

**WRITTEN QUESTIONS OF SENATOR PATRICK LEAHY,
CHAIRMAN, SENATE JUDICIARY COMMITTEE,
FOR GREGORY G. KATSAS,
NOMINEE FOR ASSISTANT ATTORNEY GENERAL OF THE CIVIL DIVISION**

- 1. This administration appears to have engaged in a policy of extraordinary rendition – sending detainees to be interrogated in other countries where they could be, and in some cases apparently have been, tortured. Indeed, I have asked former Attorney General Alberto Gonzales on several occasions about the case of Maher Arar, a Canadian citizen who when returning home from a vacation in 2002, was detained by federal agents at JFK Airport in New York City on suspicion of ties to terrorism. He was sent, not to Canada, but to Syria, where he was held for 10 months. A Canadian commission found no evidence that he had any terrorist connection or posed any threat, but concluded that he was tortured and held in abhorrent conditions in Syria. The Canadian government has apologized to Mr. Arar for its part in this debacle. The head of the Royal Canadian Mounted Police resigned, and the country has agreed to compensate Mr. Arar almost \$10 million. Our government has never apologized or admitted any wrongdoing in Mr. Arar’s case.**

You represented the government in a case in which a former detainee, Khalid El Massari, challenged the CIA’s extraordinary rendition program. In the course of you representation, did you become aware of the possibility that detainees could be transferred to another country where there was a realistic possibility that he or she may be tortured, regardless of any assurances you receive from that country? Do you believe that there are adequate precautions to prevent this from happening?

During the course of my representation of the United States in *El Masri v. Tenet*, I did not learn anything suggesting that detainees held by the United States could be transferred to another country where there is a realistic possibility of torture. Section 2242 of the Foreign Affairs Reform and Restructuring Act, which implements Article 3 of the United Nations Convention Against Torture, prohibits the United States from transferring any detainee within our borders to a country in which there are substantial grounds for believing that the detainee would be in danger of being subjected to torture. Moreover, as a matter of policy, the United States applies the same rule to detainees held outside our borders. I have no reason to believe that the government fails to honor these legal and prudential obligations.

- 2. At a June 2007 hearing on Habeas Corpus, Detentions at Guantanamo Bay, Cuba, before a Subcommittee of the House Judiciary Committee, you testified that “extending habeas to aliens abroad is both unnecessary and unwise.” You also defended the habeas stripping provisions of the Military**

Commissions Act by stating that “we think it’s defensible on the law and we think it’s defensible on the basis of national security.” Given your reluctance to extend habeas rights to detainees, what assurances can you give us that you will preserve the Department’s traditions of fair-mindedness and integrity in all cases, including detainee treatment cases or challenges to the administration’s detainee policy?

The role of the Civil Division is to defend the constitutionality of federal statutes, and the lawfulness of federal executive action, whenever there are reasonable legal arguments in support of the statute or executive action at issue. In more than six years as the Appellate Deputy for the Civil Division, I applied that principle to defend challenged statutes and executive actions regardless of my own personal views about their wisdom, and I would continue to do so if confirmed as Assistant Attorney General. In successfully defending the constitutionality of the Military Commissions Act in the D.C. Circuit in the *Boumediene* litigation, I acted consistent with the principle that congressional statutes should be defended if reasonable arguments can be asserted in their favor. To the extent that my June 2007 testimony also made policy arguments as well as legal ones, it reflected my role as an Administration witness testifying before Congress about proposed changes to existing law. Such policy arguments, however, should play no role in the Civil Division’s defense of existing statutes.

- 3. On the subject of treatment of detainees, this Administration has consistently discouraged, refused, and prevented congressional input and participation. In fact, in 2002 the Department of Justice opined, “Any effort by Congress to regulate the interrogations of battlefield combatants would violate the Constitution’s sole vesting of the commander-in-chief authority in the president.” Do you agree with this statement or will you work with Congress to ensure that we have a legal regime in place to deal with detainees that is credible to the rest of the world?**

I disagree with the statement quoted above, because it does not adequately take into account Congress’s express constitutional powers to regulate the conduct of United States armed forces and to define and punish offenses against the law of nations. If confirmed as the head of a litigating division, I would not expect to be directly involved in any interactions between the Administration and the Congress. However, I would support efforts to ensure that we have an appropriate legal regime in place to govern the treatment of detainees, and I agree that credibility abroad is one important consideration that such a regime should take into account.

- 4. At your confirmation hearing, you were asked whether an executive order can or cannot limit a President. In response, you testified that “because the Constitution doesn’t specify procedures for making or sending executive orders” it would be “literally true” that a President could act outside of an executive order and modify it without issuing a new executive order. What**

do you believe are the limits, if any, on a President's authority to act outside of the scope of previously issued executive order?

As I testified at my confirmation hearing, because the Constitution does not specify procedures for making or amending executive orders, I can discern no general constitutional prohibition on the President's informally modifying a written executive order. However, to the extent that any modification purported to change the legal rights and duties of private parties, I assume that due process would require effective communication of the modification to those parties. Finally, as a prudential matter, I believe that the President should make executive orders (including modifications or amendments to those orders) publicly available absent some strong reason for preserving their confidentiality.

- 5. The memo dated August 1, 2002, signed by then-Assistant Attorney General Jay Bybee and known as the "Bybee memo" concluded that for an act to violate the torture statute, it "must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." The Bybee memo was rescinded, but never repudiated. Will you repudiate that memo as contrary to law and American values? Do you believe that the President has the authority under any circumstances to exercise a "commander-in-chief override" and immunize acts of torture, as the Bybee memo argued?**

The Department of Justice has already repudiated the August 2002 memorandum discussed above. The Department withdrew that memorandum in June 2004, and, in December 2004, it issued a "replacement memorandum" that by its terms "supersedes the August 2002 Memorandum in its entirety." See *Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A*, at 2 (Dec. 30, 2004). Moreover, the authors of the December 2004 memorandum expressly "do not agree with" the statement that an act of unlawful torture must cause pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." See *id.* at 8 n.17. The December 2004 memorandum remains effective as the controlling DOJ position, and I agree with that position.

I have difficulty imagining any circumstance in which the President could immunize acts of 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).

6. **At your hearing, you testified that you would resign if a conflict arose between you and a superior over litigating a case where you believed there was “only one defensible view.” Absent such an extraordinary conflict, what assurances can you give us that, if confirmed, you will withstand any pressure from the White House or elsewhere to conform their legal judgments to political preferences?**

Political preferences must have no role in determining what the law is or what legal positions are defensible in litigation. For over six years, I served as the Appellate Deputy for the Civil Division. In that capacity, I supervised hundreds if not thousands of appeals, and I was personally involved in litigating many of the most important appeals handled by the Division. During that time, I was never once asked to conform my litigation judgments to the political preferences of the White House, or to those of my superiors within the Justice Department. For that reason, I would be surprised and disappointed if I were asked in the future to conform my litigation judgments to political preferences, and I would resist any such requests by all appropriate means, including by resigning if necessary.

7. **Professor Goldsmith testified before this Committee about the extraordinary secrecy with which this Administration treats legal opinions, particularly those related to terrorism. He said, for example, the controversial “Bybee memo” on torture and related memos were not circulated for comments to the State Department, which had expertise on the issue of torture and the consequences of adopting particular positions. The opinions on warrantless surveillance, before Professor Goldsmith arrived, were held so closely that not even the Deputy Attorney General was permitted to see them.**

Secrecy is obviously important when sensitive national security issues are involved, but here the purpose of the secrecy is to insulate the legal decision-making from review by those who might challenge or disagree. This is unhealthy and has led to extraordinarily costly legal and policy errors on the part of this Administration. You have argued on behalf of the Government in court in favor of an excessive reliance on secrecy in seeking to dismiss numerous important cases, including challenges to the treatment of detainees, on “state secrets” ground. If confirmed, will you commit to review the Civil Division’s assertions of a “state secrets” defense and to ensure that it is not used excessively as a way of denying people the ability to assert basic rights in courts?

Yes. The state secrets privilege should be asserted as sparingly as possible. As you know, courts require each assertion of the privilege to be made personally by the head of the federal agency seeking to protect the information at issue. In my experience, the Assistant Attorney General for the Civil Division has also personally reviewed each possible assertion of the privilege, if the Civil Division would handle the underlying litigation in court, and I pledge to continue that practice if confirmed.