

TESTIMONY OF
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HEARING ON
THE NOMINATION OF
JUDGE NEIL M. GORSUCH
FOR ASSOCIATE JUSTICE
UNITED STATES SUPREME COURT

BEFORE THE
UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

MARCH 23, 2017

Chairman Grassley, Ranking Member Feinstein, and Members of the Committee: thank you for the invitation to testify as you consider the nomination of Judge Neil Gorsuch to the Supreme Court. I speak today on behalf of Human Rights First—an independent, non-profit, non-partisan organization dedicated to advancing American leadership on human rights. Our work is grounded in the belief that our nation is stronger—and safer—when we live up to our ideals.

In our nearly 40-year history, Human Rights First has never supported or opposed a judicial nominee, and we do not do so today. Nor do we question Judge Gorsuch's temperament or credentials, which seem exemplary and have led a number of people I respect to support his nomination. Every judicial nominee deserves a fair hearing and an opportunity to fully explain his or her background, competence, and judicial philosophy.

This is an important part of the way our government works. The framers of our Constitution didn't want any one branch of government to have too much power. That was wisdom born of experience. Our system of checks and balances is part of what sets our democracy apart from many of the countries that my organization works on every day, where strongman leaders rule with absolute authority. Our system may seem convoluted and inefficient at times: the President appoints judges and heads of government departments, but those appointments have to go through you; you can pass laws, but the President can veto them; the Supreme Court can find a law to be unconstitutional, but Congress and the States can amend the Constitution. This system depends on the independence—and interdependence—of each branch of government. It is our bulwark against tyranny.

That's why I am here today. Because despite Judge Gorsuch's professional and academic credentials, his record at the Department of Justice (DOJ) raises serious concerns about his judgment and fidelity to important constitutional principles—including checks and balances and respect for human dignity—that should be thoroughly addressed before you move his nomination forward. Especially in the current environment, the stakes are too high to get this wrong.

The Role of Checks and Balances in Protecting Fundamental Rights in the National Security Context

My testimony will focus on the dangers that arise when the executive branch claims unfettered authority in the name of national security. We know from our history that when presidents override constitutionally-mandated checks on their power, they threaten fundamental rights, the rule of law, and democratic ideals. And they weaken our security.

This is not a hypothetical concern. The president of the United States—during the campaign and now as president—has advocated serious violations of basic rights, including: torture; banning individuals from entering our country because of their faith; surveillance and registries of Muslims and their houses of worship; and detaining and deporting immigrants and refugees without due process. And he has done so while expressing contempt for judges and disdain for the judiciary more generally. Just weeks

into the new administration, there have already been suggestions that the administration does not respect the independence of the judiciary and may not comply with court orders. A key—perhaps the key—question that Senators should ask Judge Gorsuch is: how would you respond in the face of what may be unprecedented threats to basic rights, separation of powers, and the rule of law?

On these issues, Judge Gorsuch is not a blank slate. As a high-level DOJ official, Judge Gorsuch was at the epicenter of one of the most dramatic, consequential, and tragic episodes in American legal history in the last half-century: the Bush Administration's adoption of torture as a weapon of war in violation of clear and explicit U.S. and international law and contrary to our deepest national values and traditions. That the United States engaged in torture is no longer a matter of serious dispute, in this country or anywhere. Thanks in substantial part to the leadership of Senator Feinstein, the Senate Select Committee on Intelligence released a summary report on the CIA's interrogation program that revealed gruesome details of the torture that our government authorized and carried out. For example, one detainee was abused so badly during a waterboarding session that he "became completely unresponsive, with bubbles rising through his open, full mouth."¹ In other cases, detainees were stripped naked, shackled to the floor, held in painful stress positions, and subjected to sleep deprivation for days on end.²

This abuse was unworthy of our great nation and, as General Petraeus noted, the images of it are non-biodegradable. As both the Intelligence and Armed Services Committees found in their investigations, it also made our country weaker and compromised our ability to fight the "war on terror" effectively.

That this abuse was authorized by the DOJ is one of the greatest institutional failures in the Department's storied history. While we don't know everything about the role Judge Gorsuch played in this sorry chapter, what we have seen suggests that he was, at the least, uncurious and untroubled by the Bush Administration's torture policies and appears to have been a "team player" in helping defend them. He may not have been present when the DOJ helped create and then authorize the torture policies, but he was in the thick of the action when the torture program started to unravel.

Judge Gorsuch started at the DOJ in 2005, a watershed year on these issues. Thanks in no small measure to the principled leadership of one of the great Senators of our generation, John McCain, the Congress had started pushing back against the administration's torture policies. In that year, whether the United States would embrace torture as part of our law and national character hung in the balance.

There is a remarkable degree of consensus today that our government, in the period after the 9/11 attacks, violated basic rights by authorizing and engaging in torture based on legal theories that were well outside the mainstream, while undermining separation of

¹ Annotated version of the Senate Select Committee on Intelligence's Summary Report on Torture, <http://www.humanrightsfirst.org/senate-report-cia-torture/torture-tactics>.

² Id.

powers and judicial independence. That consensus is reflected in an important course-correction that has occurred over the past decade. It began with the 2005 McCain Amendment (passed as part of the Detainee Treatment Act) prohibiting in federal law cruel, inhuman, and degrading treatment of detainees, continuing through the Supreme Court's ruling that detainees must be afforded basic protections under the Geneva Conventions, and culminating in the 2015 McCain-Feinstein Amendment guaranteeing access to detainees for the International Committee on the Red Cross and restricting national security interrogation techniques to those listed in the Army Field Manual.

The bi-partisan consensus against torture also reflects a consensus among national security leaders that torture and cruel treatment are not only unlawful, but undermine our security. In response to suggestions by the president that the government should return to waterboarding and other torture tactics, 176 retired generals and admirals—including 33 retired four star generals and admirals—wrote a letter to the then-president-elect, stating:³

The use of waterboarding or any so-called “enhanced interrogation techniques” is unlawful under domestic and international law. Opposition to torture has been strong and bi-partisan since the founding of our republic through the administration of President Ronald Reagan to this very day. This was reinforced last year when the Congress passed the McCain-Feinstein anti-torture law on an overwhelmingly bi-partisan basis.

Torture is unnecessary. Based on our experience—and that of our nation's top interrogators, backed by the latest science—we know that lawful, rapport-based interrogation techniques are the most effective way to elicit actionable intelligence.

Torture is also counterproductive because it undermines our national security. It increases the risks to our troops, hinders cooperation with allies, alienates populations whose support the United States needs in the struggle against terrorism, and provides a propaganda tool for extremists who wish to do us harm.

Most importantly, torture violates our core values as a nation. Our greatest strength is our commitment to the rule of law and to the principles embedded in our Constitution. Our servicemen and women need to know that our leaders do not condone torture or detainee abuse of any kind.

Beyond the issue of torture, whatever one believes about whether Guantanamo should be closed, most now agree—as the Supreme Court has ruled—that there must be judicial review and basic due process for detainees held or prosecuted there. We hope and expect that irrespective of any past role Judge Gorsuch may have played on these issues in the executive branch, he will, if confirmed, follow clearly established precedents—including

³ Letter to President-Elect Donald J. Trump, January 6, 2017, <http://www.humanrightsfirst.org/sites/default/files/torture-generals-admirals-letter-to-trump.pdf>.

in the cases of *Rasul v. Bush*,⁴ *Hamdi v. Rumsfeld*,⁵ *Hamdan v. Rumsfeld*,⁶ and *Boumediene v. Bush*⁷—if these issues come before him. And it is essential that the Senate explores his views on these issues and ensures that Judge Gorsuch commits to following these precedents before the Senate votes on his nomination.

These were the defining legal debates of the modern era, and Mr. Gorsuch was on the wrong side of them. Records show that Mr. Gorsuch played a key role in both litigation and legislative strategy involving the detention, trial, and treatment of detainees captured during President Bush’s “global war on terror.”⁸ Further, Mr. Gorsuch was directly involved in the Bush Administration’s assertions that the president has the power to take extraordinary actions without congressional authorization, that the president can disregard statutes or treaties in the name of national security, and that the judiciary either cannot or should not review such actions. These are astonishing claims that were later rejected by the courts—unsurprisingly, since they were direct attacks on the underlying structural order of our constitutional democracy.

As James Madison recognized, the greatest protection against the gradual concentration of power into one branch of government depends on ensuring that those individuals who serve in each branch have both the constitutional means and the personal motives to resist encroachment by the other branches.⁹ And with respect to the judiciary in particular, Alexander Hamilton noted that while liberty has no reason to fear the judiciary acting alone, there is everything to fear from the judiciary aligning itself with one of the other branches.¹⁰ Can we rest assured that Mr. Gorsuch has the personal motivation to resist attempts by the political branches to encroach upon individual liberty or upon the power of the other branches? Can we rest assured that he would not align himself with a strong executive, as Hamilton warned against?

⁴ *Rasul v. Bush*, 542 U.S. 466 (2004).

⁵ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

⁶ *Hamdan v. Rumsfeld* 548 U.S. 557 (2006).

⁷ *Boumediene v. Bush*, 553 U.S. 723 (2008).

⁸ Neil M. Gorsuch, Self-appraisal, <https://www.documentcloud.org/documents/3517860-Gorsuch-DOJ-war-on-terror-docs-examples.html#document/p32/a344094>.

⁹ James Madison, *Federalist Papers*, No. 51 (February 8, 1788), <https://www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-51> (“But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.”).

¹⁰ Alexander Hamilton, *Federalist* No. 78 (Saturday, June 14), 1788, <https://www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-78>. (“[L]iberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments.”).

Judge Gorsuch's Role in Subverting the Will of Congress

After photographs surfaced in 2004 showing horrific abuses of detainees in U.S. custody at the Abu Ghraib prison in Iraq, Senator McCain led an effort to pass the Detainee Treatment Act of 2005 to prohibit cruel, inhuman, and degrading treatment of detainees held in U.S. custody. Records from the Department of Justice show that Mr. Gorsuch pushed the White House for an aggressive signing statement that included language suggesting that the President could disregard the statute to the extent it conflicted with his executive authority.¹¹ The final signing statement, which prompted significant public controversy, was briefer than what Mr. Gorsuch recommended but included nearly identical language on executive power as the statement urged by Mr. Gorsuch, noting that the President would construe the statute “in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief.”¹²

As members of this Committee may recall, the “unitary executive branch” language was, in the post-9/11 context, essentially code for claiming that the executive branch has the sole and exclusive right to take action under its own discretion, without judicial review—even if such action is contrary to congressional intent or duly-enacted federal law. At that time, I called the now-infamous signing statement an “in-your-face affront” to Congress and noted that “[t]he basic civics lesson that there are three co-equal branches of government that provide checks and balances on each other is being fundamentally rejected by this executive branch.”¹³

But the signing statement was also designed to preserve the authority to use waterboarding and other acts of torture and cruel or inhuman treatment of detainees in U.S. custody, even as Congress had just acted to prohibit such abuses. As Mr. Gorsuch said in an email at the time, the signing statement was formally stating the administration's view that the McCain legislation is “best read as essentially codifying existing interrogation policies.” What wasn't known by the public or Congress at the time is that months earlier, in May of 2005, a DOJ official in the Office of Legal Counsel

¹¹ Neil M. Gorsuch, “Draft Signing Statement” Messages with John B. Bellinger, Steve Bradbury, John B. Wiegmann, and John P. Elwood, December 29, 2005. Email.

<https://www.documentcloud.org/documents/3520275#document/p44/a344885>;
<https://www.documentcloud.org/documents/3520275#document/p112/a344895>.

¹² President George W. Bush, President's Statement on Signing of H.R. 2863, December 30, 2005, <https://georgewbush-whitehouse.archives.gov/news/releases/2005/12/20051230-8.html> (“The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President, evidenced in Title X, of protecting the American people from further terrorist attacks.”).

¹³ Charlie Savage, *Bush could bypass new torture ban: Waiver right is reserved*, Boston Globe, January 4, 2006, http://archive.boston.com/news/nation/washington/articles/2006/01/04/bush_could_bypass_new_torture_ban/

(OLC), Steven G. Bradbury—who later worked on the signing statement with Mr. Gorsuch—had written a legal memorandum concluding that waterboarding and other so-called “enhanced interrogation techniques” do not constitute “cruel, inhuman, or degrading treatment,” and therefore would not run afoul of the international treaty obligations that Senator McCain was seeking to implement in his anti-torture legislation. The Bradbury memo was eventually withdrawn and discredited due to its faulty legal analysis. However, it was operative at the time of the signing statement, when Mr. Bradbury found a willing partner in Mr. Gorsuch in seeking to evade a clear congressional mandate that torture and cruel treatment are categorically prohibited in all circumstances.

Judge Gorsuch’s Role in Undermining Independent Judicial Review

While at the Department of Justice, Mr. Gorsuch also helped draft and advocate for an amendment to the Detainee Treatment Act that would have eliminated the jurisdiction of the federal courts to hear claims brought by detainees at Guantanamo. The amendment that Mr. Gorsuch sought would have prevented courts from hearing detainees’ claims entirely, including that they had been unlawfully or mistakenly detained or had been tortured or mistreated. As a fallback, he pushed for language that would eliminate court review except of final decisions rendered by military commissions and the Combatant Status Review Tribunals that designated individuals as enemy combatants.

Documents provided by the Department of Justice to this Committee show that Mr. Gorsuch celebrated as a significant victory the passage of the jurisdiction-stripping amendment that attempted to limit court review to these final decisions. In case his colleagues “needed cheering up” after Congress had acted to prohibit cruel, inhuman, and degrading treatment of detainees, he sent them articles on how the jurisdiction-stripping amendment he had pushed rendered those protective provisions “toothless” and “a right without a remedy.”¹⁴ One of these articles¹⁵ referenced a letter by the former Judge Advocate General of the U.S. Navy, retired Rear Admiral John Hutson,¹⁶ signed by ten retired military leaders, which called the amendment “the wrong law at the wrong time,” saying “The practical effects of such a bill would be sweeping and negative.”

Mr. Gorsuch’s view that the jurisdiction-stripping provisions of the Detainee Treatment Act could and should apply to cases that existed at the time—not just future cases—was rejected by the Supreme Court in *Hamdan v. Rumsfeld* (*Hamdan*). According to records

¹⁴ Neil M. Gorsuch, Untitled, Message to Brett Gerry, December 16, 2005. Email. <https://www.documentcloud.org/documents/3517860-Gorsuch-DOJ-war-on-terror-docs-examples.html#document/p1/a344072>.

¹⁵ Jeremy Brecher and Brendan Smith, “Ban Torture or Protect Torturers?” CBS News, December 5, 2005, <https://www.cbsnews.com/stories/2005/12/05/opinion/main/1096782.shtml>.

¹⁶ John D. Hutson, Letter to Senator Arlen Specter. November 9, 2005, <http://www.humanrightsfirst.org/wp-content/uploads/pdf/051111-etn-sen-arlen-specter-ltr.pdf>; See also Roxana Tiron, “Retired military leaders, human-rights activists outraged by Graham amendment” The Hill, November 15, 2005, <http://thehill.com/business-a-lobbying/2657-retired-military-leaders-human-rights-activists-outraged-by-graham-amendment>.

released to this Committee, Mr. Gorsuch played a lead role in briefing *Hamdan* for the Bush Administration and preparing its litigation strategy. In that case, the Justice Department also made the troubling claim that the president has unreviewable power to determine whether the Geneva Conventions apply, and argued that his determination that the Geneva Conventions did not apply to the conflict in Afghanistan was “binding” on the courts.¹⁷ The Supreme Court also rejected that claim, ruling that, at minimum, Common Article III of the Geneva Conventions applied and affords baseline protections against inhumane treatment to all detainees captured in armed conflict. In response to the government’s defeat in *Hamdan*, Mr. Gorsuch also helped draft legislation—a version of which would end up in the Military Commissions Act of 2006—that included among its controversial provisions language attempting to strip detainees at Guantanamo Bay of the right to habeas corpus.

The Supreme Court in *Boumediene v. Bush* later struck down as unconstitutional these jurisdiction-stripping provisions sought by Mr. Gorsuch. Perhaps because of the government’s litigation record over Guantanamo-related issues, Mr. Gorsuch suggested that the government should arrange for judges to travel to Guantanamo to receive tours and presentations from the military, with the hope that such trips would make the judges “more sympathetic to [the government’s] litigating positions.”¹⁸

In *El-Masri v. Tenet*,¹⁹ another case that Mr. Gorsuch was involved in, the Bush Administration, invoking an overbroad claim of the States Secret privilege, successfully argued that El Masri—an innocent victim of mistaken identity tortured by the CIA—could not pursue restitution in the courts because it could reveal the CIA’s secret torture program. Praise for the outcome was passed onto Mr. Gorsuch’s department and team by David Addington, then Vice-President Cheney’s lawyer—a primary driver of the Bush Administration’s torture program and its radical executive power theories. Given Judge Gorsuch’s record, it is critical that the Senate get clarity on his views of the appropriate role of the judiciary to review potentially unlawful actions by the executive branch.

Historical and Current Claims of Executive Power that Threaten Rights

The post-9/11 context is not the only one in which the executive branch has taken misguided actions that threaten basic rights in the name of national security. We all recall the dark chapter during World War II in which tens of thousands of Japanese Americans were interned without charge or trial, or even any suspicion of criminal activity—all with the imprimatur of the Supreme Court in the now condemned *Korematsu* decision.²⁰ As the late-Justice Scalia—who opposed the *Korematsu* decision—said in his dissent in *Hamdi v. Rumsfeld*: “[t]he very core of liberty secured by our Anglo-Saxon system of

¹⁷ <https://www.justsecurity.org/wp-content/uploads/2017/03/Hamdan-v-Rumsfeld2-copy-1.pdf>.

¹⁸ Neil M. Gorsuch, “GTMO Trip” Message to Nicholas Carl, Henry Terry, Jody Hunt, John Cohn, Peter Keisler, and Daniel Meron, November 10, 2005. Email. <https://www.documentcloud.org/documents/3517860-Gorsuch-DOJ-war-on-terror-docs-examples.html#document/p18/a344884>.

¹⁹ *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006).

²⁰ *Korematsu v. United States*, 323 U.S. 214 (1944).

separated powers has been freedom from indefinite imprisonment at the will of the Executive.” The issue of indefinite detention of individuals picked up inside the United States was raised again after 9/11 in the controversial case of Jose Padilla. An American citizen, Padilla was arrested in the United States in connection with allegations concerning terrorism. He was held incommunicado and without charge or trial for several years in a military brig in Charleston, South Carolina. Padilla’s case was litigated while Mr. Gorsuch was coordinating national security litigation for the department, but we do not know what his views are on indefinite detention and what role the courts can and should play in reviewing it. Does Judge Gorsuch believe that *Korematsu* was rightly decided? Does he believe it is lawful to indefinitely detain individuals—including American citizens—who are picked up inside the United States?

Of course, Judge Gorsuch's role at the DOJ working on national security issues after 9/11 could reasonably be expected to include defending the administration’s views, and we should not assume that he necessarily shared all of them or holds them now. That is for you to determine. But it is worth noting that the public record shows he sought out a political appointment at the DOJ—and expressed a specific interest in working on national security issues—at a time in which there was major public controversy about the actions the Bush Administration was taking and the authorities it was claiming to fight terrorism—from torture to military commissions to indefinite detention at Guantanamo, and beyond. Many within the Bush Administration—including some at the DOJ—understood that these actions were in many cases unlawful or not sufficiently grounded in law, and worked to put a stop to them or place them on firmer legal footing. For example, when judge advocates general and other lawyers at the Pentagon became aware of proposals to authorize torture or cruel treatment of detainees, they strongly objected and sought to stop such unlawful actions.

From the scant public record, it appears that Judge Gorsuch did not. Rather, Mr. Gorsuch joined the DOJ at the height of the public controversy over torture and cruel treatment of detainees, devoting his energies to defending these unlawful policies and advocating for ways the executive branch could minimize or eliminate judicial review and evade binding legal requirements. If there is a yet-to-be-revealed record of Mr. Gorsuch raising questions and concerns about these policies and the claims of executive power that were made by the Bush Administration at the time, this administration and Judge Gorsuch should make it public for Senators to consider.

Key Questions for Judge Gorsuch

As important as it is to understand the role Mr. Gorsuch played at the Justice Department, it is even more critical for Senators to ascertain whether he learned anything from his experience there and what his views are now on the following questions:

- Does Judge Gorsuch understand and agree that his former role at the DOJ—and the positions he advocated for there on behalf of the government—can and should have no bearing on the way he decides cases as a judge?

- Does Judge Gorsuch agree with seminal Supreme Court decisions and precedents in cases that he was involved with or associated with, in which the Court ruled against the Bush Administration? Such cases include *Rasul v. Bush*, *Hamdi v. Rumsfeld*, *Hamdan v. Rumsfeld*, and *Boumediene v. Bush*. If confirmed, will he agree to follow these precedents?
- Does Judge Gorsuch believe that the courts play an important role in reviewing and deciding on whether an individual's rights have been violated by the government, even and especially when the government is acting in the name of protecting national security? Should courts ever review the basis of the political branches' claim of national security—or are those claims subject to the exclusive determination of the executive and/or Congress? If so, in what situations and on what basis?
- Does Judge Gorsuch believe that any government actions are “unreviewable” by the courts (assuming the court has jurisdiction and the parties have standing)? If so, to what extent?
- Does Judge Gorsuch believe that humane treatment of individuals held in U.S. custody—that is, freedom from torture or cruel, inhuman, or degrading treatment—is required by international law, federal statute, and our Constitution?
- Does Judge Gorsuch believe that Congress has the authority to regulate and constrain the executive branch, including on issues related to national security? For example, does he agree that Congress can constitutionally require that the executive branch treat detainees humanely, and prohibit torture and cruel treatment? Are there any areas in which Judge Gorsuch believes that Congress is constitutionally *prohibited* from legislating to constrain the executive branch? If so, what specific areas, and to what extent?

The Senate must get to the bottom of these questions, because sooner or later—and I suspect it will be sooner—the Supreme Court will be called on to protect fundamental liberty, judicial independence, and separation of powers from a president who regards the rule of law as an annoyance.