

LANNY J. DAVIS, ESQ.  
SENIOR PARTNER  
ORRICK, HERRINGTON & SUTCLIFFE

JULY 24, 2007

"Oversight Hearing on the Privacy and Civil Liberties  
Oversight Board and the Department of Homeland Security  
Privacy Officer"

Lanny J. Davis  
12517 Bracken Hill Lane  
Potomac, Maryland 20854

July 20, 2007

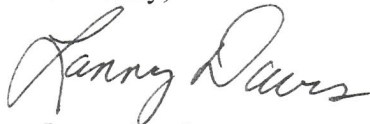
Ms. Susan Jensen-Lachmann  
Counsel  
Subcommittee on Commercial and Administrative Law  
2138 Rayburn House Office Building  
Washington DC 20515-6216

Dear Ms. Jensen-Lachmann:

Please see the enclosed letters to President Bush and the Privacy and Civil Liberties Oversight Board members. This is what my written testimony will be.

Please call me if you have any further questions.

Sincerely,

A handwritten signature in cursive script that reads "Lanny Davis".

Lanny Davis

Enclosures

Lanny J. Davis  
12517 Bracken Hill Lane  
Potomac, Maryland 20854

May 14, 2007

Honorable George W. Bush  
The White House  
Washington D.C.

Dear President Bush,

I am writing you to inform you that I am resigning from the Privacy and Civil Liberties Board effective immediately.

I wish to thank you for the honor you gave me to serve on this important body. I worked hard and I hope you and others in the administration believe that I made a contribution to justify the faith you placed in me.

Going forward, Mr. President, I would constructively suggest that you do your utmost, including by issuing a directive to relevant executive branch agencies, to guarantee full and early access of the Board to anti-terrorist programs, current and evolving, that might affect civil liberties and privacy rights. All Americans should agree that there can be an appropriate balance between doing what is necessary to win the war against terrorism and also preserving the values of privacy rights and civil liberties that have made America the great country that it is.

I also believe that it is important for the White House staff and others in the administration to understand that you insist on the Board's complete independence – not subject to White House or administration supervision or control. Only with such independence can the Board provide you and future presidents with the important function of effective oversight to ensure that this appropriate balance is maintained in the challenging years ahead.

Thank you again for asking me to serve.

My sincere best wishes to you and your family,

  
Lanny J. Davis

Lanny J. Davis  
12517 Bracken Hill Lane  
Potomac, Maryland 20854

May 14, 2007

Privacy and Civil Liberties Oversight Board Members  
1724 F St. NW, 4th Floor  
Washington DC 20503

Dear Carol, Alan, Ted and Frank:

I have written the President and tendered my resignation from the Privacy and Civil Liberties Oversight Board, effective as of today. See the enclosed letter to President Bush.

It was an honor to be asked to serve on the Board. Because of all the time and effort we put into the last year together on the Board, I feel it is necessary to explain to you in some detail why I have made the difficult decision to resign.

My reasons for resignation are based on my respectful disagreement with administration officials and most members of the Board over (1) the scope of the Board's oversight responsibilities; and (2) the interpretation of an ambiguous statute and the degree of independence of the Board intended by congress under that statute. I realize there is room for honest disagreement here and I question no one's motives or sincerity.

As to the first reason, I agree with the criticisms of the Board's report to the congress contained in the May 8, 2007, letter to the Board by the co-chairs of the 9/11 Commission, former Governor Thomas H. Kean and former Rep. Lee H. Hamilton, stating that the Board has interpreted the scope of its oversight mandate too narrowly. In particular, as you know, I agree with their view that the Board could and should review alleged civil liberties violations by American officials of non-U.S. person detainees. But I see no hope that the Board as presently constituted will ever do so.

I also continue to be concerned that there may be current and developing anti-terrorist programs affecting civil liberties and privacy rights of which the Board has neither complete knowledge nor ready access.

In addition, the decision by a majority of the Board to refuse to include a more lengthy and critical section in the congressional report concerning FBI abuses of National Security Letters ("NSLs"), as found by the DOJ's Inspector General, increased my concerns about the overly narrow interpretation of its mandate, as expressed by former Governor Kean and former Rep. Hamilton in their letter.



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As you know, only after much debate over several weeks was a more extensive and critical statement on the NSL abuses allowed – and even then, it was relegated to the cover letter submitting the report to congress, and not as part of the report itself.

The only reason given for not including the NSL statement in the report – that the report had a self-imposed cut-off date of March 1 and the DOJ Inspector General's NSL report was published after that date – made no sense to me and still doesn't. After all, the Board seemed willing to accept most of the substantial "redline" edits submitted by the White House staff on March 29, just two days from the March 31 deadline for submission to congress; and the final report was not submitted until April 20. So why not move up the self-imposed March 1 "cut-off" date to include a section in the report itself on the NSL issue? I still have no answer that makes sense to me.

I accepted the final compromise to include the longer NSL section in the cover letter to the report -- but not in the report itself -- as form over substance. But, as you all recall, even that compromise would probably not have occurred but for the intervention and support of Fred Fielding in the last day or two before the report was finally submitted to congress on April 20.

Regarding the second reason for my resignation -- the extensive "redlining" of the Board's report to the congress by administration officials, and the majority of the Board's willingness to accept most of these proposed edits and deletions – I was ready to simply state that there was a reasonable difference of opinion over interpreting the level of Board independence intended by congress under the underlying statute, and leave it at that.

But just last week an unidentified member of the Board was quoted in the newspaper "Roll Call" describing the redlined-edits to the Board's report by administration officials as "relatively light."

I respectfully disagree and, in light of the relevance of such redlining to my reason for resigning, I simply cannot allow that comment to go unchallenged. Therefore, I will make available to anyone who asks the copy of the redline of the Board's report and let others judge for themselves whether they were, or were not, "relatively light."

I will offer only one example in this letter to a deletion that I believe was not "relatively light" – the one that troubled me most. In the "Year Ahead" section (pp. 40-41 of the redline version, where all significant proposed deletions were found), we had proposed to

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review the application of the Material Witness statute. That paragraph was deleted in the redline.

The Board was told that there was no objection to the Board's looking into the subject of the Material Witness statute; but rather, that the White House Counsel's Office requested that we drop the reference to this statute in the report to congress because they were concerned that, as this is a tool used exclusively by U.S. attorneys in their prosecution efforts, this issue could unintentionally get folded into other issues associated with the U.S. attorneys public controversy.

I found this reason to be inappropriate – and emblematic of the sincere view, with which I strongly disagreed, of at least some administration officials and a majority of the Board that the Board was wholly part of the White House staff and political structure, rather than an independent oversight entity.

I am and remain grateful to White House Counsel Fred Fielding for intervening at my request and agreeing to restore that deletion of the Material Witness Statute paragraph as it was written and, indeed, all the proposed deletions from the "Year Ahead" section -- with one exception. That was the deletion of the paragraph reporting to congress on the Board's unanimously – approved January 31, 2007, memorandum to the president asking him to issue a directive to all executive agencies assuring the Board early access to developing and current anti-terrorist programs affecting privacy rights and civil liberties. I agreed to this deletion because I believed and hoped that Fred Fielding would do his best to send the Board's, memorandum to the president for his serious consideration.

As you know, in February, I was asked to offer my opinion to Senators Joseph Lieberman and Susan Collins, Chair and Ranking Member of the Senate Government Oversight Committee, on pending legislation affecting the Board's structure. I told both Senators that I supported the Senate version of the legislation that would have kept the Board within the Office of the President. I explained my belief then that the Board could still conduct independent oversight while part of the Office.

However, because of my recent experiences with the Board's report, I no longer believe that. I now believe the approach of the House bill is better – creating an independent board within the executive branch with subpoena power -- similar to the independence granted executive branch departmental Inspectors General. I have communicated to Senators

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Lieberman's and Collins' staff my change of opinion. I intend to do the same with the sponsors of the House legislation.

In closing and to repeat what I said above at the outset:

I understand and respect that I have an honest and good-faith disagreement with White House and other administration officials -- and with many of you, my colleagues, on the Board -- about the appropriate scope of the Board's oversight mandate and with the interpretation of the statute that established the Board.

I have spent many hours over the last year doing important work with you and, especially, searching together for the right balance between effective anti-terrorism programs and the need to preserve our nation's civil liberties and privacy rights that are so fundamental to American freedom and values.

I will treasure my memories working with each of you and the impressive and dedicated public servants we met and observed working so hard and so conscientiously to win the war against terrorism while honoring these core American values.

My best wishes to each of you in the months and years ahead.

Sincerely,

  
Lanny Davis





## Lanny J. Davis

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### Concentration

Civil litigation with particular focus on securities fraud and accounting irregularities cases, antitrust, government contracts and commercial contracts, and computer contracting issues.

### Education

J.D., Yale Law School, 1970

B.A., *cum laude*, Yale College

### Memberships

D.C. Bar Association

Connecticut Bar Association

U.S. Supreme Court

U.S. Court of Appeals

D.C. Circuit

Mr. Davis, a partner in Orrick's Washington, D.C. office, is a member of the Litigation Practice Group. Mr. Davis advises clients on a wide range of legal and governmental issues. He concentrates his practice in civil litigation, with particular focus on securities fraud and accounting irregularities cases, antitrust, government contracts and commercial litigation, and legal crisis management and strategic communications. In June 2005, President Bush appointed Mr. Davis to serve on the five-member Privacy and Civil Liberties Oversight Board, created by the U.S. Congress as part of the 2005 Intelligence Reform Act; and author of forthcoming book, "Scandal: How 'Gotcha' Politics is Destroying America," to be published by Palgrave Macmillan in September 2006.

From 1996 to 1998, Mr. Davis served as Special Counsel to the President in the White House and was spokesperson for the President on matters concerning the campaign finance investigations and other legal issues. Drawing upon this experience, since his return to private practice, Mr. Davis provides counseling to corporations and government contractors on crisis management issues by developing press strategies for entities exposed to high-profile litigation and regulatory matters, particularly in high-tech/securities fraud cases and other legal issues where media coverage can affect legal outcomes and commercial reputational injuries.

Mr. Davis has participated in national, state and local politics for almost 30 years. He has served three terms (1980-1992) on the Democratic National Committee representing the State of Maryland, and during that period he served on the DNC Executive Committee and as Chairman of the Eastern Region Caucus. In Montgomery County, Maryland, he served as Chairman of the Washington Suburban Transit Commission.

Mr. Davis has written extensively on politics for many years in a variety of publications. He is the author of *Truth to Tell Notes From My White House Education* (The Free Press: New York, 1999). Tom Brokaw of NBC News said, "Lanny Davis has written a book that should be required reading for all Washington officials and journalists alike. It's an instructive and cautionary tale of the constant struggle to know the truth of what is going on at the highest levels of government." He is also the author of *The Emerging Democratic Majority: Lessons and*



*Legacies from the New Politics* (Stein and Day, 1973), a political history of the liberal movements of the 1960's and early 1970's. Mr. Davis is the co-author of *Allen and Davis on Computer Contracting: A User's Guide with Forms and Strategies* (Prentice Hall, 1992), and has lectured throughout the United States and Europe on the subject.

Between 1990 and 1996, Mr. Davis was a bi-monthly commentator on Maryland politics for WAMU-88.5/FM, a Washington D.C. local affiliate of National Public Radio. He has been a regular television commentator and has been a political and legal analyst for MSNBC, CNN, Fox Cable, CNBC and network TV news programs. He has published numerous op-ed/analysis pieces in the New York Times, the Wall Street Journal, the Washington Post and other national publications.

Mr. Davis came to Washington, D.C. in 1970 after graduating from Yale Law School where he won the prestigious Thurmon Arnold Moot Court prize and served on the *Yale Law Journal*. A graduate of Yale College, Mr. Davis served as Chairman of the *Yale Daily News*.

Mr. Davis started as an associate at Patton Boggs in 1975 and became a partner in 1978. In October 2003, Mr. Davis became a partner at Orrick and brought along with him the other members of his unique "Legal Crisis Communications" practice group. He has been featured in articles published in *USA Today*, *Forbes* and *Fortune* magazines, and numerous national and local newspapers.