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S. HRG. 109–809

NOMINATION OF KENNETH L. WAINSTEIN TO BE ASSISTANT ATTORNEY GENERAL FOR NATIONAL SECURITY

HEARING

BEFORE THE

SELECT COMMITTEE ON INTELLIGENCE UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

MAY 16, 2006

Printed for the use of the Select Committee on Intelligence

Available via the World Wide Web: http://www.access.gpo.gov/congress/senate

U.S. GOVERNMENT PRINTING OFFICE

31-315 PDF WASHINGTON : 2007

For sale by the Superintendent of Documents, U.S. Government Printing Office
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NOMINATION OF KENNETH L. WAINSTEIN TO BE ASSISTANT ATTORNEY GENERAL FOR NATIONAL SECURITY

TUESDAY, MAY 16, 2006

U.S. SENATE,
SELECT COMMITTEE ON INTELLIGENCE,
Washington, DC.

The Committee met, pursuant to notice, at 10:55 a.m., in room SH–216, Hart Senate Office Building, the Honorable Pat Roberts (Chairman of the Committee) presiding.

Present: Senators Roberts, Bond, Warner, Levin, and Wyden.

Chairman ROBERTS. The Committee will come to order. The Committee meets today to receive testimony on the President's nomination for the newly created position of Assistant Attorney General for National Security at the Department of Justice. Our witness today is the President's nominee—Mr. Kenneth Wainstein.

Mr. Wainstein, the Committee welcomes you. I also note that members of your family are with you, and would like to have you introduce them at this time. I'm talking about your wife, Elizabeth, your daughters Ellie and Mackie, and your parents, Leonard and Eleanor, whom I have met. I understand that Cecily, who is 13 months, is not attending, but she's with us in spirit.

Mr. WAINSTEIN. Yes, she is.

Chairman ROBERTS. If you would like to have them stand, sir, and we will certainly welcome them to the Committee.

Thank you, folks, for being here.

Mr. WAINSTEIN. Thank you, Mr. Chairman.

Chairman ROBERTS. The Committee also welcomes our distinguished colleague from the State of Virginia, the distinguished Chairman of the Armed Services Committee and *ex officio* Member of this Committee, Senator Warner, who will introduce the nominee.

Senator Warner, thank you for being here today.

STATEMENT OF HON. JOHN WARNER, A U.S. SENATOR FROM VIRGINIA

Senator WARNER. Thank you, Mr. Chairman, and my distinguished colleague, Senator Levin.

We all are privileged from time to time to do these introductions, but every so often there is one that's very special, and this one is very special to me. And at one time in an earlier chapter of my life, I was on the staff as an assistant in the U.S. Attorney's Office for

the Nation's Capital. And this fine gentlemen to my left, I had a modest hand in seeing that he was appointed to that position.

So this is a special moment for me personally, as well as a moment in history—he will be the first in what I presume will be a long line of very distinguished individuals to hold this exceedingly important position in our Government.

I introduce this fellow Virginian, Kenneth L. Wainstein, who's been nominated to serve as Assistant Attorney General for the National Security Division.

Mr. Wainstein is joined today by his family, whom the distinguished Chairman has recognized.

As the Committee knows, the position of Assistant Attorney General for the National Security Division is a newly created position through the reauthorization of the USA PATRIOT Act. The position was created by Congress in an effort to streamline the Department of Justice's national security, counterterrorism, counterintelligence, and foreign intelligence surveillance operations under a single authority. The Assistant Attorney General for the National Security Division is responsible for leadership and oversight of all the division's programs and policies.

Without a doubt, serving as the first Assistant Attorney General for the National Security Division will be an incredibly challenging task. Based on his extensive experience within the Department of Justice, Kenneth Wainstein, will be an outstanding person for this position.

In 1984, Mr. Wainstein received his undergraduate degree from the University of Virginia, and in 1988 he received his law degree from the School of Law at the University of California at Berkeley. Upon graduation, he clerked for the Honorable Thomas Penfield Jackson in the U.S. District Court for the District of Columbia. And I was privileged to know that jurist and appear before him in years past.

Subsequent to his judicial clerkship, he began his work as a Federal prosecutor and served as an Assistant U.S. Attorney in the Southern District of New York. In 1992, he transferred to the U.S. Attorney's Office in the Nation's Capital, here in the District, where he served for 9 years specializing in the prosecution of Federal racketeering cases against violent street gangs.

In 2001 he became the Director of the Executive Office for the U.S. Attorneys. This position serves as a liaison between the 94 U.S. Attorneys offices throughout America and the Department of Justice. In 2002, he joined the Federal Bureau of Investigation as General Counsel, and later became chief of staff at the FBI for Director Mueller.

Based on his distinguished career in 2004, he was selected to serve as the interim U.S. Attorney for the District of Columbia. On October 7, 2005, he was unanimously confirmed by the U.S. Senate in this position as the U.S. Attorney for the Nation's Capital.

In my view, his vast experience in a number of areas at the Department of Justice clearly gives him a breadth of knowledge that will serve him well in the National Security Division.

I thank the Chair and the Ranking Member, and good luck. You're on your own my good friend.

OPENING STATEMENT OF HON. PAT ROBERTS, CHAIRMAN, A U.S. SENATOR FROM KANSAS

Chairman ROBERTS. The Chair thanks Senator Warner for a most appropriate introduction and endorsement.

Last spring, this Committee was the first to embrace the concept of an Assistant Attorney General for National Security by introducing legislation that would have created the position and a National Security Division within the Department of Justice. Based on discussions with the Department of Justice, a compromise was included in the USA PATRIOT Improvement and Reauthorization Act as of last winter. By law, the Assistant Attorney General will lead the newly created National Security Division within the Department of Justice. He will serve as the Attorney General's principal legal advisor on national security issues and as the Department's primary liaison to the Director of National Intelligence.

Now, this is a very important position. The National Security Division will provide crucial legal services and policy guidance for the operational elements of the intelligence community. The division will be responsible for managing the FISA process and ensuring that terrorists and spies are successfully prosecuted. These prosecutions in and of themselves can yield important foreign intelligence information to protect our Nation. National Security Division attorneys will balance the Nation's interest in prosecuting these criminals with a need to protect intelligence operations, sources and methods. The division will also have a significant policy role relative to the FBI and the intelligence community.

I believe that Mr. Wainstein is well-qualified for this position. He has served with distinction, as mentioned by Senator Warner, at nearly every level within the Department of Justice.

Let me just quickly list a few of the highlights of his impressive career. Some of this is repetitive, but it certainly bears repeating.

Mr. Wainstein has had nearly a 17-year career with the Department of Justice. He is currently the U.S. Attorney for the District of Columbia. On September 11, 2001, he was the Director of the Executive Office of the U.S. Attorneys, and later served as the General Counsel to the FBI, and then as the chief of staff to the FBI Director, Robert Mueller. In addition, Mr. Wainstein served as a Federal prosecutor in both the Southern District of New York and in Washington, DC. Mr. Wainstein is a graduate of the University of Virginia and the Boalt Hall School of Law at the University of California at Berkeley.

Before beginning his career with the Department of Justice, Mr. Wainstein clerked for Judge Thomas Penfield Jackson of the U.S. District Court for the District of Columbia.

If confirmed—and I trust he will be—I trust that this range of experience will serve Mr. Wainstein well as he assumes the challenge of being the first Assistant Attorney General for National Security.

I don't have to remind Mr. Wainstein that our Nation is at war on a global scale against a vicious and determined enemy. Winning this war will require a coordinated effort across our government. As the Attorney General's primary liaison to the DNI, the Assistant Attorney General will play a crucial role in this effort by ensuring that intelligence activities are being conducted in a manner

consistent with our civil liberties and in compliance with our Constitution and laws.

Mr. Wainstein must also ensure, however, that unnecessary or inaccurate legal interpretations do not deprive the intelligence community of the tools it needs to aggressively target national security threats. We need an intelligence community that is willing to use every lawful technique to prevent the next terrorist attack or undetected spy.

As we all know, the attacks of September 11 highlighted the danger posed when overly cautious and inaccurate interpretations of law are allowed to control the conduct of intelligence operations. We can no longer afford to build artificial walls that hinder the intelligence community's ability to protect us.

As Chairman of this Committee, I expect the lawyers in the National Security Division to provide clear legal and policy guidance based upon our Constitution and our laws. I expect our intelligence community to use every lawful tool, to the fullest extent of its authority, to protect the Nation. Indeed, that is what America expects from our intelligence agencies, despite the second-guessing that often occurs in the media and by others.

If you meet these standards as the Assistant Attorney General for National Security, you, sir, will get nothing but praise from this Chairman. While I cannot speak for my colleagues, I hope they share that sentiment.

Mr. Wainstein, if confirmed, this Committee will look to you and the lawyers of the National Security Division to provide the intelligence community with the legal expertise necessary to formulate and execute sound national security policy, from the operational planning to execution, to prosecution or otherwise.

I expect the lawyers of the National Security Division to provide timely legal support to the men and women of our intelligence community. As you can see, my expectations for the Assistant Attorney General for National Security are quite high, but I am confident that you are certainly up to the task.

With that said, I welcome you to the Committee. I look forward to your testimony. The Vice Chairman sends his regrets, as he is necessarily absent today. In the Vice Chairman's absence, I now recognize the distinguished Senator from Michigan, Senator Levin, for the purpose of making a statement.

Senator Levin.

OPENING STATEMENT OF HON. CARL LEVIN, A U.S. SENATOR FROM MICHIGAN

Senator LEVIN. Thank you, Mr. Chairman. And first let me thank you for recognizing me to make the opening statement for this side, in Senator Rockefeller's absence.

I join you in welcoming Mr. Wainstein, who is the first person nominated to the newly created position of Assistant Attorney General for National Security at the Department of Justice. And I join you in welcoming also his family, who is strongly behind him. I've talked to two of his three daughters, I want you to know. And their presence makes a real difference to their dad. I know that because I have three daughters, just the way Mr. Wainstein does, and I know how important their support has always been to me.

The nomination of Mr. Wainstein is currently pending before the Judiciary Committee, and I understand that this Committee will formally consider the nomination after the Judiciary Committee has acted upon it.

The person who assumes the job of Assistant Attorney General for National Security will play a central role in establishing legal policy for the intelligence community. He will be in charge of two prosecutorial sections within the Department of Justice—the Counterterrorism and the Counterespionage sections. He will also have responsibility for the Office of Intelligence Policy and Review, which is the Department of Justice unit that represents the government before the Foreign Intelligence Surveillance Court, FISC. In addition, the Assistant Attorney General for National Security will serve as the Department of Justice's liaison to the Director of National Intelligence.

Mr. Wainstein's nomination comes at a critical time, for the reasons which have been set forth by the Chairman and also by Chairman Warner, whose support of you is also very, very helpful to this Committee and important to this Committee.

Many reasons have been given by our Chairman for why this position is so critical at this time, and I'm not going to repeat them. I will, however, just add one other thought, and that is that a number of legal opinions in recent years have arbitrarily applied our laws, from the assertion that the use of force resolution authorizes warrantless surveillance of American citizens to some specific laws relative to treatment of detainees. And I would hope that our nominee would be aware of that history and would always act with the guideline that our Chairman set forth, which is that every opinion he renders be consistent with the Constitution, laws, meaning and intent of the statutes of the United States.

I want to thank you for your service to this Nation. You've served, I believe, now almost 18 years in your career at the Department of Justice, and the Nation is very much in your debt for your willingness to undertake this very, very heavy and serious responsibility.

And again, I thank your family for the support that they provide you.

Thank you, Mr. Chairman.

Chairman ROBERTS. Senator Levin, we have facilitated a request on your part for a document that you requested, and I understand that Mr. Wainstein will provide that document to you sometime today.

Senator LEVIN. I thank you, Mr. Chairman.

Chairman ROBERTS. Mr. Wainstein, Senator Allen could not be here to introduce you in person, but he has submitted a written statement on your behalf. It is glowing. That statement will be included in the record, without objection.

[The prepared statement of Senator Allen follows:]

PREPARED STATEMENT OF HON. GEORGE ALLEN, A U.S. SENATOR FROM VIRGINIA

Senate Select Committee on Intelligence Mr. Chairman and Members of the Committee, I thank you for the opportunity to introduce one of my constituents, Ken Wainstein of Alexandria, Virginia. Ken is here today with his wife, Elizabeth, two of his three daughters, Ellie and Mackie, and his parents. Ken grew up outside Al-

exandria, Virginia, attended the University of Virginia, and now makes his home in Alexandria, where he and his family are active members of the community.

Ken has dedicated his career to justice and the Justice Department. He started out as an Assistant U.S. Attorney in the Southern District of New York, and then transferred to the U.S. Attorney's Office here in the District of Columbia. During his tenure in that Office, Ken specialized in prosecuting homicide and Federal racketeering cases against violent street gangs, and eventually was appointed Interim United States Attorney in 2001.

Ken then gained valuable experience and insight into our war on terror, when he served as General Counsel and as Chief of Staff for FBI Director Robert Mueller. In May of 2004, Ken returned to the U.S. Attorney's Office, and he was subsequently nominated and confirmed as United States Attorney. As U.S. Attorney, Ken has proudly worked alongside the dedicated public servants in that Office to investigate and prosecute cases ranging from domestic violence to public corruption.

Under Ken's leadership, the Office has maintained a strong tradition of service to the residents of the District of Columbia, building on its community prosecution outreach effort and establishing a Homicide Section that is strengthening murder prosecutions in the District and helping to take killers off the streets. At the same time, the Office has significantly enhanced its role in the prosecution of white-collar and other Federal cases that have broader and often national implications. Ken and his colleagues have prosecuted a number of important fraud and public corruption cases. Last year Ken established a National Security Section that focuses on the terrorism, espionage, export control and other cases that protect our nation against threats from overseas.

It is my opinion that the President has chosen well with his nomination for the position of Assistant Attorney General for National Security. With his experience in both the prosecutorial and the intelligence worlds, Ken is an ideal choice for this position. I respectfully urge this committee to move quickly toward his confirmation.

Chairman ROBERTS. And you may begin, sir, with your statement.

STATEMENT OF KENNETH L. WAINSTEIN, ASSISTANT ATTORNEY GENERAL FOR NATIONAL SECURITY-DESIGNATE

Mr. WAINSTEIN. Thank you very much, Mr. Chairman, Senator Levin, Senator Bond, and Senator Warner. I will limit my remarks to several points, and then I will allow time for questions that you may have for me.

First, I want to thank Senator Warner again for his very kind introduction. As an alumnus of the office that I have the privilege of leading right now and somebody who has been in the trenches of prosecution in the District of Columbia, it's a particular honor and privilege for me to have him introduce me on this special occasion. And I also want to thank Senator Allen for the statement that he put in the record, and that means a lot to me. I'd also like to acknowledge and thank my family you've already been introduced to: My parents and my daughters, my wife, and also two dear friends, John and Suzanne Kaminski, who are here to share this occasion with me. And I appreciate their being here.

I also want to acknowledge a number of friends and colleagues from the U.S. Attorney's Office who are here today with me. It means a lot that they've come.

I just want to say that it's been a tremendous honor to serve the Department of Justice over the last 17 years, and particularly to serve with the dedicated men and women of the U.S. Attorney's Office in DC. I've been blessed to work with a tremendous group of professionals. They've taught me a lot about public service, and I expect that I will take those lessons with me if I'm fortunate enough to serve in this new capacity.

I also want to thank the President for honoring me with this nomination. I'm humbled that he and the Attorney General have placed their trust in me in regards to this important job of establishing this new division within the Department of Justice.

As to this new division, I see this as a moment of great opportunity for DOJ. The creation of this new division will open the doors to improving our operations in a number of critical ways. I'd like to just briefly summarize them.

First, it will consolidate our intelligence attorneys with our national security prosecutors and consolidate them in one division, which allows us to take full advantage of the lowering of the proverbial wall in the coordination between law enforcement and intelligence personnel that was authorized by the USA PATRIOT Act. And by doing that, it also implements one of the key recommendations of the WMD Commission.

It will also streamline and enhance the management of the national security program within the Department of Justice by bringing together the different national security components under the leadership of one Assistant Attorney General. It will establish stronger liaison and coordination with the intelligence community and the Office of the Director of National Intelligence, coordination that is vital as we continue to assess how best to deploy our intelligence and our law enforcement operational options to address the threats that we face. It will facilitate our interaction with Congress, and especially with the Intelligence Committees, on matters relating to our national security programs.

And finally, this new division will give us a focal point for considering and formulating policies that best maximize our ability to neutralize threats to our national security while securing and protecting our civil liberties.

In short, this new division presents us with a great opportunity to build and to improve. And it's an opportunity that I would very much like to be a part of.

If I am confirmed, I assure you that I will devote my complete dedication and energy to building this new division and to pursuing the mission of defending both our national security and the precious civil liberties and freedoms of all Americans.

Thank you so much for the courtesy, Mr. Chairman, and I look forward to answering your questions.

[The prepared statement of Mr. Wainstein follows:]

PREPARED STATEMENT OF KENNETH L. WAINSTEIN, ASSISTANT ATTORNEY GENERAL FOR NATIONAL SECURITY-DESIGNATE

Chairman Roberts, Vice Chairman Rockefeller, Members of the Committee.

I am honored and privileged to come before you today as the President's nominee to be the first Assistant Attorney General for National Security. As a long-time Federal prosecutor, I have devoted my career to protecting this nation and its communities against crime and defending our civil liberties. Now, I hope to have the opportunity to continue that service as the AAG for the National Security Division.

When Congress passed the USA PATRIOT Improvement and Reauthorization Act, it created a new National Security Division within the Department of Justice. The new Division combines for the first time all of the Department's primary national security elements: the Counterterrorism and Counterespionage Sections of the Criminal Division, as well as the experts from the Office of Intelligence Policy and Review (OIPR) who specialize in the Foreign Intelligence Surveillance Act (FISA). The Division's creation responds to and completely fulfills a key recommendation of the March 31, 2005, report of the Commission on the Intelligence Capabilities of the

United States Regarding Weapons of Mass Destruction (WMD Commission). The Department is particularly appreciative of your efforts Mr. Chairman, and the efforts of this Committee, to enact the legislation creating this Division and the position for which I have been nominated.

The new Division brings together all the strengths of the Counterterrorism and Counterespionage Sections with OIPR's expertise in FISA, and will enable us to fight threats to our national security more effectively and efficiently. Prevention of another terrorist attack remains the Department's highest priority. The prevention strategy implemented following the tragic events of 9/11 has served the Department well, but it demands constant coordination and information flow. The National Security Division is the next evolution of that strategy; it will improve coordination and unity of purpose against terrorism within the Department of Justice. By consolidating the intelligence lawyers in OIPR with the national security prosecutors in CES and CTS, the Department is now situated to take full advantage of the information flow between law enforcement and intelligence personnel that was authorized by the USA PATRIOT Act. Moreover, by placing those personnel in a single division under one AAG, the Department is positioning itself to drive the changes necessary to continue enhancing our counterterrorism program.

Of importance to this Committee, our integration will also make the Department more responsive to the needs of the Intelligence Community. Having one senior official at DOJ, whose title and responsibilities enable that person to represent DOJ in interagency processes related to national security, is a significant advantage: it provides one point of coordination and one point of contact for our colleagues in the Intelligence Community. If fortunate enough to be confirmed, I will act as the primary liaison to the ODNI. Indeed, I have already met with senior leadership at the ODNI, and I look forward to fostering that relationship.

Furthermore, the Division will facilitate coordination with Congress and congressional oversight, as it will serve as the central location for congressional inquiries relating to our national security programs.

This reorganization also makes good management sense for the Department of Justice. Prior to this reorganization, no official below the Deputy Attorney General (DAG) had complete responsibility for all the core national security issues that the Department handles. With responsibility for the entire Department, the DAG had many responsibilities besides addressing the myriad national security issues that arise each day. It made sense to consolidate handling of those issues in the hands of a single AAG, who can then provide informed advice and recommendations up the leadership chain.

This new position will be one of challenges, but it will also be one of great opportunity. If confirmed, I look forward to using this opportunity to build on the strong efforts and progress of the past few years, and to explore new ways by which the Department can serve its role as protector of national security and defender of civil liberties.

I have been a Department employee for 17 years, and it has been a tremendous privilege to serve the Nation in every position I have held. It will be a particular honor to work with the Departments fine and dedicated counterterrorism and counterespionage professionals to help ensure the safety and security of our homeland.

In closing, I want to thank the President and the Attorney General for honoring me with this nomination. I am humbled by the trust and faith they have placed in me. I want to assure this Committee that if I am confirmed, I will devote all my energies to the mission of protecting our national security and defending civil liberties and the freedoms that we hold so dear.

I look forward to answering any questions the members of this Committee may have.

Chairman ROBERTS. Mr. Wainstein, we have some obligatory questions that we need to ask you. Mr. Wainstein, do you agree to appear before the Committee here or in other venues when invited?

Mr. WAINSTEIN. Yes, I do, Mr. Chairman.

Chairman ROBERTS. Do you agree to send National Security Division personnel to appear before the Committee and designated staff when invited?

Mr. WAINSTEIN. Yes, I do, Mr. Chairman.

Chairman ROBERTS. Do you agree to promptly provide documents or any material requested by the Committee in order to carry out its oversight and its legislative responsibilities?

Mr. WAINSTEIN. Yes, consistent with established practice and law.

Chairman ROBERTS. Will you ensure that the congressionally mandated reports within the National Security Division's responsibility will be submitted to the appropriate committees in a timely fashion?

Mr. WAINSTEIN. Yes, I do, Mr. Chairman.

Chairman ROBERTS. Senator Levin.

Senator LEVIN. Thank you, Mr. Chairman.

First is a question which Senator Rockefeller has asked that I ask you. In your pre-hearing answers to questions, you responded that you had not yet been confirmed as Assistant Attorney General and so it would not be appropriate for you to prejudge the current organization or comment on something which you're not yet in charge of. One of those questions related to the Office of Intelligence Policy and Review, the OIPR.

Could you, even though you can't prejudge the current organization, could you let us know what the Department's plans are for OIPR, even if you're not in a position to give final decisions on this since you haven't arrived there yet?

Mr. WAINSTEIN. Yes, Senator Levin. OIPR, the Office of Intelligence Policy Review, is one of the three components that, pursuant to legislation, is part of this new National Security Division: OIPR, the Counterterrorism section, the Counterespionage section. The whole unit will become a part of the NSD.

My response on the questionnaire was, as you said, that it would be premature for me to come out with firm opinions about how I would implement any management changes, if I ultimately implement any at all, if I am fortunate enough to be confirmed. And that's based on my experiences going into different management positions throughout the Department.

I go in with a sort of sense about gee, there seem to be some problems here, there seem to be some strengths here, but I often find that when I get on board, when I actually sort of get there and start looking at the ground truth, what I came in with, the impression I came in with is a little bit off. And so, I've learned through experience not to sort of prejudge things, either prejudge structure or prejudge personnel.

I can tell you, though, that if I get this position and if I end up overseeing OIPR as the Assistant Attorney General, I will do everything I can management-wise to pursue the objectives that Chairman Roberts laid out, the objectives of serving the intelligence community, serving the mission of national security, serving the mission of protecting civil liberties.

So everything will be on the table. No management structure that's in place—nothing is going to be off-limits. And it's been made clear to me that the Department wants me to take that approach when I go in, take a look at everything.

Senator LEVIN. Thank you. Mr. Wainstein, I want to address the documents which you and I talked about in my office, one of which was referred to by the Chairman. And I appreciate your getting that document for me later on today.

But these documents relate to a period of time at Guantanamo when you were the General Counsel for the FBI, from July 2002

to March 2003, and when you were Director Mueller's chief of staff, from March 2003 to May of 2004.

What the documents show is that FBI agents and FBI personnel at Guantanamo repeatedly objected to DOD interrogation techniques, which, in the words of one of these memos, "differed drastically" from FBI's memos. That's Document 1.

FBI agents described some of the methods that were used by DOD personnel as torture techniques, which is Document 1–A, and expressed alarm over the military interrogation plans in messages back to FBI headquarters which said, "You won't believe it," which is Document 1–B. They described heated discussions between FBI personnel and Defense leaders at Guantanamo and in video teleconferences at the Pentagon.

Now, that same memo, Memo 1, describes weekly meetings in 2002 or early 2003, between Department of Justice personnel and FBI people, at which DOD interrogation techniques were discussed. And concerns about these techniques were so serious that law enforcement agents had guidance from FBI leaders to "stand clear" when military interrogators used those techniques.

Now that you've had an opportunity to review the documents, I'm wondering whether or not you can tell us whether you are aware of those concerns that I talked about, including heated discussions, reference to torture techniques, and a direction to FBI and law enforcement personnel to "stand clear" when military interrogators were using the techniques.

Mr. WAINSTEIN. Thank you for that question, Senator Levin. I also want to thank you for seeing me yesterday, and I want to thank you for giving me a heads-up about this line of questioning and providing me with this package, that I could look at it last night. That was very considerate. I appreciate that.

As I mentioned yesterday, I was General Counsel of the FBI starting in July 2002 and held that position until March of 2003, when I became chief of staff.

There were FBI personnel—and I don't know exactly what the timing was—but FBI personnel down in Guantanamo Bay for purposes of obtaining intelligence and interviewing detainees down there.

I did become aware of the fact that there were concerns on the part of personnel down at Guantanamo that the DOD way of conducting interrogations was not effective at getting useful intelligence. That was the concern that was raised, that they were using methods of interviewing these detainees that was not building a rapport, which is the approach that the FBI favors. And they thought that it wasn't useful and wasn't effective and that they wanted to see—"they" being the FBI personnel down there—wanted to see an approach that was more consistent with what the FBI practices.

At no time do I ever recall hearing anything about allegations of torture or violations of the law. I certainly understood that there were aggressive techniques being used down in Guantanamo, but I never heard anything that said that torture was taking place down there or that there was anything that violated the law. And, in fact, I never understood that there was anything taking place

that hadn't been specifically sanctioned as lawful interrogation techniques.

In terms of the stand-clear directive, that FBI should stand clear from those specific interviews down in Guantanamo, I don't recall anything that was specific to Guantanamo. I do know, however, that Director Mueller at one point made a policy directive that FBI personnel should not, in any situation in any place, engage or participate in interviews which were not conducted completely consistent with FBI guidelines. And FBI guidelines, as we discussed yesterday, Senator Levin, essentially say that FBI agents have to conduct interviews in a way that any statements that are elicited could be admissible in a court of law.

So with the exception, I believe, of possibly not Mirandizing the interviewees, FBI agents were instructed specifically that they should not engage in any interview that wasn't conducted consistent with FBI guidelines. That was then memorialized later on in an electronic communication from the FBI.

Senator LEVIN. Now, the decision of the Director to have FBI and Department of Justice personnel not participate and to stand down, when was that decision made?

Mr. WAINSTEIN. I don't remember exactly when the Director's directive went out. I know that it was memorialized in a document in May of 2004, which is after the Abu Ghraib allegations came out, but it memorialized a policy that had been in place for quite some time.

Senator LEVIN. As long as a year?

Mr. WAINSTEIN. I'd be guessing, but I'd say yes.

Senator LEVIN. I think that flashing red light means my time is up, and I don't have time here. If I'm unable to stay for a second round, Mr. Chairman, I would ask that I be allowed to ask questions for the record.

Chairman ROBERTS. Without objection, it is so ordered.

We have two votes scheduled at 12. We have three Members here. If we can work in a second round, I'll be more than happy to do so.

Senator LEVIN. And I would also ask, Mr. Chairman, that the documents which I have laid before our nominee be made part of the record so that the questions for the record can make sense when they refer to the documents.

Chairman ROBERTS. Without objection.

Senator LEVIN. Thank you.

[The information referred to follows:]

Message [redacted] Page 1 of 3

#1

[redacted] (IR) (FBI) b6 -1

From: [redacted] (Div13) (FBI) b7c -1
Sent: Monday, May 10, 2004 12:28 PM
To: HARRINGTON, T J. (Div13) (FBI)
Cc: BATTLE, FRANKIE (Div13) (FBI) [redacted] (IR) (FBI) [redacted] b6 -1
(Div13) (FBI) [redacted] (Div13) (FBI) [redacted] (Div13) (FBI); b7c -1
CUMMINGS, ARTHUR M. (Div13) (FBI)
Subject: Instructions to GTMO Interrogators.

~~SECRET//ORCON,NOFORN~~
~~RECORD STATUS: [redacted]~~

TJ,

I will have to do some digging into old files (to see if we specifically told our personnel, in writing, to not deviate from Bureau policy). We did advise each supervisor that went to GTMO to stay in line with Bureau policy and not deviate from that (as well as made them aware of some of the issues regarding DoD techniques). I went to GTMO with Andy Arena early on and we discussed the effectiveness (or lack there of) of the DoD techniques with the SSA. We (BAU and ITOS1) had also met with General's Dunlavey & Miller explaining our position (Law Enforcement techniques) vs. DoD. Both agreed the Bureau has their way of doing business and DoD has their marching orders from the Sec Def. Although the two techniques differed drastically, both Generals believed they had a job to accomplish. It was our mission to gather critical intelligence and evidence (that could be used in a DoD court of law) in furtherance of FBI cases. In my weekly meetings with DOJ we often discussed DoD techniques and how they were not effective or producing intel that was reliable. Bruce Swartz (GES), Dave Nahmias (SES), Laura Parsky (now SES, GS15 at the time) and Alice Fisher (SES Appointee) all from DOJ Criminal Division attended meetings with FBI. We all stated DoD tactics were going to be an issue in the military commission cases. I know Mr. Swartz brought this to the attention of DoD OGC.

One specific example was [redacted]. Once the Bureau provide DoD with the findings [redacted] and other connections to [redacted] at all) they wanted to pursue expeditiously their methods to get "more out of him" [redacted]. We were given a so called deadline to use our traditional methods. Once our timeline (that DoD put into place) was up, DoD took the reigns. We stepped out of the picture and DoD ran the operation against [redacted]. FBI did not participate at the direction of myself, Andy Arena, and BAU UC [redacted]. We would receive IIRs on the results of the process. (S)

I went to GTMO on one occasion to specifically address the information coming from the IIRs produced by DoD re [redacted]. We (DoD 3 Star Geoff Miller, FBI, CITF [redacted] etc) had a VTC with the Pentagon Detainee Policy Committee. During this VTC I voiced concerns that the intel produced was nothing more than what FBI got using simple investigative techniques (following the trail of the detainee in and out of the US compared to the trail of [redacted] based on classified info from the Pentbomb investigation). Lt. Col [redacted] was providing the DoD portion of the briefing. [redacted] was present at the Pentagon side of the VTC. After allowing DoD (Lt. Col [redacted]) to produce nothing, I finally voiced my opinion concerning the information. The conversations were somewhat heated. [redacted] agreed with me. DoD finally admitted the information was the same info the Bureau obtained. It still did not prevent them from continuing the "DoD methods". DOJ was with me at GTMO (Dave Nahmias) during that time.

Bottom line is FBI personnel have not been involved in any methods of interrogation that deviate from our policy. The specific guidance we have given has always been no Miranda, otherwise, follow FBI/DOJ policy just as you would in your field office. Use common sense. Utilize our methods that are proven (Reed school, etc).

If you would like to call me to discuss this on the telephone I can be reached at [redacted] b2 -1

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

[redacted]

From: HARRINGTON, T J. (Div13) (FBI)
Sent: Monday, May 10, 2004 9:21 AM
b6 -1 **To:** [redacted] (Div13) (FBI)
b7C -1 **Subject:** RE: pls confirm

SENSITIVE BUT UNCLASSIFIED
NON-RECORD

We have this information, now we are trying to go beyond, did we ever put into writing, in an EC, memo, note or briefing paper to our personnel our position to not be part of the SERE techniques that we were pursuing our traditional methods of building trust and a relationship with subjects. Tom

-----Original Message-----
From: [redacted] (Div13) (FBI)
b6 -1 **Sent:** Monday, May 10, 2004 10:52 AM
b7C -1 **To:** HARRINGTON, T J. (Div13) (FBI)
Cc: [redacted] (Div13) (FBI); BATTLE, FRANKIE (Div13) (FBI); BOWMAN, MARION E. (Div09) (FBI)
Subject: RE: pls confirm

SENSITIVE BUT UNCLASSIFIED
NON-RECORD

BAU at the request of the then (GTMO Task Force, ITOS1) wrote an EC (quite long) explaining the Bureau way of interrogation vs. DoDs methodology. Our formal guidance has always been that all personnel conduct themselves in interviews in the manner that they would in the field. [redacted] along with FBI advised that the LEA (Law Enforcement Agencies) at GTMO were not in the practice of the using SERE techniques and were of the opinion results obtained from these interrogations were suspect at best. BAU explained to DoD, FBI has been successful for many years obtaining confessions via non-confrontational interviewing techniques. b6 b7

We spoke to FBI OGC with our concerns. I also brought these matters to the attention of DOJ during detainee meetings with Laura Parsky and Dave Nahmias. DOJ express their concerns to DoD OGC.

b6 -1 [redacted] has a copy of all the information regarding the BAU LHM. I believe she has provided that to
b7C -1 TJ Harrington.

I may have more specific information in my desk at HQ. I will search what I have when I return (5/17).

-----Original Message-----
From: HARRINGTON, T J. (Div13) (FBI)
Sent: Monday, May 10, 2004 4:33 AM
To: BATTLE, FRANKIE (Div13) (FBI); [redacted] (Div13) (FBI) [redacted] (Div13) (FBI) b6 -1
Subject: FW: pls confirm b7C -1

SENSITIVE BUT UNCLASSIFIED
NON-RECORD

Please review our control files, did we produce anything on paper???
-----Original Message-----
From: Caproni, Valerie E. (Div09) (FBI)
Sent: Sunday, May 09, 2004 2:31 PM
To: [redacted] (Div09) (FBI); HARRINGTON, T J. (Div13) (FBI) [redacted] b6 b7C

b6 -1 (Div13) (FBI) [redacted] (Div13) (FBI)
b7c -1 Subject: pls confirm

SENSITIVE BUT UNCLASSIFIED
NON RECORD

I think I've heard this several times, but let me ask one more time:

Has there been any written guidance given to FBI agents in either GTMO or Iraq about when they should stand clear of the interrogation techniques being used by DOD or DHS [redacted] (S)

b1 [redacted]

b1 [redacted] (S)
b3 -1

~~SENSITIVE BUT UNCLASSIFIED~~

~~SENSITIVE BUT UNCLASSIFIED~~

~~SENSITIVE BUT UNCLASSIFIED~~

~~SENSITIVE BUT UNCLASSIFIED~~

DERIVED FROM: G-3 FBI Classification Guide G-3, dated 1/97, Foreign Counterintelligence Investigations
DECLASSIFICATION EXEMPTION 1
SECRET//ORCON,NOFORN

b6 -1
b7C -1

#1 (A)

b6 -1 From: [redacted]
b7C -1 To: Bald, Gary, BATTLE, FRANKIE, CUMMINGS, ARTHUR, ...
Date: Fri, Dec 5, 2003 9:53 AM
Subject: Fwd: Impersonating FBI at GTMO

b6 -1 Frank [redacted]
b7C -1

I am forwarding this EC up the CTD chain of command. MLDU requested this information be documented to protect the FBI. MLDU has had a long standing and documented position against use of some of DOD's interrogation practices, however, we were not aware of these latest techniques until recently.

b2 -3 Of concern, DOD interrogators impersonating Supervisory Special Agents of the FBI told a detainee that [redacted] These same interrogation teams then [redacted] The detainee was also told by this interrogation team [redacted]
b6 -4
b7C -4
b7E -1
b7F -1

These tactics have produced no intelligence of a threat neutralization nature to date and CITF believes that techniques have destroyed any chance of prosecuting this detainee.

If this detainee is ever released or his story made public in any way, DOD interrogators will not be held accountable because these torture techniques were done the "FBI" interrogators. The FBI will left holding the bag before the public.

b6 -1 SSA [redacted]
b7C -1 CTD/MLDU

CC: [redacted] b6 -1 b7C -1

[redacted]

[redacted] GTMO

Page 1

b6 -1
b7C -1

#1 (B)

From: [redacted]
To: [redacted]
Date: Mon, Dec 9, 2002 10:46 AM
Subject: GTMO

b6 -1
b7C -1

b6 -1
b7C -1

[redacted]

It was good to talkwith you the other night. I look forward to reading your response to the outlandish accusations made by the inspectors and [redacted]

b6 -1
b7C -1

Attached are two documents- 1) a one-page description of a matter concerning interview/interrogation which we spoke to the Commanding general about.
and 2) An outline of the coercive techniques in the military's interviewing tool kit.

I will also send our Interview Plan for Detainees [redacted] When I return to D.C., I will bring a copy of the miloitary's Interview Plan... You won't believe it!

b6 -3,4
b7C -3,4
b7D -1
b7E -1

b6 -1
b7C -1

[redacted]

DETAINEES-3394

4144

#1C

[redacted]

(Rev 08-28-2000)

SECRET/ORCON/NOFORN

FEDERAL BUREAU OF INVESTIGATION

Precedence: ROUTINE Date: 05/30/2003

To: Counterterrorism Attn: A/SC Raymond S. Mey, CTORS
A/UC [redacted] b6 -1
MLDU b7C -1

General Counsel Attn: Marion E. Bowman, Senior Counsel for National Security Affairs

Miami Attn: SAC Hector M. Pesquera; ASAC C. Frank Figliuzzi; SSA [redacted] b6 -1

From: CIRG b7C -1
Behavioral Analysis Unit (BAU)
Contact: SSA [redacted] b2 -1

Approved By: Wiley Stephen R. b6 -1
Battle Frankie [redacted] b6 -1 b7C -1
b7C -1

Drafted By: [redacted]

Case ID #: (U) 265A-MM-C99102; (Pending)

Title: (U) GTMO-INTEL
GUANTANAMO BAY, CUBA [redacted]
OO:MIAMI
MAJOR CASE 188

Synopsis: (U) To document BAU assistance and challenges encountered during TDY assignment in Guantanamo Bay (GTMO).

(U) Derived From : G-3
Declassify On: X1

Enclosure(s): (U) Enclosured documents provide additional details regarding issues encountered by SSAs [redacted] and [redacted] in GTMO: b6 -1 b7C

[redacted]

(U) [redacted] Referral/Consult DOD

[redacted]

SECRET/ORCON/NOFORN

[redacted] DETAINEES-1261

1264

SECRET

SECRET/ORCON/NOFORN

To: Counterterrorism From: CTMG
Re: (U) 265A-MM-C99102, 05/30/2003

Referral/Consult DOD

3. (LES) FBI(BAU) Letter forwarded to, Major General (MGEN) G.R. Miller, Commander, Joint Task Force-170 on 11/22/2002.

(U) [redacted]

5. (LES) Legal Analysis of Interrogation Techniques by SSA [redacted] FBI (BAU). b6 -1 b7C -1

(U) [redacted]

7. (LES) FBI(BAU)/CITF Interrogation Plan for Detainee [redacted] 11/22/2002. b6 -4 b7C -4

(U) [redacted]

9. (LES) Letter from FBI GTMO Supervisor/BAU to MGEN Miller re: Video Teleconference on 11/21/2002.

[redacted]

12. (LES) FBI(BAU) Interview notes re: Detainee [redacted] 11/22/2002. b6 -4 b7C -4

b6 -1
b7C -1

Details: (U) During the TDY assignments of SSA [redacted] (10/27/2002-12/06/2002) and SSA [redacted] (11/07-2002-12/18/2002), to Guantanamo Bay (GTMO), several discussions were held to determine the most effective means of conducting interviews of detainees. These discussions were prompted by the recognition that members of the Defense Intelligence Agency's (DIA) Defense Humint Services (DHS) were being encouraged at times to use aggressive interrogation tactics in GTMO which are of questionable effectiveness and subject to uncertain interpretation based on law and regulation. Not only are these tactics at odds with legally permissible interviewing techniques used by U.S. law enforcement agencies in the United States, but they are being employed by personnel in GTMO who appear to have little, if any, experience eliciting information for judicial purposes. The continued use of these techniques has the potential of negatively impacting future interviews by FBI agents as they attempt to gather intelligence and prepare cases for prosecution.

SECRET/ORCON/NOFORN

SECRET 2

DETAINEES-1262

1265

SECRET

SECRET/ORCON/NOFORN

To. Counterterrorism From: CIRG
Re: (U) 265A-MM-C99102, 05/30/2003

(U)

Referral/Direct

b1
b6 -1
b7C {S}

(U) SSAs [redacted] and [redacted] with the concurrence of BAU [redacted] Unfortunately, these arguments were met with considerable skepticism and resistance by senior DHS officials in GTMO, despite several attempts to convince them otherwise. Nonetheless, the DHS have falsely claimed that the BAU has helped to develop and support DHS's interrogation plans.

b6 -1
b7C -1

(U) During their TDY assignment, SSAs [redacted] and [redacted] kept the BAU apprized of details of the above controversy. Additionally, they offered interviewing assistance and provided training on interrogation methods to FBI/CITF personnel.

b6 -1

(U) On 12/02/2002, SSP [redacted] sent several documents via e-mail to Unit Chief [redacted] BAU, Quantico, who advised he would forward them to Marion Bowman, Legal Counsel, FBIHQ. These documents included a letter to the JTF-170 Commanding General, Major General (MGEN) J.G. Miller (Encl 3), a U.S. Army Legal Brief on Proposed Counter-Resistance Strategies supporting the use of aggressive interrogation techniques (Encl 4), and a Legal Analysis of Interrogation Techniques (Encl 5) by SSA [redacted]

b6 -1
b7C -1

(S) It is noteworthy that the case agent in GTMO, SA [redacted] and senior officials from the Criminal Investigative Task Force (CITF), who have been involved in GTMO since the beginning,

b1
b6 -2
b7C -2
{S}

SECRET/ORCON/NOFORN

SECRET

1266

(S) The differences between DHS and FBI interrogation techniques and the potential legal problems which could arise were discussed with DHS officials. However, they are adamant that their interrogation strategies are the best ones to use despite a lack of evidence of their success. The issue regarding the effectiveness of DHS's techniques was amplified during an awkward teleconference between GTMO and Pentagon officials. During this teleconference, the officer overseeing military interrogations, LCOL [redacted] USA, blatantly misled the Pentagon into believing that the BAU endorsed DHS's aggressive and controversial Interrogation Plan (Encl 6) for [redacted], a detainee commonly referred to as [redacted]. Prior to this video teleconference, SSAs [redacted] and [redacted] had discussed with DHS the advantages and rationale regarding the FBI's interrogation strategy for [redacted] (Encl 7), and had made available to them a written draft of this plan.

b6 -1,2,4
b7C -1,2,4

(U) [redacted]

Referral/Consult DOD

(U) (S) The military and DHS's inaccurate portrayal to the Pentagon that the BAU had endorsed and, in fact, helped to create DHS's interrogation plan for [redacted] prompted SSA [redacted], SSA [redacted] and the FBI on-scene TDY operations supervisor, SSA [redacted] to send a letter (Encl 9) to MGEN Miller correcting these misstatements and requesting an opportunity to address the matter with MGEN Miller in person. During a subsequent meeting between MGEN Miller and SSAs [redacted] and SA [redacted], details and rationale for the MU's interviewing approach were presented. Although MGEN Miller acknowledged positive aspects of this approach, it was apparent that he favored DHS's interrogation methods, despite FBI assertions that such methods could easily result in the elicitation of unreliable and legally inadmissible information.

b6 -1,4
b7C -1,4

(U) (S) Subsequent contact with FBI personnel in GTMO has revealed that MGEN Miller remains biased in favor of DHS's interrogation methods, although there is some indication that his attitude may be shifting slightly following a recent visit by Pentagon officials. [redacted]

Referral/Consult DOD

SECRET

SECRET/ORCON/NOFORN

To; Counterterrorism From: CIRG
Re: (U) 265A-MM-C99102, 05/30/2003

Referral/Consult DOD

b6 -1
b7C -1

(U) SSAs [redacted] and [redacted] observed that DHS personnel have an advantage over the FBI as a result of their longer periods of deployment. Currently, DHS personnel are deployed for six months, whereas the FBI on-scene supervisor and interviewing agents are assigned for periods of only 30-45 days. About the time an FBI supervisor or interviewing agent begins to feel comfortable with his/her surroundings and is able to establish meaningful rapport with detainees, he/she must prepare to depart GTMO. There are several examples in which DHS personnel have awaited the departure of an FBI supervisor before embarking on aggressive, unilateral interrogation which they knew would not have been endorsed by the FBI. For this reason, SSA [redacted] and [redacted] suggested to Acting Unit Chief (A/UC) [redacted] that the GTMO Task Force consider extending periods of deployment for the on-site FBI supervisor and for some agents assigned to conduct interviews.

b6 -1
b7C -1

(U) SSAs [redacted] and [redacted] discussed the above issues not only with BAU management, but also with A/UC [redacted] who traveled to GTMO in early December. As part of his visit, A/UC [redacted] participated in a second teleconference between MGEN Miller, his staff and the Pentagon. During this teleconference, A/UC [redacted] challenged DHS's assertion that the FBI had endorsed DHS's interrogation techniques. This disclosure surprised Pentagon officials who had been led to believe that the FBI and DHS were working as a team. [redacted] who was present at the Pentagon during this teleconference, advised that he would follow up on this issue by meeting with senior members of the Department of Defense (DOD) Legal Counsel to provide further background on this issue.

b6 -1,2
b7C -1,2

(U) Upon their return from GTMO, SSAs [redacted] and [redacted] briefed the BAU and provided unit members with copies of relevant documents. During this brief, both explained that although they were compelled by timing and circumstances to devote a considerable amount of time to the above policy issues, they were able, nevertheless, to assist agents conducting interviews and provide training to FBI/CITF personnel. Of particular importance were a series of successful interviews which SSA [redacted] conducted with [redacted] (known as detainee [redacted]) who had stopped talking to interrogators. Utilizing interviewing techniques taught by the BAU, SSA [redacted] was gradually able to re-establish a dialogue (Encl 12) which ultimately led to the detainee's renewed cooperation.

b6 -1,4
b7C -1,4

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SECRET

1268

To: Counterterrorism From: CZPG
Re: (U) 265A-MM-C99102, 05/30/2003

b6 -1
b7C -1

(U) SSAs [redacted] and [redacted] recognize that issues regarding differences in interrogation techniques may not be encountered by all BAU agents who travel to GTMO. However, considering the constant-placement and turnover of personnel there, it is an issue which is likely to surface again. At present, FBI agents and W D investigators conduct interviews on a daily basis in response to a steady number of criminal and intelligence-related leads. Some of the information gathered from these interviews is likely to be used in military tribunals and, *possibly*, in federal court. Therefore, it is essential that FBIHQ, DOJ and DOD provide specific guidance to protect agents and to avoid tainting cases which may be referred for prosecution.

SECRET

SECRET/ORCON/NOFORN

To: Counterterrorism From: CIRG
Re: (U) 265A-MM-C99102, 05/30/2003

LEAD(s):

Set Lead 1: (Discretionary)

COUNTERTERRORISM

AT WASHINGTON, D C

[redacted] b5 -1

Set Lead 2: (Discretionary)

GENERAL COUNSEL

AT WASHINGTON, DC

[redacted] b5 -1

Set Lead 3: (Info)

MIAMI

AT MIAMI, FLORIDA

(U) For information only.

cc: SSA [redacted] BAU-East
GTMO Coordinator

b6 -1
b7C -1

♦♦

SECRET/ORCON/NOFORN

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DETAINEES-1267

1270

#2

Drafted by SSA [redacted] FBI (BAU) at Guantanamo Bay and forwarded to Marion Bowman, Legal Counsel, FBIHQ, on 11/27/2002.

LEGAL ANALYSIS OF INTERROGATION TECHNIQUES:

Interrogation Techniques

Category I –

1. Gagging with gauze.
2. Yelling at detainee.
3. Deception
   a. Multiple Interrogators
   b. Interrogator posing as an interrogator from a foreign nation with a reputation of harsh treatment of detainees.

Category II-

1. Use of stress positions (such as standing) for a maximum of 4 hrs.
2. Use of falsified documents or reports.
3. Isolation facility for 30 day increments.
4. Non-standard interrogation environment/booth.
5. Hooding detainee.
6. Use of 20-hour interrogation segments.
7. Removal of all comfort items (including religious items).
8. Switching detainee from hot rations to MRE's.
9. Removal of all clothing.
10. Forced grooming (shaving of facial hair etc...)
11. Use of individual phobias (such as fear of dogs) to induce stress.

Category III-

1. Use of scenarios designed to convince detainee that death or severe pain is imminent for him or his family.
2. Exposure to cold weather or water (with medical monitoring).
3. Use of wet towel and dripping water to induce the misperception of drowning.
4. Use of mild physical contact such as grabbing, light pushing and poking with finger.

Category IV-

1. Detainee will be sent off GTMO, either temporarily or permanently, to Jordan, Egypt, or another third country to allow those countries to employ interrogation techniques that will enable them to obtain the requisite information.

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE [illegible] BY [illegible]

Legal Analysis

The following techniques are examples of coercive interrogation techniques which are not permitted by the U.S. Constitution:

Category I -

3. b. Interrogator posing as an interrogator from a foreign nation with a reputation of harsh treatment of detainees.

Category II-

1. Use of stress positions (such as standing) for a maximum of 4 hrs.
2. Use of falsified documents or reports.
5. Hooding detainee.
6. Use of 20-hour interrogation segments.
9. Removal of all clothing.
11. Use of individual phobias (such as fear of dogs) to induce stress.

Category III-

1. Use of scenarios designed to convince detainee that death or severe pain is imminent for him or his family.
2. Exposure to cold weather or water (with medical monitoring).
3. Use of wet towel and dripping water to induce the misperception of drowning.

Information obtained through these methods will not be admissible in any Criminal Trial in the U.S. Although, information obtained through these methods might be admissible in Military Commission cases, the Judge and or Panel may determine that little or no weight should be given to information that is obtained under duress.

The following techniques are examples of coercive interrogation techniques which may violate 18 U.S.C. s. 2340, (Torture Statute):

Category II-

5. Hooding detainee.
11. Use of individual phobias (such as fear of dogs) to induce stress.

Category III-

1. Use of scenarios designed to convince detainee that death or severe pain is imminent for him or his family.
2. Exposure to cold weather or water (with medical monitoring).
4. Use of wet towel and dripping water to induce the misperception of drowning.

In 18 U.S.C. s. 2340, (Torture Statute), torture is defined as "an act committed by a person acting under color of law specifically intended to inflict severe physical or mental pain or suffering upon another person within his custody or control." The torture statute defines "severe mental pain or suffering" as "the prolonged mental harm caused by or resulting from the intentional infliction or threatened infliction of severe physical pain or suffering; or the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses of the personality; or the threat of imminent death; or the threat that another person will imminently be subject to death, severe physical pain or suffering, or the administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses of the personality."

Although the above interrogation techniques may not be per se violations of the United States Torture Statute, the determination of whether any particular use of these techniques is a violation of this statue will hinge on the intent of the user. The intent of the user will be a question of fact for the Judge or Jury to decide. Therefore, it is possible that those who employ these techniques may be indicted, prosecuted, and possibly convicted if the trier of fact determines that the user had the requisite intent. Under these circumstances it is recommended that these techniques not be utilized.

The following technique is an example of a coercive interrogation technique which appears to violate 18 U.S.C. s. 2340, (Torture Statute):

Category IV-

1. Detainee will be sent off GTMO, either temporarily or permanently, to Jordan, Egypt, or another third country to allow those countries to employ interrogation techniques that will enable them to obtain the requisite information.

In as much as the intent of this category is to utilize, outside the U.S., interrogation techniques which would violate 18 U.S.C. s. 2340 if committed in the U.S., it is a per se violation of the U.S. Torture Statute. Discussing any plan which includes this category, could be seen as a conspiracy to violate 18 U.S.C. s. 2340. Any person who takes any action in furtherance of implementing such a plan, would inculpate all persons who were involved in creating this plan. This technique can not be utilized without violating U. S. Federal law.

2A

[redacted] Legal Issues Page

b6 -1

b7C -1

Fror.. [redacted]

To: [redacted] b6 -1,2

Date. Mon, Dec 2, 2002 12 46 PM b7C -1,2

Subject Legal Issues

[redacted]

Here is the Legal Issues Doc Please forward it to Spike Bowman or whoever is appropriate b6 -1,2

Thanks. b7C -1,2

[redacted]

[redacted]

123b

b6 -1

b7C -1

LEGAL ISSUES Re INTERROGATION TECHNIQUES:

Interrogation Techniques

[redacted]

b5 -3

b2 -3

b7E -1

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 09-22-2014 BY [redacted]

Legal Issues & Observations

b5 -3

b2 -3

b7E -1

[redacted]

1237

b6 -1

b7C -1

b5 -3
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b7E -1

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2B

[redacted] Fwd Re LEGAL ISSUES RE GITMO Page 1

b6 -1

b7C -1

From: MARION Bowman b6 -1
To: [redacted]
Date: Tue, Dec 3, 2002 3 14 PM b7C -1
Subject: Fwd Re LEGAL ISSUES RE GITMO

[redacted] b5 -3
b6 -4
b5 -3 b7C -4
b6 -1
b7C -1

[redacted] and get as much information as possible to D'Amuro, Gebhart and Mueller as soon as possible b5 -3

>>> [redacted] 12/02/02 05 53PM >>>
#2 and a half (SSA [redacted] final comment) b6 -1
b7C -1

[redacted]

1241

2C

[redacted] Legal Issues re: Guantanamo Bay

b6 -1
b7C -1

From: [redacted] b6 -1
To: [redacted] b7C -1
Date: Mon, Dec 9, 2002 2:25 PM
Subject: Legal Issues re: Guantanamo Bay

b6 -1
b7C -1 [redacted]

Attached are some documents that may be of interest to Spike Bowman, who I understand is reviewing legal aspects of interviews. here in GTMO. They were provided to me by one of the JAG lawyers working at CITF.

One of these is a review of interrogation methods by a DOD lawyer,Basically, it appears that the lawyer worked hard to cwrite a legal justification for the type of interviews they (the Army) want to conduct here.

b6 -1
b7C -1 [redacted]

CC: [redacted] b6 -1
b7C -1

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DATE 01-05-2006 BY [illegible] 01-cv-1151

2D

[redacted] Fwd Legal Issues re Guantanamo Bay Page 1

b6 -1

b7C -1

From. [redacted]

To: b6 -1

Date. Tue, Dec 17, 2002 9 36 AM b7C -1

Subject: Fwd Legal Issues re Guantanamo Bay

FYI

CC [redacted] b6 -1

b7C -1

[redacted]

2E

[redacted] Fwd Legal Issu... re Guantanamo Bay Page 1

b6 -1
b7C -1

From: MARION Bowman
To: [redacted]
Date: Tue, Dec 17, 2002 9 35 AM
Subject: Fwd Legal Issues re Guantanamo Bay

b6 -1
b7C -1

[redacted] b5 -3

Spike Bowman

>>> [redacted] 12/12/02 10 27AM >>>
Pls comment

b6 -1
b7C -1

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#3

KENNETH WAINSTEIN - Debriefing of [redacted] Page 1

From [redacted] b6 -1
To. [redacted] John Pa b7C -1 NNETH WAINSTEIN, Larry Melford, Pasquale
b6 -1 Demuro, [redacted]
b7C -1 Date 1/8/03 11 14AM
Subject Debriefing of [redacted] b6 -4
b7C -4

(S)

b1
b6 -1
b6 -1
b7C -1

CC [redacted] b6 -1
b7C -1

[redacted]

[redacted]

DETAINEES-1347

[redacted]

1360

SECRET/NOFORN 01/05/2003

INTERVIEW/INTERROGATION CONSIDERATIONS

[redacted] (S)

b1
b5 -1
b6 -1,4
b7C -1,4

Observations:

[redacted] (S)

b1
b5 -1
b6 -4
b7C -4
b7D -1
b7F -1

SECRET/NOFORN

[redacted]

[redacted]

[redacted] DETAINEES-1348

1361

SECRET/NOFORN

Recommendations:

{S}

b1
b5 -1
b7E -1

Additional Considerations:

{S}

b1
b5 -1
b7E -1

SECRET/NOFORN

[redacted]

b6 -1
b7C -1

#4

[redacted] INSD) (FBI)

From [redacted]
Sent. Saturday, May 22, 2004 12 23 PM
To· Caproni, Valerie E (OGC) (FBI)
Cc· [redacted] INSD) (FBI), [redacted] (INSD) (FBI)
Subject RE Post report

b6 -1
b7C -1

UNCLASSIFIED
NON-RECORD

Valerie, We are ready to launch on the other interviews and as you know there is zero indication of this thus far

-----Original Message-----
From: Caproni, Valerie E. (Div09) (FBI)
Sent: Saturday, May 22, 2004 12 17 PM
To: CHANDLER, CASSANDRA M. (Div00) (FBI), KALISCH, ELENI P. (Div00) (FBI), WAINSTEIN, KENNETH L. (Div00) (FBI), MUELLER, ROBERT S. III (Div00) (FBI), MCCRAW, STEVEN C.; GEBHARDT, BRUCE J. (Div00) (FBI)
Cc: BRIESE, M C. (Div13) (FBI); HARRINGTON, T J (Div13) (FBI)
Subject: Post report

UNCLASSIFIED
NON-RECORD

According to the Washington Post, one of the MPs that gave a statement in the Abu Ghraib prison investigation said that FBI was involved in the abuse We are going to try to get a copy of the statement and see if there is anything we can do to follow up As of right now, my information is that because of the danger at the prison, our people never spent the night

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UNCLASSIFIED

[redacted] {{MSG013 RTF Page 1

b6 -1
b7C -1

4A

From Caproni, Valerie E (OGC) (FBI)
To KALISCH, ELENI P (OCA) (FBI), WAINSTEIN, KENNETH L (DO) (FBI)
cc
Subject treatment of detainees

SENSITIVE BUT UNCLASSIFIED
NON-RECORD

attached is the latest on what we know about treatment of detainees There are still a few little nit pieces that haven't come in yet, but I don't think the macro story is going to change from this

b5 -3 Ken I don't think [redacted] WHat do you think?

SENSITIVE BUT UNCLASSIFIED

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DETAINEES-1539

1539

[redacted] {{MSG005 RTF Page 1

SECRET

4B

b6 -1
b7C -1

From WAINSTEIN, KENNETH L (DO) (FBI)
To MUELLER, ROBERT S III (DO) (FBI), Caproni, Valene E (OGC) (FBI) [redacted] (DO) b6 -1 b7C -1
(OGA)
cc
Subject Detainee Issue

~~UNCLASSIFIED~~
~~NON-RECORD~~

I spoke to Val and [redacted] this am, and we've agreed to do the following in preparation for Thursday's testimony [redacted]

b1
b5 -3
b6 -1,2
b7C -1,2

(S)

Val, please work with [redacted] on this Thanks Ken

~~UNCLASSIFIED~~

DATE: 11-03-2014
CLASSIFIED BY: 41579 DMH/RLS/JAC 04-CV-4151
REASON: 1.4 (C)
DECLASSIFY ON: 11-03-2029

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WHERE SHOWN OTHERWISE

SECRET

DETAINEES-1440

1440

DOJFBI-002055

[redacted] ((MSG007 RTF SECRET Page 1

b6 -1
b7C -1

4C

From Caproni, Valerie E (OGC) (FBI)
To KALISCH, ELENI P (OCA) (FBI), WAINSTEIN, KENNETH L (DO) (FBI)
cc
Subject FW Potential New Iraq Public Corruption Case

UNCLASSIFIED
NON-RECORD

This long string amounts to the following there is a meeting on Monday that relates [redacted] b1
[redacted] Will know more Monday ; For now, I think the Director's answer was okay (S) b7A -1
b5 -3

-----Original Message-----
From LAUGHLIN, LAURA M (Div06) (FBI)
Sent Friday, May 21, 2004 12 41 PM
To Caproni, Valerie E (Div09) (FBI)
Cc LEWIS, JOSEPH R (Div06) (FBI), SWECKER, CHRIS (Div06) (FBI) [redacted] NV) (FBI), KINNALLY, THOMAS G (WF) (FBI), KENNEDY, KATHLEEN E (NV) (FBI)
Subject RE Potential New Iraq Public Corruption Case

b6 -1
b7C -1

UNCLASSIFIED
NON-RECORD

Valerie,
WFO telephonically advised that they believe both referrals cited in your e-mail to relate to the same person, but they'll know more on Monday FYI, the Case Agent is in the process [redacted] b1
[redacted] (the reason for such sketchy info) b7A -1
(S) b5 -3

Laura

-----Original Message-----
From Caproni, Valerie E (Div09) (FBI)
Sent Friday, May 21, 2004 12 17 PM
To LAUGHLIN, LAURA M (Div06) (FBI)
Cc LEWIS, JOSEPH R (Div06) (FBI), SWECKER, CHRIS (Div06) (FBI)
Subject RE Potential New Iraq Public Corruption Case

UNCLASSIFIED
NON-RECORD

Can we try to find out today [redacted] b1
[redacted] (S) b7A -1
b5 -3

-----Original Message-----
From LAUGHLIN, LAURA M (Div06) (FBI)
Sent Friday, May 21, 2004 11 36 AM
To Caproni, Valerie E (Div09) (FBI)

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE [redacted]

SECRET

DETAINEES-1780

1780

{{MSG012 RTF Page 1

4D

b6 -1
b7C -1

From WAINSTEIN, KENNETH L (DO) (FBI)
To Caproni, Valerie E (OGC) (FBI)
cc MUELLER, ROBERT S III (DO) (FBI), PISTOLE, JOHN S (DO) (FBI), KALISCH, ELENI P (OCA) (FBI)
Subject OIG

UNCLASSIFIED
NON-RECORD

Val,
Paul Martin of the OIG called to say that they received a letter from Cong Wolf requesting that the OIG send a team to Gtmo to do a study of the handling of prisoners there Paul told Wolf's staffer that Gtmo was a DOD facility and that the DOJ IG would not have jurisdiction He wants to follow up with a letter saying same, but wants to be accurate about DOJ assets that are or have been at Gtmo He has quened Criminal Division and BOP, and is now asking us Would you please call him to clarify his request Then, let's discuss Thanks Ken

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DETAINEES-1481

1481

DOJFBI-002094

Chairman ROBERTS. Senator Warner.

Senator WARNER. Thank you, Mr. Chairman.

Mr. Chairman, I have before me the Commission on the Intelligence Capability of the United States regarding Weapons of Mass Destruction, which came forth with the recommendation for the creation of the office to which this distinguished public servant has been appointed by the President.

And then I refer to the PATRIOT Act, section 507(a), the Assistant Attorney General for National Security.

And using those documents as background, I ask the following questions:

Have you proceeded to the point where you've talked with Ambassador Negroponte regarding the relationship between the DNI and the Attorney General, given that, under these precedents that I've cited, you've become the principal liaison from the Attorney General to the office of the DNI, as stated in the statute? Have you had a chance to talk it over with him?

Mr. WAINSTEIN. Yes, Senator Warner. I've actually met with several of his staff.

Senator WARNER. Have you met with him?

Mr. WAINSTEIN. And then I met with Ambassador Negroponte for quite some time and had a very good visit, and we talked about the need for close coordination between DOJ and his office. And, in fact, the Attorney General, I know, consulted with Ambassador Negroponte about my nomination pursuant to the statute.

Senator WARNER. We have experienced—I say "we," this country—the resignation just announced by Porter Goss. And it seems like, Mr. Chairman, it was only yesterday when he sat in that very chair before this Committee under the advise and consent procedures of the Constitution and the responsibilities of the Senate. I personally regret this very deeply, just because I had been associated with our distinguished colleague, a former Member of the House of Representatives, for many years.

But that's history; it's behind us.

And in the course of the work of this Committee on General Hayden, I support General Hayden, but I want to try and understand what did transpire such that Porter Goss felt it was his duty to step aside and what it is the General's going to do that Porter Goss was either not doing or doing inconsistent with law and precedence, whatever. That's for another day.

But I see that if there were a dispute now between the DNI and the Director of the Federal Bureau of Investigation, would you be the arbitrator of that?

Mr. WAINSTEIN. No, Senator Warner, I wouldn't. As the Assistant Attorney General of the National Security Division, I wouldn't be the arbitrator necessarily. What I would do, I believe, if I were fortunate enough to be confirmed for this position is, as the liaison between the Department of Justice and the Director of National Intelligence, I think it would be my job to try to facilitate any negotiations, airing out of different views between the Department of Justice and the Director of National Intelligence.

Obviously, it would be for the Attorney General or the Director of the FBI to make decisions about policy within their respective—the FBI and the Department—ultimately, the Attorney General

would make the ultimate decision about positions that the Department will take, including the FBI.

But I would work closely with the Director and work closely with the Attorney General to make sure that I understood the reasons for our views and convey them to the ODNI. So in that sense, I would be a conduit for information. I wouldn't be the one to actually make the call.

Senator WARNER. But nevertheless, you would consult with the Attorney General and give your perspectives on that.

Mr. WAINSTEIN. Absolutely.

Senator WARNER. I would hope that it would not arise, but the—both of those individuals, I know them quite well. They are strong-willed individuals, and there do occur in public office from time to time legitimate disputes.

What is your understanding of the authority the DNI might have over your office?

Mr. WAINSTEIN. Well, pursuant to law, the Director of National Intelligence had to be consulted about my nomination, and he was and he agreed with the Attorney General's recommendation to the President that I be nominated. He does not have line—or the ODNI doesn't have line authority over the National Security Division. That being said, obviously, the National Security Division is going to be working closely with the intelligence community and closely with the Director of National Intelligence, and he and his office will have a big say in the matters that we deal with.

So I assume that we'll be working very closely together, and that I will be getting quite a bit of input from them and vice versa.

Senator WARNER. Let me turn to your responsibilities in overseeing the FISA statute, and the requests, as well as the attorneys who oversee counterterrorism and counterintelligence matters.

Could you advise the Committee how you intend to discharge that responsibility? FISA has come under close scrutiny by the Congress, given the unfortunate chapter here of the Dubai acquisition that was announced and then withdrawn.

And our distinguished Chairman of the Banking Committee, together with his equally distinguished Ranking Member, are working on a revision of that statute. Will you be consulting with them on the revision of that statute?

Mr. WAINSTEIN. Senator Warner, if you're referring to CFIUS, the organization that——

Senator WARNER. Yeah, the FISA, on FISA—F–I–S–A.

Mr. WAINSTEIN. Right. I believe FISA is the Foreign Intelligence Surveillance Act.

Senator WARNER. That's correct.

Mr. WAINSTEIN. And CFIUS is——

Senator WARNER. CFIUS is over on one side. But do you have anything to do with the CFIUS? Because it was a national security issue that came under scrutiny and resulted in the termination of the Dubai.

Mr. WAINSTEIN. Yes.

Senator WARNER. I want to treat both, and I may have mixed it there momentarily. Take CFIUS first.

Mr. WAINSTEIN. They're both national security matters. And I think CFIUS has come to the fore because of that controversy.

The Department of Justice does participate in the CFIUS process—analyzing, evaluating potential acquisitions of American businesses by foreign entities. And the Department has a seat at that table. At this point, that's been managed by the Criminal Division within the Department of Justice. There's a person there who has the point responsibility on behalf of the Attorney General.

That's one of those issues I think will have to be worked out once the National Security Division gets stood up, whether that particular assignment remains with the Criminal Division, because it does draw on some expertise in the Criminal Division—cyber expertise and this kind of thing—or should that move over to the National Security Division because it's a national security matter, or should it be shared. That is yet to be determined.

But I think that regardless, we——

Senator WARNER. You do have a hand in it, the degree to which——

Mr. WAINSTEIN. We will have a hand and we will have input, yes, sir.

Senator WARNER. Turning now to the FISA, first, have you gone back and reread that statute? It's, I think, in need of revision, given the technological changes that have taken place since the time of its enactment. Do you have a view on that?

Mr. WAINSTEIN. Yes, Senator. I think it's a statute that I became aware of and familiar with, relatively familiar with, when I got to the FBI back in 2002 and started working with agents who were seeking to get wiretap authority pursuant to FISA. It's a complicated statute. It's one that was written back in 1978, and as you pointed out, a lot of technology has come along since then. There were some refinements in the PATRIOT Act, in the PATRIOT Act reauthorization, that were very helpful.

I will take a good hard look at that, at the statute and any areas of further refinement or improvement or streamlining of the process under the statute once I get in place.

I think, though, for purposes of really expediting, streamlining and enhancing our FISA operations, as Chairman Roberts suggested, we have to look not only at the law, but also at the procedures that we put in place to follow the law, and make sure that not only the law, but the procedures are as streamlined as they can be. And that will be—I see this new division as an opportunity to take a fresh look at that.

Senator WARNER. Well, I share in that. And I do believe that we need to bring that law up into this century.

Thank you, Mr. Chairman.

Chairman ROBERTS. Thank you, Senator.

Senator Bond.

[The prepared statement of Senator Bond follows:]

PREPARED STATEMENT OF HON. CHRISTOPHER BOND, A U.S. SENATOR FROM MISSOURI

Mr. Chairman, regarding the nomination of Kenneth Wainstein to be the Assistant Attorney General for National Security, the Senate Select Committee on Ethics advises me that the consignment agreement between my wife, Linda Bond, and Elizabeth Wainstein, the wife of the nominee, does not present a conflict of interest for me in considering his nomination before this Committee. Additionally, the consignment agreement between my wife and the nominee's wife was reached before the nomination, the agreement was negotiated at arms length and it contains provi-

sions standard to industry practice. Therefore, I intend to uphold my obligation as a Senator and member of this Committee to consider the Wainstein nomination and vote on the nomination before this Committee and on the Senate floor.

Senator BOND. Mr. Chairman, I have a statement for the record on the nomination of Mr. Wainstein, and welcome him here.

And I certainly agree with your comments about the notorious wall between intelligence and law enforcement—very unfortunate and caused, perhaps, great loss as a result of its erection. And there is some sense and I've seen some suggestions that the culture derived from the existence of the wall that shouldn't have been there may still exist in cooperation between law enforcement and intelligence agencies.

Based on your experience, have you seen any areas where the culture of separation between law enforcement and intelligence operations could be improved? And do you have any suggestions on how to ensure effective integration of intelligence and law enforcement in cases concerning terrorism and national security?

Mr. WAINSTEIN. Well, thank you, Senator Bond. That's actually a critically important question, because you can change the law, but the implementation of the law doesn't necessarily change the moment that the law is enacted.

That was a big undertaking as soon as the PATRIOT Act was passed back on October 25, 2001, I believe. It was a big undertaking on the part of the Department and the intelligence community to make sure that we could take full advantage of the fact that the wall was down.

And bureaucratically speaking, looking at it in terms of sort of how bureaucracies move, I think things moved tremendously smoothly and did move toward the merging.

There's still a long way to go. I mean, there's no question that we still have to keep refining our processes.

This new division is a great example of that ongoing effort and evolution toward taking full advantage of lowering the wall. Here we have our prosecutors and our intelligence attorneys, who do the FISA work, in the same division, reporting to the same person. The heads of the components will be meeting every morning, sharing information, making sure that if there's a particular threat or a particular terrorist that we're looking at, we're thinking, with the FBI, with the intelligence community, of every single tool that we can use to neutralize that threat.

And that tool might be an intelligence tool to try to surveil, develop sources, get more intelligence about him and his cohorts, or it might be a law enforcement tool—arresting him, incapacitating him right then.

I see it as our job in this National Security Division, if I'm fortunate enough to become part of it, to perfect each of those options as best as possible, so the decisionmakers have every option at their disposal to decide how they're going to deploy their options.

And so I see that process happening, or I saw it when I was at the Bureau between 2002 and 2004. I hope to be a part of sort of accelerating that process here.

Senator BOND. If you can achieve the goal of totally thorough and effective intercommunication and cooperation between any agencies

involved in this field, your career will be a great success. And we wish you well. We look forward to it.

We have, in meetings in this Committee, seen examples as recently as a year and a half ago where other agencies—not the FBI—were still not talking to each other when they were supposedly working on the same task. And I trust now that that will never happen in the FBI. So we're looking forward to that.

We have had some problems in the past when this Committee and its staff has been conducting briefings in oversight of certain groups, individuals and intelligence operations where once the FBI took the lead from the intelligence community to prosecute certain individuals, the Committee was told that further information on those cases would not be shared for our oversight because the FBI would be using subsequent information to prepare cases. What is your view concerning the scope of this Committee's intelligence oversight in cases of terrorism and national security where the FBI is preparing cases for trial?

Mr. WAINSTEIN. Well, Senator, I will have to admit that I am not an expert on the sort of parameters of oversight by the Intelligence Committees. I understand and I appreciate the very significant role the Intelligence Committees in the Congress in general play, for purposes of oversight especially, and the mission of protecting our national security.

You have pointed to, alluded to a situation, I believe, where—and I'm speculating here—where the obstacle to providing information is that it was procured under Rule 6(e). In other words, it's procured by the grand jury, and that maybe this is grand jury-protected information, or information that is part of an ongoing investigation. Those are valid. One's a legal concern, and the other is a very valid practical concern.

My understanding is that there is a tradition between the Department and the Intelligence Committees of reaching accommodations as best we can. I've been instructed that if I have this position—and I've received this instruction in previous incarnations, or previous capacities I've served in—that I should do what I can to get the relevant information to the Committee to satisfy your appropriate oversight responsibilities while at the same time respecting whatever concerns that the Department might have.

So, the long and short of it is I don't know the exact parameters. But my understanding is that it's something that gets hammered out on a case-by-case basis.

Senator BOND. Well, I can just tell you, the Committee is not a bunch of happy campers when we aren't able to follow on the intelligence. And I trust that we will reach accommodation to assure that what we need in intelligence oversight is made available. And I will submit a final question for the record.

Thank you, Mr. Chairman.

Chairman ROBERTS. Without objection. And the distinguished Senator's prepared remarks will be also be made part of the record at the beginning of his line of questioning.

Senator Wyden.

Senator BOND. Thank you.

Senator WYDEN. Thank you, Mr. Chairman. I want to thank the nominee for coming over yesterday, and I thought we had a constructive discussion.

We talked at some length yesterday about national security letters. And I want to ask you some additional questions with regard to them. I had gotten the impression from our discussion yesterday that, by and large, you are satisfied with current laws and policy regarding national security letters. Is that correct?

Mr. WAINSTEIN. Well, Senator, I believe that, as I recall, what I expressed was that I thought that the changes to the national security letter authorities in the PATRIOT Act reauthorization ended up producing a good tool that had the necessary safeguards.

Senator WYDEN. Let us look at it, then, in a more detailed kind of way; I think in a fashion that is consistent with what I hear folks talking about in the field and at home. If the head of an FBI field office issued a national security letter and obtained financial records that had nothing to do with that current inquiry, what is the current policy for dealing with those records?

Mr. WAINSTEIN. I'll have to say, Senator, the short answer is I don't know.

I know that there are guidelines—strict guidelines—Attorney General guidelines that govern national security investigations that say when you're allowed to use that tool and other tools. And as I recall, you would not be allowed to use that tool to get records that have no relationship at all to an authorized investigation.

Senator WYDEN. So again, I'd like you to furnish that for the record so that we get a sense that—so you're comfortable with current policy with respect to national security, you know, letters. What I wanted to do was get a general sense, and I want to ask you a specific question with respect to the head of a FBI field office. And I will tell you that I don't know what happens to those you know, financial records. I want to know what happens to them, and I think there needs to be rules with respect to how they're handled, and I look forward to working with you on that.

Mr. WAINSTEIN. If I may, Senator——

Senator WYDEN. Yeah, of course.

Mr. WAINSTEIN. If I may just clarify, as a U.S. Attorney for the last 2 years, I don't deal with national security letters. Those are used in national security investigations.

Senator WYDEN. I understand that.

Mr. WAINSTEIN. So, I don't think I could sort of say right now I am satisfied or I'm not satisfied with the current policy because I don't know what the current policy is. I haven't actually looked at it for 2 years, and I assume it has changed with the changes in the law. So I will certainly take a good, hard look at them to see, as part of the oversight responsibilities in this new position—if I'm confirmed, I would—that would be my job.

Senator WYDEN. Get back to us, then, and make sure that we as a Committee understand what happens if you all get the information by accident.

Mr. WAINSTEIN. I'd be happy to.

Senator WYDEN. Because my concern is, is that there may be a substantial information floating around out there, and I want to get a sense of how it's handled and what the rules are.

Now, obviously we've been talking a lot about FISA. One reason administration officials have given as their explanation to circumvent FISA is getting a proper warrant through FISA is time consuming. It looks to me like the current FISA statute is pretty lean—pretty lean and pretty direct. So I'm wondering whether bureaucratic processes have developed to the point where there are some barriers that the law doesn't seem to reveal. What steps, if any, do you think are necessary to improve the FISA application process?

Mr. WAINSTEIN. Well, Senator, that's a very important issue. And as I said, I think in response to Senator Warner, it's not just a matter of looking at the FISA statute, but it's also a matter of looking at the FISA processes. And I do know, somewhat as a matter of looking back historically, that there was a major effort after 9/11 to revisit some of the understood processes that were in place to obtain FISA warrants because there was a sudden increase in the volume of FISA warrants. There was a huge increase in demand. And I think one of the statistics out there is that in 1 year we got 3 times as many emergency applications from the FISA Court than we did in all 23 years between the enactment of the law and 2001. So I know they have taken steps over the last few years to refine some of the processes.

I think once again this would be an opportunity to go in and take a look at them, a new look at them—I think I would want to do that with a fresh set of eyes—and see whether there are any processes in place which are unnecessarily burdensome, and once again, taking a look at the management of our operation because sometimes management and processes are indistinguishable. So I'll be looking at both.

Senator WYDEN. A question about privacy rights, obviously something very much on the minds of our citizens and something we'll certainly be talking about on Thursday in this room. I and others feel very strongly about how important it is to fight terrorism aggressively and just throw everything we got against the terrorists, while at the same time calibrating all of this so as to be sensitive to the concerns of privacy and the rights of our citizens.

You're going to have an opportunity, it seems to me, to interact with two key places where we look to strike the balance. One will be the Civil Liberties Board, and the second will be the DNI civil liberties officer. So you're going to get confirmed for this position, there's two places where you can be involved on a regular basis in terms of interacting with administration positions in terms of helping us strike that kind of constructive balance.

How do you see interacting with these two important posts in terms of striking the balance?

Mr. WAINSTEIN. Well, I see that as a critical component of the job description of the Assistant Attorney General for National Security, that being ensuring that civil liberties are perfectly protected as we pursue terrorists. And I expect that I'll be working, if I get this position, I'll be working very closely with both of those entities. I also think that I would be—within the NSD we'd be taking steps to ensure the protection of civil liberties on our own with our oversight responsibilities, with the decisions we make.

Senator WYDEN. Any steps that you're contemplating now?

Mr. WAINSTEIN. Well, I'd certainly want to—I mean, obviously, one of the advantages of this division or creating this new division is to enhance the management and get more resources into the component that does both the FISAs and the oversight of the intelligence activities.

With the rush of FISAs over the last few years, it's been hard to actually have the resources to commit to the oversight function. I see this as an opportunity to beef up that function so that we can actually strengthen it. I see us doing that. I see myself doing as AAG in this new division and what I've done as a prosecutor my whole career, which is be very aggressive going after bad guys, getting after criminals, but at the same time recognizing that it's my obligation that we do so within the law and we do so in accordance with the rules. And that's what a Federal prosecutor—that's our job. That's our mandate, and I expect to do the same thing as AAG.

Senator WYDEN. I'll wrap this up.

I could see why there would be personnel issues surrounding the whole FISA warrant process because of some of the unanswered questions about how it works and the whole nature of the debate. But I do think this is going to be a question, at some point, of political will. I mean, it's got to be a higher priority, and it seems—I mean, even in terms of the funding of these offices—we always put them into laws as we did in the Intelligence Reform Act, and somehow they get zeroed out.

So it seems that this end of the balance gets short shrift. I hope that you will take specific steps to try to ensure, as the Founding Fathers did—they always saw it as a constitutional teeter-totter. They always said you got to put both on this. You got to have the collective security and you got to have privacy, and it just looks to me—I wouldn't pretend to be able to make analogies like the distinguished Chairman of the Committee has over the years, but suffice it to say, I want to see that constitutional balance maintained, and I'm concerned that it has not been.

I thank the Chairman, and I look forward to working with the nominee.

Mr. WAINSTEIN. Thank you, Senator Wyden.

Chairman ROBERTS. Thank you, Senator.

I just have a few wrap-up questions, and then we will let you have lunch with your family.

There have been some recent cases of improper disclosure during prosecutions, which is probably the understatement of the morning. My question to you, are modifications to the Classified Information Procedures Act needed to ensure that both classified information is adequately protected during prosecutions while protecting the rights of the accused?

Mr. WAINSTEIN. Senator, that's a very important issue and one that I deal with to some extent, as the U.S. Attorney in DC, to the extent that we're prosecuting cases that involve classified information, and we are. But I will be heavily involved in that issue if I'm the AAG in national security overseeing the counterespionage and counterterrorism prosecutors who are handling cases which are often based on classified information.

The Classified Information Procedures Act, CIPA, allows the government to go to a judge, as you know, Senator, and ask the judge

to limit the disclosure of classified information. It's a balancing, obviously, between the need to retain the classification of evidence and the need to ensure that a defendant has his right to defend himself.

It's a statute that I'll be looking at very closely because I know it's one that goes to the core of our ability to prosecute some cases, our ability to be able to protect this information.

I know that the Department has proposed legislation that would ensure that if the government requests that a judge hear its request that information remain classified, that that be done in an *ex parte* setting so that it not be disclosed to defense counsel. That only makes sense to me, because if the judge says, "Government, you're going to have to disclose that information," then it will go to the defense attorney.

But at least it allows the government to then decide, OK, let me think about my options, because that's such important information. If you put the cart before the horse and actually have to disclose the fact that there's classified information to defense counsel, possibly in open courtroom, then you might well have disclosed some important information just by disclosing the fact of classified information. I think that's a very sound proposal, and I'm not sure exactly where in the process it is, but I know that it's been proposed, and that's one possible change that I would support.

Beyond that, I'd have to go in and really noodle through the statute and see what other refinements might be advisable.

Chairman ROBERTS. Well, we'll be happy to work with you on that.

This is sort of a repeat question. I think you're aware that the DOJ Inspector General is conducting an investigation that was congressionally mandated on the slow implementation of the FISA business records provision. It took nearly 2½ years after the passage of the PATRIOT Act for the Department of Justice to submit the first application for a FISA business records court order.

I think you might agree with me that 2½ years for this kind of implementation period is simply unacceptable, to say the least.

So my question to you is how you will ensure that the National Security Division provides prompt operational support, given the circumstances that we face with the war against terrorism, to those agencies that request the FISA techniques or policy guidance on other matters.

Mr. WAINSTEIN. Well, thank you, Senator, and that's a very important issue, going to your initial comments about the need to provide prompt assistance to the intelligence community and to our investigators. I've always seen it as my job as a Federal prosecutor to assist investigators when they're trying to run down cases.

If a homicide detective needs a search warrant, and he's got the basis for it, and it seems like it's a well-advised step, it's my job to help him get it or help her get it, advocate for it, if necessary, before the judge. I see that as being the role of a prosecutor. I see that as being the role of an attorney in the National Security Division helping our national security investigators, and we don't help them if we sit on things for a long time.

These are investigations that happen quickly. And I know, just from having kept pace with these threat investigations when I was

with the FBI, these threats move fast and we have to be ready to jump, and we can't be ready to jump if we take an application or request from an agent and sit on it.

I don't know what happened in that particular case, and there might well be very good reasons for the implementation being delayed. But I can tell you that on my watch in the National Security Division, if I end up there, I'm going to be putting a premium on expeditious handling of these requests and turning them around as quickly as possible, and I will put a management structure in place, as I've tried to do elsewhere, to make sure that we've got the managers demanding that of the people in the ranks.

And I tell you we've got good people over there in those components who are going to staff up the National Security Division. They like the challenge, they like to serve, and they see themselves as being the ally of the investigator—to protect our civil liberties, but also be ally of the investigator. I intend to work to maximize our effectiveness.

Chairman ROBERTS. We will help you in that endeavor.

Last year, this Committee supported the creation of an administrative subpoena, and we received testimony from the FBI General Counsel describing the extensive process for approval of national security letters, the question that was asked before. And I remain convinced that the FBI needs a national security administrative subpoena just like the authority that is provided in 335 other contexts. I won't go into them all.

Will you examine this issue closely and report back to the Committee on the need for this or other authorities?

Mr. WAINSTEIN. I certainly will, Mr. Chairman.

Chairman ROBERTS. I think most of these other questions here have been answered.

Mr. Wainstein, I thank you for your time. I advise all Members that the record will remain open through the close of business today for the submission of questions for the record.

Prior to this meeting being adjourned, how many attorneys do you have behind you there, that are your cohorts?

Mr. WAINSTEIN. I believe six of my friends are here from the U.S. Attorneys Office.

Chairman ROBERTS. Why don't they ever smile?

[Laughter.]

Mr. WAINSTEIN. That's part of U.S. Attorney training.

Chairman ROBERTS. I see. They're a very imposing group, and I'm sure they're very—and I know they're prosecutors. So I want to assure you all that we back your efforts and we view your work with admiration and support.

Mr. Wainstein, thank you very much, and we wish you well, and we will try to expedite the process.

Mr. WAINSTEIN. Thank you very much, Chairman Roberts.

Chairman ROBERTS. And thank you, sir.

The Committee stands adjourned.

[Whereupon, at 11:55 a.m., the Committee adjourned.]

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