



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

November 14, 2008

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

Dear Mr. Chairman:

This responds to your letter, dated October 21, 2008, enclosing a subpoena for all Office of Legal Counsel (OLC) opinions prepared since September 11, 2001, concerning the Administration's "national security practices and policies related to terrorism," and related documents. The subpoena also identified particular OLC opinions of interest to the Committee and requested a list of all of the subpoenaed legal opinions.

We recognize the Committee's oversight interests in understanding the Department's legal position on particular government activities. The Department has already made extraordinary accommodations of the Committee's articulated particular needs for information regarding opinions addressing electronic surveillance and interrogation. We have made available for review by all Members of the Committee and cleared staff all of the highly classified and exceptionally sensitive OLC opinions addressing the legal bases for the CIA detention and interrogation program, as described in subpoena item 1, and for NSA surveillance activities. We are prepared to explore similar accommodations if there are other Department positions of particular concern to the Committee, but complying with the Committee's request for all OLC opinions since 2001 on national security and terrorism issues, or a list of those opinions, would constitute a wholesale disclosure of confidential legal advice that would undermine the ability of the Executive Branch to obtain confidential legal advice from OLC in the future. As we have discussed with Committee staff, agencies would be substantially chilled from seeking OLC advice on sensitive, important subjects if they believed that the resulting memoranda would be disclosed to others. Moreover, OLC's confidential opinions are intended to assist Executive Branch entities in understanding what activities are permissible or impermissible under the law, but they are not themselves law.

In a further effort to accommodate your oversight information needs, we are prepared to make available for Committee staff review at the Department two OLC opinions identified in your subpoena. One is the OLC Memorandum of October, 23 2001, regarding "Authority for Use of Military Force to Combat Terrorist Activities Within the United States," which is item 1.C of the subpoena. The other is the Memorandum of June 27, 2002, regarding the "Applicability of 18 U.S.C. § 4001(a) to Military Detention of United States Citizens," which is subpoena item 1.D. In

The Honorable Patrick J. Leahy
Page Two

addition, and consistent with our letter of September 3, 2008, we are prepared to provide the Committee with copies of additional OLC memoranda on November 17, 2008. One of them is the Memorandum of March 18, 2004, regarding "'Protected persons' in Occupied Iraq," subpoena item 1.A, and another is the Memorandum of November 6, 2001, entitled "Re: Legality of the Use of Military Commissions To Try Terrorists," item 1.H. We will also provide four more OLC opinions that we have identified as responsive to the Committee's interests in this matter. They are OLC memoranda on 1) "Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949," dated February 7, 2002; 2) "Authority of the President Under Domestic and International Law to Use Military Force Against Iraq," dated October 23, 2002; 3) "Effect of a Recent United Nations Security Council Resolution on the Authority of the President Under International Law to Use Military Force Against Iraq," dated November 8, 2002; and 4) "'Further Material Breach' Under U.N. Security Council Resolution 1141 as a Result of False Statements or Omissions in Iraq's WMD Declaration," dated December 7, 2002. There are no redactions in these documents, which are unclassified.

We hope that this response will be accepted as an appropriate resolution of the issues that gave rise to the Committee's recent subpoena and we remain available to confer further with your staff if that would be helpful. Please do not hesitate to contact this office if we can provide additional assistance regarding this or any other matter.

Sincerely,



Keith B. Nelson
Principal Deputy Assistant Attorney General

Enclosures

cc: The Honorable Arlen Specter
Ranking Minority Member