

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

January 25, 2005

The Honorable John Ashcroft
Attorney General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Attorney General Ashcroft:

On December 30, 2004, the Office of Legal Counsel ("OLC") released a memorandum entitled "Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A." This long-anticipated document replaced the fundamentally flawed August 2002 memorandum interpreting the same statute. I commend the Justice Department for releasing the document publicly, but questions remain about this Administration's commitment to honoring U.S. obligations under the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment ("CAT").

The December 2004 memorandum only addresses the prohibition against torture, as defined by the CAT and 18 U.S.C. §§ 2340-2340A. Although the CAT does not require signatory states to criminalize cruel, inhuman or degrading acts not amounting to torture, it does require states to undertake to prevent such acts within territory under their jurisdiction.

At his confirmation hearing on January 6, 2005, Judge Gonzales frequently stated that it is U.S. policy not to engage in torture. He failed to make a similar unequivocal statement about cruel, inhuman or degrading treatment. In written follow-up questions, Judge Gonzales was asked whether it is legally permissible for U.S. personnel to engage in cruel, inhuman, or degrading treatment that does not rise to the level of torture. He replied that, because of a Senate reservation 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."

In order to fully understand the Justice Department's interpretation of our obligations under the CAT, and the basis for Judge Gonzales's answer, I again request that you provide all Department opinions and interpretations of the CAT. The Department publicly released the December 2004 memorandum, and there is no apparent justification for treating related documents differently.


As the requested documents are relevant to the upcoming vote on Judge Gonzales's confirmation to be Attorney General, I ask that you respond by January 28, 2005. If you

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refuse to provide the documents, please explain your selective release of the December 2004 memorandum and why it is appropriate to treat the requested documents differently.

Sincerely,


PATRICK LEAHY
Ranking Democratic Member


DIANNE FEINSTEIN
United States Senator


RUSSELL D. FEINGOLD
United States Senator



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 4, 2005

The Honorable Patrick J. Leahy
Ranking Minority Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Leahy:

This responds to your letter, dated January 25, 2005, requesting copies of Office of Legal Counsel opinions regarding the United Nations Convention Against Torture ("the Convention"). We are sending a similar response to Senators Feingold and Feinstein, who co-signed your letter.

We appreciate your interest in the OLC opinions in order to understand the Department's interpretation of our obligations under the Convention. As you know, the Executive Branch has substantial confidentiality interests in OLC opinions, and our longstanding practice is not to disclose non-public OLC opinions outside the Executive Branch. The public release of OLC's opinion, dated December 30, 2004, concerning 18 U.S.C. §§ 2340-2340A was not inconsistent with the Department's policy on not releasing non-public OLC opinions. The Department publicly announced last summer that we had withdrawn the OLC opinion on the same subject, dated August 1, 2002, and that it would be replaced by a new OLC opinion. The 2002 opinion was in the public domain as a result of an unauthorized disclosure. Accordingly, under these circumstances it was appropriate publicly to disclose the OLC opinion that superseded the already publicly available OLC opinion.

In your letter, you inquired about the obligations of the United States under Article 16 of the U.N. Convention Against Torture. Article 16 requires each party to the Convention to "undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment." Article 16 is limited in reach in two ways. First, by its own terms, it imposes obligations on the United States only "in any territory under its jurisdiction," which would exclude any place overseas that is not under U.S. jurisdiction. Second, concerned that the undefined phrase "cruel, inhuman or degrading treatment or punishment" was vague and might be applied in unanticipated ways, the Senate required a reservation to Article 16 as a condition to its advice and consent to the ratification of the Convention. Pursuant to the Senate's reservation, the United States is bound by this obligation "only 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." S. Exec. Rep. No. 101-30, at 36. This reservation is legally binding and defines the scope of U.S. obligations under the Convention. The express language of the Senate's

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reservation and the ratification history of the Convention indicate that the Senate intended that Article 16 not impose any new obligations on the United States beyond what was already required by the Constitution. See S. Exec. Rep. No. 101-30, at 8 (1990) ("In view of the ambiguity of the terms, the administration believes that U.S. obligations under this article [16] should be limited to conduct prohibited by the U.S. Constitution."); Summary and Analysis of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in Message from the President of the United States Transmitting the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. Treaty Doc. No. 100-20, at 15 (1988) (explaining that the proposed reservation would "make clear that the United States construes the phrase ['cruel, inhuman or degrading treatment or punishment'] to be coextensive with its constitutional guarantees against cruel, unusual, and inhumane treatment"); *Convention Against Torture: Hearing Before the Senate Comm. on Foreign Relations*, 101st Cong. 11 (1990) (prepared statement of Abraham D. Sofaer, Legal Adviser, Department of State) ("[T]he United States considers itself bound, under Article 16, . . . only insofar as those words mean the cruel and unusual punishment prohibited by the Fifth, [E]ighth and/or Fourteenth Amendments to the Constitution. . . . [B]ecause the Constitution of the United States directly addresses this area of law . . . we would limit our obligations under this Convention to the proscriptions already covered in our Constitution.").

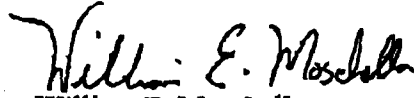
With respect to treatment of detainees by the United States Government, as opposed to punishment for crimes (which is governed by the Eighth Amendment) or treatment by state governments (which is governed by the Fourteenth Amendment), the pertinent Amendment is the Fifth Amendment. As relevant here, that Amendment protects against treatment that, in the words of the Supreme Court, "shocks the conscience," meaning (again in the words of the Court) "only the most egregious conduct," such as "conduct intended to injure in some way unjustifiable by any government interest." *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 849 (1998). In addition, in *Eisenrager v. Johnson*, 339 U.S. 763 (1950), the Supreme Court held that the Fifth Amendment does not apply to aliens in U.S. custody overseas, and it has recently reaffirmed that holding. See, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *Zadvydas v. Davis*, 533 U.S. 678 (2001). The text of the reservation and the ratification history of the Convention described above, which indicate that the Senate intended our Article 16 obligations to be coextensive with existing U.S. obligations under the Constitution, therefore strongly suggest that Article 16 does not apply to alien detainees held abroad. In any event, as noted above, even absent the U.S. reservation, Article 16 would not apply outside "territory under [U.S.] jurisdiction."

Nevertheless, as the Attorney General stated in his confirmation hearing, the Administration wants to be in compliance with the substantive constitutional standard incorporated into Article 16 even if such compliance is not legally required. We are currently reviewing interrogation methods to ensure such compliance.

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We hope that this information is helpful. If you would like assistance regarding any other matter, please do not hesitate to contact this office.

Sincerely,



William E. Moschella
Assistant Attorney General

cc: The Honorable Arlen Specter
Chairman
Committee on the Judiciary