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April 29, 2008

The Honorable Michael B. Mukasey
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Mr. Attorney General:

We are writing about the apparently extensive body of secret legal opinions issued by the Department's Office of Legal Counsel during the Bush Administration, and the threat to our constitutional system of government posed by what appears to be a large and expanding body of secret executive branch law. Recent revelations about the nature and extent of such secret opinions make plain the need for Congress and the American public to receive information on this subject, as requested below.

The recent declassification by a Department of Defense official of OLC's March 14, 2003, interrogation memorandum ("Yoo Memorandum") raises several important issues in this regard. First, it appears to us that there was never any legitimate basis for the purely legal analysis contained in this document to be classified in the first place. The Yoo Memorandum does not describe sources and methods of intelligence gathering, or any specific facts regarding any interrogation activities. Instead, it consists almost entirely of the Department's legal views, which are not properly kept secret from Congress and the American people. J. William Leonard, the Director of the National Archive's Office of Information Security Oversight Office, and a top expert in this field concurs, commenting that "[t]he document in question is purely a legal analysis" that contains "nothing which would justify classification."[1]

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[1]Aftergood, *The OLC Torture Memo as a Failure of the Classification System*, Secrecy News, Apr. 3, 2008, *available at* http://www.fas.org/blog/secrecy/2008/04/the_olc_torture_mem.html. Mr. Leonard further commented that many of the technical requirements for classification of a government document were violated with regard to this memorandum: "There were no portion markings, identifying which paragraphs were classified at what level. The original classifier was not identified on the cover page by name or position. The duration of classification was not given. A concise basis for classification was not specified. Yet all of these are explicitly required by the President's executive order on classification." Id.

In addition, the Yoo Memorandum suggests an extraordinary breadth and aggressiveness of OLC's secret legal opinionmaking. Much attention has rightly been given to the statement in footnote 10 in the March 14, 2003, memorandum that, in an October 23, 2001, opinion, OLC concluded "that the Fourth Amendment had no application to *domestic* military operations."[2] As you know, we have requested a copy of that memorandum on no less than four prior occasions and we continue to demand access to this important document.[3] In addition to this opinion, however, the Yoo Memorandum references at least 10 *other* OLC opinions on weighty matters of great interest to the American people that also do not appear to have been released. These appear to cover matters such as the power of Congress to regulate the conduct of miliary commissions,[4] legal constraints on the "military detention of United States citizens,"[5] legal rules applicable to the boarding and searching foreign ships,[6] the President's authority to render U.S. detainees to the custody of foreign governments,[7] and the President's authority to breach or suspend U.S. treaty obligations.[8] Furthermore, it has been more than five years since the Yoo Memorandum was authored, raising the question how many *other* such memoranda and letters have been secretly authored and utilized by the Administration.

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[2] Memorandum for William J. Haynes II from John C. Yoo re Military Interrogations of Alien Unlawful Combatants Held Outside the United States at 8 fn.10 (March 14, 2003) (original emphasis); see Hess and Jordan, *Memo Linked to Warrantless Surveillance,* Associated Press, April 3, 2008.

[3] See Letters of Chairman John Conyers, Jr, et al,. to Attorney General Michael B. Mukasey dated April 14, 2008, April 3, 2008, February 20, 2008, and February 12, 2008.

[4] See Memorandum for Daniel J. Bryant from. Patrick F. Philbin Re: Swift Justice Authorization Act (Apr. 8, 2002).

[5] See Memorandum for Daniel J. Bryant from John C. Yoo re Applicability of 18 U.S.C. § 4001(a) to Military Detention of United States Citizens (June 27, 2002).

[6] See Memorandum for William J. Haynes, II from Jay.S. Bybee re Legal Constraints to Boarding and Searching Foreign Vessels on the High Seas (June 13, 2002).

[7] See Memorandum for William J. Haynes II from Jay S. Bybee Re:The President's Power as Commander in Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations (Mar. 13, 2002).

[8] See Memorandum for John Bellinger, III from John C. Yoo and Robert J. Delahunty Re: Authority of the President to Suspend Certain Provisions of the ABM Treaty (Nov. 15, 2001); Memorandum for Alberto R. Gonzales from Jay S. Bybee Re: Authority of the President to Denounce the ABM Treaty (Dec. 14, 2001). A list of such apparently non-pubic memoranda is attached as an appendix to this letter. The list also includes two "letters" cited in the Yoo Memorandum that have not been released. To the extent such letters serve functionally as OLC opinion memoranda, those too are of interest to the Congress and the American public.

Indeed, a recent court filing by the Department in FOIA litigation involving the Central Intelligence Agency identifies 8 additional secret OLC opinions, dating from August 6, 2004, to February 18, 2007.[9] Given that these reflect only OLC memoranda identified in the files of the CIA, and based on the sampling procedures under which that listing was generated, it appears that these represent only a small portion of the secret OLC memoranda generated during this time, with the true number almost certainly much higher.[10]

Finally, we are concerned about the potential for confusion created by the handling of these opinions. For example, while memoranda of August 1, 2002, and March 14, 2003, are now public, and OLC apparently has disavowed them to some extent,[11] a related August 2002 memorandum remains secret and it is not clear whether or to what extent it continues in force.[12] Similarly, while the Department has prepared a detailed public statement of its broad views on the Federal torture statute, it continues to hold secret subsequent opinions operationalizing that advice.[13] Such circumstances risk confusing or misleading the public, lawmakers, and even executive branch personnel who need to understand OLC's position on these issues.

While we appreciate the need to hold closely certain types of information in certain circumstances, we are skeptical that more information regarding the Department's analysis of relevant and important legal issues cannot responsibly be made public. A recent effort by a group of former OLC attorneys to enunciate a set of "guiding principles" for that office expressly recommended that "OLC should publicly disclose its written opinions in a timely manner, absent strong reasons for delay or non-disclosure."[14] The CIA's recent release of details regarding the

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[9]See Declaration of Ralph S. DiMaio and attachments, and Declaration of Paul P. Colborn, filed in Amnesty International USA et al v. Central Intelligence Agency et al, No. 07 CV 5435 (LAP) (April 21, 2008) (S.D.N.Y.).

[10]Stipulation and Order Between Plaintiffs and the Central Intelligence Agency, filed in Amnesty International USA et al v. Central Intelligence Agency et al, No. 07 CV 5435 (LAP) (April 21, 2008) (S.D.N.Y.).

[11] See Memorandum for the Deputy Attorney General from Acting Assistant Attorney General Levin re Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (December 30, 2004).

[12]Shane, Johnston, and Risen, *Secret U.S. Endorsement of Severe Interrogations*, New York Times, Oct. 4, 2007 ("A second memo produced [in August 2002] spelled out the approved practices and how often or how long they could be used.").

[13]See Shane, Johnston, and Risen, *Secret U.S. Endorsement of Severe Interrogations*, New York Times, Oct. 4, 2007

[14] See Dellinger, Johnsen, *et* al, Principles to Guide the Office of Legal Counsel (Dec. 21, 2004), 81 Ind. L.J. 1345 (2006), *available at* www.acslaw.org/files/2004%20programs_OLC%20principles_white%20paper.pdf. The OLC's world-wide-web page, by contrast, simply states "The web site includes Office of Legal Counsel opinions that the Department of Justice has determined are appropriate for publication. . . . The web site includes

OLC memoranda contained in its files only supports that principle, and establishes a clear precedent for our request below.

Accordingly, please respond to the following questions:

1. Please provide a list of all written opinions (whether contained in a formal memorandum, letter, or email) addressing issues related in any way to national security, war, terrorism, interrogations, civil or constitutional rights of U.S. citizens, or presidential, congressional, or judicial power that the Office of Legal Counsel has issued since January 20, 2001, that have not been released to the public, including author(s), recipient(s), title, and length, and the reason that they were not released, including but without any limitation those identified in the attached appendix.

2. As to each opinion listed in response to question 1, please state whether it remains fully operative or whether it has been qualified, retracted, disavowed, or otherwise limited by the Department or the courts, and whether the Department has so notified recipients of the opinion.

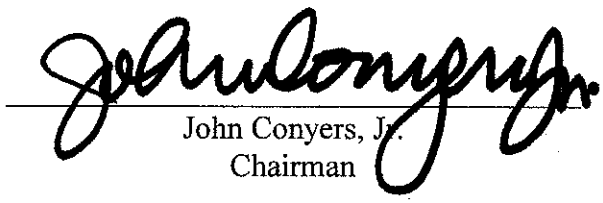
3. As to each opinion listed in response to question 1, please state whether and to what extent it has been formally classified pursuant to Executive Order 12958 or any other purported legal classification authority, the basis for classification, the person who authorized the classification, and the date of classification.

4. Please provide a copy of each non-classified opinion listed in response to question 1.

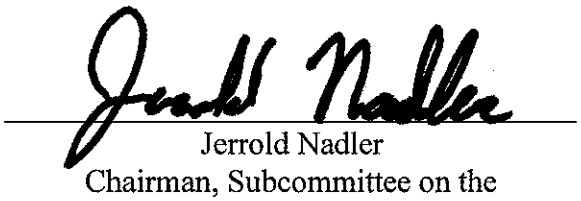
Office of Legal Counsel opinions that the Department of Justice has determined are appropriate for publication." See http://www.usdoj.gov/olc/opinions.htm. The web page contains no explanation of the factors considered by OLC in determining which opinions are "appropriate for publication."

We appreciate your attention to this matter and ask that you provide this information by Friday, May 9, 2008. Please direct your response and any questions to the staff at the Judiciary Committee office, 2138 Rayburn House Office Building, Washington, DC 20515 (tel: 202-225-3951; fax: 202-225-7680).

Sincerely,



John Conyers, Jr.
Chairman



Jerrold Nadler
Chairman, Subcommittee on the Constitution, Civil Rights and Civil Liberties

cc: Hon. Lamar S. Smith
Hon. Trent Franks
Hon. Brian A. Benczkowski

APPENDIX LISTING NON-PUBLIC OFFICE OF LEGAL COUNSEL OPINIONS AND LETTERS CITED IN THE YOO MEMORANDUM

1) 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). Cited at 4 n.5.

2) Memorandum for William J. Haynes, n, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Re: Legal Constraints to Boarding and Searching Foreign Vessels on the High Seas at 3 (June 13, 2002) ("High Seas Memorandum"). Cited at 5 n. 8.

3) Memorandum for Daniel J. Bryant, Assistant Attorney General, Office of Legislative Affairs, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Applicability of 18 U.S.C. § 4001(a) to Military Detention of United States Citizens at 2 (June 27, 2002). Cited at 6 n. 8.

4) Memorandum for William J. Haynes II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Re: The President's Power as Commander in Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations at 3 (Mar. 13, 2002) ("Transfers Memorandum"). Cited at 6.

5) Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes, n, General Counsel, Department of Defense, from John C. Yoo, Deputy Assistant Attorney General and Robert J. Delahunty, Special Counsel, Re: Authority for Use of Military Force to Combat Terrorist Activities Within the United States at 25 (Oct 23, 2001). Cited at 8 n. 10.

6) Memorandum for Daniel J. Bryant, Assistant Attorney General, Office of Legislative Affairs, from. Patrick F. Philbin, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Swift Justice Authorization Act (Apr. 8, 2002). Cited at 13.

7) Letter for William H. Taft, N, Legal Adviser, Department of State, from John C. Yoo, Deputy Assistant Attorney General, and Robert J. Delahunty, Special Counsel, Office of Legal Counsel (Jan. 14, 2002). Cited at 34.

8) Memorandum for John Bellinger, III, Senior Associate Counsel to the President and Legal Adviser to the National Security Council, from John C. Yoo, Deputy Assistant Attorney General and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, Re: Authority of the President to Suspend Certain Provisions of the ABM Treaty (Nov. 15, 2001). Cited at 47.

9) Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General. Re: Authority of the President to Denounce the ABM Treaty (Dec. 14, 2001). Cited at 47.

10) Letter for Alberto R. Gonzales, Counsel to the President from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, 1 (July 22, 2002). Cited at 47.

11) Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Re: Authority of the President under Domestic and International Law to Use Force Against Iraq at 30 (Oct. 23, 2002) ("Iraq Memorandum"). Cited at 57.