



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 1, 2004

The Honorable Patrick J. Leahy
Ranking Minority Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Leahy:

This responds to your letter, dated June 15, 2004, which enclosed written questions for the record of the Committee's oversight hearing on June 8, 2004, regarding terrorism, with particular reference to the interrogation of detainees.

Questions 1 through 4: Administration Documents

In response to the requests for documents contained in your first four questions, enclosed are six Department of Justice documents that have been released publicly. They are: 1) a memorandum from the Office of Legal Counsel (OLC) to the Counsel to the President and the General Counsel of the Department of Defense on the "Application of Treaties and Laws to al Qaeda and Taliban Detainees," dated January 22, 2002; 2) a letter from the Attorney General to the President on the status of Taliban detainees, dated February 1, 2002; 3) a memorandum from OLC to the Counsel to the President on the "Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949," dated February 7, 2002; 4) a memorandum from OLC to the General Counsel of the Department of Defense on the "Potential Legal Constraints Applicable to Interrogations of Persons Captured by U.S. Armed Forces in Afghanistan," dated February 26, 2002; 5) a letter from OLC to the Counsel to the President on the legality, under international law, of interrogation methods to be used during the war on terrorism, dated August 1, 2002; and 6) a memorandum from OLC to the Counsel to the President on "Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A," dated August 1, 2002.

While these are documents that would not usually be disclosed to anyone outside the Executive Branch, the Administration decided to release a number of documents, including these and including many from the Department of Defense, to provide a fuller picture of the issues the Administration had considered and the narrower policies the Administration actually adopted in this important area. While we appreciate your interest in the additional documents set forth in the attachment to your letter, the Executive Branch has substantial confidentiality interests in those documents. OLC opinions consist of confidential legal advice, analysis, conclusions, and recommendations for the consideration of senior Administration decision-makers. The

disclosure of OLC opinions that have not been determined to be appropriate for public dissemination would harm the deliberative processes of the Executive Branch and disrupt the attorney-client relationship between OLC and Administration officials. We are not prepared to identify these documents specifically or reveal which documents may be classified, but we can assure you that no portions of any of these documents have been classified since the Attorney General's testimony on June 8, 2004.

We also can state that included in the memoranda that have been released are all unclassified, final written opinions from the Department of Justice addressing the legality of interrogation techniques used in interrogations conducted by the United States of al Qaeda and Taliban enemy combatants. While the Department has not issued written opinions addressing interrogation practices in Iraq, it has been the consistent understanding within the Executive Branch that the conflict with Iraq is covered by the Geneva Conventions, and the Department has concurred in that understanding.

Lastly, we note that some of the documents requested originated with other agencies such as the Departments of State and Defense. Consistent with established third-agency practice, we suggest that you contact those agencies directly if you wish to obtain copies of their documents.

5. Do you agree with the conclusions articulated in an August 1, 2002, memorandum from Jay Bybee, then AAG for the Office of Legal Counsel, to Alberto Gonzales, Counsel to the President, that: (A) for conduct to rise to the level of "torture" it must include conduct that a prudent lay person could reasonably expect would rise to the level of "death, organ failure, or the permanent impairment of a significant bodily function," and (B) section 2340A of the Federal criminal code "must be construed as not applying to interrogations undertaken pursuant to [the President's] Commander-in-Chief authority"?

(A). In sections 2340 & 2340A of title 18, Congress defined torture as an act "specifically intended to inflict severe physical or mental pain or suffering." Because Congress chose to define torture as encompassing only those acts that inflict "severe . . . pain or suffering," Department of Justice lawyers who are asked to explain the scope of that prohibition must provide some guidance concerning what Congress meant by the words "severe pain" (emphasis added). In an effort to answer that question, the August 1, 2002 memorandum examines other places in the federal code where Congress used the same term – "severe pain." In at least six other provisions in the U.S. Code addressing emergency medical conditions, Congress identified "severe pain" as a typical symptom that would indicate to a prudent lay person a medical condition that, if not treated immediately, would result in – "(i) placing the health of the individual . . . in serious jeopardy, (ii) serious impairment to bodily functions, or (iii) serious dysfunction of any bodily organ or part." 42 U.S.C. § 1395w-22(d)(3)(B); *see also* 8 U.S.C. § 1369(d) (same); 42 U.S.C. § 1395x(v)(1)(K)(ii); *id.* § 1395dd(e)(1)(A); *id.* § 1396b(v)(3); *id.* § 1396u-2(b)(2)(C). In light of Congress's repeated usage of the term, the memorandum concluded that, in Congress's view, "severe pain" was the type of pain that would be associated

with such conditions. (The opinion refers to these medical consequences as a guide for what Congress meant by "severe pain"; it does not state, as your question suggests, that, to constitute torture, conduct must be likely to cause those consequences.)

Although, in other statutory provisions, Congress repeatedly associated "severe pain" as a symptom with certain physical or medical consequences, it is open to doubt whether that statutory language actually provides useful guidance concerning the prohibition in sections 2340 & 2340A. A description of medical consequences – consequences which could be accompanied by a variety of symptoms including varying degrees of pain – does not necessarily impart useful guidance to a lay person concerning the meaning of "severe pain." The Office of Legal Counsel is currently reviewing that memorandum with a view to issuing a new opinion to replace it and may well conclude that the meaning Congress intended when it defined torture to require "severe pain" is best determined from the other sources addressed in the original memorandum, including standard dictionary definitions. *See, e.g., FDIC v. Meyer*, 510 U.S. 471, 476 (1994) ("In the absence of [a statutory] definition, we construe a statutory term in accordance with its ordinary or natural meaning.").

(B). The analysis in the August 1, 2002, memorandum concerning the President's authority under the Commander-in-Chief Clause, U.S. Const. art. II, sect. 2, cl. 1, was unnecessary for any specific advice provided by the Department. The Department has concluded that specific practices it has reviewed are lawful under the terms of sections 2340 & 2340A of title 18 and other applicable law without regard to any such analysis of the Commander-in-Chief Clause. The discussion is thus irrelevant to any policy adopted by the Administration. As a result, that analysis is under review by the Office of Legal Counsel and likely will not be included in a revised memorandum that will replace the August 1, 2002, memorandum. The Department believes that, as a general matter, the better course is not to speculate about difficult constitutional issues that need not be decided. For the same reason, it would be imprudent to speculate here concerning whether some extreme circumstances might exist in which a particular application of sections 2340 & 2340A would constitute an unconstitutional infringement on the President's Commander-in-Chief power. *Cf. Request of the Senate for an Opinion as to the Powers of the President 'In Emergency or State of War,'* 39 Op. A.G. 343, 347-48 (1939).

6. **Has President Bush or anyone acting under his authority issued any order, directive, instruction, finding, or other writing regarding the interrogation of individuals held in the custody of the U.S. Government or an agent of the U.S. Government? If so, please provide copies. If any portion of any document is provided with redactions, please explain the basis for such redactions. The basis for withholding any document should also be explained in detail.**

On June 22, 2004, the White House released the instruction issued by the President to the Department of Defense on February 7, 2002, concerning the treatment of al Qaeda and Taliban detainees (it does not, however, expressly address interrogation practices). The Department of Justice is not aware of any writing issued by the President that expressly addresses the issue of

interrogations practices. The President has, however, made it clear that the United States does not condone or commit torture. We should also emphasize that the President has not in any way made a determination that doctrines of necessity or self-defense would permit conduct that otherwise constitutes torture. The President has never given any order or directive that would immunize from prosecution anyone engaged in conduct that constitutes torture.

We assume that to the extent your question asks about directives issued by others under the President's authority it is limited to interrogations of enemy combatants in the conflict with al Qaeda and the Taliban or interrogations of persons detained in connection with the conflict in Iraq. As you know, numerous law enforcement agencies of the Executive Branch have likely acted under the President's authority as Chief Executive to issue numerous directives concerning interrogations or interviews of subjects in custody in the ordinary course of enforcing the criminal and immigration laws. We assume that such directives are outside the scope of your question.

Numerous individuals acting under the President's authority have undoubtedly issued orders or instructions regarding interrogations of individuals in U.S. custody, both in the conflict with al Qaeda and the Taliban and in the conflict in Iraq. Such documents, however, are not Department of Justice documents. Those documents should be sought from the appropriate departments or agencies that issued them, through the appropriate oversight committees in Congress.

As for the Department of Justice, the General Counsel of the FBI issued a memorandum on May 19, 2004, reiterating existing FBI policy with regard to the interrogation of prisoners, detainees or other persons under United States control. That memorandum reiterated established FBI requirements that FBI personnel "may not obtain statements during interrogations by the use of force, threats, physical abuse, threats of such abuse, or severe physical conditions." It also set forth reporting requirements for known or suspected abuse or mistreatment of detainees. A copy of that memorandum is enclosed. The Department is still following up to determine whether there are any other similar written directives relevant to your question. Please also see the response to Question 8 concerning the Department's legal advice to other agencies.

7. **On Friday June 11, 2004, the President was asked the following question at a press conference: "Mr. President, the Justice Department issued an advisory opinion last year declaring that as Commander-in-Chief you have the authority to order any kind of interrogation techniques that are necessary to pursue the war on terror ... [D]id you issue any such authorization at any time?" The President answered: "No, the authorization I issued ... was that anything we did would conform to U.S. law and would be consistent with international treaty obligations." Please provide a copy of the authorization to which the President was referring. Please also provide a copy of the Presidential directive you had before you and referred to at the hearing.**

At the press conference to which you refer, it seems likely that the President was referring to the February 7, 2002, instruction discussed above. At the hearing before the Committee, the Attorney General was also referring to the President's instruction of February 7, 2002. The Attorney General did not have any Presidential directive before him at the hearing. He was merely reading language from the February 7, document that had been incorporated into his notes.

8. **Were you ever asked to approve or otherwise agree to a set of rules, procedures, or guidelines authorizing the interrogation of individuals held in the custody of the U.S. Government or an agent of the U.S. Government? If so, please indicate when you were asked to do so, and whether you did, in fact, approve or agree in any way in whole or in part. In addition, please provide a copy of any such rules, procedures or guidelines, or explain your basis for refusing to do so.**

The Department of Justice has given specific advice concerning specific interrogation practices, concluding that they are lawful. The institutional interests the Executive Branch has in ensuring that agencies of the Executive Branch can receive confidential legal advice from the Department of Justice require that that specific advice not be publicly disclosed. In addition, that advice is classified. We understand that, to the extent the client department(s) have not already done so, they will arrange to provide the advice to the relevant oversight committees in a classified setting.

As noted above, included among the memoranda that the Department has already released are all unclassified, final written opinions from the Department of Justice addressing the legality of interrogation techniques used in interrogations conducted by the United States of al Qaeda and Taliban enemy combatants. While the Department has not issued written opinions addressing interrogation practices in Iraq, it has been the consistent understanding within the Executive Branch that the conflict in Iraq is covered by the Geneva Conventions, and the Department has concurred in that understanding.

9. **What were the criteria the Department used in selecting civilian contractors to assist in the reconstituting of Iraq's prison system? Please describe the vetting process to which they were subjected. To what extent were concerns about their backgrounds known to the officials who recommended them to you and to what extent were you aware of such concerns when you selected them? Why were such concerns dismissed when such individuals were recommended to you and selected by you? Please explain in detail.**

It was and is essential that we do whatever we can to help create a fair and humane criminal justice system in Iraq. To that end, the Department of Justice responded to urgent requests from the Coalition Provisional Authority ("CPA") and its predecessor for the provision of experts in the areas of prosecution, policing, and corrections. The individuals whom the Department of Justice has sent to Iraq – federal prosecutors, former state and local police

officers, and corrections experts -- have volunteered to take on one of the most dangerous missions in that country. They are literally on the front lines: in the courts, in the police stations, and in the prisons.

The experts the Department provided to the CPA -- including the corrections experts -- have had neither responsibility for, nor control over, individuals detained by the Coalition military forces. The Department's role is strictly limited to the Iraqi criminal justice system. In particular, the corrections experts have operated heretofore under the direction of the CPA's Senior Advisor to the Iraqi Justice Ministry. Thus they have had no involvement in any of the alleged abuses at the military portions of the Abu Ghraib prison that are currently under investigation by Congress and by the United States Military.

Ensuring that these contractors are appropriately screened is a responsibility that we take very seriously. But it is important to note that we are aware of no allegation that any of the corrections contractors committed or countenanced any abuse of prisoners in Iraq. To the contrary, their central role in rebuilding the Iraqi prison system -- including creating systems for reporting and correcting abuses by Iraqi prison officials -- has been highly praised by the CPA's Senior Advisors to the Iraqi Justice Ministry. Nevertheless, at the Attorney General's request, the Inspector General is undertaking a review of the process used to screen and hire corrections advisors sent to Iraq.

With regard to the process for selecting the initial team of corrections experts, which deployed in May 2003, the Department of Justice consulted experts in the Bureau of Prisons (BOP) and the American Correctional Association. The Department contacted one of the individuals recommended by BOP, a former BOP Regional Director, and requested his assistance in further vetting proposed assessment team members. That individual agreed to join the first assessment team, and to help recommend other members. Candidates were required to submit SF 85Ps (Questionnaires for Public Trust Positions) and fingerprint cards. NCIC checks were conducted. No disqualifying information was found.

A second assessment team was deployed starting in September 2003. This team was selected based in part on BOP recommendations and in part on recommendations of members of the first assessment team. To be sure, some of the corrections experts sent to Iraq previously had been named in lawsuits in the United States, in their capacities as the directors of major state corrections systems. Although we do not minimize the significance of such lawsuits, they are commonplace for prison officials. And as far as we are aware, none of the corrections experts sent to Iraq was ever found by a court to have committed or countenanced abuses against prisoners in their custody.

As the need for corrections advisors grew, the Department worked with a government contractor firm to identify qualified candidates willing to serve in Iraq. Since January 2004, more than 80 additional correctional experts have served, or are now serving, in Iraq. These candidates were also required to submit SF85Ps and fingerprint cards. The preliminary results of

our internal review indicate that a few candidates were deployed before the necessary checks had been completed. (We would note, however, that we are aware of no allegations or findings of abuse of prisoners by these candidates in Iraq or elsewhere.) Appropriate remedial action is being taken to address this situation.

It goes without saying that these experts have taken on one of the most dangerous of tasks in Iraq. We are glad to be able to report to you that, so far as we have been able to determine, they have done so in a manner that has brought honor to the United States. We nevertheless recognize that we must engage in constant vigilance to ensure that this remains the case, and intend to do so throughout the duration of our mission in Iraq.

10. **Is the Department of Justice currently drafting, or considering drafting, legislation to authorize the President to detain individuals as “enemy combatants? If the Department is drafting or considering drafting such legislation, will you consult with us before submitting it to Congress?**

The Department is not currently drafting or considering drafting such legislation. The Department does not believe that such legislation is necessary at the present time. Although the Department is still evaluating the full import of the Supreme Court’s recent decisions, the decision in *Hamdi v. Rumsfeld*, No. 03-6696, slip op. at 9-17 (June 28, 2004), confirms that additional legislation is unnecessary. In *Hamdi*, the Court held that in the Authorization for Use of Military Force, 115 Stat. 224 (Sept. 18, 2001), Congress has “clearly and unmistakably authorized detention” of enemy combatants, *id.* at 12, including American citizens, where an enemy combatant is defined as a person who is “part of or supporting forces hostile to the United States or coalition partners” and who “engaged in an armed conflict against the United States,” *id.* at 9 (internal quotation marks omitted).

Should circumstances change, the Department would always be willing to work with the Committee to ensure that necessary and appropriate legislation is enacted.

11. **During the Judiciary Committee hearing last week, you mentioned the limitation placed on the torture statute (18 U.S.C. § 2340-2340A) by 18 U.S.C. § 7(9). This section was added to the definition of “special maritime and territorial jurisdiction” by section 804 of the USA-PATRIOT Act – originally an Administration proposal. The Administration explained at the time, in its sectional analysis, that the provision would “extend” Federal jurisdiction to ensure that crimes committed by or against U.S. nationals abroad on U.S. Government property did not go unpunished. Unmentioned in the Administration’s explanation was that this provision creates a jurisdictional gap in our ability to prosecute acts of torture.**

(A) Did the Department of Justice know and intend that the proposed amendment would restrict the applicability of the anti-torture statute?

(B) Would the Department support legislation to restore the pre-PATRIOT Act reach of the torture statute, making it applicable to U.S.-owned, U.S.-run, and U.S.-controlled facilities, including aircraft, ships, and other mobile sites, located outside of the United States? If not, why not?

(C) Would the Justice Department support further extension of the torture statute, to make it applicable anywhere outside the geographical borders of United States (i.e., the 50 States, the District of Columbia, and the commonwealths, territories, and possessions of the United States)? If not, why not?

(A) An inquiry with Department personnel who were involved in drafting the amendment to the provision defining the special maritime and territorial jurisdiction of the United States ("SMTJ"), 18 U.S.C. § 7; has determined that they were unaware of the potential that the amendment had for affecting the applicability of sections 2340 & 2340A. To the contrary, the provision was intended, as the Department's section-by-section analysis indicated, to ensure jurisdiction over crimes committed by or against U.S. nationals at embassies and consular offices and on military bases and other U.S. facilities overseas. In particular, the amendment was intended to address a conflict among the courts of appeals concerning the extraterritorial application of an existing paragraph in section 7 and to codify the longstanding position of the United States that the SMTJ did extend to overseas bases. *Compare United States v. Gatlin*, 216 F.3d 207 (2d Cir. 2000) (holding, contrary to position taken by the United States, that section 7(3) *does not* apply extraterritorially), with *United States v. Corey*, 232 F.3d 1166 (9th Cir. 2000) (holding that section 7(3) *does* apply extraterritorially), and *United States v. Erdos*, 474 F.2d 157 (4th Cir. 1973) (same).

(B) The Department would support legislation making sections 2340 & 2340A applicable to U.S.-owned, U.S.-run, and U.S.-controlled facilities outside the United States. The question, however, assumes that such applicability was clear before the passage of the USA PATRIOT Act. As our answer to part A indicates, that is not entirely accurate. Rather, before the PATRIOT Act, there was a circuit split concerning the scope of the SMTJ and whether or not it applied to overseas military bases. Thus, under the view of the Ninth Circuit, the SMTJ extended to military bases overseas and accordingly sections 2340 & 2340A would *not* have applied to such bases. *See Corey*, 232 F.3d at 1172. Under the view of the Second Circuit, on the other hand, the SMTJ did not extend to bases overseas, and sections 2340 & 2340A *would* have applied to such bases. *See Gatlin*, 216 F.3d at 223.

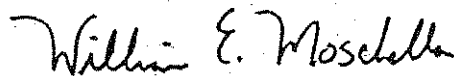
The Department will gladly work with Congress to draft appropriate legislation to achieve the objective of applying sections 2340 & 2340A to such bases overseas. Simply returning statutory language to its pre-PATRIOT Act form, however, is likely not the best means for achieving that goal.

(C) The Department would have no objection to such legislation, and would work with the Committee to ensure that it is carefully drafted to achieve its intended effect.

* * *

We hope that this information is helpful. We will supplement this response with additional information relating to other questions for the hearing record as soon as possible. Please do not hesitate to contact this office if you would like additional assistance regarding this or any other matter.

Sincerely,



William E. Moschella
Assistant Attorney General

cc: The Honorable Orrin G. Hatch
Chairman

Enclosure