

**JUSTICE DEPARTMENT'S
OFFICE OF LEGAL COUNSEL**

HEARING
BEFORE THE
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED TENTH CONGRESS
SECOND SESSION

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JUSTICE DEPARTMENT'S OFFICE OF LEGAL COUNSEL

THURSDAY, FEBRUARY 14, 2008

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 12:07 p.m., in room 2141, Rayburn House Office Building, the Honorable Jerrold Nadler (Chairman of the Subcommittee) presiding.

Present: Representatives Nadler, Davis, Ellison, Scott, Watt, Franks, and King.

Staff Present: David Lachmann, Subcommittee Chief of Staff; Burt Wides, Majority Counsel; Heather Sawyer, Majority Counsel; Sam Sokol, Majority Counsel; Caroline Mays, Majority Professional Staff Member; Paul Taylor, Minority Counsel; Crystal Jezierski, Minority Counsel; and Jennifer Burba, Minority Staff Assistant.

Mr. NADLER. This hearing of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties will come to order.

Today's hearing will examine the work of the Office of Legal Counsel of the Department of Justice with respect to its involvement in the legal review of Administration policies relating to detention and interrogation.

The Chair recognizes himself for 5 minutes for an opening statement.

Today we consider a matter that goes to the heart of who we are as a Nation. No one will argue that we live in a dangerous world, that there are people who are organizing to attack our Nation, or that our Government must gather reliable intelligence to defend us. All that is obvious. What is at issue is the lengths to which some people acting on our behalf have gone, and what the Office of Legal Counsel has advised our Government what it may and may not legally do.

The job of OLC is of critical importance to the rule of law in this country. As Newsweek described it, the OLC, 'is the most important Government office you've never heard of.'

Within the executive branch, including the Pentagon and CIA, the OLC acts as a kind of mini-Supreme Court. Its carefully worded opinions are regarded as binding precedent, final say on what the President and all his agencies can and cannot legally do. So when it comes to the question of the treatment, the use of waterboarding and other extreme forms of coercion for interroga-

tion of people detained by the United States, OLC is really the place to start.

Our witness today, Steven Bradbury, is the Principal Deputy Assistant Attorney General for OLC. He serves in that position, because his nomination as Assistant Attorney General has not yet been confirmed by the Senate.

OLC and Mr. Bradbury have been in the middle of the controversy regarding the treatment of detainees. The now infamous Bybee Torture Memo was produced by Mr. Bybee's deputy, John Yoo. Its publication coming on top of the exposé of prisoner abuse at Abu Ghraib, devastated America's standing around the world. It also led numerous prominent military lawyers to fear it would permit hostile forces to brutalize our soldiers and deny that what they were doing was torture.

That OLC product was so flawed and so at odds with our law and our values that a subsequent head of OLC, Jack Goldsmith, rescinded it. More recently, the OLC's role in developing interrogation policy has again been in the spotlight. According to the *New York Times*, Mr. Bradbury wrote two secret but controversial opinions in 2005. Mr. Bradbury, as the acting head of OLC, reportedly issued an opinion authorizing the use, in combination, of certain harsh interrogation techniques, including head-slapping, simulated drowning, and exposure to frigid temperatures.

While its details remain unknown, that is to say secret, Deputy Attorney General Comey has been reported to have objected to it so vigorously that he told colleagues they would all be ashamed when the world learned of it.

More recently, several developments have focused the attention of this Subcommittee and of the Nation on the chilling practice of waterboarding. My own view of waterboarding is clear. It is torture, period; and as such, violates several of our laws. Waterboarding is often misnamed "simulated drowning." In fact, as was testified to by witnesses at a couple of prior hearings of this Subcommittee, it is actual drowning, with all the excruciating agony that entails, which is stopped short of death. That is why what is now euphemistically called "waterboarding" has for centuries been more bluntly known as the water torture, from the Inquisition to the U.S. prosecution in the last century of both enemy captors and Americans alike for practicing waterboarding. This has been the long-held view of our Nation, our legal system and of our military.

Senator McCain, who is something of an expert on the subject, has been unsparing in his criticism of these practices. I have held several hearings where experts in interrogation have testified not only to the cruelty, but to the ineffectiveness of this practice.

Waterboarding is also prohibited by the Army Field Manual on Interrogation. Just yesterday, the Senate passed a bill that would extend the Army Field Manual guidance, which outlaws waterboarding to the entire Intelligence Community incorporating a bill which I had introduced initially with Mr. Delahunt. As a civilized Nation there must be limits in our conduct, even during military conflicts. And our laws so dictate. President Bush has long said that America does not torture. I urge him to sign this legislation into law and thus affirm that commitment.

The fact that this Administration tortures, despite its testimony that it doesn't, is no longer a closely held secret. Recently, CIA Director Hayden disclosed the three individuals who were subjected to waterboarding. He also disclosed that at least two videotapes of those sessions had been destroyed after several years of discussion among the CIA, Justice Department, and the White House.

In addition to reportedly drafting several controversial memoranda on interrogation, Mr. Bradbury also has been a point man for the Bush administration, repeatedly explaining and defending its programs and legal positions before congressional Committees and participating in White House question-and-answer sessions with the press and the public.

Opinions issued by OLC have offered the legal support for a number of the Administration's more controversial programs and actions, whose legality under statutes of the Constitution is strongly questioned by many scholars. In addition, Mr. Bradbury has been a frequent advocate for and defender of Administration policies before the Congress and press and the public. This raises the questions about the state of OLC today.

Some observers, including former OLC officials who served in Administrations of both political parties, have questioned whether OLC in this Administration has operated with sufficient independence to present objective analysis of the controlling law, or has too readily created weak arguments to support what the President wants to do in regard to terrorism or other areas. I hope we can get to this important issue.

I want to welcome our witness, I yield back the balance of my time.

I would now recognize our distinguished Ranking minority Member, the gentleman from Arizona, Mr. Franks, for his opening statement.

Mr. FRANKS. Well, thank you, Mr. Chairman.

Mr. Chairman, we are here today because of an article about interrogation techniques that appeared in the *New York Times*. The article describes a memo that allows what the headline characterizes as "Severe Interrogations," as described by a few anonymous sources who are only briefed on the memo and who have apparently not actually seen it. The *Times* article concedes that the tactics it characterizes as "severe interrogations" simply include "interrogation methods long used in training for our own American servicemen to withstand capture."

Severe interrogations are unpleasant, to be very sure, but, Mr. Chairman, they are sometimes necessary to prevent severe consequences that potentially involve the violent deaths of thousands of innocent American citizens. Severe interrogations are very infrequent. CIA Director Michael Hayden has confirmed that despite the incessant hysteria, the waterboarding technique has only been used on three high-level captured terrorists, the very worst of the worst of our terrorist enemies.

Director Hayden suspended the practice of waterboarding by CIA agents in 2006. Before the suspension, Director Hayden confirmed that his agency waterboarded Khalid Sheikh Mohammed, Abu Zubayda, and Abd al-Rahim Nashiri, each for approximately 1 minute. The results were of immeasurable benefit to the American

people. CIA Director Hayden has said that Mohammed and Zubayda provided approximately 25 percent of the information the CIA had on al-Qaeda from human sources. That's 25 percent of the total information in human intelligence that we have received on al-Qaeda, derived from 3 minutes' worth of rarely used interrogation tactics.

Curtailling this program would drastically reduce our ability to protect against horrific terrorist attacks. Even the *New York Times* article points out that such techniques have "helped our country disrupt terrorist plots and save innocent lives."

Torture, Mr. Chairman, by contrast is illegal, as it should be. Torture is banned by the Uniform Code of Military Justice in 19 U.S.C. 893 and the 2005 McCain amendment prohibiting the cruel, inhuman, or degrading treatment of anyone in U.S. custody, as understood in the 5th, 8th and 14th amendments.

According to the *New York Times*, the Department of Justice issued a legal opinion that "The standards imposed by Mr. McCain's Detainee Treatment Act would not force any change in the CIA's practices. Relying on a Supreme Court finding that only conduct that shocks the conscience was unconstitutional. The opinion found that in some circumstances, waterboarding was not cruel, inhuman or degrading if, for example, a suspect was believed to possess crucial intelligence about a planned terrorist attack, the officials familiar with the legal finding said."

Now, we do not know whether or not the confidential Department of Justice legal opinion actually used the example of waterboarding. But the general principle expressed by the Department of Justice, echoed by the Supreme Court's finding that circumstances inform our analysis of whether or not a tactic is cruel, inhuman or degrading, and whether a tactic constitutionally shocks the conscience.

The nonpartisan Congressional Research Service confirms that this analysis, "The types of acts that fall within cruel, inhuman or degrading treatment or punishment contained in the McCain amendment, may change over time, and may not always be clear. Courts have recognized that circumstances often determine whether conduct shocks the conscience and violates a person's due process rights."

Even ultra-liberal Harvard law professor Alan Dershowitz agrees as he wrote this recently in *The Wall Street Journal*. "Mukasey is absolutely correct," he says, "as a matter of constitutional law, that the issue of waterboarding cannot be decided in the abstract. The Court must examine the nature of the governmental interest at stake and then decide on a case-by-case basis. In several cases involving the actions at least as severe as waterboarding, courts have found no violations of due process."

As the *Wall Street Journal* pointed out in the recent editorial, Congress wants the Justice memos made public, but the reason to keep them secret is so that enemy combatants cannot use them as a resistance manual. If they know what is coming, they can psychologically prepare for it. We know al-Qaeda training involves its own forms of resistance training, and publicly describing the rules offers our enemies a road map for resistance.

Mr. Chairman, as I said in the last hearing, I believe those who would challenge aspects of the current practices and procedures governing the interrogation of terrorists have an absolute obligation to state explicitly what sorts of interrogation techniques they do find acceptable. Criticism without solution is useless and represents the opposite of leadership.

And I look forward to hearing from our witnesses, Mr. Chairman, and yield back.

Mr. NADLER. I thank the gentleman. I would comment that some of us have done precisely that. We have suggested that the practices that are permissible are those in the U.S. Army Field Manual.

In the interest of proceeding to our witness, and mindful of our busy schedules, I would ask that other Members submit their statements for the record.

Without objection, all Members will have 5 legislative days to submit opening statements for inclusion in the record.

Without objection, the Chair will be authorized to declare recess of the hearing.

As we ask questions of our witness, the Chair will recognize Members in the order of their seniority in the Subcommittee, alternating between majority and minority, provided that the Member is present when his or her turn arrives. Members who are not present when their turn begins will be recognized after the other Members have an opportunity to ask their questions. The Chair reserves the right to accommodate a Member who is unavoidably late or only able to be with us for a short time.

Our witness today, Steven G. Bradbury, who currently serves as the Principal Deputy Assistant Attorney General for the Office of Legal Counsel. The Office of Legal Counsel assists the Attorney General in his function as legal advisor to the President and all the executive branch agencies.

Before we begin, it is customary for the Committee to swear in its witnesses. If you would please stand and raise your right hand to take the oath.

[Witness sworn.]

Mr. NADLER. Let the record reflect the witness answered in the affirmative. You may be seated.

Mr. Bradbury, you are recognized for your statement.

TESTIMONY OF STEVEN G. BRADBURY, PRINCIPAL DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE

Mr. BRADBURY. Thank you, Mr. Chairman, Chairman Nadler, Ranking Member Franks and Members of the Committee.

Let me first extend my condolences to this body and to the family of Congressman Lantos for the loss of a great American and a great Member of this House.

Mr. Chairman, I appreciate the opportunity to appear before you today to address the CIA's program of detention and interrogation of high-value terrorists.

As this Committee knows, the Office of Legal Counsel exercises the authority of the Attorney General to render legal opinions for the executive branch. I've been privileged to serve as the Principal Deputy in OLC since April 2004, and I can assure the Committee

that every opinion I sign for the Office represents my best objective judgment as to what the law requires, without regard for the political currents that often swirl around the questions presented to us.

The CIA program was initiated not long after 9/11, when our knowledge of al-Qaeda was more limited and when the possibility of a follow-on attack was thought to be eminent. The program has always been very narrow in scope, reserved for a small number of hard-core al-Qaeda members believed to possess uniquely valuable intelligence.

Fewer than 100 terrorists have been detained by the CIA as part of this program. The President and CIA Director Hayden have said that the program has been a critical source of intelligence to help prevent further mass terrorist attacks on the U.S. This program has involved the limited use of alternative interrogation methods judged to be necessary in certain cases because hardened al-Qaeda operatives are trained to resist the types of methods approved in the Army Field Manual which governs military interrogations. The CIA's interrogation methods were developed for use by highly trained professionals, subject to careful authorizations, conditions, limitations and safeguards. They have been reviewed on several occasions by the Justice Department over the past 5-plus years and determined on each occasion to be lawful under then-applicable law.

These alternative interrogation methods have been used with fewer than one-third of the terrorists who have ever been detained in the program. Certain of the methods have been used on far fewer still. In particular, as General Hayden has now disclosed, the procedure known as waterboarding was used on only three individuals and was never used after March 2003.

While there is much we cannot say publicly about the CIA program, the program has been the subject of oversight by the Intelligence Committees of both Houses of Congress, and the classified details of the program have been briefed to Members of those Committees and other leaders in Congress.

In 2002 when the CIA was establishing the program and first sought the legal advice of the Justice Department, the relevant Federal law applicable to the CIA program was the Federal anti-torture statute which prohibits acts intended to inflict severe physical or mental pain or suffering, as defined in the statute.

The Justice Department set forth its interpretation of the anti-torture statute in OLC's public December 2004 opinion where we affirm that torture is abhorrent to American values. All advice we have given since has been consistent with the December 2004 opinion.

Since 2005, additional laws have become applicable to the program. Congress passed the Detainee Treatment Act in December 2005 and the Military Commissions Act in October 2006. And in June 2006, the Supreme Court held for the first time, in *Hamdan v. Rumsfeld*, that Common Article 3 of the Geneva Conventions applies to our worldwide armed conflict with al-Qaeda.

The CIA program is now operated in accordance with the President's executive order of July 20, 2007, which was issued pursuant to the Military Commissions Act. The President's executive order requires that the CIA program comply with a host of substantive

and procedural requirements. The executive order reaffirms that the program must be operated in conformity with all applicable statutory standards, including the Federal prohibition on torture, Detainee Treatment Act, and the prohibitions on grave breaches of Common Article 3, which were added to the War Crimes Act by the 2006 Military Commissions Act.

In addition, the executive order requires that all detainees in the program must be afforded adequate food and shelter and essential medical care. They must be protected from extremes in temperature and their treatment must be free of religious denigration or acts of humiliating personal abuse that rise to the level of an outrage upon personal dignity.

The Director of the CIA must have procedures in place to ensure compliance with the executive order, and he must personally approve each individual plan of interrogation. After enactment of the Detainee Treatment Act, the CIA commenced a comprehensive policy and operational review of the program, which eventually resulted in a narrower set of proposed interrogation methods.

As the Attorney General disclosed, the program as it is authorized today does not include waterboarding. And let me be clear, Mr. Chairman. There has been no determination by the Justice Department that the use of waterboarding under any circumstances would be lawful under current law. Many of the legal questions raised by the CIA program are difficult ones and ones over which reasonable minds may differ. But the dedicated professionals at the CIA are working with honor to protect the country in accordance with the law.

Mr. Chairman, while differences between Congress and the Department in these turbulent times are inevitable and are consistent with the institutional tension embedded in our Constitution, it is important to remember that I, like Members of this Committee, have sworn an oath to protect and defend the Constitution of the United States. Each of the opinions I have rendered at the Office of Legal Counsel has been true to this oath. While difficult questions arise, every opinion I have issued has been consistent with my professional obligations as an attorney and with my obligation to protect and defend the Constitution.

Thank you Mr. Chairman.

Mr. NADLER. I thank you, Mr. Bradbury.

[The prepared statement of Mr. Bradbury follows:]

PREPARED STATEMENT OF STEVEN G. BRADBURY

**PREPARED STATEMENT OF STEVEN G. BRADBURY
PRINCIPAL DEPUTY ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL
U.S. DEPARTMENT OF JUSTICE**

BEFORE THE

**HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES**

FEBRUARY 14, 2008

Chairman Nadler, Ranking Member Franks, Chairman Conyers, and Members of the Subcommittee, I appreciate the opportunity to appear before you today to address the Department of Justice's legal review of the CIA program of detention and interrogation.

A few basic points are worth stressing up front:

First, the CIA program is—and always has been—very narrow in scope; it is reserved for a small number of the most hardened terrorists believed to possess uniquely valuable intelligence—intelligence that could directly save lives. The program is operated in a professional manner, and all the methods of interrogation authorized for the program are subject to strict limitations and safeguards.

Second, the Justice Department's legal advice continues to reflect the principles set forth in our public December 2004 opinion to the Deputy Attorney General in which the Office of Legal Counsel explained our current interpretation of the federal statute prohibiting torture, and which rejected all torture as abhorrent to American values. All advice we have given since then has been consistent with the December 2004 opinion. Of course, many of the legal standards involved (some of which have only recently

become applicable to the CIA program) are quite general in nature, and their application can raise difficult questions about which reasonable people may disagree.

Third, although I cannot discuss classified details about the CIA program here, it is appropriate to stress that the program has been the subject of oversight by the Intelligence Committees of both Houses of Congress, and the classified details have been briefed to Members of those Committees and other leaders in Congress.

* * *

In response to the attacks of 9/11, the Central Intelligence Agency has operated a program of detention and interrogation of certain high value al Qaeda terrorists captured in the War on Terror. It is important to remember that the program was initiated at a time when our knowledge of al Qaeda was more limited and when the possibility of a follow-on attack was thought to be imminent.

Fewer than one hundred terrorists have been detained by the CIA as part of this program since its inception in 2002. The President and CIA Director General Hayden have stated that this program has been one of the most valuable sources of intelligence to help prevent further mass terrorist attacks on the U.S. homeland and U.S. interests worldwide.

As the President and General Hayden have also stated, this program has involved the limited use of alternative (also called "enhanced") interrogation methods, judged to be necessary in certain cases because hardened al Qaeda operatives are trained to resist the types of methods approved in the Army Field Manual, which guides military interrogations.

The CIA's interrogation methods were developed for use by highly trained professionals, subject to careful authorizations, conditions, limitations, and safeguards. They have been reviewed on several occasions by the Justice Department over the past five-plus years and determined on each occasion to be lawful under then-applicable law. These alternative interrogation methods have been used with fewer than one-third of the terrorists who have ever been detained in this program, and certain of the methods have been used on far fewer still. As General Hayden has disclosed, one interrogation method that has received considerable public attention, waterboarding, was used on only three individuals, and was never used after March 2003.

From the very beginning, the CIA has sought the views of the Department of Justice to ensure that its interrogation program complied with the law. In 2002, when the CIA was establishing the program and first sought advice, the relevant federal law applicable to the CIA program was the federal anti-torture statute, 18 U.S.C. §§ 2340-2340A, which prohibits government conduct occurring outside the United States that is intended to inflict severe physical or mental pain or suffering, as defined in the statute. Since then, new legal requirements have become applicable: Congress has passed the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006, and the Supreme Court held for the first time in *Hamdan v. Rumsfeld* that Common Article 3 of the Geneva Conventions applies to a worldwide armed conflict with an international terrorist organization—specifically, our armed conflict with al Qaeda.

After enactment of the Detainee Treatment Act in December 2005, the CIA commenced a comprehensive policy and operational review of the program, which

eventually resulted in a narrower set of proposed interrogation methods. While that process was underway, the Supreme Court handed down its decision in *Hamdan* in June 2006, and, in response to *Hamdan*, Congress enacted the Military Commissions Act in the fall of 2006, in part to ensure that the CIA could continue to operate its program in an effective form. Among other things, the Military Commissions Act amended the War Crimes Act to spell out the specific War Crimes Act provisions that apply in Common Article 3 conflicts. In addition, the Military Commission Act helped to clarify how the United States would apply Common Article 3.

In conjunction with the CIA's policy and operational review, OLC evaluated the legality of the narrower program against the new legal framework, including not only the Detainee Treatment Act but also the Military Commissions Act and Common Article 3.

The CIA program is now operated in accordance with the President's executive order of July 20th, 2007, which was issued pursuant to the Military Commissions Act. The President's executive order requires that the CIA program comply with a host of substantive and procedural requirements.

Number one, of course, the executive order makes clear to the world that the CIA program must and will be operated in complete conformity with all applicable statutory standards, including the federal prohibition on torture, the prohibition on cruel, inhuman, or degrading treatment contained in the Detainee Treatment Act, and the prohibitions on grave breaches of Common Article 3 of the Geneva Conventions, as defined in the amended War Crimes Act.

Number two, the executive order makes clear that the program must be very narrow in scope, to include only those high-value terrorist detainees believed to possess critical knowledge of potential attack planning or the whereabouts of senior al Qaeda leadership. All detainees in the program must be afforded the basic necessities of life, including adequate food and shelter and essential medical care; they must be protected from extremes in temperature; and their treatment must be free of religious denigration or acts of humiliating and degrading personal abuse that rise to the level of an outrage upon personal dignity. The Director of the CIA must have rules and procedures in place to ensure compliance with the executive order, and he must personally approve each individual plan of interrogation before it is implemented.

As noted, the specifics of the program authorized today are not the same as they were in the initial years. The set of interrogation methods authorized for current use is narrower than before, and it does not today include waterboarding. As the Attorney General has made clear, before any additional interrogation method could be authorized for use in the program, three things would have to happen:

First, the Director of the CIA, together with the Director of National Intelligence, would have to determine that the new method is necessary to obtain information on terrorist attack planning or the location of senior al Qaeda leadership; second, the Attorney General would have to conclude that the use of the method, subject to all conditions, limitations, and safeguards proposed for its use, would be lawful under current law (and that includes the requirements of the Detainee Treatment Act, the Military Commissions Act, and Common Article 3); and, three, even if the Attorney

General concludes that the method's use is lawful, the President would have to personally authorize its use. In addition, Congress would be appropriately notified—including, per the commitment from the Attorney General, specific notification to the Judiciary Committees if there were a plan to add waterboarding to the program.

Let me be clear, though: There has been no determination by the Justice Department that the use of waterboarding, under any circumstances, would be lawful under current law.

While there is much we cannot say publicly about the CIA program, the Administration has briefed the Intelligence Committees on the operational details relating to the program, including all of the interrogation practices that have been employed, or are currently authorized to be employed, and the authorities supporting those practices.

I realize, Mr. Chairman, that these matters are controversial. Although many of the legal questions raised by the CIA program are difficult ones, and ones over which reasonable minds may differ, we believe that Congress and the American people should have confidence that the dedicated professionals at the CIA are working with honor to protect the country effectively and in accordance with the law.

Thank you, Mr. Chairman, and I look forward to the Committee's questions.

Mr. NADLER. I will begin by recognizing myself for 5 minutes to question the witness.

Mr. Bradbury, I understand that for many of the CIA's enhanced interrogation techniques, the test of their legality under current law is linked to the constitutional standards of whether it shocks the conscience, and that this may depend on the circumstances. But under the convention against torture and the implementing Federal torture statute, torture is absolutely barred; and that does not depend on the circumstances and that does not depend on whether it shocks the conscience.

So let's put that aside and cut to the chase. The convention and the Federal torture statute defined torture to be "an act specifically designed to inflict severe physical or mental pain or suffering." I fail to see how the agonizing pain of not being able to breathe as your lungs fill with water and oxygen is denied your body cannot be considered severe physical pain. And I fail to see how feeling that you are drowning and about to die cannot be considered severe mental pain and suffering.

It is certainly specifically designed—waterboarding, that is—to inflict both severe mental and physical pain and suffering so that the prisoner will speak.

Now, in your legal opinion, is waterboarding a violation of the Federal torture statute?

Mr. BRADBURY. Well, Mr. Chairman, as General Hayden has disclosed, our office has advised—

Mr. NADLER. I'm not interested in your opinions before. Never mind former OLC opinions. I'm asking you the question now: Is waterboarding a violation of the Federal torture statute?

Mr. BRADBURY. I was about to answer the question, Mr. Chairman, this way. Our office has advised the CIA, when they were proposing to use waterboarding, that the use of the procedure, subject to strict limitations and safeguards applicable to the program, was not torture and did not violate the anti-torture statute. And I think that conclusion was reasonable. I agree with that conclusion.

Mr. NADLER. Given the definition I just read, how can you possibly justify that?

Mr. BRADBURY. Well, first of all, I'm limited in what I can say about the technique itself, because—

Mr. NADLER. We know what the technique is. It has been done for hundreds of years.

Mr. BRADBURY. Well, with respect, Mr. Chairman, your description is not an accurate description of the procedure that's used by the CIA, and I think there's—

Mr. NADLER. My description was a description that was given to this Committee by ex-interrogation officers.

Mr. BRADBURY. Well, there's been a lot of discussion in the public about historical examples. For example, as the Chairman referenced, from the Spanish Inquisition; cases of torture from the Philippines and committed by the Japanese during World War II. Those cases of water torture have involved the forced consumption of mass amounts of water and often large amounts of water in the lungs. They have often involved the imposition of weight or pressure—

Mr. NADLER. But your testimony is that that's not what we're talking about now.

Mr. BRADBURY. That is not what we are talking about.

Mr. NADLER. Well, then let me go to the following. You have refused—according to the *New York Times*, you wrote several memos on interrogation techniques in 2005. The *Times* said that the opinion about using a whole bunch of very intense techniques on the prisoner, in combination, including waterboarding, so outraged Deputy Attorney General Comey that he told colleagues they would be ashamed if it ever came out.

Now, that has peaked our curiosity. But the Attorney General said he could not give us those memos and others we have repeatedly asked for on this subject because they were very sensitive. When the Chairman of this Committee, Mr. Conyers, reminded him that we all have Top Secret clearance, the Attorney General simply repeated that he was unable to share them with us.

Now we have been shown documents on the NSA warrant list wiretapping that are Code Word, which I'm sure is a higher classification than your legal opinion of interrogation. So can you tell us why you won't—I mean, you're telling us that the opinions we're making about waterboarding are wrong because we don't know what waterboarding really is. Therefore we can't form a judgment, you're telling us, on the legal basis; or on whether it is legal because we don't know what—literally, we don't know about what we're talking because you won't tell us.

So can you tell us precisely what the legal authority is for withholding those documents from the Committee of proper subject matter jurisdiction other than the fact that they might be embarrassing to somebody?

Mr. BRADBURY. Well, Mr. Chairman, let me say I and the Department of Justice and the Attorney General fully recognize and respect the strong oversight interest this Committee has in the work of our office—

Mr. NADLER. We've seen no evidence of that.

Mr. BRADBURY. Well, let me say that we do intend and we strive to respond to—

Mr. NADLER. Let's break through all this. Will you commit to letting us see those memos? And, if not, why not?

Mr. BRADBURY. We will—we are giving that serious consideration, Mr. Chairman. We are giving that serious consideration.

Mr. NADLER. Is there any legal basis for saying “no” to a committee of jurisdiction which falls squarely within our jurisdiction and where we all have clearance—security clearance?

Mr. BRADBURY. Well, these are matters that traditionally are subject to the extensive oversight of the Intelligence Committees.

Mr. NADLER. And the Judiciary Committee.

Mr. BRADBURY. And the classified details of the program are very close hold—

Mr. NADLER. Excuse me. I said we all had top security clearances. So given that fact, is there any legal justification for withholding those documents?

Mr. BRADBURY. Well, Mr. Chairman, as you and I have discussed these—this very question before, the interest is—the interest that

the President and the executive branch have in protecting the potential public disclosure of—

Mr. NADLER. Wait, that's saying "secret". We all have top security clearance, so all you're saying is that it might be revealed. We have top security clearance.

Mr. BRADBURY. Well, I think there was some discussion previously, perhaps mentioned earlier in the opening statements, about public disclosure. That—

Mr. NADLER. We're not talking right now about public disclosure, we're talking about disclosure to this Committee.

Mr. BRADBURY. I understand that. And my point today is we recognize your interest, we recognize the unique nature of this issue, the controversial nature of the issue. We do recognize the extraordinary—

Mr. NADLER. But what is—you keep not answering my question. What is the legal basis for your assertion of your ability to have discretion about whether to give those documents to us?

Mr. BRADBURY. Mr. Chairman, I'm not asserting any legal basis.

Mr. NADLER. If there is no legal basis, then you must give them to us.

Mr. BRADBURY. It's not a decision for me, but I am saying—I am saying that the Attorney General, in close consultation with the President, are giving careful consideration—

Mr. NADLER. Are you the head of the Office of Legal Counsel?

Mr. BRADBURY. Yes.

Mr. NADLER. Isn't it your job as such to give the opinion to the Attorney General on these kinds of questions?

Mr. BRADBURY. We do most often, yes, advise the Attorney General and the President on matters that potentially involve executive privilege issues.

Mr. NADLER. So have you advised the Attorney General that they have the legal right to withhold these documents from this Committee?

Mr. BRADBURY. I don't—

Mr. NADLER. Or that they don't have the legal right?

Mr. BRADBURY. Mr. Chairman, the executive branch does have the legal right to protect the confidentiality of deliberations of the executive branch and sensitive documents—

Mr. NADLER. The executive branch, you're saying, has the unlimited right, in its own discretion, to withhold any document because of confidentiality?

Mr. BRADBURY. I'm absolutely not saying that. The Congress has a very strong constitutionally based interest in getting information necessary for oversight—

Mr. NADLER. Thank you very much.

Mr. BRADBURY. We recognize those interests.

Mr. NADLER. But you won't commit to giving us those documents despite the fact that we have security clearance, so your recognition is totally hollow.

Mr. BRADBURY. I will commit to attempting fully to satisfy the Committee's interest in these matters, to the fullest extent possible, consistent with legitimate interests that the executive branch has. And let me just underscore, we are—

Mr. NADLER. Okay. Let me just say, then, that within a few days after this Committee, we'd like an explanation in writing. Either—we'd either like to see those documents or an explanation in writing in why we can't see them, and what the legal basis of your right to withhold them is.

Mr. BRADBURY. Okay.

Mr. NADLER. Thank you.

I now recognize the distinguished Ranking Minority Member for 5 minutes.

Mr. FRANKS. Well, thank you, Mr. Chairman.

Let me just first offer a little illustration that I hope gives some idea as to why some of us separate waterboarding from torture, and why we do believe that circumstances in certain situations do change whether or not something shocks the conscience—and by way of just an illustration I hope that is relevant to most people.

If a neighbor is invited over for dinner and insults the hostess on the dessert, and the husband of the home takes a baseball bat and beats his skull in for such an insult, I think that the courts would look negatively upon that. However, if a criminal breaks in at night and is attempting to rape his 4-year-old daughter and he does the same thing, it changes the way the courts look at the same situation.

So I want to put to rest the idea that there aren't effects on the circumstances, given the nature of any act. That's very fundamental and I'm astonished that we don't understand that.

Another thing I'm a little confused about, Mr. Chairman, in all deference to the leadership of this Subcommittee and the larger Committee, the Judiciary Committee itself, we've spent time trying to deal with waterboarding issues, with issues related to FISA, with issues related to habeas corpus and Guantanamo. In all three of those areas we spent considerable time, and those things asserted by the majority would have great favorable effect on terrorists and very little effect on protecting American citizens.

And I'm astonished that, given the fact that our first purpose in the Federal Government is to protect our citizens, that we spend so much time doing what we can to make sure that we're protecting terrorists and not our own—not the citizens, which is our primary cause.

With that said, I want to ask Mr. Bradbury a question. Incidentally, sir, I think you've done a good job today.

General Hayden testified last week that in the past, the U.S. military has used waterboarding against America's soldiers during the SERE training program. SERE, that's Survival Escape Resistance and Evasion is the acronym. If waterboarding really is torture, then doesn't that mean that the U.S. military routinely tortures soldiers during their training? Would that be lawful? Do you think that those who support a criminal investigation of CIA officers for their interrogation of terrorists also would support an investigation of the military officers who waterboarded our soldiers during training exercises?

Mr. BRADBURY. Well, Mr. Franks, as General Hayden did say, the CIA's use of the waterboarding procedure was adapted from the SERE training program used by the Navy and other departments

of the military, in which many, many members of the military have been trained using that procedure.

And I agree with Chairman Nadler that, as distinct from the cruel, inhuman or degrading treatment shocks the conscience standard under the Detainee Treatment Act, the torture statute is an absolute standard statute. It is a bright line rule and whenever its done in color of law, that's when it's done for Government purposes on behalf of the Government. If it is torture when done for one purpose. The same act would be torture when done for another purpose. So I believe it would be correct that those training personnel engaged in the use of that procedure, which I think was used until very recently, would be guilty of torture.

Mr. FRANKS. Well, again, I would just assert that I too truly believe that torture in our statute and in the practice of this country is illegal and should remain illegal.

I've heard a lot of reports in the press that waterboarding was developed in the Spanish Inquisition and that the United States repeatedly prosecuted it. Is that true? Do you believe that these past historical practices bear any resemblance to the waterboarding as done by the CIA?

Mr. BRADBURY. To my knowledge, they bear no resemblance to what the CIA did in 2002 and 2003. The only thing in common is, I think, the use of water. The historical examples that have been referenced in public debate have all involved a course of conduct that everyone would agree constituted egregious cases of torture.

And with respect to the particular use of water in those cases, as I've indicated, in most of those cases they involved the forced consumption of large amounts of water, to such extent that—beyond the capacity in many cases of the victim's stomach, so that the stomach would be distended. And then in many cases weight or pressure, including in the case of the Japanese, people standing on or jumping on the stomach of the victim, blood would come out of the mouth. And in the case of the Spanish Inquisition, there truly would be agony and, in many cases, death.

And so some of these historical examples I think have been used in a way that's not, I think, an accurate portrayal of what—of the careful procedures that the CIA was authorized to use with strict time limits, safeguards, restrictions, and not involving the same kind of water torture that was involved in most of those cases.

Mr. FRANKS. Mr. Bradbury, my time is almost up, but you've— is it your testimony that waterboarding is indeed not torture and, if so, what briefly would you offer as the difference?

Mr. BRADBURY. Well, let me say—first of all, let me make it very clear, as I tried to do in my testimony, there are a lot of laws that apply here beyond the torture statute, and waterboarding has not been used by the CIA since March of 2003. There has been no determination by the Justice Department that its use today would satisfy those recently enacted laws, in particular the Military Commissions Act, which has defined new war crimes for violations of Common Article 3, which would make it much more difficult to conclude that the practices were lawful today.

But under, strictly speaking, just under the anti-torture statute, as we've said in our December 2004 opinion, there are three basic concepts: severe physical pain, severe physical suffering, and severe

mental pain or suffering, which is specifically defined in the statute.

And if something subject to strict safeguards, limitations and conditions does not involve severe physical pain or severe physical suffering—and severe physical suffering, we said in our December 2004 opinion, has to take account both the intensity of the discomfort or distress involved and the duration. Something can be quite distressing or uncomfortable, even frightening, but if it doesn't involve severe or physical pain and it doesn't last very long, it may not constitute severe physical suffering. That would be—that would be the analysis.

Under the mental side, Congress was very careful in the torture statute to have a very precise definition of severe mental pain or suffering. It requires predicate conditions be met. And then, moreover, as we said in our opinion in December 2004, reading many cases, court cases under the Torture Victims Protect Act, it requires an intent to cause prolonged mental harm. Now that's a mental disorder that is extended or continuing over time. And if you've got a body of experience with a particular procedure that's been carefully monitored that indicates that you would not expect that there would be prolonged mental harm from a procedure, you could conclude that it is not torture under the precise terms of that statute.

Mr. FRANKS. Thank you.

Mr. BRADBURY. The last thing on the torture statute I'd like to say, though, Mr. Chairman, is that the Attorney General has made it clear that if he's essentially taken—he's taking ownership of this issue in the sense that if there were any proposal to use this technique again, the question would have to go to the Attorney General, and he would personally have to determine that it satisfies all the legal standards, including the torture statute. By the way, he is not simply going to rely on past opinions that may have addressed it years ago; he would make an independent and new judgment today as to whether he agrees with that conclusion.

Mr. FRANKS. Mr. Chairman, thank you. I just wanted to ask you to pass something to the Chairman. If indeed we've had testimony in this Committee that waterboarding is being used to train our soldiers, why aren't we investigating that? Why are we more concerned about the terrorists than we are our own soldiers?

Mr. NADLER. Well, first of all, it is not necessary. One of the problems with waterboarding people that you may think are terrorists may not be. There's the question—there is always the question of—

Mr. FRANKS. Well, we know that is happening to our soldiers; why are we not investigating that?

Mr. NADLER. It is training in case they're tortured. That's what it is there for.

Mr. FRANKS. That's my point.

Mr. NADLER. In case they are tortured, because we assume that enemy nations might torture people. We assume that we won't torture people. We don't assume the enemy is going to obey the law, so it may prudent to train our people for torture.

In addition to which, I would point out that at least with respect to the mental element, infliction of severe mental distress, when

they are tortured they know they are not going to die. When someone is being drowned, the mental aspect is he doesn't know you're going to stop. If someone is being trained, he knows you're not going to actually drown him. May be severe physical, but it is certainly not a severe mental aspect. When we are torturing somebody else or someone else is torturing one of our soldiers, they don't know that they are going to be treated kindly.

Mr. FRANKS. But if it is indeed, Mr. Chairman—if it is indeed torture shouldn't we be

Mr. NADLER. Well, is the gentleman asking me to investigate the military?

Mr. FRANKS. I'm asking you to understand the points here.

Mr. DAVIS. Mr. Chairman, can I ask for regular order? Mr. Franks has exceeded his time.

Mr. FRANKS. Thank you.

Mr. NADLER. Mr. Franks has exceeded his time.

I would also point out that one thing is very interesting from Mr. Bradbury's testimony, which really puts a very different light on a lot of things and makes it very necessary to get those documents, is that essentially what he said is that everything we have thought we knew about waterboarding from past cases—what the Japanese did, the Inquisition did, the newspapers have reported—that's not what we're talking about. We are talking about something else which may be different. If that's the case, we have to know about it.

I now recognize the gentleman from Alabama for 5 minutes.

Mr. DAVIS. Thank you, Mr. Chairman.

Mr. Bradbury, I have a number of questions I want to ask you, but I want to pick up on your last line with the Ranking Member. You reiterated to him, and I think you stated in your testimony today, that you do not consider waterboarding to be torture as the term is precisely defined.

Your boss, the Attorney General, was asked a series of questions before the Senate Judiciary Committee and he stated that he would consider waterboarding to be torture if it was done to him. Is the Attorney General being hypersensitive?

Mr. BRADBURY. Well, I think he was describing how he would personally react to what I think everybody would recognize would be a very distressing and frightening procedure.

Mr. DAVIS. Let me pick up on that observation that it is a very distressing and frightening procedure. If individuals were subject to distressing, frightening procedures, is it conceivable that they might respond by lying?

Mr. BRADBURY. Well, I'm not an expert on that.

Mr. DAVIS. Well, let me ask you just to rely on your common sense. If someone—and I recognize we've quibbled today about the definition of waterboarding, let's see if we can agree on some common sense concepts.

Could waterboarding cause someone to feel distressed? If you would give me a simple answer.

Mr. BRADBURY. I think so, yes.

Mr. DAVIS. Could waterboarding cause someone to feel extremely frightened?

Mr. BRADBURY. I think so.

Mr. DAVIS. And if someone were feeling distressed or extremely frightened, would that human being be capable of telling a lie?

Mr. BRADBURY. I suppose so.

Mr. DAVIS. John McCain, who is an authentic American hero and is about to become a nominee of the party that I suspect you belong to, was subject to torture in Vietnam, was he not?

Mr. BRADBURY. Yes, sir.

Mr. DAVIS. And in response to that torture, he signed a confession of being a war criminal. That was a false confession on his part, wasn't it?

Mr. BRADBURY. Yes, sir.

Mr. DAVIS. It was an inaccurate, untruthful statement, was it not?

Mr. BRADBURY. Yes, it was.

Mr. DAVIS. And it was in response to the extreme distress and anxiety that he was experiencing, was it not?

Mr. BRADBURY. I believe he had bones broken and he—

Mr. DAVIS. If you could answer my question.

Mr. BRADBURY. Yes. Yes, it was.

Mr. DAVIS. That's the concern, Mr. Bradbury, that I think a number of us have.

I strongly disagree with the Ranking Member, a very able Member of this Committee, but I strongly disagree with his characterization that those of us who take issue with his position and yours are somehow trying to pass laws that favor terrorists. Some of us are concerned about the inherent unreliability of some of these practices.

You were absolutely correct when you say that someone who is experiencing waterboarding can feel or experience anxiety, distress, and you're absolutely correct to say that people in those conditions can lie. And if people can lie, they are not giving us the inherent information we need. Now let's test that for a moment.

Page 3 of your written statement, you state that these alternative interrogation methods have been used with fewer than one-third of the terrorists who have been detained in this program. Approximately how many people is that, Mr. Bradbury, about 30 or so?

Mr. BRADBURY. I don't think the exact number has been publicly—

Mr. DAVIS. Just give me a ballpark, if you would. This was your word choice.

Mr. BRADBURY. I actually am not authorized to be more precise.

Mr. DAVIS. Well, but this is your word choice. They have been used with fewer than one-third of the terrorists who have been detained. Approximately how many have been detained?

Mr. BRADBURY. Fewer than 100.

Mr. DAVIS. All right. Fewer than 100, a third of those. Have any of those individuals, to your knowledge, lied in response to the interrogation techniques?

Mr. BRADBURY. I don't know.

Mr. DAVIS. Is it conceivable that some of them might have lied?

Mr. BRADBURY. I don't know.

Mr. DAVIS. My point again. Mr. Bradbury, you're right, you don't know, you can't know.

How many prosecutions have been brought based on what those 30 or so individuals have said?

Mr. BRADBURY. Mr. Davis—

Mr. DAVIS. That's a simple question. How many prosecutions have been brought? Have there been any?

Mr. BRADBURY. No.

Mr. DAVIS. No prosecutions have been brought. You don't know if any of them have given untrue or false information. You know, I am an SCC guy, so I like football. That sounds to me like a completion rate that could be pretty low for all we know.

Mr. BRADBURY. May I—may I respond?

Mr. DAVIS. Yes.

Mr. BRADBURY. The purpose of this program is not to obtain evidence to use in criminal prosecutions. The purpose of the program is to obtain intelligence that may be used to—

Mr. DAVIS. No, Mr. Bradbury. We have to test whether or not you are doing that. We have to test—if I could finish my sentence, sir, we have to test whether or not the program is reliable. I assume you don't mean to fashion a program that's unreliable.

Mr. BRADBURY. I—

Mr. DAVIS. I assume you don't mean to fashion a program that doesn't yield results.

Mr. BRADBURY. I don't fashion the program. We don't fashion—

Mr. DAVIS. You don't mean to condone or sanction a program that doesn't yield results, do you?

Mr. BRADBURY. I just give my legal opinion—

Mr. DAVIS. Let me make my point, Mr. Bradbury, since you're not addressing my point. It is a very simple one. We can't measure the accuracy of this program by saying we've gone out and brought hard-and-fast cases based on it. You cannot tell me whether any of these individuals, or all of these individuals, have lied. You've conceded to me that someone facing extreme anxiety and pressure could yield false information.

I add all of that up and come to one simple conclusion: We can't tell if this program is working. You won't give us the information to let us know that. And for some of us, that's not enough for this program to pass muster. And we take that position—not in the name of protecting terrorists, with all due respect to Mr. Franks—we take that position because we want to get the real terrorists, and we don't know if you were succeeding in doing that or if you were unearthing a bunch of lies.

And I yield back the balance of my time.

Mr. BRADBURY. If I might, I rely—I can only rely on what General Hayden has said. General Hayden has said that this program has produced thousands and thousands of intelligence reports that have been extremely valuable in heading—

Mr. DAVIS. That's an inherently subjective conclusion, Mr. Bradbury, that cannot be quantified in any way. It in no way resolves the concerns.

Mr. BRADBURY. I believe he thinks it can be quantified and has been.

Mr. DAVIS. Will he share that information with this Committee?

Mr. BRADBURY. I know he has shared it with the House Intelligence Committee.

Mr. DAVIS. Well, Mr. Chairman, I would end by requesting that if the individual you mentioned, General Hayden, the Intelligence Director, has quantifiable information about the accuracy of this program, we would ask that be disclosed and shared with this Committee.

Mr. NADLER. The time of the gentleman is expired but I would second that as Chair of this Subcommittee. This is squarely within the jurisdiction of the Judiciary Committee as well, and we would ask this be shared with us.

I now recognize the distinguished gentleman from Iowa, Mr. King, for 5 minutes.

Mr. KING. Thank you, Mr. Chairman.

I point out that in the introduction of our witness Mr. Bradbury, it was addressed that he is waiting confirmation by the United States Senate. I believe there are dozens, in fact perhaps hundreds, of the President's appointees awaiting confirmation, and yet the unconfirmed representative of our Federal Government is being pushed to divulge what we know are State secrets here in a public meeting. And I don't take issue with the security clearance.

Mr. NADLER. We have asked that he provide this stuff that's confidential, in confidentiality to this Committee, all of whose Members are cleared to Top Secret information we have not asked.

Mr. KING. Reclaiming my time.

Mr. NADLER. I will give you the time back in a second. And we will take that off the time you are here.

I want to correct the record. Nobody has asked, nobody in this Committee has asked that secret information be disclosed publicly.

Mr. KING. Our definition—thank you, Mr. Chairman, I recognize your point. I think we disagree on what secret information is, and some of that—the State secret has been a subject of debate before this Committee. That would be one. And how many have been interrogated under this fashion? The question that was just asked and the answer Mr. Bradbury gave reluctantly was less than 100.

But I think also some statements that have been made here need to be clarified. One is the statement that we know what waterboarding is. I don't think there is a consensus on this Committee as to what waterboarding is. I think we understand from the testimony what some of the historical examples of or ancient versions of waterboarding are. But I go back to a statement made earlier by the Chairman, that as your lungs fill with water—and I would ask Mr. Bradbury, are you knowledgeable about any activity that would include a modern version of waterboarding in which the subject's lungs would fill with water, literally?

Mr. BRADBURY. No I'm not.

Mr. KING. And I am not either. So I just point that out to illustrate that we don't have a consensus on what we see as waterboarding. You did illustrate how it was used by the Japanese in World War II.

I want to go back to—I want to stress—I want to make another point, is that while we are here having this hearing, talking about State secrets and the risk of divulging information to the terrorists who are pledged to kill us, we have a debate going on on the floor of the House of Representatives right now; at least it is a tactical

negotiation going on right now on the eve of the expiration of our FISA law.

And I want to point out to this Committee that the national security secrets that are subject here and the national security secrets that are the subject of the FISA debate put Americans at risk. And the sunset of the FISA law is an important piece of this that ties this all together, and politics are getting in the way of the policy.

But I'm interested in one piece of the subject, and you went into the details of it to some degree. If your lungs don't fill with water and the fear definition that you gave, how does one define how this is torture under that definition if there isn't a physical pain that's involved and if the lungs aren't filling with water?

Could you go back to that fear factor, the mental pain factor, and the fear definition that you gave Mr. Bradbury?

Mr. BRADBURY. Yes, Mr. King, briefly. There is a specific definition in the anti-torture statute of severe mental pain or suffering, and it requires certain conditions, certain prerequisites or factors be present, and that those factors cause prolonged mental harm.

And one of the factors, the one that raises most questions with respect to this particular procedure, is the question of whether it involves a threat of imminent death. And what's pointed to there is the physiological sensation that's created, physiological or mental sensation, almost like a gag urge of drowning.

The question is whether that's a threat of imminent death. And as I would understand it, as I think the Chairman may have suggested, it's a reaction that even if you're involved in training, as I understand it, the subject would have. So whether or not you know that it's not really involving drowning, you have this physiological reaction, and that's the acute nature of it.

And if that is a threat of imminent death, then you need to ask: Is it the kind that would be expected to cause prolonged mental harm; that is an ongoing, persistent mental disorder as a result of that? That's what the cases have focused on with respect to the Torture Victims Protection Act and that would be—the analysis would turn on that.

Mr. KING. Thank you, just a short—

Mr. BRADBURY. I'm sorry, may I point out, though, I don't want the Committee to lose sight. There are new statutes on the books, and one of them is a new statute, the cruel and inhuman treatment war crime, added by the Military Commissions Act in fall 2006. That's a crime that took this definition from the torture statute and changed it.

Mr. NADLER. It—

Mr. BRADBURY. And it eliminated the prolonged mental harm requirement and made it serious, but nontransitory, mental harm which need not be prolonged. That's a new statute. It became effective in the fall of 2006. The Department has not analyzed this procedure under that statute. And as I think you can tell from the change in the language, that statute would present a more difficult question, significantly more difficult question with respect to this.

Mr. KING. That language sounds vague.

Are you aware of any version of waterboarding that's currently practiced where there has been a result of death?

Mr. BRADBURY. I am not.

Mr. KING. That's my point. Thank you, Mr. Chairman. I yield back.

Mr. NADLER. I thank the gentleman. The gentleman's time has expired. I now recognize for 5 minutes the gentleman from Minnesota.

Mr. ELLISON. General Mukasey testified in a Senate Judiciary Committee that he would not order an investigation of waterboarding depicted on the destroyed tapes, because the OLC had issued opinions regarding torture that were presumably relied upon by those administering the technique.

He gave two reasons. It would not be appropriate for the Justice Department to be investigating itself was one reason. The other reason is it would not be fair to prosecute persons who relied on OLC opinions.

As to the first reason, this is precisely the conflict situation for which the special counsel regulations of the Department call for pointing to someone outside of the Department to conduct important investigations.

But I want to focus on the second reason, which has certain implications I would like you to focus on. At a minimum, we need to investigate whether their actions exceeded the legal advice that OLC gave them, or whether they would have known on their own that waterboarding could not be legal.

But there is much more basic concern. If an OLC opinion, once written, had relied upon and relied upon, will prevent an investigation of executive branch felony or constitutional violations, we face a very dangerous situation. The President or other officials can violate the rights of millions of Americans and simply show that they "relied on an OLC opinion," no matter how far out and baseless the opinion is. And if the victims try to bring a lawsuit, you will use the State secrets option to have the case thrown out of court before it even starts, so perpetrators will not even be investigated.

Isn't that a recipe for unchecked executive power?

Mr. BRADBURY. Well, Congressman, no. I don't—I don't believe it is. And it may not be accepted at this point by this Committee, but I believe that the opinions we are talking about are reasonable and were appropriately relied on by the agency.

I understand this Committee is not in a position now——

Mr. ELLISON. Excuse me. Mr. Bradbury, excuse me, I have got to reclaim my time. How do you know that they were relied upon as you set forth those opinions?

Mr. BRADBURY. That's my understanding.

Mr. ELLISON. What is your understanding based on?

Mr. BRADBURY. Based on my interactions.

Mr. ELLISON. Is it based on you attending the application of these techniques of these enhanced interrogation techniques?

Mr. BRADBURY. No, sir.

Mr. ELLISON. Were you ever present for an incident of waterboarding?

Mr. BRADBURY. No.

Mr. ELLISON. Now, you said earlier that——

Mr. BRADBURY. I'm sorry, may I respond?

Mr. ELLISON. No, I reclaim my time, sir. I'm sorry.

Now, you indicated earlier that the waterboarding that we've been talking about, applied by people who you give legal advice to, is nothing like what happened to American soldiers at the hands of the Japanese or in the Spanish Inquisition. You've made that point clear.

Can you tell us exactly what it is like? Can you describe exactly what—how this technique is applied, based upon the advice that you have given?

Mr. BRADBURY. No, Mr. Ellison, I'm really not—

Mr. ELLISON. Have you seen video tape?

Mr. BRADBURY. That—no, I've not.

Mr. ELLISON. And so you haven't been there and you haven't seen videotape. So how in the world do you know that the advice you've been giving has been properly relied on? Somebody told you?

Mr. BRADBURY. I have reason to believe.

Mr. ELLISON. Which is what?

Mr. BRADBURY. In my interactions with the people that we work with.

Mr. ELLISON. Okay, your interactions. Are you talking about statements that were made to you, and that's what you're relying on?

Mr. BRADBURY. Talking about statements between clients and lawyers.

Mr. ELLISON. I know. I'm not asking you about what your client said or what you said back. I'm saying how do you know that the advice that you were given was properly relied on, how do you know that? How do you know that the limits were not exceeded?

Mr. BRADBURY. I believe that—

Mr. ELLISON. Because somebody told you, right?

Mr. BRADBURY. I believe that that's—

Mr. ELLISON. Because somebody said so, right?

Mr. BRADBURY. I don't have—I believe that that is the case.

Mr. ELLISON. Okay, so—

Mr. BRADBURY. May I make—

Mr. ELLISON. No, no, you can't, because I only have 5 minutes. If I had more time you could talk all you want.

Mr. BRADBURY. I would like to respond to—

Mr. ELLISON. No, I am going to ask you to answer my questions. That's the way this hearing goes.

So let me ask you this. I think the point was made before that it's somehow torture for the American military to use waterboarding as a training exercise, you agreed that it would in fact be torture if it were done and a violation of law. That's what you said, right?

Mr. BRADBURY. If something is torture for one purpose but it's done by the Government for another purpose, the same procedure would be torture in the other context.

Mr. ELLISON. Sure. So when a police officer goes and sells drugs as an undercover agent, do you think they should be prosecuted for controlled substance violations? I would guess you would say no to that, right?

Mr. BRADBURY. May I?

Mr. ELLISON. No. I mean, sting operations, if somebody—if a police officer is told there's a child pornographer—

Mr. BRADBURY. Mr. Chairman, may I respond?

Mr. ELLISON. Respond to the question. You have to be responsive.

Mr. BRADBURY. May I? May I respond?

Mr. ELLISON. If you're responsive.

Mr. BRADBURY. There are lines of cases addressing exactly that circumstance that say generally worded statutes that simply say any person are not reasonably read to cover the police officer in circumstances that you've suggested, because it would be an absurd result and it would not allow the Government to undertake an essential function. In this case we're dealing with a statute that says under Color of Law it is specifically addressed to Government activity. So that line of cases would not apply to this statute.

Mr. ELLISON. Right. And I'm sure you'll provide the citations for the cases.

Mr. BRADBURY. If you would like.

Mr. ELLISON. I would like.

Mr. BRADBURY. I'm happy to.

Mr. ELLISON. You mean at some later point?

Mr. BRADBURY. Well, I don't have the names of the cases on me.

Mr. ELLISON. So for example, you're saying there's a case, so trust me?

Mr. BRADBURY. Sure, there are Third Circuit cases and Second Circuit cases.

Mr. ELLISON. But you don't know the cases and so you can get them to me later.

Mr. BRADBURY. I'm happy to do that.

[The information referred to is available on page 46.]

Mr. ELLISON. As a person who has practiced law for 16 years, if I told a judge, hey, there's a case, Judge, it wouldn't pass muster. Not that I'm a judge here, but you're citing caselaw, so I expect you to at least know the name of the case.

Mr. BRADBURY. I'm not making a legal argument.

Mr. ELLISON. All right. Now, let me just ask you this question. Are we done? Okay, I'm done.

Mr. NADLER. The time of the gentleman has expired. The gentleman from Virginia is recognized for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman. Mr. Bradbury, in your statement you said that the CIA program is very narrow in scope and is reserved for a small number of most hardened terrorists believed to possess uniquely valuable intelligence, intelligence that could directly save lives. Later on you say fewer than 100 terrorists have been detained by the CIA as part of this program. It's been one of the most valuable sources of intelligence.

If you're using what everybody else in the world would consider torture, is it okay if you're not doing it to too many people and you're getting good information?

Mr. BRADBURY. No. If it's torture it's not okay. We recognize, and this is what we said in our December 2004 opinion, torture is abhorrent. And I think the President has made it clear that it's not condoned or tolerated.

Mr. SCOTT. That's 2004. What about 2005?

Mr. BRADBURY. I'm sorry, in 2005?

Mr. SCOTT. The 2005 memo.

Mr. BRADBURY. Our memos have consistently applied the principles from the December 2004 opinion.

Mr. SCOTT. And so if it's—is there any international precedence outside of this Administration that suggests that waterboarding is not torture? Anybody else in the world ever consider waterboarding not torture except this Administration?

Mr. BRADBURY. I am not aware of precedents that address the precise procedures used by the CIA. I'm simply not aware of precedents on point. And that's often what makes, frankly what makes our job difficult. And I recognize that—

Mr. SCOTT. Well, you had the stuff on tape. You've heard the, I'm sure you've heard the joke about the guy who was testifying in his murder trial and the prosecutor asking him to tell the truth and the guy said yes and the prosecutor said, do you know the penalty for perjury, and the defendant said yes, it's a whole lot less than the penalty for murder.

Now, my question is, is the penalty for destroying the CIA tapes less or more than the penalty that could have been imposed had the contents of the tape been seen?

Mr. BRADBURY. I don't know the answer. I'm not in a position to answer that. Of course that matter is being handled by John Durham, the acting U.S. attorney in the Eastern District of Virginia.

Mr. SCOTT. Was your office involved in the discussion as to whether or not the CIA tapes should have been destroyed?

Mr. BRADBURY. I was not, and to my knowledge I don't know of anybody who was.

Mr. SCOTT. You do not know—

Mr. BRADBURY. I don't know of anybody in our office who was.

Mr. SCOTT. Well, who was involved in the discussion?

Mr. BRADBURY. I don't know. I don't have personal knowledge of that.

Mr. SCOTT. Well, give us some leads. Who do you think was involved?

Mr. BRADBURY. I'm not in a position, Mr. Scott, to do that. I only know what I've read in the paper about the—

Mr. SCOTT. And so if we're trying to find out who was involved in the discussion of the destruction of the CIA tapes, who should we look to?

Mr. BRADBURY. I would look to the outcome of Mr. Durham's investigation.

Mr. SCOTT. Well, I mean, help us out a little bit. You're right here. Who would be involved in that discussion, in your opinion?

Mr. BRADBURY. Well, I believe communications between the Department and—I know Chairman Reyes on the Intel Committee had been handled by the deputy, the acting deputy attorney general, and so I would refer you to his office.

Mr. SCOTT. Okay. You've indicated that you want to be clear. Let me be clear, though. There has been no determination by the Justice Department. The use of waterboarding under any circumstances would be lawful under current law.

Mr. BRADBURY. That's correct.

Mr. SCOTT. Has there been any determination that it is unlawful under current law?

Mr. BRADBURY. No, sir, because the Department, as I've tried to indicate, has not had occasion to address the question since the enactment of these new laws.

Mr. SCOTT. And we don't have the CIA tapes to know what we're talking about, so everything is kind of vague. In the 2007 Executive order in your statement says, the Executive order makes clear to the world that the CIA program must and will be operated in complete conformity with all applicable statutory standards, including Federal prohibition against torture, the prohibition on cruel inhumane or degrading treatment contained in the Detainee Treatment Act and the prohibitions on grave breaches of Common Article 3 in the Geneva Conventions as defined in the amended War Crimes Act. Did that part of the Executive order change anything?

Mr. BRADBURY. Yes, in the sense that that Executive order—that part of the Executive order simply affirms that those statutes must be complied with.

Mr. SCOTT. Did that part of the—

Mr. BRADBURY. That doesn't—I'm sorry?

Mr. SCOTT. Did that part of the Executive order change anything?

Mr. BRADBURY. No, not in the sense that those statutes on their own terms do apply. In other words, recognize that those statutes must be satisfied. But I think the one thing the Executive order does do is—

Mr. SCOTT. I'm just talking about that part of the Executive order that says you're going to comply with the law.

Mr. BRADBURY. We have to comply with the law. The program has to comply with the law.

Mr. SCOTT. So those words didn't add anything. Could we be concerned about the word "grave," prohibitions on grave breaches of Common Article 3?

Mr. BRADBURY. That's the term, Congressman, that's used in the Military Commissions Act, which define those new War Crimes Act offenses. That's the term that is used in the statute. That's all that is referring to. Those are those serious violations of Common Article 3 that merit criminal penalties.

Mr. SCOTT. So breaches of Common Article 3 that are not grave are not illegal under the War Crimes Act; they're improper apparently, but not illegal under the War Crimes Act?

Mr. BRADBURY. That's correct. They would be a violation of our treaty obligations. And other aspects of the President's Executive order address those other aspects of Common Article 3. The purpose of the Executive order is to define requirements to ensure compliance with our treaty obligations under Common Article 3.

Mr. SCOTT. My time has just about expired, Mr. Chairman. I yield back.

Mr. NADLER. I thank the gentleman. I now recognize the gentleman from North Carolina for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman. Mr. Bradbury, on page 2 of your written testimony you say that fewer than 100 terrorists have been detained by the CIA as part of the program since its inception in 2002. Those are the people who were at Guantanamo?

Mr. BRADBURY. I believe the 14, maybe 15 high value detainees at Guantanamo who were transferred there from CIA custody are

among those who have ever been detained by the CIA. But the CIA has held others. So that's not the sum total of the terrorists who have ever been detained in this program by the CIA. Those were the ones who were—I believe, as the President said in September of 2006, when the 14 HVDs were moved to Gitmo at that time, that that emptied the overseas facilities of the CIA. At that time there were no—

Mr. WATT. What's the totality of the number of people that was held at Guantanamo?

Mr. BRADBURY. Over time or today?

Mr. WATT. Over time and today.

Mr. BRADBURY. I believe over time it may have—I may not have the accurate number. It may be somewhere around 700, 750. And today I believe it's about 350.

Mr. WATT. And if I were trying to determine the disposition of one or more of those 350 people who are still there—well, first of all, what is the maximum duration that they have been held there?

Mr. BRADBURY. I believe the first detainees came into Gitmo around January or February of 2002, I believe.

Mr. WATT. So we've got some people there who have been there since 2002?

Mr. BRADBURY. I believe so.

Mr. WATT. And they're still there. And have they been formally charged with anything?

Mr. BRADBURY. Some of them have been. A small number have been formally charged. That number is growing as we move forward with military commission procedures. All of them have had the combatant status review tribunal determinations that they are enemy combatants. They go through that process, which is then subject to appeal to the D.C. Circuit under the Detainee Treatment Act.

Mr. WATT. And if I were trying to find out the status of one or more of those 350 people, who would I be contacting?

Mr. BRADBURY. I would suggest that you contact Gordon England, the Deputy Secretary of Defense, directly.

Mr. WATT. And would he be in a position to determine who's there and what their disposition is; is that the information that would be made available to a Member of Congress?

Mr. BRADBURY. I don't know for sure, but I believe yes, sir. I believe he'll be able to provide that information.

Mr. WATT. Okay. And he's at the Department of Defense?

Mr. BRADBURY. He's the Deputy Secretary of Defense, Mr. England.

Mr. WATT. Okay. The whole legal regimen you say has changed now; new statutes. I'm wondering whether the President still has, in your opinion, the authority to under Article 2 to disregard the new legal framework, regardless of what—let's suppose you all issued an opinion that said under the new framework waterboarding was illegal.

Mr. BRADBURY. Correct.

Mr. WATT. Could the President disregard that under Article 2?

Mr. BRADBURY. I don't believe the President would ever—

Mr. WATT. I didn't ask you whether he would do it. I said could he do it?

Mr. BRADBURY. May I make a couple of points?

Mr. WATT. If you will answer my question first, you could make as many points as you would like. I would like to know first whether in your legal opinion the President has the authority under Article 2 to disregard an opinion that your office has issued?

Mr. BRADBURY. I don't believe he would disregard—

Mr. WATT. I didn't ask you that, Mr. Bradbury. I asked you whether he would have the authority to do it. I didn't ask you whether he would do it or not.

Mr. BRADBURY. Well, he—

Mr. WATT. I give my President the same presumptions that you do, that he would not.

Mr. BRADBURY. He would not.

Mr. WATT. But would he have the authority to do it under Article 2? That's the question I'm trying to—

Mr. BRADBURY. Could I get to that in a second?

Mr. WATT. What about answering that first and then getting to the explanation?

Mr. BRADBURY. This Congress has constitutional authority to enact these provisions, these War Crimes Act offenses. And so I believe they're constitutional. The Congress has authority to define offenses against the law of nations. It's constitutional authority that Congress has. There's no question about the constitutionality of the statutes. Moreover, traditionally and by statute the Attorney General is the chief law enforcement officer for the United States who gives opinions for the executive branch on what the law requires. And in all cases the President will look to those opinions; will not disregard them.

Now, in theory, Congressman, the President stands at the top of the executive branch. So in theory all of the authority of executive branch officers, including the Attorney General, is subject to the ultimate authority of the President. That said, it's not—it is quite hypothetical, and I believe unsustainable, for the President to disregard an opinion of the Attorney General, particularly a considered formal opinion of the Attorney General.

Mr. WATT. My question you still haven't answered even after all of that. Does the President have the authority to disregard the opinion under Article 2?

Mr. BRADBURY. Well, the President is sworn to—

Mr. WATT. I understand—

Mr. NADLER. The time of the gentleman has expired. I believe, Mr. Bradbury, your answer is yes, he has that authority?

Mr. BRADBURY. Well, Mr. Chairman, you are putting words in my mouth.

Mr. NADLER. Yes, I am. I think you've said he has that authority, but it would be very rare for him to exercise it.

Mr. WATT. Well, the question is does he have the authority, and if he does—I mean, I would love to have gotten, if you hadn't rosey doped my whole 5 minutes here, to the next question, which is are there any limits to that authority?

Mr. BRADBURY. Yes, there are.

Mr. NADLER. Answer that question briefly.

Mr. BRADBURY. General Hayden has very clearly said, and this is a practical limit that matters under our system of Government,

he will not order his people and his people will not do anything that the Attorney General has determined is inconsistent with a statute that applies.

Mr. WATT. So if the President of the United States issues the order to General Hayden, he's not going to—he's going to listen to the Attorney General rather than to the President of the United States, that's what you're saying?

Mr. BRADBURY. That's what General Hayden has said.

Mr. NADLER. The time of the gentleman has expired. All time has expired.

Mr. Bradbury, our Members may have additional questions after this hearing. We've had some difficulty getting responses to our questions from the Justice Department and timely responses when we get them at all. Will you commit to providing a written response to our written questions within 30 days of receipt of the questions?

Mr. BRADBURY. Yes. I will do it as soon as possible and I will make every effort to do it within 30 days.

Mr. NADLER. Thank you. Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witness, which we will forward and ask the witness to respond as promptly as you can so that your answer may be made part of the record.

Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record.

I will note for the edification of the Members there are 7 minutes left on the vote on the motion to adjourn on the floor. With that, this hearing is adjourned.

[Whereupon, at 1:25 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

February 12, 2008

The Honorable Glenn A. Fine
Inspector General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

The Honorable H. Marshall Jarrett
Counsel for Professional Responsibility
U.S. Department of Justice
950 Pennsylvania Avenue, NW, Room 3266
Washington, D.C. 20530

Dear Inspector General Fine and Counsel Jarrett:

We request that you investigate the role of Justice Department officials in authorizing and/or overseeing the use of waterboarding by the Central Intelligence Agency.

Attorney General Michael Mukasey refuses to investigate the Administration's authorization and use of waterboarding. CIA Director Michael Hayden has testified that the CIA waterboarded three detainees, and Attorney General Mukasey has testified that, "There are circumstances where waterboarding is clearly unlawful." Nonetheless, the Attorney General refused Senator Durbin's request to investigate because he does "not believe such an investigation is necessary, appropriate, or legally sustainable."

Attorney General Mukasey admitted that, "the CIA sought advice from the Department of Justice, and the Department informed the CIA that [waterboarding's] use would be lawful under the circumstances and within the limits and the safeguards of the program." The Attorney General's justification for refusing to open an investigation is that, "no one who relied in good faith on the Department's past advice should be subject to criminal investigation for actions taken in reliance on that advice." However, this does not address Senator Durbin's request that "a Justice Department investigation should explore whether waterboarding was authorized and whether those who authorized it violated the law" (our emphasis).

Waterboarding has a sordid history in the annals of torture by repressive regimes, from the Spanish Inquisition to the Khmer Rouge. The United States has always repudiated waterboarding as a form of torture and prosecuted it as a war crime. The Judge Advocates General, the highest-ranking attorneys in each of the four military services, have stated unequivocally that waterboarding is illegal and violates Common Article 3 of the Geneva Conventions.

Yet, despite the virtually unanimous consensus of legal scholars and the overwhelming weight of legal precedent that waterboarding is illegal, certain Justice Department officials, operating behind a veil of secrecy, concluded that the use of waterboarding is lawful. We believe it is appropriate for you to investigate the conduct of these Justice Department officials. As you know, a similar investigation is underway regarding Justice Department officials who advised the National Security Agency that its warrantless surveillance program is lawful.

To restore the faith of our intelligence professionals and the American people in the Justice Department's ability to provide accurate and honest legal advice, we request that you make your findings public.

We ask that you explore, among other things:

- Did Justice Department officials who advised the CIA that waterboarding is lawful perform legal work that meets applicable standards of professional responsibility and internal Justice Department policies and standards? For example, did these officials consider all relevant legal precedents, including those that appear to contradict directly their conclusion that waterboarding is lawful? Did these officials consult with government attorneys who are experts in the relevant legal standards, e.g. Judge Advocates General who are experts in the Geneva Conventions? Was it reasonable to rely on standards found in areas such as health care reimbursement law in evaluating interrogation techniques?
- Were Justice Department officials who advised the CIA that waterboarding is lawful insulated from outside pressure to reach a particular conclusion? What role did White House and/or CIA officials play in deliberations about the lawfulness of waterboarding?

We agree with Attorney General Mukasey that our intelligence professionals should be able to rely in good faith on the Justice Department's legal advice. However, if CIA agents or contractors have been put in jeopardy by misguided counsel from the Justice Department, including legal opinions that the Administration has been forced to repudiate, and as a result they risk war crimes prosecution overseas, this is a serious matter. It also places CIA agents at risk of receiving similarly flawed advice in the future. Moreover, the Justice Department's continued refusal to repudiate waterboarding does tremendous damage to America's values and image in the world and places Americans at risk of being subjected to waterboarding by enemy forces. We believe it merits investigation to determine if these grievous results were the product of legal theories violating the Department's professional standards, or improper influence violating the Department's standards for independent legal advice.

We respectfully request that you inform us whether you plan to initiate a review as soon as possible, and no later than February 19, 2008. We also request that you inform us whether the results of your review will be provided to Congress and made public. Thank you for your time and consideration.

Sincerely,
Richard J. Durbin
U.S. Senator

Sheldon Whitehouse
U.S. Senator

ROLL CALL

Seeking an Inquiry on Torture

February 13, 2008

Senate Majority Whip Dick Durbin (D-Ill.) and Sen. Sheldon Whitehouse (D-R.I.) on Tuesday called on the Department of Justice's inspector general to launch an investigation into the role DOJ officials have played in authorizing the use of waterboarding during interrogations.



At the same time, Senate Majority Leader Harry Reid (D-Nev.) on Tuesday reiterated that President Bush's nomination of Steven Bradbury to become an assistant attorney general was dead in the Senate.

"There will never be any movement" on Bradbury, Reid said, adding that "Bradbury will never be approved by the Democrats. Too many people think that he shouldn't be approved."

Bradbury's nomination has run into opposition over his role in setting the Bush administration's policies on torture, including the potential use of waterboarding.

In a letter to the IG, Durbin and Whitehouse call for an investigation of "certain Justice Department officials, [who] operating behind a veil of secrecy, concluded that the use of waterboarding is lawful. We believe it is appropriate for you to investigate the conduct of these Justice Department officials. As you know, a similar investigation is underway regarding Justice Department officials who advised the National Security Agency that its warrantless surveillance program is lawful."

Durbin and Whitehouse note that Attorney General Michael Mukasey has thus far refused to conduct his own inquiry into the matter, which is why they have called on the IG.

— **John Stanton**



U.S. Department of Justice

Office of Legal Counsel

Office of the Principal Deputy Assistant Attorney General

Washington, D.C. 20530

February 25, 2008

The Hon. Jerrold Nadler
U.S. House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Civil Liberties
2138 Rayburn House Office Building
Washington, D.C. 20515

Re: "Oversight Hearing on the Justice Department's Office of Legal Counsel"
(Feb. 14, 2008)

Dear Chairman Nadler:

Thank you for the opportunity to appear before the Subcommittee last week. I write to clarify and correct the record with respect to three matters addressed at the hearing.

First, Ranking Member Franks asked me during the hearing to describe the legal standards under the anti-torture statute, and I provided the following response:

MR. BRADBURY: [U]nder the anti-torture statute, as we've said in our December 2004 opinion, there are three basic concepts: severe physical pain, severe physical suffering and severe mental pain or suffering, which is specifically defined in the statute. And if something subject to strict safeguards, limitations and conditions does not involve severe physical pain or severe physical suffering—and severe physical suffering we said in our December 2004 opinion has to take account of both the intensity of the discomfort or distress involved and the duration, and something can be quite distressing or uncomfortable even frightening—but if it doesn't involve severe physical pain and it doesn't last very long, it may not constitute severe physical suffering. That would be the analysis.

Following my testimony, the *Washington Post* erroneously described that statement as reflecting the conclusion that an act would constitute torture only if it involves "severe and lasting pain." The *Post* subsequently issued the following correction on February 22, 2008:

A Feb. 17 A-section article misstated a portion of testimony from Steven G. Bradbury, acting chief of the Justice Department's Office of Legal Counsel. Bradbury told a House Judiciary subcommittee that an interrogation tactic may violate a federal anti-torture statute if it constitutes severe or lasting physical pain, not both severe and lasting pain.

In order to ensure that the Committee did not misunderstand my testimony, I would like to reiterate that the anti-torture statute prohibits three categories of acts: those specifically intended to inflict “severe physical pain,” “severe physical suffering,” or “severe mental pain or suffering.” An act may inflict “severe physical pain” no matter how short its duration. As I emphasized in my testimony, only if the act does not constitute “severe physical pain” would it be necessary to consider its duration (as well as its intensity) in determining whether it amounts to “severe physical suffering.” In addition, it would be necessary to consider whether the act constitutes “severe mental pain or suffering,” which includes a statutory requirement of “prolonged mental harm.” As I also emphasized, Congress has passed several recent laws prohibiting conduct not rising to the level of torture, and those statutes would need to be considered in reviewing the lawfulness of future conduct wholly apart from the anti-torture statute.

Second, I testified at last week’s hearing that if an act were to constitute unlawful torture when performed for the purpose of gathering intelligence, then it also would constitute torture if done by the Government for another purpose, such as if it were done as part of a program for training military personnel in the resistance of enemy interrogations. In response to that testimony, I had the following exchange with Representative Ellison:

REP. ELLISON: Okay, so when a police officer goes and sells drugs as an undercover agent, you think they should be prosecuted for crack—for controlled substance violations? I would guess you’d say no to that, right?

MR. BRADBURY: And, may I?

REP. ELLISON: No, I mean, sting operations. If somebody—if police officers pose as a child pornographer—

MR. BRADBURY: Mr. Chairman, may I respond, because—

REP. ELLISON: Respond to the question—

MR. BRADBURY: May I? May I respond? May I?

REP. ELLISON: If you’re responsive.

MR. BRADBURY: There are lines of cases addressing exactly that circumstance that say generally worded statutes that simply say “any person” are not reasonably read to cover the police officer in circumstances that you’ve suggested because it would be an absurd result and it would not allow the government to undertake an essential function. In this case—

REP. ELLISON: Thank you.

MR. BRADBURY: In this case we're dealing with a statute that says "under color of law." It is specifically addressed to government activity, so there—that line of cases would not apply to this statute.

REP. ELLISON: Right. And you—I'm sure you'll provide the citations for the cases.

During my testimony, I was unable to identify particular cases in response to Representative Ellison's question. In order to complete the record, however, I would submit the following legal authority in support.

It is well established that generally worded criminal statutes do not prohibit reasonable conduct by government agents, such as those who make undercover drug sales or conduct "sting" operations against peddlers of child pornography. *See, e.g., Brogan v. United States*, 522 U.S. 398, 406 (1998) (holding that a statute prohibiting "any" false statement "does not make it a crime for an undercover narcotics agent to make a false statement to a drug peddler.") (alteration and internal citation omitted); *Nardone v. United States*, 302 U.S. 379, 384 (1937) (finding it an "obvious absurdity" to apply "a speed law to a policeman pursuing a criminal or the driver of a fire engine responding to an alarm."); *United States v. Condon*, 170 F.3d 687, 690 (7th Cir. 1999) (The terms "whoever" and "any person," as used in the federal anti-gratuity statute, do not prohibit the "authorized acts of federal agents, in the ordinary course of their duties."); *United States v. Singleton*, 165 F.3d 1297, 1299-1302 (10th Cir. 1999) (en banc) (holding that a statute that criminalizes "whoever" "promises anything of value" in exchange for the testimony of "any person" does not apply to or prohibit an Assistant United States Attorney from offering leniency to defendant's accomplice in exchange for the latter's testimony). By contrast, that exception does not apply when the statute, read in context, specifically applies to and prohibits a government agent's conduct. *See, e.g., Nardone*, 302 U.S. at 384; *Condon*, 170 F.3d at 689-90. Because the federal anti-torture statute is specifically directed at government conduct—insofar as it prohibits actions taken "under the color of law," 18 U.S.C. § 2340(1)—it prohibits all torture committed by government agents, regardless of the purpose for which it was committed.

Finally, during the hearing, I had the following exchange with Representative Ellison:

REP. ELLISON: So you haven't been there and you haven't seen videotape, so how in the world do you know that the advice you've been giving has been properly relied on? Somebody told you?

MR. BRADBURY: I have reason to believe it was—

REP. ELLISON: Which is what?

MR. BRADBURY: My interactions with the people that we work with—

REP. ELLISON: Okay, your interactions. Are you talking about statements that were made to you and that's what you're relying on?

MR. BRADBURY: Talking about statements between clients and lawyers as to what—

REP. ELLISON: I know. I'm not asking you about what your client said or what you said back; I'm saying how do you know that the advice you were giving was properly relied on? How do you know that? How do you know that the limits were not exceeded?

MR. BRADBURY: I believe that—

REP. ELLISON: Because somebody told you, right?

MR. BRADBURY: I believe that that's—

REP. ELLISON: Because somebody said so, right?

MR. BRADBURY: I don't have—I believe that that is the case.

I was hampered in responding to these questions because they involve classified operational matters and confidential attorney-client interactions. Although I may have my own opinions on these matters, the primary role of the Office of Legal Counsel is to render prospective opinions for executive agencies on the correct interpretation of the law, not to evaluate the past actions of agencies to judge whether they have complied with all applicable legal requirements. In the case of the CIA, other officials or entities are better equipped than OLC to make such judgments, including the Director of National Intelligence and the Director of the CIA, with the assistance of the CIA's Inspector General; the Attorney General, with the assistance of others within the Department of Justice; and the Intelligence Committees of Congress. You can be assured that there has been and continues to be rigorous oversight of the CIA's program of detention and interrogation. In addition, as with any complex and sensitive operational program, the conditions applicable to the CIA program have been modified over time in light of experience with the program, and OLC's legal advice has taken account of such modifications.

Thank you for the opportunity to clarify and complete the record of my testimony before the Subcommittee, and I would ask that you please include this letter in the hearing record. I appreciate the opportunity to have appeared before the Subcommittee.

Sincerely,



Steven G. Bradbury
Principal Deputy Assistant Attorney General

Attachment

cc: The Honorable Trent Franks, Ranking Member
The Honorable Keith Ellison





U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

August 18, 2008

The Honorable Jerrold Nadler
Chairman
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Please find enclosed responses to questions arising from the February 14, 2008, appearance before the Subcommittee of Deputy Assistant Attorney General Steven Bradbury at a hearing entitled "Oversight Hearing on the Justice Department's Office of Legal Counsel." We hope that this information is of assistance to the Subcommittee. Please do not hesitate to call upon us if we may be of further assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "Keith B. Nelson".

Keith B. Nelson
Principal Deputy Assistant Attorney General

cc: The Honorable Trent Franks
Ranking Minority Member

Subcommittee on the Constitution, Civil Rights, and Civil Liberties
Committee on the Judiciary
U.S. House of Representatives

Questions for the Record for
Steven G. Bradbury
Principal Deputy Assistant Attorney General
Office of Legal Counsel

Arising from a Hearing Entitled
“Oversight Hearing on the Justice Department’s Office of Legal Counsel”

February 14, 2008

Questions Submitted by Chairman Jerrold Nadler

In your testimony before the Subcommittee, you agreed that, under the Convention Against Torture and the implementing Federal Torture Statute, torture is absolutely barred, and that this does not depend on the circumstances.

You said that, in your legal opinion, the CIA procedure did not violate the Convention Against Torture and the Federal Torture Statute, which prohibits: “An act . . . specifically designed to inflict severe physical or mental pain or suffering.”

You also referenced the December 30, 2004, Memorandum Opinion for the Deputy Attorney General by then acting head of OLC, Daniel Levin (Levin Memorandum) as the basic Justice Department position on what constitutes a violation of the Torture Statute. The Levin Memorandum makes clear—and your testimony confirms—that “severe physical pain,” “severe physical suffering,” and “severe mental suffering” are distinct triggers of the Torture Statute. You first questioned whether the CIA’s form of waterboarding was sufficiently painful physically to constitute torture. You then analyzed whether it constituted severe physical suffering or severe mental pain or suffering. Your comments raised several questions:

1. Physical Pain

The Levin Memorandum also makes clear that “severe pain” under the Convention and Statute need only be “intense” or “hard to endure.” It need not be “excruciating” or “agonizing.” Moreover, if the physical pain is sufficiently intense, it does not have to be prolonged to constitute torture.

Although you said the CIA waterboarding protocol involves strict safeguards, limitations, and conditions, medical experts have pointed out that waterboarding is

inherently uncontrolled and imprecise because each individual will experience and react to it differently and in unpredictable ways. The pain caused by oxygen deprivation and small amounts of water invading the respiratory system inevitably will vary among different subjects being waterboarded. So will the physiological stress caused by fear of drowning and the physical impact of stress hormones it produces, like adrenalin, cortisol and epinephrine. In addition, the subjects may be persons who have high blood pressure, or other cardiovascular and pulmonary illness.

In short, the method of waterboarding—angle of the board, amount and rate of water application, duration of the waterboarding—may be controlled and precise, but the resulting impact on the waterboarded subject can be neither precise nor controlled.

In light of that variation of physiological response, and the effect of varying preconditions, what is the basis for your assurance that waterboarding under the CIA protocol does not cause the “intense pain” that constitutes unlawful torture?

ANSWER: Information provided by the CIA indicated that the CIA’s proposed interrogation practices, subject to limitations, conditions, and safeguards, were not designed to cause, and would not be expected to cause, physical pain of such intensity as to constitute “severe physical pain” within the meaning of 18 U.S.C. § 2340(1). Relevant limitations, conditions, and safeguards have included, among other things, individual assessments of each detainee’s medical and psychological health, as well as monitoring for indications of changes in a detainee’s medical and psychological condition. The current CIA program is governed by Executive Order 13440, which requires the Director of the CIA to approve individually tailored interrogation plans contingent upon medical and psychological assessments and monitoring to help ensure safe treatment of detainees and compliance with all legal and policy standards applicable to the program. As has been publicly stated, waterboarding is not currently authorized for use in the CIA program and was last employed by the CIA in March 2003.

2. Physical Suffering

The Levin memorandum further states that “severe suffering” can occur even in the absence of “severe pain.” As you acknowledged, “severe suffering,” according to the Levin Memorandum, is calculated as a combination of intensity and duration. However, your testimony referred to the duration of the administered waterboarding. Specifically, you said that:

Something can be quite distressing, uncomfortable, even frightening [but] if it doesn’t involve severe physical pain, and *it doesn’t last very long*, it may not constitute severe physical suffering. That would be the analysis.

Yet the Levin Memorandum clearly refers to the duration of the physical suffering, not merely to the duration of the physical act of torture.

Prolonged intense physical suffering, even after relatively brief waterboarding itself ends, may be caused by oxygen deprivation, by even small amounts of water being drawn into the respiratory tract, and by the continuing physiological effects of the acute stress of perceived drowning described above.

(A) In light of the distinct possibility of intense physical suffering, the unpredictable results, and the fact that, by definition, severe physical suffering need not involve intense physical pain, what is the basis for your assurance that waterboarding under the CIA protocol does not cause the "intense physical suffering" that constitutes unlawful torture?

ANSWER: Information provided by the CIA indicated that the CIA's proposed interrogation practices, subject to limitations, conditions, and safeguards, were not designed to cause, and would not be expected to cause, physical pain, discomfort, or distress of such intensity or duration as to constitute "severe physical suffering" within the meaning of 18 U.S.C. § 2340(1).

(B) If the CIA's form of waterboarding does not cause intense physical pain or suffering, then how can you explain the fact that hardened, zealous terrorists reportedly broke in less than two dozen seconds and divulged information?

ANSWER: Responding to this question would require disclosure of classified information about particular interrogations. Such information has been provided in classified briefings to or testimony before the Intelligence Committees of Congress or their staffs.

3. Mental Pain and Suffering

As the Levin Memorandum notes, intentionally inflicting the intense mental anguish caused by the sensation and fear of imminent death, in order to obtain information, is expressly listed in the Torture Statute as one of the specified ways of inducing severe mental pain and suffering covered by the Statute. That is precisely the means by which CIA interrogators sought to induce full disclosure. Your testimony suggested that mental pain and suffering must be "prolonged" in order to constitute torture. As in the case of physical suffering, however, the Levin Memorandum makes clear that the requirement refers to prolonged harm resulting from the waterboarding, not to the duration of the waterboarding itself.

(A) On what do you base the suggestion that detainees who suffer the sensation of drowning will not experience intense mental harm or suffering for sometime afterwards, including the possibility of severe post traumatic stress disorder?

ANSWER: Information provided by the CIA indicated that the CIA's proposed interrogation practices, subject to limitations, conditions, and safeguards, were not designed to cause, and would not be expected to cause, "severe mental pain or suffering" within the meaning of 18 U.S.C. § 2340(2). The definition of "severe mental pain or suffering" under 18 U.S.C. § 2340(2)

requires the occurrence of one of the four specified predicate acts, as well as resulting "prolonged mental harm." Relevant limitations, conditions, and safeguards have included, among other things, individual assessments of each detainee's medical and psychological health, as well as monitoring for indications of changes in a detainee's medical and psychological condition.

(B) On what basis can you assume that, even if the waterboarding itself lasts only a brief period, it will not cause "prolonged" mental pain or suffering? In providing your response to this question, please keep in mind that the claim that the CIA interrogators using the protocol do not seek to inflict prolonged mental pain or suffering, and merely seek to inflict it momentarily so that the detainee will talk, is not a responsive answer. The Levin Memorandum did not conclude that the specific intent requirement of the Torture Statute is unmet if the specified harm is the foreseeable result of the waterboarding.

ANSWER: Please see the answer to question 3(A).

(C) The detainee must anticipate the prospect of additional waterboardings should the CIA interrogators become dissatisfied with the completeness or accuracy of his answers after the first waterboarding session, or if they pose additional questions, which he resists answering. This is likely to be a constant source of severe anxiety. Does that not constitute mental pain and suffering of substantial duration?

ANSWER: Please see the answer to question 3(A).

(D) You testified that "[i]f you have a body of experience with a particular procedure that's been carefully monitored that indicates that you would not expect that there would be prolonged mental harm from a procedure, you could conclude that it is not torture under the precise terms of the statute."

(i) Has any employee, contractor, or other person acting on behalf of the United States engaged in waterboarding of any type of detainees or terror suspects since September 11, 2001, apart from the three cited cases of Khalid Sheikh Mohammed, Abu Zubaydah, and Abd al-Rahim al-Nashiri?

ANSWER: The Director of the CIA has stated that the three al Qaeda members identified in the question were the only detainees subjected to waterboarding by the CIA as part of its post-9/11 program of detention and interrogation. I am not aware of other detainees who have been subjected to waterboarding by persons acting on behalf of the United States since 9/11.

(ii) Do you consider experience with the three, and only three, admitted subjects of waterboarding to be a "body of experience"?

ANSWER: It provides some relevant, though limited, experience. To the extent any particular interrogation practice may have been used as part of military training, such training experience would also be relevant to some degree.

(iii) If so, have any CIA, FBI, or non-CIA investigators, doctors, or psychiatrists raised questions about the mental state of any of those three following their subjection to waterboarding?

ANSWER: The Department of Justice has not had custody of the individuals in question. We would refer you to the CIA or to the Department of Defense (which currently has custody of the relevant individuals). Those agencies are in a better position to respond to this question.

(iv) Have the three individuals subjected to waterboarding been evaluated by independent medical professionals to determine whether or not they have suffered prolonged physical or mental harm?

ANSWER: These individuals have been evaluated by medical and psychological professionals. We would refer you to the CIA or the Department of Defense, either of which is in a better position to respond to this question.

(v) If you agree that three examples hardly constitute a "body of experience," please indicate what other subjects of waterboarding are included in that "body of experience."

ANSWER: Please see the answers to questions 3(D)(i) and (ii).

4. SERE TRAINING

You agreed with Rep. Franks's suggestion that, if the waterboarding administered by the CIA to terrorist detainees was illegal torture, then so might be the waterboarding-type procedure that U.S. personnel undergo as part of their Survival, Escape, Resistance and Evasion (SERE) training. Your answer implicitly presumed that everything about the administration and usage of such techniques is identical in the two different situations. Yet the SERE trainees, unlike terrorist detainees, know that they do not face death, that the exercise will end whether or not they provide the information sought, and they will not face repeated sessions should their interrogators subsequently decide they need to ask new questions. Moreover, the SERE trainees are select members of the military in excellent physical shape, and medical personnel are directly involved in the actual application of waterboarding during SERE training, in order to monitor the trainee's response.

(A) Do you really believe that there is no significant distinction between "waterboarding" as part of a one-time limited training exercise and waterboarding as part of a hostile interrogation of enemy detainees?

ANSWER: The terms of the federal anti-torture statute focus on whether the conduct in question is done under color of law and whether it is done with the specific intent to inflict “severe physical or mental pain or suffering” as defined in the statute. So long as the conduct is under color of law, the language of the statute does not distinguish one government purpose (such as the resistance training of military personnel) from another government purpose (such as intelligence gathering). Nevertheless, there is a significant distinction between interrogation as part of a military training program and interrogation of a hostile detainee held in custody, particularly in terms of the likely expectations of the individual undergoing the practice. The two situations are not identical, and the circumstances of particular conduct would need to be considered in evaluating a potential application of the federal prohibition on torture.

(B) Representative Franks asked whether SERE trainers should be criminally prosecuted for violating the Torture Act. During U.S. military training, especially as provided to special operations and other elite units, “drill instructors” and other trainers use a variety of intense actions on military personnel. Many of those actions could constitute criminal violations, such as assault, battery, reckless endangerment, and false imprisonment, if done to or imposed upon civilians who were not part of a military training program.

ANSWER: Depending on the circumstances, traditional forms of authorized military training, such as those described in the question, would not meet the required elements of the federal crimes of assault, battery, reckless endangerment, and false imprisonment. Furthermore, generally worded criminal statutes are typically not read to prohibit reasonable conduct by government agents in the exercise of their essential functions. *See, e.g., Brogan v. United States*, 522 U.S. 398, 406 (1998) (holding that a statute prohibiting “any” false statement “does not make it a crime for an undercover narcotics agent to make a false statement to a drug peddler”) (alteration and internal citation omitted); *Nardone v. United States*, 302 U.S. 379, 384 (1937) (finding it an “obvious absurdity” to apply “a speed law to a policeman pursuing a criminal or the driver of a fire engine responding to an alarm.”). By contrast, the *Nardone* canon of construction would not apply where the statute in question is specifically intended to reach conduct by or on behalf of the government. The federal anti-torture statute is specifically directed at government conduct—it prohibits actions taken “under the color of law,” 18 U.S.C. § 2340(1).

5. Combination of Techniques

Did your 2005 legal opinion about the use of enhanced interrogation techniques in combination consider the possibility that waterboarding, when conducted in combination with other intensive and stressful techniques, could cause prolonged severe physical or mental suffering that would constitute unlawful torture? Or did you only consider whether each technique considered separately could constitute torture?

ANSWER: In advising the CIA about the lawfulness of its proposed interrogation methods from 2002 onward, the Office of Legal Counsel (“OLC”) has consistently advised that it is

important to consider the proposed methods both individually and in their combined use. OLC advised that a comprehensive legal review under the anti-torture statute should consider how proposed methods were intended to be used together in practice, in order to ensure that their combined use would not exceed what the law permits; accordingly, in two opinions issued on May 10, 2005, OLC addressed the consistency of the CIA's interrogation methods with 18 U.S.C. §§ 2340-2340A both individually and in combination. If OLC had addressed the interrogation methods only individually, in isolation, and failed to address the overall way they were actually expected to be employed in a typical interrogation, OLC's legal advice would have risked being artificial and incomplete. Giving incomplete advice would have been irresponsible and unfair to those who sought and relied upon OLC's advice.

6. Is the CIA Waterboarding Protocol Unique?

You distinguished the waterboarding protocol used by the CIA from historical water tortures as variously practiced by the Inquisition, the U.S. Army during the occupation of the Philippines, and the Japanese army in World War II. You emphasized, in this regard, that the CIA protocol did not involve pouring or pumping large quantities of water into the victims and then applying pressure to their distended organs. Others have pointed out that the reported CIA technique of placing plastic wrap or cloth over or in the subject's nose and mouth and dripping water on the person's head is also well known and was practiced by the Khmer Rouge, the French in Algeria, and the Dutch in Southeast Asia. Thus, the more traditional "water cure" of forcing large quantities of water into the victim is not the only way in which severe pain or suffering can be inflicted.

(A) How is waterboarding as practiced under the CIA protocol and used in the three instances in which our government has acknowledged having used it to interrogate "high-value detainees" different from those other forms of water torture?

ANSWER: This question cannot be answered without disclosing the classified details of interrogation practices. Information provided by the CIA indicated that the CIA's proposed interrogation practices, subject to limitations, conditions, and safeguards, were not designed to cause, and would not be expected to cause, severe physical or mental pain or suffering within the meaning of 18 U.S.C. § 2340. As has been publicly stated, waterboarding is not currently authorized for use in the CIA program and was last employed by the CIA more than five years ago.

(B) Assume Congress were to enact a statute that the President signed, and that contained a provision that directly and explicitly banned waterboarding under the CIA protocol that you described at the hearing.

(i) Is it your legal opinion that despite the explicit statutory ban, the President still could authorize the CIA to waterboard under his Article II powers as the Commander in Chief? Please note that this question assumes

an express statutory prohibition on waterboarding, and not merely a requirement that CIA interrogation comply with the Army Field Manual.

ANSWER: The CIA has made clear that it will follow all statutory restrictions in this area that Congress may enact, including a specific statutory ban on the practice of waterboarding, if such a ban were to become law. The Director of the CIA has stated that he would not direct or permit officials of his agency to disregard a statutory prohibition. Accordingly, whether the President may have independent authority under the Constitution to authorize conduct that would otherwise contravene a specific statute—if, for example, the President determined, in light of particular circumstances, that such conduct were necessary to protect the Nation from an imminent terrorist attack that would cause mass casualties—is a hypothetical question we currently have no need to confront.

The President, of course, like all officers of the Government, is not above the law. He has the duty to protect and defend the Constitution and faithfully to execute the laws of the United States, in accordance with the Constitution. A central part of the President's responsibility under the Constitution is his duty to defend the Nation as Commander in Chief, and the Executive Branch has long taken the view that if a statute were applied to encroach impermissibly on the President's constitutional authorities, including his core Commander in Chief authority, a statute would be, to that extent, unconstitutional. *See Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 200 (1994) (opinion of Assistant Attorney General Walter Dellinger) (characterizing as "unassailable" the proposition that "the President may decline to enforce unconstitutional statutes").

However, it would be imprudent to opine on such questions in the abstract. The President's independent constitutional powers, including his powers as Commander in Chief, have never been fully defined, and cannot be, because their contours necessarily depend on the concrete exigencies of particular events. In the words of Justice Jackson in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, the President's independent constitutional powers may "depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law." 343 U.S. 579, 637 (1952) (Jackson, J., concurring). *See also Request of the Senate for an Opinion as to the Powers of the President "in Emergency or State of War,"* 39 Op. A.G. 343, 347 (1939) (opinion of Attorney General Frank Murphy) ("[T]he Executive has powers not enumerated in the statutes—powers derived not from statutory grants but from the Constitution. It is universally recognized that the constitutional duties of the Executive carry with them the constitutional powers necessary for their proper performance. These constitutional powers have never been specifically defined, and in fact cannot be, since their extent and limitations are largely dependent upon conditions and circumstances.").

(ii) Do you recognize any limits on the President's Article II powers regarding detainee interrogation, in the face of an enacted statute? If so, what is the limiting principle?

ANSWER: Yes, there are limits to the President's authority under Article II, and Congress does have power under the Constitution to legislate in this area. Depending on particular circumstances, an apparent conflict between the President's constitutional duties and a specific statutory enactment may raise difficult and weighty issues, and it would be imprudent to attempt to opine on such questions in the abstract. Please see the answer to question 6(B)(i).

7. Interrogation Memoranda

According to the *New York Times*, you wrote several memos on interrogation techniques in 2005. At the hearing, you could offer no legal authority for the Department to withhold these memoranda from the Committee. When you noted the memoranda are sensitive, I reminded you that all committee Members have Top Secret clearance, and that we have been shown documents on the NSA warrantless wiretapping that are at the codeword level, which is a higher classification than that of your legal opinions on interrogation.

You simply said there was tradition for the Executive withholding documents. You agreed to *promptly supply us with legal authority or to produce your memoranda for us to review*. Your letter of February 25th supplied no such legal authority. Please comply with your agreement and promptly cite the legal authority for withholding them or make the necessary arrangements to share these opinions with the Committee.

In your answer, please do not rely on the fact that the House Permanent Select Committee on Intelligence (HPSCI) has been briefed on those memoranda. That is irrelevant under the Rules of the House. Clauses 11(b)(3) & (4) of Rule X of the Rules of the House of Representatives makes clear that HPSCI's creation in no way derogates from the jurisdiction of any other House Committee over information concerning matters within its jurisdiction. This matter clearly is within the Judiciary Committee's jurisdiction over criminal laws, human rights and the Department of Justice.

Also, please do not rely on section 503(b)(2) of the National Security Act of 1947 (50 U.S.C. 413b(b)(2)) that permits the President to restrict intelligence information to only eight members of Congress. As you are no doubt aware, that provision relates only to the required notification of Congress about covert action.

ANSWER: The Administration recognizes Congress's legitimate oversight interests in this area; the Administration has endeavored to accommodate those interests and is currently providing further accommodations. Since my testimony, the Administration has further accommodated congressional interest in this subject by making available to the Intelligence Committees the classified OLC opinions on the CIA program. In addition, the Administration has made available to the Judiciary Committees these classified OLC opinions, with limited redactions necessary to protect exceptionally sensitive intelligence sources and methods.

At the same time, the Executive Branch has legitimate and strong interests in protecting the confidentiality of national security information and the integrity of its own internal deliberative processes. The opinions referenced in the question are highly sensitive national security documents, which contain confidential legal and deliberative communications and are classified at the codeword level. Any accommodation the Administration has made of Congress's interests in understanding the legal analysis reflected in these opinions must respect, and does not waive, the Executive Branch's confidentiality interests in the opinions. The Executive Branch preserves all potential privileges with respect to these documents and the information contained therein.

It is well established as a matter of constitutional law that inherent in the President's powers as Commander in Chief and as the Nation's principal voice in foreign affairs is the authority to "determine how, when, and under what circumstances" sensitive national security information should be disclosed, including to Congress. *Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. 92, 92 (1998); see also Memorandum for John R. Stevenson, Legal Adviser, Department of State, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: The President's Executive Privilege to Withhold Foreign Policy and National Security Information* at 7 (Dec. 8, 1969) ("[T]he President has the power to withhold from Congress information in the field of foreign relations or national security if in his judgment disclosure would be incompatible with the public interest."). Courts have repeatedly recognized the President's authority to protect national security information. See, e.g., *Department of Navy v. Egan*, 484 U.S. 518, 527 (1988) (The President's "authority to . . . control access to information bearing on national security . . . flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant. . . . The authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief."); *In re United States*, 872 F.2d 472, 476 (D.C. Cir. 1989) (explaining that the state secrets doctrine provides absolute protection for information the release of which would impair the Nation's defense, disclose intelligence activities, or disrupt diplomatic relations with foreign governments); *Hill v. Department of Air Force*, 844 F.2d 1407, 1410 (10th Cir. 1988) ("The Executive Branch has a constitutional responsibility to classify and control access to information bearing on national security."). Since the Administration of George Washington, Presidents have withheld from Congress "extremely sensitive information with respect to national defense or foreign affairs." *Whistleblower Protections*, 22 Op. O.L.C. at 95 (citing *History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress*, 6 Op. O.L.C. 751 (1982)).

The National Security Act of 1947, 50 U.S.C. §§ 401-441d, recognizes the President's authority to control access to sensitive national security information. The Act vests primary responsibility for conducting oversight of intelligence activities in the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence, see *id.* § 413, and it expressly limits what is to be provided to those primary oversight committees by specifying that the President is to provide information to the Intelligence Committees "[t]o the extent consistent with due regard for the protection from unauthorized disclosure of classified information relating

to sensitive intelligence sources and methods or other exceptionally sensitive intelligence matters." 50 U.S.C. §§ 413a(a)(1), 414b(b).

It is also settled as a matter of constitutional law that the President may protect the confidentiality of internal Executive Branch deliberations, including confidential legal advice. As the Supreme Court has explained, "A President and those who assist him must be free to explore alternatives in the process of shaping policies and to do so in a way many would be unwilling to express except privately." *United States v. Nixon*, 418 U.S. 683, 708 (1974). See also Letter for the President from John Ashcroft, Attorney General, Dec. 10, 2001 (available at <http://www.usdoj.gov/olc>) ("The Constitution clearly gives the President the power to protect the confidentiality of executive branch deliberations."); Letter for the President from Janet Reno, 23 Op. O.L.C. 1, 2 (1999) (opinion of Attorney General Janet Reno) (describing the President's constitutional authority to protect not only "confidential communications to the President, but also 'communications between high Government officials and those who advise and assist them in the performance of their manifold duties.'" (quoting *Nixon*, 418 U.S. at 705).

8. Investigation of waterboarding and destruction of tapes

Attorney General Mukasey testified in the Senate Judiciary Committee that he would not order an investigation of the waterboarding depicted on the destroyed tapes because OLC had issued opinions regarding torture that were presumably relied upon by those administering the techniques. You echoed that rationale at the Subcommittee hearing.

Representative Ellison asked you to pursue this logic of reliance on OLC memoranda. He noted it would mean that the President or other senior officials could commit a felony or violate the constitutional rights of millions of Americans, but be immunized if they claimed reliance on an OLC opinion, no matter how frivolous or baseless the legal reasoning in the opinion was. Representative Ellison asked why that was not a recipe for unchecked Executive power. Your response was that the OLC opinions about waterboarding that had been relied on were reasonable. Does reliance on an OLC opinion provide immunity from civil or criminal liability even if the act was illegal? If the OLC opinion was incorrect, would it still confer immunity on a person who relied on it? If so, how far does this principle extend? Under what circumstances would reliance on an OLC opinion not provide a person with immunity? Would it apply only if the opinion was "reasonable" or would it apply if the opinion was not reasonable?

ANSWER: The opinions of OLC are issued on behalf of the Attorney General and represent the Justice Department's authoritative interpretation of the law for the Executive Branch. Unless withdrawn by the Department or superseded by a subsequent opinion, OLC opinions are binding within the Executive Branch, subject to the constitutional authority of the President to supervise subordinate executive officers. All officials of the Executive Branch, including our intelligence professionals, must be able to rely on the advice of the Department of Justice about what the law permits. They will be unable to perform their duties to protect the country if they fear that the advice provided by the Department will survive only as long as the tenure of the person who

gave it and that a subsequent Attorney General could disregard their prior reliance in deciding whether they acted within the law. Those limitations cannot depend simply on whether a future Attorney General deems the past legal advice incorrect, because intelligence professionals, most of whom are non-lawyers, cannot be expected to perform an independent evaluation of the Department's legal advice. The Supreme Court has recognized that no one who relied in good faith on the advice of public authorities may be subject to criminal penalties based upon that reliance. *See, e.g., Cox v. Louisiana*, 379 U.S. 559, 571 (1965); *Raley v. Ohio*, 360 U.S. 423, 437-39 (1959).

**Subcommittee on the Constitution, Civil Rights, and Civil Liberties
Committee on the Judiciary
U.S. House of Representatives**

**Questions for the Record for
Steven G. Bradbury
Principal Deputy Assistant Attorney General
Office of Legal Counsel**

**Arising from a Hearing Entitled
"Oversight Hearing on the Justice Department's Office of Legal Counsel"**

February 14, 2008

Questions Submitted by Chairman John Conyers, Jr.

1. In a court pleading filed in the Southern District of New York (Case No. 04 Civ 4151 (AKH), 05 Civ. 9620 (AKH)), the Department confirmed that three memoranda regarding interrogation of CIA detainees were written in May 2005, two on May 10 and one on May 30.

(A) What role, if any, did you play in authoring the three OLC memoranda regarding the interrogation of CIA detainees that were written in May 2005.

ANSWER: I was the principal author of the three opinions in question.

(B) Who else at the Department of Justice participated in drafting or approving them, and what role did they play?

ANSWER: Consistent with longstanding Executive Branch practice, it would not be appropriate to discuss in detail the confidential deliberative processes that resulted in the issuance of these OLC opinions. Other attorneys within OLC, other offices within the Department of Justice, and other agencies and components of the Executive Branch reviewed and commented on the opinions, and the Attorney General approved their issuance. The final opinions represented my own best judgment as to what the law required.

(C) Please identify all personnel at the White House or the Vice President's office who reviewed and commented on these memoranda.

ANSWER: Please see the answer to question 1(B).

(D) Please identify any other legal opinions or memoranda you have authored or assisted in drafting regarding the interrogation of detainees by U.S. personnel or contractors.

ANSWER: In addition to the three opinions issued by OLC in May 2005, I assisted in preparing the public December 30, 2004 opinion interpreting the federal anti-torture statute. In addition, I authored two opinions related to the CIA program in 2006 and one in 2007. The latter opinion was provided in conjunction with the President's issuance of Executive Order 13440 setting forth the legal requirements for the CIA program in accordance with the Military Commissions Act of 2006. I also provided or participated in providing other legal advice relevant to the CIA program, either orally or by letter, from time to time in the period from 2004 to the present, and also presented testimony or briefings or participated in preparing letters on this subject to Committees of Congress and their Members and staffs. Finally, I assisted in drafting legal advice and testimony concerning Department of Defense interrogation policies during the tenure of Assistant Attorney General Jack Goldsmith in 2004.

2. On October 4, 2007, the New York Times published an article apparently describing these interrogation memoranda titled "Secret Endorsement of Severe Interrogations."

(A) Please state if there are any statements from this article that you find inaccurate, and explain your disagreements.

ANSWER: Several assertions in the October 4, 2007 New York Times article were inaccurate or created a misimpression. Among other things:

The New York Times article incorrectly indicated that OLC issued two opinions confirming the legality of the CIA's proposed interrogation practices in February 2005. In fact, OLC did not issue opinions to the CIA in February 2005; rather, OLC issued three opinions to the CIA addressing interrogation practices in May 2005—two opinions on May 10, 2005 addressing the federal anti-torture statute and one opinion on May 30, 2005 addressing Article 16 of the Convention Against Torture.

The New York Times article incorrectly suggested that OLC's opinions in 2005 were inconsistent with OLC's earlier advice, that the 2005 opinions found lawful interrogation methods that had never previously been found lawful, and that the 2005 opinions contradicted the interpretation of the anti-torture statute set forth in the public December 30, 2004 opinion signed by Acting Assistant Attorney General Dan Levin. In fact, OLC's 2005 opinions were fully consistent with the December 30, 2004 opinion. The May 2005 opinions did not find torture lawful in any circumstances, and both of the May 10 opinions addressing the anti-torture statute expressly reiterated the admonition from the December 30, 2004 opinion that torture is abhorrent to American values and that the President has made clear that torture will not be authorized, condoned, or tolerated. OLC's 2005 opinions, like its earlier advice, made clear that OLC's legal conclusions were contingent on a number of express conditions, limitations, and safeguards that had been adopted by the CIA and that were designed to ensure that the program

would be administered by trained professionals, with strict oversight and controls, and that none of the interrogation practices would result in severe pain or suffering. The public December 30, 2004 opinion (in footnote 8) had clearly stated that OLC had reviewed its prior advice on specific interrogation methods and determined that the Office's earlier conclusions were unaffected by OLC's December 30, 2004 interpretation of the anti-torture statute. Indeed, each of the specific interrogation techniques upheld by OLC in 2005 had previously been found lawful by the Acting AAG of OLC in the summer and fall of 2004, and OLC had also previously found lawful CIA's specific interrogation practices in 2002 (in a classified opinion that was not withdrawn by the Justice Department).

One of OLC's May 10, 2005 opinions concerning the anti-torture statute addressed the CIA's methods of interrogation individually, and the other addressed the potential combined effects of the interrogation methods. The New York Times article implied that the second of these opinions was a departure from prior advice and was designed to enable harsher interrogations. In fact, in accordance with advice that OLC has consistently provided to the CIA since 2002, the May 10, 2005 combined-effects opinion considered how proposed interrogation methods were actually intended to be used in practice, in order to help ensure that their combined use would not exceed what is permitted under the anti-torture statute. If OLC had addressed the interrogation methods only individually, in isolation, and failed to address the overall way they were actually expected to be employed in a typical interrogation, OLC's legal advice would have risked being artificial and incomplete. Giving incomplete advice would have been irresponsible and unfair to those who sought and relied upon OLC's advice.

The New York Times article implied that the Acting Assistant Attorney General of OLC was removed in early 2005 because of concern he would refuse to find CIA interrogation practices lawful, and that I was nominated to be the Assistant Attorney General because of my opinions in 2005 addressing the CIA program. In fact, the Acting AAG's departure on February 4, 2005 came only ten days before the expiration of the 210-day period under the Vacancies Reform Act for him to serve as the designated Acting AAG (since the President had not yet sent a nomination to the Senate); the Acting AAG left OLC for the White House to assume the important position of Legal Adviser to the National Security Council and Senior Associate Counsel to the President. Furthermore, the December 30, 2004 opinion signed by the Acting AAG made clear (in footnote 8) that OLC at that time had reviewed its prior advice on specific interrogation methods and determined that the Office's earlier conclusions were unaffected by OLC's December 30, 2004 interpretation of the anti-torture statute; indeed, each of the specific interrogation techniques upheld by OLC in 2005 had previously been found lawful by the Acting AAG of OLC during the summer and fall of 2004. No one ever suggested to me that my nomination as Assistant Attorney General for OLC would depend on what I concluded in any legal opinion, including the opinions addressing the CIA program. Every opinion I have signed for OLC has represented my own best judgment of what the law requires. Moreover, although my nomination was not transmitted to the Senate until June 2005, the President's approval of my nomination occurred, as such approvals usually do, weeks earlier, in April 2005, before I signed the May 2005 opinions reaffirming the legality of CIA's interrogation practices.

The New York Times article also implied that the Administration in 2005 had not communicated to Congress its views on the scope and interpretation of the “cruel, inhuman, or degrading treatment” prohibition in Article 16 of the Convention Against Torture, or “CAT,” as it may have applied to the CIA interrogation program. In fact, in July 2004, in unclassified testimony before the House Intelligence Committee, the Justice Department explained its view on the meaning of the “cruel, inhuman, or degrading treatment” standard in Article 16 (as qualified by the reservation required by the Senate as a condition of United States ratification of the CAT). The Department advised that with respect to detainees in the War on Terror who have not been convicted of any crime, the relevant substantive standard for Article 16 is what the Supreme Court has called the “shocks the conscience” standard of substantive due process under the Fifth Amendment. In various communications with Congress in early 2005, the Department explained that Article 16 does not apply to the treatment of alien detainees held outside territory subject to United States jurisdiction, but that, nevertheless, it was the policy of the Administration to ensure that United States practices did comply with the substantive standard imposed by Article 16, even where that standard did not apply as a matter of law. The Department reiterated all of these points about Article 16 in an unclassified letter to the Senate Judiciary Committee on April 4, 2005. Later in 2005, when Congress was considering the Detainee Treatment Act, the Administration made clear that it was the policy of the United States to comply with the Article 16 “cruel, inhuman, or degrading treatment” standard, regardless of the nationality or location of a detained person, and that the Administration believed it was in compliance with that standard. The Administration also made it clear that the principal effect of the so-called McCain Amendment would be to convert the Administration’s existing policy into a statutory requirement. As the President explained upon signing the Detainee Treatment Act, “Our policy has also been not to use cruel, inhuman or degrading treatment, at home or abroad. This legislation now makes that a matter of statute for practices abroad.” 41 Comp. Pres. Doc. 1920 (Dec. 30, 2005). See also Anne Plummer, *McCain and the White House Continue Efforts to Reach a Deal on Detainees*, CQ Today, Dec. 7, 2005 (quoting Secretary Rice); Press Briefing with National Security Advisor Stephen Hadley on the McCain Amendment, Dec. 15, 2005, The Roosevelt Room, The White House (Statement of National Security Advisor Hadley).

The New York Times article contained other assertions concerning internal Executive Branch deliberative matters that we are unable to address and clarify without inappropriately revealing internal deliberations or classified information. Finally, the article contained one or more assertions relating to matters unconnected to OLC’s legal advice on the CIA program that also were inaccurate or created a misimpression.

3. The New York Times article reports that former Deputy Attorney General Jim Comey refused to approve these memoranda and stated that the Department would be “ashamed” if the public learned of them.

(A) As you understand it, what was the basis for Mr. Comey’s objection or any other objections?

ANSWER: The New York Times article discussed two OLC opinions that issued on May 10, 2005—one opinion finding that all of the individual interrogation practices of the CIA were consistent with the federal anti-torture statute and a second, related opinion addressing the combined use of these practices. Of these two opinions, the article reported that Mr. Comey objected to the second one—the combined-effects opinion. The Department is not able to discuss or confirm these characterizations of confidential internal deliberations. As noted above in response to question 2(A), in accordance with advice that OLC has consistently provided to the CIA since 2002, the May 10, 2005 combined-effects opinion considered how proposed interrogation methods were actually intended to be used in practice, in order to help ensure that their combined use would not exceed what would be permitted under the anti-torture statute. If OLC had addressed the interrogation methods only individually, in isolation, and failed to address the overall way they were actually expected to be employed in a typical interrogation, OLC's legal advice would have risked being artificial and incomplete. Giving incomplete advice would have been irresponsible and unfair to those who sought and relied upon OLC's advice.

(B) Did anyone other than Mr. Comey object to these memoranda? Who, and on what basis did they object?

ANSWER: As noted above, we are not able to comment on the Executive Branch's confidential internal deliberations over these classified matters.

4. Did you have any role in the Department's decision to withdraw prior memoranda or opinions on torture that had been drafted in 2002? Please describe your role, and please explain the basis for the Department's decision to withdraw those memoranda or opinions.

ANSWER: The Department of Justice withdrew one OLC opinion addressing legal standards for interrogation that was drafted in 2002—the unclassified August 1, 2002 opinion of Assistant Attorney General Jay Bybee addressed to Counsel to the President Alberto Gonzales. That opinion was publicly withdrawn by the Department in June 2004. As the Principal Deputy Assistant Attorney General in OLC in June 2004, I participated in, and supported, the decision to withdraw that opinion. As the Principal Deputy in OLC, furthermore, I participated in preparing OLC's public December 30, 2004 opinion that set forth the Department's updated interpretation of the anti-torture statute.

The decision to withdraw the unclassified August 1, 2002 Bybee memorandum did not require the withdrawal of a separate, classified 2002 opinion of OLC, which reviewed the CIA's specific interrogation practices and found them to be consistent with the federal anti-torture statute. The conclusions of the classified 2002 opinion were more limited than those of the withdrawn Bybee memorandum: For example, the classified 2002 opinion contained no assertion of the President's Commander in Chief power, and there was no discussion of defenses to criminal prosecution or any discussion purporting to find torture lawful. The classified 2002 opinion remained in effect as an opinion of OLC until it was superseded in all relevant respects by later advice, including two opinions applying the anti-torture statute that OLC issued on May 10, 2005.

5. Did you have any role in drafting or reviewing the December 2004 memorandum by Assistant Attorney General Dan Levin stating that “[t]orture is abhorrent both to American law and values, and to international laws”? Please describe your role, and please state who else at the Department of Justice or the White House was involved in the drafting and approval of this memorandum.

ANSWER: Yes. As noted above in response to question 4, I assisted in preparing the December 30, 2004 memorandum that was signed by Mr. Levin. Consistent with longstanding Executive Branch practice, it would not be appropriate to discuss in detail the confidential deliberative processes that resulted in the issuance of this OLC opinion. Other attorneys within OLC, other offices within the Department of Justice, and other components of the Executive Branch reviewed and commented on the opinion, and the Attorney General approved its issuance.

6. The December 2004 memorandum was publicly released and taken by many as a sign that U.S. torture policy had changed.

A. How does the Department decide which memoranda and opinions are to be classified and which are to be released to the public?

ANSWER: The Office of Legal Counsel does not have original classification authority. Ordinarily, classified OLC memoranda are classified because they are derived from or incorporate information classified by another Executive Branch officer or entity with classification authority.

The December 2004 opinion was written for the express purpose of public disclosure and was intended to be published from the outset. On the other hand, most OLC opinions consist of confidential legal advice for senior Executive Branch officials. Maintaining the confidentiality of OLC opinions is often necessary to preserve the deliberative process of decision making within the Executive Branch and attorney-client relationships between OLC and other executive offices; in some cases, the disclosure of OLC advice also may interfere with federal law enforcement efforts. These confidentiality interests are especially great for OLC opinions relating to the President’s exercise of his constitutional authorities, including his authority as Commander in Chief. It is critical to the discharge of the President’s constitutional responsibilities that he and the officials under his supervision are able to receive confidential legal advice from OLC.

At the same time, many OLC opinions address issues of relevance to a broader circle of Executive Branch lawyers or agencies than just those officials directly involved in the opinion request. In some cases, the President or an affected agency may have a programmatic interest in putting other agencies, Congress, or the public on notice of the legal conclusion reached by OLC and the supporting reasoning. In addition, some OLC opinions will be of significant practical interest and benefit to lawyers outside the Executive Branch, or of broader interest to the general

public, including historians. In such cases, and when consistent with the legitimate confidentiality interests of the President and the Executive Branch, it is the policy of our Office to publish OLC opinions. This publication program is in accordance with a directive from the Attorney General to OLC to publish selected opinions on an annual basis for the convenience of the Executive, Legislative, and Judicial Branches of the Government, and of the professional bar and the general public.

The decision whether to publish an OLC opinion is made on a case-by-case basis, according to a standard practice that has existed since OLC opinions first began to be published. Relevant factors may include: whether there is a continuing need for confidentiality; the potential benefit that other Executive Branch agencies would derive from access to the opinion; whether the subject matter of the opinion is of interest to a broad segment of the Executive Branch; whether the opinion addresses a matter that gives helpful insight into the operations of government; the level of public or historical interest in the subject matter; whether the opinion addresses a novel legal issue; and whether the issue is likely to recur.

B. Who from the Department, the White House, the Vice President's office, or any other agency, participated in the decision not to release the May 2005 memoranda?

ANSWER: Since my testimony, the Administration has accommodated congressional interest in this subject by making available to the Intelligence Committees the classified OLC opinions on the CIA program. In addition, the Administration has made available to the Judiciary Committees the classified OLC opinions, with limited redactions necessary to protect exceptionally sensitive intelligence sources and methods. The May 2005 interrogation memoranda may not be publicly released because they contain highly sensitive and classified national security information and represent confidential internal deliberative communications of the Executive Branch.

7. Executive Order 12958 "prescribes a uniform system for classifying, safeguarding, and declassifying national security information." Section 6.2(b) of the Order requires the Attorney General to interpret the order as questions arise regarding its administration. On July 20, 2007, you wrote a letter stating that you "would not be providing an opinion" to the Director of the Information Security Oversight Office (ISOO) regarding a dispute between ISOO and the Office of the Vice President (OVP). Apparently, you believed that the dispute between ISOO and OVP was resolved because (1) the White House Counsel had addressed the issue in a letter and (2) White House spokespersons had made statements on the issue.

A. How does it satisfy the Attorney General's obligation to render legal interpretations on issues that arise during the administration of the Executive Order to rely on statements of the White House counsel and the White House spokespersons in a dispute between and agency and officials in the White House?

ANSWER: The January 9, 2007 letter to the Attorney General from the Director of the Information Security Oversight Office (“ISOO”) of the National Archives and Record Administration requested an opinion addressing whether the Office of the Vice President is an “agency” for purposes of Executive Order 12958, as amended. On July 12, 2007, the Counsel to the President wrote a letter on behalf of the President to Senator Brownback stating that “[t]he President has asked me to confirm to you that . . . the Office of the Vice President . . . is not an ‘agency’ for purposes of the Order.” Letter to the Honorable Sam Brownback, United States Senate, from Fred F. Fielding, Counsel to the President. As the question notes, in a letter dated July 20, 2007, OLC responded to the ISOO request by stating, “That statement on behalf of the President directly resolves the question you presented to the Attorney General. Therefore, the Department of Justice will not be providing an opinion addressing this question.”

Executive Order 12958, as amended, provides that the Attorney General may “render an interpretation of this order” with respect to questions “arising in the course of its administration.” The executive order does not specify that an Attorney General opinion is the only mechanism for clarifying the order’s meaning or that the President is disabled from issuing clarifying instructions to his subordinates.

B. Do you believe the President can change his interpretation of an Executive Order without formally amending the order or issuing a new one?

ANSWER: The clarification issued by the Counsel to the President did not change the interpretation of Executive Order 12958. As the Counsel to the President stated, “the Executive Order deals with the President and the Vice President separately from agency heads and thus the Office of the Vice President, like the President’s office, is not an ‘agency’ for purposes of the order.” *Cf. Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 156 (1980) (“The Conference Report for the 1974 FOIA Amendments indicates that ‘the President’s immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President’ are not included within the term ‘agency’ under the FOIA.”) (quoting H.R. Conf. Rep. No.93-1380, at 15 (1974)); *Whether the Office of the Vice President is an “Agency” for Purposes of the Freedom of Information Act*, 18 Op. O.L.C. 10 (1994) (OVP is not an “agency” for FOIA purposes).

The President may change his interpretation of terms within an executive order without formally amending the order or issuing a new one. An executive order is “a set of instructions from the President to his subordinates in the Executive Branch.” Memorandum for the Attorney General, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, *Re: Legal Authority for Recent Covert Arms Transfers to Iran* 14 (Dec. 17, 1986), reprinted in *Authorization for the Department of Justice for Fiscal Year 1988: Hearing Before the H. Comm. on the Judiciary*, 100th Cong. App. 97 (1988). The President has broad authority to modify an executive order, even without formally amending the order or issuing a new order. *Cf. id.* (concluding that President may, through his actions, “create[] a valid modification of, or exception to, [an] executive order” without formally amending an order). The President may

validly determine that it is sufficient to instruct his subordinates on the interpretation of an existing opinion rather than amending the order or issuing a new one.

C. What are the limits, if any, on the President's ability to determine the meaning of a written executive order by offering "interpretations" through his or her representatives once a dispute arises?

ANSWER: It is difficult to analyze in the abstract whether there might be limitations on the extent to which the President could issue interpretations of a hypothetical executive order. The President's interpretation of a single term within Executive Order 12958 was well within his broad authority to interpret a presidential directive to his subordinates.

8. On February 7, 2008, Attorney General Mukasey told the Judiciary Committee that the CIA's past use of waterboarding was "found to be permissible" by the Office of Legal Counsel and that, as a result, waterboarding "cannot possibly be" investigated by the Department.

(A) What Office of Legal Counsel memoranda or opinions did the CIA agents who used waterboarding rely on?

ANSWER: They relied on the classified August 2002 opinion that is described above in response to question 4. That opinion was not withdrawn by the Justice Department and remained in effect as an opinion of OLC until it was superseded in all relevant respects by later advice, including the two opinions issued by OLC on May 10, 2005. The public December 30, 2004 opinion (in footnote 8) stated that OLC at that time had reviewed its prior advice on specific interrogation methods and determined that the Office's earlier conclusions were unaffected by OLC's December 30, 2004 interpretation of the anti-torture statute. As has been publicly stated, waterboarding is no longer authorized for use in the CIA program and was last employed by the CIA in March 2003.

(B) Did that opinion or opinions specifically authorize waterboarding by name, and did it describe the exact method, form, and duration, of waterboarding that could be conducted, or were the agents required to interpret the opinion to determine what conduct was permissible?

ANSWER: The classified August 2002 opinion did address the consistency of specific interrogation techniques, including waterboarding, with the federal anti-torture statute, which was the only federal law determined at that time to apply to the CIA program of detention and interrogation. Beyond that, we are not able to discuss the classified operational details contained within that opinion or other relevant advice, including details related to the limits and safeguards applicable to particular interrogation techniques.

Subcommittee on the Constitution, Civil Rights, and Civil Liberties
Committee on the Judiciary
U.S. House of Representatives

Questions for the Record for
Steven G. Bradbury
Principal Deputy Assistant Attorney General
Office of Legal Counsel

Arising from a Hearing Entitled
"Oversight Hearing on the Justice Department's Office of Legal Counsel"

February 14, 2008

Questions Submitted by Ranking Member Franks

1. At the hearing, the Chairman referenced "an opinion authorizing the use in combination of certain harsh interrogation techniques" that had generated some controversy separate from the Department's advice on the interrogation techniques themselves. Could you explain why the Department provided advice on the combined effects of interrogation techniques and how that opinion relates to OLC's advice on the legality of particular interrogation techniques?

ANSWER: In advising the CIA about the lawfulness of its proposed interrogation methods, OLC considered the methods both individually and in combination, as the CIA proposed to use them. OLC concluded that its legal review should consider how the proposed methods were intended to be used in practice, in order to help ensure that their combined use would not exceed what the law permits. If OLC had addressed the interrogation methods only individually, in isolation, and failed to address the overall way they were actually expected to be employed in a typical interrogation, OLC's legal advice would have risked being artificial and incomplete. Giving incomplete advice would have been irresponsible and unfair to the people who sought and relied upon our advice.

2. I find it difficult to believe that the U.S. Government would "torture" American soldiers even during a training exercise, and I agree with your testimony that if the anti-torture statute prohibited the use of waterboarding against a captured terrorist, then it surely would prohibit the use of such alleged "torture" on members of the U.S. armed forces. A Member of the Subcommittee, however, suggested that the U.S. military might waterboard American soldiers for training purposes under the same legal theory by which an undercover police officer could sell drugs as a part of a sting operation. Could you provide a fuller explanation for why that rationale would not excuse a violation of the anti-torture statute?

ANSWER: It is well established that generally worded criminal statutes do not prohibit reasonable conduct by government agents carrying out essential functions, such as those who make undercover drug sales or conduct “sting” operations against peddlers of child pornography. *See, e.g., Brogan v. United States*, 522 U.S. 398, 406 (1998) (holding that a statute prohibiting “any” false statement “does not make it a crime for an undercover narcotics agent to make a false statement to a drug peddler.”) (alteration and internal citation omitted); *Nardone v. United States*, 302 U.S. 379, 384 (1937) (finding it an “obvious absurdity” to apply “a speed law to a policeman pursuing a criminal or the driver of a fire engine responding to an alarm.”); *United States v. Condon*, 170 F.3d 687, 690 (7th Cir. 1999) (The terms “whoever” and “any person,” as used in the federal anti-gratuity statute, do not prohibit the “authorized acts of federal agents, in the ordinary course of their duties.”); *United States v. Singleton*, 165 F.3d 1297, 1299-1302 (10th Cir. 1999) (en banc) (holding that a statute that criminalizes “whoever” “promises anything of value” in exchange for the testimony of “any person” does not apply to or prohibit an Assistant United States Attorney from offering leniency to defendant’s accomplice in exchange for the latter’s testimony). By contrast, that exception does not apply when the statute, read in context, specifically applies to and prohibits a government agent’s conduct. *See, e.g., Nardone*, 302 U.S. at 384; *Condon*, 170 F.3d at 689-90. Because the federal anti-torture statute is specifically directed at government conduct—insofar as it prohibits actions taken “under the color of law,” 18 U.S.C. § 2340(1)—it prohibits all torture committed by government agents, regardless of the purpose for which it was committed.

