

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

April 29, 2009

The Honorable Jay S. Bybee
Ninth Circuit Court of Appeals
333 Las Vegas Blvd S
Las Vegas, NV 89101

Dear Judge Bybee:

I write to invite you to testify before the Senate Judiciary Committee.

I enclose a recent article from *The Washington Post*. It suggests that you have expressed regret at the content of the Office of Legal Counsel (OLC) memoranda issued while you headed that office and that you feel that they were misused. The article reports that you were concerned about the exercise of the policies that the opinions authorized, that you were “disappointed by what was done to prisoners,” and that you felt that “the spirit of liberty has left the republic.” The article notes that your associates claim you do not feel ownership of these memos but, instead, describe your involvement this way: “He was head of the OLC, and it was written, and he was not pleased with it.” By coming forward and testifying before the Committee, you will have the opportunity to amplify or correct these accounts, and explain your role and your views.

The *Post* article concludes that you have allegedly found it “frustrating” not to be able to explain your position with regard to these memos. By coming forward to testify, you will be able to explain your position with regard to these matters, including your involvement and your knowledge regarding how these memos were written and approved, what considerations went into that process, who was consulted in that process and the roles of various individuals.

According to the press account, you became the Assistant Attorney General in charge of the Office of Legal Counsel after interviewing with White House Counsel Alberto Gonzales because you were interested in being nominated to a judgeship on the Ninth Circuit Court of Appeals. Apparently he asked if you would be willing to head OLC first. I am sure you would like an opportunity to come forward and set the record straight with respect to whether and, if so, how your judicial ambitions related to your participation at OLC.

You were nominated by President George W. Bush to serve as head of OLC on September 4, 2001. You were confirmed on October 23, 2001. While serving as the head of OLC you were then first nominated by President George W. Bush to be a Federal Judge on the United States Court of Appeals for the Ninth Circuit on May 22, 2002, and renominated on January 7, 2003.

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Along with others, I sought to explore your work at OLC but we were told by you that you would not answer those questions. You were confirmed to be a Federal Judge on March 13, 2003.

Thereafter, in 2004, an OLC memo signed by you and dated August 1, 2002, became public. In that memo you signed, the Office of Legal Counsel concluded that to violate U.S. law against torture, conduct must cause pain equivalent to “the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.” That memo was withdrawn in connection with the nomination of Alberto Gonzales to be Attorney General of the United States.

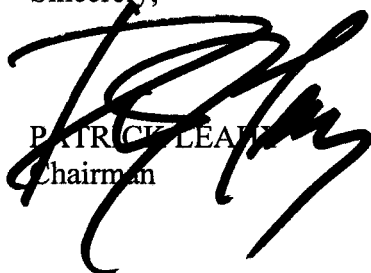
More recently, a second August 1, 2002, memorandum, also signed by you, has been publicly released by the Obama administration. This second memo specifically authorizes the use of coercive interrogation techniques on Abu Zubaydah, including sleep deprivation for 11 days at a time and waterboarding.

I also enclose an article published today in *The New York Times* in which you state, in contrast to the recent *Post* report, that you “believed at the time, and continue to believe today, that the conclusions were legally correct.” You also stated that the Office of Legal Counsel provided its “best, honest advice, based on our good-faith analysis of the law.” The contrast between the recent articles in *The New York Times* and *The Washington Post* is striking. I am giving you the opportunity to come forward and clarify what you meant in your public discussion of these matters, and so that we can establish the facts and get to the truth.

There is significant concern about the legal advice provided by OLC while you were in charge, how that advice came to be generated, the considerations that went into it, and the role played by the White House.

I look forward to your cooperation and your testimony.

Sincerely,



PATRICK LEAHY
Chairman