U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 18, 2006

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Please find enclosed responses to questions arising from the appearance of Deputy Associate Attorney General J. Michael Wiggins before the Committee at a June 15, 2005, hearing concerning detainees. We apologize for the time necessary to prepare the responses.

Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General

Enclosure

cc: The Honorable Patrick J. Leahy
Ranking Minority Member

Hearing Before the
Committee on the Judiciary
United States Senate
Concerning
Detainees
June 15, 2005

Witness: Deputy Associate Attorney General J. Michael Wiggins

Questions from Senator Joseph R. Biden

5. In Deputy Associate Attorney General Wiggin's written testimony, he discusses the similarities of the Combatant Status Review Tribunal hearings with the Army regulations that govern hearings under Article 5 of the Third Geneva Convention. In retrospect, do you think we could have saved a lot of trouble here had we just undertaken these Article 5 hearings as soon as possible after detention as required by the Third Geneva Convention, instead of waiting to begin any review process until after years and years of detention?

ANSWER: For this question, the Department defers to the Department of Defense, which is in a better position to provide a response.

6. When deciding to not use the Uniform Code of Military Justice and instead coming up with "military commissions" or in formulating the procedures and rules governing Combatant Review Status Tribunals, was there any thought that went in to how these decisions would be perceived world-wide, and in particular in Muslim countries?

ANSWER: For this question, the Department defers to the Department of Defense, which is in a better position to provide a response.

7. Do you support the creation of a 9/11-style independent commission to consider U.S. interrogation and detention operations and to propose recommendations to the President and to the Congress?

ANSWER: Our understanding is that the Department of Defense has undertaken 11 major reviews and investigations to examine every aspect of detention operations. These efforts have been led by senior officers in the military and prominent civilian officials, including former Secretaries of Defense. As a result of their efforts, the Department of Defense has reviewed nearly 500 recommendations and incorporated numerous changes to its processes, procedures, and policies.

Questions from Senator John Cornyn

1. The United States Supreme Court has held that the U.S. Government can detain Enemy Combatants during wartime. Is there any basis for the assumption that such detention can last in perpetuity?

ANSWER: As the President has made clear, our Nation has been and will continue to be a strong supporter of the Geneva Conventions and the principles they embody. The President has also unequivocally directed that the United States Armed Forces treat all detainees humanely. In *Hamdan v. Rumsfeld*, 2006 WL 1764793 (June 29, 2006), the Supreme Court concluded that Common Article 3 of the Geneva Conventions applies as a matter of law to the conflict with al Qaeda and that the military commissions as currently constituted do not comply with Article 3. It is important to note that the Court's decision concerned only whether the baseline standards contained in Common Article 3 apply to the armed conflict with al Qaeda and to military commissions; it did not decide that any other provisions of the Geneva Conventions apply to that conflict or that members of al Qaeda are entitled to the privileges of POW status. Al Qaeda terrorists are not entitled to the privileges of POW status because al Qaeda is not a party to the Conventions and because it conducts its operations in flagrant violation of the laws and customs of war, including by targeting innocent civilians. This is an important point: Combatants will have no incentive to comply with the Geneva Conventions if they receive POW status without honoring the Conventions themselves.

2. Why do the Geneva Conventions not apply to those we now detain at Guantanamo Bay?

ANSWER: As the President has made clear, our Nation has been and will continue to be a strong supporter of the Geneva Conventions and the principles they embody. Consistent with this, the President has unequivocally required that the United States Armed Forces treat all detainees humanely. *See* Memorandum from the President, Re: Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002). In *Hamdan v. Rumsfeld*, 2006 WL 1764793 (June 29, 2006), the Supreme Court concluded that Common Article 3 of the Geneva Conventions applies as a matter of law to the conflict with al Qaeda and that the military commissions as currently constituted do not comply with Article 3. It is important to note that the Court's decision concerned only whether the baseline standards contained in Common Article 3 apply to the armed conflict with al Qaeda and to military commissions; it did not decide that any other provisions of the Geneva Conventions apply to that conflict or that members of al Qaeda are entitled to the privileges of POW status. Al Qaeda terrorists are not entitled to the privileges of POW status because al Qaeda is not a party to the Conventions and because it conducts its operations in flagrant violation of the laws and customs of war, including by targeting innocent civilians. This is an important point: combatants will have no incentive to comply with the Geneva Conventions if they receive POW status without honoring the Conventions themselves.

3. With regard to detained combatants, is the application of a process like the Administrative Review Board required by the Geneva Convention or any international or domestic law?

ANSWER: No. The Administrative Review Board goes above and beyond any review traditionally provided to enemy combatants in prior conflicts.

Questions from Senator Patrick Leahy

1. In response to a question from Senator Biden, you said that, because the so-called war on terror could last decades, "it is our position that legally they (Guantanamo detainees) could be held in perpetuity." What would constitute an end to the "war on terror"? How will we know when this war is over?

ANSWER: Under the laws of war, the United States may detain enemy combatants until the cessation of hostilities. Thus, the laws of war contemplate an end to detention, but whether hostilities have ceased is a factual question that involves whether the fighting has ended and whether there is a reasonable basis for believing that it is likely to resume. During any conflict, it may be difficult to foresee exactly when or how the conflict will end. In the present conflict, however, there is no question that hostilities are ongoing. While the United States has achieved many successes in our armed conflict with al Qaeda and its affiliated terrorist organizations, that armed conflict continues in Afghanistan, Iraq, and around the world. In fact, it is our understanding that at least 12 detainees released from Guantanamo Bay have been recaptured or killed fighting United States and coalition forces in Afghanistan.

2. Some of the current detainees at Guantanamo have already been held for more than three years. During that time, they have been subject to harsh conditions, and interrogated repeatedly. Realistically, what are the chances of successfully prosecuting any of these detainees in the Federal courts, assuming that the evidence exists to convict them?

ANSWER: The President has unequivocally required that the United States Armed Forces treat all detainees humanely. *See* Memorandum from the President, *Re: Humane Treatment of al Qaeda and Taliban Detainees* (Feb. 7, 2002). The ability of the United States to pursue a Federal prosecution of any individual on a terrorism related charge is determined by the facts and circumstances of the particular case. These facts and circumstances include the quantity and quality of admissible evidence, the existence of some basis to assert jurisdiction, the extent to which prosecution risks the disclosure of classified or other sensitive information, and the potential legal and factual defenses available to the detainee. Any decision to prosecute a detainee in the Federal courts would require a thorough analysis of all these facts and circumstances.

3. A May 10, 2004, email from an FBI agent to T.J. Harrington states that FBI and Justice Department officials held meetings to discuss interrogation tactics at Guantanamo. The email states: "We all agreed DOD tactics were going to be an issue in the military commission cases." Would you agree that the Defense Department's methods of interrogation may be "an issue" in any attempt to prosecute a Guantanamo detainee? Please explain your response.

ANSWER: We are not familiar with the context in which the quoted statement was made. In response to the Supreme Court's decision in *Hamdan*, the Deputy Secretary of Defense, on July 7, 2006, issued a memorandum in which he made clear his understanding "that, aside from the military commission procedures, existing Department of Defense orders, policies, directives, Executive orders, and doctrine comply with the standards of Common Article 3 and, therefore, actions by Defense Department personnel that comply with such issuances would comply with the standards of Common Article 3." We defer to the Department of Defense regarding whether the Department of Defense's methods of interrogation may be an issue in any attempt to try a Guantanamo detainee by military commission.

4. President Bush recently discussed the case of Iyman Faris, the Ohio truck driver who was convicted of plotting to blow up the Brooklyn Bridge. The President said that when Faris was confronted with the evidence against him, "[he] chose to cooperate, and he spent the next several weeks telling authorities about his al Qaeda association." Isn't it possible, and even likely, that if the Administration had charged some of these detainees with crimes that carry stiff prison terms, many of them would have cooperated with the government?

ANSWER: As your question suggests, Iyman Faris began cooperating with the FBI shortly after he was first approached by the FBI in Ohio. Indeed, his cooperation went on for some time before he was formally charged with a crime. We do not believe that threatening Guantanamo detainees with prosecution in U.S. domestic courts would materially increase their incentives to provide information that would protect the Nation from attack. Detainees at Guantanamo already have similar incentives to cooperate in order to avoid being charged in a military commission or to reduce any sentence that they may receive following an adjudication of guilt in a commission. While the Supreme Court in *Hamdan* invalidated the military commissions as currently constituted, those incentives to avoid prosecution by military commission will remain if Congress acts to provide an appropriate framework for the Executive Branch to conduct commissions. Detainees may also be motivated by the opportunity to be released entirely from Guantanamo. While it may be difficult to isolate the incentives that trigger cooperation in each instance, the intelligence information obtained from Guantanamo detainees suggests that a large number have decided to provide at least some cooperation.

5. As detailed by the *Wall Street Journal* in April of this year, military commissions were used following World War II to try Japanese prison camp guards who interrogated Americans by, among other things, making them stand [at] attention or squat for periods of up to 30 minutes during interrogations; repeatedly interrogating American prisoners without providing for sufficient time for sleep; and refusing to stop the interrogations when American prisoners indicated that they did not wish to participate. Sixty years ago, American military commissions found that these interrogations were crimes against humanity and sentenced the Japanese to prison for terms of five to twenty years. Is it the Department's position that interrogations of detainees in U.S. custody utilizing similar methods are lawful? Is it the Department's position that statements made utilizing these methods may be used as evidence to convict detainees of war crimes?

ANSWER: In response to the Supreme Court's decision in *Hamdan*, the Deputy Secretary of Defense, on July 7, 2006, issued a memorandum in which he made clear his understanding "that, aside from the military commission procedures, existing Department of Defense orders, policies, directives, Executive orders, and doctrine comply with the standards of Common Article 3 and, therefore, actions by Defense Department personnel that comply with such issuances would comply with the standards of Common Article 3." Our understanding is that the Department of Defense takes allegations of detainee mistreatment by United States Armed Forces seriously and investigates credible allegations thoroughly, and would take appropriate action in cases where violations are substantiated. Whether a particular interrogation technique is lawful and whether particular statements made as a result of a particular technique may be introduced as evidence depends on the facts and circumstances. Without knowing the facts and circumstances, it would be inappropriate to speculate about the legality of the scenarios you describe. It is also worth noting that the Americans who were interrogated by the Japanese during World War II were entitled to special protections as prisoners of war ("POWs"). Although the President has directed that the United States Armed Forces shall continue to treat detainees humanely, it must be remembered that al Qaeda and Taliban detainees at Guantanamo Bay are not legally entitled to the special protections afforded POWs.

Questions from Senator Russell D. Feingold

1. The Bill of Rights protects the right to be free from coerced confessions, both to protect the civil liberties of defendants, and to ensure the accuracy of information relied upon to deprive individuals of their freedom. Setting aside the question of what constitutional rights apply to the detainees at Guantanamo Bay, would you agree that evidence obtained through the use of torture should be treated as suspect?

ANSWER: As the President has repeatedly and unequivocally emphasized, the United States neither commits nor condones torture. *See, e.g.*, Statement on United Nations International Day in Support of Victims of Torture, 40 Weekly Comp. Pres. Doc. 1167-68 (July 5, 2004) ("America stands against and will not tolerate torture. We will investigate and prosecute all acts of torture . . . in all territory under our jurisdiction. . . . Torture is wrong no matter where it occurs, and the United States will continue to lead the fight to eliminate it everywhere."). Torture, moreover, is a Federal crime, is not permitted, and cannot be justified for any reason. In addition, the United States has undertaken an international law obligation "to ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings." CAT Art. 15. And, in the context of military commissions, the General Counsel of the Secretary of Defense reaffirmed that statements established to have been made as a result of torture shall not be admitted as evidence against an accused in a military commission proceeding. *See* Military Commission Instruction No. 10 (Mar. 24, 2006).

2. Lieutenant Commander Swift in his written testimony stated that his client, Mr. Hamdan, has been charged with conspiracy. Please describe the elements of an offense of "conspiracy" under the substantive law applied by the military commissions.

ANSWER: For this question, the Department defers to the Department of Defense, which is in a better position to provide a response. Four Justices in *Hamdan* concluded that conspiracy to violate the law of war, standing alone, is not a violation of the law of war, and three Justices found that conspiracy to commit a violation of the law of war falls within the traditional jurisdiction of military commissions. Justice Kennedy did not address this issue, and so there was no opinion of the Court on the issue.

3. You testified before the Committee that the military commissions determine whether to allow the use of evidence obtained through torture or other coercive interrogation techniques. Can you identify any instance(s) in which a military commission has explicitly considered whether or not it should consider evidence produced through torture or other coercive techniques? If so, please identify the instance(s) and the outcome(s).

ANSWER: On March 24, 2006, the General Counsel of the Department of Defense issued Military Commission Instruction No. 10, which expressly provides: "The Commission shall not admit statements established to have been made as a result of torture as evidence against an accused, except against a person accused of torture as evidence the statement was made." Before the issuance of this instruction, no military commission factual hearings had been held; thus, this issue had not been previously presented.

4. The Administration's position is that the detainees at Guantanamo are "enemy combatants" who were picked up on the "battlefield" in as many as 40 different nations.

a. How did the U.S. officials who initially detained each of the individuals now at Guantanamo Bay determine, prior to or at the time of detention, whether the individual was an "enemy combatant"? Please submit documentation of the procedure used to make this determination.

b. Were any of these individuals given an opportunity, prior to detention, to contest their status as enemy combatants?

c. How many detainees have been released from Guantanamo Bay? Please identify each such detainee and indicate on what basis the detainee was released.

ANSWER: For this question, the Department defers to the Department of Defense, which is in a better position to provide a response.

5. In Judge Joyce Hens Green's recent decision finding the procedures of the Combatant Status Review Tribunals unconstitutional, she noted that the government did not formally

define "enemy combatant" until July 2004. On what basis was the government detaining people prior to July 2004?

ANSWER: The term "enemy combatant" has been defined in the law of war for over one hundred years. The Supreme Court recognized this in the 1942 case of *Ex parte Quirin*, where it recognized that "by universal agreement and practice the laws of war draw a distinction . . . between those who are lawful and unlawful combatants." 317 U.S. 1, 30-31. As the Court explained:

> Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.

317 U.S. at 31. Before the July 7, 2004 order of the Deputy Secretary of Defense, the Department of Defense, with particularized legal advice of the Department of Justice, determined whether each individual to be detained at Guantanamo Bay met the definition for enemy combatants long established under the laws of the war and the decisions of the Supreme Court.

6. You testified before the Judiciary Committee that the President has the authority to hold individuals for trial "for those crimes that violate the laws of war or other crimes that are regularly tried before military commissions." What "other crimes" are "regularly tried before military commissions" besides war crimes?

ANSWER: Congress in 10 U.S.C. § 821 has provided that the jurisdiction conferred on courts martial in the Uniform Code of Military Justice "does not deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions." In *Hamdan*, at least seven of the eight participating Justices agreed on the general historical jurisdiction of military commissions under the law of war, to which we refer you for further detail. *See Hamdan*, 2006 WL 1764793, * 22 (plurality); *id.* at *66 (Thomas, J., dissenting). We are aware of only two offenses currently made triable by military commission by statute: aiding the enemy and spying. 10 U.S.C. § 904, 906.

7. Lieutenant Commander Swift told the Judiciary Committee that the rules of the military commissions are explicitly unenforceable and can be changed at any time. Is that statement correct?

ANSWER: The Court in *Hamdan* invalidated the military commissions as currently constituted.