

**Gorsuch, Neil M**

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**From:** Gorsuch, Neil M  
**Sent:** Wednesday, July 12, 2006 10:18 AM  
**To:** Bradbury, Steve; Engel, Steve; Eisenberg, John; Moschella, William; Taylor, Jeffrey (OAG); Scolinos, Tasia; McNulty, Paul J; McCallum, Robert (SMO)  
**Subject:** DoD Memo on Geneva  
**Attachments:** england tps.doc

Attached is a first draft of some potential talking pts on the DoD Memo, per our discussion with the AG this morning. I'd appreciate your input. Obviously, these are close hold, not for dissemination. Thanks.

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### DOD Secretary England Memo Talking Points

- We are *not* giving al Qaeda the protections of POW status under the Geneva Conventions. The England Memo discusses only Art. 3's minimal humanitarian protections applicable even to those not entitled to POW status.
- Al Qaeda unlawful enemy combatants are not entitled to POW status. They have nothing but contempt for the laws of war and the Geneva Conventions. They kidnap relief aid workers, behead contractors, journalists, and U.S. military personnel, and bomb religious shrines, wedding parties, and restaurants. They openly mock the rule of law, the Geneva Conventions, and the standards of civilized people everywhere.
- There's nothing really new about the England Memo. Since February 2002, the President instructed the USG as a matter of policy to follow Art. 3, consistent with military necessity. The England Memo merely draws attention to the Supreme Court's decision that held Art. 3 applies to al Qaeda not just as a matter of policy but as a matter of law.
- DoD detainees at GTMO *already* receive treatment compliant with Art. 3. DoD treats detainees at GTMO humanely and with respect -- much better, in fact, than Art. 3 requires. At Tuesday's Senate Judiciary Committee hearing, Senator Durbin commented on this fact based on his recent trip to GTMO.
- The England Memo was designed merely to alert the field to the Supreme Court's decision that Art. 3 now applies, after the Supreme Court's ruling, not just as a matter of policy but also as a matter of law. The Supreme Court has spoken and, under our rule of law, we follow its rulings.
- The Supreme Court's decision that Art. 3 applies as a matter of law to our men and women in the Armed Forces makes it critical to be clear about exactly what is required. Terms like "outrages upon personal dignity" are susceptible of different interpretations. And once Art. 3 applies as a matter of law, we are obligated -- absent a Congressional statute -- to look to how other countries interpret its terms. So a judge in another country could decide that something is an "outrage" and potentially influence what constitutes criminal behavior for American troops.
- To ensure that our Armed Services operate under clear standards now that the Supreme Court has spoken, it is imperative that Congress address this issue.
- Congress has before it several options. One might be to make clear that the terms of Art. 3 and the terms of the McCain Amendment mean the same thing. Our troops have long complied with the rules set forth in the McCain Amendment for humane treatment of detainees ("cruel, inhumane, degrading treatment") and

understand their obligations under its terms. Another option might be to make clear that the term “international” armed conflict in Art. 3 includes our global fight on al Qaeda.

- We stand ready to work with Congress to help clarify the situation for our troops in the aftermath of the Supreme Court’s decision.