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9900 MAIN STREET SUITE 303 · FAIRFAX, VA 22031 · PHONE: 703.383.0880 · FAX: 703.383.5288 · WWW.GETLIBERTY.ORG

February 23, 2012

Robin C. Ashton, Esq.
Counsel
Office of Professional Responsibility
950 Pennsylvania Avenue, N.W., Suite 3266
Washington, DC 20530-0001

RE: Request for Investigation Into the Conduct of Assistant Attorney General Virginia A. Seitz and the Office of Legal Counsel (OLC) in Giving Advice Regarding Appointments Made by the President During an Alleged Recess of the U.S. Senate

Dear Ms. Ashton:

As you know, your office is charged with investigating allegations of misconduct among Department attorneys that “relate to their exercise of their authority to investigate, litigate or provide legal advice.”¹ Specifically, as relates to attorney conduct, your office “reviews allegations of attorney misconduct involving violation of any standard imposed by law, applicable rules of professional conduct, or Departmental policy.”²

In the past your office has conducted extensive investigations of senior Department personnel when an allegation of misconduct was made against them. Many of these investigations resulted in the publication of public reports.³ These reports then resulted in significant public exposure of both the attorneys involved as well as the substantive issues. For instance, your office spent several years investigating John Yoo and Jay Bybee, regarding their advice on enhanced interrogation tactics in the context of detainees held in the Global War on Terrorism.⁴ The advice given by Yoo and Bybee was a matter of significant public interest.

¹ About the Office, U.S. Department of Justice Office of Professional Responsibility, available online at: <http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf> (accessed February 10, 2012).

² *Id.*

³ See, *Resources*, U.S. Department of Justice, Office of Professional Responsibility, December 2010, available online at: <http://www.justice.gov/opr/reports.htm> (accessed February 10, 2012).

⁴ See, David Margolis, Associate Deputy Attorney General, *Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility's Report of*

Relevant Authority

Numerous binding authorities govern the conduct of attorneys within the Department. Starting with the supreme law, attorneys are bound to follow the requirements of the U.S. Constitution. For instance attorneys are bound to protect the constitutional guarantee “against unreasonable searches and seizures.”⁵ Attorneys are also bound by statutory and regulatory law and the professional standards imposed on attorneys by the various state bars in which they are licensed and practice.

For instance, the D.C. Rules of Professional Conduct include:

RULE 1.1 - COMPETENCE

(a) a lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

RULE 2.1 - ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.

Additionally, the Department maintains policies that apply to attorney conduct as well.⁶

Conduct of Assistant Attorney General Seitz and the Office of Legal Counsel

Given the responsibilities of your office and past precedent, your office, for the reasons described below and for other reasons, should likewise conduct a thorough investigation of the actions of Assistant Attorney General Virginia A. Seitz and the OLC for their actions in giving advice in a recent Memorandum Opinion for the Counsel to the President.⁷ A copy of that memo is available on the website of the Office of Legal Counsel.⁸

Investigation into the Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of “Enhanced Interrogation Techniques” on Suspected Terrorists, Office of the Deputy Attorney General, U.S. Department of Justice, January 5, 2010.

⁵ U.S. CONST. amend. IV.

⁶ As regards the Office of Legal Counsel, see, *Best Practices for OLC Legal Advice and Written Opinions*, Memorandum for Attorneys of the Office, Office of Legal Counsel, U.S. Department of Justice, July 16, 2010, available online at: <http://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf> (accessed February 10, 2012).

⁷ See, *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, Memorandum Opinion for the Counsel to the President, U.S. Department of Justice, Office of Legal Counsel, January 6, 2012, available online at: <http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf> (accessed February 10, 2012).

⁸ *Id.*

The subject matter of this memo is whether the President can unilaterally decide that the U.S. Senate is in recess and thus make appointments under the Recess Appointments Clause found in U.S. Const. art. II, § 2. cl. 3. The memo is dated January 6, 2012 and attempts to provide the justification for the President's actions on January 4, 2012 where he unilaterally asserted that the U.S. Senate was in recess and appointed four individuals to positions that otherwise would have required Senate confirmation. Three of these individuals were appointed to the National Labor Relations Board and one individual was appointed to the Consumer Financial Protection Bureau.

This breathtaking usurpation of the Senate's authority and prerogatives is unprecedented and calls into question whether attorneys in OLC committed misconduct by providing a make weight fig leaf covering with a pre-ordained conclusion in order to justify the President's patently unconstitutional actions. As noted by a respected former federal judge, "It is difficult to escape the conclusion that OLC is simply fashioning rules to reach to the outcomes it wishes."⁹

The power to use recess appointments has been turned by OLC into an exception to the general requirement for confirmation that swallows the rule. A former Assistant Attorney General for OLC described the analysis in the memo as follows:

Rather than furthering the purpose of the President's recess appointment power, the OLC opinion would allow that power to swallow the Senate's authority to withhold its consent when it believes a nominee should not be confirmed. In this way, the Administration's legal position is a vivid illustration of what Justice Cardozo called "the tendency of a principle to expand itself to the limit of its logic." BENJAMIN N. CARDOZO, *NATURE OF THE JUDICIAL PROCESS* 51 (1921). The Framers intended the President's recess appointment power to serve as an "auxiliary method" that would "supplement" the usual requirement that the President and the Senate act "jointly" in making appointments. THE FEDERALIST NO. 67 (Alexander Hamilton). Yet under the Administration's approach, a President could circumvent the Senate's opposition to a nominee by making seriatim recess appointments to the same office. That is precisely what the President has done in the case of his recess appointment to the NLRB of Sharon Block, where he replaced one recess appointee with another.¹⁰

Essentially the memo leaves no practical constraints on the appointment power of the President, regardless of whether the Senate considers itself in recess or not. The memo also utterly ignores the constitutional right of the Senate set its own schedule and rules. The memo also brushes aside previous OLC memorandum on the same subject and in

⁹ Michael McConnell, *The OLC Opinion on Recess Appointments*, Advancing a Free Society, Hoover Institution, Stanford University, available online at:

<http://www.advancingafreesociety.org/2012/01/12/olc-recess/> (accessed February 10, 2012).

¹⁰ Statement of Charles J. Cooper, *Before the House Committee on Education and the Workforce Concerning "The NLRB Recess Appointments: Implications for America's Workers and Employers,"* February 7, 2010, available online at: http://edworkforce.house.gov/UploadedFiles/02.07.12_cooper.pdf (accessed February 10, 2012).

the process comes to a conclusion that requires the intentional suspension of rational analysis to believe.

As such OPR should conduct an investigation of the matter. This investigation would be to determine whether Assistant Attorney General Seitz and other attorneys in OLC violated standards imposed by law, applicable rules of professional conduct, or Departmental policy in providing advice in this memo.

Conclusion

Based upon the foregoing the Office of Professional Responsibility should immediately undertake an extensive investigation into whether Ms. Seitz and other attorneys involved in drafting the January 6, 2012 memo fulfilled their duties under applicable law and policy.

Upon completion of this investigation a public report should be published.

If the Office finds that Ms. Seitz and other attorneys' conduct fell short of what is required, a referral for disciplinary action should be made to the bar of the appropriate jurisdictions.

Sincerely,

A handwritten signature in blue ink, appearing to read "William Wilson".

William Wilson
President