

# United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

March 31, 2009

M. Faith Burton  
Acting Assistant Attorney General  
Office of Legislative Affairs  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW, Room 3266  
Washington, D.C. 20530

Dear Ms. Burton:

Thank you for your letter, dated March 25, 2009, responding to our inquiry regarding the status of the Office of Professional Responsibility's (OPR) investigation of Justice Department attorneys who provided legal advice regarding waterboarding and other abusive interrogation techniques. We would appreciate your response to the additional questions posed below.

Your letter confirms that the OPR investigation was completed before the end of the Bush Administration, and that then-Attorney General Michael Mukasey provided OPR's draft report to the Office of Legal Counsel (OLC). According to your letter, Attorney General Mukasey, then-Deputy Attorney General Mark Filip and OLC provided comments and OPR "revised the draft report to the extent it deemed appropriate based on those comments."

Your letter does not indicate whether Steven Bradbury was recused from reviewing and providing comments on the draft report. Mr. Bradbury, who was then the Principal Deputy Assistant Attorney General of OLC, is reportedly a subject of the OPR investigation. As such, it would appear to be a conflict of interest for Mr. Bradbury to review and comment on the OPR report on OLC's behalf. We note that on January 15, 2009, Mr. Bradbury issued a "Memorandum for the Files" criticizing OLC opinions issued in 2001-2003. He wrote that the January 15<sup>th</sup> memorandum and a previous memorandum were not "intended to suggest in any way that the attorneys involved in the preparation of the opinions in question did not satisfy all applicable standards of professional responsibility." If Mr. Bradbury did review the OPR report, this could have improperly influenced the opinions he expressed on OLC's behalf in the January 15<sup>th</sup> memorandum, particularly his decision to emphasize that the authors of discredited OLC opinions on detainee issues had not necessarily violated their professional responsibilities.

According to your letter, Attorney General Mukasey and Deputy Attorney General Filip asked OPR to allow former Justice Department officials who were subjects of the investigation to review and comment on the report prior to any disclosure of its results to Congress or the public. According to media reports, these officials are former Office of Legal Counsel head Jay Bybee and former OLC official John Yoo. According to "OPR Process," posted at <http://www.usdoj.gov/opr/proc-hdl.htm>:

In many cases, OPR notifies the attorney against whom the allegation has been made and requests a written response. OPR may also conduct on-site investigations. Based on the

results of the investigation, OPR prepares a report to the component head concerned with a copy to the Office of the Deputy Attorney General setting forth its findings and conclusions, and advises the complainant and the attorney involved of the conclusion reached.

Accordingly, while OPR often notifies an attorney of the allegations against her and the conclusion of the investigation, and provides the report on its findings and conclusions to the attorney's component head, it appears that it is a departure from normal OPR practice to provide an opportunity for the attorney to review and comment on the report.

Your letter states that OPR is "now in the process of sharing the revised draft report" with former Justice Department attorneys who are the subjects of the investigation. The letter does not indicate when this process will be completed or whether the attorneys have been given a deadline for responding.


Your letter indicates that OPR will provide a final report to the Attorney General and the Deputy Attorney General for their review. We are concerned that the Attorney General and the Deputy Attorney General, and ultimately Congress, will review a report that has undergone significant revisions at the behest of the subjects of the investigation without the benefit of reviewing OPR's initial draft report.


Please respond to the following questions:

1. Was Steven Bradbury involved in reviewing and commenting on the draft OPR report?
2. Is there any precedent for allowing the subject of an OPR investigation to review and provide comments on a draft report containing OPR's findings and conclusions?
3. Have the former Justice Department attorneys who are the subjects of the investigation been given a deadline for responding?
4. Have counsel or other officials from other Executive Branch agencies or the White House been given an opportunity to review the draft OPR report? If so, is this a departure from normal practice?
5. Will OPR provide Attorney General Holder and Deputy Attorney General Ogden with the draft report that it provided to Attorney General Mukasey so that Attorney General Holder and Deputy Attorney General Ogden will know what revisions have been made to the report?

Thank you for your time and consideration.

Sincerely,

  
Richard J. Durbin

  
Sheldon Whitehouse