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.

Written Questions for Steve Engel
Submitted by Senator Patrick Leahy
May 17, 2017

1. **If the President seeks legal justification to do something unlawful or unconstitutional, should the Office of Legal Counsel say no and refuse to provide that justification? If so, are you prepared to say "no" to this White House?**

   Response: Yes, that is part of the job. The Office of Legal Counsel has the responsibility to provide candid, independent, and principled advice, even if that advice would contravene the wishes of policy makers. If the President proposes a course of action that is unlawful, then the Office of Legal Counsel has a duty to tell him so. In my experience, in both private practice and government service, clients respect lawyers who provide such advice and benefit in the long run from receiving it.

2. Last week, President Trump cited the FBI's investigation into Russian interference in the 2016 election as a basis for dismissing Director Comey. The Deputy White House Press Secretary said, "We want this to come to its conclusion . . . And we think that we've actually by removing Director Comey, taken steps to make that happen." President Trump himself admitted that "I was gonna fire [Comey] regardless of [Mr. Rosenstein's] recommendation. . . . And in fact when I decided to just do it, I said to myself, I said you know, this Russia thing with Trump and Russia is a made up story." **Should those statements and justifications for FBI Director Comey's dismissal raise concerns?**

   Response: I am not familiar with the facts and circumstances concerning Mr. Comey's termination. Because I do not have complete information about this matter, I do not believe it would be appropriate for me to comment.

3. **Is it proper for the President to pressure a law enforcement official to terminate an ongoing investigation into one of the President's associates?**

   Response: Because I am not familiar with the facts and circumstances considering these matters, I do not believe it would be appropriate for me to comment on that hypothetical.

4. **Have you ever been asked by the President, or any other individual associated with the White House, to express loyalty to President Trump? If so, please describe that conversation in detail, including the participants of that conversation.**

   Response: No.

5. **If confirmed, will you be loyal to the Constitution or to President Trump? Do you believe there is a difference? If so, will you put your obligation to uphold the Constitution above any personal loyalty to President Trump?**

   Response: If I am confirmed, I will take an oath of office to support and defend the Constitution of the United States and bear true faith and allegiance to the same. I am deeply committed to the independence and integrity of the Office of Legal Counsel.

6. **Is a sitting President who violates Federal law subject to Federal prosecution? If not, what remedies are available?**

Response: I have not examined the issue myself, but in 2000, the Office of Legal Counsel addressed this issue and issued a published opinion concluding that a sitting President was not subject to federal prosecution.

7. **During your prior tenure at the Office of Legal Counsel, 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.**

Memorandum for John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, *Re: 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* (July 20, 2007) ("2007 Bradbury memo")

Memorandum for John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Steven G. Bradbury, *Re: Application of the Detainee Treatment Act to Conditions of Confinement at Central Intelligence Agency Detention Facilities* (Aug. 31, 2006)

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.

8. **More specifically, were you the Counsel or primary or secondary Deputy assigned to either of the memos referenced above? If not, did you otherwise participate in reading, reviewing, or discussing their analysis?**

Response: I do not believe that I was the primary or second deputy for either opinion. As noted, given the timing of the August 31, 2006 issuance, I do not recall having any substantive involvement. To the best of my recollection, 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.

9. **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:**

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)

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)

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)

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)

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 would either have been final or near-final at that time.

If confirmed, you will lead the office responsible for issuing authoritative opinions that are binding on the Executive branch. This is critical role where close attention to statutory and regulatory language is essential. Please consult 28 C.F.R. § 600.1 and answer the following questions in the same way you would address similar questions presented during your previous tenure in OLC.

10. 28 C.F.R. § 600.1 states that in appropriate situations, the Attorney General or Acting Attorney General "will appoint a Special Counsel." Is it correct that "will," unlike "may," indicates that this decision is not discretionary once the relevant conditions have been established?

Response: I agree that close attention to statutory and regulatory language is essential to the role at OLC. However, I am not familiar with the regulation and not in position to opine. If I am confirmed and asked to provide advice on the matter, I will review the relevant regulations and precedents in the area and then provide advice.

11. 28 C.F.R. § 600.1(a) refers to matters that "would present a conflict of interest for the Department." What kind of conflicts of interest are contemplated by the regulation? Would that include a case where political leadership of the Justice Department are potential witnesses or subjects for the investigation?

Response: I agree that close attention to statutory and regulatory language is essential to the role at OLC. However, I am not familiar with the regulation and not in position to opine. If I am confirmed and asked to provide advice on the matter, I will review the relevant regulations and precedents in the area and then provide advice.

12. 28 C.F.R. § 600.1(a) also refers to "other extraordinary circumstances." With reference to historical examples, such as the Valerie Plame leak case, please explain what constitutes "extraordinary circumstances" for purposes of this regulation.

Response: I agree that close attention to statutory and regulatory language is essential to the role at OLC. However, I am not familiar with the regulation and not in position to opine. If I am confirmed and asked to provide advice on the matter, I will review the relevant regulations and precedents in the area and then provide advice.

13. 28 C.F.R. § 600.1(b) adds a requirement "[t]hat under the circumstances, it would be in the public interest to appoint an outside Special Counsel." If the conditions in 600.1 (a) are met, is it possible that nevertheless it might not be in the public interest to appoint a Special Counsel?

Response: I agree that close attention to statutory and regulatory language is essential to the role at OLC. However, I am not familiar with the regulation and not in position to opine. If I am confirmed and asked to provide advice on the matter, I will review the relevant regulations and precedents in the area and then provide advice.

14. Is public confidence in the Justice Department or the handling of a particular investigation a component of determining whether the appointment of a Special Counsel is in the public interest?

Response: I agree that close attention to statutory and regulatory language is essential to the role at OLC. However, I am not familiar with the regulation and not in position to opine. If I am confirmed and asked to provide advice on the matter, I will review the relevant regulations and precedents in the area and then provide advice.

Senator Dick Durbin
Written Questions for Noel Francisco, Steven Engel, and Makan Delrahim
May 17, 2017

For questions with subparts, please answer each subpart.

Questions for Steven Engel

1. In your questionnaire you say you've been a member of the Federalist Society since 2002.

   a. **Why did you join the Federalist Society?**

   Response: To the best of my recollection, I joined the Federalist Society shortly after entering private practice in Washington, DC in order to participate in the Federalist Society's speaking events and social gatherings.

   b. **Do you agree with the views espoused by this organization?**

   Response: According to the website, the Federalist Society "is founded on the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be." I believe in those principles, which I understand to be consistent with the American constitutional tradition.

   c. The Federalist Society website lists the organization's statement of purpose. That statement begins with the following: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society." **Do you agree or disagree with this statement?**

   Response: In my experience, law schools and the legal profession differ in multiple respects, including in the legal and political views of their members.

   d. **Please list all years in which you attended the Federalist Society's national convention.**

   Response: To the best of my recollection, I have attended the annual dinner for the Federalist Society's national convention for each year since 2001.

2. President Trump publicly thanked the Federalist Society and the Heritage Foundation for assembling his list of 21 Supreme Court candidates. He said he would only choose from that list in naming nominees for the Supreme Court.

   a. **Was it appropriate for President Trump to involve the Federalist Society and the Heritage Foundation in the selection of candidates for the Supreme Court?**

   b. **Are you concerned that this creates an incentive for judges and attorneys not to take positions that contravene the views of these two organizations, if those judges want to someday have a chance at being nominated by President Trump for a Supreme Court seat?**

   Response: I am not familiar with the process by which President Trump selected candidates for the Supreme Court.

3. You were a member of the Trump transition team. **What reassurance can you provide us that if you are confirmed, the Office of Legal Counsel will operate independently from President Trump when reviewing matters involving the President and his business interests?**

   Response: I am deeply committed to the independence of the Office of Legal Counsel. 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 and my volunteer work for the Trump transition team. I believe that demonstrated commitment is one reason why former heads of the Office, from both Democratic and Republican administrations, have supported my nomination.

4. The Office of Legal Counsel reviews proposed presidential executive orders to ensure they are lawful and properly drafted. Since President Trump took office, OLC has cleared controversial immigration executive orders, including the January 27 Muslim ban executive order and the January 25 executive order targeting so-called "sanctuary cities" that have subsequently been blocked by federal courts.

   Did you play any role in providing advice or opinions on President Trump's immigration executive orders?

   Response: I am currently an attorney in private practice. I have not provided any advice to the White House or to the Department of Justice with respect to the immigration executive orders. While I provided legal advice to the presidential transition, my ethical obligations as an attorney preclude me from discussing the subjects of that work.

5. On Monday, former Acting Attorney General Sally Yates testified before the Judiciary Crime and Terrorism Subcommittee. As Acting Attorney General, Ms. Yates had directed the Department of Justice not to defend the January 27 Muslim ban Executive Order. Explaining her decision, she said that she was not convinced that the Executive Order was lawful, and she also believed it was inconsistent with the principles of the Department.

   In response to questioning by Senator Cruz, Ms. Yates stated that she is not aware of a situation in DOJ history where the Office of Legal Counsel was advised not to tell the Attorney General about OLC's review and approval of a policy.

   a. **Did OLC act correctly by not informing the Acting Attorney General in a timely manner of the review and approval of the January 27 Muslim ban executive order?**

   b. **Were you consulted on, or aware of, the decision to keep the Acting Attorney General in the dark?**

   Response: I am not aware of the facts and circumstances described by Ms. Yates in her testimony. I am currently an attorney in private practice and was not consulted on, or aware of, any such decision.

6. You worked in the Office of Legal Counsel from May 2006 to January 2009. In February 2007, you were promoted to Deputy Assistant Attorney General of OLC.

   During your tenure as Deputy Assistant Attorney General, OLC provided a July 2007 memo to the CIA Acting General Counsel which concluded that six enhanced interrogation techniques authorized for use by the CIA were legal under the War Crimes Act, Common Article 3 of the Geneva

Conventions, and the Detainee Treatment Act. These techniques included, for example, extended sleep deprivation by shackling detainees in a standing position wearing a diaper for days at a time.

a. **Were you involved in any way, including drafting or reviewing, this memo?**

b. **Do you agree with its assessment that such techniques complied with Common Article 3 of the Geneva Conventions, which specifies that detainees "shall in all circumstances be treated humanely"?**

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 believe that I reviewed and commented upon the draft July 2007 memo. I would note that 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.

7. In July 2009, you testified before the House Judiciary Committee on "Proposals for Reform of the Military Commission System." You discussed your work on developing the military commission system and argued in favor of trying detainees in military commissions rather than Article III courts. Specifically, you suggested that military commissions "are better suited than Article III courts" in wartime because commissions involve fewer procedural protections.

In July 2011, you testified before the House Armed Services Committee in support of a provision in the National Defense Authorization Act prohibiting the Executive Branch from using appropriated funds to transfer Guantanamo detainees to the U.S. for trial before an Article III court.

Since 9/11, more than 550 terrorists have been tried and convicted in federal courts and are now being safely held in federal prisons. And no one has ever escaped from a federal supermax prison. In contrast, only eight individuals have been convicted by military commissions in fifteen years. Three of these convictions have been overturned and another one was partially invalidated.

a. **Do you maintain your belief that Guantanamo detainees should only be tried by military commissions, rather than by Article III courts?**

Response: I believe that the United States should use all available and lawful means to prosecute war crimes committed by members of Al Qaeda, the Taliban, and associated forces. Article III courts may be an appropriate forum for such prosecutions, particularly where the offenses were committed in the United States and the terrorist has been apprehended by law enforcement authorities. At the same time, as I testified in July 2009, the United States has traditionally not treated its wartime enemies as ordinary domestic criminals, and military commissions are well-suited for prosecuting offenses arising out of wartime circumstances.

b. Last year, then-candidate Trump endorsed the idea that U.S. citizens accused of terrorism could be tried by military commissions at Guantanamo. **Do you believe that such a system would be legal or constitutional?**

Response: I am not familiar with the statement by President Trump referenced in the question. The Supreme Court, in *Ex parte Quirin*, 317 U.S. 1 (1942), did hold that it would be constitutional to prosecute an American enemy combatant by military commission. *See id.* at 37 ("Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war."). However, the military commissions established under the Military Commissions Act are limited

only to alien enemy combatants. Therefore, they could not lawfully be used to prosecute American citizens.

c. Time and again, our most senior national security and military leaders have called for the closure of Guantanamo Bay because it weakens our alliances, inspires our enemies, and calls into question our commitment to human rights. In contrast, during his campaign, President Trump stated that "we are keeping open [Guantanamo]... and we're gonna load it up with some bad dudes."

Do you agree with President Trump that the United States should continue to bring suspected terrorists captured abroad to Guantanamo?

Response: If I am fortunate enough to be confirmed as Assistant Attorney General, it will be my role to provide legal advice to the President and to other policy makers. However, it will not be my role to opine on policy questions, such as whether suspected terrorists captured abroad should be brought to the detention facility at Guantanamo Bay.

8. In *United States v. Texas*, you filed an amicus brief in the Supreme Court on behalf of 43 Republican Senators in support of Texas's partisan challenge, which was joined solely by Republican governors and attorneys general, to the expansion of the Deferred Action for Childhood Arrivals (DACA) program and the Deferred Action for Parents of Americans and Lawful Permanent Residents program (DAPA).

In your brief you stated that President Obama "chose to implement his policy preferences by the extra-constitutional assertion of a unilateral executive power."

The Supreme Court did not determine that DAPA and the expansion of DACA are illegal. However, the result of their 4-4 deadlock was that the decision of one district court judge in Texas blocked the implementation of DAPA and the expansion of DACA.

a. **Please describe the circumstances by which you came to represent Republican Senators in this matter.**

Response: To the best of my recollection, several of the clients requested that I represent them in the matter. As an attorney, I cannot address the substance of confidential attorney-client communications, including with respect to these initial communications.

b. **Please describe your views on the legality of DACA, a subject on which you surely have a well-formed opinion, given your work on this matter.**

Response: As you know, I filed an amicus brief that argued, on behalf of my clients, that the DAPA program was unlawful. The U.S. Court of Appeals for the Fifth Circuit agreed with those arguments, and the Supreme Court affirmed by an equally divided Court. I have not had occasion separately to study the DACA program.

c. **Given your legal representation in this matter, will you pledge that if you are confirmed you will recuse yourself from any involvement in reviewing the legality of the Obama Administration's immigration actions, including DACA?**

Response: Because I am not currently in the Department, I do not know whether the Office of Legal Counsel has been asked, or will be asked, to review the legality of the DACA program or any other immigration action by the Obama Administration. If a situation arose where I believed

my impartiality might reasonably be questioned based upon my past legal representation or any other reasons, I would consult with the Department's ethics professionals to determine the most appropriate way to proceed.

d. **Given the well-known views of the Attorney General on DACA, how will you ensure that any OLC review of the legality of DACA and any related matters is independent and respects OLC precedent?**

Response: If I am fortunate enough to be confirmed, I will ensure that the Office of Legal Counsel provides candid, independent, and principled legal advice with respect to all matters that come before me. Under established practices, the Office will ordinarily give its precedents great weight and will not lightly depart from such past decisions. At the same time, the Office would have to take into account any subsequent judicial decisions that may bear upon such past opinions.

e. **Does President Trump's assertion of unilateral executive power in his Muslim ban executive order raise any constitutional concerns?**

Response: As you know, the Department of Justice is currently defending the President's executive order, "Protecting the Nation from Foreign Terrorist Entry into the United States," against constitutional challenges in the federal courts. As such, I do not believe that it would be appropriate for me to comment upon any legal issues raised by the order.

f. **What is your view on the President's and Attorney General's criticism of the federal judges who blocked this order from moving forward?**

Response: I am not aware of the particular statements to which you refer. Speaking generally, as a nominee to a position at the Department of Justice, I do not believe it would be appropriate for me to comment upon public statements that the President or the Attorney General may have made on pending litigation.

9. In *Independence Institute v. Federal Election Commission*, a 501(c)(3) group challenged the Bipartisan Campaign Reform Act's requirement that organizations engaged in electioneering communications right before an election must report to the FEC and publicly disclose their donors.

A three-judge federal district court panel upheld the law. When the decision was appealed to the Supreme Court, you filed an amicus brief on behalf of a number of 501(c)(3) groups, in which you argued that the district court's decision should be reversed. However, the Supreme Court affirmed the lower court's decision in a one-line opinion earlier this year.

I wholeheartedly disagreed with the Supreme Court's decision in *Citizens United*, but there was one statement in the majority's opinion that I strongly support. Justice Kennedy wrote: "[D]isclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."

a. **Do you disagree with the Court's statement on the importance of disclosure and transparency?**

b. **If not, how can you reconcile the position you took in the *Independence Institute v. FEC* amicus brief?**

Response: In the *Independence Institute* matter, I represented a group of 501(c)(3) organizations

that do not engage (and are prohibited from engaging) in any partisan political activities. In the amicus brief, my clients accepted the Supreme Court's holding in *Citizens United*, but argued that, as applied to the facts in *Independence Institute*, BCRA's definition of "electioneering communications" swept beyond campaign-related speech and "encompassed the bona fide exchange of ideas, where such expression was completely divorced from the outcome of any election."

10. **Do you believe that systemic racial discrimination still exists in America today?**

Response: I believe that additional progress can always be made in terms of fighting racial discrimination. If I am confirmed, I will work to ensure that the laws protect the rights of all Americans without regard to race.

11. Chief Justice Roberts wrote in the case Parents Involved in Community Schools v. Seattle School District No. 1 that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race." He used this rationale to rule against school districts that took race into account in trying to integrate public school systems.

In her dissent in *Schuette v. Coalition to Defend Affirmative Action* Justice Sotomayor wrote:

> The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination. As members of the judiciary tasked with intervening to carry out the guarantee of equal protection, we ought not sit back and wish away, rather than confront, the racial inequality that exists in our society.

Do you agree with Justice Sotomayor's statement, or are your views closer to Chief Justice Roberts' statement in *Parents Involved*?

Response: I believe that Chief Justice Roberts and Justice Sotomayor expressed their positions eloquently in their opinions in *Parents Involved*. If I were fortunate enough to be confirmed as Assistant Attorney General, I would advise policy makers on the requirements of the law as set forth by the Supreme Court.

12. In the 2014 Second Circuit case *Floyd v. City of New York*, you represented three police unions. The District Judge had entered an order finding that the City of New York had violated the Fourth and Fourteenth Amendments by acting with "deliberate indifference" toward the NYPD's practice of making suspicionless "stops" and "frisks" and by adopting "a policy of indirect racial profiling by targeting racially defined groups" for "stops" and "frisks."

The Court issued an order imposing remedies in the form of various "reforms" to the NYPD's "stop and frisk" practices to be overseen by a court-appointed monitor. The parties decided to settle, and agreed to "substantially comply" with the remedies in the Court order, with additional provisions. You, however, moved to intervene in the action on behalf of police unions. You argued that NYPD should not be required to adhere to these policy modifications. You argued "it is the business of cities, not federal courts or special masters, to run police departments."

Do you oppose federal oversight of local law enforcement through enforcement of consent decrees?

Response: No, the propriety of federal oversight of local law enforcement would have to depend

upon the facts and circumstances of each case. In *Floyd v. City of New York*, the police unions argued that the District Court's liability findings against the New York Police Department were erroneous, and therefore, the remedial order should be vacated.

13. Since 2009, the Justice Department has opened 25 investigations into law enforcement agencies and has been enforcing 14 consent decrees, along with some other agreements.

    However, Attorney General Sessions has publicly criticized the Department's use of consent decrees, and on March 31, 2017, he issued a memorandum directing the Deputy Attorney General and Associate Attorney General to review all existing or contemplated consent decrees.

    If you are confirmed as Assistant Attorney General for the Office of Legal Counsel, your job will be to advise the President, agencies of the Executive Branch, and offices within the Department. You may be called upon to evaluate the constitutionality or legality of existing or contemplated consent decrees, or the Departments' policy regarding consent decrees.

    a. **Have you had any conversations with Attorney General Sessions or Deputy Attorney General Rosenstein concerning consent decrees?**

    Response: No.

    b. **Have you had any conversations with Attorney General Sessions or Deputy Attorney General Rosenstein concerning this March 31 Sessions memo?**

    Response: No.

    c. **Do you agree that if you are confirmed as head of OLC, your role will be limited to opining on the legality of the Department's actions, not offering policy advice on consent decrees?**

    Response: Because I am not in the Department of Justice, I am not aware of any discussions concerning existing or contemplated consent decrees. I do agree, however, that the role of the Office of Legal Counsel is to offer legal advice to policy makers, not to offer policy advice.

    d. **What are your views as to the Department's power to re-consider existing consent decrees already entered into?**

    Response: I am not familiar with the issue. If I were confirmed to be Assistant Attorney General, and such a question came before me, I would review the existing judicial precedents in this area, any relevant Attorney General and OLC opinions on the subject, and the terms of the particular decree at issue, before providing any advice on the matter.

14. In 2010 I sponsored a law that directed the Securities and Exchange Commission to require companies to disclose their use of conflict minerals in their products. This bipartisan measure has helped stop mining companies operating in conflict zones like the Democratic Republic of the Congo from funding warlords.

    You have represented industry groups in amicus filings in litigation challenging the SEC rules implementing this law. You have also written an article questioning the legality of these rules. **Given your past representation and advocacy, if you are confirmed will you recuse yourself from all matters at OLC involving the conflict minerals law?**

Response: I have not previously represented any client in connection with challenges to the conflict minerals regulations. I did co-write an article identifying potential legal issues with respect to the SEC's rules, but that piece was not a work of advocacy. Because I am not currently in the Department, I do not know whether the Office of Legal Counsel has been asked, or will be asked, to review matters related to the conflicts mineral law. If a situation arose where I believed my impartiality might reasonably be questioned, I would consult with the Department's ethics professionals to determine the most appropriate way to proceed.

15. According to news reports, in a January 27th dinner, President Trump asked then-FBI Director James Comey if Comey would pledge his loyalty to President Trump. **Do you believe it is appropriate for a President to ask a Director of the FBI to pledge loyalty to the President?**

Response: I do not have any knowledge concerning the communications between President Trump and former FBI Director Comey.

16.

a. **Do you think the Office of Legal Counsel has the responsibility to say no to the President if he asks for something that's improper?**

b. **If the views that the President wants to execute are unlawful, should the Office of Legal Counsel say no?**

Response: Yes, that is part of the job. The Office of Legal Counsel has the responsibility to provide independent, principled and candid advice, even if that advice may not always support the Administration's policy goals. If the President proposes a course of action that is unlawful, then the Office of Legal Counsel has a duty to tell him so.

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 Detaineee Treatment Act of 20056 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)

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 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 to 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.

Senate Judiciary Committee
"Nominations"
Questions for the Record
May 10, 2017

Senator Amy Klobuchar

Questions for Mr. Engel, Nominee to be Assistant Attorney General, Office of Legal Counsel
Earlier this week, former Acting Attorney General Sally Yates explained her view of the role of the Office of Legal Counsel (OLC) in reviewing executive orders from the President before they are released.

- What is your view of the approach that OLC should take in these matters?

  Response: The Office of Legal Counsel has a responsibility to review proposed executive orders and determine that they would comply with the Constitution and laws of the United States. OLC's advice is essential to ensuring that the President fulfills his constitutional duty to take care that the laws be faithfully executed.

  During her Senate testimony, Ms. Yates advised, "The Office of Legal Counsel has a narrow function, and that is to look at the face of an executive order and to determine purely on its face whether there is some set of circumstances under which at least some part of the executive order may be lawful." I believe that description of OLC's role is too narrow. OLC's job is not to identify "whether there is some set of circumstances" under which "part of the executive order" may be lawful. Rather, OLC must ensure, in the best judgment of the Office, that all portions of an order are lawful. In my experience, if one part of an order is problematic, then OLC will not sign off on a draft until it is revised to make it consistent with the law.

The Office of Legal Counsel has been described as "the most significant centralized source of legal advice within the Executive Branch." Sometimes, providing legal advice means saying no.

- When you previously worked in the Office of Legal Counsel, did you ever have to say no to the Attorney General, the White House Counsel, or any executive branch agencies? If so, how did you handle these situations?

- Would you be willing to tell the White House Counsel that the President's proposed course of action is illegal? Would you be willing to do so if the situation involved national security issues?

  Response: Yes, that is all part of the job. In my experience in the Office, OLC would regularly advise clients within the Executive Branch that certain proposals must be modified or rescinded to be consistent with the law. I have no problem providing candid, independent, and principled advice to clients. In my experience, in both private practice and government service, clients respect lawyers who provide such advice and benefit in the long run from receiving it. If I confirmed, I will adhere to those standards without regard to the subject matter of the advice or the identity of the Executive Branch client.

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

QUESTIONS FROM SENATOR COONS

1. The Judiciary Committee recently heard testimony from former Acting Attorney General Sally Yates that, in her view, the executive order barring individuals from seven countries is unconstitutional.
    a. Did you play any role in conceiving, drafting, reviewing, or approving the executive orders suspending the refugee program and blocking travel from certain Muslim-majority countries?
    b. Did you ever discuss the orders with Acting Attorney General Yates?

Response: I am currently in private practice. Accordingly, I have not provided any advice to the White House or the Department of Justice with respect to the immigration executive orders, and did not discuss the orders with former Acting Attorney General Yates. While I provided legal advice on a variety of subjects to the presidential transition, my ethical obligations as an attorney preclude me from discussing that work.

2. Have you worked on any of President Trump's other Executive Orders?
    a. If yes, please identify each order you worked on and your specific involvement with each.

Response: I am currently in private practice. Accordingly, I have not provided any advice to the White House or the Department of Justice with respect to any of President Trump's executive orders. While I provided legal advice on a variety of subjects to the presidential transition, my ethical obligations as an attorney preclude me from discussing that work.

3. Please provide examples from your past that demonstrate your capability to withstand political pressure in order to provide an independent assessment on issues of great importance?

Response: I am deeply committed to the independence of the Office of Legal Counsel. 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. As a matter of respect for my clients and my confidentiality obligations, I am not in a position to provide examples. However, I believe that demonstrated commitment is one reason why former heads of the Office, from both Democratic and Republican administrations, have supported my nomination.

Senator Mazie K. Hirono
Questions for the Record following hearing on May 10, 2017 entitled:
"Nominations"

Steven A. Engel

1) The Office of Legal Counsel exercises statutory authority to provide legal advice to the President and executive agencies. By tradition, its advice is binding on executive branch officials. If confirmed, you will be confronted with some of the most difficult and novel legal questions that arise in the executive branch, particularly those involving the scope of executive authority and the separation of powers.

    a. In the first several months of this presidency, we've seen the courts strike down a number of the President's executive orders, many of which seemed not to consider constitutional implications. Would you ever sign off on an executive order if you did not believe it to be constitutionally sound?

Response: No.

    b. In a statement you made on a panel hosted by the Constitution Project, you stated "I was at the Office of Legal Counsel from 2006-2009 and some of what the office did didn't live up to its usual standards." What did you mean by that? If confirmed, how will that experience inform you work in the current administration?

Response: To the best my recollection, I was referring to certain opinions issued by the Office of Legal Counsel in the wake of the September 11th attacks. Those opinions were subsequently withdrawn or replaced by the Office of Legal Counsel prior to my service in the Office. I believe that those opinions departed from OLC's best practices because they did not benefit from comment from interested agencies within the Executive Branch, they addressed hypothetical issues that were not necessary for decision, and they failed to consider contrary authority bearing upon the questions at issue. If I am confirmed, I will ensure that OLC provides candid, independent, and principled advice, consistent with the high standards that have traditionally governed the work of the Office.

    c. Did you have any involvement in the executive orders issued shortly after President Trump's inauguration, such as the Muslim ban executive order (EO 13769, issued on January 27)?

Response: I have not been in the Department of Justice, and accordingly, I have not provided advice to the White House or to the Department of Justice in connection with the orders. While I provided legal advice to the presidential transition, my ethical obligations as an attorney preclude me from discussing the subjects of that work.

    d. It is my understanding that, under ordinary procedure, a proposed executive order must be sent to the Office of Management and Budget and to any interested agencies for review, and that this process, which helps make sure agencies understand the orders they will be implementing, has been in place since 1962. However, the *Washington Post* reported that this process was not followed for the Muslim ban executive order. 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 have not been in the Department of Justice, I am not familiar with the process followed with respect to Executive Order 13769. In my experience in the Department, the interagency process does play an important role in ensuring prudent and lawful decision-making by the Executive Branch.

2) In *Independence Institute v. FEC*, you filed an amicus brief on behalf of a group of 501(c)(3) non-profits challenging the disclosure requirements of McCain-Feingold. You argued that such requirements were "draconian," and said they chill speech by forcing non-profits "either to restrict the timing and content of their speech or to publicly disclose their financial donors, who often do not wish to be publicly identified with a potentially controversial issue campaign." A three-judge panel of the US District Court for DC found in favor of the FEC, and the Supreme Court affirmed.

   a. Even though the Supreme Court has steadily dismantled the legal framework for fighting the corruption of our campaign finance system, it has stated that disclosure and disclaimer requirements advance the government's interest in providing the electorate with information concerning the sources of election-related spending. Even in *Citizens United*, eight of the nine justices held that this interest survives the "exacting scrutiny" the Constitution requires. Doesn't the public deserve to know who is behind an ad, like the one in the *Independence Institute* case, that asks them to contact their elected officials about pending legislation? Do you believe that the Supreme Court's disclosure holding in *Citizens United* was correct?

   Response: In the *Independence Institute* matter, I represented a group of 501(c)(3) organizations that do not engage (and are prohibited from engaging) in any partisan political activities. In the amicus brief, my clients accepted the Supreme Court's holding in *Citizens United*, but argued that, as applied to the facts in *Independence Institute*, BCRA's definition of "electioneering communications" swept beyond campaign-related speech and "encompassed the bona fide exchange of ideas, where such expression was completely divorced from the outcome of any election."

   b. Is it your position that we can only constitutionally require disclosure of campaign ads that expressly include words like "vote for" or "vote against" a candidate, notwithstanding the Supreme Court's clear and repeated holdings to the contrary?

   Response: No. The Supreme Court has held that disclosure requirements may constitutionally apply, not only to express advocacy, but to communications that are the functional equivalence of express advocacy.

   c. How are voters supposed to make informed decisions when they are bombarded by anonymous messaging? How can we engage in a robust debate on an issue if we don't know all the facts, namely, who is making the argument in the first place?

   Response: I agree that the identity of a speaker is one fact that may be relevant in evaluating the message conveyed by the speaker. By the same token, as the Supreme Court recognized in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), in an opinion by Justice Stevens, anonymous speech may also promote a robust public debate by permitting

speakers to air unpopular views without fear of retaliation. *See id.* at 357 ("Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority.").

d. Under the legal argument you advanced in the *Independence Institute* case, what is to stop a billionaire donor from hiding behind a 501(c)(3) in order to advance his or her agenda on a particular issue at the expense of ordinary Americans?

Response: In the *Independence Institute* case, my clients expressed concern that BCRA's definition of "electioneering communications" swept beyond campaign-related speech and "encompassed the bona fide exchange of ideas, where such expression was completely divorced from the outcome of any election."

e. Do you agree with Justice Scalia's statement, in his concurring opinion in *Doe v. Reed*, that "[r]equiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed?"

Response: Yes.

3) In 2012, you filed an amicus brief in the Supreme Court in *Fisher v. University of Texas* on behalf of individuals who had served in civil rights positions in Republican administrations. The brief argued that the university did not fulfill its obligation to seriously consider race-neutral alternatives to its admissions program, which considered race as one factor among many for a small percentage of applicants. You argued that race should not be a factor when schools seek to promote diversity in higher education. The Supreme Court affirmed the Fifth Circuit, which had upheld the university's program.

a. Justice Kennedy's opinion in *Fisher* found that the university "articulated concrete and precise goals" with regard to its affirmative action program, so its "holistic review process" for applicants survived strict scrutiny. Do you agree with that finding?

b. Do you believe there is a compelling government interest in the diversity of our nation's higher education institutions? How are we to further diversity without taking race into account as one of many factors?

c. Do you believe that *Brown v. Board* mandates an approach to the Constitution that ignores our history of racial discrimination in education and other contexts, and treats pernicious racial discrimination that imposed segregation the same as efforts to remedy that discrimination? Do you agree with Chief Justice Roberts' opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*, which stated that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race"?

Response: I filed an amicus brief in connection with *Fisher v. University of Texas*, 133 S. Ct. 2411 (2013), on behalf of present and former civil rights officials. My clients recognized that the Supreme Court had held diversity to be a compelling government interest, but argued that the Fifth Circuit had failed to apply strict scrutiny correctly. The Supreme Court agreed with that view, vacated the Fifth Circuit's decision, and sent it back for further consideration. If I were fortunate enough to be confirmed as Assistant Attorney

General, I would advise policy makers on the requirements of the law as set forth by the Supreme Court.

4) I understand that, because OLC often considers questions that courts have not decided, its prior opinions play an important role in its decision making. When is it appropriate for OLC to withdraw or reconsider OLC opinions from a prior administration? What criteria do you think should be used in determining whether to revisit a prior OLC opinion? How much should OLC's legal conclusions—or even the way OLC approaches legal interpretation—depend on which 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.

Senator Ben Sasse
Questions for Office of Legal Counsel Nominee Steven Engel

The American people's confidence in our institutions of government has been seriously eroded. This problem has festered for many years, but it has only worsened due to events in the course of the 2016 presidential election and subsequent fallout. In light of these developments, rebuilding trust in our institutions is one of the most important tasks facing our leaders today.

As head of the Office of Legal Counsel (OLC)—the organ of government at the crossroads of the Executive Branch's duty to hold itself accountable to the law—you will have particularly powerful responsibility to protect the rule of law even in difficult circumstances. I want to ensure your commitment to the norms and best practices of the Office that have proven so critical over the years to ensuring the Office's ability to offer sound, independent legal advice to different components of the Executive Branch:

1. Under what circumstances is OLC bound to respect the precedents set by previous OLC opinions?

   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.

2. What factors counsel for and against either limiting or overruling a precedent set by a previous OLC opinion?

   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.

3. How would you define which agencies have cognizable equities regarding a particular matter before OLC?

   Response: I think that it is difficult to answer this question without a legal and factual context. In some cases, the interested agencies themselves bring the matter to the Office for a decision. In others, the inter-agency process may help determine which agencies have cognizable equities.

4. Under ordinary circumstances, should agencies with equities at issue be shown drafts of OLC opinions?

   Response: During my prior experience at OLC, the Office would permit interested agencies to provide comments to draft opinions to ensure that the Office had not made any mistakes or overlooked any material issues in its analysis. OLC's revised Best Practices Memorandum, issued in July 2010, suggested that the sharing of drafts had since become the exception, rather than the rule. If I am fortunate enough to be confirmed, I will consult with the experienced lawyers at the Department to determine the best way to proceed.

5. Under what types of circumstances would it be appropriate for OLC to refrain from showing opinion drafts to agencies with equities at issue in the matter at hand?

   Response: The hypothetical described in this question did not arise in my previous OLC experience. If I am confirmed and this question arose, I would work with others in the Department to determine an appropriate way forward.

6. Besides sharing draft opinions with agencies with equities at issue, how will you ensure that OLC opinions receive sufficient scrutiny from potential disagreeing viewpoints before they are finalized?

   Response: In my experience, OLC has always had a rigorous and robust process for considering different, and potentially conflicting, views within the process that leads to its opinions. If I am confirmed, I would expect to continue that process.

7. Should a presumption of publication within a reasonably short amount of time apply to OLC opinions?

   Response: The question of whether publication is appropriate really depends upon the opinion itself. It is also not a decision that the Office should make unilaterally, but requires consultation with the agencies that have equities in the matter. In some instances, an opinion's continuing confidentiality is important to the effectiveness of the program that is the subject of the opinion, but in other instances, publication may be important for other reasons. The Office has had established procedures to consider publication on a case by case basis. If I am confirmed, I would expect to continue that process.

8. If so, under what circumstances should such a presumption be overridden?

   Response: Please see the previous response.

9. What concrete affirmative steps would you take to maximize transparency as is legal and prudent in OLC's work, both for formal opinions and more informal advice?

   Response: I recognize the importance of transparency regarding government programs and other actions. Transparency can help build understanding of a government program, and it can potentially improve and strengthen the legal justifications for a program. Since I am not in the Department, it is difficult to provide information about what concrete steps might be taken at OLC. If I am confirmed, I would expect to consider this issue further in consultation with others in the Department.

10. How would you work to restore OLC's position as the last word—barring being overruled by the Attorney General or the President—on the legal views of the Executive Branch?

    Response: I believe that, based upon long-standing policy and practice, OLC's advice is considered to be authoritative within Executive Branch agencies. Because I am not in the Department, I do not know whether any action is needed to continue that tradition.

11. How would you propose to avoid the sort of irregular "forum shopping" between different agencies' lawyers, as is reported[1] to have occurred under previous administrations?

Response: Because I am not in the Department, I am not in a position to evaluate the extent to which this may be an issue or, if it is, whether or how OLC should address it.

12. What steps would you take to ensure transparency for Congress and the American people in the event that an entity or individual attempts to influence an OLC opinion or other authoritative legal interpretation of the Executive Branch in a manner that could reasonably create the appearance of a conflict of interest or other ethical infirmity?

Response: As I said at the Committee's hearing, I am committed to the independence and integrity of OLC and the advice it provides within the Executive Branch. If I am confirmed, that will be a fundamental, central purpose in my leadership. Because I am not in the Department at this point, I cannot speak to whether or what steps should be taken to ensure that result.

[1] *See, e.g.*, Charlie Savage, *2 Top Lawyers Lose Argument on War Power*, N.Y. TIMES, June 17, 2011, http://www.nytimes.com/2011/06/18/world/africa/18powers.html.