

**Nomination of Steven Engel to be Assistant Attorney General for the Office of Legal Counsel**

**Questions for the Record**

**Submitted May 17, 2017**

**QUESTIONS FROM SENATOR FEINSTEIN**

1. OLC often has the last word about whether an executive action is legal, and its conclusions are generally binding. Because OLC has this enormous power, it must remain an independent voice in the Executive Branch.

- a. **If confirmed, what steps will you take to ensure that the Office of Legal Counsel is insulated from political pressure from the White House?**

**Response:** I am deeply committed to the independence and the integrity of the Office of Legal Counsel, and I believe that commitment is shared by others at the Department. It is in the best interests of the White House that the Office provide candid, independent, and principled advice, even if that advice may not always support the Administration's policy goals. If I am confirmed, I will do my job with these commitments in mind.

- b. **If the Office of Legal Counsel advised the White House that certain conduct was unconstitutional or unlawful, but the White House engaged in the conduct notwithstanding your advice, what would you do?**

**Response:** I do not believe that the hypothetical is likely to arise, because in my experience, the White House generally works within the legal advice provided by the Department of Justice. If circumstances did arise, however, where I believed that I could no longer perform the functions of the Assistant Attorney General of the Office of Legal Counsel, then I would have to resign.

- c. **What will you do when you are confronted with a legal question where the outcome implicates the President's business or other financial interests?**

**Response:** If I am confirmed, the President's business or financial interests would not have any relevance to the advice provided by the Office of Legal Counsel.

2. In 2009, you spoke at a conference hosted by Columbia Law School on the legal implications of closing Guantanamo Bay. An article included in the materials you supplied the Committee reports that you suggested that the Bush Administration's detention policies were "legal" and that "the decisions made then were quite reasonable." Do you still believe that the Bush Administration's War on Terror policies, including its positions on detention, rendition, and torture, were "legal" and "reasonable"?

**Response:** To the best of my recollection, the statement quoted in the article referred to the Bush Administration's initial decision to detain captured terrorists at a detention facility at Guantanamo Bay, Cuba. After the United States invaded Afghanistan, our armed forces captured many people whom they believed to be members of Al Qaeda and the Taliban. The United States made the decision to transfer about 750 of them to the U.S. Naval Base at Guantanamo Bay, Cuba, rather than to detain them near the battlefield or to bring them into the United States. While it may not have been the only policy option available, I believe it was a reasonable and legally available decision.

3. While at OLC, you helped draft what became the Military Commissions Act of 2006. That law included a provision that stripped federal courts of jurisdiction over habeas claims filed by Guantanamo Bay detainees challenging their detention. The Supreme Court, in *Boumediene v. Bush*, later held that provision to be an unconstitutional suspension of habeas corpus. Do you believe that this effort to suspend habeas corpus rights at Guantanamo Bay was “legal” and “reasonable”?

**Response:** At the time that Congress enacted the Military Commissions Act of 2006, the position of the United States Government was that alien enemy combatants detained at the Guantanamo Bay, Cuba did not have a constitutional right to habeas corpus and that even if they did, the existing combatant status review tribunals provided an adequate alternative to habeas corpus. The D.C. Circuit agreed with the Government’s position, but the Supreme Court reversed by a 5-4 vote. Accordingly, while I believe the Government’s position was reasonable, the Supreme Court ultimately held it to be contrary to law.

4. On July 20, 2007, while you were a Deputy Assistant Attorney General at OLC, the Office issued a memorandum to the Acting General Counsel of the CIA entitled, “Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to Certain Techniques that May Be Used by the CIA in the Interrogation of High Value al Qaeda Detainees.”

That opinion concluded that so-called “enhanced interrogation techniques” were legal under domestic and international law. Some of those techniques included sleep deprivation for up to 96 hours, during which the detainee was forced to remain in a standing position; depriving detainees of the ability to use toilet facilities, and forcing them to wear diapers; and various uses of force, including the “facial hold,” the “abdominal slap,” and the “insult (or facial) slap.” The opinion concluded that such techniques did not constitute “cruel, inhuman, or degrading treatment,” inflict “serious mental pain or suffering,” or “shock the conscience.”

In 2009, this opinion was withdrawn, and it was noted that this opinion “no longer represents the views of the Office of Legal Counsel.”

- a. Were you involved in drafting, reviewing, or otherwise contributing to this 2007 opinion on enhanced interrogation?

**Response:** When I was a Deputy Assistant Attorney General, the Office required that draft opinions would be reviewed by at least two Deputy Assistant Attorneys General. Consistent with that practice, I believe that I reviewed and commented upon the draft July 2007 memo.

- b. Do you believe that the 2007 opinion on enhanced interrogation was correct as a legal matter?

**Response:** My role in connection with the review of the draft 2007 opinion was not to agree or disagree with its conclusions, but to provide comments. The law in this area has changed significantly in the past decade. Section 1045 of the National Defense Authorization Act for Fiscal Year 2016 provides that no individual in U.S. custody may be subjected to any interrogation technique that is not authorized or listed in the Army Field Manual.

**c. Did you work on any other opinions related to “enhanced interrogation techniques” while you were at OLC?**

**Response:** To the best of my recollection, I did not receive access to classified information related to the CIA’s detention and interrogation program until shortly before President Bush publicly disclosed the CIA program on September 6, 2006. Accordingly, I did not work on any draft opinions issued prior to that time.

5. Were you interviewed by the Department of Justice’s Office of Professional Responsibility regarding their investigation into OLC opinions regarding the CIA’s “enhanced interrogation” program, which culminated in its report on July 29, 2009?

**Response:** No.

6. Have you reviewed the Executive Summary of the Senate Select Committee on Intelligence’s Study into the CIA’s Detention and Interrogation Program?

**Response:** Yes.

7. If confirmed, will you commit to reviewing the full, classified study before the Office of Legal Counsel issues legal guidance regarding detainee treatment, interpretation of the Convention Against Torture or Geneva Conventions?

**Response:** Since I am not in the Department, I do not know whether the complete classified study would be available for my review. If I am confirmed, I will discuss the study with knowledgeable officials within the Government and review it to extent I have access and that it would bear upon my future work at the Office of Legal Counsel.

8. The OPR report stated that “The Bradbury Memos also reflect uncritical acceptance of the CIA’s representations regarding the method of implementation of certain EITs” and also that OPR “question[ed] whether it was reasonable for OLC to rely on CIA representations as to the effectiveness of the EITs.” In some instances, information was available to OLC at the time that directly contradicted those representations. Do you disagree with the OPR report’s critique?

**Response:** I am not familiar with the basis for the OPR report’s critiques.

9. What steps would you take to ensure that OLC’s advice to agencies is based on correct factual representations? Do you believe there is an obligation for OLC to consider or cite to contradictory factual information?

**Response:** Generally speaking, OLC gives its advice based upon the factual information provided by the agency requesting advice. Where the factual information is unclear, or if OLC has a reason to question the accuracy of the information, then it is appropriate for OLC to ask additional questions. OLC generally lacks the resources or competence to independently review factual matters within the province of another agency. However, if the agency provides materially inaccurate information, then OLC’s resulting advice will not be helpful to the agency.

10. President Trump has made public comments suggesting that he would like to bring back waterboarding and “a hell of a lot worse.” Do you agree that waterboarding and other forms of torture are illegal?

**Response:** Yes. Section 1045 of the National Defense Authorization Act for Fiscal Year 2016 provides that no individual in U.S. custody may be subjected to any interrogation technique that is not authorized or listed in the Army Field Manual, and it prohibits the Army Field Manual from including techniques involving the use or threat of force. In addition, Congress has prohibited torture and cruel, inhuman, and degrading treatment in several other statutes.

11. While you were in private practice, you filed briefs arguing that the Affordable Care Act was unconstitutional, and that President Obama's Executive Order regarding deferred action for parents of U.S. citizens was unconstitutional. These are positions that we would expect a Republican lawyer to take on behalf of Republican clients. But you have now been nominated to head the Office of Legal Counsel, and if confirmed, you have to be independent. **What is the best evidence you can offer the Committee that you will be able to give candid legal advice to your clients, regardless of partisan policy preferences?**

**Response:** I am deeply committed to the independence and integrity of the Office of Legal Counsel, and partisan policy preferences should not have any role in that work. The Office's role in providing candid and principled legal advice is critical to ensuring that ours remains a nation governed by laws. I demonstrated that commitment in my prior service in the Office, as well as in my activities in private practice. I believe that demonstrated commitment is one reason why former heads of the Office, from both Democratic and Republican administrations, have supported my nomination.

12. On May 9, the President fired FBI Director James Comey. On January 30, the President fired Acting Attorney General Sally Yates. The President has made very clear that he will fire individuals who disagree with him or who pursue investigations against his wishes. Kellyanne Conway, one of the President's advisors, stated on May 11 that President Trump "expects people who are serving in this Administration to be loyal to the country and to be loyal to the Administration." Yet if confirmed, you will be called upon to exercise independence and to serve the American people, not the President.

- a. **How can this Committee have confidence that you will be independent from the President?**
- b. **What specific examples from your background offer evidence that you will not reflexively do what the White House wants you to do?**
- c. **Do you believe it is important for the Assistant Attorney General of the Office of Legal Counsel to be, first and foremost, "loyal to the Administration"?**

**Response:** The Assistant Attorney General for the Office of Legal Counsel must, first and foremost, be committed to the independence and integrity of the Office and the Department as a whole. I believe that the purpose of the job is to provide one's best judgment as to what the law requires, even where it is inconsistent with the aims of policy makers. As noted, I have demonstrated that commitment in my prior service in the Office, as well as in private practice, and I believe that is one reason why my nomination has received support from former Republican and Democratic appointees at OLC. If confirmed, I will ensure that OLC's legal advice to the Attorney General and others in the Executive Branch is consistent with the law and Constitution.

13. When Senator Graham introduced you at your hearing, he said he worked with you while you were a Deputy Assistant Attorney General at OLC from 2007-2009. He described you as “a fierce advocate for the Bush Administration.”

**a. Do you believe that OLC’s role is to be a “fierce advocate” for any administration?**

**b. In light of Senator Graham’s characterization of your previous tenure at OLC, how can we have confidence that, if you are confirmed, you will discharge your duties independently and stand up to the White House when necessary?**

**Response:** I believe that Senator Graham was referring to my participation as one of the lawyers involved in negotiations with Congress over the Military Commissions Act of 2006. I do not believe that the role of the Assistant Attorney General for the Office of Legal Counsel is to be a “fierce advocate” for anything other than the best interpretation of the law.

14. You previously served on President Trump’s transition team, including as a member of the Department of Justice “Landing Team.”

**a. Did you ever take part in any meetings or conversations about whether Director Comey should be fired?**

**b. If so, who else was a part of these conversations?**

**c. Did anyone ever solicit your opinion as to whether Director Comey should be removed? If so, who?**

**Response:** No, I have not taken part in any meetings or conversations about that subject. My ethical obligations as an attorney preclude me from discussing any legal advice provided during the presidential transition.

15. As you know, the day of President Trump’s inauguration, OLC issued an opinion concluding that the anti-nepotism statute would not bar Jared Kushner from working in the White House. One news outlet noted that this was “a reversal of legal advice given to prior president

**a. As a member of the Trump Transition and DOJ Landing Teams, did you have any role in drafting, advising on, or otherwise contributing to that opinion?**

**b. Did the White House pressure OLC to reach any particular conclusion in that opinion?**

**Response:** I did not have any role in drafting the opinion concerning the anti-nepotism statute. The opinion was issued by a career Deputy Assistant Attorney General in the Office of Legal Counsel. Because I have not been in the Department of Justice or the White House, I cannot comment on communications within the Executive Branch, but I have no information to suggest that the Office was pressured to reach any conclusion. With respect to the presidential transition, my ethical obligations as an attorney preclude me from discussing the subjects of legal advice provided during that time.

16. On January 27, just a week after taking office, President Trump issued Executive Order 13769. This Executive Order suspended the admission of refugees and banned entry of individuals from seven majority Muslim countries.

- a. **As a member of the Trump Transition and DOJ Landing Teams, did you have any role in drafting, reviewing, or advising on the original Executive Order?**
- b. **Did you have any role in drafting, reviewing, or advising on the revised Executive Order that was issued on March 6?**

**Response:** Because I have not been at the Department of Justice during this Administration, I did not provide any advice to the White House or the Department of Justice with respect to Executive Order 13769 or the successor order issued on March 6, 2017. While I provided legal advice on a variety of subjects during the presidential transition, my ethical obligations as an attorney preclude me from discussing that work.

17. Former Acting Attorney General Yates testified before the Senate Judiciary Committee on May 8 that while the Office of Legal Counsel reviewed the Executive Order, it was “advised not to tell the [Acting] Attorney General about it until after it was over.”

- a. **Under what circumstances do you believe it is appropriate for someone to instruct the Office of Legal Counsel not to tell Department of Justice leadership about a draft Executive Order or any other issue?**

**Response:** I am not familiar with the facts and circumstances at issue in Ms. Yates’ testimony. The Office of Legal Counsel exercises authority delegated from the Attorney General, and in my experience, the Office regularly keeps the Attorney General informed about its work.

- b. **In an earlier question, I asked about the 2009 Justice Department Office of Professional Responsibility (OPR) report which summarized the results of its investigation into the Office of Legal Counsel’s issuance of several now- discredited memos justifying torture and other “enhanced interrogation techniques” during the Bush Administration. OPR identified various institutional breakdowns that led to the issuance of these memos, including that “the review of the OLC memoranda within the Department . . . was deficient” and “the memoranda should have been circulated to all attorneys and policy makers with expertise and a stake in the issues involved.” Do you agree that, as an institutional matter, the Office of Legal Counsel should not conceal its work from other interested stakeholders in the Executive Branch, including other components of the Justice Department?**

**Response:** I agree that, where practicable, it is important for OLC to obtain input from all interested stakeholders in the Executive Branch. OLC’s Best Practices Memorandum provides, “[w]hen appropriate and helpful, and consistent with the confidentiality interests of the requesting agency,” the Office will “solicit the views of other agencies not directly involved in the opinion request that have subject-matter expertise or a special interest in the question presented.”

18. It is my understanding that, in the ordinary course, a proposed executive order must be sent to the Office of Management and Budget and to any interested agencies for review. This process—which is governed by an Executive Order that has been in place since 1962—helps make sure that the agencies that will be implementing the order will have input and a full understanding of what is

Order 13769, it appears that this process was not followed. Do you think this interagency process is important to ensuring the legality and integrity of all executive orders that come out of the White House?

**Response:** Because I am not in the Department, I do not know whether an interagency process applied to Executive Order 13769 or if it did, whether it was followed with regard to the Order. Generally speaking, the OMB process is one important way of ensuring that all interested agencies have an opportunity to comment upon a proposed executive order.

19. I'm interested in your thoughts on the role of precedent at the Office of Legal Counsel. I understand that, because the Office often considers questions that courts have not decided, its prior opinions play an important role in its decision making.

- a. **In your opinion, when is it appropriate for OLC to withdraw or reconsider OLC opinions from a prior administration?**
- b. **What criteria do you think should be used in determining whether to revisit a previous OLC opinion?**
- c. **How much should OLC's legal conclusions—or even the way OLC approaches legal interpretation—depend on which political party is in office?**

**Response:** OLC's Best Practices Memorandum provides that the Office ordinarily give great weight to any relevant past opinions of Attorneys General and the Office. The Office should not lightly depart from such past decisions, particularly where they directly address and decide a point in question, but as with any system of precedent, past decisions may be subject to reconsideration where appropriate. OLC's respect for its precedents helps ensure that the Office fulfills its mission to provide candid, independent, and principled legal advice. In my experience, the most common reason why OLC would revisit an earlier opinion would be to reflect subsequent developments in the law. The Office's analysis of the facts and law pertinent to a particular matter also may lead to either distinguishing or revisiting positions articulated in previous opinions. The Assistant Attorney General for OLC must use his or her best judgment in applying these principles to the particular facts and circumstances before him, but none of that should depend upon which political party is in office.

20. In 2010, the Office of Legal Counsel issued a signed memo by David Barron called "Best Practices for OLC Legal Advice and Written Opinions." That memo sets out several principles to guide the office in providing advice that is "clear, accurate, thoroughly researched, and soundly reasoned," as well as "candid, independent, and principled."

- a. **Are you familiar with this memo?**
- b. **Do you agree with the memo that "OLC must always give candid, independent, and principled advice—even when that advice is inconsistent with the aims of policymakers"?**
- c. **Do you agree with the memo that "OLC must provide advice based on its best understanding of what the law requires—not simply an advocate's defense of the contemplated action or position proposed by an agency or the Administration"?**

- d. The best practices memo also requires that two OLC deputies, in addition to the Assistant Attorney General, review and sign off on all opinions before they are issued. Do you agree that this “two-deputy review” rule is important? Will you pledge to continue this practice if you’re confirmed?
- e. Are there any portions of the best practices memo that you disagree with?
- f. Will you ensure that OLC continues to follow the best practices set forth in the memo if you’re confirmed?

**Response:** I am familiar with the Best Practice Memo, and I do agree with the quoted statements. I have not worked in the Department of Justice since this memo was issued, however. Before commenting further on particular practices, I would want to confer with others in the Department of Justice to review whether particular practices have been effective in ensuring that the Office of Legal Counsel best performs its role.

21. Please describe with particularity the process by which these questions were answered.

**Response:** These answers are my own and reflect my own views. I discussed my answers and consulted with representatives of the Department of Justice. I understand that the Department will submit my answers to the Committee.