

From: "Miers, Harriet"
To: "McDonald, Matthew T.,"Gerry, Brett C." [b3 50 USC 3024 (m)(1)] Kavanaugh, Brett M.,"Wallace, Nicole","Bartlett, Dan","McClellan, Scott"
Cc: "Perino, Dana M."
Subject: RE: STRS Final
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I am fine.

From: McDonald, Matthew T.
Sent: Sunday, January 22, 2006 4:40 PM
To: Miers, Harriet; Gerry, Brett C.; 'Benjamin'; Kavanaugh, Brett M.; Wallace, Nicole; Bartlett, Dan; McClellan, Scott
Cc: Perino, Dana M.
Subject: RE: STRS Final

with edits. Let me know if this is good to go. we should fire it out before 5.

Setting The Record Straight:

Democrats Continue Criticism Of NSA Program To Detect And Prevent Terrorist Attacks

"The NSA's terrorist surveillance program is targeted at al Qaeda communications coming into or going out of the United States. It is a limited, hot pursuit effort by our intelligence community to detect and prevent attacks. Senate Democrats continue to engage in misleading and outlandish charges about this vital tool that helps us do exactly what the 9/11 Commission said we needed to do – connect the dots. It defies common sense for Democrats to now claim the administration is acting outside its authority while their own party leaders have been briefed more than a dozen times – only after there was a leak and subsequent media coverage did they start criticizing the program. Such irresponsible accusations will not keep us from acting to stay a step ahead of a deadly enemy that is determined to strike America again."

- Scott McClellan, White House Press Secretary

Setting The Record Straight On The Legality Of NSA Activities To Safeguard Americans.

Sen. John Kerry (D-MA) Claims That The NSA Program Is Illegal. SEN. KERRY: "It is a violation of law. ... There's nothing in the FISA law that we passed that suggests the President has this power." (ABC's "This Week," 1/22/06)

But The President's Authorization Of This Program Is Consistent With U.S. Law.

- **The President Has The Inherent Authority Under The Constitution, As Commander-In-Chief, To Authorize The NSA Program.** AG GONZALES: "I might also add that we also believe the President has the inherent authority under the Constitution, as Commander-in-Chief, to engage in this kind of activity. Signals intelligence has been a fundamental aspect of waging war since the Civil War, where we intercepted telegraphs, obviously, during the world wars, as we intercepted telegrams in and out of the United States. Signals intelligence is very important for the United States government to know what the enemy is doing, to know what the enemy is about to do." (The White House, Press Briefing, 12/19/05)
- **The Congress Confirmed And Supplemented This Authority When It Passed The Authorization For The Use Of Military Force In The wake Of The 9/11 Attacks.** AG GONZALES: "Now, in terms of legal authorities, the Foreign Intelligence Surveillance Act ... requires a court order before engaging in this kind of surveillance that I've just discussed and the President announced on Saturday ... unless otherwise authorized by statute or by Congress. That's what the law requires. Our position is, is that the authorization to use force, which was passed by the Congress in the days following September 11th, constitutes that other authorization, that other statute by Congress, to engage in this kind of signals intelligence." (The White House, Press Briefing, 12/19/05)
- **The Supreme Court Ruled That The AUMF's Authorization To "Use All Necessary And Appropriate Force" Encompasses The "Fundamental Incident[s] Of Waging War."** AG GONZALES: "[O]ne might argue, now, wait a minute, there's nothing in the authorization to use force that specifically mentions electronic surveillance. Let me take you back to a case that the Supreme Court reviewed this past – in 2004, the Hamdi decision. ... [In Hamdi, the Supreme Court said that] it was clear and unmistakable that the Congress had authorized the detention of an American citizen captured on the battlefield as an enemy

combatant for the remainder – the duration of the hostilities. So even though the authorization to use force did not mention the word, 'detention,' she felt that detention of enemy soldiers captured on the battlefield was a fundamental incident of waging war, and therefore, had been authorized by Congress when they used the words, 'authorize the President to use all necessary and appropriate force.'" (The White House, Press Briefing, 12/19/05)

- **Interception Of Communications Has Been Authorized Since President Roosevelt In 1940.** "[Interception of communications for foreign intelligence purposes] have been authorized by Presidents at least since the administration of Franklin Roosevelt in 1940." ("Legal Authorities Supporting The Activities Of The National Security Agency Described By The President," U.S. Department Of Justice, 1/19/06)
- **Every Federal Appellate Court Has Ruled That The President Has Inherent Authority To Conduct Warrantless Searches.** "The courts uniformly have approved this longstanding Executive Branch practice. Indeed, every federal appellate court to rule on the question has concluded that, even in peacetime, the President has inherent constitutional authority, consistent with the Fourth Amendment, to conduct searches for foreign intelligence purposes without securing a judicial warrant." ("Legal Authorities Supporting The Activities Of The National Security Agency Described By The President," U.S. Department Of Justice, 1/19/06)

Setting The Record Straight On Congressional Briefings On NSA Activities To Safeguard Americans.

Rep. Jane Harman (D-CA) Claims That The Administration Is Violating The National Security Act Of 1947. REP. HARMAN: "I think the Administration is violating the National Security Act of 1947 by failing to brief the full intelligence committees." (ABC's "This Week," 1/22/06)

But The Administration Has Repeatedly Briefed Congress On The NSA Program.

- **Congressional Leaders "Have Been Briefed More Than A Dozen Times" On The NSA Authorization.** THE PRESIDENT: "Leaders in Congress have been briefed more than a dozen times on this authorization and the activities conducted under it. Intelligence officials involved in this activity also receive extensive training to ensure they perform their duties consistent with the letter and intent of the

authorization." (President Bush, Radio Address, 12/17/05)

- **Rep Pete Hoekstra (R-MI) Says That Members Of Congress Had Multiple Opportunities To Ask Questions And Express Concerns.** REP. HOEKSTRA: "When the program began, I guess, roughly four years ago, you know, congressional leaders were brought in. The leadership of the House and the Senate, the leadership of the House and Senate intelligence committees – I've been chair for about 15 months – I've been briefed four times on this, I've been given every opportunity to ask questions about the program, to ask questions about the legality of the program, to understand the scope of the program and how it works and, most importantly, the impact it has. I've had every opportunity to get information on the program. And I have a responsibility, as the chairman of the Intelligence Committee, that if I believe the law is being broken to stand up in that meeting and say, stop it and we're going to do everything in Congress. The problem that we have right now is we have a whole bunch of Democrats who were for this program before they were against it and the only thing that has changed is that the story was illegally, in a damaging way, leaked to *The New York Times*." (ABC's "This Week," 1/22/06)
- **These Briefings Are Fully Consistent With The National Security Act Of 1947.** The Act expressly states that Executive Branch briefings should be conducted in a manner consistent with "due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters." (50 USC 413a(a))

Setting The Record Straight On The Use Of The FISA Court.

Sen. Dick Durbin (D-IL) Says The Administration Should Be Using The FISA Court. FOX NEWS' CHRIS WALLACE: "Senator, let's talk about the NSA wiretap program, though. We all saw the Osama bin Laden tape that came out late this week. If someone from Al Qaida in Pakistan is calling someone here in the U.S., don't you want to know what they're talking about?" SEN. DURBIN: "Absolutely. And that's why we created the FISA court." (Fox News' "Fox News Sunday," 1/22/06)

But The NSA Program Provides The Speed And Agility Needed To Prosecute The War On Terror.

- **Former Clinton Administration Associate Attorney General Writes That "FISA Does Not Anticipate A Post-Sept. 11 Situation."** "The administration has offered the further defense that FISA's reference to surveillance 'authorized by statute' is satisfied by congressional passage of the post-Sept. 11 resolution giving the president authority to 'use all necessary and appropriate force' to prevent those responsible for Sept. 11 from carrying out further attacks. The administration argues that obtaining intelligence is a necessary and expected component of any military or other use of force to prevent enemy action. But even if the NSA activity is 'electronic surveillance' and the Sept. 11 resolution is not 'statutory authorization' within the meaning of FISA, the act still cannot, in the words of the 2002 Court of Review decision, 'encroach upon the president's constitutional power.' FISA does not anticipate a post-Sept. 11 situation. What was needed after Sept. 11, according to the president, was surveillance beyond what could be authorized under that kind of individualized case-by-case judgment. It is hard to imagine the Supreme Court second-guessing that presidential judgment." (John Schmidt, Op-Ed, "President Had Legal Authority To OK Taps," *The Chicago Tribune*, 12/21/05)
- **The Government Continues To Use The FISA Court But Must Preserve The Flexibility To Act With Speed In All Circumstances.** AG GONZALES: "Well, we continue to go to the FISA court and obtain orders. It is a very important tool that we continue to utilize. ... The operators out at NSA tell me that we don't have the speed and the agility that we need, in all circumstances, to deal with this new kind of enemy. You have to remember that FISA was passed by the Congress in 1978. There have been tremendous advances in technology ... since then." (The White House, Press Briefing, 12/19/05)
- **Because Of Its Speed, The NSA Program Has Provided Crucial Information Otherwise Not Available.** GENERAL HAYDEN: "I can say unequivocally, all right, that we have got information through this program that would not otherwise have been available." QUESTION: "Through the court? Because of the speed that you got it?" GENERAL HAYDEN: "Yes, because of the speed, because of the procedures, because of the processes and requirements set up in the FISA process, I can say unequivocally that we have used this program in lieu of that and this program has been successful." (The White House, Press Briefing, 12/19/05)