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Subcommittee on the Constitution, Civil Rights, and Civil Liberties

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Mr. Chairman, thank you for the opportunity to testify before the Subcommittee. I am a professor of law at the University of California, Berkeley, and a visiting scholar at the American Enterprise Institute. From 2001 to 2003, I served as a deputy assistant attorney general in the Office of Legal Counsel at the Department of Justice. During my period of service, I worked on issues involving national security, foreign relations, and terrorism. My academic writing on these subjects can be found in two books, *The Powers of War and Peace* (2005), and *War by Other Means* (2006). The views I present here are mine alone.

As an attorney who has worked for both the legislative and executive branches, I have enormous respect for this Subcommittee's oversight functions and for the importance of cooperation between the executive and legislative branches. At the same time, as an attorney I am bound to honor the confidential and privileged nature of my work for the Department of Justice, as I previously honored the confidentiality of my work for the Legislative Branch. I may discuss my work for the Department only to the extent I am permitted to do so by the Department itself. Accordingly, when Chairman Conyers sent his April 8, 2008, letter inviting me to testify, my attorneys asked the Department of Justice about the appropriate scope of my appearance before the Committee. In response, they received an e-mail from Steve Bradbury of the Office of Legal Counsel of the Department of Justice, dated April 21, 2008. I understand the text of that email previously has been provided to Committee staff.[1]

In brief, the Department of Justice has expressly prohibited me from discussing "specific deliberative communications, including the substance of comments on opinions or policy questions, or the confidential predecisional advice, recommendations, or other positions taken by individuals or entities of the Executive Branch." As I understand this instruction, I cannot share any specific comments, advice, or communications between me and any other specific members of the Executive Branch. The Justice Department, however, has authorized me to discuss "the conclusions reached and the reasoning supporting those conclusions in particular unclassified or declassified legal opinions that have been publicly disclosed by the Department." In this respect, it is my understanding that I may explain and clarify the reasoning in the legal memoranda on which I personally worked while at OLC related to the subject of today's hearing, so long as the memoranda have been made public by the Department of Justice. In addition, "as a special accommodation of Congress's interests in this particular area," the Justice Department has authorized me to discuss "in general terms which offices of the Executive Branch participated in the process that led to a particular opinion or policy decision, to the extent those opinions or policy decisions are now matters of public record." I understand this to allow me to describe which offices within the Executive Branch were consulted or reviewed our opinions in draft form, but not the substance of any input they may have given OLC.

As should be apparent, these instructions, taken together, limit in important respects the matters I properly may discuss before this Subcommittee, and therefore I may not be able to respond to all of the inquiries that you may have today. I, of course, have no authority to resolve any conflicts that may arise between your questions and the Justice Department's orders directing me to safeguard the confidentiality of Executive Branch deliberations. Any such conflicts must be resolved directly between the House and the Executive Branch. But within the constraints I have been ordered to observe, I will strive today to be as helpful as I can to this Subcommittee.

I would like to begin by generally describing OLC and its functions, and the historical context within which these questions arose. The Office of Legal Counsel in the Department of Justice, known as OLC, exists to provide legal advice on the meaning of federal constitutional and statutory law to the Attorney General and other components of the Justice Department, federal agencies, and the White House. The legal issues that concern the Subcommittee today – involving the interrogation of alien enemy combatants—first arose about six months after the 9/11 attacks, in which about 3000 of our fellow citizens were killed in surprise terrorist attacks in New York City and Washington, D.C. Leaders of the Executive Branch as well as members of Congress were deeply concerned that al Qaeda would attempt follow-on attacks, as they did in Europe. In facing these questions in 2002 and 2003, we gave our best effort under the pressures of time and circumstances. We tried to answer these questions as best we could. Certainly we could have used more time to research and draft the legal opinions. But circumstances did not give us that luxury.

Nonetheless, we in OLC were determined, as were all of us in the Justice Department at the time, to interpret the law, in good faith, as best we could under the circumstances. We wanted to make sure that the United States had the ability to defeat this new enemy and to prevent another September 11 attack, and that we did so by operating within the bounds drawn by the laws and Constitution of the United States. Now as then, I believe we achieved this goal.

We reached our conclusions based on the legal materials at hand. These were hard questions, perhaps the hardest that a government lawyer can face. The federal criminal anti-torture law uses words rare in the federal code, no prosecutions had been brought under it, and it had never been interpreted by a federal court. We wrote the memos to give the Executive Branch guidance, not to reach any particular policy result. As you can see from the opinions, we consulted federal judicial decisions in related areas, the legislative history in Congress of the approval of the international instruments and the enactment of the anti-torture statute, even the judgments of foreign tribunals that addressed similar questions. There is certainly room for disagreement among reasonable people, acting in good faith, on these questions. But I still believe we gave the best answers we could on the basis of the legal materials available to us.

It should also be clear, however, that OLC was not involved in the making of policy decisions. OLC interpreted the law, but did not develop or advocate for or against any policy option. To the extent that the United States has successfully prevented al Qaeda from launching another successful terrorist attack on our territory since 9/11, this has been due to the policies chosen by our elected leadership, both those in the Executive Branch who developed and approved them and those in the Legislative Branch who knew of them. I personally believe that the intelligence gleaned by interrogating al Qaeda leaders has contributed significantly to the safety of the American people during these last seven years. When this Subcommittee reviews

the development of American policy during this period, I urge it to consider whether alternative policies would have provided the same level of protection to the national security against the al Qaeda threat. But all the same, those policy choices – adopting particular techniques within the lines that OLC had determined to be lawful – were not mine to make and I did not make them. I cannot, therefore, provide the Subcommittee with information about the reasons for particular policy choices. Decisions involving intelligence and covert activity during the time I served in government would have been made by the CIA, the NSC, and the White House. Decisions about interrogation methods at Guantanamo Bay were made by the Defense Department.

Turning to the specifics, during my service at OLC, I was one of five deputy assistant attorneys general who assisted the assistant attorney general for the office. I worked on two matters that have become public and drawn the attention of this Subcommittee. One was a request by the Central Intelligence Agency and the National Security Council for guidance on the rules set by federal criminal law on interrogation of a high-ranking al Qaeda leader, held outside the United States, who was believed to have information that could prevent attacks upon the Nation. The second was a similar question from the Department of Defense on the legal rules on interrogation of al Qaeda members held at Guantanamo Bay who also were believed to have high-value intelligence regarding possible attacks on the United States.

We gave substantially the same advice to both agencies. Both matters at the time were highly classified and the pressures of time and circumstances were high – we received the first request a few months after the September 11, 2001 terrorist attacks on New York City and Washington, D.C. Under those difficult conditions, OLC substantially followed its normal process for writing and researching a legal opinion on a classified matter, including consultation with components of the Justice Department and relevant Executive Branch agencies. We interpreted Congress's statute prohibiting torture as prohibiting extreme acts, as intended by the Executive branch and the Senate at the time that the United States entered the Convention Against Torture. Concerned about potential ambiguity in the statute's terms, we also provided a comprehensive analysis of alternative issues, such as a potential conflict between the Commander-in-Chief and legislative powers in wartime, which might arise if interrogation methods that were ultimately chosen by policymakers were close to or on the line set by the statute.

CIA and NSC Request for Opinion in 2002

Interrogation policy did not arise in the abstract, but in the context of a specific person at a specific point in time. On March 28, 2002, American and Pakistan intelligence agents captured al Qaeda's number three leader, Abu Zubaydah. With the death of Mohammed Atef in the American invasion of Afghanistan in November 2001, Zubaydah had assumed the role of chief military planner for al Qaeda, ranking in importance only behind Osama bin Laden and Dr. Ayman Zawahiri.

It is difficult to understate the importance of the capture. With his new promotion, Zubaydah headed the organization and planning of al Qaeda's operations and its covert cells. With al Qaeda reeling from American success in Afghanistan, and bin Laden and Zawahiri in hiding, Zubaydah took on the role of building and managing al Qaeda's network of covert cells throughout the world. More than anyone else, he knew the identities of hundreds of terrorists and their plans. If anyone had "actionable intelligence" that could be put to use straightaway to

kill or capture al Qaeda operatives and to frustrate their plans to murder our citizens, it was Zubaydah. At the same time, Zubaydah was clearly an expert at resisting regular interrogation methods.

OLC was asked to evaluate the legality of interrogation methods proposed for use with Zubaydah. While the subject matter was certainly extraordinary and demanded unusually tight controls because of its sensitivity, the question of the meaning of the federal anti-torture law was handled in the same way that other classified OLC opinions are handled. These opinions did not receive the broad dissemination within the government that would normally occur with a memorandum opinion. But this was because the question of interrogation involved national security and covert action and was classified at a top secret level. Nonetheless, the process that governed the research, writing, and review of these memos was in line with that which occurs with opinions on other classified, sensitive issues.

In particular, the offices of the CIA general counsel and of the NSC legal advisor asked OLC for an opinion on the meaning of the anti-torture statute. They set the classification level of the work and dictated which agencies and personnel could know about it. In this case, the NSC ordered that we not discuss our work on this matter with either the State or Defense Departments. The Office of the Attorney General was promptly informed of the request and it decided which components within the Justice Department were to review our work: these were the offices of the attorney general, the deputy attorney general, and the criminal division. The Office of the Attorney General also selected the Justice Department staff who could know about the request. Within OLC, career staff handled the initial research and drafting of the opinion. It was edited and reviewed by another deputy assistant attorney general. It was then reviewed, edited, and re-written by the assistant attorney general in charge of the office at the time, as is the case with all opinions that issue from OLC.

The Office of the Attorney General was also actively involved in reviewing OLC's work. Not only did OLC brief the Office of the Attorney General several times about the legal opinion, but the Office of the Attorney General made edits to the opinion, and even worked on it with OLC staff in our offices, up until the very minute the opinion was signed. We also sent drafts of the opinion to the deputy attorney general's office and to the criminal division for their views and comments. No opinion of this significance could ever issue from the Justice Department without the review of, and the approval of, the Office of the Attorney General.

We also sent the opinion in draft form to the office of the CIA general counsel, the office of the NSC legal advisor, and the office of the White House counsel for their review, as would normally be the case with any opinion involving intelligence matters. As with any opinion, OLC welcomed comments, suggested edits, and questions.

I should emphasize that our work on this issue was with regard to Zubaydah. It was not conducted with regard to Iraq, nor did it have anything to do with the terrible abuses that occurred at the Abu Ghraib prison more than a year and a half later. In fact, the legal regimes governing the war with al Qaeda and the war with Iraq were utterly different. The Geneva Convention provided the relevant rules for the war in Iraq. After extended debate, however, the Bush Administration concluded in February 2002 that al Qaeda prisoners were not covered by the Third Geneva Convention, which establishes the rules governing the treatment of prisoners of war. Al Qaeda was not a state party to the treaty nor has it shown any desire to obey its rules in

this war. Therefore, in our view at the time, the Geneva Conventions did not govern the legal regime that applied to the interrogation of al Qaeda terrorists.

What federal law commands is that al Qaeda and Taliban operatives not be tortured. Specifically, the federal anti-torture law makes clear that the United States cannot use interrogation methods that cause "severe physical or mental pain or suffering." No one in the government, to my knowledge, questioned that ban—then or now. In fact, the very purpose of seeking legal advice was to make sure that the government did not do anything that would violate this federal law. As we examined that legal question in the particular, narrow context in which it arose, we believed that the application of the legal standard set by Congress—barring any treatment that caused severe physical or mental pain or suffering—would depend not just on the particular interrogation method, but on the subject's physical and mental condition. In the particular context that we faced—Zubaydah, the hardened operational leader of al Qaeda, and perhaps others similarly situated—we did not believe that the coercive interrogation methods being contemplated transgressed the line that had been prescribed by Congress. I personally do not believe that torture is necessary or should ever be used by the United States. Nor do I believe that OLC's August 1, 2002 memorandum authorizes such a result.

It also should not go unmentioned that the importance of appropriately questioning Zubaydah—*i.e.*, of permitting our Nation to use certain coercive techniques within the bounds of the law—was demonstrated by the string of successes for American intelligence that occurred in the months after his capture. These have been widely reported. A year to the day of the September 11 attacks, Pakistani authorities captured Ramzi bin al Shibh. Bin al Shibh was the right hand man to Khalid Shaikh Mohammed, referred to by American intelligence and law enforcement as "KSM." A 30-year-old Yemeni, bin al Shibh had journeyed to Hamburg, Germany, where he became close friends and a fellow al Qaeda member with Mohammed Atta, the tactical commander of the 9/11 attacks. Hand-picked by Osama bin Laden to join the 9/11 attackers, bin al Shibh's American visa applications had been repeatedly rejected. He continued to serve as a conduit for money and instructions between al Qaeda leaders and the hijackers. He was the coordinator of the attacks.

Another six months later, American and Pakistani intelligence landed KSM himself. Labeled by the 9/11 Commission Report as the "principal architect" of the 9/11 attacks and a "terrorist entrepreneur," KSM was captured on March 1, 2003 in Rawalpindi, Pakistan. The uncle of Ramzi Yousef, who had carried out the first bombing of the World Trade Center, KSM had worked on the foiled plan to bomb twelve American airliners over the Pacific. It was KSM who met with bin Laden in 1996 and proposed the idea of crashing planes into American targets. He helped select the operatives, provided the financing and preparation for their trip to the United States, and continued to stay in close contact with the operatives in the months leading up to 9/11. After the U.S. invasion of Afghanistan and the capture of Zubaydah, KSM became the most important leader after bin Laden and Zawahiri.

According to public reports, these three seasoned al Qaeda commanders provided useful information to the United States. Not only did their captures take significant parts of the al Qaeda leadership out of action, they led to the recovery of much information that prevented future terrorist attacks and helped American intelligence more fully understand the operation of the terrorist network. One only has to read the 9/11 Commission report to see the large amounts

of information provided by the three.[2] Indeed, government officials have said publicly that these operations have allowed the government to stop attacks on the United States itself.

Revised 2004 OLC Opinion on Interrogation

At the end of 2004, well after I had left the Justice Department, OLC issued a revised opinion on some of the matters covered by OLC's 2002 memorandum. The 2004 opinion replaced the 2002 opinion's definition of torture. The 2004 memo said that torture might be broader than "excruciating or agonizing pain or suffering," using words not much different from the anti-torture statute itself. It then proceeded to list acts that everyone would agree were torture. The 2004 opinion did not provide as precise a definition of the law as the 2002 opinion. Though it criticized our earlier work, the 2004 opinion included a footnote to say that *all* interrogation methods that earlier opinions had said were legal, *were still legal.* Interrogation policy had not changed. The 2004 opinion also followed the 2002 opinion's distinction between torture and cruel, inhuman, and degrading treatment, and agreed that federal criminal law prohibited only the former. It agreed that "torture" should be used to describe only extreme, outrageous acts that were unusually cruel.

The 2004 opinion also omitted a discussion in the 2002 opinion on the scope of the President's Commander-in-Chief power and possible defenses should the statute be violated. Let me be clear that the 2002 opinion did not include this discussion because we wanted to condone any violation of federal law. Federal law prohibits the infliction of severe physical or mental pain or suffering. As government lawyers, our duty was to interpret the laws as written by Congress. There is no doubt that these were and are very difficult and close questions, made all the harder because of the lack of any authoritative judicial interpretation. Indeed, it was precisely because some might later deem a particular interrogation technique to be "close to the statutory line" that OLC believed in 2002 that it was necessary to consider all potential legal issues, including the independent constitutional powers of the President. Conversely, by finding the *same* interrogation techniques *wholly legal* without regard to any independent authority that the President might have in this area under the Constitution, the 2004 opinion necessarily found the statutory questions far easier than OLC had believed it to be in 2002.

Request from the Defense Department

Let me turn now to the second opinion request I mentioned earlier—the one OLC received from the Department of Defense, which dealt with potential interrogation methods for high-value al Qaeda members being held at Guantanamo Bay.

Interrogation methods at Guantanamo Bay were the result of a careful vetting process through a Defense Department-wide working group. In 2003, the DOD Working Group considered the policy, operational, and legal issues involved in the interrogation of detainees in the war on terrorism, and the DOD General Counsel's office requested an opinion from OLC on certain of the legal standards that would govern the interrogation of al Qaeda terrorists held at Guantanamo Bay. Our inquiry was limited to the potential application of federal criminal law. It did not analyze any issues that might arise in Guantanamo under military law, as DOD reserved analysis of those issues for itself.

Just as we had with the request from the CIA/NSC in 2002, OLC notified the components in our chain of command within DOJ about DOD's request for an opinion. As in 2002, OLC circulated drafts of the proposed opinion to the Offices of the Deputy Attorney General, the Attorney General, and the Criminal Division. The process of researching, drafting, and editing within OLC and within the Justice Department was the same as with the 2002 opinion. Although the Working Group did not know of the CIA/NSC 2002 request for similar advice, our 2003 opinion would be substantially similar to our August 2002. In fact, it had to be if OLC were to follow its own internal precedent. I met with the working group, composed of both military officers and Defense Department civilians, to discuss legal issues. Our final opinion was delivered to DOD on March 14, 2003.

That April, the Working Group issued a report that incorporated sections of OLC's opinion as part of a broader analysis of the legal and policy issues regarding interrogations at Guantanamo Bay. The Working Group, after carefully considering all the issues, approved a set of 26 well-known tactics in oral questioning while reserving anything more aggressive for use only on specific detainees with important information subject to senior commander approval. It required that any interrogation plan take into account the physical and mental condition of the detainee, the information that they might know, and environmental and historical factors. It reiterated President Bush's 2002 executive order that all prisoners be treated humanely and consistent with the principles of the Geneva Conventions. The Working Group report also outlined the potential costs of exceptional interrogation methods—loss of support among allies, weakened protections for captured U.S. personnel, confusion among interrogators about approved methods, and weakening of standards of conduct and morale among U.S. troops.

As it turned out, it appears that the Secretary of Defense refused to authorize these exceptional interrogation methods for Guantanamo Bay with the sole exception of isolation. The Secretary struck out the use of blindfolds and even mild, non-injurious physical contact from the list of conventional interrogation techniques. I repeat—of the exceptional methods, it appears that the Secretary of Defense authorized only one: isolation. He allowed it only if it generally would not be longer than 30 days. That was it. He never approved any use of dogs, physical contact, slapping, sleep deprivation, or stress positions.

Let me be clear, again, that we in OLC never proposed or selected any specific interrogation methods, either for the CIA or DOD. These difficult decisions were the province of the policymakers. But, again, judging from published reports of our intelligence successes, it appears clear those decisions almost certainly thwarted near terrorist attacks upon our citizenry.

In closing, I believe that it is important to avoid the pitfalls of Monday morning quarterbacking. It may seem apparent today–at least to some—that other choices would have led to better outcomes, though I am not so sure. In facing the questions that were posed to us, we appropriately kept in mind that the homeland of the United States had been attacked by a dangerous, unconventional enemy. But we did not make policy, and we called the legal questions as we saw them. There is little doubt that these are difficult questions, about which reasonable people can differ in good faith. Yet, the facts remain that the United States has successfully frustrated al Qaeda's efforts to carry out follow-on attacks on the Nation, and that the interrogation of captured al Qaeda leaders have been a critical part of that effort. It may be convenient to criticize those of us who had to make these difficult decisions, but it is an important exercise to ask whether others would truly have made a different decision, under the

circumstances that existed in early 2002 and early 2003—and whether, if they had, the Nation would have been as successful in averting another murderous attack upon our citizens.

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[1] The email guidance reads:

> The Department of Justice does not object to Prof. Yoo's appearance before the House Judiciary Committee to testify on the general subjects identified in the letter to him of April 8, 2008 from Chairman Conyers, subject to the limitations set forth herein. Specifically, the Department authorizes Prof. Yoo to respond to questions in the following manner: He may discuss the conclusions reached and the reasoning supporting those conclusions in particular unclassified or declassified legal opinions that have been publicly disclosed by the Department (such as the unclassified August 1, 2002 opinion addressing the anti-torture statute, the published December 30, 2004 opinion addressing the anti-torture statute, and the declassified March 14, 2003 opinion to the Department of Defense addressing interrogation standards). As a special accommodation of Congress's interests in this particular area, he may discuss in general terms which offices of the Executive Branch participated in the process that led to a particular opinion or policy decision, to the extent those opinions or policy decisions are now matters of public record. He is not authorized, however, to discuss specific deliberative communications, including the substance of comments on opinions or policy questions, or the confidential predecisional advice, recommendations, or other positions taken by individuals or entities of the Executive Branch.

[2] Most of the details of the formation and execution of the 9/11 attacks are directly attributed in the Commission Report's text and footnotes to their interrogations. See the note on Detainee Interrogation Reports in The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attakcs Upon the United States 146 (2004).