Senator Edward M. Kennedy
Questions for the Record
From Senate Judiciary Committee hearing on "Preserving the Rule of Law in the Fight Against Terrorism"
Held on October 2, 2007

To Professor Jack Landman Goldsmith

1. In your book and in your testimony, you criticized the Administration's failure to work with Congress. You described numerous instances in which you and others urged the White House to go to Congress about a controversial policy, only to be rejected by officials such as David Addington, who insisted on a "go-it-alone" approach.

Your book and your testimony explain how this approach was both unnecessary and unwise, and has caused a number of harms. "Political disagreement and debate are strengths of a democracy in wartime," you write, "for they allow the country's leadership to develop a fuller picture of legal, practical and strategic questions, and to learn about and correct its errors." Political dialogue also gives Americans a voice in their own government. Yet, the Bush Administration has consistently stifled disagreement and debate and shut out its critics.

Questions:

- **Since the Administration has so often refused to cooperate with Congress, or even to keep us informed about what it is doing, how can we best exercise our oversight and lawmaking responsibilities?**

Answer: If an administration does not cooperate with or inform Congress, Congress can use political tools to ensure that it gets the cooperation and information it needs to exercise its constitutional responsibilities.

- **Your book explains that there are numerous reasons for the Administration's go-it-alone approach. You said that top officials in the White House have an "unquestioned commitment to a peculiar conception of executive power," have "found it much easier" to avoid debate rather than engage in it, and have an unhealthy obsession with secrecy. From what you said, it sounds as if this Administration will never commit to working responsibly with Congress. Is this correct?**

Answer: I do not believe this is correct. Recently the administration seems to be working responsibly with Congress.

2. In your written testimony, you stated, "Many people believe that the Bush administration has been indifferent to . . . legal constraints in the fight against terrorism. In my experience, the opposite is true: the administration has paid scrupulous attention to law."

I found this a curious statement, given what you had said in your book. For example, your book explains that:

- the OLC was under heavy pressure to justify what the President wanted to do, and the "President and Vice President always made clear that a central administration priority was to maintain and expand the President's formal legal powers";
- the OLC "took shortcuts in its opinion-writing procedures," so as to "control outcomes in the opinions and minimize resistance to them";
- numerous OLC opinions were "deeply flawed: sloppily reasoned, overbroad, and incautious";
- the President's "War Council" "wrote opinion after opinion approving every aspect of the administration's aggressive antiterrorism efforts";
- John Yoo had "extraordinary influence within the administration," because his astonishingly broad views on executive power told the White House what it wanted to hear;
- the Administration refused to work with Congress, even though doing so would have put its antiterrorism policies "on a sounder legal footing";
- you faced major challenges in trying to "put[] the [Terrorist Surveillance Program] legally aright" after the Administration had kept it secret from Congress and the FISA court;
- the President used signing statements in unprecedented ways that are "antithetical" to our historical and constitutional traditions; and
- the White House "used lawyers . . . as a sword to silence or discipline" those who were nervous about implementing its most controversial policies.

You also described how, following the OLC's determination that violations of the Geneva Conventions in Iraq could be punishable under the U.S. war crimes statute, David Addington yelled at you: "The President has already decided that terrorists do not receive Geneva Conventions protections. You cannot question his decision." On other occasions when you tried to explain why an Executive policy was illegal, you were overruled and berated in the same way.

Here is how you described the Administration's approach to electronic surveillance: "After 9/11 . . . top officials in the administration dealt with FISA the way they dealt with other laws they didn't like: they blew through them in secret based on flimsy legal opinions that they guarded closely so no one could question the legal basis of the operations."

Frankly, this does not sound like an administration that "has paid scrupulous attention to law."

From your account, it sounds like the exact opposite is true: White House officials have consistently manipulated or ignored the law to suit their own ends, and the main reason they've paid attention to the law is to cover themselves. It is hard to come away from your book without concluding that this Administration is not committed to the rule of law.

Question:

- **Do you believe that the Administration has been committed to the rule of law—not just as a means to justify their policies, but as a bedrock principle that makes this Nation better and stronger?**

Answer: I do not agree with all of these characterizations of my book, *The Terror Presidency*. As I explained in the book, I believe the administration, far from being indifferent to law, was preoccupied with law. As I also explain in my book, I disagreed with some of the administration's legal contentions and some of its approaches to ascertaining and complying with the law.

3. Your book explains how you felt you had no choice but to withdraw two OLC opinions from 2002 and 2003 on the use of torture in interrogation, because they were so fundamentally flawed. These opinions were classified, but leaks have exposed them to the public and inspired worldwide outrage and condemnation. Leaks have also recently shed some light on the President's "Terrorist Surveillance Program" to eavesdrop on Americans without a warrant. This secret policy has likewise led to mass shock and outrage.

But there is a large amount that we still do not know. For instance, even as the Administration insists that FISA must be reformed, it has failed to provide Congress with adequate information about its activities, the legal justifications for those activities, or the FISA Court opinions that we are told make new legislation necessary.

Questions:

- **In the same chapter of your book in which you described the OLC opinions you withdrew because they were so flagrantly erroneous, you wrote that each of the government's most sensitive counterterrorism programs "had been approved by OLC and backed by an OLC opinion." Without revealing any classified information, can you tell us about the nature and quality of these other OLC opinions?**

Answer: No, I cannot.

- **Can you comment generally on the mass of OLC antiterrorism opinions that remain secret? Can we expect to find the same sort of sloppy and self-serving analysis in all of the OLC opinions used by the Administration to justify its most controversial activities?**

Answer: No, I cannot.

4. Last Thursday, the *New York Times* alerted the nation to two more secret "torture memos" from the Office of Legal Counsel. These memos, issued in 2005, have led to new outrage. The first reportedly authorized harsh interrogation techniques to be used "in combination" to create a more extreme overall effect. The second declared that none of the

CIA's interrogation methods violated the ban on "cruel, inhuman, and degrading" treatment that Congress was about to pass.

Part of the outrage over these new memos concerns their substance. From what we know of their contents, both seem to take a distorted view of the law. They essentially say that nothing the Administration does to obtain terrorist information can qualify as cruel, inhuman, or degrading. Part of the outrage concerns the way in which these opinions were issued. At a time when the Office of Legal Counsel was claiming publicly that it had put things right after withdrawing the infamous Bybee memo, it was secretly issuing these two new memos that appear to contain similarly extreme analysis.

Questions:

- **Why did the Administration issue these two memos in 2005 authorizing harsh interrogation techniques, after the withdrawal of the 2002 Bybee memo and the public issuance of a less extreme opinion? Was the Administration attempting to mislead the public and reinstate its earlier position on torture?**

Answer: Because I was not in the government at this time, I do not know how many opinions were issued, or why they were issued.

- **From what you know of the 2005 opinions, can you comment on their legal merits? Is their analysis consistent with the positions you took as head of the Office?**

Answer: It is impossible to tell from newspaper reports,

- **The Administration is now refusing to share these memos with members of Congress. Particularly since the Administration made a big show of publicly issuing the replacement torture memo—presumably in an effort to subdue criticism—is it appropriate to refuse to share the later memos with Congress, either in a classified context or otherwise?**

Answer: I believe that OLC should make every effort to publish its opinions or, if opinions are classified and related to intelligence, to show the opinions to the intelligence committees. I believe it is the President's prerogative not to disclose these opinions. And I believe it is the Congress's prerogative to use political pressure to try to force the Executive to disclose the opinions.

5. The author of the 2005 torture memos was Steven J. Bradbury, who has been the acting head of the Office of Legal Counsel since February 2005. In late June 2005, he was formally nominated to take over the position.

Along with the existence of the new torture memos, it has recently been revealed in the press that Mr. Bradbury was given a "tryout" before he was officially nominated to lead the Office. His nomination was delayed while the White House "decided to watch Bradbury for a month or two," according to a Justice Department official. "He was sort of on trial." The

purpose of this tryout seems to have been to see if Mr. Bradbury would be sufficiently accommodating to the President's desires—rather than stand up for the rule of law.

As the *New York Times* notes, "While waiting to learn whether he would be nominated to head the Office of Legal Counsel, Mr. Bradbury was in an awkward position, knowing that a decision contrary to White House wishes could kill his chances." It was during this trial period that Mr. Bradbury authored at least one and possibly both of the new torture memos that have just come to light.

Questions:

- **What do you think about the recent revelation that Stephen Bradbury was on a "tryout" before he was nominated to head the Office?**

Answer: I do not have enough information to assess the claim. I hired Mr. Bradbury to be my Deputy and during my time in office I found him to be a fine lawyer and a person of integrity.

  - **What does that say about the relationship between the White House and the Department of Justice?**

Answer: Since I do not know whether the claim is true I cannot answer this question.

  - **What does it say about the Administration's commitment to the rule of law?**

Answer: Since I do not know whether the claim is true I cannot answer this question.

- **Professor Sandy Levinson recently wrote: "If one believes that the OLC is in fact to have some quasi-independent role in offering an honest and disinterested view regarding highly controversial issues, then one might want to make sure that there is at least a modicum of job security attached to the position. . . . What we are seeing, incidentally, is a more and more open fight between 'rule of law' conservatives, including Jack Goldsmith and Doug Kmeic, and 'anything the President wants to do, so long as it's accompanied by the magic words "national security," is automatically authorized by the Constitution,' typified, of course, by David Addington, John Yoo, and, it appears, Mr. Bradbury."**

  - **Is this an accurate characterization of the legal fights that have occurred within this Administration? Have the "rule of law" conservatives like you and James Comey now been entirely pushed out?**

Answer: I do not think this is an entirely accurate characterization. As I explain in my book, I think the differences among lawyers in the administration resulted more from a clash of perspectives about Executive power and about the prudence of working with Congress and other institutions of our government. I was not "pushed out"; I resigned voluntarily.

6. David Addington plays a very large role in your book. Mr. Addington's job title is technically Counsel to the Vice President, but from your account, it appears that he helped shape all of the Administration's most sensitive and controversial antiterrorism legal policies.

In this capacity, Mr. Addington appears to have taken over certain duties traditionally left to the Attorney General and the White House Counsel. In one passage, you note: "The new arrangement . . . made Addington an altogether different type of Vice President's Counsel, one who received all of the important governmental documents that went to Alberto Gonzales, and one who was always in the room when Gonzales was discussing an important legal issue. Of probably a hundred meetings in Gonzales's office to discuss national security issues, I recall only one when Addington was not there."

In other passages, you describe Addington as the de facto leader of the unofficial "War Council," a "secretive five-person group with great influence over the administration's antiterrorism policies." Although John Yoo also played an important role on this Council, "Addington's hard-line nonaccomodation stance always prevailed when the lawyers met to discuss legal policy issues." You report that Mr. Yoo frequently told you "stories about Addington slaying the legal wimps in the administration who stood as an obstacle to the President's aggressive antiterrorism policies."

With regard to Mr. Addington's views, you make clear that he is an extreme proponent of executive power, secrecy, and unilateralism. You describe his unwavering "commitment to expanding presidential power" and to the "unitary executive" theory. You indicate his contempt for the Foreign Intelligence Surveillance Act, noting that he was "the chief legal architect of the Terrorist Surveillance Program" and that he once remarked to you, "We're one bomb away from getting rid of that obnoxious [FISA] court." You note that "Addington's hostility to working with Congress was mild compared to his hostility to accommodating the concerns of allies and international organizations." And you reveal that Addington demanded "strict enforcement of the party line on promotions in the Justice Department," such as when he blocked the promotion of Patrick Philbin because Mr. Philbin had not been sufficiently accommodating in agreeing with all that the White House wanted to do.

You also say that you thought some of Mr. Addington's legal judgments were "crazy." For example, he clearly endorsed the OLC interrogation memos, which were so deeply flawed that you felt you had no choice but to withdraw them. Several times, as your book describes, Mr. Addington berated you for coming to a legal conclusion that did not coincide with what the President wanted to hear.

Questions:

- **It is remarkable to learn from your book that the Counsel to the Vice President has played such a central and radical role in shaping antiterrorism legal policy. Is it appropriate that Mr. Addington wields so much power and influence?**

Answer: The President can organize his legal staff in the White House however he wishes.

- **Do you believe that reforms are needed to ensure that Counsels to the Vice President do not have such a large, secret, and unlimited role in the formulation of legal policy? What specific reforms do you favor?**

Answer: I do not think there is anything wrong with a Counsel to the Vice President participating in and commenting on legal policy debates.