

United States Senate

WASHINGTON, DC 20510

February 12, 2008

The Honorable Glenn A. Fine
Inspector General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

The Honorable H. Marshall Jarrett
Counsel for Professional Responsibility
U.S. Department of Justice
950 Pennsylvania Avenue, NW, Room 3266
Washington, D.C. 20530

Dear Inspector General Fine and Counsel Jarrett:

We request that you investigate the role of Justice Department officials in authorizing and/or overseeing the use of waterboarding by the Central Intelligence Agency.

Attorney General Michael Mukasey refuses to investigate the Administration's authorization and use of waterboarding. CIA Director Michael Hayden has testified that the CIA waterboarded three detainees, and Attorney General Mukasey has testified that, "There are circumstances where waterboarding is clearly unlawful." Nonetheless, the Attorney General refused Senator Durbin's request to investigate because he does "not believe such an investigation is necessary, appropriate, or legally sustainable."

Attorney General Mukasey admitted that, "the CIA sought advice from the Department of Justice, and the Department informed the CIA that [waterboarding's] use would be lawful under the circumstances and within the limits and the safeguards of the program." The Attorney General's justification for refusing to open an investigation is that, "no one who relied in good faith on the Department's past advice should be subject to criminal investigation for actions taken in reliance on that advice." However, this does not address Senator Durbin's request that "a Justice Department investigation should explore whether waterboarding was authorized and whether those who authorized it violated the law" (our emphasis).

Waterboarding has a sordid history in the annals of torture by repressive regimes, from the Spanish Inquisition to the Khmer Rouge. The United States has always repudiated waterboarding as a form of torture and prosecuted it as a war crime. The Judge Advocates General, the highest-ranking attorneys in each of the four military services, have stated unequivocally that waterboarding is illegal and violates Common Article 3 of the Geneva Conventions.

Yet, despite the virtually unanimous consensus of legal scholars and the overwhelming weight of legal precedent that waterboarding is illegal, certain Justice Department officials, operating behind a veil of secrecy, concluded that the use of waterboarding is lawful. We believe it is

appropriate for you to investigate the conduct of these Justice Department officials. As you know, a similar investigation is underway regarding Justice Department officials who advised the National Security Agency that its warrantless surveillance program is lawful.

To restore the faith of our intelligence professionals and the American people in the Justice Department's ability to provide accurate and honest legal advice, we request that you make your findings public.

We ask that you explore, among other things:

- Did Justice Department officials who advised the CIA that waterboarding is lawful perform legal work that meets applicable standards of professional responsibility and internal Justice Department policies and standards? For example, did these officials consider all relevant legal precedents, including those that appear to contradict directly their conclusion that waterboarding is lawful? Did these officials consult with government attorneys who are experts in the relevant legal standards, e.g. Judge Advocates General who are experts in the Geneva Conventions? Was it reasonable to rely on standards found in areas such as health care reimbursement law in evaluating interrogation techniques?
- Were Justice Department officials who advised the CIA that waterboarding is lawful insulated from outside pressure to reach a particular conclusion? What role did White House and/or CIA officials play in deliberations about the lawfulness of waterboarding?

We agree with Attorney General Mukasey that our intelligence professionals should be able to rely in good faith on the Justice Department's legal advice. However, if CIA agents or contractors have been put in jeopardy by misguided counsel from the Justice Department, including legal opinions that the Administration has been forced to repudiate, and as a result they risk war crimes prosecution overseas, this is a serious matter. It also places CIA agents at risk of receiving similarly flawed advice in the future. Moreover, the Justice Department's continued refusal to repudiate waterboarding does tremendous damage to America's values and image in the world and places Americans at risk of being subjected to waterboarding by enemy forces. We believe it merits investigation to determine if these grievous results were the product of legal theories violating the Department's professional standards, or improper influence violating the Department's standards for independent legal advice.

We respectfully request that you inform us whether you plan to initiate a review as soon as possible, and no later than February 19, 2008. We also request that you inform us whether the results of your review will be provided to Congress and made public. Thank you for your time and consideration.

Sincerely,



Richard J. Durbin



Sheldon Whitehouse