

United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6276

May 28, 2004

The Honorable John Ashcroft
Attorney General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Attorney General Ashcroft:

For over a year, I have sought answers from the Department of Justice, the FBI, the CIA, and the Department of Defense regarding reported and, in some instances, documented cases of the abuse of prisoners in U.S. custody.

Contrary to the statements of some Pentagon officials, the photographs and reports that have recently emerged of prisoner abuse in Iraq depict an interrogation and detention system operating contrary to U.S. law and the Geneva Conventions. Such acts are not limited to Iraq. This system includes policies that allowed the transfer of a suspect to Syria, a country that the President himself has condemned for its systematic use of torture. It encourages the rendition of terrorism suspects to any number of third countries for interrogation. Administration policies reportedly proclaim that as long as an individual being tortured is in the "custody" of another government, any U.S. officials who observe and gather evidence are acting legally.

As you know, torture is a crime. It is a crime under the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment – to which the U.S. is a party – and it is a crime under the criminal code. See 18 U.S.C. 2340 *et seq.* It is a crime whether it is an American soldier who is the victim or a suspected member of al Qaeda.

All Americans should be outraged to learn that the Department of Justice may have assisted the Pentagon and the intelligence community in circumventing the law. In order that all Members of Congress have timely, detailed and accurate information about the role of the Department in developing these policies and practices, I ask that you respond to the following questions by June 7, 2004.

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1. Press reports describe "a set of secret rules for the interrogation of high-level [al] Qaeda prisoners ... that were endorsed by the Justice Department and the C.I.A." "Harsh C.I.A. Methods Cited in Top Qaeda Interrogations," *New York Times*, May 13, 2004. The same article describes "a series of secret legal opinions by the [CIA]'s and Justice Department lawyers" providing a "legal basis for the use of harsh interrogation techniques". In addition, the January 25, 2002, memo regarding the treatment of terrorism suspects that was purportedly sent by White House Counsel Alberto Gonzales to President Bush states: "[A]s a matter of international law and domestic law, [the Third Geneva Convention] does not apply to the conflict with Al Qaeda. [The Office of Legal Counsel] has further opined that you have the authority to determine that [the Third Geneva Convention] does not apply to the Taliban. As I discussed with you, the grounds for such a determination may include... a determination that the Taliban and its forces were, in fact, not a government, but a militant, terrorist-like group. ... OLC's interpretation of this legal issue is definitive... Nevertheless, you should be aware that the Legal Adviser to the Secretary of State has expressed a different view."

Please provide us with copies of all rules, memoranda and legal opinions regarding the treatment and interrogation of suspected al Qaeda members who are detained on U.S. territory, or in Guantanamo Bay, Afghanistan, Iraq, or wherever they are held. I expect this set of documents to include, but not be limited to, final versions of the following:

- (a) Memorandum for William J. Haynes, General Counsel, Department of Defense, from John Yoo, Deputy Assistant Attorney General, and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, *Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees* (Jan. 9, 2002).
- (b) Memorandum for William J. Haynes, General Counsel, Department of Defense, from Patrick F. Philbin, Deputy Assistant Attorney General, and John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Possible Habeas Jurisdiction Over Aliens Held in Guantanamo Bay, Cuba* (Dec. 28, 2001).
- (c) A memorandum described in a May 21, 2004, *Newsweek* article to put "a highly restrictive interpretation on an international torture convention." Michael Isikoff, "Double Standards?" *Newsweek*, May 21, 2004. This article was apparently written by Mr. Yoo.
- (d) The January 11, 2002, memorandum written by William Howard Taft IV, Department of State Office of Legal Advisor, in response to the January 9, 2002, memo noted above in (a).

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2. In addition to the individuals named as authors of memos above, who in the Justice Department participated in the drafting, review, or authorization of such rules or the issuing of such legal opinions? Please provide the names and then-current titles of all such officials. When did the Department become involved in this process? Who is the highest ranking DOJ official that approved the rules or legal opinions?
3. Is it the position of the Department, as stated in the January 9, 2002, Yoo/Delahunty memo, that no international laws apply to the conflict between the United States and al Qaeda and the Taliban? Does the Department stand by the conclusions of the January 9, 2002, memo that even though the laws of war do not apply to the U.S. military, the U.S. can still charge and prosecute al Qaeda and Taliban prisoners as war criminals for violating the same laws?
4. The January 9, 2002, Yoo/Delahunty memo discusses whether U.S. troops in Afghanistan can be prosecuted under the War Crimes Act, 18 U.S.C. § 2441. The memo concludes that U.S. soldiers are not subject to prosecution for violations of the WCA committed against al Qaeda or Taliban detainees. Putting aside the questionable validity of that argument, many of the detainees in the Abu Ghraib prison in Iraq are covered by either Convention III or Common Article 3 of the Geneva Conventions. Does the Justice Department take the position that U.S. soldiers and intelligence agents, and contractors to the military and intelligence agencies, are subject to prosecution for violations of WCA committed against prisoners at Abu Ghraib and other detention centers in Iraq?
5. The January 25, 2002, Gonzales memo argues that by not providing the protections of the Geneva Conventions to al Qaeda and the Taliban, U.S. personnel who, in an action against those groups, violate the War Crimes Act, would likely be shielded from prosecution. This assertion is apparently based on the January 9, 2002, Yoo/Delahunty memo, which states on pages 12-13, that "the military's treatment of al Qaeda members captured in that conflict is not limited either by common Article 3 of the Geneva Conventions or 18 U.S.C.2441(c)(3), the provision of the War Crimes Act incorporating that article." Does the Department stand by the assertion that the U.S. may deny certain individuals the protections of the Geneva Conventions and simultaneously exempt its own soldiers from prosecutions for violation of U.S. law? Does the Justice Department agree with Judge Gonzales that denying Geneva Convention protections to detainees would substantially reduce the threat of prosecution under the War Crimes Act?

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6. Does the Department agree with the statement contained in the January 25, 2002, Gonzales memo that the President's "policy of providing humane treatment to enemy detainees gives us the credibility to insist on like treatment for our soldiers"? In your opinion, how has American credibility been impacted by the abuses at Abu Ghraib prison in Baghdad, where the U.S. claims it adhered to the requirements of the Geneva Conventions?
7. Does the Department of Justice disagree with the assertions of the State Department Office of Legal Advisor, as reported by Newsweek, that "arguments by the United States to the effect that customary international law is not binding will be used by defendants before military commissions (or in proceedings in federal court) to argue that the commissions cannot properly try them for crimes under international law"?
8. Please provide copies of any memoranda of understanding between DOJ and other government agencies regarding detention and interrogation of POWs and those labeled by the Administration as non-POW detainees, or "enemy combatants."
9. The May 13, 2004, *New York Times* article mentioned above states: "One set of legal memorandums ... advises government officials that if they are contemplating procedures that may put them in violation of American statutes that prohibit torture, degrading treatment or the Geneva Conventions, they will not be responsible if it can be argued that the detainees are formally in the custody of another country." The article continues: "The official said the legal opinions say restrictions on procedures would not apply if the detainee could be deemed to be in the custody of a different country, even though American officials were getting the benefit of the interrogation." Does DOJ take the position that torture, as defined under U.S. law, does not amount to a violation of U.S. law if it is committed against a detainee who is formally in the custody of another country or deemed to be in the custody of another country?
10. Was any office of DOJ, such as the Office of Legal Counsel, consulted on any other government agency's guidelines or procedures for the interrogation and punishment of POWs? Of prisoners at Guantanamo Bay? Of terrorist suspects captured and held in secret detention overseas? If OLC, or any other DOJ office or component, issued an opinion on such policies or procedures, or any opinion for another government agency interpreting international law regarding interrogation of prisoners or captured individuals, torture, or the jurisdiction of U.S. courts over such issues, please provide this opinion.

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11. In addition to the specific documents referenced in this letter, please describe any communications DOJ officials have had with the General Counsels' offices of DOD, the CIA, or the White House, regarding interrogation methods. When did these conversations begin and how frequently did they occur? Please provide me with an index of all such communications.
12. The *New York Times* article mentioned above states: "FBI officials have advised the bureau's director, Robert S. Mueller III, that the interrogation techniques, which would be prohibited in criminal cases, could compromise their agents in future criminal cases." In a May 20, 2004, hearing before the Committee, Director Mueller stated that, "the FBI has directed its agents to conform to its policies with regard to the handling of interviews, whether it be here in the United States or overseas. And to the extent that an agent believes that interviews were not being conducted according to the standards of the FBI, that agent was not to participate in those interviews." Did you or anyone else in the Department of Justice advise Director Mueller or any employee of the FBI that the Bureau should refrain from observing or participating in interrogations because the techniques used might jeopardize future prosecutions?
13. When did DOJ become aware of reports of prisoner abuse in Iraq, Afghanistan, and elsewhere by the International Committee of the Red Cross? By non-governmental organizations such as Human Rights Watch and Amnesty International? Was DOJ asked by DOD, the CIA, or the White House to comment or analyze these reports in any way? Was DOJ asked for advice on how to restructure the interrogation programs in response to such reports? Did DOJ modify and/or approve of revised rules at any point in response to such reports or in response to accounts in the media of abuse?
14. Charts of interrogation techniques that were approved for use in Iraq were published in the *Washington Post* on May 12, 2004. Was DOJ consulted on the content of these charts, or on any similar charts of interrogation techniques used in Guantanamo Bay or other places where suspected al Qaeda members are held? Did the Office of Legal Counsel or any other office within DOJ consult with or provide any legal analysis of these charts or interrogation techniques? Please provide me with copies of all such analysis and all legal opinions on these matters.

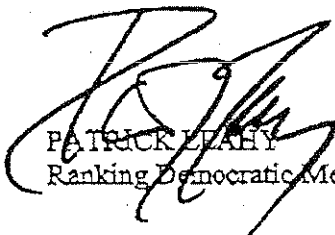
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15. Please provide copies of the following memoranda:

- (a) Memorandum for Timothy E. Flanigan, Deputy Counsel to the President, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: The President's Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them* (Sept. 25, 2001); and
- (b) Memorandum for Alberto R. Gonzales, Counsel to the President, from Patrick F. Philbin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Legality of the Use of Military Commissions to Try Terrorists* (Nov. 6, 2001).

Thank you in advance for what I expect to be detailed and comprehensive answers to the above questions.

Sincerely,



PATRICK LEAHY
Ranking Democratic Member