

Nomination of Michael B. Mukasey to be Attorney General of the United States
Written Questions from Senator Herb Kohl

Office of Legal Counsel Independence

1. In 2004, 19 former Office of Legal Counsel (OLC) officials outlined a number of principles that they believe should guide OLC opinions. One of their recommendations included the principle that “OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration’s pursuit of desired policies.” According to press accounts, the Office of the White House Counsel and the Office of the Vice President have been deeply involved in the drafting of opinions issued by the Office of Legal Counsel.

Is it appropriate for the White House to be involved in the drafting of OLC opinions before OLC renders final advice on the legality of Administration policies, whether ongoing or proposed?

Will you place limitations on communications between OLC officials and the White House prior to the issuance of final OLC opinions?

2. According to Jack Goldsmith, during his time as head of OLC, he withdrew more opinions than any of his predecessors. One of those opinions was the August 2002 torture memo that you called a “mistake.” According to a recent *New York Times* story, in February 2005, OLC issued another opinion endorsing the “harshest interrogation techniques” ever used by the CIA. Many view this as a reinstatement of the withdrawn August 2002 memo.

Will you commit to notifying Congress if other opinions withdrawn or modified during Goldsmith’s tenure at OLC were reinstated, in whole or in part, or if the policies or programs affected were continued based on similar or new legal reasoning after Attorney General Gonzales was sworn in as Attorney General on February 3, 2005?

Interrogation of Enemy Prisoners

3. During the hearing, you acknowledged that Congress has the authority to prohibit torture and cruel, inhuman and degrading treatment. You also expressed the belief that the current statutes in this area are constitutional. On the issue of electronic surveillance, however, you left open the possibility that the President may have inherent powers that Congress cannot limit under the Foreign Intelligence Surveillance Act. You referred to former Attorney General Griffin Bell, who said that FISA may not have reached the limits of presidential authority.

Do you believe the same is true of Congressional limitations on interrogation? Can Congress define these limitations however it chooses, or do you believe that the President has certain inherent powers to interrogate enemy prisoners that Congress cannot limit?

4. **Do you believe that torture is an effective method of interrogation that elicits valuable intelligence information?**
5. **Do you believe that cruel, inhuman and degrading treatment, or other coercive techniques that fall short of torture, are effective methods of interrogation that elicit valuable intelligence information?**
6. Many national security experts argue that the abusive interrogation techniques authorized by the Administration have undermined our efforts to combat terrorism around the world. Specifically, they argue that the use of abusive interrogation tactics strains relationships with our allies, fuels anti-Americanism, and bolsters terrorist recruitment. Former Secretary of State Colin Powell suggested that the world is “beginning to doubt the moral basis of our fight against terrorism.”

Do you agree with these criticisms of the use of abusive interrogation techniques?

7. In 2005, Congress passed the Detainee Treatment Act in response to public allegations of ongoing abuse by government interrogators. That law was intended to govern interrogations by all government personnel, including the Central Intelligence Agency. According to the *New York Times*, OLC issued an opinion saying that the aggressive interrogation methods being used at the time were not impacted by that law.

Do you believe it is appropriate for OLC to issue secret opinions interpreting Congressional statutes and then refuse to share that interpretation with Congress?

State and Local Law Enforcement

8. When I asked you about the COPS program, you said it was not supposed to be an ongoing funding program for police departments. You went on to say that it should encourage state and local governments to pick up the funding for these positions when the federal funds run out. I do not disagree with that. However, we have to deal with the reality on the ground today. Medium-sized cities around the country have seen record increases in violent crime in recent years. As a result of cuts to the COPS Universal Hiring Program, police departments in those cities have large numbers of vacancies, without the funding to fill them.

Do you agree that we have an obligation to provide assistance under the COPS Hiring Program to these communities today to help combat violent crime?

Antitrust

9. I have been very disappointed in a sharp cutback of antitrust enforcement at the Justice Department. The Justice Department’s own statistics show that, compared to the last four years of the Clinton administration, the number of merger investigations initiated by the Justice Department in the most recent four years for which there are complete statistics (FY 2003-2006) has declined by nearly 60 percent, and the numbers of mergers challenged have declined by 75 %. And the number of non-merger civil investigations has declined by over a

third during these last four years as compared to the last four years of the Clinton administration.

Additionally, mergers among direct competitors in highly concentrated industries affecting millions of consumers have been approved by the Justice Department in recent years – including the Whirlpool/Maytag deal, and AT&T's acquisition of Bell South, to name just two – without the requirement of any divestitures or consent decrees to protect consumers, often over the objections of Justice Department career staff. Sometimes it appears that the Department has been more concerned with lessening the burden on merging companies in the merger review process than protecting the American consumer. Indeed, in October 2006, the New York Times editorialized that Justice Department merger policy “often appears to be little more than ‘anything goes.’ One gets the impression at times that the referee has left the playing field.”

Do you share my concern at what appears to be a sharp decline in antitrust enforcement at the Justice Department? And what steps will you take to reverse this trend?

10. **Do you agree with the conclusion contained in the Antitrust Modernization Commission's April 2007 Report that merger law, as reflected in the joint Justice Department/Federal Trade Commission Horizontal Merger Guidelines, is fundamentally sound and should apply without modification to high tech industries?**
11. **Are there any recommendations of the Antitrust Modernization Commission which you believe would require changes to the Justice Department's policies or practices which you favor implementing? Are there any with which you disagree?**
12. The Antitrust Modernization Commission's April 2007 Report stated:

“Statutory immunities from the antitrust laws should be disfavored. They should be granted rarely, and only where . . . [the immunity] is necessary to satisfy a specific societal goal that trumps the benefit of a free market to consumers and the U.S. economy in general.”

Do you agree with this statement and the principle that exemptions from the antitrust law should be disfavored?

13. I have introduced legislation, S. 772, the Railroad Antitrust Enforcement Act, which would remove the antitrust exemptions currently protecting the freight railroad industry and authorized the Justice Department to bring action to block mergers and acquisition in the railroad industry that violate antitrust law.

Do you support this legislation?

14. We have received allegations of anti-competitive and monopolistic conduct by DFA, the nation's leading milk marketing cooperative. One allegation in Florida is that independent

dairy cooperatives could not have their milk processed in plants affiliated with DFA unless the independent cooperative paid the processor millions of dollars about the cost of processing the milk. It is alleged that this and other anti-competitive conduct destroys the ability of independent cooperatives to compete and ultimately results in higher milk prices to consumers.

We have been informed that a year ago the staff of the Antitrust Division recommended to the Assistant Attorney General for Antitrust that the Justice Department pursue an antitrust case against DFA, but that the Assistant Attorney General has taken no action on that recommendation.

Will you pledge to investigate this issue, and to pursue an antitrust enforcement action should Antitrust Division staff find that the basis exists for such an action?