

June 7, 2017

The Honorable Charles Grassley, Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Dianne Feinstein, Ranking Member
Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Grassley and Ranking Member Feinstein:

The undersigned organizations write to express our concern regarding Steven Engel's nomination to head the Department of Justice's Office of Legal Counsel (OLC), particularly Mr. Engel's troubling and incomplete answers regarding his role in OLC's July 2007 torture memo.¹ The executive branch's recent decision to return agency copies of the Senate torture report to the Intelligence Committee—including the only remaining copy in the Justice Department's possession—greatly exacerbates our concern.

We urge the Judiciary Committee not to vote on Mr. Engel's nomination unless and until it receives and reviews additional information (described below) relating to his involvement with the 2007 OLC memo, as well as a firm commitment from Mr. Engel to review at least the portions of the full torture report relevant to OLC.

In response to questions from Senators during the confirmation process, Mr. Engel acknowledged having reviewed and provided comments on a 2007 memo which found that six of the CIA's "enhanced interrogation techniques"—including sleep deprivation by means of shackling diapered detainees in a standing position for days at a time—complied with Common Article 3 of the Geneva Conventions. He declined to answer any substantive follow-up questions on the memo, on grounds that "my role... was not to agree or disagree with [the memo's] conclusions, but to provide comment" and that Congress had recently passed further restrictions on coercive interrogations.

This evasion is not acceptable. Before voting on Mr. Engel's nomination, the Judiciary Committee should request from the Department of Justice his comments and correspondence on the 2007 memo, as well as any other documents that he produced during his previous tenure at OLC relating to the CIA's rendition, detention and interrogation program.

¹ The 2007 memo is available at <https://www.justice.gov/olc/file/886296/download>. Mr. Engel's responses to Senators' written questions are available at <https://www.documentcloud.org/documents/3731497-Steven-Engel-OLC-nomination-Responses-to-QFRs.html>.

The Geneva Conventions protect captured U.S. servicemembers as well as their adversaries, and Common Article 3 is one of the crucial legal standards governing the United States' struggle with ISIS and Al Qaeda. If OLC again adopted the 2007 memo's approach, it would cease to be a meaningful constraint—and other crucial legal protections might be similarly interpreted away.

The State Department Legal Advisor warned OLC in 2007 that its interpretation of Common Article 3 to allow depriving detainees of sleep for 96 hours or more, using a particularly painful and degrading method similar to the abuses documented in the Abu Ghraib photographs, would be seen as “a work of advocacy to achieve a desired outcome.”² The Justice Department's Office of Professional Responsibility (OPR) concluded that the 2007 memo was “inconsistent with the plain meaning and commonly-held understandings of the language of Common Article 3.”³

OPR also criticized the memo's “uncritical acceptance” of the CIA's inaccurate factual claims about the black site program.⁴ While the full extent of the CIA's inaccuracies was not known at the time, the 2007 memo disregarded readily available evidence that directly contradicted them. The misrepresentations that the 2007 memo cited included:

- A number of false claims about intelligence obtained and terrorist attacks prevented through the use of “enhanced interrogation”—including basic chronological errors that would have been uncovered with even minimal due diligence.
- The assertion that the CIA forced detainees undergoing sleep deprivation to wear diapers “[b]ecause releasing a detainee from the shackles to use toilet facilities would present a significant security risk and would interfere with the effectiveness of the technique,” and that the purpose was “not to humiliate the detainee.” This was both facially implausible and contradicted by CIA documents that described the use of diapers “in order to humiliate.”
- A series of false claims about steps the CIA took to protect detainees from severe pain and suffering during “enhanced interrogation” sessions, which were contradicted by detailed accounts that former CIA black site detainees had given to the International Committee of the Red Cross (ICRC). The 2007 memo deliberately omitted any reference to the ICRC report.
- A false claim that when the CIA briefed “the full memberships of the House and Senate Intelligence Committees and Senator McCain, none of the Members expressed the view that the CIA detention and interrogation program should be stopped, or that the techniques at issue were inappropriate.” In fact, Senator McCain had characterized the CIA's practice of sleep deprivation as “torture” both publicly and privately, and at least four other Senators raised objections to the program.

When asked whether he accepted the OPR's criticism of the Bradbury memos, Mr. Engel would only reply that “I am not familiar with the basis for the OPR report's critiques.”

² https://www.aclu.org/sites/default/files/field_document/bellinger_letter_0.pdf.

³ https://www.thetorturedatabase.org/files/foia_subsite/33.pdf, pp. 249-250.

⁴ *Id.* at pp. 154-159, 241-251, 258-259.

Mr. Engel also would not commit to obtaining access to and reviewing the classified version of the Senate Select Committee on Intelligence's study of the detention and interrogation program, the most complete account of the extent to which the legal authorization of the torture program relied on false factual claims. According to press reports, the Justice Department has returned one copy of the study to Congress and placed the other in a court vault, in violation of commitments Attorney General Sessions made during his confirmation hearing.⁵

OLC has a crucial role in ensuring that the President faithfully executes the laws. The best indication of how Mr. Engel would lead the office is his prior tenure there. The Senate should not vote on his nomination with crucial questions unanswered, and without a firm commitment by Mr. Engel to obtain and review the full Senate study on detention and interrogation.

Sincerely,

American Civil Liberties Union
Appeal for Justice
Center for Victims of Torture
The Constitution Project
Defending Rights and Dissent
Human Rights First
Human Rights Watch
National Religious Campaign Against Torture
Open Society Policy Center
OpenTheGovernment.Org

Cc: Members of the Senate Judiciary Committee

⁵ <https://www.nytimes.com/2017/06/02/us/politics/cia-torture-report-trump.html>.