

**Written Questions to
Former Deputy Attorney General James B. Comey
Submitted by Senator Patrick Leahy
May 22, 2007**

1. You testified that the Department of Justice (“DoJ”) completed a factual and legal evaluation of “a particular classified program” in 2004, and this review was conducted by, among others, the Office of Legal Counsel (“OLC”).

a. When was this review started?

I believe some time in late fall 2003.

b. Why was the review started? Was the review started at the request of any individual or entity? If so, who or what entity?

I believe it was started at the initiative of Jack Goldsmith and Patrick Philbin.

c. Who participated in the review? Other than OLC, did any other division, section, or unit at DoJ participate in the review?

Goldsmith and Philbin were the principal participants, as I recall. I believe they were assisted from time to time by James Baker from the Office of Intelligence Policy and Review and my chief of staff, Chuck Rosenberg. There may have been other DOJ lawyers who assisted them.

d. Did any individual or entity from outside DoJ participate in the review? Were there any individuals from the White House, the Department of Defense (“DoD”), or other federal agency who participated in the review? If so please identify those individuals and/or entities?

I believe Goldsmith and Philbin coordinated their effort with lawyers in the intelligence community.

e. Did the review assess the full duration of the classified program and, if not, what time frame was reviewed?

The review focused on current operations during late 2003 and early 2004, and the legal basis for the program.

f. As a result of the review, did any individual or entity at DoJ, or any other agency, prepare a legal opinion or memorandum related to the classified program, and, if so, who or what entity prepared the legal opinion or memorandum?

OLC prepared legal memoranda concerning the matter, some of which would have been drafts. I also prepared at least one memorandum.

g. Were the results of this review shared with the Federal Bureau of Investigation (“FBI”), and, if so, who at the FBI and when?

It is my understanding that Goldsmith and Philbin discussed their work with officials from the General Counsel's office at the FBI, including the General Counsel, Valerie Caproni. I discussed the matter privately with FBI Director Mueller and FBI Deputy Director John Pistole.

h. Other than the White House or individuals at the White House, were the results of this review shared with any individual, entity, or federal agency outside DoJ, and, if so, who or what entity and when?

The matter was discussed with lawyers and non-lawyers in the intelligence community. I am uncomfortable going into more detail in an unclassified setting.

2. In your testimony, you stated that the views of DoJ related to the classified program were communicated to the White House prior to the evening of March 10, 2004.

a. How were these views communicated to the White House? Please identify whether the communications were made orally, in writing, by electronic communication, or other means; and to whom and when the communications were made. Please identify if any of the documents responsive to Question 1 above were included in this communication.

The views were communicated orally prior to March 10, 2004, including at a March 9 meeting I attended at the White House. I also believe that Goldsmith and Philbin had a variety of contacts with officials at the White House in the preceding weeks or months as the review was conducted. Those contacts may have involved their sharing written materials, but I am not sure. I recall sending one memorandum to the White House, after March 10, which I believe attached a memorandum written by Goldsmith.

b. Without disclosing the substance of the classified program or any legal advice, did these views include the understanding that the Attorney General, or you as Acting Attorney General, would not certify the classified program?

Yes.

c. Did you or others at DoJ receive any response to these views from the White House? If so, please identify whether the responses were made orally, in writing, by electronic communication, or other means; and to whom and when was the response was made.

I directly received oral responses during discussions at the White House on March 9, 2004. I know there were a variety of discussions in early 2004 in which I did not participate but that involved Jack Goldsmith and Patrick Philbin.

d. Did the response include any legal opinion or memorandum from the White House, or any other federal agency related to the classified program? If so, please identify what individual(s) or entities prepared and reviewed the legal opinion or memorandum.

I am not aware of any other such memorandum or legal opinion prior to March 10, 2004. Some time shortly after March 10, I received a memorandum from White House Counsel Gonzales.

3. You testified that after you arrived at the George Washington Hospital in Washington, D.C., on the evening of March 10, 2004, White House Counsel Alberto Gonzales and White House Chief of Staff Andrew Card came to Attorney General John Ashcroft's hospital room and spoke to him relating to the authorization of a classified program.

a. Did any individual(s) come with Mr. Gonzales or Mr. Card to the hospital, and if so, who? Were those individuals present for the conversation between Mr. Ashcroft and Mr. Gonzales?

I do not know with whom Mr. Gonzales and Mr. Card arrived; only the two of them entered the room.

b. Upon arriving in the hospital room, did Mr. Gonzales say anything to you, either before or after his conversation with Mr. Ashcroft, and if so, what did he say?

He did not speak to me at any time.

c. Did Mr. Card speak to Mr. Ashcroft or you in the hospital room and if so, what did he say?

Mr. Card did not speak to me. I believe he said, "Be well," to Attorney General Ashcroft as he turned to depart.

d. To your knowledge, did Mr. Gonzales or Mr. Card consult with Mr. Ashcroft's physician or any medical staff prior to entering the hospital room?

Not to my knowledge.

e. In your presence, did Mr. Gonzales or Mr. Card ask Mr. Ashcroft questions to elicit his state of mind and/or medical condition prior to discussing their request for authorization of the classified program?

I believe Mr. Gonzales began the conversation by asking, "How are you General?" to which the Attorney General replied, "Not well."

f. To your knowledge, did Mr. Gonzales or Mr. Card take any steps to ensure that facts related to the classified program were not disclosed to individuals without proper clearances or an actual need to know who were present in the hospital room?

Not to my knowledge.

4. In your testimony, you stated that FBI Director Robert Mueller also arrived at the George Washington Hospital that night.

a. To your knowledge, did Mr. Mueller have any conversation with Mr. Gonzales or Mr. Card at the hospital that night? If so, what was that conversation?

Not to my knowledge.

b. In your testimony, you indicated that Mr. Mueller had a "memorable" exchange with Mr. Ashcroft after Mr. Gonzales and Mr. Card left. Please describe that exchange.

It was a private conversation in which Mr. Mueller expressed his admiration for the Attorney General's conduct that evening.

5. You testified that the President met with you privately, and then, at your urging, he also met with Mr. Mueller privately, on the morning of March 12, 2004 following your daily counter-terrorism briefing. After these discussions, you stated that the President indicated to Mr. Mueller that you were now authorized to make changes to the classified program in response to the Department of Justice's views.

a. Following your meetings, did the President direct you or Mr. Mueller to discontinue or suspend any portion of classified program immediately until the appropriate changes were made to bring it into legal compliance?

No.

b. How long did the classified program continue without legal certification from DoJ?

I don't recall exactly, but believe it was approximately several weeks.

6. You testified that you discussed DoJ's views on the classified program with Vice President Dick Cheney and members of his staff, including his Chief of Staff David Addington.

a. Where and when did those discussions take place?

March 9, 2004 at the White House.

b. Who else was present for those discussions?

Jack Goldsmith, Patrick Philbin, Vice President Cheney, Mr. Addington, Mr. Card, Mr. Gonzales, and members of the intelligence community.

c. If those discussions were on or before March 10, 2004, was the Vice President and/or his staff aware of DoJ's decision not to certify the classified program? If so, how were they aware?

Yes. The Vice President was aware of DOJ's decision to not certify the program, because I had communicated this orally during a March 9 meeting. That meeting was a culmination of ongoing dialogue between DOJ and the White House.

d. If those discussions were on or before March 10, 2004, was the Vice President and/or his staff aware of your intention to resign if the classified program was authorized without DoJ certification? If so, how were they aware?

No. I had not made a decision to resign yet.

e. To your knowledge, did the Vice President or his staff have any role in the decision to have Mr. Card and Mr. Gonzales visit Mr. Ashcroft in the hospital? If so, what role did they have and what is the source for your information?

I have no knowledge about that.

7. You testified that Mr. Philbin, who was with you in the hospital, was “blocked from promotion,” as a result of the position taken by DoJ related to this classified program.
- a. Did any individual or individuals from the White House have any input into his potential promotion at DoJ? If so who, and in relation to what promotion?

Mr. Philbin was considered for principal Deputy Solicitor General after Paul Clement became Solicitor General. It was my understanding that the Vice President’s office blocked that appointment.

- b. Who was involved in blocking Mr. Philbin’s promotion, and what did they do?

I understood that someone at the White House communicated to Attorney General Gonzales that the Vice President would oppose the appointment if the Attorney General pursued the matter. The Attorney General chose not to pursue it.

8. When did the Administration first conclude that the Authorization for Use of Military Force (“AUMF”) authorized warrantless electronic surveillance of the type involved in what the Administration has called the “terrorism surveillance program” or TSP? If you do not recall a specific date, please provide as close an approximation as is possible.

I don’t think it is appropriate for me to discuss legal advice by the Department of Justice or any particular classified program.

9. What legal standard for intercepting communications was the National Security Agency (“NSA”) applying in its warrantless electronic surveillance program before March 2004? Was it a “probably cause” standard? What standard was the NSA applying when the program was first authorized? What standard was applied after March 2004?

I don’t think it is appropriate for me to discuss legal advice by the Department of Justice or any particular classified program.

10. Has the warrantless electronic surveillance program always required before authorizing interception of a communication that at least one party to the communication be located outside of the United States? If not, approximately when did this become a requirement?

I don’t think it is appropriate for me to discuss legal advice by the Department of Justice or any particular classified program.

11. Has the warrantless electronic surveillance program always required before authorizing interception of a communication that at least one party to the communication be a member or agent of Al Qaeda or an affiliate terrorist organization? If not, approximately when did this become a requirement?

I don’t think it is appropriate for me to discuss legal advice by the Department of Justice or any particular classified program.

**Written Questions from Senator Charles E. Schumer to James B. Comey
May 15, 2007 Hearing**

1. When the Attorney General testified before the Senate Judiciary Committee on February 6, 2006, he stated that there was little or no dissent within the Administration with respect to the program that “the President has confirmed.”
 - **Was the classified program over which you and others almost resigned in March 2004 the program that the President confirmed in early 2006? Was it a variant of the program the President confirmed in early 2006?**

I do not believe I can answer these questions in an unclassified environment.

2. You testified that in March of 2004, while Attorney General Ashcroft was hospitalized with pancreatitis, the powers of the Attorney General were transferred to you.
 - **Please describe the mechanism by which that power was transferred to you, what documentation was created, what public statements were made about the transfer, and what communications were had with White House personnel about the transfer.**

David Ayres, the Attorney General’s Chief of Staff, handled the documentation and notifications to the White House. He would have worked with my Chief of Staff, Chuck Rosenberg. I do not recall what specific documents were created. There was media coverage about the fact that I was acting Attorney General and I believe DOJ Public Affairs made public statements to that effect.

3. Please identify all the officials at the Department of Justice or elsewhere whom you have a basis to believe were prepared to resign in March 2004 over the classified program you alluded to in your testimony.

I believe the following individuals were prepared to resign: Jack Goldsmith, Patrick Philbin, Chuck Rosenberg, Daniel Levin, James Baker, David Ayres, David Israelite, Robert Mueller. Although not involved with the matter, I believe a large portion of my staff would have resigned were I to depart.

4. You testified that you believed that your former aide, Patrick Philbin, had been blocked from promotion as a result of his participation in the dispute over the classified program you alluded to. Specifically, it has been reported in the press that Mr. Philbin was blocked from taking the position of Principal

Deputy Solicitor General because of the objections of Vice President Cheney and his aide, David Addington.

- **Can you confirm the accuracy of these media accounts? If they are inaccurate, please identify the particular promotion that was denied to Mr. Philbin, the individuals who objected, and the circumstances surrounding Mr. Philbin's being rejected for the promotion.**

I believe they are accurate.

5. You testified that during the visit to Attorney General Ashcroft's hospital room on the evening of March 10, 2004, Mrs. Ashcroft was present when you first arrived and also later when Messrs. Gonzales and Card arrived.

- **Did you reveal classified information in Mrs. Ashcroft's presence?**

No.

- **Did either Mr. Gonzales or Mr. Card reveal classified information in Mrs. Ashcroft's presence?**

Mr. Card did not. I do not recall whether Mr. Gonzales mentioned any aspects of the matter that would be considered classified, including the name of the program – which was itself classified, as I recall – when addressing Mr. Ashcroft.

6. You testified that in or about March 2004, the Justice Department's Office of Legal Counsel determined that it could not certify the legality of the classified program you alluded to in your testimony.

- **Did the Office of Legal Counsel or any other office prepare a written opinion providing the basis for concerns about the legality of the classified program you alluded to in your testimony? If so, please identify the approximate date(s) of any such opinion, the author(s), and the recipients of any such opinion, inside and outside the Justice Department.**

Yes. OLC prepared legal memoranda concerning the matter during early 2004, some of which would have been drafts. I also prepared at least one memorandum that I recall. The Department of Justice would be in the best position to supply dates and information about recipients.

7. As you may know, Todd Graves has recently said that he was asked to resign in January of 2006, making him at least the 9th United States Attorney who was dismissed last year.

- **Did you form an opinion of the quality of Mr. Graves's work when you were the Deputy Attorney General? If so, what was it?**

I had a positive impression of Mr. Graves and believed he was performing well as U.S. Attorney.

- **What was John Ashcroft's opinion of Mr. Graves, if you know?**

I believe Attorney General Ashcroft shared my opinion of Mr. Graves, although I do not recall a specific conversation with Mr. Ashcroft concerning Todd's performance.

8. I know that you are familiar with the highest-ranking career official at the Justice Department, David Margolis. He has testified that in November of 2006, Kyle Sampson read him a list of several names of U.S. Attorneys who would be asked to resign. In response, Mr. Margolis made clear that so long as people were being dismissed, there were two U.S. Attorneys who were very poor performers who deserved to be fired. One, he said, was Kevin Ryan, who by many accounts had management and other issues in the Northern District of California. The other U.S. Attorney, whom Mr. Margolis did not identify, was not dismissed and continues to serve as a U.S. Attorney today.

- **What do you make of the fact that the same people who decided to fire Dan Bogden of Nevada for no apparent reason also refused to heed Mr. Margolis's advice with respect to this other U.S. Attorney?**

I don't know what to make of it. Mr. Margolis is a wise person with significant experience in personnel matters, whose advice is always worthy of serious consideration.

9. You are the Department official who decided – after I called for it – to appoint a Special Prosecutor in the Valerie Plame affair. After John Ashcroft recused himself from the issue, you appointed your former colleague, Patrick Fitzgerald. And you performed the delegation of duties to Mr. Fitzgerald with respect to the Plame investigation.

- **If Mr. Fitzgerald were fired as U.S. Attorney, would he have been able to continue as Special Prosecutor under your delegation of authority?**

I don't believe so because he was appointed in his capacity as United States Attorney.

10. You testified before the House a few weeks ago that you had a 15-minute conversation with Mr. Sampson on February 28, 2005 – shortly after Alberto

Gonzales took over as Attorney General. You testified that you discussed two things. One was a conversation about who you thought were the weakest U.S. Attorneys. You were never asked about the second topic.

- **What was the second subject? Please provide details of that portion of your conversation with Mr. Sampson.**

This conversation occurred shortly after Attorney General Gonzales's confirmation. Mr. Sampson explained to me a vision for the operation of the Attorney General's office and the Office of the Deputy Attorney General that would involve operating those respective staffs as essentially one staff. My understanding was that this vision would entail the Deputy Attorney General and staff acting in much closer coordination with the Attorney General and his staff. I responded that I believed it was very valuable to the Attorney General and the Department for the Deputy Attorney General to act as a separate office and that I did not support this vision.

I thought such an arrangement risked elimination of the separate vetting and advice function of the DAG and his or her staff. There is great value in having that office -- called ODAG -- available to make decisions that need not reach the Attorney General or to review and advise on matters headed to the Attorney General for decision. The risk inherent in combining the staffs is that the separate review and advice function is lost, which would not be in the interest of the Attorney General or the Department.

Questions for the Record for James Comey (Senator Feingold)

1. In testimony before the House and Senate Judiciary Committees in 2006, Attorney General Gonzales stated that there were not any serious disagreements between you and others within the Administration relating to the NSA wiretapping program confirmed by the President. After your testimony last week, Senators Schumer, Kennedy, Durbin and I sent a letter to the Attorney General asking if he wished to revise that testimony. The Attorney General responded that his testimony was accurate. (See attached letter and response.)

a. Based on your knowledge of what transpired within the Administration when you were Deputy Attorney General, do you agree with the Attorney General that his testimony in 2006 “was and remains accurate”?

I do not believe I can answer that question in an unclassified environment.

b. Was his testimony misleading?

I do not believe I can answer that question in an unclassified environment.

2. The Attorney General has stated repeatedly that although he did not personally look into the rationales behind why each attorney should be fired, he approved the list of U.S. Attorneys to be fired because he believed the list reflected a consensus judgment of the “senior leadership of the department.” For example, on Thursday, April 19, 2007, he testified:

“What I understood was that the recommendations reflected the consensus judgment of the senior leadership of the department and that, therefore, the senior leadership had lost confidence in these individuals and thus the department had lost confidence. . . I understood that the senior leadership, that the recommendation made to me reflected the consensus view of the senior leadership of the department, of individuals who would know better than I about the qualifications of these individuals.”

This testimony suggests that there was a serious and deliberative process that yielded these judgments, yet virtually every senior DOJ official who has testified in our investigation has disavowed any significant or active involvement in selecting which individuals should be fired. For example, Mr. Sampson, the Attorney General’s former chief of staff, suggested that you played a role in selecting the attorneys for firing, but you testified to the House on May 3, 2007, that you were “not aware that there was any kind of process going on or that my

very brief conversation with Mr. Sampson was part of some process to figure out a group of U.S. attorneys to fire.”

Deputy Attorney General Paul McNulty, Principal Associate Deputy Attorney General William Moschella, Associate Deputy Attorney General David Margolis, Acting Associate Attorney General William Mercer, Former Director of the Executive Office of U.S. Attorneys Michael Battle, the Chief of Staff to Mr. McNulty, Michael Elston, and Counselor to the Attorney General Matt Friedrich have all reported little to no involvement in personally recommending individual attorneys for this list. Mr. Sampson has characterized his function as merely aggregating the recommendations of others and then passing those recommendations on to the Attorney General and has denied that any of the individuals were on the list because he personally wanted them there.

- a. If this had actually been a legitimate and serious process, who would have been consulted for their opinions on this matter? Which positions at DOJ are held by people who you think can speak with authority on the performance of specific U.S. Attorneys?

An evaluation of the performance of U.S. Attorneys should involve, at a minimum, the Deputy Attorney General and members of his staff who interacted with the U.S. Attorneys and officials at the Executive Office for U.S. Attorneys who deal regularly with, and inspect, the U.S. Attorneys.

- b. If this had actually been a legitimate and serious process, what records would you expect would have been created for the Attorney General and the Deputy Attorney General to document it?

I have never been involved in such a review process so I do not know what types of documents would be created. In my opinion, the EARS evaluations should be a critical part of any review process, either for an individual U.S. Attorney or for a broader group review.

- c. Other than the officials mentioned above, can you think of any other “senior Department officials” who the Committee should ask if they were involved in determining which U.S. Attorneys should be fired?

No.

- d. If, in fact, the senior leadership of the department was not involved in generating the names of individuals to be fired, who should the Committee

look to in order to understand why the specific fired U.S. Attorneys—other than Mr. Ryan from San Francisco—were singled out?

I do not know.

3. You testified in the House that Kyle Sampson met with you for about 15 minutes on February 28, 2005, and asked you who the weakest U.S. Attorneys were. You gave him several names. You testified that of those names, only Kevin Ryan ended up on the list to be fired. You did not mention any of the other fired U.S. Attorneys and in fact, you testified that you had and have quite favorable opinions of many of them. Just two days after your meeting with him, on March 2, Mr. Sampson sent a preliminary chart reflecting his assessment of all 93 U.S. Attorneys to Harriet Miers in the White House. That list shows Kevin Ryan as a strong U.S. Attorney and lists Margaret Chiara, Bud Cummins, and Carol Lam as U.S. Attorneys to consider removing.

a. If this were a legitimate and serious process, where senior officials of the Department were being consulted, and Mr. Sampson had received information suggesting that Chiara, Cummins, and Lam should be removed for legitimate reasons, would you have expected him to have specifically asked your opinion about these U.S. Attorneys when he met with you two days before?

Yes.

b. If the information Mr. Sampson obtained about Kevin Ryan was so different than your assessment, shouldn't he have discussed that with you as well?

Yes.

4. In an unfortunately prescient section of your farewell address to Department of Justice employees on August 2005, you discussed the fact that the good work that DOJ accomplishes is made possible by “a reservoir of trust and credibility” that the public has for the Department. You also noted that “the problem with reservoirs is that it takes tremendous time and effort to fill them, but one hole in a dam can drain them. The protection of that reservoir requires vigilance, an unerring commitment to truth, and a recognition that the actions of one may affect the priceless gift that benefits all.”

a. Is the matter of the fired U.S. Attorneys an example of such a hole in that dam, one that affects the trust and credibility of the Department and has

implications far beyond the lives and reputations of the individual U.S. Attorneys?

Yes. The entire affair has harmed the Department and its reputation.

b. What should be done, in your view, to repair the credibility of the Department and the American people's trust in it? In particular, what steps should be taken internally by the Department of Justice or by the Administration as a whole?

Time and distance, and the everyday good work of the Department's thousands of trustworthy and honest people all over the country, will help to repair the harm. We should remember that this is a Department that survived – and even thrived – following the Watergate era. As painful as this time is, the great and positive institutional inertia of the organization – composed of people who love doing good for a living – will be its salvation.

c. Are there things that we in Congress should do either to help restore DOJ's reputation or to prevent this sort of thing from happening in the future?

It would be a good thing if Congress shone a light on the good work being done by the men and women of the Department all over the country. There is much good out there that gets too little attention.