

## **QUESTIONS FOR DAWN JOHNSEN FROM SENATOR CORNYN**

1. In *Boumediene v. Bush*, the Supreme Court arrived at its ruling that the Guantanamo detainees have the habeas corpus privilege based on an evaluation of three factors: “(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.” A crucial factor in their decision was that the United States has maintained complete, uninterrupted, and indefinite control of Guantanamo for over 100 years, even though Cuba still officially owns the land.

Currently, there are 600 or more detainees being held by U.S. forces at the Bagram air base in Afghanistan. Like the detention center at Guantanamo Bay, Cuba, the prison at Bagram is controlled by the United States. Recently, lawyers representing these detainees have argued that Bagram is essentially the same as Guantanamo and that prisoners there ought to have the same rights as those at Guantanamo. The cases of these detainees are being argued before the U.S. District Court.

- a. Do you believe that the detainees at Bagram are also entitled to the writ of habeas corpus?
- b. Do you believe that a legitimate distinction can be made from *Boumediene* regarding “the nature of the sites where apprehension and then detention took place?”
- c. Do you personally agree with last week’s filing by the Justice Department that reaffirmed the litigation position taken by the Bush Administration with respect to habeas claims from Bagram detainees?

Answer: I have not studied this issue and do not have a position on it. If I am confirmed and if the issue were presented to OLC, I would follow the traditional OLC processes to respond, including researching the relevant facts and law and consulting with other components of the Department of Justice and with the Department of Defense and other agencies that have relevant expertise.

2. Several former Clinton Administration officials have stated that the practice known as extraordinary rendition was regularly practiced during that administration. Richard Clarke, the counterterrorism coordinator for the National Security Council, wrote that renditions-which he defined as “operations to apprehend terrorists abroad, usually without the knowledge of and almost always without public acknowledgment of the host government”- “were becoming routine” by “the mid-1990s.” He added that “[s]ometimes FBI arrest teams, sometimes CIA personnel, had been regularly dragging terrorists back to stand trial in the United States or flying them to incarceration in other countries.” Mr. Clarke stated that “President Clinton approved every snatch” - another term for rendition - “that he was asked to review. Every snatch CIA, Justice, or Defense proposed during [Clarke’s] tenure as [Counterterrorism Security Group] chairman, from 1992 to 2001, was approved.

“Former CIA Director George Tenet asserted the following in 2002: “In conjunction with the FBI, CIA had rendered 70 terrorists to justice around the world” prior to September 11. “Al-Qa’ida might have been able to operate freely in Afghanistan, but the terrorists knew they were fair game elsewhere.”

In a March 11, 2005 op-ed in the *New York Times* entitled “A Fine Rendition,” Michael Scheuer, the Clinton-era Chief of the CIA’S bin Laden unit, asserted that officials in the Clinton White House and Justice Department:

“... knew that taking detainees to Egypt or elsewhere might yield treatment not consonant with United States legal practice. How did they know? Well, several senior C.I.A. officers, myself included, were confident that common sense would elude that bunch, and so we told them - again and again and again. Each time a decision to do a rendition was made, we reminded the lawyers and policy makers that Egypt was Egypt, and that Jimmy Stewart never starred in a movie called ‘Mr. Smith Goes to Cairo.’ They usually listened, nodded, and then inserted a legal nicety by insisting that each country to which the agency delivered a detainee would have to pledge it would treat him according to the rules of its own legal system.”

- a. During your tenure in the Clinton Administration Office of Legal Counsel, to what extent were you aware of participation in the practice of extraordinary rendition by the Clinton Administration generally, and by the FBI or other components of the Justice Department specifically?
- b. Did you ever authorize the practice of rendition or otherwise express an opinion endorsing the legality of the practice? If so, do you believe you made the correct decision?
- c. Do you believe that the Clinton Administration’s practices with respect to rendition were lawful? Do you believe they were otherwise consistent with American values?

Answer: I know that the practice of rendition did not begin with the Bush Administration and my belief is that it is not in all cases unlawful. I have not engaged in any study of the Clinton Administration’s rendition practices that would allow me to comment on their legality or advisability. President Obama has ordered reviews of detention and rendition policies. It would be inappropriate for me to answer these questions that would require me to disclose nonpublic legal advice that I provided during the course of my service at OLC. Moreover, the subject matter is such that, if such advice was given, it likely would have been classified.

3. In July 1994, Clinton Administration Deputy Attorney General Jamie Gorelick argued before the House Select Committee on Intelligence that the President has inherent authority to conduct warrantless physical searches for foreign intelligence purposes. The Committee at the time was considering legislation to subject such searches to approval from the FISA court. That issue arose when attention was drawn to the practice of intelligence agents conducting clandestine searches within the United States. Such searches extended not only to foreign embassies, but to U.S. citizens within our borders. The warrantless searches of the office and home of Aldrich Ames, a U.S. citizen, in June and October 1993 gave rise to concerns that courts might strike down this practice.

Deputy Attorney General Gorelick's testimony before the Senate Intelligence Committee maintained, "the Department of Justice believes, and the case law supports, that the President has inherent authority to conduct warrantless physical searches for foreign intelligence purposes and that the President may, as has been done, delegate this authority to the Attorney General." She stated further, "it is important to understand that the rules and methodology for criminal searches are inconsistent with the collection of foreign intelligence and would unduly frustrate the President in carrying out his foreign intelligence responsibilities." In the Justice Department's view, she testified, it did not matter whether searches were "conducted for foreign intelligence purposes in the United States or against U.S. persons abroad. . . . [w]e believe that the warrant clause of the Fourth Amendment is inapplicable to such searches."

a. Do you agree with this statement?

b. Were you aware of this position during your tenure in the Justice Department?

Answer: I was generally aware of this issue and of Deputy Attorney General Gorelick's position. Although I had not (and still have not) carefully studied the question, I had no disagreement with her position and understood it to be the position of most of the federal courts that had addressed the question in a related context.

4. If you "do not believe the 13<sup>th</sup> Amendment is relevant at all" to the questions before the Supreme Court in *Webster v. Reproductive Health Services*, then why did you cite the 13<sup>th</sup> Amendment in footnote 23 of the brief that you filed in that case? Do you believe that the Amendment informs the 14<sup>th</sup> Amendment analysis in cases related to abortion?

Answer: As I testified at my hearing, I do not believe that abortion restrictions violate the Thirteenth Amendment. My longstanding view is that the right at issue is protected by the Fourteenth Amendment, as *Roe v. Wade* held and as the Court has since reaffirmed. The brief does not argue that abortion restrictions violate the Thirteenth Amendment, and I am quite certain that I have never made that argument anywhere else. I cannot say more about what the footnote intended because, until I was told of the *National Review* article about it, I did not recall it

nor do I remember its genesis. I would note that eleven lawyers signed that brief and it was written on behalf of seventy-seven organizations, which I do recall led to a great deal of negotiation among counsel and organizations about the content of the brief.