



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

November 20, 2009

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 arising from the June 10, 2008, appearance before the Committee of FBI general counsel Valerie Caproni at a hearing entitled "Coercive Interrogation Techniques: Do They Work, Are They Reliable, and What Did the FBI Know About Them?" The responses were current as of December 19, 2008.

We hope that this information is helpful to the Committee. The Office of Management and Budget has advised us that, from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "M. Weich".

Ronald Weich
Assistant Attorney General

cc: The Honorable Jeff Sessions
Ranking Minority Member

**Responses of the Federal Bureau of Investigation
to Questions for the Record
Arising from the June 10, 2008, Hearing Before the
Committee on the Judiciary
United States Senate
Entitled
“Coercive Interrogation Techniques: Do They Work, Are They Reliable,
and What Did the FBI Know About Them?”**

Questions Posed by Senator Kennedy

1. The recent Office of the Inspector General (OIG) report indicates that on several occasions, the FBI made the commendable decision not to participate in interrogations because of the use of harsh techniques that the Bureau had rejected. The report also notes other instances in which FBI agents learned of physical abuse of detainees and were uncertain whether U.S. government interrogators were violating U.S. law (see, e.g., pp. 238-39). Yet, despite these concerns and the fact that CIA’s Inspector General referred five cases of potential misconduct to the Justice Department between February 2003 and 2004, the FBI chose not to pursue any investigations into detainee abuse (p. 112). The FBI is the chief investigative arm of the Department of Justice, and we now know that on multiple grounds, the Bureau had reason to believe that some U.S. interrogators’ actions may have been illegal. Why didn’t the FBI begin any investigations?

Response:

This question appears not to distinguish the treatment of detainees by members of the military from the treatment of detainees by employees of the Central Intelligence Agency (CIA).

Consistent with Section C.2 of the “Memorandum of Understanding Between the Departments of Justice And Defense Relating to the Investigation and Prosecution of Certain Crimes” (hereinafter MOU) and implementing Department of Defense Directive 5525.7 (1985), the FBI referred all instances of abusive or arguably abusive treatment of military detainees known to the FBI to the Department of Defense (DoD), which bears responsibility for such investigations under the MOU. Pursuant to the MOU, DoD is required to provide notice of such investigations to the Department of Justice (DOJ), and may refer a case to DOJ if evidence supports prosecution before civilian courts. After their own investigation, DoD did make some referrals to DOJ, which referred these cases to a task force in the United States Attorney’s Office in the Eastern District of Virginia for potential prosecution.

The referrals discussed at page 112 of the OIG report related to allegations of misconduct against CIA employees or contractors. The CIA OIG referred these incidents, as well as later, additional incidents, to DOJ for investigation.

The FBI conducted additional investigation as needed in the cases that were referred to DOJ. As an investigative agency, the FBI is not charged with the ultimate decision to prosecute a particular case; this determination is instead made by others in DOJ.

2. Since September 11, 2001, according to the OIG report, the FBI has adhered to its preexisting policies on interrogation, which had been tried and tested in prior counterterrorism investigations. Yet, the report also notes that FBI agents sought guidance from their superiors on four distinct issues following the 9/11 attacks: which techniques FBI agents could use in military zones, what they should do when other agencies used non-FBI-approved techniques, when to interview detainees who had been harshly interrogated, and how to report these incidents (p. 144). Before issuing its written policy on these questions in May 2004, did the FBI ever seek or receive guidance from the Office of Legal Counsel or any other arm of the Justice Department regarding interrogations in which coercive tactics were being used?

Response:

The FBI did not seek or receive guidance from the Office of Legal Counsel (OLC) or any other arm of the Justice Department before issuing its guidance in May 2004.

3. The OIG report reveals that after the Abu Ghraib scandal became public in April 2004, the FBI developed and deployed a policy to address situations in which FBI agents were present at or otherwise knew of interrogations in which other government agencies were using non-FBI approved interrogation techniques by May 19th. However, the report also states that the FBI knew of the abuses at Abu Ghraib prison in January, but took no measures at that time to clarify its own policies or to gain a better understanding of the legal limits of other agencies' behavior. Why did the FBI wait until the Abu Ghraib scandal broke before taking such action?

Response:

As indicated in the OIG report, agents who were deployed in Iraq were aware in January 2004 that the allegations of mistreatment of detainees by United States government personnel at Abu Ghraib were "founded" and that the Army's Criminal Investigation Command (CID) was investigating those allegations. The FBI determined that the responsibility for investigating the conduct of military personnel in Iraq rightfully fell to the military. There was no indication at that time that FBI employees had any doubt about the standards they were to use when conducting interrogations. Nor was there any indication at that time that the sort of

misconduct being investigated (beatings and a rape) was the result of policies that allowed aggressive techniques to be used during military interrogation as opposed to blatant misconduct. In addition, it is not accurate to suggest that the FBI “wait[ed] until the Abu Ghraib scandal broke” to take action. Rather, the publicity surrounding the Abu Ghraib scandal brought to FBI management’s attention the fact that we had not previously specifically reminded FBI employees that FBI policy governing interrogation techniques, which has been in effect for years, had not changed, regardless of what policies were in place for other government agencies.

4. Over the course of U.S. involvement in Iraq and Afghanistan since 9/11, there have been numerous allegations about contractors mistreating detainees in military zones. The FBI itself has documented serious allegations of mistreatment by contractors at the Guantanamo Bay prison camp.

a. What procedures does the FBI follow when it receives such allegations?

Response:

In accordance with FBI policy, if an FBI employee knows or suspects that a detainee has been abused or mistreated, the FBI employee must report the incident to the FBI’s on-scene commander and to the appropriate FBI chain of command. As discussed in the response to Question 1, above, in accordance with Section C.2 of the “Memorandum of Understanding Between the Departments of Justice And Defense Relating to the Investigation and Prosecution of Certain Crimes” and implementing DoD Directive 5525.7 (1985), the FBI refers any allegations of abusive, or arguably abusive, treatment of detainees under DoD control to DoD for investigation. Pursuant to the MOU, responsibility for investigating such matters belongs to DoD. Under the MOU, DoD is required only to provide notice to DOJ, although a DoD investigative agency may refer a case to DOJ if the evidence supports prosecution before civilian courts. Under the Fiscal Year 2007 Military Authorization Act, U.S. military contractors deployed to Iraq and Afghanistan became subject to the Uniform Code of Military Justice (UCMJ). Under the MOU, DoD is only required to notify DOJ of crimes committed by personnel subject to the UCMJ in “significant cases in which an individual subject/victim is other than a military member or dependent thereof.”

b. Has it investigated these allegations as potential criminal violations?

Response:

As noted above, the FBI has referred such allegations to DoD for appropriate investigation.

5. Numerous sources have reported on the U.S. government's use of "extraordinary rendition" in recent years, even though domestic and international law prohibit the United States from transferring people to places where there is a substantial risk they will face torture. Did the FBI ever initiate, or was the FBI ever involved in, any renditions of prisoners to or from a non-U.S. territory for the purpose of interrogation?

Response:

The FBI has not initiated or intentionally participated in the rendition of suspects to third countries. In one incident, however, an FBI source invited an individual from one foreign country to another and, over the objection of the FBI, the person was taken into custody and removed to a third country by another U.S. government agency.

6. After Attorney General Ashcroft reportedly conveyed the FBI's concern over the use of harsh interrogation tactics to DOD and the CIA, those agencies continued their practices unchanged. Did officials in the FBI ever try to convey its views to different senior administration officials or otherwise elevate its concern? Did it ever do so in writing? If not, why not?

Response:

The FBI understood that OLC, which is charged with responsibility for drafting opinions on questions of law, had issued opinions concerning the legality of certain aggressive interrogation techniques. Accordingly, the FBI's discussion regarding interrogation techniques was necessarily limited to the effectiveness of the aggressive techniques, not their legality. Although FBI management did not reduce its concerns to writing, it is our belief that the CIA and DoD were well aware that the FBI did not believe aggressive interrogation techniques were an effective means of gathering accurate intelligence from detainees.

7. The OIG report reveals that the FBI has Memoranda of Understanding in place with both the CIA and the Defense Department regarding requirements to report allegations of abuse, confidentiality safeguards, and information sharing (pp. 18-19). Has the FBI considered entering into new MOUs to address standards for interrogation of detainees by all of the agencies and the protocol for joint investigations?

Response:

The FBI has not considered entering into MOUs with other agencies to address standards for the interrogation of detainees. When interrogating detainees, the FBI will use only interview techniques that are non-coercive. Those techniques have been proven effective over time when used by trained FBI agents. While the FBI has long stated that it believes non-coercive techniques are the most effective

means of obtaining accurate information, we also understand that other agencies operate pursuant to policies that have been established by those agencies.

Questions Posed by Senator Feingold

8. When I asked whether you had raised any concerns about the CIA or Defense Department's use of abusive interrogation techniques with the White House, the National Security Council, or directly with the agencies at issue, you responded that you were not aware that abusive techniques were being used until the news about Abu Ghraib "broke."

a. According to the Inspector General report, the FBI learned about the abuses at Abu Ghraib in January 2004, months before the pictures documenting that abuse became public. In what month did you personally become aware of the Abu Ghraib abuses, and was it before or after the pictures documenting the abuse became public?

Response:

The FBI General Counsel first became personally aware that other government agencies were using aggressive interrogation techniques after the pictures documenting the abuse of detainees at Abu Ghraib became public.

b. Why did you choose not to raise concerns with the any of the agencies involved?

Response:

The FBI General Counsel was aware that OLC had opined on the legality of certain interrogation techniques the CIA and DoD had proposed to use. Because the OLC has the delegated authority to provide authoritative legal advice to executive departments and agencies on the meaning of federal laws, its views on the legality of the activities of these agencies was final within the Executive Branch -- subject, of course, to reversal or modification by OLC, the Attorney General, or the President.

9. At the hearing, you responded to a question I asked by saying the following: "There were existing OLC opinions that were highly classified and that we did not have access to, though the bureau, kind of, writ large, generally understood that there were existing memos."

a. Did you try to get access to these OLC opinions?

Response:

In mid-2004, the FBI General Counsel requested access to the OLC opinions governing interrogation techniques.

b. Did anyone else at the FBI try to get access to these OLC opinions?

Response:

To our knowledge, the only person at the FBI who attempted to obtain access to the OLC opinions prior to 2008 was the General Counsel.

c. When, if ever, did you get access to OLC opinions governing the use of enhanced interrogation techniques?

Response:

The FBI General Counsel has never been provided access to the classified OLC opinions governing the use of enhanced interrogation techniques. She does, though, have access to publicly available unclassified information, including any declassified opinions publicly released by the Department.

d. When, if ever, did anyone at the FBI get access to OLC opinions governing the use of enhanced interrogation techniques?

Response:

In connection with the investigation into the destruction of videotapes of detainee interrogations, in 2008 some or all of these OLC opinions were obtained by the investigative team, which includes FBI agents working under the direction of DOJ-appointed prosecutor John Durham.

10. According to the Inspector General report, in January 2004 the FBI's On-Scene Commander in Iraq contacted senior managers in the Counterterrorism Division at FBI Headquarters with allegations of abuse at Abu Ghraib. The On-Scene Commander suggested that an FBI investigation of these allegations might make it difficult for the FBI to maintain a good relationship with the military. FBI Assistant Director Gary Bald's response was: "Agreed. Let's let [Army] CID [Criminal Investigation Command] handle it."

a. Why, in your opinion, did the FBI not take action on these allegations? How would you have handled this information if it had been given to you?

Response:

The FBI did not take action because, as stated in the report, an investigation was already being conducted by the Army's CID. Investigation of the matter by Army

CID rather than the FBI was consistent with Section C.2 of the “Memorandum of Understanding Between the Departments of Justice And Defense Relating to the Investigation and Prosecution of Certain Crimes” and implementing DoD Directive 5525.7 (1985).

b. In this instance, the FBI did not take action despite its knowledge that detainees were abused. Is it the FBI’s policy to ignore allegations of misconduct when interagency relationships are at stake?

Response:

The FBI has a long-standing MOU with the military and has long relied on Attorney General Guidelines that govern the intra-governmental responsibilities for investigations of government employees’ alleged criminal conduct. Pursuant to existing agreements and guidelines, the responsibility to address employee misconduct falls, in the first instance, to the employing agency. For example, criminal conduct by active duty military personnel is initially addressed through the military’s court-martial system, which is typically a highly efficient process. Although the language in the on-scene commander’s email suggests that the FBI did not become involved with the inquiry into Abu Ghraib because such an FBI investigation might have impaired the working relationship between the FBI and the military in Iraq, that was not an accurate statement of FBI policy.

11. According to the Inspector General report, you told the Office of the Inspector General that there was an “expectation” that an agent would report incidents of torture or other egregious conduct by another agency’s interrogator.

a. On what information did you base your view that such an expectation existed?

Response:

FBI Special Agents, all of whom are well trained and educated, follow a strict code of conduct that requires them to report any conduct they suspect may violate the laws of the United States. The FBI General Counsel based her expectation on the education, training, and experience of the FBI Special Agents.

b. If such an expectation did exist, why did the Inspector General’s report conclude that very few agents in Iraq or Afghanistan reported detainee mistreatment at the time that it occurred?

Response:

The OIG report identified very few instances in which FBI agents were personally aware of mistreatment of detainees in Iraq or Afghanistan and took no steps in response. See, for example, the OIG Report at pages 231 (“the vast majority of FBI agents who served in Afghanistan reported that they never saw or heard about any incidents of detainee treatment that caused them discomfort . . .”) and 261 (“Most agents said they saw no abuses [in Iraq] to report.”). As a general matter, the agents either reported the mistreatment they saw to their on-scene commander or dealt directly with the member of the military who was mistreating the detainee in order to stop the mistreatment. See, for example, the OIG Report at page 234 (“Another FBI agent deployed to Bagram reported to military supervisors his objection to military police shoving a shackled detainee against a wall. The agent told us that the soldier was removed from detainee escort duty as a result.”).

12. According to the report, you told the Inspector General’s Office that the FBI never finalized more detailed guidance on when FBI agents should report incidents of abusive interrogation by other agencies because you were unable to list every technique or scenario that agents might face. Given that all military interrogators are now required to follow the Army Field Manual, why can’t you simply tell FBI agents to report the use of any techniques by military interrogators that are not authorized in that Manual?

Response:

The standardization of the techniques the military may use has made advising FBI employees who are deployed with the military far easier than it was when there were shifting policies governing military interrogators. During their pre-deployment training, FBI employees are now informed that the military is limited to the techniques in the Army Field Manual. They are also informed that if they see a detainee being abused, they should report the abuse to their on-scene commander. We believe the standardization of detainee treatment by the military in accordance with the Detainee Treatment Act of 2005 has eliminated the uncertainty a few employees had about the parameters of “abuse.” Nevertheless, we instruct our employees during pre-deployment training that if they have any doubt about whether treatment constitutes abuse, it should be reported and they should use as a test whether they would view particular treatment to be abusive if it were used against one of their colleagues. We believe the combination of standardized military techniques with expanded discussion of this issue during pre-deployment training adequately apprizes our employees of the circumstances under which they should report questionable treatment of detainees.

13. The Inspector General’s report indicates that your office worked for months in 2004 and 2005 on draft guidance for how the FBI should handle situations in which FBI agents want to interview someone who had previously been subjected to harsh techniques by other agencies. As you put it, the FBI could unwittingly end up playing the “good cop” to the military’s “bad cop.” But no guidance was ever issued.

a. Why was that guidance never finalized?

Response:

Finalizing the guidance was complicated by the many different scenarios it tried to address. Ultimately, the FBI determined that a better way to proceed was to handle this during pre-deployment training, when the various scenarios could be discussed. Currently, with the benefit of the Detainee Treatment Act, this is no longer a substantial problem. While the FBI could end up being the “good cop” to the military’s “bad cop,” the “bad cop” treatment of every detainee should be within the parameters set by Congress. If, of course, the detainee has been treated outside the parameters of the Detainee Treatment Act and the requirements of the Army Field Manual, FBI Special Agents are trained that the agent must leave the interrogation and report the mistreatment to the on-scene commander.

b. Do you have any plans to finalize the guidance in the future?

Response:

As discussed above, the FBI determined that the standardization of the methods allowed under the Detainee Treatment Act and Army Field Manual, along with the standardized training provided to FBI personnel before deployment, was the most effective approach to addressing these issues.

14. According to the Inspector General’s report, in 2004 you sent an email to an FBI Assistant General Counsel at Guantanamo saying that “there needs to be a system so that when we learn of allegations against our agents, even if we believe them to be untrue, someone needs to run it down so we have a record that we did so.” Later, a memo was issued to create a process for reporting allegations of abuse in Guantanamo Bay. Has the FBI instituted any reporting requirements for agent misconduct in Iraq or Afghanistan? If not, why hasn’t that been done?

Response:

There is standing written FBI policy regarding standards of conduct and discipline for misconduct. Any allegation of misconduct on the part of an FBI Special Agent in Iraq or Afghanistan would be handled in accordance with these policies in the same manner as an allegation of abuse or misconduct made by a person in custody in the United States. Any such allegation is required to be reported and investigated through the proper chain of command as articulated in that policy.

Special procedures were implemented for Guantanamo Bay because of the nature of the work being done there in connection with the Military Commissions and the Office for the Administrative Review of the Detention of Enemy Combatants. FBI

agents review many documents containing detainees' statements in connection with these proceedings, and the FBI wanted to ensure that, during this process (which occurs in Guantanamo and not in either Iraq or Afghanistan), our employees understand that the normal FBI policies regarding reporting allegations of misconduct are followed.

15. The Inspector General's report states that the vast majority of FBI agents did not participate in the use of abusive interrogation techniques – something the FBI should be proud of. However, the report did cover some incidents where FBI agents did participate.

a. When the FBI receives allegations that its agents have been involved in the use of abusive techniques, what action is taken to address these allegations?

Response:

All allegations of employee misconduct are referred to the Internal Investigation Section (IIS) of the FBI's Inspection Division for investigation. DOJ's OIG has a right of first refusal to investigate any such allegation. Whether the FBI's IIS or DOJ's OIG investigates the allegation, upon completion of the investigation the matter is either closed or referred to the FBI's Office of Professional Responsibility (OPR) for adjudication and disciplinary action as deemed appropriate.

b. What disciplinary actions have been taken with respect to the incidents discussed in the IG report?

Response:

The FBI's IIS received an allegation of detainee abuse from an FBI agent formerly assigned to Guantanamo Bay and in 2005 an investigation was opened by DOJ's OIG. In May 2008, the OIG completed its investigation and forwarded its findings to the FBI's OPR for adjudication. In August 2008, the FBI's OPR concluded, as had the OIG, that the nine named subjects, who were FBI agents previously assigned to Guantanamo Bay or Iraq, had not engaged in misconduct. On August 7, 2008, letters were forwarded to the nine subjects advising that the allegations were unsubstantiated and the administrative inquiry was closed.

16. In July 2004, the FBI surveyed about 500 employees who served at Guantanamo to determine the FBI's knowledge of aggressive interviews of detainees. This investigation was not as thorough as that conducted by the Office of the Inspector General, and it did not reveal as many incidents or types of abuse. However, it did discover numerous incidents of misconduct, such as a detainee being observed with a bloody nose, detainees being put in stress positions and urinating on themselves, and disrespectful treatment of the Koran. Despite the discovery of these events, you sent an email to the Deputy General Counsel for the Department of Defense, John H. Smith, in which you stated that "no employee reported

conduct appropriate for referral.” What about this conduct made it inappropriate for referral?

Response:

All FBI reports of aggressive treatment (including reports that were clearly second-hand or that reported treatment that was authorized) were referred to DoD for such action as it deemed appropriate. The reference in the letter from the FBI’s General Counsel to the DoD Deputy General Counsel to conduct not appropriate for referral related to allegations that were either very general, not first-hand observations, or related to conduct that was known to be an allowable technique.

17. Since 2004, the end of the time period covered by the Inspector General report, have any incidences of abuse been reported by FBI agents serving in military zones? How have these reports been handled?

Response:

Since 2004, FBI employees serving in military zones have reported incidents of alleged abuse of detainees. In accordance with FBI policy, if an FBI employee knows or suspects that a detainee has been abused or mistreated, the FBI employee must report the incident to the FBI on-scene commander and to the appropriate FBI chain of command. In accordance with the MOU discussed in response to Question 1, these allegations have also been referred to DoD for further investigation and potential prosecution under applicable law.

Questions Posed by Senator Schumer

It has been reported that the Pentagon may have instructed interrogators at Guantánamo Bay to destroy handwritten notes from questioning sessions, in case interrogators were called to testify about the treatment of detainees. (Associated Press, June 9, 2008)

18. Are you aware of government personnel destroying any notes or other evidence relating to interrogations or the treatment of detainees?

Response:

Other than the destruction of videotapes by the CIA, which has been publicly acknowledged by the CIA and which is currently under investigation, the FBI General Counsel is not aware of any government personnel destroying any notes or other evidence relating to interrogations or the treatment of detainees.

19. Are you aware of the Pentagon instructing its employees or contractors to destroy notes or other evidence relating to interrogations or the treatment of detainees?

Response:

The FBI General Counsel is not aware of the Pentagon instructing its employees or contractors to destroy notes or other evidence relating to interrogations or the treatment of detainees.

20. Has the FBI ever instructed its employees or contractors to destroy notes or other evidence relating to interrogations or the treatment of detainees?

Response:

The FBI has never instructed its employees or contractors to destroy notes or other evidence relating to interrogations or the treatment of detainees.

21. At the hearing, you agreed to look into, and provide a response for, the following question: Did anyone in the government outside of the FBI demand, encourage, or pressure Director Mueller or anyone else at the FBI to participate in the coercive techniques that were used by other government interrogators?

Response:

The FBI General Counsel discussed this with Director Mueller. No one demanded, encouraged, or pressured Director Mueller or anyone else at the FBI to participate in the coercive techniques that were used by other government interrogators.

22. Who, if anyone, expressed disappointment or disapproval of the FBI's decision or policy not to participate in the coercive techniques that were used by other government interrogators? Specifically, did any of the following express disappointment or disapproval:

a. Personnel at the National Security Council;

Response:

The FBI is unaware of anyone at the National Security Council expressing disappointment or disapproval of the FBI's decision or policy not to participate in the coercive techniques that were used by other government interrogators.

b. Personnel at the Department of Defense, including Secretary Donald Rumsfeld or General Counsel William Haynes;

Response:

The FBI is unaware of anyone at DoD, including former Secretary Donald Rumsfeld or former General Counsel William Haynes, expressing disappointment or disapproval of the FBI's decision or policy not to participate in the coercive techniques that were used by other government interrogators.

c. Personnel at the White House, including Vice President Cheney or his staff members David Addington or I. Lewis Libby?

Response:

The FBI is unaware of anyone at the White House, including former Vice President Cheney or his staff members David Addington or I. Lewis Libby, expressing disappointment or disapproval of the FBI's decision or policy not to participate in the coercive techniques that were used by other government interrogators.