

**Nomination of Steven A. Engel  
to be Assistant Attorney General, Office of Legal Counsel  
Questions for the Record  
Submitted May 17, 2017**

**QUESTIONS FROM SENATOR WHITEHOUSE**

- 1) In our one-on-one meeting, you indicated that you were not involved in the drafting of the “torture memos” during your prior tenure at the Office of Legal Counsel (OLC) from 2006-2009. During your prior tenure at OLC, did you review, research, draft, discuss, or provide any feedback on the following memoranda or their underlying analysis? If so, please describe your role in detail.
  - a. August 31, 2006 memo from Steven Bradbury to CIA Acting General Counsel John Rizzo, *Re: Conditions of Confinement at Central Intelligence Agency Facilities*. This memo concluded that CIA confinement conditions including the use of extended solitary confinement, blindfolds, lights on 24 hours a day, and constant surveillance were justified as security measures and were not cruel, inhuman or degrading or violations of the Detainee Treatment Act of 2005 or the War Crimes Act
  - b. July 20, 2007 memo from Steven Bradbury to CIA Acting General Counsel John Rizzo, *Re: Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to Certain Interrogation Techniques That Be Used By the CIA*. This memo approved the use of six “enhanced interrogation techniques” (including extended sleep deprivation by shackling diapered detainees in a standing position for days at time) as consistent with the Geneva Conventions and the Detainee Treatment Act of 2005.

**Response:** When I was a Deputy Assistant Attorney General, the Office required that draft opinions be reviewed by at least two Deputy Assistant Attorneys General. Consistent with that practice, I reviewed and commented upon the draft July 2007 opinion. With respect to the August 31, 2006 opinion, I did not receive access to classified information concerning the CIA’s interrogation program until shortly before President Bush publicly disclosed the CIA program on September 6, 2006. At that point, I would have first seen the August 31 opinion, but to the best of my recollection, it was either final or near final.

- 2) More specifically, were you the Attorney-Advisor assigned or primary or secondary Deputy assigned to either of the above memos? If not, did you otherwise participate in reading, reviewing, or discussing their analysis?

**Response:** To the best of my recollection, I was not the primary or secondary deputy for either opinion. As noted, given the timing of the August 31, 2006 issuance, I do not recall having any substantive involvement. I believe that the work on the July 2007 opinion (and any formal assignments) began prior to my becoming a Deputy Assistant Attorney General, but I did review and comment upon the draft opinion.

3) Please describe any role you had in drafting, discussing or reviewing the following documents, or any communications with either OLC or CIA personnel regarding the CIA detention and interrogation program:

- a. Letter for the Associate General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel (Nov. 7, 2007)
- b. Letter for the Associate General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel (Nov. 6, 2007)
- c. Letter for the Associate General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel (Aug. 23, 2007)
- d. Letter for the Associate General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel (July 24, 2007)
- e. Letter for John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel (Aug. 31, 2006)

**Response:** I do not recall playing any direct role with respect to the 2007 letters. With respect to the August 31, 2006 letter opinion, I would have become aware of that opinion upon receiving access to classified information concerning the CIA's interrogation program shortly before President Bush's September 6, 2006 speech. At that point, I would have first seen the August 31 letter, but it was either final or near-final at that time.

4) Were you interviewed by, or did you have any informal contacts with, the Department of Justice's Office of Professional Responsibility regarding OPR's investigation into OLC memoranda concerning the CIA's "enhanced interrogation" program? (The OPR report is available at the following link:  
[https://www.aclu.org/files/pdfs/natsec/opr20100219/20090729\\_OPR\\_Final\\_Report\\_with\\_20100719\\_declassifications.pdf](https://www.aclu.org/files/pdfs/natsec/opr20100219/20090729_OPR_Final_Report_with_20100719_declassifications.pdf))

**Response:** No.

5) Did you discuss the OPR investigation with Steven Bradbury, or any other individuals who were subjects of it? Did you consult with Mr. Bradbury regarding his response to the OPR report? If so, please provide an account of those conversations.

**Response:** I learned of the OPR investigation at some point during my prior service at the Office of Legal Counsel. To the best of my recollection, OLC's draft report was circulated at the very end of my tenure at OLC, shortly before the inauguration of President Obama. I do not recall whether I consulted with Mr. Bradbury with respect to OLC's response to the report at that time.

- 6) The 2006 and 2007 Bradbury memos relied heavily on CIA factual representations regarding the application of “enhanced interrogation techniques,” conditions of confinement, and safeguards against harm to detainees, Congressional endorsement of the “enhanced interrogation techniques” (EIT) program, and the intelligence gained from the techniques that later proved to be false, as documented in the Senate Select Committee on Intelligence’s Study into the CIA’s Detention and Interrogation Program.

- a. Have you reviewed the executive summary of the Senate study?
- b. If not, will you commit to reviewing it before OLC issues legal guidance regarding detainee treatment, interpretation of the Convention Against Torture or Geneva Conventions, or any CIA covert action program you review and/or approve any opinion issued by OLC related to the CIA’s detention and interrogation program?

**Response:** Yes, I have reviewed the unclassified executive summary of the SSCI Study.

- 7) The 2007 Bradbury memo concluded that the CIA’s “enhanced interrogation technique” of depriving a detainee of sleep by means of shackling him in a standing position for up to 96 hours, in diapers so that he would not need to be released from his shackles to use toilet facilities, complied with Common Article 3 of the Geneva Conventions. Common Article 3 states that detainees “shall in all circumstances be treated humanely” and forbids “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;” and “outrages upon personal dignity, in particular humiliating and degrading treatment.” OPR found that this conclusion “appear[ed] to be inconsistent with the plain meaning and commonly-held understandings of the language of Common Article 3. Do you agree?

**Response:** I am not aware of the basis upon which OPR rested its critique of the 2007 Bradbury memo. The law in this area has changed significantly over 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, and it prohibits the Army Field Manual from including techniques involving the use or threat of force.

- 8) Would you view CIA’s practice of sleep deprivation as “humane” if it was applied to U.S. captives by a foreign government or armed group?

**Response:** I agree that the law of war is founded upon principles of reciprocity. It is therefore important that we take great care in interpreting treaties that we may rely upon to protect American servicemen and women in time of war. American soldiers are generally entitled to the full protections afforded to prisoners of war, above the baseline standards of Common Article 3.

- 9) Were you familiar with State Department Legal Advisor John Bellinger’s objections to a draft of the 2007 Bradbury memo, and Bradbury’s response?

**Response:** Yes.

- 10) The OPR report describes the 2007 Bradbury memo as reflecting “uncritical acceptance” of the CIA’s factual representations regarding the EIT program, even in cases where information available to OLC at the time directly contradicted those representations. The contradictory

information—including basic facts about chronology, internal CIA descriptions and investigations of the EIT program, and accounts from former CIA detainees to the International Committee of the Red Cross—was not cited in the Bradbury memo. Do you disagree with the OPR report's critique? If so, please explain your disagreement(s).

**Response:** I am not familiar with the factual basis for OPR's critique.

- 11) What steps would you take to ensure that OLC's advice to agencies is based on correct factual representations? Is there an obligation for OLC to consider or cite to contradictory factual information? What should be the consequence when OLC provides an agency assurance of the legality of its conduct based on agency's misrepresentation or deliberate omission of material facts?

**Response:** OLC generally relies upon the factual representations provided in an agency's request and provides advice based on those representations. 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 representations are not correct, then the OLC advice may not be pertinent or responsive to the agency's particular circumstances. The consequences of such inaccuracies would depend on the facts and circumstances of the situation.

- 12) You have publicly dismissed the characterization of the treatment of Guantanamo detainees as torture, calling that label a "point of view." See <https://www.youtube.com/watch?v=DR0HwRc9QnY> at 33:15-35:00.

- a. As a question of law, did any of the EIT employed at Guantanamo constitute torture?

**Response:** As of the time I joined the Office of Legal Counsel, the Detainee Treatment Act of 2005 barred the United States from using any techniques at Guantanamo Bay, Cuba, that were not in the Army Field Manual. I do not believe that any of those techniques would constitute torture. I am not familiar with what approved or unapproved interrogation techniques were used at Guantanamo Bay, Cuba, prior to the passage of the Detainee Treatment Act.

- 13) As a question of law, does waterboarding constitute "torture"?

**Response:** As of the time I joined the Office of Legal Counsel, waterboarding was not permitted for use by the CIA. Congress further has made clear that the use of waterboarding would be unlawful. Notably, 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.

- 14) President Trump has said that torture "absolutely works" and has indicated that he is interested in using torture in interrogations. Do you believe torture works?

**Response:** I am not in a position to answer that question, because it is beyond my knowledge and experience. However, U.S. and international law prohibit torture without regard to whether it works.

15) What circumstances would justify the use of interrogation methods that might violate the Geneva Convention or U.S. law?

**Response:** I am not aware of circumstances that would justify the use of interrogation methods in violation of United States law. Congress has passed a number of laws to regulate the treatment of detainees and to prohibit grave breaches of the Geneva Conventions.

16) You were a member of the Trump administration transition team. Please describe your role on the transition team in detail, including any involvement in the development of any policy or executive order, and in any decision-making regarding personnel.

**Response:** I was a member of the DOJ Landing Team and provided legal advice to the Presidential Transition Team. With respect to the DOJ Landing Team, my role was to work with those in the Department of Justice to assist the presidential transition, consistent with the goals of the Presidential Transition Act. With respect to the presidential transition, my ethical obligations as an attorney preclude me from discussing the subjects of the legal advice provided in connection with that work.

17) You were a member of the Trump administration DOJ landing team. Please describe your role on the DOJ landing team in detail.

**Response:** Please see my response to Question 16.

18) Please list every case, regulation, executive order, or other matter you were involved in, in any capacity whatsoever, as a member of the Trump administration DOJ landing team.

**Response:** My ethical obligations as an attorney preclude me from discussing the subjects of legal advice provided in connection with the transition.

19) As part of the DOJ landing team, did you review, research, draft, discuss, or provide any feedback on the following issues or decisions. If so, please describe your role in detail. If you provided legal counsel on any of the below issues, please summarize your legal conclusions and the legal reasoning behind them.

- a. DOJ's conclusion that President Trump's hiring of Jared Kushner does not violate federal anti-nepotism laws.
- b. OLC's approval as to form and legality of President Trump's initial Executive Order "Protecting the Nation from Foreign Terrorist Entry into the United States," Exec. Order 13769 (Jan. 27, 2017)
- c. OLC's approval as to form and legality of President Trump's Executive Order "Enhancing Public Safety in the Interior of the United States," Exec. Order 13768 (Jan. 25, 2017)

**Response:** My ethical obligations as an attorney preclude me from discussing the subjects of legal advice provided in connection with the transition.

20) Do you agree that, as the office responsible for providing legal counsel to the executive branch on matters of particular importance and complexity, OLC has a unique obligation to be objective and independent from the White House?

**Response:** I am deeply committed to the independence and integrity of the Office of Legal Counsel. If I am confirmed, I will ensure that OLC's legal advice is independent, principled, and consistent with the law and the Constitution, even if the advice would constrain the client agency's pursuit of desired practices or policy objectives.

21) Is OLC's obligation to the President or to the American people? As AAG for OLC, how would you handle a situation in which you felt those interests were at odds?

**Response:** If I am confirmed, I will take an oath to support and defend the Constitution and to bear true faith and allegiance to the same. I believe that is where my obligations would lie. I believe that OLC best assists the President by ensuring that he receives candid, independent, and principled advice, even where it is inconsistent with the aims of policy makers.

22) Does OLC owe a legal ethical duty of loyalty to the President comparable to a workaday attorney's duty of loyalty to her client?

**Response:** My understanding is that attorneys at the Department of Justice owe a legal ethical duty of loyalty to the United States, which is the organizational client of a government lawyer.

23) How would you handle a case that implicated President Trump's business interests?

**Response:** If confirmed, I would provide candid, independent, and principled advice without regard to the business interests of the President or anyone else.

24) Do you believe an OLC attorney owes a duty of candor, as set forth in Rule 3.3 of the Model Rules of Professional Conduct?

- a. If so, do you believe the OLC attorney's duty of candor is any less than that of a workaday attorney in another context?
- b. May an OLC attorney make a false statement of law or fail to disclose adverse controlling authority in an OLC memorandum opinion?
- c. Given DOJ's policy of not disclosing OLC memorandum opinions to the public as a matter of course, how can the public be confident that OLC is meeting its duty of candor?

**Response:** As I mentioned during our private conversation, if we are speaking about OLC in the same sentence as minimal ethical duties, then we are asking the wrong question. OLC attorneys must be committed to the highest of ethical standards, including with respect to the duty of candor. OLC attorneys swear a duty to uphold the law and, as I know from my previous service, Department attorneys take their responsibilities very seriously.

25) What is your understanding of the precedential value of an OLC opinion?

**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.

26) According to OLC "guiding principles," "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. Thus, in rendering legal advice, OLC seeks to provide an accurate and honest appraisal of applicable law, even if that appraisal will constrain the Administration's or an agency's pursuit of desired practices or policy objectives." In light of this guiding principle, what is your understanding of OLC policy on reversing previous positions?

- a. Is it appropriate for OLC to change position on policy grounds? Or only when a determination is made that a previous position was incorrect as a matter of law?

**Response:** 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. Because OLC provides legal advice, rather than policy advice, I do not believe that a change in OLC's legal position would itself rest upon a change in policy.

27) Do you believe there is a public interest in disclosure of OLC opinions?

**Response:** I think there is a public interest in the disclosure of OLC opinions, but there can also be countervailing interests depending upon the nature of the opinion and the confidentiality interests of the client agency, which may change over time.

28) The Freedom of Information Act requires all executive branch agencies to make available to the public, among other things, final opinions made in the adjudication of cases, and statements of policy and interpretation the agency has adopted. OLC has traditionally claimed privilege over some of its opinions. What criteria would you use to determine whether disclosure is appropriate?

- a. Will you commit to at least the disclosure of the existence of all OLC memorandum opinions?
- b. If not, what interest do you believe is served by the nondisclosure of the existence of OLC memorandum opinions?

**Response:** As indicated in the previous response, I think that the decision about whether it is appropriate to disclose an OLC opinion must depend upon the confidentiality interests of the client agency, which may change over time. If agencies cannot rely upon OLC to maintain the

confidentiality of their communications, then they may be discouraged from seeking OLC advice in the first place. Because I am not in the Department at this point, I am not in a position to make any commitments about disclosures regarding OLC opinions.