VERBATIM

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On the Thompson Memo, Terrorist Surveillance, and the Detainee Act

I am pleased to be with you. There are three subjects I'd like to touch on relatively briefly and reserve time for questions and answers. I make it a point whenever I start a speech to take my watch off and put it prominently on the podium to give my audience a false sense of security that I'm paying attention to the time.

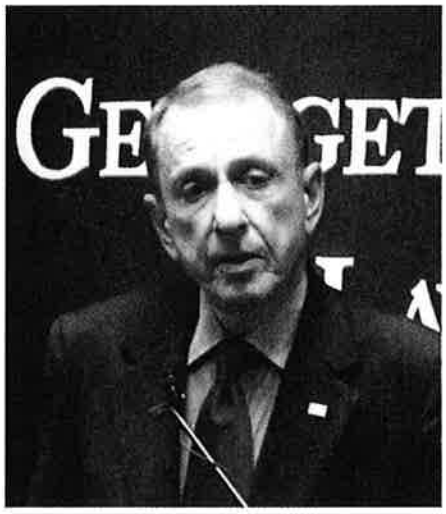
On Tuesday we had the hearing on the Thompson Memorandum, and yesterday we reported out legislation on the president's Terrorist Surveillance Program. Today we're tackling the legislation on military tribunals and what to do to comply with *Hamdi v. Rumsfeld*. These are all front-range burners. Part of my interest in speaking is to get some thinking that will come up in the Q&A session.

The Thompson Memorandum is really to me surprising and shocking, that the government would consider charging based on whether you waive the attorney-client privilege and whether corporations agree not to pay counsel fees for people in their employ. We had Paul McNulty, the deputy attorney general, in to defend it. We had, on the other side, some distinguished witnesses including former Attorney General Ed Meese, and a statement from former Attorney General Dick Thornburgh.

When we come to the issue of privilege, I asked McNulty, "Well, what about executive privilege? Would you say the president was uncooperative when he asserts executive privilege? Would you say that Judge Roberts, now chief justice, was uncooperative, or that the government was uncooperative, in refusing to turn over memorandum he wrote in the Solicitor General's office?

Senator Leahy and I were the only senators present. Regrettably, it's a very busy place. Pat Leahy was the district attorney in Burlington, and I in Philadelphia. We have some sense of balance in the criminal justice system, and the privilege being very important and the staggering attorney's fees. I said at the hearing, when I practiced law my hourly rate was so high that I could not afford to hire a lawyer who charged as much as I did. My compensation wouldn't accommodate that. It's just overpowering.

I think former Attorney General Ed Meese summed it up. I said, "Do you think we ought to legislate on the subject?" He said, "It would be my hope that the Department of Justice would change



Sen. Arlen Specter (R-Pa.)

their practices after they heard this proceeding. And if they don't — if they consider the ruling of the judge in the Southern District in New York. . . ." I said, "Absent that, you think we ought to legislate?" He said, "Yes, as a last resort."

Well, I don't propose to wait that long. I'm going to introduce the legislation on the subject. Let's see what happens.

The president's terrorist surveillance program clearly violates the Foreign Intelligence Surveillance Act. There's just no doubt about it. The argument of the government that the resolution authorizing the use of force, which we passed three days after 9/11, somehow amends FISA, is really too preposterous in my opinion to argue about.

But the president claims that he has Article II power, so it may be valid. There are three circuits and the appellate court of FISA which have ruled on the question left open by the Supreme Court in the "Keith" case, saying that the president does have Keith power. And as Justice Powell said in Keith, it's a balancing act. You can't make a determination on that, plus you go to court.

My legislation would send the bill to the Foreign Intelligence Surveillance Court. At one of the four hearings we had, four former judges of the court come in to testify that the court could handle it, that it was a justiciable issue. They thought there was standing by analogy to the other proceedings the court had, and we proceeded. Since that time there have been a number of cases in a number of districts, a highly-publicized Detroit case in the federal court, one in San Francisco, Chief Judge Walker. I don't think there is standing in either of those cases, but there may be. I don't know the details.

There is a Portland case where there is some evidence that the plaintiffs were actually subjected to surveillance. And if that's so, I think there is standing. The legislation would put all the cases in the Foreign Intelligence Surveillance Court to avoid judge shopping and having a court which is experienced and the confidentiality is respected.

But as matters have evolved and these other cases have come up, I've said it on the floor here this morning that I would not strip the court of jurisdiction in those cases. They ought to go forward. If they get to the Supreme Court first,

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not understand if we are not told — that, "The subway is an icon of the City's culture and history, an engine of its colossal economy, a subterranean repository of its art and music, and, most often, the place where millions of diverse New Yorkers and visitors stand elbow to elbow as they traverse the metropolis. Quantified, the subway is staggering." *Id.* at ___. I do not accuse the *MacWade* court of opinion-padding; I seek only to offer the would-be reader of the *MacWade* opinion the *granum salis* with which he must take some portions of what he finds there.

18. *MacWade* at ___. The court also noted that plots to bomb portions of the N.Y. subway system had been uncovered in 1997 and 2004. *Id.* at ___.

19. *Id.* at ___.

20. *Id.* at ___ (internal quotation mark omitted).

21. *Id.*

22. *Id.*

23. *Id.* at ___.

24. *Id.* at ___.

25. Ironically, the Tampa Sports Authority policy of searching every person is arguably more defensible on Fourth Amendment grounds than the N.Y.P.D. policy of searching, say, every tenth person. It is not necessarily unreasonable to ask any person to endure a search or seizure that must be endured by every person. It is unreasonable to ask any person to endure a search that must be endured only by some persons, which persons were chosen at random and for no reason whatever.

About the Author

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fine. But I think the Supreme Court ought to consider the matter.

The negotiations to get the bill approved by the president were really very, very difficult. Without going through the details, I was surprised when the White House was willing to negotiate. Then the final discussions were personally with the president. I was surprised that he was willing to submit his Article II powers to the court because the administration has been very, very assertive on Article II powers, with their signing statements and the general approach which they have taken. In a sense, as soon as the president agreed to review by the FISA court, a lot of people were opposed to it. If President Bush has agreed to it, there necessarily must be something wrong with it.

Hamdi has a whole range of complex issues. In my view, it's unthinkable to subject people to prosecutions where they have serious penalties, including the death penalty, without presenting the evidence to them. Just can't do that.

The Geneva Convention Common Article 3 provides that you have to have procedures which are generally recognized in a civilized society. The argument is made that there will be sources and methods disclosed. Well, under the Confidential Information Protection Act, as you know, if you can't produce the case without violating important secrets, you have to drop the prosecution. But these individuals will be enemy combatants, so they can go back to Guantanamo. The real question is to follow that process being held definitely, but that's the status of it. So if the prosecutions are dropped, they're not released.

The administration wants to use coerced confessions, which are unfair and unreliable.

Then we get into the provisions of the Common Article 3 where there's an argument as to whether we ought to import detainee provisions incorporating the 5th, 8th, and 14th amendments. I think we should. There is a lot of case law which delineates what is cruel and unusual punishment or what's a violation of the due process of law. I think we can do that without limiting the scope of the Common Article 3.

The last point, which I think is the most serious of all, is the Detainee Act passed last year. It takes away jurisdiction from the federal courts, and that's what the administration wants to do again on pending cases. That amendment was drafted overnight and argued for just a few minutes on the Senate floor in what I had not seen in the time I have been there in terms of a really big, key issue handled in such a summary fashion without any thought or analysis or understanding as to what we were doing.

Senator (Carl) Levin and I have talked about offering an amendment to see if we can't get habeas corpus back in. I'm up to the 11-minute mark. That's as long as any speech ought to be.

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