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December 20, 2007

The Honorable Brian A. Benczkowski
Principal Deputy Assistant Attorney General
Office of Legislative Affairs
Department of Justice
Washington, D.C. 20530

Dear Mr. Benczkowski:

Thank you for your response to my letter to Principal Deputy Assistant Attorney General Bradbury, regarding Executive Order 13440 and the CIA detention and interrogation program. While I do not agree with all of the conclusions that have been reached regarding the legality of this program, I appreciate your detailed explanation of the Executive Branch's current interpretation of the law.

Your letter raises two sets of questions that I would like to address. In my previous letter I asked whether the Department of Justice believed that the meaning of the term "humane treatment" could vary based on the identity of a detainee, or the information that he or she is believed to possess. Your response notes that Common Article 3 of the Geneva Conventions requires that detainees be treated humanely "in all circumstances", but does not directly address my question about whether or not the Department of Justice believes that the meaning of this phrase can vary.

Similarly, your response to my question about whether or not the definition of "cruel, inhuman and degrading treatment" can vary based on a detainee's identity, or the information that he or she is believed to possess, notes that the legal prohibition on cruel, inhuman and degrading treatment essentially mandates compliance with due process requirements of the Fifth Amendment. Your response cites *Rochin v. California* and *County of Sacramento v. Lewis*, and concludes that in order to violate the Fifth Amendment, and thereby violate prohibitions on cruel, inhuman and degrading treatment, a detainee would have to be subjected to treatment that "shocks the conscience".

The idea that treatment which shocks the conscience is a violation of the Fifth Amendment does indeed stem from *Rochin v. California.* And in *Sacramento v. Lewis*, the Supreme Court concluded that prisoners who are already in custody have a right to expect different treatment than suspects who are attempting to flee police in a high-speed chase. However, neither of these cases appears to directly answer the question of whether or not the definition of "humane treatment" can vary from one detainee to the next. This begs my first set of questions: are there any possible instances in which the identity of a detainee, or the information that the detainee is assessed to possess, could

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help determine what sort of treatment can be considered humane? Similarly, can the definition of "cruel, inhuman and degrading treatment" vary based on these factors?

My second question stems from your statement that the Eighth Amendment does not apply in situations where there has been no formal adjudication of guilt. The Detainee Treatment Act of 2005 prohibits the infliction of "cruel, inhuman and degrading treatment or punishment" as defined by the Fifth, Eighth and Fourteenth Amendments to the Constitution. While the Eighth Amendment itself refers to punishment, in my view the clear intent of this statute is to prohibit any treatment that would violate the Eighth Amendment if the treatment were imposed as punishment.

This raises my second set of questions: if, in the Department of Justice's view, the Eighth Amendment protections granted by the Detainee Treatment Act do not apply to pretrial detainees, is there any point at which they apply to long-term detainees who have not been brought to trial? If not, does the reference to the Eighth Amendment in the Detainee Treatment Act confer any protections at all on individuals who have been detained by the CIA and not brought to trial?

Thank you for your attention to this issue. I would appreciate a response no later than February 5.

Sincerely,

Ron Wyden

Ron Wyden
United States Senator