

Senator Edward M. Kennedy
Questions for the Record
Senate Judiciary Committee Hearing on the Nomination of Gregory G. Katsas for
Assistant Attorney General, Civil Division

1. Litigation Record

You've litigated an extraordinary number of cases in the Administration's war on terrorism, and you've taken some controversial positions on behalf of the government. As a lawyer in the Justice Department, I understand that you were performing the role of an advocate, and that the policy decisions you supported were made elsewhere. But one of the tasks of the confirmation process is to find out your own, personal views on the Department's legal policies. If confirmed as head of the Civil Division, you will have significantly more influence on policymaking than you did as an advocate, and it's important to know where you stand on the key legal issues of our time.

You've apparently been involved in every one of the recent landmark cases on the right to habeas corpus of enemy combatants. In *Rasul v. Bush* and again in *Hamdan v. Rumsfeld*, you defended the government's position that detainees who are foreign nationals have no constitutional or statutory rights to habeas corpus. In both of these cases, however, the Supreme Court overruled the Administration, holding that it lacked the authority to deny detainees access to the judicial system. In these and other cases, the Court has had to remind the Bush Administration of what should have been obvious: "A state of war is not a blank check for the President."

The issue of habeas corpus is before the Court again in *Boumediene v. Bush*, which will be decided by the Supreme Court later this year. During oral argument in the D.C. Circuit on the rights of aliens held by the U.S. government outside the United States, a judge asked you point blank, "Are you saying they don't have any rights?" Reports indicate that you agreed. In addition, you testified before Congress last July that "extending habeas corpus to aliens abroad is both unnecessary and profoundly unwise."

In that same testimony, you defended the Combatant Status Review Tribunals used at Guantanamo, asserting that they provide greater procedural protections to detainees than have ever before been provided. Just a week earlier, however, Lt. Col. Stephen Abraham had filed an affidavit in which he explained with insider's knowledge the many ways in which these tribunals are fundamentally flawed and unjust.

Lt. Col. Abraham later testified that when he served on a tribunal panel to review evidence on the recommended status of a detainee, he found the information presented to be legally unsound. He stated: "What were purported to be specific statements of fact lacked even the most fundamental earmarks of objectively credible evidence."

Questions:

- A. In all of the cases you have helped prepare or litigate for the Administration relating to the war on terrorism, can you provide any examples of legal arguments put forth by the government with which you personally disagreed? If so, which ones?**

The question of how many rights are available to wartime detainees remains very much alive in pending cases. As an advocate, I have a continuing duty of loyalty to the government, and I would not want any possible disagreement between my client and me to be used against my client in litigation. Therefore, I do not feel comfortable stating my possible disagreement with legal arguments that I have made on behalf of the government in this litigation. However, I can assure the Committee that, before taking any position on behalf of any client in litigation, I have always satisfied myself that there are reasonable, legally-defensible arguments in favor of that position.

- B. Do you agree that the Supreme Court's repeated rebukes of the Administration's positions on detainee rights indicate that the Administration has taken a fundamentally flawed legal approach to the treatment of detainees?**

I respectfully disagree. In the *Hamdi* and *Hamdan* cases, the Supreme Court agreed with the Administration that the ongoing struggle against the Taliban and al Qaeda is properly subject to the law of armed conflict. In *Hamdi*, the Supreme Court further agreed with the Administration that due process analysis must take into account the exigencies of armed conflict. Following the *Rasul* decision, Congress, in enacting the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006, adopted the Administration's position that the habeas corpus statute should not extend to aliens captured outside the United States and detained as enemy combatants at Guantanamo Bay, Cuba. Following the *Hamdan* decision, Congress, in enacting the MCA, adopted the Administration's position that the rules applicable to military commissions need not rigidly follow the rules applicable to courts martial. Finally, in *Boumediene*, the D.C. Circuit agreed with the Administration that the Suspension Clause and the Fifth Amendment are inapplicable to the Guantanamo detainees. To be sure, neither Congress nor the courts have agreed with all of the legal positions taken by the Administration in these cases, and I recognize that reasonable people can differ over these difficult and controversial questions. On balance, however, I believe that the Administration's positions have fared generally well in the courts and before Congress.

- C. Do you believe that a suspected terrorist, citizen or non-citizen, who is being held under the effective control of the United States beyond our borders has any legal rights under our laws? If so, which rights?**

Yes. Under the Supreme Court's decision in *Reid v. Covert*, a citizen held outside our borders would likely have a significant measure of constitutional rights. The Guantanamo detainees (all of whom are non-citizens) are entitled to a status determination before a Combatant Status Review Tribunal, under procedures specified in part by the Detainee Treatment Act and in part by binding regulations issued by the

Department of Defense. Moreover, each detainee may challenge an adverse CSRT decision in the Court of Appeals for the District of Columbia Circuit. To the extent that any non-citizen is eligible for prosecution by military commission, he or she would be entitled to the various statutory protections set forth in the Military Commissions Act. Those protections include a presumption of innocence and a requirement of proof beyond a reasonable doubt; the right to counsel; rights of confrontation, compulsory process, and access to exculpatory evidence possessed by the government; the right against self-incrimination; restrictions on the admission of hearsay and classified evidence; exclusion of evidence obtained by unlawful interrogation methods; a prohibition against double jeopardy; and a right of judicial review in the D.C. Circuit. With respect to treatment and interrogation methods, the federal torture statute imposes a criminal prohibition on the torture of citizens and non-citizens alike, the war crimes statute criminalizes grave breaches of the Geneva Conventions (including of Common Article 3), and the DTA imposes a prohibition on subjecting citizens and non-citizens alike to cruel, inhuman, or degrading treatment.

D. In light of the criticism by Lt. Col. Abraham and many others, do you still maintain that the Combatant Status Review Tribunals and other protections for detainees being held at Guantanamo are legally and morally adequate?

In the *Boumediene* litigation and elsewhere, the government continues to maintain that the regime of status determinations before Combatant Status Review Tribunals, followed by judicial review in the D.C. Circuit, is a legally adequate substitute for district-court habeas corpus. In defense of that position, the government has explained that CSRTs afford greater procedural protections for wartime status determinations than those available under Article 5 of the Third Geneva Convention, which the Supreme Court in *Hamdi* said would be constitutionally sufficient to justify the detention of enemy combatants who are citizens.

I respectfully disagree with the specific criticism raised by Lt. Col. Abraham. As noted above, he has stated that, in his view, some of the evidence relied upon by some of the CSRTs “lacked even the most fundamental earmarks of objectively credible evidence.” However, the judicial review mechanism enacted by Congress enables a detainee to raise in the D.C. Circuit the specific question whether a CSRT determination is “supported by a preponderance of the evidence.” See Detainee Treatment Act § 1005(e)(2)(C)(i). Thus, to the extent that the criticism raised by Lt. Col. Abraham has force in the context of any particular case, the detainee may fairly pursue that issue in the D.C. Circuit.

The question whether CSRTs are adequate as a policy or moral matter lies well beyond the responsibilities of the Civil Division. If confirmed as Assistant Attorney General, my role would be to assert reasonable legal defenses in support of CSRT decisions challenged in court. As an Administration witness testifying before Congress, I have expressed the view that the present scheme does, as a policy matter, represent a reasonable accommodation between the need to ensure fairness to individual detainees and the exigencies of the ongoing armed conflict. However, I recognize that the question

whether additional protections are warranted is a difficult one about which reasonable people may disagree, and one that Congress and the Administration no doubt will continue to discuss.

E. What assurances can you provide us that, in confirming you for this position, the Senate would not be confirming someone who subscribes to the extreme executive-power theories of David Addington and John Yoo?

I do not believe that my views or my record can fairly be characterized as extreme. As explained above, I believe that the litigation positions that I have taken on behalf of the government in the detainee cases lie well within the bounds of reasonableness, and have generally fared well in the courts and before Congress. Similarly, to the extent that I have expressed policy positions in congressional testimony and elsewhere, I have done so in defense of recent congressional statutes. More generally, despite arguing many of the most challenging appeals handled by the Civil Division over the last seven years, I have won 28 appeals over the course of my career, and lost only nine. Over the years, I have successfully defended the constitutionality of the Freedom of Access to Clinic Entrances Act, successfully argued that former Attorney General Janet Reno should not be held personally liable for any constitutional violations committed during the Elian Gonzalez raid, successfully represented injured migrant farmworkers seeking compensation from employers, and sought to expand procedural protections available to broadcasters accused by the FCC of indecent programming. Thus, I believe that my record reflects the effective representation of a wide range of client interests, as well as a balanced and thoughtful approach to the law.

a. Can you point to a single legal position or positions that either Addington or Yoo has taken with which you personally disagree? If so, please list all such examples.

My only professional interaction with Mr. Addington involved my successful defense of the Vice President in one case, and I have had no professional interaction with Mr. Yoo. I am familiar with statements by Professor Jack Goldsmith that Mr. Addington consistently has favored unilateral executive action over working jointly with the Congress where possible. To the extent those statements accurately portray Mr. Addington's views, I would respectfully disagree with those views. Moreover, I am familiar with public speculation that Mr. Yoo was involved in preparing the August 1, 2002 memorandum titled *Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A*. I believe that this memorandum was legally flawed and correctly withdrawn.

2. Secrecy

By all objective measures, this Administration has withheld more documents and more information from the American people than any in recent history, often on the flimsiest of legal and policy grounds. As the *New York Times* noted in an editorial last December, "government secrecy has become [a] higher and darker art under the Bush administration."

You've had a prominent role in litigation to protect the Administration's claims of secrecy. In the most recent example, in *El-Masri v. Tenet*, you argued that the state secrets privilege prevented the court from considering the plaintiff's well-documented claim that he was kidnapped by the CIA as part of its "extraordinary rendition" program and sent to Afghanistan to be tortured—all on the basis of mistaken identity. You said: "Just because some facts are in the public domain doesn't eliminate the need to keep others secret. . . . Even disclosures to judges carry risks."

You made similar arguments in other notable cases. In *Detroit Free Press v. Ashcroft* and *North Jersey Media Group, Inc. v. Ashcroft*, you defended the Attorney General's decision to close post-9/11 "special interest" deportation hearings to the public and the press. In *Center for National Security Studies v. Department of Justice*, you defended the Department's categorical refusal to disclose any information on hundreds of people detained in the wake of the 9/11 attacks.

In both these cases, you relied partly on the "mosaic theory," which holds that the government should not release even the most harmless-seeming information, since that information might be combined with other information to form a dangerous mosaic. At the 2003 Federalist Society Convention, you emphasized the significance of this theory.

As you may know, many commentators have criticized the government's reliance on the mosaic theory in these and other cases as being excessive and overbroad.

One commentator said that the mosaic theory provides "a latently subversive basis for withholding information." He said the theory has "supported both more secrecy in the [Bush Administration's] management of information and more secrecy about that secrecy by foreclosing scrutiny ex post." Since these highly speculative claims are impossible to disprove, he said, they make "the mosaic theory ripe for agency opportunism and abuse."

Another commentator observed that "[n]ow, the government invokes mosaic theory to rationalize closing deportation hearings, indefinitely detaining non-citizens, restricting dissemination of non-classified information, and secretly searching certain kinds of records, including library and Internet records. In other words, the government uses mosaic theory to justify the very bases of certain programs or actions. . . . Unfortunately, the government's current use of mosaic theory effectively reads constitutional liberties out of the balance.

Government officials apparently have determined that there is no acceptable risk of danger from disclosure of information and that infringement of constitutional liberties is an unavoidable side-effect of attaining that level of risk (although they rarely say this out loud)."

Still another commentator observed that "[i]n case after case, the [Bush] Administration has asserted that it can't release even previously unclassified data because they might be part of a mosaic—innocent in and of themselves but able to be fitted together toward some unspecified evil end. . . . The invocation of a 'mosaic' metaphor to suppress what might be connected to some amorphous other could be used to justify keeping anything at all secret."

Questions:

- A. Did you personally agree with every assertion of the mosaic theory you made on behalf of the government? If not, with which assertions did you disagree?**

For the reasons set forth above, I am not comfortable identifying my possible disagreement with arguments that I have asserted in court on behalf of clients. However, I am confident that the positions asserted by the government in each of the cases mentioned above are reasonable. In fact, the courts of appeals agreed with the government's litigation positions in three of the four cases: *El Masri*, *Center for National Security Studies*, and *North Jersey Media Group*. Although the government's litigation position did not prevail in *Detroit Free Press*, that case presented a close question, and at least three courts of appeals have specifically disagreed with the Sixth Circuit's reasoning and result in that case. See *Center for National Security Studies v. DOJ*, 331 F.3d 918, 932 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1104 (2004); *North Jersey Media Group v. Ashcroft*, 308 F.3d 198, 201 (3d Cir. 2002), *cert. denied*, 538 U.S. 1056 (2003); *Copley Press, Inc. v. Superior Court*, 141 P.3d 288, 309-10 (Cal. 2006).

- B. What is your response to critics who say that the Bush Administration—and you in particular—have abused the mosaic theory to shield government actions from legitimate scrutiny?**

In litigation in which I have been directly involved, the government has invoked the mosaic theory in an attempt to protect the confidentiality of government records or proceedings on three occasions: in *CNSS*, *North Jersey Media Group*, and *Detroit Free Press*. In each of those cases, national-security concerns were raised not by me or other litigators in the Civil Division, but by senior law-enforcement professionals in the FBI and experienced prosecutors in what was then the Terrorism and Violent Crime Section of the Criminal Division. Those experts filed detailed affidavits laying out their concerns, which centered on protecting the confidentiality of the law-enforcement investigation into the terrorist attacks of September 11, 2001. In litigating these cases on behalf of the government, my role was to argue that the affidavits established the applicability of Exemption 7 of the Freedom of Information Act (in *CNSS*) and the inapplicability of First Amendment rights of access (in *North Jersey Media* and *Detroit Free Press*). As noted above, the courts accepted our arguments in *CNSS* and *North Jersey Media*, and the adverse decision in *Detroit Free Press* has been the subject of reasonable criticism by other appellate courts. I am unfamiliar with any assertions of the mosaic theory by the government other than in the three cases discussed above.

- C. The mosaic theory is clearly susceptible to opportunism and abuse. It “proves too much” by potentially covering even the most harmless information. What steps has the Justice Department taken to avoid its improper use? What steps should be taken?**

The mosaic theory represents a longstanding recognition that, in some instances, “superficially innocuous information” may in fact be quite sensitive. See, *e.g.*, *CIA v.*

Sims, 471 U.S. 159, 178-79 (1985); *Halkin v. Helms*, 598 F.2d 1, 9 (D.C. Cir. 1987). That principle may be relevant in assessing a wide variety of legal questions, including the applicability of constitutional rights of access to government information, the applicability of the state secrets privilege, or the applicability of FOIA exemptions. In all such cases, government security experts must assess the risk of disclosure and must explain any concerns in sworn affidavits; government litigators must assess whether there are reasonable arguments for confidentiality under the governing legal standards; and courts must assess whether any government claim of confidentiality ultimately has merit. In my experience, this division of responsibility usually leads to reasonable confidentiality assertions by the government, and reasonable adjudications by the courts.

- D. In an Administration criticized as being the most secretive and opaque that America has ever had, you've had a central role in defending this secrecy in court. The legal positions you have advocated have set back this country's many years of progress in making the federal government more open to the people. Can you provide any examples of how you've shown reluctance or at least moderation and a proper respect for democratic accountability in your handling of matters related to government secrecy?**

As explained above, I have defended the confidentiality of government records or information only to the extent that government security experts have urged operational needs for confidentiality in sworn affidavits, and only to the extent that, in my professional judgment, there has been a defensible case for preserving confidentiality under governing legal standards established by Congress and the courts. With respect, I do not believe that the litigation positions successfully asserted by the government in *El Masri*, *CNSS*, and *North Jersey Media* have inappropriately set back the important value of government openness.

3. Torture

As you know, the nation was disgraced in the eyes of the world by the Bybee "torture memorandum" of August 2002, a legal opinion by the Office of Legal Counsel that redefined torture in such a narrow way that it justified interrogation techniques that are widely recognized as torture.

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 that fell 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, stating that the President and the people he directs are not bound by laws passed by Congress that prohibit torture.

The memo further stated that government 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.

At the end of 2004, when the Office of Legal Counsel withdrew the Bybee memorandum, it replaced it with a less extreme opinion that did not address the most controversial parts of the earlier opinion. The Department made this new opinion public.

But last October, we learned from the *New York Times* that the Office of Legal Counsel had issued two other secret “torture memos” in 2005—only a few months after publicly releasing the memo that replaced the Bybee memo.

The first secret memo reportedly authorized interrogators to use harsh techniques in combination, in order to create a more extreme overall effect. They could deprive detainees of sleep and food, bombard them with loud music, and subject them to freezing temperatures, all at the same time. These are techniques that our Judge Advocates General have said are illegal under U.S. law and the Geneva Conventions.

The second memo reportedly declared that none of the CIA’s interrogation methods violated the ban on cruel, inhuman, and degrading treatment that Congress was preparing to pass. At the time, the CIA was using abhorrent techniques copied from the Soviet Union and other brutal regimes.

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 to violate laws against torture.

Questions:

- A. In your years at the Justice Department, you’ve had a lead role in several major cases dealing with the treatment of detainees. I would like you to specify in as much detail as possible: what role did you play in *developing* any of the Administration’s policies toward terrorist suspects, as opposed to simply *defending* these policies?**

During my time in the Civil Division, from June 2001 to August 2006, I played no role in developing any of the Administration’s policies toward terrorist suspects. Since then, during my time in the Office of the Associate Attorney General, the only role I have played in developing such policies involved advising Administration lawyers who were working with Congress to secure enactment of the Military Commissions Act.

- a. Did you ever consult or advise in any way, formally or informally, on any legal document other than a court pleading, decision, or directive that related to interrogation practices?**

As noted above, I informally advised Administration lawyers who were seeking enactment of the Military Commissions Act. Section 6 of the MCA affects interrogation practices by defining criminal offenses that constitute grave breaches of Common Article 3 of the Geneva Conventions, and by authorizing the President to define less serious breaches of Common Article 3 through executive action. To the best of my recollection, my advice did not address any of those subjects.

- b. Have you had any contacts with lawyers at the Office of Legal Counsel regarding any analysis they have produced relating to interrogation? Please explain in detail all such contacts.**

I have never had any contact with any Office of Legal Counsel lawyer regarding the preparation of OLC advice, whether written or oral, relating to interrogation. In preparing for my confirmation hearing, I was advised informally by OLC attorneys regarding the treatment standards set forth in the federal torture statute, the war crimes statute, the Detainee Treatment Act, Common Article 3 of the Geneva Conventions, and Executive Order 13440. That preparation did not involve discussion of any nonpublic OLC memoranda relating to interrogation.

- B. Dean Harold Koh of 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.” Do you agree?**

I agree that the August 2002 memorandum was legally flawed and that it was correctly withdrawn.

- C. Do you agree or disagree with the Bybee memo’s claim that “necessity” can justify the use of torture?**

I have not had occasion to study this question carefully, but I am inclined to disagree. The availability of a common-law necessity defense to a federal criminal prohibition turns on congressional intent. See, e.g., *United States v. Bailey*, 444 U.S. 394, 409-13 (1980); Model Penal Code § 3.02. On its face, the federal torture statute does not address whether a necessity defense is available. See 18 U.S.C. §§ 2340-2340A. However, to the extent that the statute was designed to fully implement the Convention Against Torture, the defense would appear to be foreclosed because Article 2 of the CAT provides that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”

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

I have not had occasion to study this question carefully, but I am inclined to disagree for the reasons set forth above.

E. Do you agree or disagree with the Bybee memo's claim that for purposes of the Torture Act, physical suffering can never be "severe" unless it is of "extended duration or persistence"?

I do not understand the August 2002 memorandum to have asserted that claim. The August 2002 memorandum asserted that "severe physical pain" and "severe physical suffering" are "not distinct concepts" under the federal torture statute, and that both require pain or suffering that "must rise to the level of death, organ failure, or the permanent impairment of a significant body function." See *Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A* at n.3 & accompanying text (Aug. 1, 2002). The successor OLC memorandum expressly repudiated both of these conclusions. See *Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A* at 2, 10 (Dec. 30, 2004). I believe that the successor memorandum was correct to do so.

F. Do you agree or disagree with the theory—which this Administration has never repudiated—that laws banning torture do not always bind the Executive Branch, because of the President's inherent powers as commander-in-chief?

I have difficulty imagining any circumstance in which the President could use his commander-in-chief powers to override laws banning torture. To begin with, the Fifth, Eighth, and Fourteenth Amendments prohibit torture at least within the United States, and these Amendments of course bind the Executive Branch. Moreover, through the exercise of its express constitutional power to define and punish violations against the law of nations, Congress by statute has prohibited torture outside the United States. See 18 U.S.C. §§ 2340-2340A. Thus, to the extent that a President purported to authorize such torture, his power would be "at its lowest ebb." See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952) (Jackson, J., concurring). To my knowledge, no President has ever claimed the need to torture as an exercise of his powers and duties as Commander-in-Chief, and President Bush, in the context of the ongoing armed conflict against the Taliban and al Qaeda, repeatedly has stated that the United States will never engage in torture, and repeatedly has ordered the humane treatment of enemy detainees. See, e.g., *Humane Treatment of al Qaeda and Taliban Detainees* (Feb. 7, 2002); *Military Order of November 13, 2001*, § III, 66 Fed. Reg. 57831, 57834 (Nov. 16, 2001).

G. Do you believe that the President has any reservoir of authority under the Constitution that allows him to disregard laws that Congress passes on torture?

Please see my answer to question 3(F) above.

4. Waterboarding

As you know, waterboarding has become the worldwide symbol for America's debate over torture. It was the centerpiece of Attorney General Mukasey's confirmation hearings. It was also the technique apparently shown on the videotapes that the CIA destroyed. Waterboarding, however, is not by any means the only interrogation technique approved by the Bush Administration that Congress and legal experts believe to be torture. It's just the most notorious.

In fact, waterboarding is hardly new. It's an ancient, barbaric technique. In the fifteenth and sixteenth centuries, it was used in the Spanish Inquisition. In the nineteenth century, it was used against slaves in this country. In World War II, it was used against our own soldiers by Japan. In the 1970s, it was used by the Khmer Rouge and the military dictatorships in Chile and Argentina. It's being used today against pro-democracy activists in Burma. This is the company the Bush Administration is keeping when it refuses to give up waterboarding.

Top military lawyers and legal experts across the political spectrum have condemned it as a violation of U.S. law and a crime against humanity. After World War II, the United States helped organize the International Military Tribunal for the Far East, and it prosecuted Japanese soldiers for waterboarding Allied prisoners of war. At one trial, an Army Lieutenant testified that the experience "felt more or less like I was drowning, just gasping between life and death." We sentenced Japanese officers to years of hard labor for using waterboarding.

Like many of my colleagues and many American citizens, I was very troubled by Attorney General Mukasey's evasive answers about waterboarding. He repeatedly refused to acknowledge that waterboarding is torture. Yet as the record makes clear, courts and military tribunals have consistently agreed that waterboarding is an unlawful act of torture.

The question is not whether torture is unlawful—everyone knows that it is. Nor is the question whether torture is repugnant—everyone agrees on that too. The question is what constitutes torture. I am not asking you for an official pronouncement on the legality of waterboarding or any other interrogation technique. I am asking for your personal views on this legal question.

Questions:

A. Is waterboarding torture, as defined by domestic and international law?

During his recent oversight testimony, Attorney General Mukasey specifically declined to address the question of whether or when waterboarding – which is not presently authorized under any circumstances – may be a lawful interrogation technique in the context of the ongoing armed conflict against the Taliban and al Qaeda. The Attorney General explained his view that it is inadvisable to address difficult legal questions in the absence of concrete facts and circumstances, particularly where any answer could reveal to our adversaries the contours of generally-worded laws that define

the limits of a highly classified interrogation program. Given the Attorney General's decision, I must respectfully decline, as a subordinate Department of Justice official, to answer this question.

B. Is waterboarding illegal under United States law?

Please see my response to question 4(A).

C. Would it be lawful for another country to use waterboarding against an American?

It would probably be unlawful. To the extent that such waterboarding might occur outside the context of an armed conflict, I assume that it would constitute an unlawful battery. To the extent that such waterboarding might occur inside the context of an armed conflict, United States forces – which have a recognized command structure, fight in uniform, carry arms openly, and conduct operations in accordance with the laws and customs of war (most importantly, by not targeting civilians) – would be entitled to the full prisoner-of-war protections under the Third Geneva Convention. For prisoners-of-war, Article 17 of that Convention prohibits all forms of coercive interrogation, including “any unpleasant or disadvantageous treatment of any kind.”

D. According to *The New Yorker* magazine, in a recent interview 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.”

a. When even our own DNI acknowledges that waterboarding would be torture “for [him],” doesn’t that call into question the soundness of any definition of torture that excludes waterboarding?

In testimony before the Senate Select Committee on Intelligence, Director McConnell has stated that *The New Yorker* misquoted him. In any event, even as quoted in *The New Yorker*, Director McConnell expressly declined to address the question of when waterboarding might satisfy the legal definition of torture. See “The Spymaster,” *The New Yorker*, Jan. 21, 2008, at 53. Moreover, as the Attorney General has explained, that question is a difficult one about which reasonable minds can and do differ.

b. Would waterboarding be torture for you?

I imagine that I would likely find the technique extremely frightening and unpleasant.

- E. Where do you draw the line if you cannot say that waterboarding, a classic method of torture throughout the ages, is never permissible? If you feel you cannot say whether waterboarding is torture and illegal, what about the rack and the screw? Can we bring them back?**

Lines may be drawn by consulting the text, legislative history, and caselaw interpreting the federal torture statute, the war crimes statute, and the Detainee Treatment Act. For example, in the context of an armed conflict, the war crimes statute prohibits not only torture and cruel or inhuman treatment, but also specific acts such as murder, mutilation or maiming, intentionally causing serious bodily injury, rape, and sexual assault or abuse. See 18 U.S.C. § 2241(d). Moreover, although the torture statute does not specifically define the operative term “severe physical or mental pain or suffering,” see *id.* § 2340(1), legislative history suggests that the statute reaches “extreme, deliberate and unusually cruel practices” such as “sustained systematic beating, application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain.” S. Exec. Rep. No. 101-30, at 13-14 (Senate Foreign Relations Committee analysis of the Convention Against Torture, which the federal torture statute implements). Furthermore, the Detainee Treatment Act defines cruel, inhuman, or degrading treatment as the kind of conduct “prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States,” DTA § 1003(d), thus incorporating an extensive body of federal constitutional precedents. These sources provide reasonable benchmarks for analysis, even though many fact patterns obviously would present close and debatable questions. Under these standards, I believe that the rack and the screw would be clearly unlawful.

- F. Did you have any knowledge of any kind about the CIA interrogation tapes that were destroyed in 2005? If so, please specify in as much detail as possible the nature of your knowledge of the tapes and the actions you took in regard to that knowledge.**

No.

- G. If you had been asked by the CIA, what would your advice have been on whether the tapes should have been destroyed?**

If asked, I would have advised the CIA not to destroy the tapes.

5. Army Field Manual Legislation

In the Detainee Treatment Act passed in 2005, Congress attempted to restore confidence in America’s treatment of detainees and affirm our commitment to the basic rights in the Geneva Conventions. But by not specifically applying the Army Field Manual’s interrogation standards to all government agencies, we left open a loophole that an administration determined to use abusive techniques might exploit. The Bush Administration drove a Mack truck through that loophole.

The CIA's so-called "enhanced interrogation program," carried out at secret sites, became an international scandal and a new stain on America in the eyes of the world. The Administration issued an Executive Order last year to minimize the outcry, but the Order failed to provide guidelines for civilian interrogators or to renounce abuses such as waterboarding, mock executions, use of attack dogs, beatings, and electric shocks. The recent disclosure of secret opinions by the Office of Legal Counsel is evidence that the Administration still intended to use such techniques. Attorney General Mukasey's refusal to say whether waterboarding is illegal and the destruction of the CIA videotapes give us even greater reason for concern.

All of these disgraceful episodes leave no doubt that the only solution is for Congress to apply the Army Field Manual standards across the board. The Intelligence Authorization Bill now pending in the Senate would do that.

The Army Field Manual clearly states that "[u]se of torture is not only illegal but also it is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the [interrogator] wants to hear." The Manual still leaves great flexibility for interrogators, but it makes clear that torture is illegal and always forbidden.

Applying the Field Manual's standards throughout the government will help repair the damage to our international reputation. It will also improve the quality of our intelligence gathering, and help protect our own personnel from torture anywhere in the world. It will make America safer and stronger.

Questions:

- A. Shouldn't we require all interrogations to comply with the standards of the Army Field Manual, no matter who conducts them?**

The Army Field Manual is designed primarily to govern the interrogation of lawful combatants entitled under the Third Geneva Convention to be free from all forms of coercive interrogation. Accordingly, the Army Field Manual prohibits a wide range of interrogation techniques that constitute neither torture nor cruel, inhuman, or degrading treatment. The question of which of these techniques, if any, should be available to the CIA lies well beyond the expertise of the Civil Division or the Office of the Associate Attorney General.

- B. If not, which specific techniques disallowed by the Field Manual do you believe the CIA should be allowed to use—even though the Department of Defense has rejected them as illegal, immoral, ineffective, and damaging to America's global standing and the safety of our own servicemen and women overseas?**

Please see my answer to question 5(A) above.

- C. The standard we apply to detainees also sets the standard for other nations' treatment of Americans they take into custody. If we decide it is lawful 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. Do you agree that we shouldn't subject anyone to interrogation practices that we'd consider unlawful if used against an American?**

I agree that reciprocity concerns are an important consideration in this area. On that point, I would note that, consistent with the Geneva Conventions, the United States does not engage in any coercive interrogation techniques when fighting against adversaries who respect the laws of war.

6. FISA and Executive Power

The scandal over the Administration's warrantless eavesdropping is still coming to light. But we already know that its surveillance activities were so shocking that up to 30 Justice Department employees threatened to resign because of them. The President's own head of the Office of Legal Counsel, Jack Goldsmith, testified that he "could not find a legal basis for some aspects of the program." He called it "the biggest legal mess [he] had ever encountered."

Here is how Mr. Goldsmith described the Administration's general approach to FISA: "After 9/11 . . . top officials in the administration dealt with FISA the way they dealt with other laws they didn't like: they blew through them in secret based on flimsy legal opinions that they guarded closely so no one could question the legal basis of the operations." He said that David Addington, the powerful Counsel to the Vice President, once exclaimed, "We're one bomb away from getting rid of that obnoxious [FISA] court."

As you know, Congress is currently debating the possible reform of FISA. The White House has asked that we make the temporary changes made by the Protect America Act permanent, and that we amend FISA in other ways as well. At the same time, the Administration refuses to acknowledge it is bound by FISA. So we have a bizarre situation: the Administration is demanding that Congress pass a new law, but it is simultaneously insisting that no such law is necessary and that it will not be bound by it.

The language of FISA is clear: it provides the "exclusive" means by which the Executive may conduct foreign intelligence surveillance. As we know from Justice Jackson's famous opinion in the Steel Seizure Cases half a century ago, the President's authority is at its weakest when he acts contrary to a congressional statute. Yet President Bush apparently intends to defy clear statutory language.

Questions:

- A. In Attorney General Mukasey's confirmations hearings, he seemed to suggest that the President is free in certain cases to ignore the crystal-clear instruction from Congress that FISA is the "exclusive" means by which the Executive Branch can conduct foreign intelligence surveillance. Do you agree that the Executive Branch is bound by FISA in conducting all foreign intelligence surveillance?**

I agree that the President is bound by FISA except insofar as particular applications of FISA might be unconstitutional. I also believe that, were the President to assert that a particular application of FISA would unconstitutionally interfere with his powers under Article II of the Constitution, his power would be "at its lowest ebb." See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952) (Jackson, J., concurring).

- B. When if ever, in your view, would the President be authorized to disregard or violate FISA?**

In my view, the President would never be authorized to violate FISA in cases where the statute is constitutional as applied. The President would be authorized to disregard FISA in cases where the statute is inapplicable, in cases where it has been amended or superseded by subsequent legislation, and in cases (if any) where it is unconstitutional as applied.

- C. Do you agree that any new legislation should reaffirm that FISA is the "exclusive" means by which the executive can conduct foreign intelligence surveillance?**

I am unfamiliar with specific policy issues related to FISA. In general, I believe that Congress and the President should work together as much as possible to establish appropriate parameters for the conduct of foreign intelligence surveillance.

- D. In an Administration that has shown little respect for FISA, it will obviously take courage to insist that the law must be followed. No matter what pressures you face, will you insist that government surveillance must comply with FISA?**

The Civil Division does not enforce compliance with FISA. Instead, it defends challenged executive action when there are reasonable, good-faith arguments to be asserted. If faced with executive action that violates FISA, I would defend that action in court only to the extent I concluded that there were reasonable, good-faith arguments that FISA was unconstitutional in the particular circumstances presented. Otherwise, I would decline to defend any executive action in violation of FISA.

7. Office of Immigration Litigation

As head of the Civil Division, you supervise the Office of Immigration Litigation, whose role is to defend the decisions of the Board of Immigration Appeals and the Department of Homeland Security in federal court. However, some have criticized the Office for expanding its role and becoming involved in immigration policy within the Department of Justice.

Questions:

- A. How would you define the role of the Office of Immigration Litigation? Does it have a role in setting policy on immigration issues at the Department of Justice? If so, is that an appropriate role?**

The Office of Immigration Litigation is a litigation branch of the Civil Division. I agree that its primary role is to defend the decisions of the Board of Immigration Appeals and the Department of Homeland Security in federal court. To the extent that OIL has any involvement in policy development, that role should be to advise on the litigation consequences of particular policy decisions made by others outside the Civil Division.

In the last two years, I understand that the number of cases being appealed from the Board of Immigration Appeals to the federal courts has decreased, a reversal of what had been the trend in the prior several years.

- B. Is that the case? If so, what do you attribute the decline to?**

Yes. According to the database maintained by the Civil Division, there were 11,073 petitions for review of BIA decisions filed in 2005, and only 9140 such petitions filed in 2007. I do not know the reason for this decline.

On the other hand, I understand that the number of appeals from Department of Homeland Security decisions has increased.

- C. What do you attribute this trend to?**

While I do not have exact figures on this point, my understanding is that the number of challenges to DHS decisions has increased. I do not know the precise reasons for this increase. However, one significant source of new litigation has been mandamus actions seeking to compel decisions on naturalization requests.