October 31, 2007

Senator Arlen Specter
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Specter:

Thank you again for the graciousness that you showed me throughout the hearing. Thank you also for the letter of October 24, which gives me an additional opportunity to discuss several issues that arose during my testimony.

Your letter asks me first to explain my views on the scope of the President's authority under the Constitution. In our constitutional system, no person, including the President, stands above the law. Indeed, the President has a specific obligation under the Constitution to faithfully execute the laws that Congress has passed. That obligation, of course, extends to executing our highest law, the Constitution. As I stated during the hearing, the Constitution confers upon each branch a sphere of authority that is exclusive to that branch. For example, the President has the exclusive authority to nominate members of his Cabinet or Article III judges, and Congress has the exclusive authority to confirm or not to confirm such officers.

From time to time, difficult separation of powers questions may arise when Congress legislates in an area where the Constitution confers authority upon the President. I understand that such an issue has arisen recently with respect to the Foreign Intelligence Surveillance Act ("FISA"). The courts have recognized that the President has the constitutional authority to conduct warrantless surveillance for the collection of foreign intelligence. *See, e.g.*, *United States* v. *Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980); *United States* v. *Butenko*, 494 F.2d 593 (en banc) (3d Cir. 1974); *United States* v. *Brown*, 484 F.2d 418, 426 (5th Cir. 1973); *see also In re Sealed Case*, 310 F. 3d 717, 742 (FIS Court of Review 2002). As Attorney General Griffin Bell explained at the time that FISA was enacted, FISA's surveillance procedures may not reach the limits of the President's authority under the Constitution. Therefore, a separation of powers question can arise if, during wartime, the President sought to rely upon his constitutional authority to collect foreign intelligence in a manner that was arguably inconsistent with FISA's procedures.

As I tried to stress during the hearing, government works best, and with the greatest legitimacy, when the branches act cooperatively, each with respect for the other's constitutional prerogatives. I agreed more than once that consultation between the Committee and the Department often can prevent issues from evolving into controversies. I am not of the view that the President's constitutional authority to conduct the foreign affairs of the United States, including protecting our national security, is inevitably in tension with Congress's power to legislate. To the contrary, if confirmed, I would be a strong advocate for a cooperative approach to Congress in matters of national security. There is no reason to provoke a constitutional controversy over a process that works well

most of the time, that can be fixed where it does not work, and that involves the security of the American people.

Your letter asks also for my views on the legality and propriety of water-boarding, as well as the appropriate scope of interrogation under United States law, which includes the Geneva Conventions. I well understand the concern that this Country remain true to its ideals, and that includes how we treat even the most brutal terrorists in U.S. custody. I understand also the importance of the United States remaining a nation of laws and setting a high standard of respect for human rights. Indeed, I said at the hearing that torture violates the law and the Constitution, and the President may not authorize it as he is no less bound by constitutional restrictions than any other government official.

I was asked at the hearing and in your letter questions about the hypothetical use of certain coercive interrogation techniques. As described at the hearing, these techniques seem over the line or, on a personal basis, repugnant to me, and would probably seem the same to many Americans. But hypotheticals are different from real life, and in any legal opinion the actual facts and circumstances are critical. As a judge, I tried to be objective in my decision-making and to put aside even strongly held personal beliefs when assessing a legal question because legal questions must be answered based solely on the actual facts, circumstances, and legal standards presented. A legal opinion based on hypothetical facts and circumstances may be of some limited academic appeal but has scant practical effect or value.

I have said repeatedly, and reiterate here, that no one, including a President, is above the law, and that I would leave office sooner than participate in a violation of law. If confirmed, any legal opinions I offer will reflect that I appreciate the need for the United States to remain a nation of laws and to set the highest standards. I will be mindful also of our shared obligation to ensure that our Nation has the tools it needs, within the law, to protect the American people.

As I testified, any discussion of coercive interrogation techniques necessarily involves a discussion of and a choice among bad alternatives. I was and remain loath to discuss and opine on any of those alternatives at this stage for the following three principal reasons: First, I have not been made aware of the details of any interrogation program to the extent that any such program may be classified, and thus do not know what techniques may be involved in any such program that some may find analogous or comparable to the coercive techniques presented to me at the hearing and in your letter. Second, I would not want any uninformed statement of mine to present our own professional interrogators in the field, who must perform their duty under the most stressful conditions, or those charged with reviewing their conduct, with a perceived threat that any conduct of theirs, past or present, that was based on authorizations supported by the Department of Justice could place them in personal legal jeopardy. Third, for the reasons that I believe our intelligence community has explained in detail, I would not want any statement of mine to provide our enemies with a window into the limits or contours of any interrogation program we may have in place and thereby assist them in training to resist the techniques we actually may use.

I do know, however, that "waterboarding" cannot be used by the United States military because its use by the military would be a clear violation of the Detainee

Treatment Act ("DTA"). That is because "waterboarding" and certain other coercive interrogation techniques are expressly prohibited by the Army Field Manual on Intelligence Interrogation, and Congress specifically legislated in the DTA that no person in the custody or control of the Department of Defense ("DOD") or held in a DOD facility may be subject to any interrogation techniques not authorized and listed in the Manual.

In the absence of legislation expressly banning certain interrogation techniques in all circumstances, one must consider whether a particular technique complies with relevant legal standards. Below, I provide a summary of the type of analysis that I would undertake, were I presented as Attorney General with the question of whether coercive interrogation techniques, including "waterboarding" as described in your letter, would constitute torture, cruel, inhuman or degrading treatment, or a violation of Common Article 3 of the Geneva Conventions.

The statutory elements of torture are set forth in 18 U.S.C. § 2340. By the terms of the statute, whether a particular technique is torture would turn principally on whether it is specifically intended to cause (a) severe physical pain or suffering or (b) prolonged mental harm resulting from certain specified threats or acts. If, after being briefed, I determine that a particular technique satisfies the elements of section 2340, I would conclude that the technique violated the law.

Even if a particular technique did not constitute torture under 18 U.S.C. § 2340, I would have to consider also whether it nevertheless would be prohibited as "cruel, inhuman or degrading treatment" as set forth in the DTA and the MCA—enacted after the Department of Justice's December 30, 2004 memorandum to Mr. Comey—which extended the Convention Against Torture's prohibition on "cruel, inhuman or degrading treatment" to individuals in United States custody regardless of location or nationality. Congress specified in those statutes, as the Senate had in consenting to the ratification of the Convention Against Torture, that the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution would control our interpretation of the phrase "cruel, inhuman or degrading treatment."

The Fifth Amendment is likely most relevant to an inquiry under the DTA and MCA into the lawfulness of an interrogation technique used against alien enemy combatants held abroad, and the Supreme Court has established the well-known "shocks the conscience" test in determining whether particular government conduct is consistent with the Fifth Amendment's due process guarantees. *See County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998); *Rochin v. California*, 342 U.S. 165, 174 (1952). A legal opinion on whether any interrogation technique shocks the conscience such that it constitutes cruel, inhuman or degrading treatment requires an understanding of the relevant facts and circumstances of the technique's past or proposed use. This is the test mandated by the Supreme Court itself in *County of Sacramento v. Lewis* in which it wrote that "our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking." 523 U.S. 833, 850 (1998) (emphasis added). As the Supreme Court has explained, a court first considers whether the conduct is "arbitrary in the constitutional sense," a test that asks whether the conduct is proportionate to the governmental interests involved. *Id.* at 847. In addition, the court must conduct an

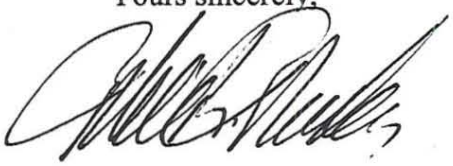
objective inquiry into whether the conduct at issue is "egregious" or "outrageous" in light of "traditional executive behavior and contemporary practices." *Id.* at 847 n.8. This inquiry requires a review of executive practice so as to determine what the United States has traditionally considered to be out of bounds, and it makes clear that there are some acts that would be prohibited regardless of the surrounding circumstances.

I would have to ensure also that any technique complies with our Nation's obligations under the Geneva Conventions, including those acts, such as murder, mutilation, rape, and cruel or inhuman treatment, that Congress has forbidden as grave breaches of Common Article 3 under the War Crimes Act. With respect to any coercive interrogation technique, the prohibition on "cruel or inhuman treatment" would be of particular relevance. That statute, similar in structure to 18 U.S.C. § 2340, prohibits acts intended (a) to cause serious physical pain or suffering, or (b) serious and non-transitory mental harm resulting from certain specific threats or acts. Also, I would have to consider whether there would be a violation of the additional prohibitions imposed by Executive Order 13440, which includes a prohibition of willful and outrageous personal abuse inflicted for the purpose of humiliating and degrading the detainee.

As I testified, if confirmed I will review any coercive interrogation techniques currently used by the United States government and the legal analysis authorizing their use to assess whether such techniques comply with the law. If, after such a review, I determine that any technique is unlawful, I will not hesitate to so advise the President and will rescind or correct any legal opinion of the Department of Justice that supports use of the technique.

With respect to your question about signing statements, I emphasize again that our system of government works best when Congress and the Executive Branch act in a spirit of mutual accommodation and cooperation. The practice of presidential signing statements is not new, and I do not believe that it must be controversial. The President may express his views about the laws that he signs, and if he believes that a particular provision of the bill is constitutionally problematic, the President may appropriately identify that problem. That said, I agree with you that presidential signing statements should not be the vehicle for creating unnecessary confrontation between the branches, particularly in cases where the laws themselves reflect productive collaboration between the branches. If confirmed, I will ensure that the Department of Justice provides advice on the issue of signing statements with this spirit in mind.

Yours sincerely,



Michael B. Mukasey