U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

July 2, 2008

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Please find enclosed responses to questions for the record, which were posed to Attorney General Michael B. Mukasey following his appearance before the Committee on January 30, 2008. The hearing concerned Department of Justice Oversight. This submission supplements our transmittal, dated June 27, 2008, and provides responses to a large number of questions posed by the Committee. The Department is working expeditiously to provide the remaining responses, and we will forward them to the Committee as soon as possible.

The Office of Management and Budget has advised us that from the perspective of the Administration's program, they have no objection to the submission of this letter.

We hope this information is helpful. Please do not hesitate to contact this office if we may be of further assistance with this, or any other matter.

Sincerely,

Keith B. Nelson
Principal Deputy Assistant Attorney General

Enclosures

cc: The Honorable Arlen Specter
Ranking Minority Member

Questions for the Record Posed to
Attorney General Michael B. Mukasey
Senate Committee on the Judiciary
DOJ Oversight Hearing on January 30, 2008
Part Two

QUESTIONS FROM CHAIRMAN LEAHY

Leahy 1 At last week's oversight hearing, you would not agree with me that waterboarding an American citizen anywhere in world is torture and illegal. Under what circumstances or with what justifications would you consider waterboarding an American not torture and not illegal?

ANSWER: As the Attorney General stated during his appearance before the Committee, because waterboarding is not among the practices currently authorized for use in the CIA program, we do not believe that it would be appropriate to answer categorically questions concerning the legality of waterboarding absent a set of circumstances that call for those answers.

Leahy 2 We are engaged in a debate in the Senate about this Administration's proposal to grant retroactive immunity to telecommunications carriers who participated in secret warrant less surveillance efforts for more than 5 years in violation of the Foreign Intelligence Surveillance Act, presumably some of the same carriers that later disconnected wiretaps when the bills were not paid. What payments were made to telecom companies to compensate for their participation in surveillance efforts including that which came to know as the President's program and the Terrorist Surveillance Program?

ANSWER: The Senate and House Intelligence Committees have conducted extensive oversight of operational aspects of the National Security Agency activities described by the President in December 2005 and now commonly known as the Terrorist Surveillance Program. The Judiciary Committees of both Houses have also been provided with documents, held hearings, and have been briefed on this Program. The specifics of an arrangement between the Government and a telecommunication carrier to provide classified assistance with foreign intelligence surveillance efforts cannot be further discussed in an unclassified setting.

Leahy 3 The Justice Department has now opened a formal investigation into the CIA's destruction of tapes showing the use of harsh interrogation techniques, including waterboarding. When that investigation has concluded, would you have any objection to the Department's Inspector General doing a subsequent investigation and reporting on the appropriateness of the tapes' destruction?

ANSWER: As you know, the Department has opened an investigation into the CIA's destruction of interrogation tapes. The Department's preliminary inquiry into this matter was conducted jointly with the CIA's Inspector General, because the inquiry concerned the acts of CIA personnel. Because the Department's criminal investigation is now ongoing and CIA's Office of Inspector General is supporting the criminal investigation, it would be premature to speculate as to whether any future Inspector General investigation, by the CIA or otherwise, would be appropriate.

Leahy 4 What were the Department's policies or legal views between 2002 and 2005 about the preservation or destruction of documentation or recordings of interrogations? Have you acted to change those policies since you learned of the destruction of the tapes?

ANSWER: The CIA's destruction of the tapes is currently the subject of an ongoing criminal investigation. As such, it would be premature to comment at this time on the Department's policies or legal views between 2002 and 2005 regarding the preservation or destruction of documentation or recordings of interrogations, or the role, if any, played by Department of Justice personnel in this matter.

Leahy 15 The Department's time-honored guidelines, set forth in the Department's "red book"—its guidebook on "Federal Prosecution of Election Offenses"—were revised under the outgoing, discredited leadership group to turn the traditional practice of not bringing last-minute investigations and actions on its head. The policies in the new "green book" provide great latitude for the Department to influence the outcomes of elections. We learned of this shift last year and were made aware of its dangers in investigating the actions of interim U.S. Attorney Bradley Schlozman, who replaced fired U.S. Attorney Todd Graves and brought election-eve indictments in a highly contested election in Missouri. What steps are you and the Department taking to make sure that there is no repeat of this type of conduct?

ANSWER: This question includes several components, which we address separately. As an initial matter, earlier this year, the Attorney General circulated a memorandum to all Department employees emphasizing the Department's existing policies with respect to political activities. The memorandum reiterated that "politics must play no role in the decisions of federal investigators or prosecutors regarding any investigations or criminal charges." The Attorney General has also reiterated this message personally on numerous occasions in his meetings with Department personnel.

With respect to the question, there was nothing improper about the timing of the registration fraud indictments in Missouri. Evidence submitted to the Department reflected that the subjects had submitted numerous bogus voter registrations to a get-out-the vote organization. No voters needed to be interviewed; the Department's consultation procedures for such matters were followed; and the charges did not violate the Department's policy against interfering with an ongoing election. This policy focuses on the timing of investigations of alleged voter fraud—not the timing of filing charges that have already been investigated—and discourages overt criminal investigation during the period immediately prior to an election or on Election Day in order to avoid chilling lawful voting activity or interjecting a criminal investigation into an ongoing campaign.

Simply stated, the Department's 1995 election crime manual was revised because it was out of date. The main authors of the 2007 manual are two career prosecutors in the Criminal Division's Public Integrity Section. These senior prosecutors are the Department's experts on election crimes and collectively have over sixty years of experience in the investigation and prosecution of election fraud and campaign financing crimes. The updated draft went through several revisions by its authors. After review and approval by the Section and Criminal Division, the manual was forwarded to other Department components prior to publication. Its authors received no substantive suggestions from anyone outside the Criminal Division.

The 2007 manual incorporates the landmark changes enacted by Congress in the Bipartisan Campaign Reform Act of 2002 (BCRA), and especially the enhanced criminal penalties for campaign financing crimes included in these reforms. It also incorporates the Department's renewed commitment to addressing election fraud and campaign financing crimes that is exemplified by the Department's Ballot Access and Voting Integrity Initiative. The initiative was created in 2002 to increase the Department's efforts to protect voting rights and deter and prosecute election crimes, and recognizes that it does little good to protect a person's right to vote if that person's vote is subsequently diluted or eliminated by fraud.

As in other areas of criminal law enforcement, the effect of vigorous and impartial enforcement of the federal statutes criminalizing various types of election crimes is likely to extend beyond the defendants charged in specific cases and deter others who are considering similar conduct. While this deterrence is not capable of measurement, it remains an important societal and governmental goal. Congress also has recently recognized the importance of deterring crimes. *See* BCRA § 314(b)(1) (mandating a new sentencing guideline for campaign financing crimes that would reflect "the need for appropriate and aggressive law enforcement action to prevent such violations."). The 2007 manual also incorporates the Department's additional enforcement experiences prosecuting election crimes over the past decade, and recognizes that there are situations where prosecution of an individual act of election fraud or campaign fraud may be warranted. Rather than providing what is in essence a blanket immunity for an individual who commits a federal crime, this approach allows prosecutive decisions to be made on a case-by-case basis, as is the case in other areas of criminal law enforcement.

Moreover, there has been no substantive change in the Department's policy regarding noninterference with elections. For over two decades, the Public Integrity Section and its Election Crimes Branch have counseled United States Attorneys' Offices against taking overt criminal investigative measures involving alleged election fraud, such as interviewing voters or issuing grand jury subpoenas for ballot documents, until the election in question has been concluded and its results certified. This policy reduces the risks of chilling legitimate voting, interfering with the administration of elections by the states, or transforming a criminal investigation into a campaign issue by appearing to legitimize unsubstantiated allegations. Rather than being "watered down" or weakened, the text was expanded in the updated manual to provide additional guidance and assistance as a result of the Department's ongoing criminal enforcement efforts in this area.

Election crimes strike at the heart of our democratic form of government and the Department is committed to the vigorous and impartial enforcement of the federal criminal statutes enacted by Congress to combat these serious crimes.

Leahy 19 One of the most disturbing features of the Justice Department in this Administration has been the complicity of the Department's supposedly independent and impartial Office of Legal Counsel in providing secret legal memoranda defining torture down to meaninglessness, excusing warrantless spying on Americans contrary to our laws and, more recently, justifying the absolute immunity of White House employees from Congressional subpoenas without reference to a single legal precedent. Jack Goldsmith, a conservative former head of the Office of Legal Counsel who found many of these opinions to be "deeply flawed and sloppily reasoned" rescinded several of the most extreme of them, only to see some reinstated in other forms after his departure. In response to questions from Senator Schumer at your confirmation hearing, you committed to this Committee that you would conduct a review of OLC opinions in several areas, including detention policies, interrogation policies, and policies relating to warrantless wiretapping. Have you conducted this review and in what areas? If not, why not?

ANSWER: As the Attorney General committed in his letter to the Committee, dated October 30, 2007, he has reviewed the Office of Legal Counsel's legal analysis of practices that are currently authorized for use in the CIA's interrogation program. The Attorney General has found those practices to be lawful and has found the Office's analysis and conclusions concerning those practices to be correct and sound. The Attorney General has not found it necessary to go further and to review Office of Legal Counsel opinions, or portions of those opinions, that do not address matters currently before him.

Leahy 20 Have you determined that any OLC opinions are suspect? If so, what action have you taken?

ANSWER: No, the Attorney General has reviewed the Office of Legal Counsel's legal analysis of practices that are currently authorized for use in the CIA's interrogation program. The Attorney General has found those practices to be lawful and has found the Office's analysis and conclusions concerning those practices to be correct and sound.

Leahy 21 Congress cannot legislate in the dark. With this Committee, in particular, that means we must know how the Executive Branch interprets the law on critical national security issues. Yet this Administration has steadfastly refused to provide the Congress with key opinions from the Office of Legal Counsel on electronic surveillance and their interpretation of the laws on torture. Will you commit to providing this Committee, under appropriate security protections, the OLC legal opinions that we have been requesting for years and that we require in order to fulfill our constitutional responsibilities?

ANSWER: The Administration has made extraordinary accommodations in recent months to accommodate Congress's interest in these matters. Highly classified opinions concerning the Terrorist Surveillance Program have been made available to, among others, the Intelligence and Judiciary Committees of both Houses of Congress. As to the CIA's interrogation program, the Intelligence Committees briefed on both the classified details of and the legal basis supporting the program, and unclassified briefings also have been provided to Congress. Since the Attorney General's testimony, the Administration has further accommodated congressional interest in this subject by making available to the Intelligence Committees the classified OLC opinions on the CIA program. In addition, the Administration has made available to the Judiciary Committees three of those opinions, with limited redactions necessary to protect intelligence sources and methods.

Leahy 22 I have been concerned with this Administration's attempt to use obscure and formerly rarely asserted legal doctrines to shroud their actions in a veil of secrecy. We have seen the White House make blanket assertions of executive privilege and novel assertions of immunity to interfere with Congressional oversight. We have also seen the vast expansion in the use of the state secrets privilege to deny litigants their day in court by the mere assertion that the disclosure of some evidence in the case might harm national security. Federal courts faced with these blanket assertions by the government have dealt with them in widely different ways, leading to disparate results such as protracted litigation in some cases and outright dismissal in others without the court ever reviewing any evidence whatsoever. What legal standard does the Department invoke when reviewing claims of executive privilege or when deciding whether to assert state secrets privilege in litigation?

ANSWER: When deciding whether to advise the President that he may invoke executive privilege or whether it is appropriate to assert the state secrets privilege, the Department applies the longstanding principles and precedent that have guided the Executive Branch for decades. In the area of executive privilege, the President has invoked executive privilege or the immunity of his senior advisers only rarely, and those invocations have been consistent with longstanding precedent from Administrations of both parties, as explained in the Attorney General's February 29, 2008, letter to Speaker Pelosi, as well as the Department's July 24, 2007, letter to Chairman Conyers. Copies of both letters are attached.

With respect to the state secrets privilege, since September 11, 2001, there has been a marked increase in civil litigation brought by private parties challenging the actions of the Government in the field of national security. Such litigation may risk disclosing details regarding our signals intelligence capabilities and operations, our sources and methods of foreign intelligence gathering, and other important and sensitive activities that we are presently undertaking in our conflict. Accordingly, consistent with past practice, the United States has invoked the state secrets privilege to ensure that civil litigation does not undermine the national security by forcing the disclosure of highly sensitive information.

The state secrets privilege, which dates back to the 19th century and is rooted in the Constitution, *see United States v. Nixon*, 418 U.S. 683 (1974); *United States v. Reynolds*, 345 U.S. 1, 7-10 (1953); *El-Masri v. United States*, 479 F.3d 296, 303-04 (4th Cir. 2007), protects national security information from disclosure when "there is a reasonable danger that compulsion of the evidence will expose [state] matters which, in the interest of national security, should not be divulged." *Reynolds*, 345 U.S. at 10. The privilege is particularly important during times, such as the present, when our Nation is engaged in a conflict with an enemy that seeks to attack the homeland.

Leahy 23 It seems that the Administration's default position has become to adopt these privileges whenever its actions might face public scrutiny. What steps does the Department take to ensure that these privileges are asserted only when necessary?

ANSWER: With respect to executive privilege, over the past seven years, the Administration has sought to work with Congress to accommodate its legitimate oversight interests, and the President has asserted executive privilege with respect to only three matters and only as a last resort. The advice that the Department has provided to the White House on these matters has been consistent with this view, and with the longstanding practice by Administrations of both parties.

With respect to the state secrets privilege, the Government asserts the privilege to prevent harm to national security. In so doing, the Government follows a cautious and careful process to ensure that the privilege is not, in the words of the Supreme Court, "lightly invoked." *Reynolds*, 345 U.S. at 7. As set out by the Supreme Court, the privilege must be invoked by the United States only through a "formal claim of

privilege," *id.* at 7-8, and such an invocation must come from "the head of the department which has control over the matter," after giving "actual personal consideration" to the matter. *Id.* Because the state secrets privilege is asserted in litigation, the Department of Justice also must agree that asserting the privilege is legally appropriate.

Even if the Executive Branch determines that the state secrets privilege is applicable, "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege." *Reynolds*, 345 U.S. at 8. As just one of many examples, the United States Court of Appeals for the Ninth Circuit recently noted that the Government's assertion of "the basis for the privilege is exceptionally well documented. Detailed statements [in the Government's classified filings] underscore that disclosure of information concerning the Sealed Document and the means, sources and methods of intelligence gathering in the context of this case would undermine the government's intelligence capabilities and compromise national security." *Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190, 1204 (9th Cir. 2007) (emphasis added).

Leahy 39 In November, I sent you a letter expressing my concerns that flawed bullet lead analysis done by the FBI for many years may have led to wrongful convictions. As you know, the National Academy of Sciences issued a report in 2005 discrediting bullet lead analysis, and the FBI stopped conducting bullet lead testing that same year. But over the last two years, the Justice Department has not taken steps to find or correct the cases where it was misused. As a former judge, I am sure you share my fear that this faulty forensic evidence may have been introduced in the estimated 2,500 cases where it was used. Two months ago, I asked you to provide the Judiciary Committee with the list of cases where FBI bullet lead analysis was used, and to advise the Committee what steps you've taken to correct any unjust convictions resulting from bullet lead analysis. When can I expect a response to my letter? Have you taken any action in response to my letter?

ANSWER: The Department provided a response to your letter on June 30, 2008.

Leahy 42 Because of strong objections from the administration and some Republicans, the OPEN Government Act did not include a provision expressly reversing the so-called "Ashcroft memo" – a misguided policy of your two predecessors to reverse the Clinton administration policy of a presumption of openness with regards to the disclosure of information under FOIA. Will you commit to review and consider overturning this policy?

ANSWER: The Attorney General will commit to review the "Ashcroft memo".

QUESTIONS FROM SENATOR SPECTER

Specter 48 The McNulty Memo creates a lower standard and level of review for requests for client communications to the lawyer. The Memo provides lesser treatment to client communications to the lawyer by allowing prosecutors to weigh an organization's refusal to provide this information against the company as a negative factor in its charging decision. How do you justify giving client communications to the lawyer a lesser degree of protection than lawyer communication to the client?

ANSWER: The McNulty Memorandum does not create different standards or levels of review for lawyer-to-client communications and client-to-lawyer communications. First, under the Memorandum, prosecutors must undertake a rigorous internal analysis before they may request a corporate entity to waive its attorney-client privilege. Specifically, they must demonstrate the existence of a "legitimate need" for the potentially privileged information; they must explore alternate means of obtaining the potentially privileged information; and they must seek certain approvals from and consult with senior Department officials.

Critically, the McNulty Memo identifies two separate and distinct categories of potentially privileged information. "Category I" information includes copies of key factual documents, witness statements, or purely factual interview memoranda regarding the underlying misconduct; organization charts created by company counsel; and factual chronologies, factual summaries, or reports (or portions thereof) containing investigative facts documented by counsel. Such information may or may not actually be privileged, depending upon the circumstances pursuant to which the company or its attorneys collected it. Although the United States Attorney has the authority to approve Category I waiver requests, prosecutors are required to consult with the Assistant Attorney General of the Department's Criminal Division prior to making such requests.

"Category II" information includes actual attorney-client privileged communications or non-factual (i.e., analytical) attorney work product, including legal advice provided to the corporation before, during and after the underlying alleged misconduct occurred. Included within this category, for example, are communications from corporate personnel to corporate counsel, made for the purpose of seeking legal advice regarding whether to pursue a planned course of conduct. Only the Deputy Attorney General has the authority to approve Category II waiver requests.

In short, the McNulty Memo calls for higher-level review for non-factual attorney-client communications. It does not distinguish between "lawyer-to-client" and "client-to-lawyer" communications.

Specter 61 In an article from the George Washington University Law Review entitled "State Secrets and the Limits of National Security Litigation," Professor Robert Chesney proposes that Congress modify the state secrets privilege and presents several solutions, such as recalibrating the reasonable risk balancing test test to increase the discretion of the judge to disagree with the executive branch's assertion that national security interests warrant exclusion of evidence or dismissal of a complaint. Do you think legislative modifications should be made to the privilege, and, if so, do you have any specific proposals to aid Congress in this effort?

ANSWER: We do not believe that legislative modifications should be made to the state secrets privilege. The Constitution and settled Supreme Court precedent define the law governing the state secrets privilege. This body of law already provides the appropriate standard and strikes the appropriate balance between the need to protect the national security in civil litigation and the need to protect the rights of litigants in cases that implicate national security information.

Specter 63 Do you agree there is a great benefit in having a uniform standard – including classified procedures – to allow for the evaluation of the state secrets privilege?

ANSWER: As noted in the response to Question 61, there already is a well-established, uniform standard to evaluate assertions of the state secrets privilege. Also, as noted in the response to Question 60, although it is not obliged to do so, it is the general practice of the Executive Branch to submit classified declarations and information to federal judges for *in camera*, *ex parte* review in cases in which the privilege is asserted to ensure that courts will be satisfied that information is subject to the state secrets privilege.

Specter 67 Do you believe that Congress has the constitutional authority to create National Security Courts to try cases against accused terrorists?

ANSWER: Yes.

Specter 68 If so, what procedural protections for both the accused and the Government's classified evidence would you recommend beyond what Congress already did in the Classified Information Procedures Act (Publ.L. 96-456, Oct. 15, 1980)?

ANSWER: The Department has not proposed the creation of a national security court, and this therefore is not a matter on which the Department has taken a position. The Department stands willing to work with Congress with respect to legislative proposals in this area.

Specter 69 If you still support congressional action to create National Security Courts, do you also believe that Congress has the constitutional authority to legislate a) procedures for invoking and reviewing state secrets privileges; and b) procedures governing the use of extraordinary renditions?

ANSWER: The Department has not examined the questions that you pose. As you know, the Department has separately addressed the state secrets legislation that has been introduced in the Senate in our views letter to the Committee, dated March 31, 2008.

Specter 80 Has the Department sought to study the relatively low 'failure to appear' rates in the criminal defendant context to see if methods and procedures could be applied to lower the 'failure to appear rates' for illegal aliens?

ANSWER: The Department has not commissioned a study to examine the 'failure to appear' of non-citizens, but would be willing to explore the possibility of such a study with the Committee. In the late 1970s and early 1980s, the Department's National Institute of Justice commissioned some studies on failure to appear rates, but these studies did not focus on illegal aliens.

Specter 81 The Department of Homeland Security's Inspector General reported in 2006 that, at the state and local level, a substantial number of deportable aliens are released rather than removed at the conclusion of their sentence because not enough is done to ascertain their immigration status. What systems are in place at the federal prison level to alert Immigration and Customs Enforcement (ICE) of criminal aliens in custody at federal prison?

ANSWER: The Bureau of Prisons (BOP) has established procedures at each of its institutions to notify Immigration and Customs Enforcement (ICE) about non-U.S. citizens in BOP custody. Most BOP institutions use a Detainer Action Letter (a notification or inquiry sent to a federal, state, or local jurisdiction requesting a formal action be lodged if that jurisdiction intends to place a release hold on an inmate) to notify ICE. Other BOP facilities have established specific procedures with their local ICE office to provide this information. These procedures include providing the local ICE office with rosters of non-U.S. citizens within the facility. In addition, ICE has access to the BOP's online inmate information system and has the ability to prepare lists of inmates by facility and to monitor these inmates' pending releases.

Because the BOP provides access to this information, ICE has the information it needs to place detainers on criminal aliens. If the BOP does not receive a detainer or response on a particular criminal alien from ICE prior to the inmate's release, as a matter of routine practice, the BOP will ordinarily follow up by contacting the local ICE office prior to releasing the inmate from custody.

Specter 82 How effective are these procedures in identifying and reporting criminal aliens?

ANSWER: The various methods implemented by the BOP have proven to be very effective in notifying ICE of criminal aliens in BOP custody. However, it remains the responsibility of ICE to review these cases to determine if a detainer will be lodged.

Specter 83 Could any of these procedures be implemented at the state and local level?

ANSWER: The Department of Homeland Security will need to determine whether the procedures that have been established between ICE and the BOP could be implemented at the state and local level.

Specter 84 A 2006 OIG report states that for want of detention space, 36% of undocumented aliens apprehended by the DHS Office of Detention and Removal (DRO) are released pending adjudication of their status, and 62% of them then fail to surrender for removal pursuant to a final order of the Executive Office of Immigration Review. Speeding the removal process would free up detention space to ensure undocumented aliens do not take advantage of the procedural process we offer them by absconding. Procedures already exist to speed up the process, but they are not utilized. 8 U.S.C. §1225, enacted during the Clinton administration, provides for expedited removal of any removeable alien who cannot establish 2 years of continuous presence in the United States. Aliens in expedited removal may be deported without further hearings or review unless they claim a fear of persecution if returned. Nevertheless, current regulations drastically limit the use of expedited removal applying it only to arriving aliens, those who arrived by sea, or those who are encountered within 100 miles of the border AND have not been in the U.S. for more than two weeks. Given the funding problems, the public calls for enforcement, and the high risk of flight, why are the DOJ and DRO not using expedited removal to the full extent allowed by law?

ANSWER: The Homeland Security Act of 2002 reorganized key immigration responsibilities within the Executive Branch. One of the key changes was to transfer many of the authorities relating to the removal of aliens from the Attorney General to the Secretary of Homeland Security. *See* Homeland Security Act of 2002, §§ 441(2), 442(a)(3), 451(b), 116 Stat. 2192, 2193, 2196, 6 U.S.C. §§ 251(2), 252(a)(3), 271(b) (2000 ed., Supp. II); *see also* 8 U.S.C. § 1103 (discussing responsibilities of Secretary of Homeland Security and Attorney General). This transfer included certain authorities under 8 U.S.C. § 1225(b) to remove without a hearing before an immigration judge aliens who do not claim asylum. Accordingly, the decision to expand the scope of the expedited removal program for aliens who do not claim asylum is generally entrusted to the Secretary of Homeland Security.

Specter 85 How quickly could the DOJ and ICE implement expedited removal to the full extent allowed by law?

ANSWER: Please see the response to Question 84.

Specter 86 Do you believe it would be possible to have criminal illegal aliens serve their sentences in their home countries and reimbursing those nations with SCAAP grant dollars? This approach has the advantage of lower cost incarceration abroad and renders moot the problem of recidivism upon release. The U.S. is already party to a treaty with Mexico providing for prison transfers but it requires the prisoner express consent. (See, 18 U.S.C. §§ 4100-4115) What types of offers do you think might be made to prisoners as an incentive to consent to transfer?

ANSWER: The Department understands the potential benefits of allowing criminal illegal aliens to serve their sentences in home countries with possible reimbursement with SCAAP grants. The Department is willing to work with Congress to examine the feasibility of such a program.

QUESTIONS FROM SENATOR KENNEDY

Kennedy 87 The nation was disgraced in the eyes of the world by the Bybee "torture memorandum," a 2002 legal opinion by the Office of Legal Counsel that defined torture so narrowly that it justified interrogation techniques widely recognized as illegal. As the memo stated: "Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." Anything short of this standard would not be torture, the memo said. CIA interrogators called the memo their "golden shield," because it allowed them to use virtually any interrogation method they wanted. The memo also created a commander-in-chief exception, which no legal authority had ever recognized. It stated that the President and the officials he directs are not bound by laws passed by Congress against torture. The memo also stated that officials can avoid prosecution for their acts of torture by invoking the defenses of "necessity" or "self-defense"—even though the Convention Against Torture, an international treaty ratified by Congress in 1994, states very clearly that "no exceptional circumstances whatsoever" may be invoked as a justification for torture. All of the arguments in the memo are morally repugnant, and they are also legally repugnant. The torture memo did not come to light until 2004, and when it did, it created worldwide outrage and condemnation. America lost its moral high ground in the fight against terrorism, possibly for years to come. We've been told that the Bybee memo was withdrawn at the end of 2004, but its legal reasoning has never been repudiated by the Administration. In addition, we've recently learned about two other secret "torture memos" issued by the Office of Legal Counsel in 2005. In your confirmation hearings before this Committee, you stated that "the Bybee memo, to paraphrase a French diplomat, was worse than a sin, it was a mistake. It was unnecessary." I agree wholeheartedly that the memo was a mistake, but I'm troubled that you didn't repudiate its contents explicitly. Nor did you do so in response to my written questions. Your statement that the Bybee memo was "unnecessary" leaves the alarming impression that you may actually agree with its legal reasoning. Dean Harold Koh of the Yale Law School has said that the Bybee memo was "perhaps the most clearly erroneous legal opinion I have ever read." He called it "a stain upon our law and our national reputation."
If you agree that the Bybee memo was legally erroneous, please explain why in as much detail as possible.

ANSWER: As the Attorney General made clear before his confirmation, he believes that the "Bybee memo" was a mistake, and the Department correctly withdrew the opinion in 2004. Among other matters, the Attorney General disagrees with the Bybee memo's interpretation of "severe physical pain or suffering" under the anti-torture statute, its understanding of the President's Commander in Chief authority, and its discussion of the necessity defense. After withdrawing the Bybee memo, the Office of Legal Counsel issued a memorandum in 2004 that "supersedes in its entirety" the 2002 memorandum. Memorandum for the Deputy Attorney General, from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Legal Standards Applicable Under 18*

U.S.C. §§ 2340-2340A (Dec. 30, 2004). The Department believes that this opinion sets out the correct interpretation of the anti-torture statute, and we have relied upon this opinion in our subsequent opinions in this area.

Kennedy 88 Do you agree or disagree with the memo's claim that "necessity" can justify the use of torture?

ANSWER: We disagree.

Kennedy 89 Do you agree or disagree with the memo's claim that "self-defense" can justify the use of torture?

ANSWER: We disagree.

Kennedy 91 As Attorney General, have you completely rescinded the Bybee memo? I want to learn exactly what steps you've taken to ensure that the legal analysis of the Bybee memo has been completely repudiated—not just sugarcoated or replaced with yet another secret memo, but totally and unambiguously repudiated.

ANSWER: As discussed in response to Question 87, the Department rescinded the Bybee memo and replaced it with the public Levin memorandum providing the Department's interpretation of the anti-torture statute. The Department has followed the standards set out in the Levin memorandum in all subsequent opinions addressing the anti-torture statute.

Kennedy 92 Waterboarding has become the worldwide symbol for America's debate over torture, and it became the centerpiece of your confirmation hearings after you refused to take a position on whether it's unlawful. In fact, even though you claimed to be opposed to "torture," you refused to say anything whatever on the crucial questions of what constitutes torture and who gets to decide the issue. Courts and military tribunals have consistently agreed that waterboarding is an unlawful act of torture, but you refused to say so. And then, in a letter sent to this Committee on January 29, you once again refused to state the obvious—that waterboarding has been, and continues to be, an unlawful act of torture. Your letter told us that the CIA does not currently use waterboarding, but that fact had already been disclosed. What your letter completely ignored is the fact that the CIA did use waterboarding, and no one is being held to account. In your letter, you wouldn't even commit to refuse to bring waterboarding back should the CIA want to do so. You would not take waterboarding off the table. Your letter also ignored the fact that the CIA continues to use painful stress positions, extreme sleep deprivation, and other techniques that are every bit as abusive as waterboarding—

techniques that the Department of Defense has rejected as illegal, immoral, ineffective, and damaging to America's global standing and the safety of our own servicemen and women overseas. Your refusal to rule out specific torture techniques harms America's global standing and breeds mistrust throughout the world. When America fails to draw clear lines on these techniques, it puts our own troops at risk. If we won't say whether it is unlawful for us to use sleep deprivation, waterboarding, and stress positions, then we increase the likelihood that other countries will use the same practices on us. Your evasive approach to torture has no benefit for our national security, but it has tremendous costs for your personal credibility and for the credibility of our government. This country needs an Attorney General who will say what the law is and who understands that America should be the world's leading voice against torture. In a recent interview with The New Yorker magazine, the Director of National Intelligence, Admiral Mike McConnell, stated: "If I had water draining into my nose, oh God, I just can't imagine how painful! Whether it's torture by anybody else's definition, for me [waterboarding] would be torture." At your oversight hearing on January 30, I asked, "Would waterboarding be torture if it was done to you?" and you replied, "I would feel that it was." When our Director of National Intelligence and our Attorney General both acknowledge that waterboarding would be torture for them, doesn't that call into question the soundness of any definition of torture that excludes waterboarding?

ANSWER: In his testimony, the Attorney General stated that if waterboarding were done to him he would feel that it was "torture" in the colloquial sense; at the same time, he made clear that his subjective feeling on this matter was quite different from providing a legal determination on whether such hypothetical conduct would violate the anti-torture statute. Similarly, we understand that Director McConnell has testified his comments were not intended to suggest legal views on the question. As the Attorney General explained in his testimony, waterboarding is not currently authorized for use in the CIA interrogation program and therefore may not be used. In the absence of concrete—rather than hypothetical—facts and circumstances that require the Attorney General's legal opinion, it would not be appropriate to give an opinion on the legality of waterboarding.

Kennedy 93 Several weeks ago, reporters asked you whether you were prepared to answer this Committee's questions on waterboarding. According to the Wall Street Journal, you said that your response to our questions would "aim at precision but never achieve clarity." This comment gave the troubling impression that you intended to provide answers which appear to be precise but are not actually clear. Why is it so difficult to "achieve clarity" in response to questions about something as important and as serious as torture?

ANSWER: Although we understand the strong interest in this question, we do not think it would be responsible to address a difficult legal question in the absence of concrete facts and circumstances. Because waterboarding is not among the practices currently authorized for use in the CIA program, it would not be appropriate to answer questions

concerning the legality of waterboarding absent a set of circumstances that call for those answers. It is precisely because this issue is so important, and the questions so difficult, that we cannot—and should not—provide answers to questions about circumstances that do not present themselves today, and may never present themselves in the future.

Kennedy 94 In your letter of January 29, you defended your refusal to answer our questions on waterboarding partly with the argument that to determine whether something is torture will depend on the "concrete facts and circumstances." Without knowing the facts and circumstances of a given case, you said, it would be irresponsible to give a legal opinion as to whether any specific interrogation technique violates our laws. The problem with this argument is that our laws against torture were designed so that some abusive practices would always be impermissible. Cruel, inhuman, and degrading treatment is always impermissible. If waterboarding isn't always cruel, inhuman, and degrading, then it's hard to see what is.Under what "facts and circumstances," exactly, would it be lawful to waterboard a prisoner?

ANSWER: As the Attorney General testified, waterboarding is not currently among those techniques authorized for use under the CIA program, and he has not had the occasion to decide whether the technique would be lawful under current law. Whether waterboarding would be legal for use in the CIA program would depend upon whether it complies with the anti-torture statute, the Detainee Treatment Act of 2005, the War Crimes Act, and Executive Order 13440. Some of those prohibitions, such as the anti-torture statute, are absolute and prohibit the proscribed conduct regardless of the government interest implicated.

Kennedy 95 Under what facts and circumstances would it be lawful to pull his fingernails out?

ANSWER: The War Crimes Act specifically prohibits acts of "mutilation or maiming" for individuals covered by the Act. The term "mutilation or maiming" is defined in the Act. *See* 18 U.S.C. § 2441(d)(1)(E). Executive Order 13440 likewise prohibits "acts of violence serious enough to be considered comparable to . . . mutilation." In addition, such a practice would almost certainly be considered done with an intent to cause severe physical pain, in violation of the anti-torture statute.

Kennedy 96 Under what facts and circumstances would it be lawful to sexually abuse him?

ANSWER: The War Crimes Act prohibits "sexual assault or abuse" for individuals covered by the Act. The term "sexual assault or abuse" is defined in the Act. *See* 18 U.S.C. § 2441(d)(1)(H). Executive Order 13440 likewise prohibits CIA personnel from engaging in all "sexual or sexually indecent acts undertaken for the purpose of

humiliation, forcing the individual to perform sexual acts or to pose sexually, [and] threatening the individual with sexual mutilation."

Kennedy 97 Under what facts and circumstances could the United States government lawfully bring back the rack and the screw?

ANSWER: Federal law specifically prohibits torture and cruel and inhuman treatment, and Executive Order 13440, which governs the CIA program, prohibits "acts of violence serious enough to be considered comparable to" torture and cruel or inhuman treatment. We would think that these provisions preclude the use of "the rack and the screw."

Kennedy 98 Are there any interrogation techniques that you would acknowledge are always illegal? If so, what are these techniques, and how do you draw the line between these techniques and those such as waterboarding that you do not categorically rule out?

ANSWER: Yes. For example, please see the responses to Questions 94 through 97. In addition, Executive Order 13440 sets out a non-exclusive list of acts that would be unlawful under any circumstances.

Kennedy 99 At the January 30 oversight hearing, in response to questioning from Senator Feingold, you appeared to say that you would not come to Congress to explain, in a classified setting, how it is that you came to conclude that the CIA's "enhanced interrogation program" is lawful in its entirety. Is it correct that you refused Sen. Feingold's request to provide such a briefing?

ANSWER: The Attorney General's response simply reflected the fact that he was not in a position to commit to the disclosure of classified information outside of the Intelligence Committees. The Administration has taken several steps to accommodate congressional oversight in this area. The Senate Select Committee on Intelligence has been fully briefed on all aspects of the CIA program, including the Department's legal analysis of interrogation techniques. More recently, in an extraordinary accommodation of Congress's oversight interest in this area, highly classified opinions concerning the CIA interrogation program were made available to both the Intelligence and the Judiciary Committees; with respect to this accommodation, certain sensitive information that pertained to sources and methods was redacted from the opinions made available to the Judiciary Committees.

Kennedy 100 Given that Congress enacted the laws against torture that you are now charged with interpreting and enforcing, I find it extremely troubling that you would prevent Congress from learning how you are doing so. How are we to know if the laws need to be revised, when the Justice Department will not even let us know how they are being applied?

ANSWER: Please see the response to Question 99.

Kennedy 101 How are we to exercise our oversight function?

ANSWER: Please see the response to Question 99.

Kennedy 102 If I have characterized correctly your answer to Sen. Feingold, it is hard to reconcile it with your repeated pledges during the confirmation process to work openly with this Committee on even the most sensitive of issues. One leading commentator observed that your answer to Sen. Feingold's question showed "disdain" for Congress and its constitutional role. On what grounds are you defending your apparent refusal to brief congressional committees, in a classified setting, on the CIA's interrogation program?

ANSWER: As noted, the Administration has fully briefed the Intelligence Committees on all aspects of the CIA's interrogation program. With respect to the Judiciary Committee, please see the response to Question 99.

Kennedy 104 Based on the information you now possess, have you ruled out the opening of an investigation into past practices relating to torture?

ANSWER: Please see the response to Question 103.

Kennedy 105 How can we say to the world that America doesn't use torture ever, under any circumstances, while you simultaneously try to preserve doubt and ambiguity on that very question?

ANSWER: To be clear: the United States does not authorize the use of torture under any circumstances. The Administration has consistently emphasized that torture violates both domestic and international law, and it is abhorrent to American values. There should be absolutely no ambiguity whatsoever on that point.

Kennedy 106 I'm disappointed that you seem determined to keep secret your interpretations of our laws against torture, and to avoid prosecution of anyone who may have violated them. Why, exactly, should Americans, members of Congress, and people around the world believe you are strictly interpreting and vigorously enforcing these laws, when you refuse to provide any public evidence that you are doing so?

ANSWER: The Department of Justice publicly released its interpretation of the federal statute prohibiting torture more than three years ago. In a December 30, 2004 opinion by the Office of Legal Counsel, the Department emphasized that: "Torture is abhorrent both to American law and values and to international norms. This universal repudiation of torture is reflected in our criminal law, for example, 18 U.S.C. §§ 2340-2340A; international agreements, exemplified by the United Nations Convention Against Torture; customary international law; centuries of Anglo-American law; and the longstanding policy of the United States, repeatedly and recently reaffirmed by the President." It is true that we are unable to reveal publicly the classified operational details of the CIA program, but the December 2004 OLC opinion is public in its entirety; it remains binding on the Executive Branch today; and all legal analysis of the CIA program since December 2004 has been consistent with that opinion and with the additional standards set by the Detainee Treatment Act of 2005, the Military Commissions Act of 2006, and Executive Order 13440.

Kennedy 108 Haven't these techniques and the Administration's interrogation policies been publicly discussed and debated for years?

ANSWER: No. The interrogation techniques in the CIA program have remained classified since its inception.

Kennedy 109 Haven't large numbers of detainees passed through our detention system in Iraq, Afghanistan, and the CIA's secret sites who could speak to the interrogation techniques we employ there?

ANSWER: No. The U.S. military interrogation techniques are published in the Army Field Manual, but the techniques available to the CIA are not. Fewer than one hundred terrorists have been detained by the CIA as part of this program since its inception in 2002. The CIA's alternative interrogation methods have been used with fewer than one-third of the terrorists who have ever been detained in this program, and certain of the methods have been used on far fewer still.

Kennedy 110 Hasn't the United States made a public, legal commitment in the Geneva Conventions and in our statutes to reject all forms of torture?

ANSWER: Yes.

Kennedy 111 More than three months ago, when we met in my office, I spoke with you about the need for the next Attorney General to undertake fundamental reforms in the Office of Legal Counsel. Too often in this Administration, important OLC opinions have been issued without the necessary review at the highest levels of the Department and by other affected agencies. Many of the opinions were not legally sound and have led us in the wrong direction. They formed the legal basis for the abuse of detainees, evasion of the Geneva Conventions, and trials of detainees by poorly conceived military commissions. We've been embarrassed in the eyes of the world and we've failed to hold terrorists accountable. The former head of the Office of Legal Counsel, Jack Goldsmith, recently stated that under this Administration, OLC "took shortcuts in its opinion-writing procedures" so as to "control outcomes in the opinions and minimize resistance to them." Mr. Goldsmith acknowledged that numerous OLC opinions were "deeply flawed: sloppily reasoned, overbroad, and incautious." It was remarkable. The head of OLC admitted publicly that the Office's opinions were "deeply flawed: sloppily reasoned, overbroad, and incautious"—yet, as far as we know, those opinions still have not been reviewed and rewritten in any systematic way. It was disturbing to learn last November that OLC issued two further secret opinions authorizing the use of extreme interrogation techniques in 2005, after it had publicly withdrawn the notorious Bybee torture memo. It's disappointing, to say the least, that we have to learn about these secret torture memos from the news. Before he was sidelined by the White House, Deputy Attorney General James Comey told his colleagues at the Justice Department that they would all be "ashamed" when the world eventually learned of these opinions. The world has now learned of them, and once again there's a scandal involving opinions of the Office of Legal Counsel, issued in secret, authorizing interrogation techniques widely believed by people outside the Department of Justice to violate laws against torture. 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, and last week the President nominated him again to lead OLC. It's 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 President's counsel, Harriet Miers, "decided to watch Bradbury for a month or two," according to a Justice Department official. The official said that Mr. Bradbury "was sort of on trial." The purpose of this tryout, it seems, was 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, which lasted almost 6 months, that Mr. Bradbury authored at least one and possibly both of the new torture memos that have just come to light. Do you agree that Stephen Bradbury was on a "tryout" before he was nominated to head the Office of Legal Counsel?

ANSWER: We do not believe that is the case, and indeed, the facts suggest otherwise. After a distinguished career in private practice, Mr. Bradbury came to the Office of Legal Counsel to serve as the number two attorney in the Office to both Jack Goldsmith and then to Acting Assistant Attorney General Daniel Levin. After serving in that role for a year, Mr. Bradbury was nominated to head the office as the Assistant Attorney General.

As you note, there was a period of about five months between Mr. Levin's departure and the President's nomination of Mr. Bradbury. That lag, however, is not surprising. Mr. Levin left at the beginning of the President's second term, which was a time of significant transition in which a new Attorney General had just been confirmed, a new White House Counsel had been appointed, and many other positions had to be filled at the Department and elsewhere in the Administration. As is typically the case, the President's decision to nominate an individual occurs some time before the nomination is actually transmitted, and the transmittal of the nomination then awaits the successful completion of a thorough background check. Accordingly, the transmittal of Mr. Bradbury's nomination to the Senate in June 2005 was the end of the nomination process, rather the beginning, and the timing of the nomination in no way supports the suggestion of a "trial period."

Finally, we would note that Mr. Bradbury made clear to the *New York Times*, and in subsequent statements, that no one ever suggested to him that his nomination would depend on how he ruled with respect to a particular opinion. Mr. Bradbury carries no agenda but his views of the law, and he does not hesitate to provide his candid views of what the law requires or prohibits. Mr. Bradbury is an exceptional and honorable lawyer who has served the Department and Nation admirably during his tenure in the Office of Legal Counsel.

Kennedy 112 What does that say about the relationship between the White House and the Department of Justice?

ANSWER: Please see the response to Question 111.

Kennedy 113 What does it say about the Administration's commitment to the rule of law when Justice Department officials are given a "tryout" to make sure that they will do exactly what the President wants, rather than follow the law?

ANSWER: Please see the response to Question 111.

Kennedy 114 I was heartened that during your confirmation hearings, you committed to review OLC's opinions. You stated: "I'm going to review the significant decisions of the Office of Legal Counsel, particularly those relating to national security, so as to make certain that they are sound." In your letter of

January 29, you stated that you have reviewed the legal analysis of the techniques currently authorized for use in the CIA's program. Does this mean you have reviewed all OLC opinions issued under this Administration on harsh interrogations?

ANSWER: As the Attorney General committed in his letter to the Committee, dated October 30, 2007, he has reviewed the Office of Legal Counsel opinions insofar as they concern practices that are currently authorized for use in the CIA's interrogation program. The Attorney General found those practices to be lawful, and found the Office's analysis and conclusions concerning those practices to be correct and sound. The Attorney General has not found it necessary to go further and to provide a definitive review of Office of Legal Counsel opinions, or portions of those opinions, that do not address matters currently before him.

Kennedy 115 If so, do you agree with all of these opinions?

ANSWER: The Attorney General found the analysis in the OLC opinions that he reviewed to be correct and sound.

Kennedy 116 Will you produce for the Committee the OLC opinions dealing with interrogation tactics? Your conclusion that waterboarding can be a lawful practice makes it difficult to accept your judgment on the lawfulness of other techniques. It is, therefore, extremely important for the Committee to see the OLC opinions, so that we can perform our oversight duties and modify the law, if necessary.

ANSWER: We respect Congress's oversight in this area, and we believe that this Administration has made substantial accommodations in recent months to accommodate those interests. Highly classified opinions concerning NSA surveillance activities have recently been made available to the Intelligence and Judiciary Committees of both Houses of Congress. As to the CIA's interrogation program, the Intelligence Committees have been briefed on both the classified details of and the legal basis supporting the program, and unclassified briefings also have been provided to Congress. Recently, the Administration further accommodated congressional interest by making available to the Intelligence Committees the classified OLC opinions on the CIA program. In addition, the Administration made available to the Judiciary Committees three of those opinions, with limited redactions necessary to protect intelligence sources and methods.

Kennedy 117 Would you be willing to conduct a briefing for the Committee on the contents of the OLC interrogation memos?

ANSWER: Please see the response to Question 116.

Kennedy 118 Have you revised or withdrawn any Office of Legal Counsel opinions that you found to be legally deficient, whether dealing with national security or other subjects?

ANSWER: No, the Attorney General has reviewed the Office of Legal Counsel's legal analysis of practices that are currently authorized for use in the CIA's interrogation program. The Attorney General has found those practices to be lawful and has found the Office's analysis and conclusions concerning those practices to be correct and sound.

Kennedy 119 When Janet Reno was Attorney General, she had a presumption in favor of public disclosure of OLC opinions, so that citizens and lawmakers could stay informed, and faulty opinions could be exposed. She also had a policy of consulting with relevant agencies about the substance of the opinions, because the agencies often have the most expertise. I believe that both of these policies should be brought back. We need a much more open and collaborative process to ensure that the nation is not damaged by more flawed OLC opinions. Will you restore the presumption in favor of public disclosure of OLC opinions?

ANSWER: The OLC opinion publication process reflects a commitment to a basic policy of openness in government, and it is the same process OLC has followed during prior administrations. OLC also regularly consults with other interested agencies in the preparation of its opinions. From 2005 to the present, OLC published 69 opinions, and more will be published shortly. In addition, we are making efforts to reduce the period of time between when an opinion is signed and when it is published.

This publication practice, however, does not diminish the interest that the Government may have in particular instances in preserving the confidentiality of other nonpublic OLC opinions. As recognized by *Principles to Guide the Office of Legal Counsel*, a statement of principles written by former OLC attorneys, "[t]here nonetheless will exist some legal advice that properly should remain confidential." Maintaining the confidentiality of OLC legal advice is often essential to the functioning of the Department, the President, and the Executive Branch. In 1993, Walter Dellinger, who was at that time the nominee to serve as Assistant Attorney General for the Office of Legal Counsel, provided the following response to a question from Senator Grassley:

> I share [the Attorney General's] commitment [to a basic policy of openness in government]. Openness promotes public confidence that the government is making its decisions through a process of careful and thoughtful reasoning. At the same time, I recognize that, in some types of cases, there are considerations weighing against the release of opinions. Some categories of documents, such as opinions on matters classified for reasons of national security, are especially sensitive. In addition, opinions may reflect legal advice given as part of the government's deliberative process, and protection of some of these opinions may be necessary to ensure that decisionmakers are willing to

> seek candid legal advice before they act. Opinions resolving inter-agency disputes are likely to be strong candidates for disclosure. Although government decisionmaking requires a certain measure of confidentiality, the government should not reflexively seek secrecy.

We agree with this statement from Assistant Attorney General Dellinger.

Kennedy 120 Will you ensure that OLC consults with lawyers in affected agencies in the drafting of OLC opinions?

ANSWER: The Office of Legal Counsel ordinarily does consult with affected agencies in drafting an opinion, and they are committed to continuing that practice.

Kennedy 121 At the oversight hearing, I commended you for taking a number of positive steps to investigate the destruction of the CIA interrogation tapes, including:

- **launching a full-scale criminal investigation;**
- **moving the investigation out of Main Justice;**
- **accepting the recusal of the Eastern District of Virginia's U.S. Attorneys office;**
- **appointing John Durham, a seasoned and respected prosecutor; and**
- **making the FBI the lead investigative agency.**

Each of these steps shows sensitivity to potential conflicts of interest and a desire for a meaningful investigation. But I'm troubled that you decided not to make Mr. Durham an independent counsel, to ensure against even the appearance of impropriety. You repeated to the press last week that you will not appoint an independent counsel. Many of us are increasingly convinced that appointment of an independent counsel is essential to give this investigation the full credibility it needs. We know that the Office of Legal Counsel issued opinions—including the discredited Bybee torture memorandum—that gave CIA interrogators the legal foundation for using abusive interrogation techniques. Even after the Bybee memo was exposed as legally and morally reprehensible and was withdrawn in late 2004, we've learned that OLC, under Stephen Bradbury, issued two new secret opinions that authorized the use of techniques like those depicted on the tapes. Obviously, OLC and the senior leadership of the Department will suffer further embarrassment if graphic depictions of these techniques ever become public. In addition, reports have surfaced that high-level Bush Administration lawyers, including Alberto Gonzales, were consulted about the destruction of the tapes. Mr. Gonzales was Attorney General for several months before the tapes were destroyed, and he may well have consulted with lawyers in the Justice Department about their destruction. The investigation will necessarily reach into the highest levels of the Department and the Administration. In fact, the Department is litigating cases in

which detainees have asked the Administration to produce evidence that may include the tapes, and the Department has opposed such requests. Recently, Judge Roberts of the U.S. District Court in D.C. ordered the Department to report in writing on the destruction of the tapes. In another case, the Department is defending the CIA in a lawsuit under the Freedom of Information Act for production of documents relevant to detainee abuse. Judge Hellerstein of the U.S. District Court in the Southern District of New York commented the other day that the CIA's claim to have no records of the tapes "boggles the mind."
The Justice Department is in the untenable position of resisting efforts to learn more about the destroyed tapes, while at the same time it is supposedly investigating the destruction of the tapes. It's a classic conflict of interest. Finally, the Administration's credibility on matters concerning torture stands at an all-time low. Your own confirmation was nearly derailed by your refusal to state the obvious—that waterboarding, which is one of the practices reportedly shown on the destroyed tapes, is torture. The conclusion is inescapable that we need an independent counsel to investigate and prosecute the destruction of the tapes. Do you continue to stand by your decision not to appoint an independent counsel?

ANSWER: Yes, we do not believe that the circumstances warrant the appointment of a Special Counsel under the Department's Regulations. As we have explained, the Attorney General has appointed John Durham, who has been designated for purposes of this investigation as the Acting U.S. Attorney for the Eastern District of Virginia, to lead this investigation. Mr. Durham is a widely respected and experienced career prosecutor who has supervised a wide range of complex investigations in the past, and the Attorney General has instructed him to follow the investigation wherever the evidence may lead.

Kennedy 122 If so, do you have in place a process for determining whether the appointment of an independent counsel may become necessary as the investigation progresses? Will you reconsider if new facts arise?

ANSWER: We do not believe that the circumstances warrant the appointment of a Special Counsel under the Department's regulations. Should new facts come to our attention, we of course will consider whether they warrant a different conclusion.

Kennedy 123 To whom does Mr. Durham report? Will he be required to expose specific investigative steps?

ANSWER: For purposes of this investigation, Mr. Durham functions as the Acting United States Attorney for the Eastern District of Virginia. Accordingly, he reports to the Deputy Attorney General. Mr. Durham's investigation will proceed in accordance with established Department policies on all matters related to his investigation.

Kennedy 124 Will he be required to obtain approval before seeking an indictment?

ANSWER: Please see the response to Question 123.

Kennedy 125 Over a month ago, I wrote you a letter—to which I never received a response—stating that this "investigation must also include an effort to recover and examine what was on the destroyed tapes. Surely, the content of the tapes may prove highly relevant in determining why the tapes were destroyed. If the conduct depicted on the tapes involved the commission of crimes, it, too, must be pursued. America's laws against torture are every bit as important as our laws against obstruction of justice, and they too deserve the vigorous enforcement that you pledged in your confirmation hearings. As in any truly independent investigation, the investigators must be allowed to follow the evidence wherever it leads and to bring any wrongdoers to justice." I understood from your testimony that you will allow the investigation to include the conduct shown on the tapes. Is that correct?

ANSWER: The Department is committed to conducting a comprehensive and impartial investigation into the CIA's acknowledged destruction of videotapes of certain interrogations of detainees. Mr. Durham is a widely respected and experienced career prosecutor who has supervised a wide range of complex investigations. He has been authorized to follow this investigation wherever the evidence leads.

That said, no one should expect Mr. Durham's investigation into the destruction of CIA tapes to encompass a review of past conduct approved as lawful by the Department. The lawfulness of conduct undertaken at the time in good-faith reliance upon the Department's advice can no more depend upon the retrospective views of a particular U.S. Attorney than it could on the views of a particular Attorney General. If our intelligence professionals rely in good faith on advice that they are given by the Department of Justice, they should not be subjected to criminal investigation for it. Accordingly, the CIA tapes investigation will proceed consistent with the Department's interpretation of governing criminal statutes, as well as with fundamental fairness to those government officials who relied on the Department's advice in the past.

Kennedy 126 Specifically, will investigators be permitted to consider whether the conduct shown on the tapes is torture? If so, will they be permitted to consider prosecution of anyone who engaged in torture?

ANSWER: Please see the response to Question 125.

Kennedy 127 If the investigation will not be covering the conduct on the tapes, does that mean you've decided that the conduct—including waterboarding—was lawful? If you haven't reached that conclusion, how can you prohibit investigators from looking into possible crimes?

ANSWER: The question whether to initiate an investigation into conduct that took place in 2002 and 2003 based upon advice provided by this Department cannot—indeed, must not—depend upon the retrospective views of the Attorney General in place years later. Before the CIA used this technique, the CIA sought advice from the Department of Justice, and the Department advised the CIA that its use would be lawful under the circumstances and within the limits and the safeguards of the program. If our intelligence professionals rely in good faith on advice that they are given by the Department of Justice, then they should not be subjected to criminal investigation for it. This principle recognizes that it would be unwise, and terribly unjust, to expose those who relied in good faith on those prior decisions to possible criminal penalties.

Kennedy 128 Will you make a public commitment that you will not prohibit the investigators from looking into possible crimes—and that you will authorize them to look into the conduct shown on the tapes? If you can't do that, aren't you ignoring possible evidence of torture?

ANSWER: Please see the response to Question 125.

Kennedy 129 I'm concerned about the partisan and ideological nature of the current Commission on Civil Rights. Press reports spotlight Republican Commissioners have changed their party affiliations to Independent in order to bypass the statutory requirement that no more than 4 of the eight Commissioners may be from the same political party. The Commission was created over fifty years ago to be the conscience of the country on civil rights matters, to shine a clear and impartial light on civil rights issues. The Commission's role in documenting discrimination in the right to vote led to the original passage of the Voting Rights Act of 1965 and several of its subsequent reauthorizations. But under the Bush Administration, the Commission has repeatedly failed to hold hearings on current civil rights issues, such as access to voting equipment, tactics to prevent minorities from voting, and the serious problem of hate crimes. The Commission has abandoned its fact-finding role and engages only in briefings that seem intended to advance a partisan agenda. The law governing the Commission was intended to ensure balance on the Commission – with four Republicans and four Democrats. But in December 2004, the Office of Legal Counsel issued an opinion stating that Republicans could switch their party affiliation to Independents to in order to be appointed to the Commission, even if there were already four Republicans members. Relying on this opinion, Commissioner Abigail Thernstrom and Commissioner Gail Heirot, both long-time Republicans, declared themselves independents shortly before their appointment. The non-partisan Congressional

Research Service recently reviewed the OLC opinion and concluded that "a reviewing court would [likely] find the OLC opinion unpersuasive and the recent appointments violative of the political balance requirements of the statute." Will you rescind the December 2004 opinion of the Office of Legal Counsel on party-switching by nominees to the Commission?

ANSWER: No, the Department will not rescind the opinion. The December 2004 opinion concludes that, under the plain terms of 42 U.S.C. § 1975(b) (2000), where a member of the Civil Rights Commission changes his or her party affiliation after the time of appointment, the statute calls for the President to consider that change in making future appointments to the Commission. *See* http://www.usdoj.gov/olc/2004/12062004_crcbalance.pdf. After careful review, we have concluded that this opinion correctly construes the statutory language and that its interpretation serves the purposes identified in the legislative history at least as well as the proposed alternative construction. Accordingly, it would not be appropriate to withdraw that opinion.

As you note, the Civil Rights Commission has eight members—four appointed by the President, two by the Speaker of the House, and two by the President pro tempore of the Senate. 42 U.S.C. § 1975(b). The statute provides that "[n]ot more than 4 of the members shall at any one time be of the same political party." *Id.* § 1975(b). The analysis by the Congressional Research Service referenced in your question suggests that, for purposes of section 1975(b)'s political balance requirement, a commissioner's party affiliation is fixed at the time of appointment and any later changes should not be taken into account. Memorandum for the Senate Committee on the Judiciary, from Morton Rosenberg, Specialist in American Law, American Law Division, Congressional Research Service, *Re: Political Balance Requirements at the United States Commission on Civil Rights* (Jan. 3, 2008). The CRS analysis, however, does not explain how that result can be squared with the language of the statute, under which no more than four members "shall at *any one time be* of the same political party." CRS argues that the legislative history conflicts with the December 2004 OLC opinion. Even assuming that the legislative history could overcome the plain language of the statute, *but see Ratzlaf v. United States*, 510 U.S. 135, 147-148 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear."), CRS cites nothing in the legislative history specifically discussing whether it is appropriate for an appointing authority to account for changes in existing commissioners' party affiliation. Instead, CRS points to general legislative history indicating that the Commission is to be independent.

CRS only expresses concern that, under the OLC opinion, commissioners may manipulate their party affiliations and thereby give rise to political imbalance. However, the alternative reading of the statute suggested by the CRS analysis does not provide better protection against manipulation through insincere changes in party affiliation. If party affiliation were fixed at the time of appointment, a prospective appointee could change his or her affiliation just before appointment to become an Independent, change that affiliation back immediately after appointment, and be counted throughout his or her term as an Independent for purposes of the political balance requirements. Indeed, that alternative interpretation would permit the scenario set forth in your question:

"Republicans could switch their party affiliation to Independent[] . . . in order to be appointed to the Commission, even if there were already four Republican[] members."

The interpretation set forth in the OLC opinion better serves interests in political balance in the event of sincere changes in party affiliation. Suppose, for example, that on a Commission composed of four Republicans and four Democrats, one of the Democratic commissioners made a sincere change of affiliation and became a Republican, and one of the other Republican members then resigned. Under the alternative reading suggested by the CRS analysis, the President would next have to appoint another Republican or an Independent and could not appoint a Democrat, even though the Commission would already have four Republicans and only three Democrats. The OLC opinion, however, would call for the appointment of a Democrat or Independent, thus better preserving the Commission's balance.

Sincere changes of party affiliation are well known among those in public life. For example, Senators Ben Nighthorse Campbell, James Jeffords, Richard Shelby, and Robert Smith, and Representatives Rodney Alexander, Nathan Deal, Virgil Goode, Phil Gramm, Robert Stump, and Billy Tauzin all changed their party affiliation while serving in Congress. Former Commission member Mary Frances Berry reportedly changed her party affiliation while on the Commission, identifying herself as an Independent beginning in the 1980s. News accounts indicate that one of the sitting Commissioners who changed her registration from Republican to Independent had, before her appointment to the Commission, registered both as a Democrat and as an Independent. Considering commissioners' changes in party affiliation in making new appointments is not only directed by the plain language of the statute—a point the CRS analysis does not appear to contest—but also better promotes interests in preserving the political balance of the Commission. We are not aware of a more persuasive alternative interpretation of section 1975(b). Accordingly, it would not be appropriate to withdraw the OLC opinion.

Finally, as suggested by the CRS Report, *see* CRS Report at CRS-11, Congress retains the authority to amend the terms of the statute if it wishes to make a Commissioner's party affiliation at the time of appointment controlling for purposes of presidential appointments under section 1975(b).

Kennedy 157 A report in December by the Justice Department's Office of the Inspector General brought to light serious problems in the Office of the Pardon Attorney. The head of the Office, Roger Adams, has been accused of mismanagement, and even worse, of racism in making decisions about pardon applications. The investigators also found that Mr. Adams threatened retaliation against those who made complaints about his management. Such behavior is reprehensible and undermines the purpose of the pardon process. Some of the complaints date back to 2001, and the office currently has a backlog of over 2,000 applications for clemency. Surprisingly, Mr. Adams was merely been shuffled to another position in the Department's management, even though the allegations are

very serious. Are you troubled by the situation in the Office of the Pardon Attorney?

ANSWER: An outstanding candidate has been selected for the position of Pardon Attorney. He began his new assignment on April 28, 2008. He is a current Department employee who began his Justice Department career in 1999 after retiring from the United States Marine Corps. For 16 of his 22 years in the Marines, he served as a judge advocate as well as in various capacities including stints as a prosecutor and as a defense counsel for military personnel, and also a stint as a military judge. Since joining the Department, he has been assigned to the Narcotics and Dangerous Drug Section within the Criminal Division. He began his service as a trial attorney in the Drug Intelligence Unit (DIU) and was then promoted to Deputy Director and then Director of the DIU. We are confident he will do an excellent job leading the Office of the Pardon Attorney.

As to the backlog, the Department receives over 1,000 new clemency petitions each year. For fiscal year 2007, the Department received 1,259 petitions. To give a historical perspective, this administration has already received more clemency petitions than any other administration in the 20th century except for President Franklin D. Roosevelt. The processing and evaluation of these cases takes significant time, and in many cases, several years. Under both the previous Administration and the current Administration, the Department has seen sharp increases in the number of clemency petitions received. Unlike prior administrations, however, the overwhelming number of petitions received in the last two administrations have been petitions for commutations of sentence. With the advent of guideline sentencing and the elimination of parole, commutations can be the only way for many prisoners to be released early; however, a commutation of sentence remains an extraordinary form of relief that is rarely granted.

You are correct that Mr. Adams was detailed to another Department component. However, since that time he has retired from government service.

Kennedy 159 What steps will you take to guarantee that clemency applications are processed fairly and efficiently?

ANSWER: Clemency applications which are submitted to the Office of Pardon Attorney go through a multi-step review before they are forwarded to the White House for the President's consideration. An outstanding candidate has been selected for the position of Pardon Attorney. His new assignment began on April 28, 2008. (For more details about the candidate's background, please see the response to Question 157, above.) We fully expect the new director will respect the review process while also ensuring, through the review process, that all applications will be processed fairly and efficiently. In the application subject to the Inspector General's Report, in an abundance of caution, the Department is conducting a de novo review of the application. It is worth noting, the Inspector General's Report found a sufficient basis for denying the clemency application.

QUESTIONS FROM SENATOR BIDEN

Biden 167 During your Senate confirmation hearing you pledged to review significant OLC decisions to ensure that such decisions are "sound, soundly reasoned, and soundly based." A recent opinion issued by the Congressional Research Service found no legal basis for a 2004 OLC memo interpreting the statute governing appointments to US Commission on Civil Rights. The 2004 OLC memo misconstrues the statutory requirement protecting US Commission on Civil Rights' independence and bipartisanship by allowing the President to appoint as many commissioners of the same political party as he chooses as long as the sitting commissioners switch from Republican to Independent prior to presidential appointments. In sum, the OLC opinion sanctions political manipulation of the appointment process to an independent commission. It violates the plain language of the statute which governs the appointment process to the Commission and clearly states that no more than four members of Commission shall be of the same political party. Given your promise to ensure that OLC opinions are soundly based, will you withdraw this clearly unsound OLC opinion?

ANSWER: No, the Department will not rescind the opinion. The December 2004 opinion referenced in your question concludes that, under the plain terms of 42 U.S.C. § 1975(b) (2000), where a member of the Civil Rights Commission changes his or her party affiliation after the time of appointment, the statute calls for the President to consider that change in making future appointments to the Commission. *See* http://www.usdoj.gov/olc/2004/12062004_crcbalance.pdf. As explained in the response to question 129, we have concluded after careful review that the December 2004 OLC opinion correctly construes the statutory language and that its interpretation serves the purposes identified in the legislative history at least as well as the proposed alternative construction.

Biden 179 In a letter you sent to members of the Judiciary Committee before your appearance on January 30, 2008, you stated that you would refrain from stating whether waterboarding was illegal under US law. You said that, "it is not an easy question. There are some circumstances where current law would appear clearly to prohibit the use of waterboarding. Other circumstances would present a far closer question." When I asked you whether "torture" was a relative question, you noted that under the Detainee Treatment Act, the legality of certain interrogation methods would be analyzed under the "shocks the conscience" standard, which you said was "essentially a balancing test of the value of doing something as against the cost of doing it." Is the Department of Justice's position that whether waterboarding is legal in a particular circumstance is determined by using the "shocks the conscience" standard? Please explain.

ANSWER: As the Attorney General testified, waterboarding is not currently among those techniques authorized for use under the CIA program, and he has not had occasion to decide whether the technique would be lawful under current law. Whether

waterboarding would be legal for use in the CIA program would depend upon whether it complies with the anti-torture statute, the Detainee Treatment Act of 2005, the War Crimes Act, and Executive Order 13440. Some of those prohibitions, such as the anti-torture statute, are absolute and prohibit the proscribed conduct regardless of the government interest implicated.

In the Attorney General's testimony, he referenced the Detainee Treatment Act's prohibition on "cruel, inhuman, or degrading treatment or punishment." This standard incorporates the Fifth Amendment's substantive due process prohibition on conduct that "shocks the conscience," which the Supreme Court has held to require consideration of the governmental interest at stake. In *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), the Court observed that "our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking." *Id.* at 850. As the Supreme Court explained, a court first must consider whether the conduct is "arbitrary in the constitutional sense," a test that asks whether the conduct is proportionate to the governmental interests involved. *Id.* at 847. In addition, the court must conduct an objective inquiry into whether the conduct at issue is "egregious" or "outrageous" in light of "traditional executive behavior and contemporary practices." *Id.* at 847 n.8.

Biden 182 The administration recently announced its plan to renominate Steven Bradbury to be the Assistant Attorney General for the Office of Legal Policy. As you know, the Senate previously opposed his nomination because of his role in establishing the administration's torture policy. As revealed in the New York Times on October 4th of last year, Mr. Bradbury authored several legal memoranda that authorized the continued use of so-called "enhanced interrogation techniques" against detainees after Congress passed the Detainee Treatment Act of 2005, which banned the practice. Have you reviewed the Office of Legal Counsel opinions that Mr. Bradbury has contributed to that relate to the legality of interrogation practices?

ANSWER: We are aware that individual Senators have expressed concerns about Mr. Bradbury's nomination. With respect to your question, the Attorney General has reviewed the Office of Legal Counsel opinions insofar as they concern interrogation practices that are currently authorized for use in the CIA's interrogation program. He has found those practices to be lawful, and has found the Office's analysis and conclusions concerning those practices to be correct and sound.

Biden 183 Do you agree with Mr. Bradbury's analyses on this subject?

ANSWER: The Attorney General has reviewed the Office of Legal Counsel's legal analysis of practices that are currently authorized for use in the CIA's interrogation program. The Attorney General has found those practices to be lawful and has found the Office's analysis and conclusions concerning those practices to be correct and sound.

Biden 184 To assist in Mr. Bradbury's confirmation process, will you make these legal opinions available to the committee for review?

ANSWER: In an extraordinary accommodation of Congress's oversight interest in this area, highly classified opinions concerning the CIA interrogation program were made available to both the Intelligence and the Judiciary Committees; with respect to this accommodation, certain sensitive information that pertained to sources and methods was redacted from the opinions made available to the Judiciary Committees.

QUESTIONS FROM SENATOR FEINSTEIN

Feinstein 188 You testified that the telephone companies who cooperated with the Terrorist Surveillance Program "have been compliant with the law." As you are aware, 18 U.S.C. Section 2511(2)(a)(ii)(B) states that a provider is authorized to provide assistance if the provider has received a certification from a proper authority "that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required." Have you reviewed all of the requests for assistance that were sent to the telecommunications providers?

ANSWER: We have considered a variety of information, including requests for assistance sent to telecommunications providers, in concluding that providers who cooperated with the Terrorist Surveillance Program complied with the law and should be afforded liability protection.

Feinstein 189 Is it your opinion that each of the requests complied fully with the requirements of 18 U.S.C. Section 2511(2)(a)(ii)(B)?

ANSWER: The Department cannot comment on that question in an unclassified setting in light of the state secrets privilege assertion in ongoing litigation concerning this very issue. The Department already has provided the Members of the Senate and House Intelligence and Judiciary Committees with classified briefings and documents on this matter.

Feinstein 190 Is it your belief that there were other laws besides 18 U.S.C. Section 2511 that would have authorized the alleged assistance? If yes, please identify such laws.

ANSWER: As you note, 18 U.S.C. § 2511(2)(a) may provide such authorization. That statute also provides that no cause of action shall lie when a person who provided the assistance received a court order or a certification. In addition, in its January 2006 public white paper, the Department set forth its position that statutory authority for the Terrorist Surveillance Program was provided by the Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (Sept. 18, 2001) (reported as a note to 50 U.S.C.A. § 1541). The Department's classified legal opinions regarding that program have been provided to the Senate and House Intelligence and Judiciary Committees.

Feinstein 191 The New York Times reported last fall that although the so-called Bybee memo on torture was rescinded in late 2004, DOJ's Office of Legal Counsel (OLC) issued two secret memos on interrogation techniques in 2005. Those memos reportedly endorsed physical abuse and simulated drowning. James Comey (then the Deputy Attorney General) said that DOJ would be "ashamed" when the world learned of the memos. Are the policies contained in those secret memos the current policy of the Administration?

ANSWER: Without accepting as true the *New York Times* article's characterization of Mr. Comey's views, we are not able to comment on the Department's internal deliberations over these classified matters. As reported in that article, the remark allegedly attributed to Mr. Comey supposedly was associated with an opinion addressing the lawfulness under the anti-torture statute of the CIA's use of a combination of interrogation techniques. The Department has disclosed that the Office of Legal Counsel issued three classified opinions relating to the CIA program in May 2005. [In advising the CIA about the lawfulness of its proposed interrogation methods, OLC considered the methods both individually and in their combined use. OLC concluded that its legal review should consider how the proposed methods were intended to be used in practice, in order to ensure that their combined use would not exceed what the law permits. If OLC had addressed the interrogation methods only individually, in isolation, and failed to address the overall way they were actually expected to be used in a typical interrogation, OLC's legal advice would have risked being artificial and incomplete. Giving incomplete advice would have been irresponsible and unfair to the people who were relying on OLC's advice.

With respect to your question about current policies, the classified OLC opinions were fully consistent with the Department's public December 30, 2004 opinion interpreting the anti-torture statute and the 2005 opinions reaffirmed that torture is abhorrent to American law and values and is not to be condoned or encouraged in any way. The Attorney General has reviewed the 2005 opinions insofar as they address interrogation practices currently authorized for use in the CIA program, and he found them to be correct and sound. These opinions have recently been made available to both the Intelligence and the Judiciary Committees; with respect to this accommodation, certain sensitive information that pertained to sources and methods was redacted from the opinions made available to the Judiciary Committees.

Feinstein 192 Have the two memos been rescinded?

ANSWER: No.

Feinstein 193 Have you ordered new memos to be issued?

ANSWER: No.

Feinstein 194 Admiral Michael McConnell, the Director of National Intelligence, testified in open session before the Senate Select Committee on Intelligence on February 5, 2008 that he believed the OLC opinions on interrogation techniques should be provided to the oversight committees. Will you provide them?

ANSWER: We believe that the Administration has made substantial accommodations in recent months to accommodate Congress's interest in these matters. As you know, the Intelligence Committees have been briefed on both the classified details of and the legal basis supporting the program and unclassified briefings also have been provided to Congress. Recently, the Administration made an additional, extraordinary accommodation of congressional interest in this area by making available to the Intelligence Committees the classified OLC opinions on the CIA program. In addition, the Administration made available to the Judiciary Committees three of those opinions, with limited redactions necessary to protect intelligence sources and methods.

Feinstein 195 Defense Secretary Robert Gates, Chairman of the Joint Chiefs Admiral Michael Mullen, and former Secretary of State Colin Powell are among the senior Bush Administration officials who have called for the detention facility at Guantanamo Bay to be closed. And it is my understanding that the U.S. military thinks it is now feasible to close Guantanamo. For example, there are about 275 detainees currently at Guantanamo and there are reportedly enough beds to house all of them at the naval brig in Charleston, South Carolina – which has already handled enemy combatants such as Jose Padilla. How many Guantanamo detainees can be repatriated?

ANSWER: Our understanding is that the Department of Defense does not believe that any existing military detention facility has the capacity to hold these detainees under the security conditions necessary to ensure the safety of U.S. personnel. With respect to the question of how many detainees may be repatriated, the United States has repatriated well more than half of the enemy combatants who have been detained at Guantanamo Bay. Of those who remain, the United States has designated approximately 60 detainees for transfer, provided that their home countries or third countries will accept them and subject to assurances of humane treatment. Also, where appropriate, the United States seeks security-related assurances before repatriation. With respect to the remaining detainees, we would refer you to the Department of Defense for more information as to how many it may be possible to repatriate in the future.

Feinstein 196 How many detainees cannot be repatriated?

ANSWER: Department of Defense prosecutors have stated that approximately 80 enemy combatants are likely to be prosecuted by military commission, and therefore we are not seeking to repatriate them. We would direct you to the Department of Defense for additional details as to whether others may be repatriated.

QUESTIONS FROM SENATOR FEINGOLD

Feingold 198 When I asked you whether telephone companies should be expected to comply with 18 U.S.C. § 2511, which prohibits telephone companies from complying with government requests for assistance unless the company receives a court order or a proper certification, you responded that "[t]he telephone companies have been compliant with the law." Section 2511(2)(a)(ii) of title 18 expressly grants immunity to companies that comply with the court order/certification requirement. If it is in fact the case that the telephone companies complied with the law, as you state, they are already immune from suit. Why does Congress need to pass a law to grant telephone companies immunity if they already have it?

ANSWER: As explained previously, under current law a company cannot invoke a certification defense in litigation, and a court cannot rule on such a defense, without disclosing state secrets. Nor can a company assert, or a court rule on, a defense that no assistance was provided. That is because, among other reasons, the identity of any company that assisted with classified intelligence activities, and the nature of any such assistance, remains highly classified. As the Senate Intelligence Committee stated in its report on S. 2248, "the identities of persons or entities who provided assistance to the U.S. Government are protected as vital sources and methods of intelligence," and it would be "inappropriate to disclose the names of the electronic communication service providers from which assistance was sought, the activities in which the Government was engaged or in which providers assisted, or the details regarding any such assistance." The Committee further recognized that private entities have been precluded "from taking advantage of existing immunity provisions" because of the state secrets problems. Accordingly, telecommunications providers are unable to defend themselves against numerous lawsuits pending in the federal courts.

The bipartisan Senate immunity provision would allow the resolution of the issue in litigation without the disclosure of state secrets. In addition, it is narrowly targeted at the current litigation and is designed to provide immunity specifically for those cases. Thus, an action may be dismissed under the Senate bill only if the Attorney General certifies to the court that either (1) the company did not provide the alleged assistance; or (2) the assistance was provided in connection with a communications intelligence activity authorized by the President between September 11, 2001, and January 17, 2007, designed to detect or prevent a terrorist attack (or activities in preparation for a terrorist attack) against the United States, and described in a written request from the Attorney General or head of an element of the Intelligence Community (or deputy of such person) indicating that the activity was authorized by the President and determined to be lawful. A court must review the Attorney General's certification before an action may be dismissed, and the immunity does not extend to Government officials or criminal conduct.

Providing this liability protection is critical to the national security. First, it will prevent the disclosure of national security information in litigation. Second, as the Director of National Intelligence and the Attorney General have explained, we have experienced significant difficulties in working with private sector companies because of the continued failure to provide such liability protection. Exposing the private sector to the continued risk of multibillion-dollar class action suits for allegedly assisting in efforts to defend the country understandably makes company counsel much more reluctant to cooperate and much more inclined to litigate our requests for assistance—thereby delaying the surveillance we are requesting—in order to insulate their companies and shareholders from liability. Without their cooperation, our efforts to protect the country cannot succeed. As the Senate Intelligence Committee recognized, "the Intelligence Community cannot obtain the intelligence it needs without assistance from these companies." The Committee also concluded that "without retroactive immunity, the private sector might be unwilling to cooperate with lawful Government requests in the future without unnecessary court involvement and protracted litigation," and the "possible reduction in intelligence that might result from this delay is simply unacceptable for the safety of our Nation."

Feingold 199 Even assuming there was some value in Congress enacting yet another provision to immunize companies that complied with the law, the immunity provision that the Senate is currently considering contains no requirement that companies have complied with 18 U.S.C. § 2511 in order to receive immunity. Would you support amending the provision to provide immunity only to those companies that complied with 18 U.S.C. § 2511?

ANSWER: No. After conducting an extensive study of the issue and the underlying classified information, the Senate Intelligence Committee concluded that the companies that provided assistance acted in good faith and are entitled to protection from civil suit in this unique historical circumstance. Moreover, as explained above, the Committee also found that immunity is critical for the protection of national security. Having reached such determinations, there is no reason to condition immunity on compliance with the particular requirements of 18 U.S.C. § 2511(2)(a)(ii). Ultimately, resolution of that narrow question does not change the fact that immunity is both the just and fair result and in the best interest of the national security.

Feingold 201 Your January 29, 2008, letter to Chairman Leahy described the process by which new interrogation techniques may be added to the CIA interrogation program. That process includes a step in which you must determine whether the proposed technique would be lawful. Will you commit to informing the full membership of the relevant committees of Congress of your view of the legality of any new techniques before they are implemented?

ANSWER: As the Attorney General has testified, there is a defined process by which a technique should be considered for use in the CIA interrogation program, one step of which would require the Attorney General's analysis of the lawfulness of the technique under the circumstances and limits proposed. The Attorney General committed that he would notify the Judiciary Committee if waterboarding is ever again authorized for use in the CIA program. With respect to any other proposed technique, the Intelligence Committee has been briefed on the classified details of the CIA program, including the Department's legal analysis, and we would expect that the Committee would be notified should there be any additions to the program in the future.

Feingold 202 If your answer to the above question is anything other than "yes," when would you propose to provide to Congress your views on any newly-added techniques?

ANSWER: Please see the response to Question 201.

Feingold 203 I asked you whether you would come to Congress and, in a classified setting, provide a detailed explanation of your conclusion that the particular techniques included in the CIA interrogation program are lawful. You indicated that you would not do so, because "[t]he view that I have of the details of the program is embodied in classified letters," and that these letters "explain it far beyond my ability to do it . . . in a session with Congress where I'm not sitting with the authorities in hand and with the people at hand to do that review, which has been done in the letters." What are the "classified letters" to which you were referring?

ANSWER: The Attorney General was referring to the OLC opinions concerning the CIA interrogation program.

Feingold 204 If these letters have not yet been provided to the Intelligence or Judiciary Committees, will you provide them in a classified setting? If your answer is no, please set forth in detail the legal basis for your withholding of these letters.

ANSWER: The Administration has made substantial accommodations in recent months to accommodate Congress's interest in these matters. The Intelligence Committee has been briefed on both the classified details of and the legal basis supporting the program, and unclassified briefings also have been provided to Congress. Recently, the Administration took an additional, extraordinary step by making available to the Intelligence Committees the classified OLC opinions on the CIA program. In addition, the Administration made available to the Judiciary Committees three of those opinions, with limited redactions necessary to protect intelligence sources and methods.

Feingold 205 As you pointed out in your January 29, 2008, letter, it is ultimately your responsibility, as the Attorney General of the United States, to determine whether interrogation techniques employed by the government are lawful. Moreover, in your confirmation hearings, you testified that you would conduct an independent review of the lawfulness of any currently approved interrogation techniques. In light of these facts, it is puzzling that you take the position that you cannot explain the basis for your conclusions to Congress because your explanation would be less authoritative than, or might somehow differ from, the review done by others in the "classified letters" you reviewed.

ANSWER: Respectfully, we do not believe that is the Attorney General's position. As he had committed, the Attorney General conducted his own review of the techniques currently authorized for use in the CIA program, and determined that those techniques are lawful and that the Department's analysis of those matters was correct and sound. The Department has explained its legal views with respect to the classified techniques to the Intelligence Committee. We are unable to discuss those classified details, however, in a public setting.

Feingold 206 In my letter to you dated December 10, 2007, I requested that you provide any current or past legal analyses of the CIA's interrogation program, such as Office of Legal Counsel memoranda. I have not received a response to this request. Will you provide those analyses? If your answer is no, please set forth in detail the legal basis for your withholding of these memoranda.

ANSWER: Please see the response to Question 204.

Feingold 207 You testified that senior advisers to the President who claim executive privilege in response to subpoenas from Congress are "immune" from contempt prosecutions. You also testified that this "immunity" is granted by the President. Please provide legal authority for your claim that the President may immunize executive officials from contempt proceedings.

ANSWER: The Department's views on this matter are well established. For a recent discussion of the Department's position and the relevant authorities, we would refer you to the Attorney General's February 29, 2008 letter to Speaker Pelosi, as well as the Department's July 24, 2007 letter to Chairman Conyers. Copies of both letters are attached.

Feingold 208 You've previously indicated that the rationale for the Department of Justice refusing to undertake contempt prosecutions in these cases is that the advisers relied on the President's invocation of the privilege. Under that rationale, the President, not the adviser, would be directly responsible for any non-compliance with the subpoena. And, of course, refusing to comply with a subpoena in the

absence of a valid privilege claim is unlawful. Does the current law allow Congress to refer the President for contempt prosecution where he improperly invokes executive privilege to prevent an adviser from responding to a Congressional subpoena? If not, do you agree that the law should be amended to allow such a referral?

ANSWER: The plain text of the criminal contempt of Congress statute only authorizes referrals of individuals for prosecution who themselves have been subpoenaed. *See* 2 U.S.C. § 192. Here, the individuals subpoenaed declined to provide information based on an assertion of executive privilege by the President that the Department of Justice had previously determined was legally proper. Amending the statute to allow Congress to make a criminal referral of the President for "improperly" invoking executive privilege and directing a subordinate not to comply with a subpoena would raise serious constitutional questions.

Feingold 209 As you know, the individual who ordinarily would be responsible for investigating the destruction of the CIA interrogation tapes is the United States Attorney for the Eastern District of Virginia. However, he recused himself for unspecified "conflicts," and the investigation is being conducted instead by First Assistant United States Attorney for the District of Connecticut, John Durham. In the absence of any public explanation of what "conflicts" presented ordinary procedures from being followed, it could appear to the public that the Department was simply shopping for an investigator it preferred. When Chairman Leahy asked you about the details of the recusal request, you stated, "I'm not going to get into the details." What was the basis of your refusal to answer Chairman Leahy's question?

ANSWER: The Department has a strong interest in maintaining the confidentiality of internal deliberations on matters such as this, particularly where they related to an ongoing criminal investigation. As the Attorney General stated during his testimony, "Facts [in the recusal request] were teased out in such a way as to present the possibility that there could be a conflict." Furthermore, the Department noted in announcing the appointment of Mr. Durham as Acting United States Attorney for the Eastern District of Virginia for the purpose of investigating the CIA's destruction of interrogation tapes, that the United States Attorney's recusal request was granted out of an abundance of caution, in accordance with Department of Justice policy, in order to avoid any possible appearance of a conflict with other legal matters handled by that office.

Feingold 210 It is critically important that there be public confidence in the outcome of this investigation. To avoid any appearance that the recusal of the United States Attorney was based on political or other improper considerations, please specify the nature of the "conflicts" that led to the recusal.

ANSWER: We can assure you that the recusal was not based on political or other improper considerations. Please see the response to Question 209.

Feingold 211 Chairman Leahy asked you why John Durham wasn't given the kind of authority that Special Counsel Patrick Fitzgerald was given in the investigation into the leak of CIA agent Valerie Plame's identity. You responded, "There's a regulation regarding when you appoint a special counsel and when you don't. You appoint a special counsel when there's a conflict." In fact, however, Mr. Fitzgerald was not appointed under that regulation. Instead, Acting Attorney General James Comey invoked 28 U.S.C. § 510 to delegate the full powers of the Attorney General to Mr. Fitzgerald in connection with the investigation. This was done for the express purpose of freeing Mr. Fitzgerald from the restrictions imposed by the special counsel regulations, in particular, the requirement that the special counsel report to the Attorney General and obtain his approval for certain investigatory steps. The decision to invoke 28 U.S.C. § 510 and thus ensure Mr. Fitzpatrick's independence was widely hailed as an important step toward safeguarding the integrity of the investigation. Will you agree to do the same for Mr. Durham's investigation of the destruction of the tapes?

ANSWER: The Department is committed to conducting a comprehensive and impartial investigation. The Attorney General named Mr. Durham as the Acting United States Attorney for the Eastern District of Virginia for the purposes of investigating the CIA's acknowledged destruction of tapes of interrogations. As such, he has at his disposal all resources available to any United States Attorney to enable him to complete his investigation. Like all United States Attorneys, Mr. Durham will report to the Deputy Attorney General and to the Attorney General.

Feingold 224 Government officials, as well as declassified documents issued in response to a FOIA request, have recently confirmed that both the CIA and the Pentagon have issued national security letters to obtain financial records from financial institutions here in the United States. Executive Order 12,333 places primary responsibility for domestic intelligence gathering with the FBI, and limits the ability of other intelligence agencies to spy domestically.What role should the CIA and military intelligence agencies play with respect to domestic intelligence gathering operations? If other intelligence agencies need information on Americans, would it be preferable for them to ask for follow-up from the FBI, which has the expertise and appropriate safeguards in place to conduct domestic operations?

ANSWER: Various federal agencies are authorized by statute to use national security letters to obtain certain types of information. For example, 50 U.S.C. § 436 provides, among other things, that "[a]ny authorized investigative agency may request . . . financial records, other financial information, and consumer reports as may be necessary in order to conduct any authorized law enforcement investigation, counterintelligence inquiry, or security determination" under certain specific circumstances. Whereas NSLs issued by the FBI are compulsory in nature, NSLs issued by other agencies, such as the CIA or DoD, are voluntary in nature (with the exception of NSLs issued pursuant to 15 USC § 1681v). In other words, the agencies can make the requests, but the receiving institution

is not obligated to respond. *See* 50 U.S.C. § 436(a)(1). Other national security letter authorities, for example, require the Federal Bureau of Investigation to make such requests. *See, e.g.*, 18 U.S.C. § 2709. These statutes, among others generally referred to as national security letter statutes, permit appropriate agencies to obtain information related to their authorized responsibilities.

Pursuant to Executive Order 12333, the Central Intelligence Agency is required to coordinate its "collection of foreign intelligence or counterintelligence within the United States . . . with the FBI as required by procedures agreed upon by the Director of [National] Intelligence and the Attorney General." *See* Executive Order 12333 § 1.8(a). Similarly, the Department of Defense is required to coordinate its "counterintelligence activities . . . within the United States . . . with the FBI pursuant to procedures agreed upon by the Secretary of Defense and the Attorney General." *See* Executive Order 12,333 § 1.11(d). The procedures required by Executive Order 12333 are designed to ensure appropriate deconfliction of activities by these agencies and appropriate protection of the privacy and civil liberties of Americans.

Feingold 225 Do you have any concerns about a situation in which the CIA or the Defense Department might issue an NSL to the same financial institution that the FBI works with regularly? Do these coextensive authorities present the opportunity for confusion for the institutions that might receive them, for example if they receive overlapping requests?

ANSWER: As noted in response to Question 224, the national security letter statutes permit appropriate agencies to obtain information related to their authorized responsibilities. The financial institutions and other entities that are authorized to provide information pursuant to these statutes regularly provide information to appropriate federal government agencies under various provisions of existing law. If financial institutions receive similar or identical information requests from more than one agency, they would simply respond to them separately.

Feingold 227 Does the Justice Department provide any legal review of particular NSLs issued by these other agencies, or get notice when the CIA or Defense Department issues NSLs?

ANSWER: Requests made pursuant to national security letter provisions are generally required to be accompanied by written certifications by senior officials within the agency authorized to make such requests to ensure that particular legal requirements are met. For example, 50 U.S.C. § 436 requires a request under that section to be "accompanied by a written certification signed by the department or agency head or deputy department or agency head concerned, or by a senior official designated by the department or agency head concerned (whose rank shall be no lower than Assistant Secretary or Assistant Director)" certifying that particular requirements of that statute are met. *See* 50 U.S.C. § 436(a)(3). As such, each agency authorized to use such authority is required to certify,

through an appropriate senior official, that the particular statutory requirements have been satisfied. The Department of Justice is not required under these statutes to review such determinations by these officials nor is the Department required to be notified of such requests made pursuant to statutory authority. As noted above, pursuant to Executive Order 12333, both the Central Intelligence Agency and the Department of Defense are required to coordinate certain intelligence activities within the United States with the FBI pursuant to procedures agreed upon by the relevant cabinet members and the Attorney General.

QUESTIONS FROM SENATOR SCHUMER

Schumer 231 On three occasions during your confirmation process, you assured me that you would undertake a review of existing opinions of the Office of Legal Counsel. I asked you in a private meeting, during your confirmation hearing, and in written questions, whether you would re-examine legal opinions relating to the Terrorist Surveillance Program, detention, interrogation, and torture. On these occasions, you assured me that you would undertake such a review and withdraw any opinions that you found to be legally unsustainable. You have also assured me that when you completed your review of operative OLC opinions you would take steps to make it known to Congress if appropriate. Have you completed such a review and re-examination of OLC opinions related to the Terrorist Surveillance Program, and policies of detention, interrogation, and torture?

ANSWER: As the Attorney General stated in advance of his January 31, 2008, hearing before the Senate Judiciary Committee, he reviewed the Department's legal advice concerning those practices that are currently authorized for use in the CIA's program. He found those practices to be lawful, and found the Department's analysis and conclusions concerning those practices to be correct and sound. The Attorney General has not found it necessary to go further and to provide a definitive review of Office of Legal Counsel opinions, or portions of those opinions, that do not address matters currently before him.

Schumer 232 If you have completed the review, have you directed that any OLC opinions be corrected and/or withdrawn?

ANSWER: No, the Attorney General has reviewed the Office of Legal Counsel's legal analysis of practices that are currently authorized for use in the CIA's interrogation program. The Attorney General has found those practices to be lawful and has found the Office's analysis and conclusions concerning those practices to be correct and sound.

Schumer 233 If you have not yet completed the review, could you please inform me of the review's progress and when Congress will receive a response?

ANSWER: Please see the response to Question 231.

Schumer 234 In the written questions submitted during your confirmation process, Senator Durbin referenced two OLC opinions approving the legality of abusive interrogation techniques authored by Steven Bradbury. He asked that you review all OLC opinions regarding interrogation techniques. You pledged to do so. Specifically, have you reviewed Mr. Bradbury's opinions on interrogations, specifically those dated May 10, 2005, and May 30, 2005? Do you stand by them?

ANSWER: Yes, the Attorney General has reviewed the Office of Legal Counsel's legal analysis of practices that are currently authorized for use in the CIA's interrogation program. The Attorney General has found practices to be lawful and has found the Office's analysis and conclusions concerning those practices to be correct and sound.

Schumer 235 If not, will you commit to completing your review by February 27th? Will you commit to advising the Committee whether you agree with the legal reasoning contained in those opinions?

ANSWER: Please see the response to Question 234.

Schumer 236 The authorizing statute of the United States Commission on Civil Rights provides that no more than half of the Commission's members may be from a single political party. Two members of the current Commission are independents who were registered Republicans at the time of their appointments, but who changed their party affiliation while in office. After these commissioners became independents, the Office of Legal Counsel (OLC) issued an opinion on December 4, 2006, concluding that the Commission's statutory limits apply only to a Commissioner's partisan affiliation at the time of his or her nomination. A day after the OLC issued this opinion, the President nominated two Republicans to fill vacancies on the Commission. Thus, the current Commission is composed of two Democrats, four Republicans, and two independents who were previously registered as Republicans. During your confirmation process, you pledged to re-examine a number of key OLC opinions and to withdraw any opinions that you found to be legally unsustainable. I request that you also reexamine the OLC opinion issued on December 4, 2006 that interprets the partisan balance provisions of the Civil Rights Commission's authorizing statute. Will you commit to conducting such a review and re-examination? If not, please explain the reasons for your refusal to reexamine this OLC opinion.

ANSWER: We believe you are referencing an OLC opinion released December 6, 2004. *See* http://www.usdoj.gov/olc/2004/12062004_crcbalance.pdf. That opinion concludes that under the plain terms of 42 U.S.C. § 1975(b) (2000), where a member of the Civil Rights Commission changes his or her party affiliation after the time of appointment, the statute calls for the President to consider that change in making future appointments to the Commission. As explained in the response to Question 129, we have concluded after careful review that the December 2004 OLC opinion correctly construes the statutory language and that its interpretation serves the purposes identified in the legislative history at least as well as the proposed alternative construction.

Schumer 237 Will you commit to advising the Committee whether you agree with the legal reasoning in this OLC opinion?

ANSWER: Please see the response to Question 236.

Schumer 238 Will you commit to withdrawing this OLC opinion if you find that the legal reasoning is flawed or insufficient?

ANSWER: As explained in response to Questions 129 and 236, we have concluded that the opinion is correct and should not be rescinded.

Schumer 239 As you have acknowledged, waterboarding cannot be used by the United States military because it would be a clear violation of the Detainee Treatment Act. Moreover, we know from a multitude of distinguished generals and military officials that coercive techniques like waterboarding are ineffective and beneath the dignity of the United States. Indeed, in a letter to American armed forces in Iraq, General Petraeus wrote: "Some may argue that we would be more effective if we sanctioned torture or other expedient methods to obtain information from the enemy. They would be wrong. Beyond the basic fact that such actions are illegal, history shows that they also are frequently neither useful nor necessary…. In fact, our experience in applying the interrogation standards laid out in the Army Field Manual…shows that the techniques in the manual work effectively and humanely in eliciting information from detainees. And, as we wrote in our October letter to you and as Senator Durbin has pointed out, the "highest-ranking military lawyers in each of the U.S. Armed Forces' four branches" said unequivocally that waterboarding is illegal and violates Common Article 3 of the Geneva Conventions. The Marine Corps Staff Judge Advocate stated flatly that "threatening a detainee with imminent death, to include drowning, is torture under 18 USC §2340."" Unlike you, these military lawyers do not believe waterboarding presents a "close" legal question. How can all of these distinguished lawyers come out so differently on the question than you? Where are they wrong in their reasoning?

ANSWER: As the Attorney General stated during his testimony, because waterboarding is not among the practices currently authorized for use in the CIA program, we do not believe that it would be appropriate for the Attorney General to answer categorically questions concerning the legality of waterboarding absent a set of circumstances that call for those answers.

Schumer 240 Am I correct that in your mind it is still a "close question" whether the waterboarding of an American by Iraqi insurgents, for example, violates the Geneva Conventions?

ANSWER: With respect to the conflict in Iraq, it seems unrealistic to expect that Iraqi insurgents would comply with any legal standard, because they have demonstrated no respect for the law of war. Rather, they target civilians, and they murder and torture the people whom they capture. Nonetheless, we do agree that in interpreting and applying the Geneva Conventions, we are interpreting legal principles that could potentially apply to American citizens, and that this supplies an additional reason why the United States must adhere fully to its obligations under the Geneva Conventions. That said, for reasons we have explained, we continue to believe that it would be inappropriate to give an opinion on the legality of waterboarding under current law in the absence of concrete facts and circumstances that require the Attorney General to opine on this legal question.

Schumer 241 Senator Feinstein successfully negotiated into the Intelligence Authorization conference report extending the Army Field Manual to the CIA. Among other things, if passed into law, that bill would forbid the CIA from engaging in certain coercive interrogation practices – including waterboarding. That conference report was passed by the House of Representatives in December. In this matter is Congress acting within its Constitutional authority?

ANSWER: The Department expressed some constitutional concerns with certain provisions of the Intelligence Authorization Act for Fiscal Year 2008, but we did not express any constitutional concern with section 327, which would have required CIA personnel to comply with the Army Field Manual on Interrogations. As you know, on March 8, 2008, the President vetoed the Intelligence Authorization Act.

Schumer 242 Would the President have any legal basis to avoid complying with such a law?

ANSWER: Please see the response to Question 241.

Schumer 243 If Congress passes such a law, will you advise the President to sign it or will you advise the President to veto it? (I note that you have recently publicly stated your views on whether the President should veto other bills if passed, such as one related to FISA.)

ANSWER: The President vetoed the Intelligence Authorization Act, and the Department supported that decision.

Schumer 244 Recently, the Director of National Intelligence Mike McConnell made some comments in the New Yorker about waterboarding. He said this: "If I had water draining into my nose, oh God, I just can't imagine how painful! Whether it's torture by anybody else's definition, for me it would be torture." Do

you agree that if waterboarding involves water draining into the mouth or nose, it clearly constitutes torture?

ANSWER: We understand that Director McConnell clarified in subsequent congressional testimony that the quoted statements in the *New Yorker* were not intended to suggest legal views on the question. As the Attorney General stated in his testimony, waterboarding is not currently authorized for use in the CIA interrogation program and therefore may not be used. In the absence of concrete—rather than hypothetical—facts and circumstances that require Attorney General's opinion, it would not be appropriate to give an opinion on the legality of waterboarding.

Schumer 245 If the CIA asked for authorization to engage in a form of waterboarding that caused water to drain into the mouth or nose, would you deny that authorization? If so, on what grounds?

ANSWER: Please see the response to Question 244.

Schumer 246 Did any of the waterboarding techniques that were reportedly discontinued involve "water draining into the mouth or nose"?

ANSWER: General Hayden acknowledged publicly that waterboarding was used in the past on three senior al Qaeda terrorists, but that it is no longer part of the CIA's program. Obviously, the operational details of the CIA's interrogation program remain highly classified. Any questions concerning additional details about waterboarding, or about any other practice, should be directed to the CIA.

Schumer 247 In a recent "National Journal" article, Ambassador John Negroponte made some on-the-record statements about waterboarding. He said, "We've taken steps to address the issue of interrogations, for instance, and waterboarding has not been used in years. It wasn't used when I was director of national intelligence, nor even for a few years before that." This statement makes clear that waterboarding was once used – in the not-too-distant past – by the American government. Just this week, Director McConnell confirmed that three individuals were waterboarded. Why was the practice removed as an authorized technique?

ANSWER: Following the enactment of the Detainee Treatment Act in December 2005, the CIA commenced a comprehensive policy and operational review of the interrogation program, which eventually resulted in a narrower set of proposed interrogation methods. While that review was underway, the Supreme Court held in *Hamdan* in June 2006 that Common Article 3 applies to our armed conflict with al Qaeda, Congress passed the Military Commissions Act of 2006, and the President issued Executive Order 13440 to prescribe additional requirements under the CIA program. As part of the legal and policy

review, and these developments in the law, the CIA concluded that waterboarding would not be part of those practices proposed for use in the CIA program. The CIA accordingly did not request that the Department of Justice examine the legality of waterboarding in light of these developments in the law.

Schumer 248 Was it for legal or policy reasons or a combination of the two?

ANSWER: Please see the response to Question 247.

Schumer 249 If there were not any question of criminal or civil liability on the part of any official for past conduct, would that in any way change your analysis or your willingness to analyze the legal questions surrounding waterboarding?

ANSWER: No. The question whether to initiate an investigation into conduct that took place in 2002 and 2003 based upon advice provided by this Department should not depend upon the retrospective views of the Attorney General in place years later. If our intelligence professionals rely in good faith on advice that they are given by the Department of Justice, they should not be subjected to criminal investigation for it. Accordingly, the Attorney General's reluctance to opine in the abstract on the legality of waterboarding does not turn on the impact that any such an opinion could have on the criminal or civil liability of individuals for past actions.

QUESTIONS FROM SENATOR DURBIN

Durbin 263 Other than the joint investigation being conducted by the Inspector General and Office of Professional Responsibility, what steps, if any, have you taken to investigate whether any selective prosecutions were brought by the Justice Department between 2001-2007?

ANSWER: Department policy and regulations require Department employees to report evidence and non-frivolous allegations of misconduct. Also, the Office of Professional Responsibility reviews judicial opinions for judicial criticism or findings that might warrant investigation, and conducts investigations when information from other sources suggests that an investigation is warranted. These processes assure that non-frivolous accusations of selective prosecution receive appropriate scrutiny.

QUESTIONS FROM SENATOR GRASSLEY

Grassley 268 As you are aware, I'm a long time supporter of whistleblowers and believe that they have helped uncover all sorts of financial irregularities and mismanagement within the Executive Branch. During the hearing, I asked about a January 22, 2008, letter you signed along with the Director of National Intelligence McConnell, Secretary of Defense Gates, and Secretary of Homeland Security Chertoff objecting to S.274, the Federal Employee Protection Act of 2007. In response to my question, you stated that the process outlined in S.274 where national security whistleblowers could make protected disclosures to Congress, "cuts off the supervisory chain and cuts off even the President from the chain of reporting. That raises separation of powers issues and creates a situation where somebody is essentially encouraged to bypass supervisors." Further, you added that you believe S.274 is "not the way to do it" and that you were "not saying that this is drawing of the line in the sand." Instead, you said you were willing to work with the Senate on this important legislation. Accordingly, please answer the following: Does Congress have a constitutional right to classified information from Executive Branch employees acting outside their chain of command?

ANSWER: The Supreme Court has recognized that the President's "authority to classify and control access to information bearing on national security . . . flows primarily from" his constitutional authority under Article II as Commander in Chief "and exists quite apart from any explicit congressional grant." *Department of Navy v. Egan*, 484 U.S. 518, 527 (1988); *see United States v. Nixon*, 418 U.S. 683, 711 (1974) (to the extent a claim of presidential privilege "relates to the effective discharge of the President's powers, it is constitutionally based"); *id.* at 710 ("claim of privilege on the ground that [information constitutes] military or diplomatic secrets" necessarily involves "areas of Art. II duties" assigned to the President). Accordingly, it is the long-standing position of the Executive branch, and of Administrations of both political parties, that the President has "the right . . . to decide to withhold national security information from Congress under extraordinary circumstances." *Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. 92, 95 (1998). That includes the authority "to decide, based on the national interest, how, when and under what circumstances particular classified information should be discussed to Congress." *Id.* at 100.

Of course, the Department agrees that Congress has an interest in receiving the information that enables it to carry out its important legislative responsibilities. The Executive branch remains committed to accommodating Congress's legitimate oversight needs in ways that are consistent with the Executive Branch's constitutional responsibilities. Under the National Security Act and long-standing practice between the Legislative and Executive Branches, the Executive Branch keeps certain Members of Congress appropriately informed regarding national security matters.

Grassley 269 Does a national security whistleblower really need to try to contact the President directly before making a protected disclosure to Congress?

ANSWER: An individual may make any such disclosure to the Special Counsel or to the Inspector General of an agency. 5 U.S.C. § 2302(b)(8)(B); Inspector General Act of 1978, 5 U.S.C. App. 3. Those entities, with certain restrictions and following applicable procedures, may communicate with Congress regarding whistleblower complaints.

Grassley 270 If so, what sort of mechanism is in place for this individual to have his or her claim heard by the President? Are Executive Branch employees aware of such a mechanism?

ANSWERS: An individual need not contact the President directly, but he must follow (and report up) the chain of command to obtain authorization from his department or agency for the disclosure of classified information to Congress. An individual does not have a unilateral right to determine how, when, and under what circumstances classified information may be disclosed to Congress. Rather, such disclosures must be authorized by the individual's supervisors or other appropriate officials within his department or agency.

Grassley 271 If there is not a mechanism in place, what is the process for an individual to raise concerns within the Executive Branch?

ANSWER: Please see the responses to Questions 269-270.

Grassley 304 On November 14, 2007, Senator Bond and I wrote to you seeking information on about the former FBI and CIA agent Nada Nadim Prouty, who recently pled guilty to various charges, including immigration fraud and unauthorized access to FBI case information dealing with Hezbollah, her relatives, and herself. Why did the FBI's employment screening background investigation fail to discover that Prouty had overstayed her student visa?

ANSWER: Nada Prouty applied for employment with the FBI by application dated 7/9/97. At the time, she was known as Nada Alley, and was required to provide citizenship information in her application, including country of citizenship, how acquired, and, if naturalized, date and place of naturalization and naturalization certificate number. Then-current procedures required the FBI to confirm her naturalization "directly from the appropriate registration authority." This was accomplished by accessing automated Immigration and Naturalization Service (INS) records in accordance with reciprocity mandates. Although the automated records were searched in accordance with then-current procedures, the records associated with that search did not contain information pertaining to the overstay.

Grassley 306 Did the A-file contain information regarding her visa overstay? If not, why not?

ANSWER: While the alien file is not retained by the FBI, the FBI reviewed that file in the context of its review of this matter and found that the information regarding Prouty's overstay is contained in the alien file.

Grassley 307 What is the FBI's policy regarding hiring agent applicants who have overstayed their visas? If it is not disqualifying, please explain why not?

ANSWER: All FBI employees must possess Top Secret security clearances and be United States citizens. Individuals illegally residing in the United States on expired visas are not eligible for employment by the FBI. When the FBI conducted Nada Alley's background investigation we received confirmation of naturalization from INS, as indicated above. Having received the confirmation of naturalization from automated records, we did not review the alien file. The FBI has since revised this procedure.

Grassley 308 Does the FBI have a policy of heightened scrutiny of employment applications from recently naturalized foreign nationals from high risk countries with a high degree of terrorist activity? If not, what steps do you believe should be taken to implements such a policy?

ANSWER: Yes, the FBI does provide heightened scrutiny with respect to employment applications from recently naturalized foreign nationals from high risk countries. Since the attacks of September 11, 2001, the demand for personnel with particular foreign language skills and cultural backgrounds has created a unique challenge for the FBI. To address this challenge, the FBI created a Post Adjudication Risk Management (PARM) Program, which was initially developed to address the threat associated with hiring high risk contract language specialists. The PARM program, which has since been expanded to include all personnel with high risk indicators, is designed to track and monitor high risk personnel through periodic audits and other appropriate security checks on a continual basis.

Grassley 309 Do you agree that knowledge that she had overstayed her visa should have triggered additional scrutiny of her marriage and citizenship application, which were both fraudulent?

ANSWER: Yes.

Grassley 310 The FBI's employment screening background investigation failed to discover that Prouty engaged in a sham marriage in order to obtain citizenship. Prouty never lived with her purported spouse, which background investigators should have known. According to the FBI, Prouty's female roommate was interviewed during the background investigation and indicated that the two were roommates at the time she was allegedly married to the man through whom she obtained U.S. citizenship. However, the FBI did not follow-up to determine why Prouty was not living with her "husband." Why did the FBI background investigation fail to uncover this information and what steps do you intend to take to ensure that further background investigations are more thorough?

ANSWER: While the background investigation conducted prior to Prouty's 1997 FBI employment was conducted under the procedures in place at that time, those procedures were revised significantly following the 2001 arrest of FBI Agent Robert Hanssen and have been further revised in the wake of Prouty's fraud. For example, the FBI's 1997 procedures required the verification of some information, such as marriages, through a check of public records rather than interviews, so a fraudulent marriage would not have been exposed. While background investigation interviews reveal a great deal, their value is largely dependent on the quality of the questions asked. FBI background investigation procedures have, therefore, been reviewed to ensure we do not rely inappropriately on public record information. In addition, the FBI has expanded applicant background investigations to include, at a minimum, the review of the alien file by an investigator. Depending on the circumstances of the case, the FBI may also require review of the alien files of the applicant's relatives, references, or associates.

Grassley 311 In response to the Prouty case, the FBI indicated that it is going to determine how many agents are naturalized citizens from high-risk countries and re-examine their backgrounds to some degree. However, the details about how and when such a review will be done are not clear. Do you agree that the FBI's previous reliance on citizenship decisions made by another agency in a different context is misplaced when making hiring decisions critical to national security? If so, what steps do you intend to take to ensure that naturalized agent applicants are screened more thoroughly?

ANSWER: The FBI acknowledges that previous reliance on citizenship decisions made by another agency was misplaced when making hiring decisions. To correct this deficiency, the immigration files of all foreign born applicants will be reviewed during initial security processing. With regard to on-board employees, the FBI will review their immigration files during their periodic reinvestigations. The FBI is also focusing on better training analysts and investigators to recognize immigration issues, including fraudulent marriages and citizenship fraud.

Grassley 312 Will you agree to provide regular and detailed updates to the Committee on the progress of the FBI's effort to re-check the backgrounds of foreign-born FBI agents in response to the Prouty case?

ANSWER: Yes. The FBI would be pleased to provide updates on our progress in rechecking the backgrounds of all foreign-born Special Agents.

Grassley 313 The FBI's employment screening background investigation also failed to uncover derogatory information on Prouty's brother-in-law, former employer, and Hezbollah supporter, Talal Khalil Chahine. The FBI interviewed Chahine, who is now a fugitive indicted on tax evasion and other charges, during Prouty's background investigation, but merely to verify Prouty's employment. However, according to FBI briefers, Chahine had been the subject of a terrorism-related investigation in 1986, long before Prouty's application for FBI employment. Why does the FBI background investigation not generally include a basic name-check on references?

ANSWER: The FBI determined that Prouty's brother-in-law, Talal Khalil Chahine, is not the Talal Chahine identified as the subject of an 1986 terrorism investigation. The FBI's background investigation process was conducted in accordance with existing procedures, which called for the interview of references and verification of employment, including interviews of supervisors. Chahine was not listed as a reference or as a direct supervisor, but was interviewed as the owner of a business that employed the candidate. While procedures then in place did not require name checks on either references or supervisors; as a result of the Prouty investigation the FBI has added these checks in connection with the background investigations of foreign-born or otherwise high-risk candidates.

Grassley 314 Why should this particular investigation not have included name checks on references given Prouty's visa overstay, questionable marriage, and recent immigration from a high risk country?

ANSWER: As indicated above, Prouty's visa status was not discovered during the course of the background investigation or otherwise known by the FBI, as her naturalization was verified through automated records rather than a review of her INS file. At the time of the background investigation the legality of her marriage and subsequent divorce were not in question. In accordance with procedures in place at the time, Prouty's divorce was verified through court records and an interview of her former spouse. At the FBI's request, Prouty's immigration from Lebanon and her status in that country were reviewed by a local United States Embassy security officer, who developed no derogatory information.

Grassley 315 Prouty passed at least two polygraph examinations, one at the FBI and one at the CIA. I recently wrote to FBI Director Mueller raising questions about the reliability of polygraph examinations for employment screening purposes. There are serious concerns that the FBI cannot establish what the false positive rate is, and therefore, does not know how many qualified, valuable candidates may be unfairly denied the opportunity to become FBI agents. This case illustrates the opposite problem, that polygraphs also produce false negatives. The notorious CIA spy Aldrich Ames also passed two polygraph examinations. In Prouty's case, the polygraph was no more effective at uncovering her fraud in obtaining U.S. citizenship. The FBI did not even ask her the question, "Have you ever committed a serious crime?" If the FBI placed more emphasis on rigorous and thorough background checks instead of placing all its eggs in the polygraph basket, perhaps Prouty's could have been prevented from infiltrating the FBI. While polygraphs are a tool that can be useful, they should not be used as a substitute for a full and complete investigation. Why was Prouty not asked whether she had committed a serious crime during her polygraph examination?

ANSWER: At the time of Prouty's polygraph examination, a question regarding serious crime was not included in the series of polygraph questions asked of applicants. The FBI is currently reviewing the applicant polygraph process with a view toward adding a question asking whether the applicant has been involved in a serious crime (including immigration/naturalization fraud).

Grassley 316 At the time of Prouty's application, were applicants generally asked that question?

ANSWER: Please see the response to Question 315.

Grassley 317 Are they generally asked that question now? Why or why not?

ANSWER: Please see the response to Question 315.

Grassley 318 The FBI computer system did not automatically alert management when an agent queries his or her own name or relatives' names, nor does the FBI systematically conduct audits to search for and address suspicious computer activity. While ACS had audit capabilities to allow an investigation of who accessed particular records after-the-fact, such an investigation is only triggered when some other event causes suspicion to fall on an agent or if a particular manager happens to decide to do a random check. What steps do you believe the FBI should take to be more proactive about internal security?

ANSWER: The FBI's Enterprise Security Operations Center (ESOC) conducts information technology (IT) security monitoring on the three major FBI system enclaves

(i.e., the Sensitive Compartmented Information Operations Network, Secret Enclave, and Unclassified Network). In 2007, the ESOC implemented the Advanced Indication and Warning System, which provides an automated, systematic notification of questionable employee computer activities, including self searches and relative searches, which is reviewed by an analyst and forwarded for additional analysis or action as appropriate.

Grassley 321 At no time before Prouty left the FBI did it detect any of her illegal activities or warn the CIA about them, and even today it appears that the FBI is providing limited access to information about the Prouty case to the CIA. Not until a source told the FBI in 2005, two years after Prouty had left for the CIA, did the FBI discover that Prouty may have been helping her brother-in-law and Hezbollah supporter, Chahine. Does the senior CIA official responsible for security currently have access to the FBI's Prouty case file? If so, when did he first obtain it?

ANSWER: Yes. The Prouty background investigation file was provided to the CIA on 1/30/08. The FBI worked with the CIA in connection with the criminal (terrorism) investigation of Prouty.

Grassley 322 Will Prouty be deported after completion of her sentence? If so, does the CIA agree with that decision in light of information she may have by virtue of her employment at the CIA after leaving the FBI?

ANSWER: The United States will not seek deportation of Ms. Prouty as a result of this prosecution. This decision was made in consultation with the agencies for whom she worked in the past, including the CIA.

Grassley 323 Please describe the nature, extent, and initial results of the damage assessment being conducted in response to the Prouty case, including when it is expected to be complete.

ANSWER: The FBI continues to work on the damage assessment based on Prouty's conviction of conspiracy, unauthorized computer access, and naturalization fraud, considering how the loss or compromise of classified information could damage the national security, otherwise harm the United States, or advantage foreign powers, and whether countermeasures to negate or minimize the effect of the compromise are appropriate and feasible. Several FBI field divisions and a Legal Attaché office (LEGAT) have been asked to provide information regarding investigations and sources (subjects) that may have been compromised by Prouty's unauthorized computer access, and additional LEGATS have been advised of the potential risk related to Prouty's review of communications sent to those regions. The assessment has included review of investigative case files, information system audits, and interviews and, because of the volume of information under review, may not be finalized until the summer of 2008.

Grassley 324 Please describe what lessons have been learned from this breach and what additional remedial measures will be taken to improve the FBI's internal security in light of it.

ANSWER: The FBI learned several lessons from the Prouty case. The first was the need to conduct a full review of the immigration files of all foreign-born applicants, rather than relying on USCIS database checks. With the benefit of training provided by the USCIS, the FBI has begun this process and will review the immigration files of foreign-born on-board employees during their periodic reinvestigations. The second lesson learned was the need to include in the polygraph process a question concerning the applicant's involvement in serious crimes and terrorism, and the FBI is moving forward to add this inquiry. The third was the need to ensure that the field interview and personal security interview (PSI) processes address indicators of naturalization fraud. The FBI is currently re-engineering the security interview guidelines provided to its investigators and sensitizing those involved in the background investigation process to the naturalization fraud profile and specific foreign influence issues highlighted by the Prouty matter.

Questions for the Record Posed to
Attorney General Michael B. Mukasey
Senate Committee on the Judiciary
DOJ Oversight Hearing on January 30, 2008
Part Two

Attachments to Answers #22 and 207

Office of the Attorney General
Washington, D.C.

February 29, 2008

The Honorable Nancy Pelosi
Speaker
House of Representatives
Washington, D.C. 20515

Dear Madam Speaker:

As you know, the President, asserting executive privilege, directed that Joshua Bolten, Chief of Staff to the President, and Harriet Miers, the former Counsel to the President, not release certain documents or provide related testimony subpoenaed by the Committee on the Judiciary of the House of Representatives. The President also directed Ms. Miers to invoke her constitutional immunity from compelled congressional testimony and to decline to appear before the Committee. These directives were based on legal opinions from the Department of Justice advising that the assertions of privilege and immunity were legally proper.

Notwithstanding the President's directives, on July 25, 2007, the House Committee on the Judiciary adopted a resolution recommending that the House of Representatives cite Mr. Bolten and Ms. Miers for contempt. On November 5, 2007, the Committee referred its report on the resolution to the full House. On February 14, 2008, the House adopted a contempt resolution, which you referred on February 28, 2008, to the United States Attorney for the District of Columbia for prosecution under the criminal contempt of Congress statute, 2 U.S.C. §§ 192, 194 (2000).

As explained in our July 24, 2007, letter to Judiciary Committee Chairman Conyers, a copy of which is enclosed, the Department of Justice's longstanding position taken during Administrations of both parties is "that the contempt of Congress statute was not intended to apply and could not constitutionally be applied to an Executive Branch official who asserts the President's claim of executive privilege." *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 102 (1984). Further, as we also explained in the letter to Chairman Conyers, the same principles that preclude prosecuting an Executive Branch official for abiding by a presidential claim of executive privilege also preclude prosecuting a senior presidential adviser for lawfully invoking her constitutional immunity from compelled congressional testimony. Here, the President directed Ms. Miers to invoke her constitutional immunity, and the President's directive was based upon a legal opinion from the Department of Justice advising that such an invocation of immunity would be legally proper.

Accordingly, the Department has determined that the non-compliance by Mr. Bolten and Ms. Miers with the Judiciary Committee subpoenas did not constitute a crime, and therefore the Department will not bring the congressional contempt citations before a grand jury or take any other action to prosecute Mr. Bolten or Ms. Miers.

Please do not hesitate to contact me if you would like to discuss this matter further.

Sincerely,

Michael B. Mukasey
Attorney General

Enclosure

cc: The Honorable John Boehner
The Honorable John Conyers, Jr.
The Honorable Lamar Smith

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 24, 2007

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

We understand that the Judiciary Committee is voting tomorrow on resolutions calling for the House of Representatives to refer contempt of Congress citations against Josh Bolton, the Chief of Staff to the President, and Harriet Miers, the former Counsel to the President, to the United States Attorney for the District of Columbia for prosecution pursuant to the criminal contempt of Congress statute, 2 U.S.C. §§ 192, 194 (2000).

As you know, the President has asserted executive privilege and directed that certain documents and related testimony not be provided in response to subpoenas issued by the Judiciary Committee in connection with its inquiry into the decision of the Department of Justice to request the resignations of several United States Attorneys in 2006. The President also directed Ms. Miers to invoke her immunity from compelled congressional testimony and decline to appear in response to a subpoena from the Judiciary Committee. These directives were based on legal opinions from the Department advising that the assertion of privilege and immunity were legally proper. *See* Letter for the President from Paul D. Clement, Solicitor General and Acting Attorney General (June 27, 2007) (addressing assertion of executive privilege); Memorandum for the Counsel to the President from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Immunity of Former Counsel to the President from Compelled Congressional Testimony* (July 10, 2007).

As it considers the contempt resolutions, we think it is important that the Committee appreciate fully the longstanding Department of Justice position, articulated during Administrations of both parties, that "the criminal contempt of Congress statute does not apply to the President or presidential subordinates who assert executive privilege." *Application of 28 U.S.C. § 458 to Presidential Appointment of Federal Judges*, 19 Op. O.L.C. 350, 356 (1995). As expressed by Office of Legal Counsel Assistant Attorney General Theodore B. Olson more than twenty years ago, when an Executive Branch official complies in good faith with the President's assertion of executive privilege, "a United States Attorney is not required to refer a contempt citation . . . to a grand jury or otherwise to prosecute [the] Executive Branch official who is carrying out the President's instruction . . . ." *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101,

102 (1984) ("*Prosecution for Contempt of Congress*"). Two legal conclusions support the longstanding Department position:

> First, as a matter of statutory interpretation reinforced by compelling separation of powers considerations, we believe that Congress may not direct the Executive to prosecute a particular individual without leaving any discretion to the Executive to determine whether a violation of the law has occurred. Second, as a matter of statutory interpretation and the constitutional separation of powers, we believe that the contempt of Congress statute was not intended to apply and could not constitutionally be applied to an Executive Branch official who asserts the President's claim of executive privilege in this context.

Id.

The position Mr. Olson articulated was based on prior Department positions and has been consistently followed ever since, including in an explicit statement in a published OLC opinion by Assistant Attorney General Walter Dellinger during the Clinton Administration, recognizing that "the criminal contempt of Congress statute does not apply" in this context, because "application of the contempt statute against an assertion of executive privilege would seriously disrupt the balance between the President and Congress." *Application of 28 U.S.C. § 458 to Presidential Appointment of Federal Judges*, 19 Op. O.L.C. at 356.

It is the Department's view that the same position necessarily also applies to Ms. Miers's lawful invocation of her immunity from compelled congressional testimony. The principles that protect an Executive Branch official from prosecution for declining to comply with a congressional subpoena based on a directive from the President asserting executive privilege similarly shield a current or former immediate adviser to the President from prosecution for invoking his or her immunity from compelled congressional testimony—especially when, as here, the President instructs the official to do so.

Please do not hesitate to contact us if you would like further information concerning the Department's position on the pending contempt of Congress resolutions. We would be pleased to provide a fuller explanation of our views on this important matter.

Sincerely,

Brian A. Benczkowski
Principal Deputy Assistant Attorney General

cc: The Honorable Lamar Smith