U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

September 20, 2005

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

Dear Mr. Chairman:

Enclosed are responses to the second round of written questions from Senator Durbin arising out of the appearance of Timothy E. Flanigan before the Committee on July 26, 2005, concerning his nomination to be Deputy Attorney General of the United States. We hope that you will find this information helpful in the consideration of this nomination. Please do not hesitate to contact the Department if we can be of further assistance in connection with this or any other matter.

Sincerely,

William E. Moschella
Assistant Attorney General

cc: The Honorable Patrick J. Leahy
Ranking Minority Member

Responses to Senator Richard J. Durbin's
Follow-Up Questions for Timothy Flanigan, Nominee to be Deputy Attorney General
September 14, 2005

1. In your responses to my written questions, you stated that you believe that, pursuant to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), "no U.S. personnel may, under any circumstances, engage in acts of cruel, unusual, and inhumane treatment or punishment prohibited by the Constitution." However, you also said that you agree with the Justice Department's interpretation of the CAT, that "there is no legal prohibition under the CAT on cruel, inhuman or degrading treatment with respect to aliens overseas."

To be clear, do you believe that U.S. personnel can subject aliens overseas to treatment or punishment that would constitute cruel, unusual, and inhumane treatment or punishment if such treatment or punishment took place in the United States?

ANSWER: I understand that it is the policy of the Administration to abide by the substantive constitutional standard incorporated by the Senate reservation into Article 16 of the Convention Against Torture, even where such compliance is not legally required and regardless of whether the conduct in question occurs in the United States or overseas. If confirmed, I will seek to uphold the Administration's policy.

2. At your hearing, you said, "The President has said we will not treat people inhumanely So I guess I would take very seriously any allegation or suggestion that we were treating anyone inhumanely." I asked you to define inhumane treatment. You explained that you were referring to the President's February 7, 2002 memorandum that directed the U.S. Armed Forces to treat all detainees humanely.

a. You were Deputy White House Counsel at the time the President issued his memorandum. Please describe your participation, if any, in drafting the memorandum and shaping the policy that is memorialized in the memorandum.

ANSWER: I do not remember participating in the drafting of the President's February 7, 2002, memorandum. As Deputy Counsel to the President, I would have been involved in analyzing legal issues like those addressed in that memorandum. I am advised by the Department of Justice that further discussion of the deliberative process surrounding the framing of the President's February 7, 2002, memorandum would be inconsistent with the confidential nature of that process.

b. The directive to treat all detainees humanely applies only to the U.S. Armed Forces. Are U.S. personnel other than members of the U.S. Armed Forces required to treat all detainees humanely?

ANSWER: I understand that the Administration is committed to complying with all of its constitutional, statutory, and treaty obligations that apply to U.S. interrogation practices. Depending on the circumstances, several treaties and statutes, such as the Convention Against Torture; the Geneva Conventions; the War Crimes Act; and various provisions of

the federal criminal code, including the anti-torture statute, as well as the general crimes of assault, maiming, murder, and manslaughter, appear to prohibit U.S. personnel who are not members of the Armed Forces from engaging in treatment of detainees that would be inhumane. The Convention Against Torture, for example, provides, in relevant part, that "[e]ach State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture." Pursuant to a Senate reservation, the United States is bound by its obligations under Article 16 "only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution." I understand that it is the policy of the Administration to abide by the substantive constitutional standard incorporated into Article 16 by the Senate reservation even where such compliance is not legally required. I also understand that it is incumbent on all U.S. personnel to abide by any applicable provisions of the federal criminal code.

c. The President's memorandum states, "our values ... call for us to treat detainees humanely, including those who are not legally entitled to such treatment." It also states that the U.S. Armed Forces shall treat detainees humanely "as a matter of policy." Which detainees is the United States not legally required to treat humanely? Can the President determine, as a matter of policy, that U.S. personnel are not required to treat detainees humanely?

ANSWER: The presidential memorandum that the question quotes addresses the applicability of the Geneva Convention Relative to the Treatment of Prisoners of War to al Qaeda and Taliban detainees. As the President made clear, our Nation has been and will continue to be a strong supporter of Geneva and its principles. The Geneva Convention, however, does not apply to all armed conflicts nor does it provide protections to all persons regardless of circumstances and conditions. Article 2 of the Convention states that it applies only to "cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties," "cases of partial or total occupation of the territory of a High Contracting Party," and cases in which a "Power[] in conflict . . . accepts and applies the provisions" of Geneva. The President can determine, and has determined, that the Convention does not apply to our conflict with al Qaeda. Al Qaeda is an international terrorist group, not a state, and therefore is not and cannot be a "High Contracting Party" to the Convention. Al Qaeda also does not recognize the Convention or comply with the principles it embodies. It conducts its operations in flagrant violation of the laws and customs of war, including by targeting innocent civilians. There are important policy reasons that support the President's determination. For example, people will have no incentive to comply with the Geneva Convention if they receive the Convention's benefits without honoring the Convention. With respect to our conflict with the Taliban, the President can determine, and has determined, that the Geneva Convention does apply, but that Taliban detainees do not qualify for "prisoner of war" status because they do not satisfy the requirements set forth in Article 4 of the Convention. For example, they do not conduct their operations in accordance with the laws and customs of war, they do not have a fixed distinctive sign recognizable at a distance, and they are not commanded by persons responsible for their subordinates.

d. The February 7, 2002 memorandum states that the President has the authority under the Constitution to suspend the Geneva Conventions. The Geneva Conventions were ratified by Congress and are the law of the land. Under what authority can the President suspend a treaty without congressional approval?

ANSWER: The President has not suspended the Geneva Conventions. In his memorandum dated February 7, 2002, the President stated: "I accept the legal conclusion of the Attorney General and the Department of Justice that I have the authority under the Constitution to suspend Geneva as between the United States and Afghanistan, but I decline to exercise that authority at this time." The Congressional Research Service, in its study prepared for the United States Senate Committee on Foreign Relations, stated, with respect to such authority, that "[t]he actual practice whereby treaties have been terminated demonstrates considerable variation," but that in some cases "the initiative was taken by the President, in some cases independently." Congressional Research Service, 106th Cong., *Treaties and Other International Agreements: The Role of the United States Senate* 201-02 (Comm. Print 2001); *see also id.* at 205-08 (documenting practice). The practice documented by the Congressional Research Service is consistent with conclusions of the courts and of the Restatement (Third) of Foreign Relations Law that the President may unilaterally terminate or suspend a treaty. *See, e.g.*, *Goldwater v. Carter*, 617 F.2d 697, 709 (D.C. Cir.) (en banc) (holding that the President may withdraw from a treaty by giving notice under the treaty's terms, without obtaining the consent of the Senate or any "other legislative concurrences"), *vacated and remanded with directions to dismiss*, 444 U.S. 996 (1979); Restatement (Third) of Foreign Relations Law § 339 (1987) ("Under the law of the United States, the President has the power . . . to make the determination that would justify the United States in terminating or suspending an agreement because of its violation by another party or because of supervening events, and to proceed to terminate or suspend the agreement on behalf of the United States . . . ."). I understand this authority to derive, at least in part, from the President's constitutional role as "sole organ of the nation in its external relations." 10 Annals of Cong. 613 (1800) (John Marshall); *see* U.S. Const. art II § 1, cl. 1, & § 2.

You said you "do not believe that the term 'inhumane' treatment is susceptible to a succinct definition."

e. How can our service men and women comply with the President's directive if inhumane treatment is not susceptible to a succinct definition?

ANSWER: To say that the term "inhumane" treatment is not susceptible to a succinct definition is not to say that the term lacks meaning or that the Department of Defense cannot provide service men and women with appropriate guidance in the context of specific facts and circumstances.

f. To your knowledge, has the White House provided any guidance regarding the meaning of humane treatment?

ANSWER: I am not aware of any guidance provided by the White House specifically related to the meaning of humane treatment. The February 7, 2002, White House Fact Sheet on the Status of Detainees at Guantanamo, however, among other things, states that all

detainees at Guantanamo are being provided three meals a day that meet Muslim dietary laws, water, medical care, clothing and shoes, shelter, showers, the opportunity to worship, etc. The Fact Sheet also states: "The detainees will not be subjected to physical or mental abuse or cruel treatment. The International Committee of the Red Cross has visited and will continue to be able to visit the detainees privately."

You said a determination as to whether particular treatment is humane should be resolved by reference to the customary laws of war based upon a careful review of all of the relevant facts and circumstances.

g. To what provisions of the customary laws of war would you refer in order to determine whether particular treatment is humane? Is the United States legally bound by the customary laws of war?

ANSWER: To determine whether particular treatment is humane, one might refer, for example, to the widely accepted prohibitions of the customary laws of war against willful killing, torture or inhuman treatment, including biological experiments, or willfully causing great suffering or serious injury to body or health. In addition, I expect that humane treatment would include providing adequate food, drinking water, shelter, clothing, and medical treatment. I understand that the United States is committed to abiding by the principles of the customary laws of war.

h. Please provide examples of relevant facts and circumstances that would help to determine whether particular treatment is humane.

ANSWER: All facts and circumstances should be considered in determining whether particular treatment is humane, including, for example, the details of the particular conduct in question including its duration and severity, the state of health of the person receiving the treatment, and the intent with which it was carried out.

The lack of guidance provided by the President's directive is reflected in the Schmidt-Furlow Report on the Investigation into FBI Allegations of Detainee Abuses at Guantanamo Bay. The Report concluded that an interrogation "resulted in degrading and abusive treatment but did not rise to the level of being inhumane treatment."

i. Do you agree that the treatment of a detainee could be degrading and abusive, but not inhumane?

ANSWER: With respect, your question is difficult for me to answer because I am not familiar with the legal standard that the report to which the question refers uses to distinguish treatment that is "degrading and abusive" from treatment that is "inhumane." Nor do I know whether there is an established understanding of these terms, as they relate to each other, in the laws of war.

You stated that, "If confirmed as Deputy Attorney General, I will take seriously my role and responsibility to ensure that the directive referred to is implemented.

j. What role or responsibility would you have for implementing the President's directive if you are confirmed as Deputy Attorney General? Is the directive legally binding?

ANSWER: The President's February 7, 2002, memorandum was addressed not only to the Secretary of Defense, but also to other high ranking Executive Branch officials, including the Attorney General. If confirmed, I would assist the Attorney General in ensuring that all of the duties of the Department are lawfully and effectively fulfilled, consistent with direction from the President. I also understand that the Attorney General and the Deputy Attorney General participate in interagency policy discussions regarding the conduct of the War on Terrorism. I believe it would be my responsibility, if confirmed, to ensure that the President's directive concerning humane treatment of detainees is respected in such discussions.

3. A draft January 25, 2002 memorandum to the President from then-White House Counsel Alberto Gonzales recommends that the President reject then-Secretary of State Powell's recommendation that the President reconsider his determination that the Geneva Conventions do not apply to the conflict with the Taliban and al Qaeda. The memorandum also states that the Geneva Conventions' "strict limitations on questioning of enemy prisoners" are "obsolete."

Do you agree with the memorandum's conclusions and recommendations? Please describe your participation, if any, in drafting the memorandum and shaping its conclusions and recommendations.

ANSWER: The January 25, 2002, draft memorandum concluded that the Geneva Convention Relative to the Treatment of Prisoners of War does not apply to our conflict with al Qaeda and that the President had reasonable grounds to determine that the Convention does not apply to our conflict with the Taliban, and I agree with those conclusions. The President accepted the memorandum's conclusions, but declined to exercise his authority to suspend the Convention as between the United States and Afghanistan. I do not remember whether I participated in preparing the draft memorandum to which you refer, although as Deputy Counsel to the President, I would have been involved in discussing legal issues like those addressed in that memorandum, and my comments would have been considered in developing any final version of that memorandum. I am advised by the Department of Justice that further discussion of my role in this deliberative process would be inconsistent with the confidential nature of that process.

4. I asked you who conducted the briefings that you and then-White House Counsel Alberto Gonzales received from the Justice Department's Office of Legal Counsel (OLC) on their legal opinion regarding the torture statute and specific interrogation techniques. You replied, "Lawyers from OLC."

Please provide the names of the OLC lawyers who conducted the briefings.

ANSWER: As I have previously stated, as Deputy Counsel to the President, I was briefed by the Office of Legal Counsel on that Office's interpretation of the anti-torture statute. I am advised by the Department of Justice that providing the names of the lawyers who conducted the briefings would be inconsistent with the confidential nature of the deliberative process of which those briefings were a part.

5. You said that "specific interrogation techniques were mentioned" at the OLC briefing.

What interrogation techniques were mentioned?

ANSWER: As I have previously stated, as Deputy Counsel to the President, I was briefed by the Office of Legal Counsel on that Office's interpretation of the anti-torture statute. I remember that there was some discussion of certain proposed interrogation methods, but I do not remember any discussion of the application of the statutory standards to particular techniques. I am advised by the Department of Justice that discussion of any interrogation techniques mentioned at the OLC briefing would be inconsistent with the confidential nature of the deliberative process of which those briefings were a part. I am also advised by the Department of Justice that any discussion of proposed techniques would involve sensitive information, and their revelation could compromise intelligence sources and methods. In addition, it is important to note that my role as Deputy Counsel to the President was not to evaluate particular methods; rather it was to assist the Counsel to the President in ensuring that the Department of Justice was providing legal advice that would assist the Government in complying with the law.

6. The August 1, 2002 OLC opinion entitled, "Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340 – 2340A" (OLC torture memo) concluded that the torture statute does not apply to interrogations conducted under the President's Commander-in-Chief authority. I asked whether you believe this conclusion is correct. You said that the analysis "was – and remains – unnecessary." That is not responsive to the question I asked.

a. Do you believe this conclusion is correct? Did you raise any objections to this conclusion at the OLC briefings?

ANSWER: The President, like all officers of the Government, is not above the law. He has a duty to protect and defend the Constitution and faithfully to execute the laws of the United States, in accordance with the Constitution. In light of the President's unequivocal and repeatedly reaffirmed policy against torture, I believe it would be inappropriate to reach out and decide, under hypothetical circumstances, the issue that you raise. I do not recall participating in any discussion of the conclusion you refer to at either of the OLC briefings I attended.

I asked you whether the torture statute would be unconstitutional if it conflicted with an order issued by the President as Commander-in-Chief. You said that, "Given the President's unequivocal policy against torture, I do not foresee a circumstance in which the issue you raise would occur." That is not responsive to the question I asked.

b. Do you believe the torture statute would be unconstitutional if it conflicted with an order issued by the President as Commander-in-Chief?

ANSWER: With respect, the question you pose cannot be answered in the abstract. The President's independent constitutional powers have never been fully defined and cannot be, because their contours depend on the circumstances. In the words of Justice Jackson, the President's independent powers may "depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law." It would be imprudent to purport to define the limits of the President's constitutional powers based on hypotheticals. It would be especially imprudent where, as here, the President's unequivocal policy against torture obviates the practical need to confront and resolve this issue.

7. I asked you whether, in your personal opinion, it is legally permissible or inhumane for U.S. personnel to subject a detainee to waterboarding (simulated drowning) or mock execution, to physically beat a detainee, or to force a detainee into a painful stress position for a prolonged time period. You said:

> Whether a particular interrogation technique is lawful depends on the facts and circumstances. Without knowing the facts and circumstances, it would be inappropriate for me to speculate about the legality of the techniques you describe. With respect to your question whether these techniques are "inhumane," "inhumane" treatment is not susceptible to a succinct definition. It is informed by the customary laws of war and depends on all of the relevant facts and circumstances.

I have difficulty imagining facts and circumstances in which it would legal or humane to subject a detainee to waterboarding, mock execution, physical beatings, or painful stress positions for a prolonged time period. Can you suggest any facts and circumstances in which treating a detainee in this fashion would be legal and humane? Would it ever be legal to subject a detainee to such treatment in the United States?

ANSWER: As I have previously stated, my role as Deputy Counsel to the President was not to evaluate particular interrogation methods, and I have not done so. Whether a particular interrogation method, such as those you mention, would be lawful would depend on the facts and circumstances surrounding its use. The anti-torture statute enacted by Congress, for example, defines "torture" as conduct that is "specifically intended to inflict severe physical or mental pain or suffering," 18 U.S.C. § 2340(1), and the statutory meaning of these terms incorporates the reservations and understandings required by the Senate as a condition to the Senate's advice and consent to ratification of the Convention Against Torture. The legal standards that apply under this statute are further discussed in the Office of Legal Counsel's recently issued opinion of December 30, 2004. I am not in a position to discuss the application of those or other legal standards in the abstract to hypothetical conduct without more specificity. For all of these reasons, it would be inappropriate for me to speculate about whether such techniques are lawful or humane.

8. I asked you a number of questions about your relationship with Jack Abramoff, whom, on behalf of Tyco International, you retained as a lobbyist and supervised for a period of time.

At your hearing, you told me that Tyco had terminated its relationship with Greenberg Traurig, Abramoff's firm at the time that Tyco was his client. You said that, "we [Tyco] have issues in the nature of claims involving the Greenberg firm which are pending which are, I believe, covered by an attorney-client privilege that is not mine to waive." In your responses to my written questions, you explained the nature of these claims in some detail.

a. Who at Tyco has the authority to waive the attorney-client privilege with Greenberg Traurig? To your knowledge, has the attorney-client privilege been waived? If yes, did you participate in discussions or deliberations about whether to waive the privilege?

ANSWER: The chief legal officer of a corporation generally makes the decision to waive the attorney client privilege. For Tyco, that would be Mr. William Lytton, Executive Vice President and General Counsel of Tyco International Ltd. Although I understand that Mr. Lytton has authorized limited disclosures regarding the nature of Tyco's relationship with the Greenberg Traurig firm, I do not believe that he has waived any privilege with respect to the details of the work performed for Tyco, and I have not discussed the question of such a waiver with him.

In your responses to my written questions, you explained that, at Mr. Abramoff's recommendation, Tyco contracted with GrassRoots Interactive, LLC, to "perform support services in connection with Greenberg Traurig's lobbying activities."

b. Please describe the nature of these support services. How much did Tyco pay GrassRoots Interactive and what was the length of the contract? Please describe the nature of your efforts to monitor GrassRoots Interactive's work.

ANSWER: GrassRoots Interactive was engaged by Tyco at Mr. Abramoff's suggestion to develop broad-based political support among companies doing business with Tyco for Tyco's position on legislation that would disadvantage Tyco because of its non-U.S. charter. Tyco paid GrassRoots Interactive a total of approximately $1.5 million for this work under two contracts, one that required the performance of work in the spring of 2003 and the other that required the performance of work in the summer or fall of 2003.

My efforts (along with those of others at Tyco) to monitor GrassRoots Interactive's work included reviewing a description of the work to be performed by GrassRoots Interactive and later reviewing a detailed description of the work that company claimed to have performed. We also devoted significant internal resources to collecting information that GrassRoots Interactive informed us would be necessary for them to conduct their activities.

In your responses to my written questions, you told me that Greenberg Traurig conducted an internal investigation which concluded that Tyco's payments to GrassRoots Interactive were diverted by Abramoff to entities he controlled.

c. Have you reviewed any report or other document on Greenberg Traurig's internal investigation? If yes, please provide a copy of any such document.

ANSWER: I have not reviewed any report or other document on Greenberg Traurig's internal investigation.