

**Responses to Senator Richard J. Durbin's  
Written Questions for Timothy Flanigan, Nominee to be Deputy Attorney General**

**1. At your hearing, I asked you whether U.S. personnel are prohibited from subjecting detainees to cruel, inhuman or degrading treatment in all circumstances. You told me, "I have some hesitancy in signing on without understanding what a particular phrase means."**

**To clarify, when the United States ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Senate filed a reservation to define cruel, inhuman or degrading treatment. This reservation states that the United States is bound to prevent "cruel, inhuman or degrading treatment" to the extent that phrase means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the U.S. Constitution.**

**a. In light of this definition, do you believe that U.S. personnel can legally engage in cruel, inhuman, or degrading treatment under any circumstances?**

**ANSWER:** I am aware that the United States has committed itself to complying with all of its obligations under the Convention. I believe that all U.S. personnel are bound to abide by these obligations and that no U.S. personnel may, under any circumstances, engage in acts of cruel, unusual, and inhumane treatment or punishment prohibited by the Constitution.

**b. Can you assure me that, if you are confirmed, you will not advise the Attorney General or anyone else that U.S. personnel are legally permitted to engage in cruel, inhuman or degrading treatment?**

**ANSWER:** Yes. If confirmed, I would uphold the Department's commitment to enforce the law. I would not advise the Attorney General or others that U.S. personnel are permitted to engage in cruel, inhuman, or degrading treatment prohibited by the CAT or other provisions of law.

**2. During his confirmation hearing, Attorney General Alberto Gonzales said, "as a direct result of the reservation the Senate attached to the CAT, the Department of Justice has concluded that under Article 16 there is no legal prohibition under the CAT on cruel, inhuman or degrading treatment with respect to aliens overseas."**

**Abraham Sofaer, who was the State Department's Legal Adviser in 1985-90, was the Reagan Administration official who handled the ratification of the CAT. He said, "I disagree with the merits and wisdom of the conclusion reached by the Department of Justice and cited in the response of Judge Gonzales concerning the geographic reach of Article 16 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment."**

**Do you agree with the Justice Department or Mr. Sofaer?**

**ANSWER:** I have reviewed a letter, dated April 4, 2005, from Assistant Attorney General William Moschella to Senators Leahy, Feinstein, and Feingold, which analyzes U.S. obligations under Article 16 of the Convention Against Torture. (A copy of that letter is attached.) This letter further explains the Attorney General's statement. The analysis in this letter appears to me to be correct.

**3. 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."**

**How do you define inhumane treatment?**

**ANSWER:** My statement referred to the President's memorandum of February 7, 2002, in which he directed that the United States Armed Forces shall treat detainees humanely. If confirmed as Deputy Attorney General, I will take seriously my role and responsibility to ensure that the directive referred to is implemented. Any questions that may arise regarding whether particular treatment complies with that directive should be resolved by reference to the customary laws of war based upon a careful review of all of the relevant facts and circumstances. Because the determination of whether particular treatment is inhumane is fact-specific, I do not believe that the term "inhumane" treatment is susceptible to a succinct definition.

**4. At your hearing, you said you and White House Counsel Alberto Gonzales were briefed twice by the Justice Department's Office of Legal Counsel (OLC) on legal opinions they were preparing at the request of the CIA regarding the torture statute (18 U.S.C. §§ 2340 – 2340A) and specific interrogation techniques.**

**a. Please describe the substance of these briefings in as much detail as possible, including any discussion of specific interrogation techniques. Please respond to this question in an unclassified form to the greatest extent possible, with a classified annex if necessary.**

**ANSWER:** Following the attacks of September 11, 2001, it was the policy of the Administration to gather as much information as possible, within the bounds of the law, concerning terrorists and their plans and activities in order to prevent additional and potentially even more devastating attacks.

As I noted in my testimony before the Committee, I remember participating in two briefings regarding legal advice that the Department of Justice's Office of Legal Counsel (OLC) was asked to provide regarding the scope of 18 U.S.C. §§ 2340 & 2340A (the "anti-torture statute").

The anti-torture statute defines torture, in part, as an act that is “specifically intended to inflict severe physical or mental pain or suffering.” The substance of the two briefings was OLC’s views on the interpretation of the anti-torture statute – what the words of the statute meant and how it would be applied. Although specific interrogation methods were mentioned, I do not recall that they were discussed in detail, or that they were evaluated in terms of the legal analysis that was the subject of the OLC briefing.

My role as Deputy Counsel to the President was not to evaluate these methods or even to substitute my judgment for that of the Department of Justice regarding the appropriate underlying legal analysis. Rather it was to assist the Counsel to the President in ensuring that the Department of Justice was providing legal advice responsive to the request that would assist the government in complying with the law.

**b. On what dates were these briefings?**

**ANSWER: I do not remember the specific dates on which the two briefings occurred. I believe they occurred sometime during the summer of 2002.**

**c. Who conducted the briefings?**

**ANSWER: Lawyers from OLC conducted the briefings.**

**d. At or following the briefings did you receive any written analysis, e.g. draft memos?**

**ANSWER: I do not remember receiving any written analysis or draft memoranda on the matters discussed during the briefings.**

**e. When did you receive the final OLC opinions? Were you in agreement with their conclusions? Did you take any action after reviewing them?**

**ANSWER: I do not remember receiving any final OLC opinions. I came to learn through press reports, after I had left my employment at the White House, that OLC did, in fact, prepare a final memorandum dated August 1, 2002, that was addressed to the then-Counsel to the President (the “August 1, 2002, memorandum”). Because I do not remember receiving any final OLC opinions, I do not remember whether, at the time I reviewed them, I agreed with their conclusions or took any action after reviewing them.**

**f. Regarding the briefings, you said, “my principal concern would have been to make sure that they had the statutory analysis correct, that it sounded correct.” Did you then believe that OLC’s analysis of the torture statute and specific interrogation techniques was correct? Do you now?**

**ANSWER:** I remember that I was persuaded by the description given in the briefings of OLC's analysis of the intent of Congress in framing the anti-torture statute. I do not recall any discussion applying that analysis to particular interrogation methods.

I would note that the August 1, 2002, memorandum was withdrawn in June 2004 and was replaced with a new OLC memorandum on December 30, 2004 (the "December 30, 2004, replacement memorandum"). I understand that the December 30, 2004, replacement memorandum sets forth OLC's reconsidered views on the proper interpretation of the anti-torture statute. The analysis set forth in that replacement memorandum regarding the intent of Congress in framing the anti-torture statute is consistent with my recollection of the briefing given by OLC regarding its statutory analysis. I agree with the analysis set forth in the December 30, 2004 replacement memorandum.

**5. As you know, one product of the discussions about the torture statute was an August 1, 2002 OLC opinion entitled, "Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340 – 2340A" (hereinafter OLC torture memo).**

**The OLC torture memo concludes that the torture statute does not apply to interrogations conducted under the President's Commander-in-Chief authority. At your hearing, you said this argument was "inappropriate in a sort of sophomoric way. It was a kitchen sink argument that was basically thrown in."**

**a. Were you briefed on this interpretation of the torture statute? Do you believe it is correct?**

**ANSWER:** 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. The August 1, 2002, memorandum to which your question refers was withdrawn and was subsequently replaced by a publicly available memorandum dated December 30, 2004, which concludes that the Commander-in-Chief analysis in the August 1, 2002, memorandum "was—and remains—unnecessary." I agree with this conclusion, particularly in light of the President's unequivocal and repeatedly reaffirmed policy against torture.

**b. At your hearing, you discussed a hypothetical statute that "would be unconstitutional as applied to the President's orders as Commander-in-Chief." In your opinion would the torture statute be unconstitutional if it conflicted with an order issued by the President as Commander-in-Chief?**

**ANSWER:** The President has recently and repeatedly reaffirmed the longstanding policy that the United States will neither commit nor condone torture. I agree wholeheartedly with that policy. I understand that the Administration and the Department of Justice are committed to investigating and punishing acts of torture or improper treatment of detainees. Given the

President's unequivocal policy against torture, I do not foresee a circumstance in which the issue you raise would occur.

**c. Can you assure me that, if you are confirmed, you will not advise the Attorney General or anyone else that the President, acting as Commander-in-Chief, is not required to comply with the torture statute?**

**ANSWER:** Yes. The President has made clear that the United States will neither commit nor condone torture.

**The OLC torture memo argued that in order for abuse to constitute torture under the torture statute, "The victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result."**

**d. Were you briefed on this interpretation of the torture statute? Do you believe it is correct?**

**ANSWER:** 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 do not recall any discussion of the analysis to which you refer. I agree with the analysis of the December 30, 2004 replacement memorandum that disavows the analysis that your question quotes.

**The torture statute defines torture to include "prolonged mental harm caused by or resulting from ... the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality." The OLC torture memo argues that the statute only prohibits the use of mind-altering drugs or other procedures that "penetrate to the core of an individual's ability to perceive the world around him, substantially interfering with his cognitive abilities, or fundamentally alter his personality." They give the example of "pushing someone to the brink of suicide (which could be evidenced by acts of self-mutilation)" as a sufficient disruption to constitute torture.**

**e. Were you briefed on this interpretation of the torture statute? Do you believe it is correct?**

**ANSWER:** I do not recall any discussion of the analysis to which you refer. I agree with the analysis of the statute contained in the December 30, 2004, replacement memorandum.

**6. At your hearing, you would not comment on specific interrogation techniques because you did not want reveal classified information inadvertently. To avoid this, I told you I**

would send you written questions asking for your personal opinion on specific interrogation techniques.

- a. In your personal opinion, is it legally permissible for U.S. personnel to subject a detainee to waterboarding (simulated drowning)? Is it inhumane?
- b. In your personal opinion, is it legally permissible for U.S. personnel to subject a detainee to mock execution? Is it inhumane?
- c. In your personal opinion, is it legally permissible for U.S. personnel to physically beat a detainee? Is it inhumane?
- d. In your personal opinion, is it legally permissible for U.S. personnel to force a detainee into a painful stress position for a prolonged time period? Is it inhumane?

**ANSWER:** The following is in response to questions 6(a)-(d): The President has recently and repeatedly reaffirmed the longstanding policy that the United States will neither commit nor condone torture. Article 4 of the Convention Against Torture requires the United States to “ensure that all acts of torture are offences under its criminal law.” The anti-torture statute, 18 U.S.C. §§ 2340-2340A, makes it a crime for any person outside the United States to commit, attempt to commit, or conspire to commit torture. The Constitution and numerous state and federal criminal laws prohibit conduct that amounts to torture within the United States. Article 16 of the Convention Against Torture also requires the United States to “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 reservation required by the U.S. Senate, the United States is bound by this obligation “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.” Depending on the circumstances, interrogation practices may be subject to other treaties and statutes. 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.

**7. At your hearing, we discussed your relationship with Jack Abramoff, who Tyco International retained as a lobbyist.**

- a. Was it your decision to retain Abramoff as a lobbyist?

**ANSWER:** Some time before I joined Tyco in December 2002, the Company had retained the firm of Greenberg Traurig, LLP to perform governmental relations services on Tyco's behalf. Mr. Abramoff was not involved in that work. In the spring of 2003, Tyco consulted with Greenberg Traurig regarding potential tax legislation that would discriminate against corporations incorporated outside the United States (discussed more specifically in response to question "d." below). The Greenberg Traurig partners with which Tyco had an existing relationship introduced Mr. Abramoff to us and proposed that he be assigned to perform legislative affairs work on Tyco's behalf in connection with this issue. As part of my responsibilities as Tyco's General Counsel for Corporate and International Law, I (along with Gardner Courson in his role as Tyco's Deputy General Counsel for Litigation and other Tyco personnel) approved engaging Greenberg Traurig and Mr. Abramoff. I had not met or heard of Mr. Abramoff before that time.

In reaching the decision to retain Greenberg Traurig, we were impressed by the breadth of the team of specialists the firm identified to work on the engagement team. This group included highly regarded former Congressional staff members, from both political parties. Greenberg Traurig assigned the day-to-day management of Tyco's engagement to another partner of the firm, Mr. Edward Ayoob. (Although Mr. Ayoob has since left Greenberg Traurig, he remains one of Tyco's legislative advisors.).

**b. Did Abramoff claim that he had any special influence on or access to the Executive Office of the President (EOP), the Commerce Department, the Senate, or the House of Representatives? Who were his contacts in the EOP, the Commerce Department, the Senate, and the House?**

**ANSWER:** As mentioned above, several Greenberg Traurig partners recommended that Tyco engage Mr. Abramoff to perform legislative affairs services on its behalf. These Greenberg Traurig partners advised Tyco that Mr. Abramoff had good relationships with members of Congress, including Rep. Tom DeLay. Sometime after Tyco agreed to Mr. Abramoff's addition to the engagement team, he told us that he had contact with Mr. Karl Rove. I do not recall the names of any other contacts he may have claimed to have.

**c. You said that, "For a period of time ... I was the one who was responsible on a day to day basis for supervising [Abramoff's] activities." How closely did you oversee Abramoff's activities? Did he have an unusual amount of authority or discretion compared to other lobbyists?**

**ANSWER:** I monitored the activities of the Greenberg Traurig team primarily through periodic phone and email contact with Mr. Ayoob and, less frequently, with Mr. Abramoff. In my contacts with the Greenberg Traurig team, I endeavored to ensure that the steps they were taking or considering were in Tyco's best interests and an appropriate use of the company's resources. Neither Mr. Abramoff nor the rest of the Greenberg Traurig team had any more or less authority or discretion than any other lobbyist retained by Tyco would have had.

**d. For what specifically did Abramoff lobby on behalf of Tyco? Did he lobby against legislation that would have penalized companies incorporated outside the U.S. to avoid taxes, e.g., the Corporate Patriot Enforcement Act (H.R. 737 and S. 384 in the 108<sup>th</sup> Congress)?**

**ANSWER:** Greenberg Traurig was retained to monitor and, where appropriate, oppose legislation that would (i) treat a foreign incorporated entity as an “inverted” domestic corporation, increasing its tax liability, or (ii) deny contracts with the federal government to such corporations. Our challenge was to communicate to lawmakers that Tyco is not, in fact, an “inverted company” as that term is normally understood (i.e., a company that elects for tax reasons to abandon its U.S. incorporation in favor of a new charter in an off-shore jurisdiction). Tyco has been incorporated in Bermuda since 1997 as the result of a legitimate merger with another publicly traded company (ADT Limited). The negative publicity that Tyco had experienced in 2002 and 2003 in connection with the indictment of several of its executive officers made it difficult for Tyco to communicate this distinction to Congress and secure broad support for Tyco’s legislative positions.

**e. For what specifically did Abramoff lobby the EOP on behalf of Tyco? Please describe the nature of your supervision of Abramoff’s lobbying of the EOP.**

**ANSWER:** I did not ask Mr. Abramoff to lobby the EOP. Nor did I direct or encourage Mr. Abramoff to meet with personnel in the EOP. At some point after he joined the engagement team, Mr. Abramoff told me that he intended to contact Mr. Rove directly or indirectly to communicate Tyco’s position on the topics discussed in the answer to question “d.”

**f. How was Abramoff paid? Did Tyco make any payments to third parties or entities on behalf of Abramoff?**

**ANSWER:** Tyco did not make any payments to Mr. Abramoff. Nor did Tyco knowingly make payments to any third parties or entities on behalf of Mr. Abramoff. Tyco paid Greenberg Traurig a flat monthly fee, plus reasonable expenses, for Greenberg Traurig’s services. Tyco did make payments directly to a third party consultant, GrassRoots Interactive, LLC, that Tyco engaged on Mr. Abramoff’s recommendation, to perform support services in connection with Greenberg Traurig’s lobbying activities.

**g. Has Tyco conducted an investigation of Abramoff’s activities on behalf of Tyco? If so, what were the results of the investigation?**

**ANSWER:** Tyco has not conducted such an investigation. Greenberg Traurig, however, has conducted its own internal investigation and has informed Tyco of its conclusion that payments made by Tyco to GrassRoots Interactive, LLC were diverted by Mr. Abramoff. Specifically, Greenberg Traurig advised Tyco that Mr. Abramoff caused Tyco’s payments to GrassRoots



Interactive, LLC to be forwarded to a Greenberg Traurig trust account and, from there, ultimately to entities controlled by Mr. Abramoff. Greenberg Traurig informed Tyco that the funds diverted to the entities controlled by Mr. Abramoff were not used in furtherance of lobbying efforts on behalf of Tyco. This diversion occurred without my knowledge and was in violation of Mr. Abramoff's ethical, fiduciary, and contractual obligations to Tyco.

Tyco and Greenberg Traurig have reached an agreement in principle to settle Tyco's claims stemming from the diversion of funds as described above. Pursuant to the settlement, Greenberg Traurig will compensate Tyco for the funds diverted by Mr. Abramoff.

**h. Will you recuse yourself from any Justice Department investigations of Abramoff and his activities?**

**ANSWER:** I am not familiar with the scope or facts of the pending investigations and thus cannot at this point determine whether I should recuse myself. If I am confirmed, I will consult with DOJ ethics officials in making any recusal decisions, and I will apply the normal recusal standards used by DOJ officials for avoiding actual or apparent conflicts. If, for example, it appears likely that those investigations could involve Tyco (e.g., by virtue of its apparent victimization by Mr. Abramoff), I would recuse myself.