

United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

July 19, 2007

The Honorable Alberto R. Gonzales
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear Attorney General Gonzales:

We write seeking information about a memorandum issued on July 10, 2007, by the Justice Department's Office of Legal Counsel (OLC), concluding that former White House Counsel Harriet Miers should be absolutely immunized from responding to a subpoena to appear and testify before Congress. The White House and Ms. Miers are relying on this opinion as the basis for Ms. Miers' refusal to appear yesterday before the House Judiciary Committee.

There is a serious question about whether this OLC opinion was properly issued. Under applicable law and regulations, the Attorney General has delegated to the Assistant Attorney General of OLC the authority to render opinions and legal advice to the various agencies of the government. The Assistant Attorney General may delegate this authority, but he or she must supervise the delegated work. When there is no Assistant Attorney General, confirmed or acting, the Attorney General must supervise the delegated work. Since you have recused yourself from matters relating to the U.S. Attorney's scandal, it is unclear under whose supervision the July 10th OLC opinion was issued.

The July 10th opinion was signed by Steven Bradbury, who now holds the title of Principal Deputy Assistant Attorney General of OLC. As you know, President Bush has nominated Mr. Bradbury to be Assistant Attorney General of OLC. However, it has been more than 210 days since the Senate returned to the President Mr. Bradbury's second nomination to the position and therefore, under the Vacancies Act, he may no longer serve as acting head of OLC. 5 U.S.C. § 3346(b)(2)(B). Under the Vacancies Act, when there is no acting head of an office, only the head of the agency, i.e., the Attorney General, can perform the functions and duties of the OLC Assistant Attorney General. 5 U.S.C. § 3348(b)(2).

The fact that Mr. Bradbury, regardless of his change in title, appears to continue to perform the functions and duties of the head of OLC seems to violate the Vacancies Act.

This is particularly troubling in light of the Bush Administration's abuse of U.S. Attorney appointments. Justice Department officials worked to insert a provision in last year's Patriot Act reauthorization that gave the Attorney General the authority to appoint U.S. Attorneys on an interim basis for an indefinite time period. As we have learned in

recent months, officials in your Department and in the White House were involved in a plan to dismiss at least nine U.S. Attorneys and to replace them, in some instances, with interim and acting appointments rather than nominations submitted to the Senate for confirmation. This end run around the Senate's advise and consent authority was deeply troubling, and Congress changed the law to prevent additional abuse. The re-designation of Mr. Bradbury as the Principal Deputy Assistant Attorney General of OLC, after his acting appointment expired, appears to be yet another attempt by this Administration to circumvent the confirmation process in order to install a controversial nominee in a key Justice Department post.

We note that Mr. Bradbury's nomination has not moved forward in the Judiciary Committee because of serious unresolved questions about his role in the NSA warrantless surveillance program. As you know, the Justice Department's Office of Professional Responsibility (OPR) last year launched an investigation into the conduct of Justice Department attorneys who authorized the NSA program. President Bush personally denied security clearances to the OPR investigators, effectively shutting down the investigation. Documents provided to the Senate Judiciary Committee indicate that OPR was investigating whether OLC engaged in misconduct while Mr. Bradbury was acting head of OLC. Our view is that it is inappropriate to proceed with Mr. Bradbury's nomination before the OPR investigation is completed and Mr. Bradbury is cleared of any wrongdoing.


Please respond to the following questions:


- What is the legal basis for Mr. Bradbury effectively serving as the head of OLC more than 210 days after the return his second nomination?
- Under whose supervision was the July 10th OLC memorandum issued?
- Will you direct the Office of Professional Responsibility to investigate whether Mr. Bradbury improperly performed the functions and duties of OLC Assistant Attorney General?
- When does the President plan to withdraw Mr. Bradbury's nomination and submit a new nominee for Assistant Attorney General of the Office of Legal Counsel?

Due to the seriousness of this matter, we request that you respond to this letter as soon as possible, and in no case later than Monday, July 23.

Sincerely,


Richard J. Durbin


Edward M. Kennedy


Patrick J. Leahy


Russell D. Feingold