

# United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

January 8, 2015

## **Via Electronic Transmission**

The Honorable Eric H. Holder, Jr.  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Ave., NW  
Washington, DC 20530

Dear Attorney General Holder,

I write today to renew my January 2014 request that the Department of Justice publicly disclose the advice it has provided regarding the constitutionality and lawfulness of executive actions proposed by President Obama. Respectfully, the Department's responses to my request and my follow-up inquiry are inadequate to date.

Unfortunately, the President's resort to unilateral executive action is threatening the Constitution's separation of powers by circumventing Congress's role to make the law. At the very minimum, his use of these actions has brought their constitutionality to the forefront of our political debate. Yet in almost every instance, the public remains without important information that could inform that debate – the Office of Legal Counsel (OLC) analysis of these actions.

As you know, I have engaged the Department on this issue since the President signaled his intention to implement his agenda through aggressive use of executive action in his 2014 State of the Union address. On January 31, 2014, I wrote to you to request that the Department publicly disclose the opinions, analyses, and conclusions that the OLC provides about these actions.

Over four months later, in a letter dated May 20, the Department declined my request, citing both attorney-client and executive privileges. However, the letter invited me to follow up with questions regarding particular executive actions.

A few weeks later, I took the Department up on its offer concerning a particular executive action that was highly troubling, both as a matter of law and policy. In early June, the President released five Taliban detainees held at Guantanamo Bay in exchange for U.S. Army Sergeant Bowe Bergdahl. The detainees were reportedly senior-level Taliban commanders with direct links to al-Qaeda. They were also reportedly determined to be of high risk to the United States and were recommended for continued detention.

However, the Administration did so without complying with the National Defense Authorization Act of 2014 (NDAA), which required that 30 days before the transfer of any detainee from Guantanamo Bay, it notify and provide Congress with important information justifying the transfer. As you know, the non-partisan Government Accountability Office (GAO) subsequently concluded that the Administration acted illegally when it did not provide this notice to Congress. Moreover, substantial questions remain about whether the transfer of these detainees was sound national security policy.

Therefore, in a letter to you dated June 5, I requested that you make public the OLC's opinions, analyses and conclusions related to this specific executive action. I did so in part because Administration officials testified that the Department provided written legal advice in advance of these controversial transfers, and because the Administration's factual justification for failing to comply with the law appeared to shift in the days and weeks following their announcement.

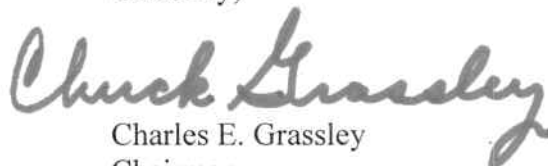
In a letter dated December 9, the Department declined my follow-up request. The letter broadly asserted that the "Executive Branch has substantial confidentiality interests in legal advice provided by the Department" and that "such advice is generally not disclosed." Instead, the letter enclosed a portion of an after-the-fact rationalization for the action that the Department of Defense provided to the GAO in response to its inquiry into the matter.

Respectfully, the Department's most recent response does not address my concerns or resolve my requests. In my original letter, I wrote that part of my intent was to shed light on whether controversial executive actions "are being subjected to a rigorous constitutional review at the Department." For this and other reasons, I requested that OLC analyses be made public "contemporaneously" with the undertaking of the executive action itself. The *post hoc* justification the Department of Defense provided to the GAO does not allow Congress or the American people to know whether the OLC is fulfilling its duty to provide unbiased, thorough advice to Administration officials *before* decisions are made, and whether officials are being candid with the OLC about the relevant facts on which its advice is based. The Judiciary Committee must be able to fulfill its oversight responsibilities in this regard.

Therefore, I again request that you publicly disclose any *ex ante* legal advice – whether in a memorandum or less formal format – that the Department provided in advance of the President's decision to transfer the five senior Taliban leaders from Guantanamo Bay without notifying Congress. I also renew my request for public disclosure of any similar Department or OLC opinions, analyses, conclusions or other advice documents related to the President's other uses of executive action since January 2014.

Finally, I note that the Department's refusal to disclose the OLC's advice related to these detainee transfers is particularly inexplicable after the Administration recently publicly disclosed lengthy legal memoranda purportedly justifying the President's highly contentious executive action on immigration. The Administration's use of selective transparency only serves to sow doubt about whether the Department rendered sound advice regarding these transfers.

Sincerely,

A handwritten signature in dark ink, reading "Chuck Grassley". The signature is fluid and cursive, with the first name "Chuck" and last name "Grassley" clearly legible.

Charles E. Grassley  
Chairman

cc: The Honorable Patrick J. Leahy  
Ranking Member