much power and influence?**

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Answer: The President can organize his legal staff in the White House however he wishes.

- **Do you believe that reforms are needed to ensure that Counsels to the Vice President do not have such a large, secret, and unlimited role in the formulation of legal policy? What specific reforms do you favor?**

Answer: I do not think there is anything wrong with a Counsel to the Vice President participating in and commenting on legal policy debates.

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Responses to Questions from Jack Goldsmith to Questions submitted by Senator Dianne Feinstein

After the March 10, 2004 meeting in AG Ashcroft's hospital room and the meetings the next day at the White House that Acting-Attorney General Comey testified about, changes were made to the relevant intelligence program as you had advocated in your legal analysis.

- *Did the White House, and in particular then-White House Counsel Gonzales, agree with your legal reasoning or did he continue to believe that the John Yoo OLC opinion was correct?*

Answer: I am not sure.

It is reported that, according to you, Attorney General Ashcroft felt the war council was usurping his legal-policy decisions – decisions entrusted to the Attorney General.

- *What was your understanding of the White House's role in reviewing the Department of Justice's Office of Legal Counsel opinions?*

Answer: The White House provided comments on some draft opinions.

- *Did David Addington review all OLC opinions? If not all, when was he involved and what was his role?*

Answer: He did not review all of them. I am not sure when and why he got involved. When he did get involved, he gave comments.

In an interview you discussed your final decision to resign and that you almost resigned several times.

- *Please explain what was involved and why you considered resigning each time.*

- *What, specifically was your reason for ultimately deciding to resign from the Department of Justice? What made that decision different from the previous times you considered resigning?*

- *Who was involved in your decision?*

39358.010

Answer: I first considered resigning two months into my job at OLC, when I discovered legal opinions that I believed were flawed. As I explained in my book, *The Terror Presidency*, I worried that I could not, if asked, stand by or reaffirm the opinions. The second time I considered resigning came in March of 2004. I considered resigning at that time because I believed the White House misled me about its intentions to comply with the Department of Justice's legal advice, because I believed the White House acted in disregard of DOJ's legal advice, and because the circumstances surrounding the March 2004 events caused a breakdown in trust between DOJ and the White House. Finally, I did submit my resignation in June of 2004. As I explained in *The Terror Presidency*, I resigned because I was exhausted, because I was fed up with government, because I believed that some important people in the administration had lost faith in my ability to run OLC, because I was anxious to return to the academy, and because I wanted to spend more time with my wife and two young sons. He main people I consulted before resigning were Jim Comey, Patrick Philbin, and my wife.

In a recent New York Times article it is reported that after you helped issue a new memo on interrogation techninques, just a few months after you departed, the Department of Justice issued a new memo.

- *Were you aware of this?*

  Answer: I had a very vague awareness of some of the events in the *New York Times* story to which I think the question refers.

- *Are you aware of others memos that you rescinded or reworked that were changed or altered after your departure?*

  Answer: I am not aware of any memo that altered or changed my work at OLC.

39358.011

Senate Judiciary Committee
Hearing on "Preserving the Rule of Law in the Fight Against Terrorism"
Tuesday October 2, 2007

Questions Submitted by Senator Sheldon Whitehouse

1. What was your role in analyzing the lawfulness of various interrogation techniques to be used by Department of Defense interrogators during your time in the Office of the General Counsel?

Answer: I analyzed many questions related to the laws of war during my time in the Department of Defense, but I do not recall analyzing the lawfulness of interrogation techniques. In the Spring of 2004 I sat in on one meeting of the Department of Defense Working Group related to the law and policy of interrogation.

2. Did you review or provide any advice related to the memo that, according to a *New Yorker* article by Jane Mayer, Secretary of Defense Rumsfeld approved on December 2, 2002, authorizing a variety of expanded interrogation techniques? If so, what was your reaction or advice with respect to that memo or decision?

Answer: No.

39358.012

SUBMISSIONS FOR THE RECORD

Preserving the Rule of Law in the Fight Against Terrorism

United States Senate, Committee on the Judiciary

Testimony of Jack Goldsmith, Harvard Law School

October 2, 2007

I thank the Judiciary Committee for inviting me to testify on the important issue of "Preserving the Rule of Law in the Fight Against Terrorism." I first confronted this issue when I was Special Counsel to the General Counsel of the Department of Defense from September 2002 through July 2003. My formative experiences on the issue occurred during my service as Assistant Attorney General, Office of Legal Counsel, from October 2003 through June 2004. When I left the Justice Department and moved to Harvard Law School, I spent three years reading and thinking about the issue and reflecting on my time in government. The result of this study is a book called *The Terror Presidency: Law and Judgment Inside the Bush Administration.* This testimony draws in part on ideas in my book.

Under the U.S. Constitution, the President possesses the twin duties of keeping the country safe and enforcing the law. In the fight against terrorism, these duties pose historically unique challenges, and they often conflict. The last six years teach many lessons about how the President and Congress can better meet these challenges and resolve these conflicts.

Since Watergate and Vietnam, and to a much greater degree than at any time in our history, the President's responsibilities as Commander in Chief have become regulated by law. Core traditional military functions like surveilling, targeting, detaining, and interrogating enemy soldiers are today regulated by complex domestic and international laws. Many of these laws have criminal penalties enforceable by the Justice Department, special counsels, inspectors general, and foreign and international courts.

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These laws, and the lawyers and courts that enforce them, serve many important goals. They are designed to prevent the extraordinary abuses committed by the intelligence community in the 1950s and 1960s when the community was largely unregulated by law and ignored by Congress – abuses that included experimenting with psychotropic drugs on unwitting human beings, and surveilling Americans who did nothing more than exercise their First Amendment rights to protest the Vietnam war or advocate civil rights change. The laws also aim to prevent wartime abuses by the military, and more broadly to take a stand against human rights abuses that were the scourge of the twentieth century. The laws also impose discipline and accountability on the sprawling intelligence and military bureaucracies. And they ensure that the Executive branch channels its wartime efforts in ways that maximize military effectiveness and minimize unnecessary harm. Compliance with these laws – and more generally with the rule of law in wartime – is critical to both domestic legitimacy and to the task of winning hearts and minds that is so central in modern warfare.

Many people believe that the Bush administration has been indifferent to these legal constraints in the fight against terrorism. In my experience, the opposite is true: the administration has paid scrupulous attention to law. The CIA has more than 100 lawyers; the Department of Defense has more than 10,000. Nothing of significance happens in the military or intelligence establishments without the approval of at least one lawyer, and often several lawyers. And the Department of Justice has probably written more legal opinions related to this war than in all prior American wars combined.

Executive branch officials take legal restrictions seriously because they have a constitutional duty to do so, because it is the right thing to do, and because they appreciate the virtues of compliance, described earlier. They also take legal restrictions seriously because they are afraid of going to jail. In my two years in the government, I witnessed top officials and bureaucrats in the White House and throughout the administration openly worrying that investigators acting with the benefit of hindsight in a different political environment would impose criminal penalties on heat-of-battle judgment calls. These men and women did not believe they were breaking the law, and

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indeed they took extraordinary steps to ensure that they didn't. But they worried nonetheless because they would be judged in an atmosphere different from when they acted, because the criminal investigative process is mysterious and scary, because lawyer's fees can cause devastating financial losses, and because an investigation can produce reputation-ruining dishonor and possibly end one's career, even if one emerges "innocent."

In my experience, the intelligence community in particular, and especially the CIA, is fearful of "retroactive discipline" – the idea that no matter how much legal and political support an intelligence operative gets before engaging in aggressive actions, he will be punished after the fact by a different set of rules created in a different political environment. Fear of retroactive discipline is why CIA leaders encourage their officers to buy professional liability insurance for legal expenses to be incurred in criminal and related investigations. And it was one of the main causes of the much-criticized risk aversion that gripped the counterterrorism world before 9/11.

Law and lawyers were a contributing factor to this risk aversion. Senator Bob Graham complained about "cautious lawyering" at the CIA one year after 9/11, during the Senate Intelligence Committee confirmation hearings of Scott Muller for the General Counsel of the CIA. "I know from my work on this Committee for the past 10 years that lawyers at CIA sometimes have displayed a risk aversion in the advice they give their clients," he said. "Unfortunately, we are not living in times in which lawyers can say no to an operation just to play it safe," the Senator added. "We need excellent, aggressive lawyers who give sound, accurate legal advice, not lawyers who say no to an otherwise legal operation just because it is easier to put on the brakes." Graham concluded by asking Muller to give "cutting-edge legal advice that lets the operators do their jobs quickly and aggressively within the confines of law and regulation."[1]

Senator Graham's comments reveal the national security lawyer's central dilemma. The lawyer is criticized for being too cautious, for putting on the brakes, for playing it safe in a dangerous world. But he is in the same breath cautioned to give

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"sound, accurate" legal advice within the "confines" of the law. It is often difficult, and sometimes impossible, to do both. The laws that govern the intelligence agencies are usually written not in black and white, but rather in complex shades of gray. When intelligence clients ask lawyers whether aggressive counterterrorism actions are legal, clear answers don't always leap from the pages of the Constitution or the U.S. Code. Often the best a lawyer can do is to lay out degrees of legal risk, and to advise that the further the client pushes into the dark areas of gray legal prohibitions, the more legal risk he assumes. Even when the law is clear, lawyers sometimes offer hedging interpretations based on extra-legal concerns, such as a worry about political repercussions of the program under review. Whatever its source, equivocal legal advice understandably frustrates the men and women asked to take aggressive action to protect the country, and who want to know whether what they are doing is legal or not, period. When they hear a government lawyer talking about shades of gray and degrees of risk, they understandably hesitate, especially when criminal laws are in play.

So the growth of law governing the intelligence and military communities had both virtues and drawbacks prior to 9/11. After 9/11, these virtues and drawbacks took on special significance, for two reasons.

The first reason was that the risk aversion that characterized the pre-9/11 period was no longer acceptable. After 9/11, the message to the Executive branch from Senator Graham, others in Congress, the 9/11 Commission, and pundits of all stripes was that the government must be more forward-leaning against the terrorist threat: more imaginative, more aggressive, less risk-averse. These criticisms made clear to every counter-terrorism officer in the government that he or she, and ultimately the President, would be blamed harshly by the American people for failing to stop a second attack.

This was not a new message for the Bush administration. "Don't ever let this happen again," President Bush told Attorney General Ashcroft during a National Security Council Meeting on September 12, 2001.[2] The Commander in Chief's order had a big impact on the Attorney General and other counterterrorism officials, and induced a grave

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sense of responsibility for preventing the next attack. This responsibility was heightened by the harrowing threat reports that counterterrorism officials receive daily. "You simply could not sit where I did and read what passed across my desk on a daily basis and be anything other than scared to death about what it portended" says George Tenet in his book *At the Center of the Storm*, capturing the attitude of every person I knew in government who regularly read terrorist threat reports.[3] One of the reasons the threat reports are so frightening is that the government has little "actionable intelligence" about who is going to hit us, or where, or when.[4] This want of actionable intelligence combines with knowledge of the threats to produce an aggressive attitude that often assumes the worst about the threats and embraces a "better safe than sorry" posture toward them.

Many people have criticized this attitude.[5] But the Executive's internal anxiety in the face of the threats is not something we can wish or will away. For generations the Presidency will be characterized by an unremitting fear of devastating attack, a preoccupation with preventing the attack, and a proclivity to act aggressively and preemptively to do so. The threats have such a firm foundation in possibility, and such a frightening promise of enormous destruction, that any responsible Executive leader aware of the threats must take them very seriously and must often assume the worst. In my opinion, every foreseeable post-9/11 President, Republican or Democrat, will embrace this attitude, just as Presidents Lincoln, Roosevelt, Kennedy, and others did in time of war or emergency. If anything, the next Democratic President – having digested a few threat reports, and flush with the awareness that he or she alone will be wholly responsible when thousands of Americans are killed in the next attack – will be even more anxious than the current President to thwart the threat, especially if there is no attack in the interim.

The anxious attitude toward threats affects the Executive branch's attitude toward law. After 9/11, CIA Director and former NSA Director General Michael Hayden would often say that he was "troubled if not using the full authority allowed by law," and that he was "going to live on the edge," where his "spikes will have chalk on them."[6] Hayden's

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view permeated the Executive branch after 9/11, especially in the early years after 9/11. This attitude, too, was one that prior crisis presidencies – those of Lincoln, Roosevelt, Kennedy, and others – embraced.

The second major development after 9/11 was uncertainty about how pre-9/11 law applied, or should apply, to the novel war against transnational non-state actor terrorists. Sometimes the issue was whether legal frameworks were up to the task of preventing a recurrence of 9/11. The Foreign Intelligence Surveillance Act, for example, was enacted in 1978 on the basis of 1978 technological and legal assumptions, and was not designed for wartime surveillance, much less the nimble surveillance needed to find shadowy non-state terror groups who communicate and plan using disposable cell phones and encrypted e-mails buried in a global multi-billion-communications-per-day system.

Other times the issue was legal uncertainty about how pre-9/11 law applied in the post-9/11 world – uncertainty that stoked counterterrorism officials' fears of later being deemed to have violated the law. There were dozens of hard questions about how domestic and international laws applied to the novel problem of war against a non-state transnational terrorist organization. One question was whether and how ordinary domestic constitutional and statutory law applied in this war. The Office of Legal Counsel, for example, wrote a long memorandum in 2002 analyzing the many ways that the famous *Miranda* rule ("you have the right to remain silent") applied on the battlefield in Afghanistan.[7] Other questions concerned, for example, how the 1949 Geneva Conventions drafted primarily with traditional interstate war in mind applied in the very different type of conflict with al Qaeda and its affiliates.

In light of all of these developments, the central challenge of "Preserving the Rule of Law in the Fight Against Terrorism" is the proper management of the tension between the Executive branch's duty to prevent the next attack and its duty to comply with the law. The Executive branch is under enormous pressure to do everything possible, including action at the edges of the law, to stop the next attack. But this fear of the next attack (and of the inability to thwart it) often clashes with a fear of law: a fear of going

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too far, of doing too much, of ending up before a grand jury or an Inspector General or a foreign court, and possibly going to jail.

This tension between fear of attack and fear of violating the law lies behind the Bush administration's legal policy decisions about the Terrorist Surveillance Program, the Geneva Conventions, military commissions, interrogation, Guantanamo Bay, and more. Examining the issue from the always-more-lucid perspective of hindsight, I believe there are at least eight lessons – four for the Executive branch, and four for Congress – that can be gleaned from the nation's experience negotiating this tension during the last six years.

Executive Branch

1. OLC

Every day, thousands of Executive branch lawyers work to ensure that the Executive branch complies with the law. Sitting near the top of the hierarchy of Executive branch lawyers is the Office of Legal Counsel ("OLC") in the Justice Department, the office I headed for nine months. Ever since 9/11, OLC has advised the Attorney General, the White House, and other agencies about the legality of terrorism-related presidential actions. OLC decides whether the government's most sensitive and important counterterrorism plans are lawful, and thus whether they can be implemented. Its decisions are, with narrow exceptions, binding on all Executive branch actors, subject to being overruled by the Attorney General or the President.

More than any other institution inside the Executive branch, OLC is supposed to provide detached, apolitical legal advice. And it has an honorable tradition of providing such advice to a remarkable degree. But OLC's position is precarious: few real rules guide its actions, it has little or no oversight or public accountability, and it is (and always has been) subject to many subtle pressures to help the President achieve his goals. In order to ensure that it provides the President with the high-quality advice that he needs,

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OLC has over the years developed powerful internal norms of detachment and professionalism. It has also developed a number of practices to help it avoid errors, and to compensate for the fact that its opinions are not subject to the same critical scrutiny of adversary process and dissent that characterize the judiciary. These practices include (1) insisting that agencies seeking OLC's advice request OLC opinions in writing, setting forth their view of the law and facts; (2) seeking the written legal and factual views of all agencies with expertise or that may be affected by the opinion; (3) subjecting draft opinions to multiple levels of scrutiny and review inside OLC; (4) writing narrowly tailored opinions; and (5) publishing non-classified opinions when possible.

OLC has not always followed these norms and practices during the past six years, or even during the period before that. It seems clear that had these norms and practices been followed, OLC would have avoided some and perhaps most of the mistakes that it made. Presidents and Attorneys General should insist that OLC follow its traditional norms and practices, even in times of crisis.

2. Secrecy

Secrecy is obviously important in war. But too much secrecy can be counterproductive. In my opinion, the Bush administration was excessively secretive inside the Executive branch when it came to the production and receipt of legal advice. For example, the controversial interrogation opinion of August 1, 2002, was not circulated for comments to the State Department, which had expertise on the meaning of torture and the consequences of adopting particular interpretations of torture. Another example is the Terrorist Surveillance Program ("TSP"). Before I arrived at OLC, the NSA General Counsel did not have access to OLC's legal analysis related to the TSP. FBI Director Mueller has noted that Attorney General Ashcroft complained "that he was barred from obtaining the advice he needed on the program by the strict compartmentalization rules of the WH."[8] I too faced resistance from the White House in getting the clearance for the lawyers I needed to analyze the program.

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This extreme internal secrecy was exacerbated by the fact that the people inside the small circle of lawyers working on these issues shared remarkably like-minded and sometimes unusual views about the law. Close-looped decisionmaking by like-minded lawyers resulted in legal and political errors that would be very costly to the administration down the road. Many of these errors were unnecessary and would have been avoided with wider deliberation and consultation. The administration acknowledged, for example, that the extreme contentions about the President's exclusive constitutional powers in the famous interrogation opinions – contentions that led many in the United States and abroad to assume the worst about the administration's intentions related to torture – were "overbroad" and "unnecessary."[9]

There is a balance to be struck between too much and too little secrecy inside the Executive branch. But just as it was widely thought after 9/11 that the intelligence agencies were acting sub-optimally because they were not sharing information, it now seems obvious that the Executive branch was too secretive and compartmentalized in its legal deliberations in the years after 9/11. Executive branch legal analysis naturally suffers from a lack of external scrutiny and criticism, and every effort should be made to enhance rather than hinder such scrutiny and criticism inside the government, even, and indeed especially, on sensitive national security matters.

3. Working with Congress

One obvious solution to the many legal novelties and legal hurdles that the administration faced after 9/11 was to work with Congress to update the law. This was easier to do with some issues (for example, detention and military commissions) than others (for example, surveillance and interrogation). But on these issues and many others, the administration often eschewed genuine deliberation with Congress, both formal and informal, not just with members of the opposition, but with members of the President's own party as well. It instead took a "go-it-alone" approach that rested on the President's Article II powers, World War II and Civil War precedents, and imaginative interpretations of extant law.

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Political disagreement and debate are strengths of a democracy in wartime, for they allows the country's leadership to develop a fuller picture of legal, practical and strategic questions, and to learn about and correct its errors. The administration's failure to engage Congress deprived the country of national debates about the nature of the threat and its proper response that would have served an educative and legitimating function regardless of what emerged from the process. The go-it-alone strategy minimized the short-term discomforts to the Executive branch of public debate, but at the expense of medium-term Executive branch mistakes. When the Executive branch forces Congress to deliberate, argue, and take a stand, it spreads accountability and minimizes the recriminations and other bad effects of the risk taking that the President's job demands. The Bush administration's failure to do this has often left the President alone, holding the bag, as things have gone wrong. And it has hurt the Executive branch in dealing with the third branch of government as well. Courts have been much more skeptical of the President's counterterrorism policies than they would have been had the President secured Congress's express support.

The administration did go to Congress twice in the last thirteen months, and Congress responded with the Military Commissions Act of 2006, which authorized military commissions and much more, and the Protect America Act of 2007, which amended the Foreign Intelligence Surveillance Act to give the President more power and flexibility in finding the enemy. These statutes show that when the President insists that Congress stand up and be counted, he can get a lot of what he thinks he needs to protect national security. Forcing Congress to assume joint responsibility for counterterrorism policy weakens presidential prerogatives to act unilaterally. But it strengthens presidential power overall, as Presidents Lincoln and Roosevelt understood.

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4. Executive Power and Trust

It is no secret that a top priority for the administration has been to leave the presidency more powerful than it found it. I do not believe, as many have claimed, that the administration has used 9/11 as an excuse to expand Executive power. But I do think that its views of Executive power have influenced how it has executed the fight against terrorism. There is much to say on this topic, but I focus here on two lessons that I believe the last six years teach.

The first concerns relations with Congress. One of the reasons that the administration did not consult more with Congress is that it believed doing so on any particular issue would imply a lack of inherent or exclusive Executive power, and might result in restrictions imposed by Congress that tied the President's hands in ways that prevented him from thwarting the terrorists. The administration believed that the President would be best equipped to identify and defeat the uncertain, shifting, and lethal new enemy by eliminating all hurdles to the exercise of his power. It had no sense of trading constraint for power – the idea that the President's strength and effectiveness could be enhanced by accepting reasonable limits on his prerogatives in order to secure more significant support from Congress, the courts, and allies.

I believe the last six years have shown this to be a flawed conception of Executive power. The President possesses broad inherent wartime powers under our Constitution. And there is a place for Executive unilateralism, especially in time of crisis when there is no opportunity for consultation, or when the President faces some other form of genuine necessity. But the last six years have borne out the truism among political scientists and historians who study the American presidency that a president's authority is not measured primarily by his hard power in statutes and precedents, but rather by his softer powers to convince the other institutions of our society to come around to his point of view.

The second point concerns the administration's public pronouncements about its desire to expand Executive power vis à vis Congress. The administration has often

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engaged in this unusual practice in contexts (such as interviews, legal opinions, and signing statements) where the assertions of such power were entirely unnecessary. The main consequence of these pronouncements has been to legitimize the fear and mistrust of presidential power that is always present in wartime, and that most wartime presidents seek to assuage rather than exacerbate. When a wartime administration makes little attempt to work with the other institutions of our government and makes it a public priority to expand its power, Congress, courts, and the public listen carefully, and worry. These pronouncements about Executive power have been especially costly in this war, where trust in the Presidency is more important than ever because the public cannot fully see the terrorist threat and does not fully appreciate it; because this war has an indefinite and diffuse character that challenges a democracy's vigilance; because the academic and journalistic establishments are much more skeptical about many aspects of this war than they were in World War II or the Civil War; and because this war is fought in an unprecedentedly constrictive legal culture.

Congress

1. Oversight

The first lesson of the last six years for Congress is the value of oversight. Despite years of studying the separation of powers, I was impressed during my time in government how even the weakest forms of congressional oversight forced valuable deliberation inside the Executive branch. Questions from Senators on this Committee in 2003-2004 about definition and treatment of enemy combatants, for example, sparked extended inter-agency discussions that led the government to improve the definition and treatment of detainees in ways that likely never would have otherwise occurred. The seemingly trivial requirement to notify Congress about covert actions has a similarly beneficial impact on Executive branch actions. "I sat in the Situation Room in secret meetings for nearly twenty years under five Presidents," Secretary of Defense Robert Gates once said, reflecting on the significance of such notification during his prior jobs in the CIA and NSC, "and all I can say is that some awfully crazy schemes might well have

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been approved had everyone present not known and expected hard questions, debate and criticism from the Hill."[10]

Oversight is important because it forces the Executive branch to deliberate, to explain, to defend, to justify, and to learn about and fix its errors. Had the Executive been subject to more congressional oversight during the last six years, it would have committed fewer mistakes.

2. New Legislation

Presidential-congressional relations are a two-way street, and in the last six years Congress has not always exercised its national security responsibilities to update relevant law.

As mentioned earlier, Congress and the President have worked together recently to address some of the hardest issues in U.S. counterterrorism policy. But these statutes do not come close to establishing the comprehensive, coherent, and durable institutions the country needs to meet the endless terror threat. The 2006 military commission legislation is bogged down in litigation, and we have not had a single trial by military commission. Nor do we have a consensus on whether and when terrorists should be tried in military or civilian courts, if at all, or about the proper scope of interrogation. Congress and the President also have not acted together to establish a coherent and durable institution for detaining the hundreds of dangerous terrorists who probably can never be brought to trial in any forum. Finally, while the 2007 surveillance legislation reflected a consensus on the need to modernize our ability to monitor terrorists, the legislation was not comprehensive, and it conferred only temporary authorities that are now the topic of intense debate in Congress.

In my opinion Congress is too often inclined – on issues ranging from surveillance policy to detention policy – to push off the hard and controversial questions of counterterrorism policy to courts. Courts have an important role to play in policing the

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boundaries of counterterrorism policy. But judges are unelected and politically unaccountable, and lack expertise in intelligence or access to intelligence reports. They should not be forced to make the hard tradeoffs, or to address the difficult questions of institutional design, that modern counterterrorism policy requires. The Supreme Court "is only one branch of government, and it cannot, and should not, give broad answers to the difficult policy questions that face our nation today," said Justice O'Connor, soon after her retirement, in a speech at West Point about legal issues in the war on terror. "[W]e expect Congress to step in," she said, before noting, disappointingly, that "it has done surprisingly little to date to clarify United States policy towards prisoners in the war on terror."[11]

Two years after Justice O'Connor wrote these words, Congress has still done nothing of substance to resolve the novel and difficult issues surrounding the most consequential U.S. policy toward prisoners in the war on terror: the long-term military detention, without trial, of dangerous terrorists. About all Congress has done recently on this issue is to strip federal courts of statutory habeas corpus jurisdiction over Guantanamo detainee issues in the Military Commissions Act of 2006, and then to debate this Fall whether it should restore habeas jurisdiction. At bottom this is a debate over which court Congress wants to craft this country's detention policy: a court on habeas review or, if habeas remains eliminated, the D.C. Circuit acting on direct review under standards articulated in the Detainee Treatment Act.[12] Either way, Congress has essentially delegated to courts the task of resolving one of the country's most serious and contested counterterrorism debates. Justice O'Connor is right: The People's elected representatives should not pass the buck on this hard issue to the judiciary.

3. Vague Legal Prohibitions

When Congress places vague legal prohibitions on the Executive branch in the intelligence and military contexts, and especially when the vague legal prohibitions are enforceable by criminal penalties, three potential effects follow: the President has significant potential discretion about how to implement the law, counterterrorism

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officials worry that a prosecutor down the road will conclude that they violated the vague law; and unaccountable lawyers will often have the last say on the scope of the law and thus on the scope of our counterterrorism policies.

Consider the Military Commissions Act of 2006, which made clear that U.S. officials will go to jail if they commit acts of "cruel or inhuman treatment."[13] Although Congress defined the term "cruel or inhuman treatment,"[14] it left many concrete issues unsettled. The new law "rein[s] in the [CIA] program," Senator Lindsey Graham proclaimed. It makes it a crime to use interrogation techniques like "painful stress positions and prolonged sleep deprivation," said Senator Richard Durbin. Senator John McCain agreed that the 2006 Act would end "extreme measures" by the CIA.[15] President Bush had a different view. In his official "signing statement" for the law, he said: "When I proposed this legislation, I explained that I would have one test for the bill Congress produced: Will it allow the CIA program to continue? This bill meets that test."[16]

Who is right? Suppose U.S. forces in Afghanistan capture Ayman al-Zawahiri, Bin Laden's lieutenant, and find in his "pocket litter" concrete evidence of planning for a large-scale biological attack on Los Angeles, but no dates or names. And suppose that the CIA, responding to the Presidents' demand to do everything lawful to get the information, proposes "tough" interrogation techniques short of torture. What effect will the prohibition on "cruel or inhuman" treatment have? There are three potential answers to this question.

The first is that the Executive branch rather than Congress will decide this question. The President's constitutional duty to "take Care that the Laws be faithfully executed" requires that he interpret the law before he enforces it. When a legal prohibition is vague, it gives the Executive branch discretion about how to interpret and enforce it. And in the military and intelligence context the Executive branch will usually have the last word on this interpretation, because most military and intelligence matters are beyond judicial review.

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The second potential effect of the "cruel or inhuman" prohibition is to chill counterterrorism officials from acting at the edges of the law. It is well known that vague criminal prohibitions over-deter because actors subject to the prohibitions will not want to risk touching the fuzzy criminal line and thus will keep some distance from it. Vague criminal prohibitions are a prime cause of lawyer-induced risk aversion. They cause special fear of "retroactive discipline" by investigators and prosecutors down the road who, acting in a different political or threat environment, might take a different, more restrictive view of the vague prohibition.

The third and dominant effect of a criminal prohibition on "cruel or inhuman" treatment is to empower an executive branch lawyer – probably the head of OLC, or the General Counsel of the CIA – to determine the scope of the prohibition. The President in theory has wide interpretive power, but in fact counterterrorism officials will not act beyond what their lawyers tell them is permissible under the law. The lawyer trying to determine what is permissible under the "cruel or inhuman" treatment standard will have few judicial precedents to draw on, and little concrete guidance from the statute. The scope of Congress's prohibition will thus depend on the lawyer's interpretive philosophy, his background and outlook, his perception of the threat, his sense of professionalism, his ambitions, and many other vagaries that lead different people to interpret the same law differently. This means that the legal answers counterterrorism officials receive depends critically on which lawyer they ask, and under what circumstances. It also means that the scope of our counterterrorism policies are often determined by a largely unaccountable lawyer rather than by the politically accountable President or Congress.

I am not criticizing Congress's enactment of the "cruel or inhuman" treatment standard, for as mentioned earlier Congress did struggle to define the term, with modest success. The example is merely illustrative, and is designed to show the not-always-welcome consequences that follow when Congress regulates the military and intelligence establishments, as it so often does, with vague criminal prohibitions.

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4. Confirmation

Today many top spots at the Justice Department remain vacant due to retirement or to the Senate's delay in confirming, or refusal to confirm, the person nominated for these spots. The President's nominee for General Counsel at the CIA recently withdrew from consideration after it became clear that the Senate would not confirm him. The Senate has delayed or declined to confirm other top legal positions in the Executive branch. I believe this practice has a deleterious effect on the rule of law. In my experience, a nominee for a legal position has a greater sense of responsibility to the American people, enhanced independence, and more fortitude in resisting political pressures to bend the law, when he or she has been confirmed by the Senate. I thus believe that one important step in preserving the rule of law in the fight against terrorism is to confirm nominees for top legal positions in the Executive branch as expeditiously as possible.

* * *

The American people expect their government to take imaginative and aggressive actions to keep the terrorists at bay and keep the country safe. And they expect it to do so, if at all possible, consistent with the rule of law. With rare emergency exceptions, our government is capable of doing both. One of the lessons of hindsight of the last six years is that just about every aggressive counterterrorism technique the Bush administration has employed could have been accomplished less controversially, and with more legitimacy, had the administration worked more closely with the other institutions of our government.

The primary responsibility for maintaining national security and enforcing the law rests with the President. The President represents all the people, he directs the military and intelligence apparatus, and only he can act with the force, secrecy, and decisiveness needed to meet and defeat the enemy. But the President's control over the military and intelligence agencies, his ability to act in secret, and his power to self-interpret legal

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limits on his authority create opportunities for abuse, and spark mistrust of his power, especially in war. "The problem is to devise a means of reconciling a strong and purposeful Presidency with equally strong and purposeful forms of democratic control," wrote Arthur Schlesinger Jr. in a Watergate-era book that still resonates today.[17] The problem Schlesinger identifies concerns not just the current president, but also future presidents as far as the eye can see. These future presidents will read the same frightening threat reports as President Bush, and probably more frightening ones; the responsibilities of the office will cause these presidents to take super-aggressive steps to keep the country safe; and these steps will often bump up against legal limitations designed to check presidential power and foster democratic accountability.

I have tried to suggest ways to help our government meet the twin challenges of keeping us safe and preserving the rule of law. The first and most important step, I believe, is to recognize that the government – and especially the President – will have an extraordinarily difficult time managing these challenges, and to acknowledge that the institutions of our government can only address these challenges by working together in good faith.

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[1] *See Nomination of Scott W. Muller to be General Counsel of the Central Intelligence Agency: Hearing Before the S. Select Comm. on Intelligence*, 107th Cong. (2002) (opening statement of Sen. Bob Graham), *available at* http://www.fas.org/irp/congress/2002_hr/100902muller.html.
[2] JOHN ASHCROFT, NEVER AGAIN: SECURING AMERICA AND RESTORING JUSTICE 130 (2006).
[3] GEORGE TENET, AT THE CENTER OF THE STORM: MY YEARS AT THE CIA 99 (2007).
[4] *See* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT (2004).
[5] *See, e.g.*, JOHN MUELLER, OVERBLOWN: HOW POLITICIANS AND THE TERRORISM INDUSTRY INFLATE NATIONAL SECURITY THREATS, AND WHY WE BELIEVE THEM (2006).
[6] Dana Priest, *Covert CIA Program Withstands New Furor*, WASH. POST, Dec. 30, 2005, at A1.
[7] Memorandum from Jay S. Bybee, Assistant Attorney General, Department of Justice, to William J. Haynes II, General Counsel, Department of Defense, Potential Legal Constraints Applicable to Interrogations of Persons Captured by U.S. Armed Forces in Afghanistan (Feb. 26, 2002), *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 144 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).
[8] Robert S. Mueller Program Log (Mar. 10, 2004), *available at* http://media.washingtonpost.com/wp-srv/politics/documents/doj_response_to_mueller_letter_081608.pdf.
[9] *See* Press Briefing by White House Counsel Alberto Gonzales, Department of Defense General Counsel William Haynes, Department of Defense Deputy General Counsel Daniel Dell'Orto and Army Deputy Chief of Staff for Intelligence General Keith Alexander, June 22, 2004, *available at* http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html.
[10] ROBERT M. GATES, FROM THE SHADOWS: THE ULTIMATE INSIDER'S STORY OF FIVE PRESIDENTS AND HOW THEY WON THE COLD WAR 559 (1997).
[11] Sandra Day O'Connor, Associate Justice, U.S. Supreme Court, Remarks at the 2005 Thayer Award Ceremonies at West Point (Oct. 20, 2005), *available at* http://www.aogusma.org/aog/awards/TA/05Speech.htm.

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[12] Pub. L. No. 109-148, 119 Stat. 2739.
[13] Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(d)(1)(B), 120 Stat. 2600 (2006).
[14] *See, e.g.*, *id.* § (6)(d)(2).
[15] 152 CONG. REC. S10,393 (daily ed. Sept. 28, 2006) (statement of Sen. Lindsey Graham); 152 CONG. REC. S10,236 (daily ed. Sept. 27, 2006) (statement of Sen. Richard Durbin); Interview with Sen. John McCain, *Face the Nation* (CBS television broadcast, Sept. 24, 2006).
[16] Press Release, President George W. Bush, President Bush Signs Military Commissions Act of 2006 (Oct. 17, 2006), *available at* http://www.whitehouse.gov/news/releases/2006/10/20061017-1.html
[17] ARTHUR M. SCHLESINGER JR., THE IMPERIAL PRESIDENCY x (1973).

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Statement Of Chairman Patrick Leahy,
Senate Judiciary Committee
Hearing On "Preserving the Rule of Law in the Fight Against Terrorism"
October 2, 2007

The subject of today's hearing is one of the most fundamental tests that we face as a nation: Can we maintain respect for the rule of law and our Constitution in a time of crisis? I think it is now clear that this Administration has failed that test.

The attacks of September 11 shook this nation. The grave threat from international terrorism that we experienced that day remains real, and our government has the responsibility to protect Americans against further attack. But that is not its only responsibility. The government must protect our security without doing harm to the liberties we value and the vibrant system of checks and balances that the Founders created to preserve them.

Rather than working to preserve those checks and our constitutional balance, this Administration set out to accomplish a radical realignment of the powers of the government. Its goal is an unprecedented expansion of executive authority. The Administration has used the threat of terrorism to justify this expansion, but its genesis was well before September 11.

Key members of this Administration have long held the view that the President should not be encumbered. Not by laws, not by Congress, not by the courts.

To accomplish this vision of Executive power, the White House set out to limit knowledge of important legal decisions to a tiny, powerful cabal of like-minded lawyers. This group was led by Alberto Gonzales, then Counsel to the President, and by the Counsel to the Vice President, now his Chief of Staff, David Addington. If you might disagree with these lawyers, you were not allowed in the discussion. Congress, at all costs, was to be denied any input into critical decisions.

No doubt about it, secrecy, insularity and unilateralism are powerful tools that have been used before to expand Executive authority. And secrecy, insularity and unilateralism have become the hallmarks of the Bush Administration's dealings with Congress, with our allies, and with the wider world.

We have begun to see the great cost this has exacted on American values, constitutional principles, and our standing as we pursue our national interests around the world. We see it in a system of detention that, rather than being above reproach and an example to the world, has lost all credibility with our allies and is a powerful rhetorical tool for our direst enemies. We see it in the terrible abuses at Abu Ghraib, which stained us as a country and which were the direct result of a lack of clarity and restraint in the rules about interrogation. We see it in a President who chose to violate a surveillance law rather than come to Congress to get it changed, sowing seeds of distrust and suspicion for himself and, no doubt, for many Presidents to follow. We see it in the President's cavalier use of

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his pardon power to override a jury verdict that convicted a top White House aide of lying to a grand jury and the FBI. We see it in the White House's efforts to corrupt federal law enforcement by the unprecedented mass firings of U.S. Attorneys who this President had appointed, in order to install cronies and loyalists. We see it generally in a deplorable lack of respect for the liberties of Americans by this Administration.

Our witness today, Jack Goldsmith, was invited – briefly – into this powerful group of lawyers. He is a conservative lawyer who shares many of this Administration's views about legal policy to fight terrorism. Indeed, I suspect Mr. Goldsmith and I would disagree on more than a few topics. But when Mr. Goldsmith became head of the Justice Department's Office of Legal Counsel he was dismayed by what he saw.

The Office of Legal Counsel or "OLC" is a small, but critical office within the Justice Department. It is the office that gives legal advice to the rest of the Executive Branch, so that the President can carry out his obligation to "faithfully execute" the law. But Mr. Goldsmith found OLC opinions that, in his words, were "deeply flawed: sloppily reasoned, overbroad, and incautious in asserting extraordinary constitutional authorities on behalf of the President." Mr. Goldsmith decided he had to try to fix them.

I thank Mr. Goldsmith for standing up and insisting on putting things right. This was an act of courage; he suffered searing criticism and many personal misgivings. Mr. Goldsmith has written a book, "The Terror Presidency," which is a rare window into this crucial period and a chilling account of what he saw over the short time he headed OLC. It contains many lessons for this Administration, if it were willing to listen, and for future administrations that I hope will listen. We will explore some of those lessons today.

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