

**WRITTEN QUESTIONS OF SENATOR PATRICK LEAHY,
CHAIRMAN, SENATE JUDICIARY COMMITTEE,
FOR MICHAEL B. MUKASEY,
NOMINEE FOR ATTORNEY GENERAL OF THE UNITED STATES**

Torture/Executive Power

1. Our nation's top military lawyers, the Judge Advocates General of the Army, Navy, Air Force and Marines, have said that the use in interrogations of simulated drowning, dogs, forced nudity, and stress positions – in which prisoners are forced to stand, sit, or kneel in abnormal positions for extended periods of time – are not only bad policy because they yield unreliable information and could expose our own troops to such tactics, but also violate our law and the laws of war. The Army Field Manual published in September 2006 prohibited the military from using waterboarding or dogs in interrogations, as well as beatings and induced hypothermia. Yet in response to questioning at your Senate Judiciary Committee hearing, you declined to say that even the most extreme of these tactics, forced drowning or waterboarding, constitutes torture or cruel, inhuman, and degrading treatment and would therefore be illegal for the President to authorize.
 - A. With further time to reflect, do you agree with our top military lawyers that each of these interrogation techniques – simulated drowning, dogs, forced nudity, stress positions, beatings, and induced hypothermia – is unlawful?
 - B. Are these tactics, either individually or in combination, ever acceptable as a matter of law? Would it be acceptable for the President to authorize such tactics or immunize officials who carry them out?
 - C. The Army Field Manual asks soldiers evaluating whether or not to use a specific interrogation technique, "If the proposed approach technique were used by the enemy against one of your fellow soldiers, would you believe the soldier had been abused?" Do you believe that the techniques set out above would be abuse if applied to captured American soldiers?
 - D. If you are not willing to declare any of these tactics to be unlawful at this time, what type of further information and analysis will you need in order to make such a determination?
 - E. As Attorney General, will you consult with the JAGs before approving or issuing legal opinions on the subject of interrogation techniques?
2. 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.” That memorandum has since been withdrawn, but it is not entirely clear what standard currently governs. What is your understanding of what standard the Department of Justice currently has in place for determining what type of conduct constitutes torture or cruel, inhuman, or degrading treatment, and what do you believe the standard should be?
3. 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. I asked Attorney General 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. This country has not apologized or admitted any wrongdoing.
- A. Will you commit that you will not approve the transfer of any detainee to another country where there is a realistic possibility that he or she may be tortured, regardless of any assurances you receive from that country?
- B. If you are confirmed, will you commit to look into issuing some form of apology or compensation to Mr. Arar and to anyone else who may have been transferred from the United States to another country and tortured?

Executive Privilege

4. You testified that executive privilege was related to the President’s need to gather facts. You did not categorically rule out that it could apply to third parties.
- A. Do you view executive privilege as a communications privilege?
- B. Do you think executive privilege extends to matters in which the President was not personally involved?
- C. What are the limits of executive privilege in your view?
5. No prosecutor should take a matter to a grand jury, or to trial, if he or she believes there is not probable cause. But prosecutors need to be able to test the validity of a claim of privilege. Under our current statutes, the way to test the validity of the executive privilege claim is through a contempt citation. That is a mechanism

that brings the executive's claim of privilege to withhold information and the legislature's claim to the information to a head. You suggested in your testimony, though, that where an official relied on Justice Department advice in asserting executive privilege, then no Justice Department prosecutor could move forward on a contempt citation.

- A. If the other two branches have not been able to work out an accommodation, then the courts as the third branch can referee the dispute and apply what is actually a judicially-created privilege. Isn't that the logical place in our constitutional system of checks and balances to resolve a dispute between the executive and Congress about an assertion of executive privilege?
- B. The language of the governing statute, a statute that was passed by the Congress and signed by the President, says that in connection with a contempt of Congress citation, the U.S. Attorney "shall" refer the citation to a grand jury. If the U.S. Attorney does not proceed as the statute provides, how does the claim of executive privilege get evaluated and how does the conflict with the Congress get resolved?

Civil Rights

- 6. On the first day of your hearing before the Senate Judiciary Committee, you were asked questions about your plans for restoring the morale and the historical priorities of the Civil Rights Division. In the last seven years, arguably as a result of blatant politicization, we have seen the Justice Department abandon its historic positions in civil rights cases ranging from employment discrimination to racial integration in schools. During the hearing, you testified that the Civil Rights Division is "important" and that you had met with a few Civil Rights Division attorneys who were "energized," but what is your vision for the role of the Justice Department with regard to civil rights enforcement? How do you plan to address the well-documented problems with low morale in the Division?