FROM THE DEPARTMENT OF JUSTICE TO GUANTANAMO BAY: ADMINISTRATION LAWYERS AND ADMINISTRATION INTERROGATION RULES (PART V)

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

JULY 17, 2008

Serial No. 110–196

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://judiciary.house.gov

U.S. GOVERNMENT PRINTING OFFICE

43–527 PDF WASHINGTON : 2008

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

COMMITTEE ON THE JUDICIARY

JOHN CONYERS, JR., Michigan, *Chairman*

HOWARD L. BERMAN, California
RICK BOUCHER, Virginia
JERROLD NADLER, New York
ROBERT C. "BOBBY" SCOTT, Virginia
MELVIN L. WATT, North Carolina
ZOE LOFGREN, California
SHEILA JACKSON LEE, Texas
MAXINE WATERS, California
WILLIAM D. DELAHUNT, Massachusetts
ROBERT WEXLER, Florida
LINDA T. SANCHEZ, California
STEVE COHEN, Tennessee
HANK JOHNSON, Georgia
BETTY SUTTON, Ohio
LUIS V. GUTIERREZ, Illinois
BRAD SHERMAN, California
TAMMY BALDWIN, Wisconsin
ANTHONY D. WEINER, New York
ADAM B. SCHIFF, California
ARTUR DAVIS, Alabama
DEBBIE WASSERMAN SCHULTZ, Florida
KEITH ELLISON, Minnesota

LAMAR SMITH, Texas
F. JAMES SENSENBRENNER, JR., Wisconsin
HOWARD COBLE, North Carolina
ELTON GALLEGLY, California
BOB GOODLATTE, Virginia
STEVE CHABOT, Ohio
DANIEL E. LUNGREN, California
CHRIS CANNON, Utah
RIC KELLER, Florida
DARRELL ISSA, California
MIKE PENCE, Indiana
J. RANDY FORBES, Virginia
STEVE KING, Iowa
TOM FEENEY, Florida
TRENT FRANKS, Arizona
LOUIE GOHMERT, Texas
JIM JORDAN, Ohio

PERRY APELBAUM, *Staff Director and Chief Counsel*
SEAN MCLAUGHLIN, *Minority Chief of Staff and General Counsel*

CONTENTS

JULY 17, 2008

Page

OPENING STATEMENT

The Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Chairman, Committee on the Judiciary 1
The Honorable Lamar Smith, a Representative in Congress from the State of Texas, and Ranking Member, Committee on the Judiciary 2

WITNESSES

The Honorable John Ashcroft, former Attorney General, U.S. Department of Justice
Oral Testimony 3
Prepared Statement 7
Mr. Benjamin Wittes, Fellow and Research Director in Public Law, The Brookings Institution
Oral Testimony 13
Prepared Statement 16
Mr. Walter Dellinger, former Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice
Oral Testimony 21
Prepared Statement 24

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Chairman, Committee on the Judiciary 85
Prepared Statement of the Honorable Maxine Waters, a Representative in Congress from the State of California, and Member, Committee on the Judiciary 86
Prepared Statement of the Honorable Steve Cohen, a Representative in Congress from the State of Tennessee, and Member, Committee on the Judiciary 87
Appendices to the Prepared Statement of Walter Dellinger, former Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice 88

FROM THE DEPARTMENT OF JUSTICE TO GUANTANAMO BAY: ADMINISTRATION LAWYERS AND ADMINISTRATION INTERROGATION RULES (PART V)

THURSDAY, JULY 17, 2008

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:09 a.m., in room 2141, Rayburn House Office Building, the Honorable John Conyers, Jr. (Chairman of the Committee) presiding.

Present: Representatives Conyers, Nadler, Scott, Lofgren, Waters, Delahunt, Wexler, Sánchez, Cohen, Johnson, Sherman, Baldwin, Schiff, Davis, Ellison, Smith, Coble, Gallegly, Goodlatte, Chabot, Lungren, Cannon, Keller, Issa, Pence, King, Feeney, Franks, Gohmert, and Jordan.

Staff Present: Elliot Mincberg, Majority Chief Oversight Counsel; Sam Sokol, Majority Oversight Counsel; Paul Taylor, Minority Counsel; and Renata Strause, Majority Staff Assistant.

Mr. CONYERS. Good morning. The Committee will come to order. The hearing today is entitled "From the Department of Justice to Guantanamo Bay: Administration Lawyers and Administration Interrogation Rules" that are being examined before the Committee. Actually, this is the fifth in a series of hearings on the subject, the first four which have been held in the Constitution Subcommittee of the Judiciary Committee.

In recent months, our Constitution Subcommittee has conducted a vigorous investigation of the Administration's interrogation policy, and some of the legal theories that allowed it. Today the investigation comes to the full Committee, with a remarkable opportunity to hear from our former Attorney General and two other distinguished witnesses.

I think that all of us, witnesses and Members of the Committee alike, share in the view that there is important common ground in the subject matter that brings us together. I could recite a number of examples of where the former Attorney General made me very proud of the decisions he made or some of the things that he said.

But our subject today is a narrow one about interrogation rules. Our overall inquiry, however, is about the rule of law. In prior hearings, the Subcommittee heard testimony, including claims of Presidential power, that made it seem that no act or conduct was out of bounds if the President thought it necessary. We heard testi-

mony about how dissenting views were handled on this issue. I have great concern about the way any executive branch responds to legal advice it doesn't like, especially when it results in the firing of the lawyer that provided it.

So while one goal of this hearing is to continue to develop as well as we can these recent important historical incidents on the interrogation issue, I am also appreciative of the opportunity to hear from all our witnesses on what is happening to the rule of law today and how they best think we can move forward on this issue, and to continue it. After all, that is the role, one of the important roles of the Constitution Committee—of the Judiciary Committee, which has jurisdiction over the Constitution. And so we hope that we can restore meaning and significance to the promise that America does not torture, and that further, America respects the rule of law.

I now turn to our distinguished Ranking Member from Texas, Lamar Smith.

Mr. SMITH. Thank you, Mr. Chairman. Mr. Chairman, this is the ninth hearing of this Committee and its Subcommittees regarding the interrogation of known terrorists. After nine hearings, like nine innings, the game should be over. Yet all the curve balls thrown at these many hearings cannot obscure the simple fact that Members of both political parties had been fully briefed on the CIA's interrogation program, and no objections were raised.

According to the Washington Post, four Members of Congress, including House Speaker Nancy Pelosi, were given a thorough review of the CIA interrogation program in September 2002. The methods outlined included waterboarding. No objections to the interrogation program or the methods were raised at the time by the Members.

Torture is, and has been, illegal under U.S. law, as it should be. We do not, have not, and will not condone acts of torture. In fact, Congress has taken additional steps in recent years to strengthen laws against torture. The McCain amendment prohibits persons in the custody or control of the U.S. Government, regardless of their nationality or physical location, from being subjected to cruel, inhuman, or degrading treatment or punishment.

It should come as no surprise that special interrogation methods that do not amount to torture are legal and can and have been used appropriately to save American lives. For example, the interrogation of terrorist Zubaydah, a high level logistics chief of al-Qaeda, resulted in the disruption of several terrorist attacks. When Zubaydah was captured, he and two other men were in the process of building a bomb. A soldering gun used to make the explosives was still hot on the table, along with building plans for a school. According to a former CIA official, when asked what he would do if released, he responded I would kill every American and Jew I could get my hands on. He refused to offer any actionable intelligence until he was subjected to special interrogation procedures for between 30 to 55 seconds. According to what he said, quote, from that day on he answered every question. The threat information that he provided disrupted a number of attacks, maybe dozens of attacks.

The Supreme Court has determined that unconstitutional acts, or torture, are those that shock the conscience. And what shocks

the conscience depends on the circumstances and purpose of the interrogation. For example, if someone were picked at random on the streets of New York and subjected to special interrogation techniques, it would undoubtedly shock the conscience. But what if that person was one of the 9/11 terrorists? Or perhaps a known terrorist who is found in possession of explosives, the blueprint for a U.S. embassy, and expresses his desire to kill Americans? Given the recent events in Turkey, this is a realistic hypothetical. Using legal means, even as a last resort, to gather information that could save hundreds or thousands of American lives does not shock the conscience. Though rarely used, these legal methods work and have saved lives.

The Schlesinger report, an independent report on Pentagon detention operations, concluded that at Guantanamo the interrogators used those additional techniques with only two detainees, gaining important and time-urgent information in the process. A separate review found that the interrogation program in the case of alleged 20th hijacker, Mohammad al-Qahtani, ultimately provided extremely valuable intelligence.

Benjamin Wittes of the Brookings Institution, one of our witnesses today, perhaps said it best. Whatever rhetorical pose politicians adopt, categorical opposition to coercive interrogation is not a tenable position for anyone with actual responsibility for protecting the country. Those charged with the responsibility of keeping Americans safe must do what they can within the limits of the law. And when they do so in very difficult circumstances, there will inevitably be debates regarding what those limits are. But while those debates should be welcomed, we should be careful not to unjustly persecute anyone, especially those whose sleepless efforts enable us and our families to sleep better at night.

Thank you, Mr. Chairman. I yield back.

Mr. CONYERS. Thank you. Would the witnesses please stand to be administered the oath? Raise your right-hand.

[Witnesses sworn.]

Mr. CONYERS. Thank you. All the witnesses said yes. Without objection, other Members' opening statements will be included in the record.

Our first witness this morning is the distinguished former Attorney General John Ashcroft, who served in that position from 2001 to 2005. He was additionally a United States Senator from Missouri. He was also the State's Governor for two terms. And we are very proud to welcome him back again to the House Judiciary Committee. Sir, you may proceed.

TESTIMONY OF THE HONORABLE JOHN ASHCROFT, FORMER ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Mr. ASHCROFT. Thank you, Chairman Conyers and Ranking Member Smith. I am grateful for the opportunity to testify about interrogation of al-Qaeda detainees. This Committee's prior hearings on this topic have focused principally on three legal opinions authored by the Office of Legal Counsel, opinions authored in August of 2002, March 2003, and December of 2004. I served as Attorney General of the United States when each of these opinions was

written. And before delving into the specifics of the memos, I would like to make a few preliminary points.

First, after 7 years without an attack, it is perhaps easy to forget just how perilous the time was. But during the summer of 2002, we in the Justice Department were confronted with daily reminders that the lives of countless Americans depended on our efforts to prevent another terrorist attack, and that even the slightest mistake could result in tragedy. After 9/11, the Administration's overriding goal, which I fully embraced, was to do everything within its power and within the limits of the law, I repeat within its power and within the limits of the law, to keep this country and the American people safe from terrorist attacks.

As this Congress and the Nation now turn to reevaluate the work that was done, with the altered perception of 7 years of safety, we would all do well to remember the dangers we faced and the dangers we still face, and the potentially catastrophic consequences of error.

Second, the process we will discuss here today, the examination of difficult legal questions by the Office of Legal Counsel and OLC's reassessment of its opinions when warranted by new concerns, conditions or information, is a distinct virtue, and reflects this Administration's commitment to the rule of law. There is no room in the Justice Department for an assumption that its work is perfect, nor for an attitude of resistance to reconsideration. Determined to provide the best advice possible, I sought to ensure that the Department adhered to the highest professional standards of quality and integrity.

In rendering legal advice to the President and the executive branch agencies, the Office of Legal Counsel, or OLC, is bound to adhere faithfully to the holdings of relevant Supreme Court precedents. So too are the lower Federal courts. That is why, I submit, the Justice Department's legal positions in the major war on terror cases uniformly prevailed in the courts of appeals, courts where the Supreme Court precedent is binding. Indeed, the Department of Justice lost only one vote of the 12 Court of Appeals judges that heard such cases. The Department's positions to be sure did not fare as well in the Supreme Court, where unlike the Court of Appeals, the justices are free to depart from the Court's precedents. It simply cannot be denied, however, that each of these cases presented close, difficult issues on which reasonable legal minds, acting in good faith, disagree.

The Justice Department serves both the institution of the presidency and the presidency—or the President himself, in whom the Constitution of the United States vests the executive power. While OLC is bound to adhere faithfully to Supreme Court precedent, that precedent is often genuinely open to more than one interpretation, and thus contemplates an executive branch interpretive role. It follows, I believe, that when OLC is presented with a close and difficult legal question, one on which it cannot conclude that an Administration's proposed policy is legally foreclosed, OLC is obliged to so inform the President and to offer any advice it may have on steps that might be taken to reduce any legal uncertainty.

It is difficult to imagine an area in which the imperative to afford the President the benefit of genuine doubt is greater than with

respect to his judgments as Commander in Chief on how best to protect the lives and liberties of the American people in the war on terror.

A final preliminary point I would like to make is this. Before these hearings commenced, I had but a limited recollection of many of the events pertinent to your inquiry. In attempting to prepare for this hearing, I reviewed testimony from prior hearings, I read portions of publications recounting some of the timely events, and I must admit that it has been difficult for me sometimes to distinguish between what I in fact recall as a matter of my own experience and what I remember from the accounts of others. As a result, what I hope I will be able to say will be of value to the Committee. Reliance on my statements and observations ought to be tempered by these awarenesses.

In March of 2002, the United States and Pakistan captured Abu Zubaydah, al-Qaeda's third in command, the highest value capture up to that point. The Administration turned to OLC for guidance as to the standard for interrogation of al-Qaeda detainees outside the United States under the anti-torture statute and the Convention Against Torture. OLC issued its opinion August 1, 2002.

In 2003, the Department of Defense requested that OLC provide an opinion on the scope of Federal and international law standards governing military interrogation of al-Qaeda detainees held outside of the United States. The resulting opinion was issued on March the 14th, 2003.

Former Deputy Attorney General John Yoo has testified to this Committee that OLC followed its normal process in preparing both of these highly classified opinions, including consultations with other components of the Justice Department and executive branch agencies, and he provided a fairly detailed account of the process that attended the preparation and issuance of the August 2002 opinion.

My own memory is not nearly so detailed, but I do not generally recall that I was—pardon me, but I do generally recall that I was made aware that a legal opinion relating to the interrogation of al-Qaeda detainees was being prepared by OLC, that a draft or drafts were provided to my office, and that I was briefed on the general contours of the opinion's substantive analysis and on its conclusions, and that I approved its issuance.

Thus, as best I can recall, the August 2002 interrogation opinion followed the normal review process in my office for such matters. In this regard, it is important to bear in mind that each week during my tenure as Attorney General, and especially following 9/11, scores of critically important matters came to my desk. Necessarily then I did what every Attorney General and Cabinet official must, I daily relied on expert counsel and painstaking work of experienced and skilled professionals who staffed the Department.

With respect specifically to the March 2003 opinion, while I have no recollection of the process that attended its preparation by OLC or the review it received in my office, I have no reason to doubt the testimony of Mr. Yoo on this matter.

It is now well known that Assistant Attorney General Jack Goldsmith withdrew the August 2002 and March 2003 memos during his tenure as head of the OLC. He did so with both my knowledge

and my approval. Upon review of the memos, concerns were raised about the appropriateness of some of the analysis, and that the memos addressed certain issues beyond those necessary to answer the narrow questions presented to the Department.

This remedial process worked as it should have. When concerns were raised about the Department's work, I directed the professionals at the Department to reexamine the work and to make any warranted adjustments. The December 2004 memo that ultimately replaced the August 2002 memo advanced a narrower interpretation of the standard defined by the anti-torture statute. It also deleted unnecessary discussions of the scope of Presidential power and potential defenses to prosecutions under the anti-torture statute.

The memo did not, however, call into question any of the actual interrogation practices that OLC had previously approved as legal. In fact, the new memo, the replacement memo stated we have reviewed the office's prior opinions addressing issues involving treatment of detainees, and do not believe that any of their conclusions would have been different under the standards set forth in this memorandum.

One way to think about this is to imagine that a highway had a posted speed limit of 85 miles per hour, but the cars traveling upon it never moved faster than 65 miles per hour. Taking down the 85 mile per hour signs and putting up 65 mile per hour signs would not require a change in driving conduct. It would merely redefine the outer boundaries of what drivers would be said legally could be done. This is precisely what happened with the interrogation advice rendered by the Department in 2002 and 2003. When I was informed about concerns relating to overly broad advice, the limits of which were never tested, I directed the OLC to correct it.

To the extent my memory will allow and the extent I am permitted under the guidance I have received from the Department of Justice, I would be pleased to answer your questions.

[Prepared statement of Mr. Ashcroft follows:]

PREPARED STATEMENT OF JOHN ASHCROFT

STATEMENT OF JOHN ASHCROFT

Hearing before the House Judiciary Committee
From the DOJ to Guantanamo Bay: Administration Lawyers and Administration Interrogation Rules

July 17, 2008

Mr. Chairman, thank you for the opportunity to testify about "United States policies regarding interrogation of persons in the custody of the nation's intelligence services and armed forces." This Committee's prior hearings on this topic have focused principally on three legal opinions authored by the Office of Legal Counsel in August 2002, March 2003, and December 2004. I served as Attorney General when each of these memos was written. Before delving into the specifics of those memos, I would like to make a few preliminary points.

First, during the weeks and months following September 11—and particularly in the summer of 2002, as the first anniversary of that tragic day approached—the Nation greeted each new day with justified awareness that al Qaeda was determined to strike us again. The daily report of national security threats prepared for the President by the intelligence agencies served as a chilling reminder of the danger we faced, and every morning brought new and pressing challenges. As I stated to the 9/11 Commission: "My day beg[an] with a review of the threats to Americans and to American interests that were received in the previous twenty-four hours. If ever there were proof of the existence of evil in the world, it is in the pages of these reports."

After seven years without an attack, it is perhaps easy to forget just how perilous that time was; easy to forget the daily headlines of foiled plots and new threats; easy to forget the color-coded threat levels and the nervous apprehension that hung in the air; easy to forget how strange it seemed to take our shoes off in airport security lines. But at the time—the summer of 2002—reminders of the peril we faced were all about us. During that summer both Zacarias Moussaoui, a confessed co-conspirator in 9/11, and John Walker Lindh, the American turned Taliban fighter, were being prosecuted by the Justice Department. It was also during that summer that the Department announced the disruption of Jose Padilla's plot to explode a dirty bomb, and the indictment of five leaders of the Islamic terrorist organization Abu Sayyaf. And in August of 2002 the first payments from the September 11 Victim Compensation Fund went out to the families of some of our murdered countrymen.

In short, we in the Justice Department were confronted with daily reminders that the lives of countless Americans depended on the effectiveness of our efforts to prevent another terrorist attack and that even the slightest mistake could result in tragedy. After 9/11, the Administration's overriding goal, which I fully embraced, was to do everything within its power and within the limits of the law—I repeat, within its power *and* within the limits of the law—to keep this country and the American people safe from terrorist attacks. If we had missed some piece of intelligence, or had failed to pursue vigorously every lead—if we had returned to a pre-9/11 way of doing business, with counterproductive firewalls and outdated laws and procedures—I might still be testifying here today, but the topic might be far different. As this Congress and the nation now turn to reevaluate that work with the altered perception of seven

years of safety, we would all do well to remember the danger we faced (and still face) and the potentially catastrophic consequences of error.

Second, the process we will discuss here today—the examination of difficult legal questions by OLC, and OLC's reassessment of its opinions when warranted by new concerns, conditions, or information—is a distinct virtue, and reflects this Administration's commitment to the rule of law. There is no room in the Justice Department for an assumption that its work is perfect, nor for an attitude of resistance to reconsideration. The Administration's continual—indeed, almost obsessive—quest for legal guidance and specific authorization for measures necessitated by the War on Terror is evidence of a government striving to keep within the limits of law, not one seeking to ignore or evade those limits. I make no claim that the Department's analyses of the difficult legal questions that arose during my tenure as Attorney General—questions often at the edges of our law—were always flawless, nor that our conclusions were always free from doubt. No Administration can lay claim to such a feat; nor can the oft-divided Supreme Court, which reverses itself, from time to time, on issues of the greatest national importance. I can and do claim, however, that as Attorney General I sought to ensure that the legal advice provided by the Department adhered to the highest professional standards of quality and integrity.

In rendering legal advice to the President and Executive Branch agencies, OLC is bound to respect and faithfully adhere to the holdings of relevant Supreme Court precedents. So, too, are the lower federal courts bound by Supreme Court precedents in deciding the issues that come before them. That is why, I submit, the Justice Department's legal positions in the major War on Terror cases—*Rasul, Hamdi, Hamdan,* and *Boumediene*—uniformly prevailed in the courts of appeals, courts in which Supreme Court precedent is binding. Indeed, the Department lost the vote of only one of the twelve court of appeals judges that heard these cases. The Department's positions, to be sure, did not fare as well when these cases reached the Supreme Court, but the Justices were closely divided in each of them. Unlike the courts of appeals and OLC, however, the Supreme Court is free to depart from its own precedents, and that is what it did, I submit, in these cases. But whether you agree with the 27 federal judges who ruled against the Department in these cases, or the 24 federal judges who agreed with the Department, it simply cannot be denied that each of these cases presented close and difficult issues on which reasonable people acting in good faith could disagree.

Which brings me to a related point about the work of the Justice Department, and of the OLC in particular. The Justice Department is located in the Executive Branch and serves both the institution of the presidency and the incumbent, democratically elected President, in whom the Constitution vests the executive power. OLC therefore differs from a court in that its responsibilities include facilitating the objectives of the offices and persons it serves, especially the President, consistent with the requirements of the law. And while OLC is bound to respect and adhere to Supreme Court precedent, that precedent is often genuinely open to more than one interpretation and thus contemplates an Executive Branch interpretive role. It follows, I believe, that when OLC is presented with a close and difficult legal question, one on which it cannot conclude that an Administration policy or course of action is legally foreclosed, OLC is obliged to so inform the President and to offer any advice it may have on steps that might be taken to reduce any legal uncertainty. It is difficult to imagine an area in which the imperative to afford

the President the benefit of genuine doubt is greater than with respect to his judgments as Commander-in-Chief on how best to protect the lives and liberty of the American people in the War on Terror.

To relate these points to actual legal issues addressed by OLC, let me return to the Supreme Court's decisions in *Rasul*, *Hamdi*, *Hamdan*, and *Boumediene*. Again, although the Supreme Court ultimately ruled against certain features of Administration policy in each of these cases, the Justices themselves were closely divided and the courts of appeals had uniformly upheld the Administration's positions. In one of those cases, we find the Court issuing six separate opinions. On questions plagued by significant uncertainty, on which the sharpest legal minds embrace differing legal analysis, it would have been inappropriate for OLC to constrain as unlawful the President's defense prerogatives.

The fourth point to keep in mind when examining the interrogation memos is that the Office of Legal Counsel provides just what its name implies: legal counsel. It is not a policymaking body, and it does not offer policy recommendations. It renders legal advice based upon its best reading of the existing law. To my recollection, nothing in the three interrogation memos advocates any particular policy or practice; the memos represented attempts to answer specific fact-bound legal questions posed to the Department regarding the reach of laws that might be implicated by interrogation practices. Legal analysis marks the beginning of policy analysis, not the end. The decision to pursue a policy within the legal boundaries recognized in an OLC memo was left to the relevant agencies.

The final preliminary point I would like to make is this: Before these hearings commenced, I had but a limited recollection of many of the events pertinent to your inquiry. In attempting to prepare for this hearing, I have reviewed testimony from prior hearings and have read portions of publications recounting some of the timely events. I must admit that it has become difficult for me to distinguish between what I in fact recall as a matter of my own experience and what I remember from the accounts of others. As a result, while I hope what I can say will be of value to the Committee, reliance on my statements and observations ought to be tempered by this awareness.

With these points in mind, let me turn now to some specifics about the OLC memos in question.

In March 2002, the United States and Pakistan captured Abu Zubaydah, al Qaeda's third-in-command, and the highest value capture up to that point. This was an event of overwhelming significance for the intelligence community. Former CIA Director George Tenet explained in his book, *At the Center of the Storm*, "Zubaydah and a small number of other extremely highly placed terrorists potentially had information that might save thousands of lives." Zubaydah was the chief military planner for al Qaeda, and he knew the identities and plans of many of its operatives. He was, however, highly resistant to standard interrogation techniques. In this setting, the Administration turned to OLC for general guidance as to the standard for interrogation of al Qaeda detainees outside the United States under 18 U.S.C. §§ 2340-2340A, commonly known as the anti-torture statute, and the Convention Against Torture and other Cruel, Inhuman, and Degrading Treatment or Punishment ("CAT"). OLC issued its opinion on

August 1, 2002, under the signature of Assistant Attorney General Jay Bybee. Press accounts have related that another still-classified memorandum gave more focused guidance on the legality of certain individual interrogation techniques.

In 2003, the Department of Defense requested that OLC provide an opinion on the scope of federal and international law standards governing military interrogation of *al Qaeda detainees* held outside of the United States, including at Guantanamo Bay, Cuba. The resulting opinion, issued on March 14, 2003, under the signature of Deputy Assistant Attorney General John Yoo, also addressed the anti-torture statute and the CAT, and its analysis of these provisions largely tracked the August 2002 opinion.

Mr. Yoo has testified to this Committee that OLC followed its normal process in preparing both of these highly classified legal opinions, including consultation with other components of the Justice Department and Executive Branch agencies. And he provided a fairly detailed account of the process that attended the preparation and issuance of the August 2002 opinion. My own memory is not nearly so detailed, but I do generally recall that I was made aware that a legal opinion relating to interrogation of al Qaeda detainees was being prepared by OLC, that a draft (or drafts) were provided to my office, that I was briefed on the general contours of the opinion's substantive analysis and on its conclusions, and that I approved of its issuance.

Thus, as best I can recall, the August 2002 interrogation opinion followed the normal review process in my office for such matters. In this regard, it is important to bear in mind that each week during my tenure as Attorney General—and especially following 9/11—scores of critically important matters came to my desk. During the time period in question—2002 and 2003—myriad opinions issued from OLC, many on urgent matters of national security; hundreds of criminal prosecutions were brought; hundreds of civil enforcement suits were filed by the Department's litigating divisions and U.S. Attorneys; scores of judicial candidates were considered and many nominations were made; dozens of corporate mergers were analyzed and decided; major legislative proposals were formulated and analyzed; the Solicitor General filed hundreds of briefs in the Supreme Court on issues of paramount importance, and on, and on, and on. In other words, while the focused nature of this congressional hearing might lead some to the impression that interrogation issues constituted the bulk of the Department's business from 2002 through 2004, the reality is that the entire Department of Justice marched on during this time, and it was my responsibility to oversee all of it. Necessarily then, I did what every Attorney General and Cabinet official must: I daily relied on the expert counsel and painstaking work of the experienced and skilled professionals who staff the Department.

With respect specifically to the March 2003 opinion, while I have no recollection of the process that attended its preparation by OLC or the review it received by my office, I have no reason to doubt the testimony of Mr. Yoo on this matter. Given that the relevant analysis in the March 2003 memo largely mirrored that of the earlier August 2002 memo, the fact that its review process is not particularly memorable to me is unsurprising.

Thus, the bottom line is that I treated the interrogation memos like I treated other critical matters percolating at the time: I relied on the professional staff in the Department to research,

formulate, and properly vet the analysis, to brief me on its general contours and bottom line, and to answer any questions I had. But it was no more feasible for me to read these memos line by line, and to pull the sources cited therein to double check their applicability, than it would have been for me to line edit and source-check the more than 300 briefs filed by the Solicitor General before the Supreme Court in 2002 and 2003.

It is now well known that Assistant Attorney General Jack Goldsmith withdrew the August 2002 and March 2003 memos during his tenure as head of the OLC. He did so with my knowledge and approval. The question will thus be asked: why did my office approve these memos in the first place and then approve their withdrawal? The answer is simply that, upon review of the memos, concerns were raised about the appropriateness of some of the analysis and that the memos addressed certain issues beyond those necessary to answer the narrow questions presented to the Department. I believe this process worked as it should have: when concerns were raised about the Department's work on any important matter, I directed the experts at the Department to reexamine its work and make any warranted adjustments.

The December 2004 memo that ultimately replaced the August 2002 memo advanced a narrower interpretation of the standard defined by the anti-torture statute. It also deleted unnecessary discussions of the scope of presidential power and potential defenses to prosecutions under the anti-torture statute. The memo did not, however, call into question any of the actual interrogation practices that the OLC had previously approved as legal. As the memo itself stated: "we have reviewed the Office's prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would have been different under the standards set forth in this memorandum." And as Attorney General Mukasey explained to the Senate just last week: "[I]t's fair to say that the conclusions—the ultimate bottom-line conclusions of those opinions were unchanged. That is that practices that were permitted under the laws that then existed were in fact permissible, although not for the reasons outlined in those opinions." One way to think about this is with an analogy. Imagine that a highway had a posted speed limit of 85 miles per hour, but the cars traveling upon it never moved faster than 65 miles per hour. Taking down the 85 miles-per-hour signs and putting up 65 miles-per-hour signs would not require a change in driving conduct: It would merely redefine the outer boundaries of what the drivers legally could do. That is precisely what happened with the interrogation advice rendered by the Department in 2002 and 2003: when I was informed about concerns regarding overly broad advice, the limits of which were never tested, I directed the OLC to correct it.

---

[1] Specifically, the guidance from the Department of Justice states:

> The Department of Justice does not object to former Attorney General Ashcroft's appearance before the House Judiciary Committee to testify on the general subjects identified in the letter to him of April 11, 2008 from Chairman Conyers, subject to limitations set forth herein. Specifically, the Department authorizes General Ashcroft to respond to questions in the following manner: He may discuss the conclusions reached and the reasoning supporting those conclusions

To the extent my memory will allow, and to the extent I am permitted under the guidance I have received from the Department of Justice[1], I will attempt to answer your questions.

---

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 interest 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.

Mr. CONYERS. Thank you.

Benjamin Wittes is a Fellow and Research Director in Public Law at the Brookings Institution, a well known writer and author of a recently published book, entitled Law and the Long War: The Future of Justice in the Age of Terror.

Mr. Benjamin Wittes, welcome to the Judiciary Committee.

TESTIMONY OF BENJAMIN WITTES, FELLOW AND RESEARCH DIRECTOR IN PUBLIC LAW, THE BROOKINGS INSTITUTION

Mr. WITTES. Thank you very much, Mr. Chairman, Mr. Ranking Member, and Members of the Committee, for inviting me to testify concerning American interrogation policy. I do not intend today to focus on the past, but on the future; that is, on the contours of the interrogation laws we need prospectively in order to prosecute the war on terrorism in a manner that is at once effective and consistent with American values.

I would like to make three points. First, that Congress in the McCain amendment successfully addressed the problem of military interrogations. That law gave the military, within the parameters of more general requirements of humane treatment of detainees, great latitude to set its own rules, requiring only that it publish and follow them. The new field manual that the Army promulgated in response offers a limited degree of additional flexibility over the old one in certain areas. It also contains a great deal more specificity about all of the interrogation tactics it authorizes than did the prior version. These policy changes have been so successful that today neither human rights groups nor the military is complaining a whole lot about contemporary Army interrogation rules. And the result of this is that the currently contested terrain in the battle over interrogation policy is actually a lot narrower than most people imagine it to be.

Second point, that the policy Congress adopted in that statute is relatively easily adapted to address interrogations by the CIA, though not simply by applying the McCain amendment itself to the agency; that is, applying the Army Field Manual to the agency.

The residual dispute; that is, the rules that govern the interrogations of the comparatively tiny number of detainees held by the CIA, is a narrow, but important one. It is important both because these detainees present the highest stakes interrogations, and because the rules that are applied against them in the CIA's program define the outer parameters of what the U.S. will do in interrogations under any circumstances.

The current state of the law for these detainees is in my judgment simply inadequate. Current law articulates flat bans on vaguely defined categories of abuse, torture, and cruel, inhuman, and degrading treatment. These amount in practice to absolute injunctions not to do anything too mean, but leave far too open the question both of what meanness is and the additional question of how much of it is too much. The result of this is a terrible conundrum for interrogators in the field. We want these people to be aggressive. We want them to walk up to the line of legality in order to get information that will stop the next attack. Yet on the other side of that line is illegality. And we have refused as a society to draw the line clearly or to promise that it won't move. We are ask-

ing men and women in the service of this country to live their professional lives leaning over the border of unlawful conduct that we haven't the courage to define precisely.

It is an abdication that we need to redress. And Congress can do so simply using the McCain amendment as a model for the CIA. The CIA should not be bound by the Army Field Manual itself, for even a completely responsible palette of procedures for the CIA would probably differ in some respects from the list in the Army Field Manual. Yet the CIA, like the military, should have its own list of approved techniques, amendable at any time, to which the law binds its compliance.

Think of it as a CIA field manual. That is, within the confines of the existing legal strictures on interrogation, Congress should permit the agency the use of any technique to which it will willingly attach its name. Ideally, Congress would insist that this document, like the Army Field Manual, be openly disclosed so that all approved interrogation techniques available on the law could withstand debate and scrutiny. This may not be possible with the CIA, however. The agency may rather need to maintain a certain level of ambiguity about its interrogation palette. But Congress should still require of it as much transparency and accountability as possible.

Binding the CIA to its own interrogation palette by law would likely fix the problem that we are currently fighting about for all but a tiny number of the highest value detainees.

Third, that tiny subset of high value detainees will stress the rules. The agency sometimes interrogates highly resistant detainees in time-sensitive efforts to avert catastrophes. In these efforts the executive branch will face extraordinary pressure to get information and will sometimes make a decision to breach the rules in order to get it. We should be honest that these breaches are breaches of the rules, not within the rules, and that reality requires that the rules here do something genuinely extraordinary, which is to contemplate the circumstances of their own violation.

The question, and it is a tremendously difficult question, is what legal zone the President and his Administration and the people in the field will occupy when they do what they deem necessary in those dire circumstances. Many people believe in structuring the law so as to render the interrogator in the field culpable of a felony for the interrogation expected of him under these circumstances. I do not. To ask that interrogators subject themselves to prosecution for these acts, approved at the highest levels, is unlike anything we ask of other government officials for acts we expect them to take in foreseeable situations. Congress needs to create a mechanism to recognize that in such situations the President has the authority to stand alone accountable for the interrogations he orders. This implies a law that clarifies that the President's authority—that the President has the authority to assume legal and political responsibility for breaches of the normal rules, and also ensures that the legislature is kept informed and has the opportunity to object.

Congress can accomplish this relatively simply. The law should forbid the President to authorize any deviations from CIA interrogation policies except by written finding to the congressional intelligence committees identifying the need for enhanced techniques in

the specific case and the individual techniques the President is ordering. The law should insist that these techniques under no circumstances violate the prohibition on torture, and the findings should require the personal signature of the President. Congress should require as well that the White House annually publish the number of such findings the President issues, so that while each finding would remain classified, the public may determine whether coercive interrogation has remained an exception or is drifting toward more of a norm.

The law should further immunize against all criminal and civil liability those personnel carrying out the enhanced techniques specified within such a finding.

I am happy to take your questions. Thank you very much.

[Prepared statement of Mr. Wittes follows:]

PREPARED STATEMENT OF BENJAMIN WITTES

Prepared Statement of Benjamin Wittes
Fellow and Research Director in Public Law
The Brookings Institution
before the
House Committee on the Judiciary
"From the Department of Justice to Guantanamo Bay: Administration Lawyers and Administration Interrogation Rules, Part V"
July 17, 2008

Thank you, Mr. Chairman and members of the committee, for inviting me to testify concerning American interrogation policy in the war against terrorism. I am a Fellow in Governance Studies and Research Director in Public Law at the Brookings Institution. I am the author of the book, *Law and the Long War: The Future of Justice in the Age of Terror*, from which this testimony is adapted. I have written extensively on the challenges to the legal system posed by the September 11 attacks. I also serve on the Hoover Institution Task Force on National Security and Law. The views I am expressing here are my own.

The histories of the interrogation programs of both the military and the intelligence community have been debated at great length. The scope of the administration's errors and excesses are well known, as are its claims that the CIA's high-value detainee program yielded critical intelligence unobtainable by traditional means. I do not today intend to focus on the past, but on the future, that is, on the contours of the interrogation laws we need prospectively in order to prosecute the war on terrorism in a manner at once effective and consistent with American values.

Specifically, I intend to make three points: first, that Congress in the McCain Amendment addressed the problem of military interrogations and did so succesfully; second, that the policy that Congress adopted in that statute can be adapted relatively easily to address interrogations by the CIA, though not by simply applying the McCain Amendment itself to the agency; and third, that for a tiny subset of detainees, the executive is likely in the future to face overwhelming pressure to breach the rules and, consequently, that some provision to govern the circumstances of such breaches is necessary too.

First, the currently contested terrain in the battles over interrogation policy is actually much narrower than most people imagine. For one thing, it no longer involves torture, for the administration no longer asserts the legal propriety of engaging in conduct that breaches the federal ban on torture—as its earlier Office of Legal Counsel memoranda appeared to do. In practice, the contested legal ground today involves a lesser category of illegal abuse: "cruel, inhuman, and degrading treatment." More importantly, between the McCain Amendment and the new Army Field Manual on intelligence gathering, Congress and the administration have largely solved the problem of military interrogations, meaning that the dispute today does not involve tens of thousands of military detainees.

The McCain Amendment offered an elegantly simple fix for the military's post-9/11 interrogation woes. The law gave the military, within the parameters of more general requirements of humane treatment, great latitude to set its own rules, requiring only that it

publish and follow them. This the military then did in the revised Army Field Manual released after an exhaustive internal discussion in September 2006. The new field manual offers a limited degree of additional flexibility over the old one. It also contains a great deal more specificity about all of the interrogation tactics it authorizes than did the prior version, so that interrogators have a better sense of what exactly it allows and disallows. And it spells out in considerable detail what tactics are *not* permitted. It complies with the Geneva Conventions. And as the military can amend it at any time, interrogation policy can remain fluid, even as it remains accountable under the law. It is a mark of how successful—if largely unnoticed—the policy changes have been that not even human rights groups today complain much about contemporary military interrogation policies. The complaints about coercive interrogations by the military, however justified, are all retrospective.

Second, the residual dispute is limited to the rules governing the interrogations of the comparatively tiny numbers of detainees held by the CIA. Though narrow, this dispute is important both because these are, generally speaking, the highest-stakes interrogations and because the rules in the CIA's program define the outer parameters of what the United States will do in interrogations.

The current state of the law is simply inadequate. Current law articulates flat bans on vaguely defined categories of abuse: torture and cruel, inhuman, and degrading treatment. The absoluteness of the bans allows Congress to take the institutional position that it has authorized nothing untoward in any questioning of anyone. The vagueness, meanwhile, gives the administration enough interpretive latitude to authorize some pretty extreme tactics—waterboarding being only the furthest out on the limb. On the books, to put it simply, is an absolute injunction not to do anything too mean—an injunction that leaves far too open the question of what meanness is and how much of it is too much.

The result is a terrible conundrum for interrogators in the field: We want them to be aggressive, to walk up to the line of legality in an effort to get information that will stop the next attack. If any space remains between their conduct of interrogations and that line, the next 9/11 Commission will devote a chapter to the "missed opportunity" the interrogation represented; the interrogators' timidity will become an "intelligence failure" worthy of study. Yet on the other side of that line lies illegality. And we have refused as a society to draw the line clearly or to promise that it won't move. We are, in short, asking men and women in the service of their country to live their professional lives standing on and leaning over the border of unlawful conduct we lack the courage to define precisely. It is an abdication Congress needs to redress.

With relatively simple statutory changes, Congress can use the McCain Amendment as a model for the CIA. Within the confines of the existing legal strictures on interrogation, Congress should permit the agency the use of any technique to which it willingly attaches its name. That is, the CIA should have its own list of approved techniques, amendable at any time, to which the law binds its compliance. This list, in fact, already exists, but as in the military prior to the McCain Amendment, it exists purely as policy, not as law. The idea is to bind the agency to it and to harness the political heat associated with sunshine and congressional oversight to smooth off its roughest edges.

The CIA ought not be bound by the Army Field Manual itself. Even a completely responsible palette of procedures for the CIA would probably differ in some respects from the list in the Army Field Manual, which has to create rules not merely for the unlawful combatant but for routine interrogations of protected persons like prisoners of war and, therefore, should not even approach the legal limits of interrogation roughness. As the agency will never have custody over such privileged belligerents and will generally, in fact, hold only those unlawful combatants deemed (correctly or erroneously) the most dangerous in the world, a CIA field manual might properly permit more than the Army Field Manual does. The Army document, after all, is used in zones of active combat by thousands of young soldiers with limited training; by contrast the CIA has many fewer interrogators whom it can train much more rigorously if it chooses. The agency can probably allow more without letting things spin out of control, and it therefore might reasonably contemplate the judicious use of some of the enhanced techniques the military ultimately rejected in its rewrite of the field manual.

Whatever one might think of such tactics as yelling at detainees, removing comfort items, or denying hot rations, these acts surely come nowhere near the *legal* lines of a proper interrogation. Even techniques like stress positions, sleep deprivation, and temperature manipulations, which can be torturous in some iterations, can also be merely unpleasant and harassing in others. The CIA might with perfect propriety draw its policy lines in a different spot than the military, and Congress should tolerate its going deeper into the gray area than the military does.

Ideally, Congress would insist that this document, like the Army Field Manual, be openly disclosed, so that all approved interrogation techniques available under the law could withstand debate and scrutiny. This may not be possible with the CIA, however. The agency may, rather, need to maintain a certain level of ambiguity about its interrogation palette, but Congress should still require of it as much transparency and accountability as possible. One possibility would be the publication of a document that describes the techniques in general terms while leaving the more granular details to a classified version shared only with the congressional intelligence committees. The key, however, is for Congress to force the CIA to articulate—in significant detail and in public to the maximum extent possible—what it will do and what it will not do and to put the force of law behind this list. To the extent members of Congress believe that any listed techniques violate the prohibition against "cruel, inhuman, or degrading" treatment or Common Article 3 of the Geneva Conventions, they would then have ample leverage and information to force its removal.

Such a rule would, at once, ameliorate a great deal of public and international anxiety about American interrogation policy and provide ample flexibility for all but the most exigent interrogation circumstances. The public concerns about American interrogation policy, after all, do not have roots in the talismanic magic of the specific techniques approved by the Army Field Manual. There is a big gray area between what the military permits and the actual legal lines—wherever they may be. The anxiety, rather, flows from a combination of the brutality of certain specific tactics and the sense of the agency's interrogations as constituting a lawless zone in which anything goes. Clarifying that anything does not go and that what does go—while perhaps more permissive than the military's rules—falls within international humanitarian protections would go a long way toward addressing the anxiety. Such a rule would likely suffice for all but a

tiny number of the highest-value detainees.

This brings me to my third point: A subset of high-value detainees exists which will stress the rules. And Congress cannot pretend that the executive does not sometimes interrogate highly resistant detainees in time sensitive efforts to avert catastrophes. In these efforts, the executive will face extraordinary pressure to get information and will sometimes make a decision to breach the rules in order to get it. That reality requires that the rules do something genuinely extraordinary: contemplate the circumstances of their own violation. The question—and it is a tremendously difficult question—is what legal zone the president and his administration will occupy when they do what they deem necessary in such dire circumstances.

This question has two distinct components: the legal status of the action by the agents in the field and the legal status of the order to take those actions. Many people believe in structuring the law so as to render the interrogator in the field culpable of a felony for the interrogation expected of him under these circumstances. This seems to me perverse. These people are not the guards at Abu Ghraib, people who sated their sadism by violating policies designed to protect detainees from abuse. Rather, to the extent their conduct breaches America's international obligations—even its domestic laws—it breaches them precisely *because* they are following instructions, ultimately of the president, in a situation of presumably surpassing national importance. To ask that they subject themselves to prosecution for these acts is unlike anything we ask of other officials in government service for acts we expect them to take in foreseeable situations. We don't ask police officers to face murder charges when they fire their guns and kill people in accordance with departmental policies, for example. Congress needs to create a mechanism to recognize that in such situations, the president has the authority to immunize officers for the effectuation of his orders, for which he alone stands accountable.

Congress, in fact, gives up little in recognizing this—because a crude such mechanism already exists as a matter of constitutional law. The president has the unreviewable and plenary power to pardon people for any infraction under federal law, and he has the implicit authority to promise to do so. He can already, in other words, make clear to agents in the field that he will shield them from the consequences of any illegality associated with carrying out his will—and shoulder the burden of responsibility himself.

Congress should enact a law that provides a more refined device for the president to use, in lieu of the pardon power, in such situations, one that clarifies his legal and political accountability for breaches of the normal rules and also ensures that the legislature is kept informed and has the opportunity to object. The idea is to fix accountability where it belongs—in the person of the president—and to make clear that field personnel do not commit crimes in carrying out the deviations for which the president is willing to take responsibility.

Congress can accomplish this relatively simply. The law should forbid the president to authorize any deviations from CIA interrogation policies except by written finding to the congressional intelligence committees, identifying the need for enhanced tactics in the specific case and the individual techniques he is ordering. The law should insist that these techniques under no circumstances violate the prohibition on torture, and the finding should require the personal signature of the president. Congress should require as well that the White House annually

publish the number of such findings the president issues, so that while each finding would remain classified, the public may determine whether coercive interrogation has remained an exception or is drifting towards more of a norm. The law should further immunize against all criminal and civil liability those personnel carrying out the enhanced techniques specified within such a finding.

The idea here is to create a stopgap for the true emergency, an arrangement that recognizes what the president has the raw power to do and will face an overwhelming temptation to do, without overtly approving of it and while affixing the clearest of accountability for it.

Congress has already taken substantial steps towards a healthier statutory environment for interrogations. It is time to finish the job.

Mr. CONYERS. Thank you.

Walter Dellinger was the head of the Office of Legal Counsel, OLC, under President Clinton. And as Acting Solicitor General, he argued nine cases before the Supreme Court, more than any Solicitor General in more than 2 decades. He is a visiting professor at Harvard Law School, and is on leave from teaching law at Duke University, and belongs to the O'Melveny & Myers law firm. Welcome again to the Committee.

TESTIMONY OF WALTER DELLINGER, FORMER ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE

Mr. DELLINGER. Chairman Conyers, Ranking Member Smith, Members of the Committee, on September the 12th 2001, the New York Times had a single sentence paragraph: It was a moment that split history. And because I will use my time to take issue with some of the things that each of our witnesses has said, I want to begin by acknowledging how difficult were the circumstances faced by General Ashcroft and the others in government.

There was a real sense that further attacks, perhaps even more deadly, were in the offing, a palpable sense. I can hardly imagine what the pressures must have been on those who were in the government. And we all could exercise some humility in judging how well we would have done under those extraordinary pressures. General Ashcroft is, we know, a man of the law who is willing to stand up and take tough and courageous positions when in his view the law is being violated. And my friend, Ben Wittes's thoughtful work, Law and the Long War, is indispensable reading for anyone who wants a really balanced and thoughtful approach to these issues.

Nonetheless, I want to say that I fear that we have not had an adequate defense of the torture memos, which more than anything else are the source of this hearing, the memos of 2002 and 2003. I don't think it was a process that worked well in the end, because they were reversed. I think it is also the case that these memoranda were not close questions.

As Jack Goldsmith, the subsequent head of the Office of Legal Counsel said, the memos were deeply flawed, sloppily reasoned, overbroad, incautious in asserting extraordinary constitutional authorities on behalf of the President.

As Dean Harold Koh said, the 2002 memo was a stain upon the law and upon America's reputation in the world.

In his testimony, General Ashcroft refers us to the fact that the Federal courts were closely divided on the issues that came to the U.S. Supreme Court in Rasul, and Hamdi, and Hamdan, and in the Court's most recent case of Boumediene. But no one has disputed that. Those were difficult cases. Whether habeas corpus applied in a territory over which we did not have de jure sovereignty with respect to noncitizens was a question of first impression. And the extraordinary arguments were evenly divided in that case. And the Court came close. But that segue in General Ashcroft's testimony is away from the separate issue of the torture memos, where I think it is hard to defend the extraordinary reading of the torture statute that would, as the Office of Legal Counsel memorandum

read the statute, approve even of the worst techniques of Saddam Hussein if they were intended to get information, and not simply to inflict pain.

The connection and the assertion of a Presidential authority to disregard criminal statutes enacted by Congress, signed into law by the President, intended to limit the authority in precisely these circumstances, which was true of the torture statute of the Foreign Intelligence Surveillance Act and the war crimes law, the ability to disregard those statutes was I think a virtually shocking assertion of Presidential authority not to comply with the law. There is a connection between those memoranda and the Supreme Court decision.

I think that one thing that led the Supreme Court to require the use of habeas corpus was because it had lost trust in the Administration of justice because of the extraordinary position taken with respect to the Foreign Intelligence Surveillance Act, the torture laws, and other issues. The Court felt that it did not have confidence that the processes in the absence of judicial oversight would work appropriately. So that I think at the end of the day, the process did not work well, and we need to acknowledge how extraordinary those assertions of power were.

Ben Wittes offers very thoughtful, very thoughtful views on how we should think about these issues going forward. And with much of what he says I concur. A couple of points with which I disagree, and then I will yield for questions for our panel.

It seems to me that to say that the CIA ought to have authority beyond what is in the Army Field Manual for interrogations, to open up a gap there between what is cruelty and what is torture when the U.S. military has complied with the field manual in questioning the Viet Cong, in questioning throughout our history, I am not sure that we want to be a Nation which officially approves of the use of cruelty as a matter of government policy. I think that the President does not have the lawful authority to pardon someone in advance for what would be a criminal offense. I do believe the pardon would be effective, just it would be I think if someone is bribed to give a pardon, the pardon cannot be called into question. But it is an offense for the Governor or the President who accepted the bribe. And I think that a Presidential pardon intended to facilitate the commission of a violation of a criminal statute would itself be lawless, even if the pardon were to be sustained.

Finally, let me just address the notion that we should have a specific exception for extraordinary circumstances where someone has information that would save the lives of countless Americans, the ticking time bomb in the middle of Manhattan. I don't think the law should make an exception for that. I believe that is a situation, if and when it ever arose, that calls for civil disobedience.

I think what we would expect a President to do in those circumstances is to authorize what was necessary to save the lives of countless Americans when there is a direct and immediate threat in those circumstances, and to turn himself in after having done so, and to submit to the criminal process. We ask sacrifices of men and women in the military more serious than that. That to me would be the answer, not to engraft in our code of laws the notion that we are a country that would tolerate that kind of cruelty.

Thank you, Mr. Chairman.

[Prepared statement of Mr. Dellinger follows:]

Walter Dellinger

From the Department of Justice to Guantanamo Bay: Administration Lawyers and Administration Interrogation Rules, Part V

Prepared Testimony to the Committee on the Judiciary United States House of Representatives

2141 Rayburn House Office Building
July 17, 2008

Chairman Conyers, Ranking Member Smith, members of the Committee – Thank you for the opportunity to appear before you today.

I am currently a professor of law (on leave) from Duke Law School, a visiting professor at Harvard Law School and a partner and chair of the Supreme Court and Appellate practice at O'Melveny & Myers, LLP in Washington.

In 1993, I was nominated by the President and confirmed by the Senate to be Assistant Attorney General and head of the Office of Legal Counsel (OLC). I served in that role from 1993 until 1996. During and since my time at OLC, I have discussed its importance with many of those who preceded me as heads of the office, including the late Chief Justice Rehnquist and Justice Antonin Scalia, John Harmon, Theodore Olson, Charles Cooper, Douglas Kmiec, William P. Barr, Judge Michael Luttig, and Tim Flanigan. We all share a belief in the critical role that office plays in the legitimate and lawful functioning of the national government. Its responsibility is no less than assisting the President and the Attorney General in insuring that the Constitution is obeyed and the laws of the United States are faithfully executed. It was, for me, the most rewarding job I have ever held. I thus understand and appreciate the importance of the series of hearings you are conducting. [1]

It is indisputable that something went badly wrong with the Office of Legal Counsel. A series of the most important legal opinions it has ever issued were described by a subsequent head of the office in the same administration as "deeply flawed: sloppily reasoned, overbroad, and incautious in asserting extraordinary constitutional authorities on behalf of the President."[2] Jack Goldsmith was referring to the substantive and

[1] I need not continue at great length in my prepared statement because I fully share the reasoning and conclusions put forth by my colleague Christopher Schroeder in his testimony submitted to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties. *From the Department of Justice to Guantanamo Bay: Administration Lawyers and Administration Interrogation Rules, Part III* (herein *Interrogation Techniques*): *Hearings Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. (2008) (prepared statement of Christopher H. Schroeder, former Deputy Assistant Attorney General in the OLC in the Department of Justice).
[2] Jack Goldsmith, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE ADMINISTRATION 10 (2007).

procedural failings that infected the memos issued on the use of aggressive interrogation tactics on persons detained in the war on terror. The first of these opinions, known as the "Bybee memo" was prepared at the request of Alberto Gonzales, former Counsel to the President, and signed by Jay Bybee, former Assistant Attorney General for the OLC. It generated resounding criticism from the legal community.[3] Many distinguished lawyers and scholars shared the conclusion of Yale Law School Dean Harold Koh that the August 2002 memo was "perhaps the most clearly erroneous legal opinion I have ever read."[4]

Indeed, this single memo underscores what I believe was the primary and critical flaw in OLC's process: the drafters of the "torture memos" deviated from their duty to offer neutral legal advice,[5] instead reaching a pre-determined and unsupportable legal conclusion. In order to reach its conclusion, this and the subsequent torture memo of March 14, 2003, had to overcome legal constraints embodied in federal laws concerning Assault, 18 U.S.C s. 113, Maiming, 18 U.S.C s. 115, Interstate stalking, 18 U.S.C s. 2261A, War crimes, 18 U.S.C s. 2441, and Torture, 18 U.S.C s. 2340A, as well as the Fifth, Eighth and Fourteenth Amendments, the Convention Against Torture (CAT) and customary international law.

---

[3] *See* Eric Lichtblau, BUSH'S LAW: THE REMAKING OF AMERICAN JUSTICE 142-44, 154 (2008); Milan Markovic, *Can Lawyers Be War Criminals?*, 20 Geo. J. Legal Ethics 347, 349 (2007); Jose Alvarez, Symposium: *Torture and the War on Terror: Torturing the Law*, 37 Case W. Res. J. Int'l L. 175, 195 (2006); David Luban, *The Torture Debate in America, in Liberalism, Torture, and the Ticking Bomb* 35, 66 (Karen Greenberg ed., Cambridge University Press 2006); Louis-Phillippe Rouillard, *Misinterpreting the Prohibition of Torture Under International Law: The Office of Legal Counsel Memorandum*, 21 Am. U. Int'l L. Rev. 9, 37 (2005); W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 Cornell L. Rev. 67, 83 (2005); Marty Lederman, *Understanding the OLC Torture Memos (Part I)* (Jan. 8, 2005) http://balkin.blogspot.com/2005/01/understanding-olc-torture-memos-part-i.html; Marty Lederman, *Judge Roberts and the Commander in Chief Clause* (Sept. 13, 2005) http://www.scotusblog.com/wp/judge-roberts-and-the-commander-in-chief-clause; *Nomination of the Honorable Alberto R. Gonzales as Attorney General of the United States: Hearing Before the S. Judiciary Comm.*, 109th Cong. (2005) (statement of Harold Hongju Koh, Dean and Professor of International Law, Yale Law School); Peter Brooks, *The Plain Meaning of Torture?*, Slate, Feb. 9, 2005, http://www.slate.com/id/2113314; Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 Colum. L. Rev. 1681, 1707 (2005); Jordan J. Paust, *Executive Plans and Authorization to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 Colum. J. Transnat'l L. 811, 813-23 (2005).

[4] *Nomination of the Honorable Alberto R. Gonzales as Attorney General of the United States: Hearing Before the S. Judiciary Comm.*, 109th Cong. (2005) (statement of Harold Hongju Koh, Dean and Professor of International Law, Yale Law School).

[5] Several years ago, a bipartisan working group of former OLC employees compiled a list of best practices that have historically guided the work of the Office. *See* Appendix F entitled "Principles to Guide the Office of Legal Counsel," dated Dec. 21, 2004. *See also Interrogation Techniques: Hearings Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. (2008) (testimony of Daniel Levin) ("The opinions I worked on benefitted [sic] enormously from comments from other parts of the Justice Department and the government. In particular, the opinion I wrote at the end of 2004 benefitted [sic] from detailed comments from lawyers at the State Department and the Criminal Division in Justice, although it bears repeating that any mistakes in that opinion are entirely my responsibility. There is an incredible wealth of legal talent around the government and I believe it is a mistake not to take advantage of it. You won't always agree with what other lawyers may have to say, but you almost always benefit from hearing it. I do not know why, but my understanding is that some of the earlier opinions were very tightly held and were not circulated for comments. I do not think that was justified by any legitimate concerns about classification or leaks. Rather, I think that was a mistake and that the opinions would have benefited from broader review.").

Only a deeply flawed process could produce such a disastrous legal opinion. And deeply flawed the process was. State Department, immigration, and military officials were systematically excluded from substantive discussions, as OLC ignored those most likely to have insight on the day-to-day administration of the relevant laws. Discussion was limited to a small group of high-level officials who ultimately failed to address or disclose the weaknesses in their analysis, leaving their conclusions susceptible to obvious criticism. In order to preserve OLC's institutional function, similar abuses must not occur again.

In the case of the torture memos, however, it is not simply that a bad process produced flawed opinions. Rather it seems that the predetermined need to reach indefensible conclusions necessarily required a truncated process that excluded from consultation other agencies and career attorneys who would not have condoned the reasoning or the results of the process. Here, conclusion drove process. When former Assistant Attorney General Daniel Levin testified before the Subcommittee he was asked by Representative Davis, "Mr. Levin, . . . do you know of any Administration that has so consistently advanced positions that are at odds with mainstream and judicial opinions regarding the scope of its powers?," Mr. Levin replied: "I don't."[6]

I believe it is important to view the torture memos in a larger perspective. Those memos are but one part of an approach to law that represented perhaps the most sustained challenge in our history to fundamental constitutional values, including the separation of powers.

At the heart of this regime you will find a consistent, undisguised disregard for the other branches of the national government. This denigration of the legitimate authority of the legislative and judicial branches of government is made manifest in a striking number of assertions and actions – first and foremost the disregard for criminal provisions of the war crimes and torture laws, as well as the Foreign Intelligence Surveillance Act; the assertion that Congress lacks a significant policymaking role in defining the scope and objectives of American military action; the repeated attempts to keep the judiciary from reviewing the legality and constitutionality of detentions; the sweeping assertions of executive immunity from compliance with laws passed by Congress, coupled with the extraordinary claim that decisions to violate statutory requirements would and should be kept secret from Congress; and finally, a refusal to provide any meaningful accommodation to Congress's legitimate need for testimony and information that could either confirm or put to rest very serious charges that the criminal justice process was politicized.

With respect to the legislature, the claimed freedom to violate the prohibitions against torture asserted in the memoranda of August 1, 2002 and March 14, 2003 was predicated upon an analytical approach that wholly denigrates the role of Congress. The

---

[6] *Interrogation Techniques: Hearings Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. (2008) (testimony of Daniel Levin, former Assistant Attorney General).

August 2002 Bybee Memo sets out the authority that a President might legitimately have in the absence of any legislative constraints, calls that inherent authority, and then assumes that the authority cannot be impaired by acts of Congress. That is, whatever the President could do in the absence of any legislative authorization, he can do even if Congress has expressly prohibited the acts in question. As explained in a recent article by David Barron and Martin Lederman, this cannot be right.[7] This is a distinction fundamental to our system of separated powers, a distinction long recognized by the Supreme Court, by past Presidents and by the Congress, between the ability of a president to take the initiative when Congress has not acted versus the ability of a president to defy duly enacted laws of the United States.

The President cannot rule by decree. Every official action taken by the president must have a basis in statutory or constitutional authority. Like almost all of my predecessors as head of the OLC, I have a robust view of the scope of the inherent authority of the President under the Constitution. In the area of national security and defense, there would be very few instances in which I would conclude that the President could not act merely because his action was said to be *ultra vires* – that is, beyond his affirmative authority, even though violative of no constitutional or statutory restrictions.

Once Congress has acted, however, the situation is fundamentally changed. Where Congress is legislating in areas under its board authority under Article I, laws designed to limit executive branch action are generally lawful and should rarely be held invalid because they entrench upon a core untouchable authority of the President.

Take the simple example of the disciplining and punishment of members of the military. There is no doubt that the President's responsibilities as commander-in-chief provide him with the "inherent authority" to create a set of rules of conduct for members of the armed services and to create a system for trying and punishing violations of his code of conduct. You can't run an Army without a system of discipline. But that "inherent authority" does not preclude Congress from adopting a Uniform Code of Military Justice. Congress has adopted such a code and it is indisputably constitutional and binding on the President.

The notion that Congress cannot limit actions that the President – in the absence of legislation – could otherwise take as part of his "inherent power" has no support in the case law. The Supreme Court has never endorsed such a sweeping theory of presidential power. To the contrary, whenever the Supreme Court has been presented with a case in which the executive branch has acted in violation of an existing statute governing the conduct of armed conflict or intelligence gathering, it has repudiated the idea that the President has broad authority to ignore existing law. It has done so in cases decided as far back as the early 1800s.[8] As Justice Stevens' recently wrote in an opinion of the Court, "[w]hether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that

---

[7] David J. Barron & Martin S. Lederman, *The Commander In Chief at the Lowest Ebb - Framing the Problem, Doctrine and Original Understanding*, 121 Harv. L. Rev. 689, 741-43, 761-62 (2008).
[8] *See, e.g.*, *Little v. Barreme*, 6 U.S. 170 (1804).

Congress has, in proper exercise of its own war powers, placed on his powers."[9]

Mr. Chairman, we should never forget that the circumstances facing officials of the Department of Justice and national security agencies after September 11, 2001 were truly extraordinary. The morning after the attack, the New York Times said it with stark simplicity: "It was a moment that split history." Fears that further attacks were coming – perhaps even more deadly – were real and palpable. We should all have some humility about how we would have performed under such excruciating pressures.

It is nonetheless clear that the adoption of an extreme version of "executive unilateralism" was a mistake, as many courageous lawyers within the administration argued at the time. Americans – in government and out – were prepared to work together. Our historic constitutional structures would have been adequate to the extraordinary demands. We must now continue the process of restoring the constitutional order that has served us so well for more than two centuries.

Thank you, Chairman Conyers. For the convenience of the Subcommittee, I have enclosed various documents which elaborate upon some of the issues raised in my testimony. I look forward to answering any questions the members of the Subcommittee may have.

Appendix A is an editorial Christopher Schroeder and I wrote for the Washington Post in 2001 discussing the President's power to use military commissions in times of war and emphasizing the need for judicial review of those proceedings.

Appendix B is an op-ed Christopher Schroeder and I wrote for the New York Times in 2007 discussing Congress's role with respect to military activities.

Appendix C is a 2006 article from the New York Review of Books written as a letter to Congress from various law professors and government officials regarding FISA, presidential power, and the domestic spying program.

Appendix D is the 1994 OLC memorandum I prepared for the Hon. Abner Mikva, then counsel to the President, regarding the President's authority to decline to execute unconstitutional statutes.

Appendix E is an op-ed I wrote for the New York Times in 2006 defending the President's authority to decline to execute unconstitutional laws in certain situations.

Appendix F is the 2004 memorandum describing best practices and guiding principles for OLC prepared by various OLC attorneys.

---

[9] *Hamdan v. Rumsfeld*, 548 U.S. 557, 126 S. Ct. 2749, 2774 n.23 (2006).

Mr. CONYERS. Thank you. Before I invite our Ranking Member to begin the questions, Lamar, I have only one question. I got some others a little later. But the notion that we have not been attacked since September 11, 2001, means that we are doing things right to me begs the question. I mean is that safe, Mr. Attorney General, to assume that that is the conclusion we ought to come to?

Mr. ASHCROFT. Mr. Chairman, I believe that there have been disrupted plots. I believe there have been numbers of them. I believe the evidence of that is good. So that something we have done is right enough to have disrupted those plots. The fact that you are doing some things right doesn't mean that you are doing everything right. And so I think it is appropriate for us always to be looking at what we are doing. And if we are being successful, to be grateful that some of what we are doing is participating in the success, but not assuming that everything we are doing is responsible for it. And we have to look intelligently.

It is a complex question. So it is one of those things like when we run for office. You know, if you win, everything you did was right. If you lose, everything you did was wrong. It may have turned out that you were just running in the wrong year or the right year.

So I think overly simplistic approaches that say everything we are doing is right—really, as a matter of fact they are dangerous approaches because they lead us not to make good judgments about corrective behavior, how we might improve our performance. You know, if you think everything you are doing is right, then when you get hit the next time, it tells you that maybe we should have done something a little differently.

We learned a powerful lot after 9/11. I did. And we learned that we had to make changes. Wouldn't it be great if we not assume that everything is right and we always ask ourselves how can we make changes so that we don't have to be awakened by something that cost Americans lives?

Mr. CONYERS. Mr. Wittes, what is your response to that question?

Mr. WITTES. It is not an argument that I have ever made, and so I feel a little awkward about responding to it. I largely agree with Mr. Ashcroft. I think, you know, there has obviously been some successes. I don't think 7 years ago people would have imagined that we would go another 7 years without another major attack. So we can assume something is going right as a result of that, and I don't think one should overread that. I don't think one should assume therefore everything is going right, or therefore there is no cause for course correction.

Mr. CONYERS. Professor Dellinger.

Mr. DELLINGER. Mr. Chairman, this is not an area in which I have an informed view except to say that I know that the threat assessments that come in daily to the Attorney General and others must be extraordinary. And surely, credit is due to this Administration for the fact that we have in many areas appeared to have been successful in countering activities. I think at the end of the day our long-range national security is best served by our adherence to the fundamental constitutional values that should make us a country respected by the world.

Mr. CONYERS. Thank you. I turn now to Lamar Smith.

Mr. SMITH. Thank you, Mr. Chairman. Mr. Dellinger, just a few minutes ago you complimented the other witnesses in I think unusually flattering terms. You don't often hear a witness do that, particularly a witness who might disagree with them strongly on the legal analysis that might be contained in memos. But I thank you for doing that. And I think, quite frankly, your graciousness adds to your stature. And I appreciate your comments a while ago.

Mr. Ashcroft, I would like to direct my first question to you. It is traditional, I think, that congressional leaders are briefed on interrogation techniques that are being used by various agencies within the government. But why specifically, for example, were then Congresswoman Pelosi and others informed about the use of waterboarding to obtain information from terrorists several years ago? What is the specific reason?

Mr. ASHCROFT. I didn't make the decision to do that. That was a decision made by others. I am not in a position to comment on it. And to the extent it has been revealed, I believe those briefings were classified. And I am very sensitive about making comments about classified matters.

Mr. SMITH. The briefings were classified. Let me just assume that those types of briefings occur simply because the Administration, whatever Administration it might be, wants to make sure that congressional leaders understand and appreciate, and presumably approve of the techniques that are being used to obtain valuable information. At least that would be my view.

Mr. Wittes, let me ask you whether you feel in general that enhanced interrogation techniques are effective in obtaining valuable information that we might not otherwise get.

Mr. WITTES. As I say in my book, I am actually somewhat agnostic on that point. I think the—you know, I have spoken to a lot of interrogators over the years who are very emphatic about the general proposition that the best intelligence is always gathered through rapport building, noncoercive interviews.

Mr. SMITH. And if that is not successful, what techniques do you——

Mr. WITTES. And I have also been impressed by the fact that there is, you know, a fairly large number of people, and I outline some of this in the book, who are—you know, who do contend that there are situations in which these techniques do not succeed and you don't have time to develop them. The best academic work that I have seen evaluating the data came to the conclusion, such as it is, came to the conclusion that we really don't know what works—there is a very striking discussion of this—and concludes that we need a lot more study about what works, both in the coercive and in the noncoercive.

Mr. SMITH. It seems to me that I might disagree with the academics who say we don't know what works, because clearly some techniques do work, and there is evidence of it. And I have given some quotes in my opening statement.

Mr. WITTES. Well, if I may, I mean I think the general pattern, at least as I have noticed it, is that everybody believes that the techniques that they have used successfully work. And people tend to generalize the success. So if you talk to FBI people who use non-

coercive stuff, they are very convinced that they have the best way to do it. If you talk to the people who have, you know——

Mr. SMITH. Maybe they all work at different times. Who knows?

Mr. WITTES. You know, there may be something to be said for that. And I think what I conclude from this is that unless you know that it does not work in the highest stakes situations, where there is enormous time pressure, and you know that what you are doing isn't working, there will be enormous pressure on you to ratchet it up. And I think, you know, that is a reality that, you know, exists whatever the optimum level of coercion is, whether it is zero or considerable.

Mr. SMITH. Okay. Thank you.

Mr. Ashcroft, the last question for you. What are the disadvantages of taking a criminal law approach to trying to combat terrorism?

Mr. ASHCROFT. Well, my belief is that there are some times when the criminal law is the appropriate approach. There are some times when it is not. We apprehended people who were involved in terrorist plots in the United States, brought them to trial when I was in the Justice Department. A number of them have been convicted, a number of them are serving time. There are other individuals that were detained as enemy combatants that were terrorists and involved in terrorist activity, and some that I think the Administration will eventually seek to try in military commissions. When you are defending the country, I think you should have the full array of potentials available. And I think maybe that splashes over a little bit into the interrogation world. Not everything is appropriate in every circumstance. There are different things that work in different settings. Sometimes the security associated with the national security would be jeopardized by having an Article 3 criminal proceeding, and so other views or other avenues ought to be explored.

Mr. SMITH. Thank you, Mr. Ashcroft. Thank you, Mr. Chairman.

Mr. CONYERS. The Chairman of the Constitution Subcommittee, Jerry Nadler.

Mr. NADLER. Thank you, Mr. Chairman. Attorney General Ashcroft, in your testimony you mentioned Abu Zubaydah, who was captured in March 2002. The Inspector General report on the FBI's role in interrogation makes clear that he was interrogated beginning in March of that year. The Yoo-Bybee legal memo was not issued until August 2002. So was the interrogation of Abu Zubaydah before August 2002 done without DOJ legal approval?

Mr. ASHCROFT. I don't know.

Mr. NADLER. Well, did you offer legal approval of interrogation methods used at that time?

Mr. ASHCROFT. At what time, sir?

Mr. NADLER. Prior to August of 2002, March 2002.

Mr. ASHCROFT. I have no recollection of doing that at all.

Mr. NADLER. And you don't know if anyone else from the Department of Justice did?

Mr. ASHCROFT. I don't know.

Mr. NADLER. One FBI agent objected to the interrogation at this time before the Yoo-Bybee memo was issued as, quote, borderline torture. He described the techniques used on Abu Zubaydah as

comparable to harsh techniques used during military SERE training. SERE training, as we know, includes waterboarding. Do you know if waterboarding was used on Abu Zubaydah before the DOJ approved it?

Mr. ASHCROFT. I do not.

Mr. NADLER. Okay. Your written testimony stated that the December 2004 interrogation memo by Mr. Levin, which withdrew the August 2002 memo, did not, quote, call into question any actual interrogation practices authorized by the prior Office of Legal Counsel opinions. You used the 65 to 85 mile an hour example there. But Dan Levin, the final author of the 2004 memo, testified to our Subcommittee that the 2004 memo did change interrogation practices. He said, quote, I believe it is the case that there were certain changes in practices as a result of the change in legal analysis, close quote. Do you think Mr. Levin was in error?

Mr. ASHCROFT. It is possible that there have been changes in practices in a variety of times and in a variety of intervals, both prior to and subsequent to the issuance of the various opinions. My statement is not that there hasn't been an ability, within the limits expressed in the opinions, for those practices to be adjusted. I wouldn't have knowledge of that.

Mr. NADLER. No, but he said that——

Mr. ASHCROFT. The point of the opinions is that what was defined as permissible or explained as permissible in the memos did not render impermissible things that had been determined permissible in prior memo.

Mr. NADLER. That was what you said. But Mr. Levin said exactly the contrary.

Mr. ASHCROFT. I don't think he did.

Mr. NADLER. Let me read you the——

Mr. ASHCROFT. I don't want to quibble about it. He may have said the practices changed.

Mr. NADLER. Well, let me read you an exchange between myself and him in an earlier hearing. Mr. Levin: "I don't think it is accurate that nothing changed as a result in the change in legal analysis. What do you think was the change? Well, I unfortunately am not authorized to discuss certain matters, but I believe it is the case that there were certain changes in practices as a result of the change in legal analysis." Representative Nadler: "So as a result of the change in your memo you think there were changes in practices? That means required changes in interrogation policies?" Mr. Levin: "I believe that's the case, sir, yes."

So you are saying in effect that you and he would disagree on that point?

Mr. ASHCROFT. My understanding is related to what he said in the footnote of his opinion, that while they have identified disagreements with the memorandum, we have reviewed the office's prior opinions addressing issues involving treatment of detainees, and do not believe that any of the conclusions would be different.

Mr. NADLER. But he explained at the hearing that this footnote simply, in his view—simply that in his view the people who wrote the original opinions would not have reached different conclusions even under a different legal analysis. He himself was at the time

drafting new, more restrictive legal opinions to address the specific practices when he was fired by Attorney General Gonzales.

So what he said was that memo simply said that the people who wrote the original memo would not have believed that that memo would have changed the analysis, but that he believed it did. So you are disagreeing not with the memo—forget the footnote. But are you disagreeing with his opinion and his testimony at the hearing?

Mr. ASHCROFT. He may have more information about what was an actual practice than I do.

Mr. NADLER. Okay.

Mr. ASHCROFT. But I have—the Department has on a consistent basis reiterated its conclusion, including testimony by General Mukasey last week, when he said but it is fair to say that the conclusions——

Mr. NADLER. Okay.

Mr. ASHCROFT [continuing]. The ultimate bottom line is the same. And the acting head of OLC has indicated that they have on numerous occasions revisited the various definitions of practice by the agencies, and have found them in each instance——

Mr. NADLER. Okay——

Mr. ASHCROFT [continuing]. Consistent with the new opinion. So there seems to be a pretty substantial consensus of people who believe the fair, understandable reading of the footnote, the subsequent statements and evaluations by OLC, and the recent last week testimony by the Attorney General, that the second opinion had adjusted the reasoning and a number of other things, but as it relates to practices and techniques, they remained legal under the new tests.

Mr. CONYERS. The Chair recognizes the senior Member from North Carolina, Howard Coble.

Mr. COBLE. Thank you, Mr. Chairman. It is good to have you all on the Hill. General, I was going to pursue the waterboarding briefing that Mr. Smith mentioned, but you advised us, and I recall, that they were classified, so I don't think I can insert my oars into those waters at this time.

Let me ask you this, General. Waterboarding, as we all know, is a controversial issue. Do you think it served a beneficial purpose?

Mr. ASHCROFT. The reports that I have heard, and I have no reason to disbelieve them, indicate that they were very valuable. I think the Director of the CIA, George Tenet, indicated that the value of the information received from the use of enhanced interrogation techniques, I don't know whether he was saying waterboarding or not, but assume that he was for a moment, the value of that information exceeded the value of information that was received from virtually all other sources.

When the lives of Americans are at stake, and in significant numbers, as we well know they were, on one day we lost more people in New York—way more than we lost at Pearl Harbor, and we lost more people in the combined New York, Pennsylvania, and Washington area, that the people expect, and I think the President has a duty, to do everything within the law and within his power. I emphasize both of those phrases. And using techniques that do not violate the law that bring us the kind of productivity that the

Director of the CIA, George Tenet, said they brought, and I have no reason to doubt that, I think is a duty, not just an option of a chief executive, commander in chief.

Mr. COBLE. Thank you, General.

Mr. Wittes, is it your opinion that waterboarding is torture and why?

Mr. WITTES. Well, you know, I think—I say this in the book, I think it is very difficult for me anyway to reconcile it with the text of the torture statute. And for the simple reason that it is designed, as I understand it, to induce a perception of drowning. And I believe the torture statute, I don't have the text in front of me, specifically identifies the fear of—the inducing of the fear of imminent death as a prototypical definition. So I think it is at least extremely close. And you know, I am not a lawyer, and I am not—you know, I wouldn't, you know, declare my views on this authoritative in any respect. But I have a lot of trouble reconciling it with the torture statute.

Mr. COBLE. I thank you, sir.

Mr. Dellinger, do you believe that the President of the United States could lawfully order the assassination of Osama bin Laden?

Mr. DELLINGER. Yes, I do.

Mr. COBLE. Let me give you Part B.

Mr. DELLINGER. It would require—let me qualify that by saying it would probably require—it may well require the revision of an Executive order of the President prohibiting assassination.

Mr. COBLE. Mr. Dellinger, let's assume that the Congress enacted a statute that provided that the United States shall never engage in an assassination. In view of those circumstances, what would be your answer?

Mr. DELLINGER. No.

Mr. COBLE. An assassination could not be ordered?

Mr. DELLINGER. That is correct.

Mr. COBLE. Do you know whether or not during your time with President Clinton that he ever argued that a Federal law should not be followed by him?

Mr. DELLINGER. Yes. On more than a few occasions we took the position, which every President has taken, and which I believe, that the President has not only the authority, but the responsibility to decline to enforce laws that in the President's view are unconstitutional. That should be done with great care and with deference to the courts and what the courts might hold. But I do believe that every President has that authority.

And if I may add a word, Mr. Coble, because the important qualification is I am concerned that that legitimate authority of the President has been called into question by the assertion of Presidential authority to decline to enforce laws that I believe are unquestionably valid and constitutional, and that it is the exercise of that authority with respect to, for example, the FISA law, the torture law, where I believe that there is not a good case that those laws were unconstitutional, and the President nonetheless asserted the authority not to comply with those.

Mr. COBLE. Thank you, sir.

Mr. Chairman, I think this is a very fine panel that appeared before us, and I thank you all for being here.

Mr. ISSA. Would the gentleman yield? Would the gentleman yield, Mr. Coble? Never mind, we have lost our time.

Mr. COBLE. All right. I took a lot of time. Yield back.

Mr. CONYERS. The Chair recognizes the Chairman of the Crime Subcommittee, Bobby Scott of Virginia.

Mr. SCOTT. Thank you, Mr. Chairman.

I thank our witnesses for being with us today.

Attorney General Ashcroft, there is no question that torture is illegal. Is that——

Mr. ASHCROFT. That's correct.

Mr. SCOTT. Okay. Now, is there an exception to that if it is done during a crisis?

Mr. ASHCROFT. There is no exception that I know of that allows people to violate the law.

Mr. SCOTT. Okay. Well, suppose you got some good information as a direct result of torture. Would that be an exemption to the statute?

Mr. ASHCROFT. No, the outcome or product of torture doesn't justify it.

Mr. SCOTT. Okay. Now, you've made a comment that we have not been attacked since 9/11. Are we to surmise that that is a direct result of the fact that people have been tortured and we got good information?

Mr. ASHCROFT. Well, first of all, I don't know of any acts of torture that have been committed by individuals in developing information. So I would not certainly make an assumption.

I would attribute the absence of an attack, at least in part, because there are specific attacks that have been disrupted, to the excellent work and the dedication and commitment of people whose lives are dedicated to defending the country.

Mr. SCOTT. Well, we are here to talk about——

Mr. ASHCROFT. That includes interrogators, who have used enhanced interrogation techniques, but they haven't used torture.

Mr. SCOTT. So you are not suggesting that we should forgive torture because we got good information and we are therefore safer. That is not your position.

Mr. ASHCROFT. No, that is not my position.

Mr. SCOTT. Okay. It is a defense against torture that traditional techniques were not working?

Mr. ASHCROFT. Not to my knowledge.

Mr. SCOTT. Is it an exemption from the criminal law on torture that a Department of Justice or an Office of Legal Counsel lawyer wrote a memo that said what people generally perceive to be torture is okay?

Mr. ASHCROFT. I think the ultimate definition of "torture" will be rendered in the courts.

Mr. SCOTT. And if a Department of Justice or Office of Legal Counsel writes a memo saying a technique is okay when everybody else in the world thinks it constitutes torture, would that be an exemption for the criminal statute?

Mr. ASHCROFT. It would be a marvelous thing of unanimity if everybody else in the world agreed.

[Laughter.]

Mr. SCOTT. Well, I think just about everybody agrees waterboarding is torture. There hasn't been much controversy about that.

No? You don't believe that waterboarding is torture?

Well, excuse me. Everybody on this side of the aisle, I believe, believes that waterboarding is torture.

Mr. ASHCROFT. Well, in all deference and respect to the Members of this Committee, I believe that the legal definition of "torture" will prevail.

One of the things about the rule of law that the Chairman eloquently brought to our attention at the beginning of the hearing is that people are not convicted based on polls taken from men on the street or people in the world. People are convicted of violations of the law based on what the statute says——

Mr. SCOTT. Okay, so my question, though, is that you don't get an exemption because of Department of Justice or an Office of Legal Counsel lawyer wrote a memo excusing it.

Do you get an exemption if the CIA does it rather than Department of Defense?

Mr. ASHCROFT. I don't know of any exception in the law that relates to the different parties that are involved in the activity.

Mr. SCOTT. Is there an exemption of the law if we hand someone over to another country, believing that they will torture the person, where we might not have been able to do it because of our statutes?

Mr. ASHCROFT. I think you are taking me beyond my awareness of the statute, at this point. And I am going to decline to try and be exhaustive about the law.

First of all, you have amended the statute, I think, several times since I left office. I wasn't an expert in this arena when I was in office. So I am going to have to decline to follow down a more and more intricate set of options, which are obviously beyond my capacity.

If you want legal advice on this, as a Member of Congress, you have your own legal counsel and you have the Attorney General. I am not there anymore.

Mr. SCOTT. Let me ask Mr. Dellinger a question.

If the United States is generally believed to be a Nation which inflicts torture on detainees, what impact would that have on our troops and our national security?

Mr. DELLINGER. Mr. Scott, I am not an expert on that. I think I agree with Senator McCain. His view has been that it would put our own troops at serious risk and greater risk if we take the position that techniques like that are lawful, and others who have taken that position.

May I add a word to your question to General Ashcroft?

Mr. SCOTT. Yes, please.

Mr. DELLINGER. Which is just that I think it has to be the case that when the Office of Legal Counsel issues an opinion that a given activity is lawful to an officer or agent of the Government, that criminal prosecution of such a person is ruled out in all but the most extreme, unusual circumstances.

Mr. SCOTT. Well, in that case, who would be responsible and accountable for the torture?

Mr. DELLINGER. Well, I think that moral responsibility would lie with lots of people, but that, in terms of legality, that is the way it has to work. It means you ought to be very careful about who is approved to head the Office of Legal Counsel. But the office is given the delegated authority to make law for the executive branch of the Government. I think that is binding.

I am not necessarily happy to give you that answer, but I think——

Mr. SCOTT. And some laws are so poorly written that people really ought not——

Mr. CONYERS. The time of the gentleman has expired.

The gentleman from California, Elton Gallegly.

Mr. GALLEGLY. Thank you very much, Mr. Chairman.

Welcome, General, Mr. Wittes and Professor Dellinger.

In your opening statement, General Ashcroft, you talked about the success, if you will, of how we have been able to avoid any significant attacks since 9/11, something that we have all been concerned about. Unfortunately, sometimes people have a tendency to, kind of, forget after a period of a year or 2 years or 3 years, although the threat is still there, even though we have had success. Some might argue that that has just been a matter of luck. Some might argue that it is 100 percent a result of the actions of your office and your successors. But I think, clearly, the Chairman asked and Bobby Scott, my good friend from North Carolina, also asked about, is this all a result of the Justice Department?

The one thing that we all know, that have been following this for years, is the fact that there have been many, many direct attacks that we are aware of that have been foiled by our interrogation process. Many are public; many are classified. But we do know that there have been specific attempts to attack us and do harm to the level of the World Trade Center and maybe even more, and they have been foiled.

You have also said, as I understand it, that, to the best of your knowledge, during your administration you lived within the letter of the law, as it related to your understanding of the interrogation process. Is that correct?

Mr. ASHCROFT. My understanding of what process?

Mr. GALLEGLY. What was legally permissible through the laws at the time as it related to interrogation.

Mr. ASHCROFT. Yeah, I think the request for guidance on this by the Administration signals that it's an Administration that is very eager to do everything possible, but within the law. And there was almost an obsessive demand that we get clarity and do what we could to define the law clearly, because you had these parallel aspirations: One, we have to stop terrorists; and, two, we have to do it within the law. So it demands and requires that you get as much definition as you can.

And, with that in mind, there was this sensitivity to making sure we stayed within the limits of the law. But we, within those limits, were as aggressive as possible in defending America.

Mr. GALLEGLY. And in dealing with those limits, would you say that this Nation—had we not used these interrogation techniques that we did during the past 7 years, had we not used those, would

the probability of another attack not only been a probability but a certainty?

Mr. ASHCROFT. It could well have been. No one can say what would have happened exactly, but I believe specific attacks were disrupted.

Mr. GALLEGLY. Well, we know for a fact that many were, and there are people in prison as a result of those.

Mr. ASHCROFT. There are people in prison that were prosecuted successfully, in this metropolitan area, but all across America. I happen to have been Attorney General when the excellent work of the prosecutors resulted in their detentions and incarceration. And absent, I believe, their incarceration, they would be out doing things that would threaten the American people.

Mr. GALLEGLY. Mr. Wittes, I know that—maybe I am paraphrasing—but we talked a little bit about plan A in interrogation and plan B, if you will, and rapport-building, and then enhanced, if that doesn't work.

Can you give me some thoughts about why some terrorists do not respond to rapport-building?

Mr. WITTES. Well, look, I am not in any sense an interrogator, and I have never engaged in, you know, a high-stakes interrogation.

Mr. GALLEGLY. But you have written about it.

Mr. WITTES. But I think what we do know is that there has been a certain amount of training to known interrogation techniques.

We also know that, you know, if you are trying to protect something—these are extremely motivated, very serious people, and if you are trying to protect something, you have a lot of incentive to resist whatever interrogation techniques are being used. And that is true, by the way, in the criminal justice system too. You know, that is a general truth about trying to get information from non-cooperative suspects.

And so, I mean, you know, whenever you are an in-custody detainee who is trying to protect something that you want to succeed from an official who is trying to prevent you from doing it, you have a lot of incentive to use whatever resources are at your disposal, including, in some cases, very high intelligence and very deep-seated convictions and motivations in order to protect those pieces of information that you are trying to protect.

Mr. GALLEGLY. Thank you.

Thank you, Mr. Chairman.

Mr. CONYERS. The Chairwoman of the Immigration Subcommittee and an expert in our intellectual property issues, Zoe Lofgren of California.

Ms. LOFGREN. Thank you, Mr. Chairman. I am appreciative of this hearing.

This is a very troubling subject. And, you know, as I think about where we are in this country today and the various challenges that we as a Nation have faced, certainly we should be concerned about international terrorism. We need to be vigilant. There are enemies of our country who wish to do us harm. But surely that challenge isn't greater than the harm posed to us by the Soviet Union during the entire Cold War. Surely that challenge is not more serious than that posed by the Nazis in World War II.

I mean, we have always been able to face off with those who would do harm to our country while living within our Constitution and our rule of law. And whenever we decide that our safety is more important than our freedom, then we've lost, we've lost it.

I think that we are coming fairly close to that spot right now, which is why I think we need to sort through this and make sure that our system of government is preserved as we continue to preserve the safety of this Nation. I think that's the seriousness of what we are doing here today.

So I just have a couple of questions.

Mr. Ashcroft, I appreciate your willingness to be here and the light that you are shedding on these important issues.

On the withdrawal of the interrogation memos, both the August 1, 2002, memo and the March 14, 2003, memo on interrogations were withdrawn by the Department of Justice while you were the Attorney General. In accordance with your testimony, Jack Goldsmith wrote that you were fully supportive of his judgment that these memos needed to be withdrawn and corrected.

Can you describe your decision to support Mr. Goldsmith on this?

Mr. ASHCROFT. You know, when I said I approved the issuance of the memos, I relied on the experts in the Department.

And let me just say for a moment that John Yoo is a noted expert in national security, and he is a person of incredible intelligence and is an outstanding person who wants to serve America and, I thought, served America in good faith. And we accepted the judgment of the Department reviews and all.

But it became apparent, when further examination of those opinions was made by others in another time frame and at a subsequent time, that there were matters of concern that they brought to my attention. And it was not a hard decision for me. My philosophy is that if we have done something that we can improve, you know, why would we not want to improve it? Why would we not want to adjust it?

And let me just say this, that when it was brought to me that there were matters of concern that related to the appropriateness of the analysis and, secondly, that related to the scope of the opinion itself, my own—and I am, kind of, conjecturing here a little bit—my way of looking at it would be just to make sure this wasn't one attorney picking at another attorney. As you well know, attorneys can pick at each other pretty——

Ms. LOFGREN. We have seen that.

Mr. ASHCROFT. We've restrained ourselves so far here.

But once I satisfied myself that these were concerns that were not just isolated and were not part of one-upsmanship by attorneys, I said, "Any time this Department has the ability to improve what it is doing, by way of giving advice or counsel to the executive branch, we owe it to the President, we owe it to America, we owe it to ourselves to make sure we do the best job possible."

With that in mind, it wasn't a hard decision for me when they came to me and I came to the conclusion that these were genuine concerns: Get about the business of correcting it.

Ms. LOFGREN. Let me just mention, I certainly don't question Mr. Yoo's patriotism or his love of country. I do question his legal analysis. I mean, there seems to be, you know, the Constitution and the

Constitution as Mr. Yoo thinks it should be, and the two are remarkably different.

But I want to get to the FBI's role on this. As you know, the DOJ Inspector General recently released a report. And, to summarize, I mean, the FBI was very concerned about what was going on at Gitmo and, in fact, would not participate.

And I am wondering, I mean, these are people who know interrogation, and whether their lack of participation because of their concern has really led to a situation where we are less safe because we are missing their expertise.

Mr. ASHCROFT. First of all, I don't think that is the case.

Ms. LOFGREN. You mean the Inspector General is wrong?

Mr. ASHCROFT. No. No. I think that it's fair to say that the report can be—I have no reason to quarrel with the report.

Different cultures and different bureaucracies of the American Government handle things in different ways. And I think it has already been alluded to on the panel that everybody seems to think his way is the best way.

I think the Congress of the United States, for example, has been reluctant to extend to the CIA the ability to operate domestically, because we know that they operate worldwide and they are accustomed to a different set of rules. Sort of, when in Rome, do as the Romans do. I don't mean to say anything about the Italians, but just that they operate in a variety of forums.

Now, the point that I would make, the FBI has a tradition and culture of being involved in Article 3 court proceedings, where what it does is done in a way that is consistent with what is expected for use in prosecutions and the like. So their approach to interrogations reflects that culture. But——

Ms. LOFGREN. If I may—my time is running out. I don't mean to be rude and interrupt. But that really gets to the gist of it, whether this process has led to a situation where we are not going to be able to convict these people because of the prosecution——

Mr. ASHCROFT. Well, you know, very frankly, people that we intercept on the battlefield are not people frequently that we expect to convict. They were out there fighting. What we want to interrogate them for is not so we can try them someday. We expect to detain them for the pendency of the battle and then to release them when the war is over.

The value of the interrogation is to provide the basis for prevention, and especially in the modern world, where lethality of weaponry is so robust, so that if you wait and try to penalize someone after an event, you have really taken a super risk, especially when al-Qaeda has an express desire to gain nuclear and chemical and other weapons.

So the CIA may tend more toward a culture which is prevention-oriented. One of the things we hoped to do at the FBI was to bring prevention to the top of our list of priorities. That is what I hoped to do. Not that we would abandon our commitment to the Article 3 processes, but our exclusive effort at intelligence is not designed to bring evidence to Article 3 courts; it is designed to prevent damage to the country.

Mr. CONYERS. Bob Goodlatte, the Ranking Member of Agriculture, distinguished Member of Judiciary.

Mr. GOODLATTE. Well, thank you, Mr. Chairman.

And I want to thank all of our witnesses for their contributions here today.

I would like to follow up on the questions of my colleagues, Mr. Scott of Virginia and Ms. Lofgren of California, Attorney General Ashcroft.

Congressman Scott asked and you affirmed that torture is illegal and it is a violation of the law under all circumstances. Then he started moving in the direction of what constitutes torture, citing his specific example, waterboarding. And I think therein lies the crux of the problem that we have to look at here today.

And that is, if you attempt to define that, the McCain amendment refers you to the Constitution. So if you look at the Constitution to determine what constitutes torture, you are then looking at court decisions interpreting various circumstances under which torture has been alleged throughout our judicial history. And what you find is that the courts have a general standard that torture constitutes what shocks the conscience.

Now, I can see and I think many can see that what shocks the conscience under one circumstance, taking somebody off the street under some minor charge and conducting certain activities, might be very different than under circumstances where somebody is a known terrorist, known to have been involved in a particular activity and may have extraordinarily valuable information and information that, under the circumstances following 9/11, we might have felt a need to gather very promptly.

So I would like to ask you to comment on that. And then I am going to ask Mr. Dellinger a follow-up question about that, as well.

Mr. ASHCROFT. Well, the question you have asked, Congressman Goodlatte, is one that relates to the amendments in the torture framework of statutory prohibition that you have enacted since I have left office. And it does, I think, make reference to the kinds of language that appear under the—I believe it's the eighth amendment that prevents cruel and——

Mr. Goodlatte. Unusual punishment.

Mr. Ashcroft.—unusual punishment. And so there is a different body of law and there is a different body of analysis and reasoning that is now available. And I think that makes our understanding a little bit clearer.

And, as Mr. Wittes has indicated, we need clearer definitions here. One of the problems that we had at the Department of Justice was that the severe pain standard for torture was just not very clear; it was hard to define.

Mr. GOODLATTE. Well, in light of that, let me ask you this question, in following up on what Ms. Lofgren asked. And that is, looking back now, to the best of your knowledge, under the circumstances at the time and the information available to you, do you believe that any memo that your Department provided the President on interrogation techniques contained legal advice that was inaccurate?

Mr. ASHCROFT. The conclusions of all the memos were, I believe, accurate conclusions. There was some of the reasoning which is of arguable appropriateness, and we thought that we would be best served and the Nation would be best served if that was withdrawn.

But the Attorney General himself, as short a time ago as last week, I believe, and the Office of Legal Counsel several times in the last 5 years, according to its leader, Mr. Bradbury, has indicated that they have gone back over and, applying the reasoning and analysis of the second memo, have indicated that all of the conclusions reached in the first memo relating to enhanced interrogation would be acceptable under the second memo.

Mr. GOODLATTE. Thank you.

Now, let me ask Mr. Dellinger whether or not it's easy to define "torture."

Mr. DELLINGER. No, except that I think the definitions reached and the—it may not be easy to affirmatively define what is not torture. But, certainly, the techniques approved in the 2003 memo would seem, to me, clearly to be within the category of torture. That is——

Mr. GOODLATTE. Can you give us a framework of that? Can you state what you think torture would be that would allow those things to, as you say, clearly fit into that framework?

Mr. DELLINGER. That is beyond my, sort of, competency to do here, to affirmatively define it. Someone once said it's easier to identify instances of injustice than it is to define justice, and so it is here. But——

Mr. GOODLATTE. Do you agree with the line of thought that is included in the Supreme Court cases that uses a standard that "shocks the conscience" as being a measure of what constitutes torture?

Mr. DELLINGER. No, because I think the standards are different from that.

And let me give you one particular example. The 2002 memorandum says that something is not torture if it is not specifically intended to inflict pain; that is, if it's intended to gain information. And that would simply exclude virtually any technique that you're using to gain information from the definition of "torture."

And it also uses the definition of "severe pain" that is taken from a completely different context to indicate that it has to be something equivalent to that associated with organ failure or death. And I don't think that anybody in the world has ever thought that the definition of "torture," as enacted by this Congress as a prohibition, was so narrowly defined as it is in that memorandum

Mr. GOODLATTE. I think my time has expired, Mr. Chairman.

I would just add that, in other words, you are saying that that line of reasoning from the courts, that a definition of "torture" as something that shocks the conscious and, therefore, might be different under different circumstances, you do not agree with that being at least a part of how you would define "torture"?

Mr. DELLINGER. It may well be a part. I don't think it is particularly helpful. And I certainly don't think that the techniques approved by the 2003 memo are outside the definition of "torture."

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. CONYERS. The gentlelady from California, Maxine Waters, Chair of the Housing Subcommittee on Finance and distinguished Member of Judiciary.

Ms. WATERS. Thank you very much, Mr. Chairman. I certainly appreciate you holding this hearing today.

And I want to get back to a subject that has been in the papers consistently, and they may have already been touched upon or discussed here this morning. I was a little bit late coming in. And if so, our witnesses can just refer to their earlier testimony.

I want to ask about, were there ever allegations of torture or other misconduct by U.S. personnel involved in interrogations that you, Mr. Ashcroft, considered to rise to the level as to justify a criminal investigation?

I understand there has been some discussion, but I am not clear whether or not you feel that there was information that emerged in these interrogations that really did rise to that level of a criminal investigation.

Mr. ASHCROFT. I'm not aware of any interrogation process that resulted in a request or in a situation that would have given rise to a basis for prosecution for torture.

Ms. WATERS. Where you ever aware that U.S. personnel were indeed involved with waterboarding?

Mr. ASHCROFT. I have been aware of that.

Ms. WATERS. How did you become aware of this?

Mr. ASHCROFT. I'm not sure. I know that I have become aware of it as a result of this discussion in areas before this Committee and the like. But I'm not sure at what other points. And if I had received information, it probably would have been in classified settings that I couldn't discuss.

Ms. WATERS. So you believe that the information that you received about waterboarding was not in a setting—but where you were being advised, you were being told that, based on news reports, other reports, that some very serious was going on and described to you in detail, perhaps?

Mr. ASHCROFT. I believe that a report of waterboarding would be serious, but I do not believe it would define torture. The Department of Justice has consistently—when I say the word "waterboarding," I mean waterboarding as defined and described by the CIA in its descriptions. And the Department of Justice has, on a consistent basis over the last half-dozen years or so, over and over again in its evaluations, come to the conclusion that, under the law in existence during my time as Attorney General, waterboarding did not constitute torture, if you say waterboarding as the CIA interrogation methods were described.

So I could receive information about waterboarding. That's clear that that was a possibility. But if I received information about waterboarding being conducted as the CIA had described it, the experts at the Department, who very carefully went over this material uniformly over the last half-dozen years, under the law in effect at that time, indicated to me that it was not a violation of the law.

I am trying to be clear.

Ms. WATERS. I understand what you are saying. And I suppose that I would like to explore just a moment whether or not, given those analyses, those explanations, those descriptions and what you have since learned about it, do you think that that advice was good advice, it was an accurate description of what was going on? Have you had second thoughts about it?

Mr. ASHCROFT. Well, let me just say this, that I believe that the conclusions of the memoranda, that concluded that as described by the CIA's interrogation methods that waterboarding did not constitute torture, I think those are valid conclusions.

I don't think I could, under oath, say that I've never had a second thought about it. But when the Department has revisited over and over again, as it has testified according to the head of OLC, Mr. Bradbury, they have concluded on each occasion that it did not violate the laws enacted by the Congress, signed by the President, that prohibited torture.

Ms. WATERS. Finally, if I just may ask, based on all of that information, those descriptions, your understanding, and the conclusions, if, in fact, these practices as they were identified in the reports were applied to American soldiers, do you think that that conclusion would be a good one? Or do you think that if these techniques were used on American soldiers, that they would be totally unacceptable and even criminal?

Mr. ASHCROFT. Well, my subscription to these memos and my belief that the law provides the basis for these memos persisted even in the presence of my son serving two tours of duty overseas in the Gulf area as a member of our Armed Forces. I know that his training included a number of activities that I think would be very, very difficult for any of us to sustain, including having to deal with evil chemistry and the like.

But my job as Attorney General was to try and elicit from the experts and the best people in the Department definitions that comported with the statutes enacted by the Congress and the Constitution of the United States. And those statutes have consistently been interpreted so as to say, by the definitions, that waterboarding as described in the CIA's request is not torture.

Mr. CONYERS. The gentleman from Ohio, the distinguished gentleman from Ohio, Steve Chabot.

Mr. CHABOT. I thank the Chairman for yielding.

And welcome, General Ashcroft. Just a couple of questions.

First of all, waterboarding has come up a couple of times this morning already. And we hear about it so much in the press and others; it's as if this is a fairly routine thing that is done all the time. How many times has it actually occurred, to our knowledge, at this point?

Mr. ASHCROFT. I don't really have knowledge other than what I read in the newspapers, but my understanding is that it has been done three times.

Mr. CHABOT. Three times.

Mr. ASHCROFT. Excuse me, as part of an interrogation process. There are other times people have done it as part of training our own military and to be resistant to and to understand what kind of techniques might be used on them.

Mr. CHABOT. But in an actual interrogation environment, the three individuals you mentioned, what type of people were these?

Mr. ASHCROFT. Well, I think they were people that would be labeled as high-value detainees, people that we think might have significant information that could relate to the safety and security of the United States.

I think also it's fair to say that generally in people who have that kind of information, members of al-Qaeda, they have been trained in resisting interrogation and they have been hardened both in their own—as I recall from reading their training manual, which I had a copy of, or translations of it, they are hardened in resisting interrogation and, of course, in accusing—whether or not their detainers do anything to them or not, always alleging abuse.

Mr. CHABOT. Thank you.

And, secondly, the term "cruel and unusual punishment" has come up a couple of times. Do you know in advance what the Supreme Court is going to say or is likely to say in what is cruel and unusual punishment?

An example that has come up recently is there are a number of States that believe that a child rapist who has committed an unspeakable crime should be subject to the highest penalty, which is the death penalty. A number of States have taken that posture. But the Supreme Court recently, on a 5-4 vote, decided no, that it is cruel and unusual punishment to execute somebody who has raped a child under the age of 12. For that reason, a number of us, because it is the only thing available to us, have introduced a constitutional amendment to reverse the court on that particular issue.

But do you know in advance what the court is likely to say? And if not, what is your procedure that you undergo to make sure that you're as closely as possible following the law as defined by the U.S. Supreme Court?

Mr. ASHCROFT. That may seem like a simple question, but it's not a simple question.

When you're trying to figure out what the law is, in a rule-of-law culture you should be able to go and find out what the courts have said in the past that that is what the law is. And that is why we were very successful. In the major terrorism cases, of the 12 judges at the Court of Appeals level, where they repair to the standard of what finding out what has been said previously on the law, 11 out of 12 judges said, the Justice Department has got this right.

But you get to the Supreme Court, and the way our system is is that the Supreme Court is the court that, while it respects precedent, or at least it likes to allege that it does, it is free to abandon it if it so chooses.

Now, it makes difficult, then—guessing where the Supreme Court might go is a lot harder than ascertaining where the Supreme Court has been. And this puts some tension into the law.

It's the way our system operates, and it puts some uncertainty into it. It's one of the things that gives lawyers the space in which to argue. As you well know, what it does is it provide for the employment of lots of lawyers, because when things are uncertain, you have to have more and more advice. Unfortunately, when it's uncertain, it shrinks freedom.

Mr. CHABOT. General, not to interrupt you, but I am almost out of time. I had one more question I wanted to slip in.

I had the opportunity to visit Guantanamo Bay on two separate occasions, the second time actually accompany the gentleman from New York, Mr. Nadler, and some of our colleagues, and Mr. Gohmert, Judge Gohmert also, and a few others. And I happened

to be, for 6 years, the Chairman of the Subcommittee on the Constitution, which Mr. Nadler is now, and so we wanted to see firsthand.

We witnessed an interrogation that was going on. We were in another room over a closed-circuit TV. We also saw the type of medical care they were receiving. We learned that they gained about 15 pounds per person, were getting better medical care than they ever had, that there was an arrow pointing to Mecca, and all the other types of things that were going on at that time.

Relative to the interrogation that we viewed—and, of course, you weren't with us—but is that typically what an interrogation is? It was a person essentially talking to another person in another Chair.

Could you comment on the interrogations that were taking place there?

Mr. ASHCROFT. I suppose that's the most frequent kind of interrogation.

But I think one of the problems is to assume that there is a best way to interrogate. I mean, we are all different kinds of people. We all have different training. We all have different kind of heritage. For this Congress to say, "This is the only way we are going to interrogate; we are going to have a warm and fuzzy approach to everybody," I think it would be to jeopardize the Nation's security.

I think what we need to do—yes, I'm in favor of rules that can provide the right parameters to what we do, but I think we need to have variety, because we are unrealistic if we don't anticipate a variety of people that we'll be up against.

And if I just had a second, someone raised the issue of, well, we made it through the Second World War with one set of rules, and we made it through the Cold War with another set of rules; shouldn't we just lock in on all those things and pretend the world is the same? It's not.

I offer to you that in the Second World War we didn't have people dying on the streets of America. We had 3,000 that died in American streets on the first day of the war on terror that came to the United States—far more than we had in even in what was then a territory, not a State.

So the lethality and the nature of weaponry and the fact that small groups of individuals can pose threats to the entire Nation, which wasn't true before, shouldn't lead us to narrow unduly our ability to defend America.

Mr. CHABOT. Thank you.

Yield back.

Mr. CONYERS. The distinguished gentleman from Florida, Attorney Bob Wexler.

Mr. WEXLER. Thank you very much, Mr. Chairman.

I first want to thank you, Chairman Conyers, for aggressively pursuing the issue of torture and the potentially abusive interrogation practices and detainee abuse practiced by this Administration.

Simply put, in my view, torture is antithetical to who we are as Americans. And how we respond to allegations of the illegal use of torture defines the character of our Nation.

I also, Mr. Ashcroft, Mr. Attorney General, want to commend you for your willingness to appear before this Committee. I think it says a lot about you in a positive way.

I want to follow, Mr. Attorney General, Mr. Nadler's question to you, if I could. If I understand it correctly, Mr. Nadler asked, are you aware whether Abu Zubaydah was waterboarded before August 2002, and you answered you didn't know.

In your testimony, you had indicated that Mr. Zubaydah was captured in March 2002. The Department of Justice Inspector General report on the FBI's role in the interrogation makes clear that he was interrogated beginning in March of that year.

So the question I would like to offer you, was the interrogation of Mr. Zubaydah before August 2002, from March until August, done with or without the Department of Justice's legal approval?

Mr. ASHCROFT. I don't know. I don't know if we—it was done without the opinion, which was issued on the 1st of August. And I don't know what other kinds of activity there would have been.

Mr. WEXLER. So from March to August, did you offer any legal approval of the interrogation methods used at that time?

Mr. ASHCROFT. I don't have any recollection of doing so.

Mr. WEXLER. And did anyone else at the Department of Justice?

Mr. ASHCROFT. I don't know. I don't know.

Mr. WEXLER. Did you provide anybody at the White House or the CIA or the Defense Department, prior to August in 2002, with any instructions or advice regarding waterboarding, hypothermia, or any enhanced interrogation techniques? Did you tell anybody at the White House, the Defense Department or the CIA that those actions do not violate the Anti-Torture Act or any other Federal criminal law?

Mr. ASHCROFT. If I had a recollection about that, it would be classified communication and outside the guidelines of what I could answer.

Mr. WEXLER. Did any other attorney, to your knowledge, at the Justice Department provide advice to those people prior to August 2002?

Mr. ASHCROFT. I think my answer should be the same as it was before.

Mr. WEXLER. Okay. Let's move on.

News reports described detailed meetings in the White House Situation Room at which interrogation methods were discussed and, in some cases, apparently demonstrated.

It is reported that you attended those meetings. Is that accurate?

Mr. ASHCROFT. Let me just say that I attended a lot of meetings in the Situation Room. I don't know if I attended those meetings, but I attended a lot of meetings there. They were all classified, and I will not comment on the meetings.

Mr. WEXLER. Well, two different accounts place you at the meetings. ABC News reports they have a quote from you saying, quote, "History will not judge this kindly." And journalist Jane Mayer quotes you as saying, quote, "History will not treat us kindly."

Did you make those statements about history and the judgment of history?

Mr. ASHCROFT. Any statement I did or did not make or would or would not make in a classified setting I would not comment on.

I am appalled that so much seems to be available from classified settings. This town leaks like a sieve. I think the easiest job in the world would be to be a spy against America.

Mr. WEXLER. Well, yeah, I am appalled too. But from what we know, it was only yourself, Secretary Rice, the Secretary of Defense, the head of the FBI, the CIA that were in the rooms. That's all, reportedly, and possibly the Vice President. So it's not just ancillary people.

Can you tell us who was in those meetings? Was the President in the meeting? Just a yes or no?

Mr. ASHCROFT. I will not tell you who was in the meetings. I will not comment on meetings that are classified. I think it would be for me to break the law to do so. And I really want to cooperate with the Committee, but I don't want to break the law in doing so, and I don't want to be invited to break the law before the Committee.

Mr. WEXLER. I'm not asking you to break the law.

Mr. ASHCROFT. I've been making this statement on a regular basis. I just want you to know that the consistency of my answer is not my attempt to be obdurate or less than cooperative, but it is my persistence in wanting to respect the law.

Mr. WEXLER. Sure. Apparently, Mr. Attorney General, you were specifically uncomfortable with what the principals at that meeting were doing or were being asked to do, to your credit.

Mr. ASHCROFT. Do you think I would want to break the law if I thought it was to my credit?

[Laughter.]

Mr. WEXLER. No.

Mr. ASHCROFT. Well, then I'm not going to answer. I mean, with all due respect, Congressman——

Mr. CONYERS. The time of the gentleman has expired.

Mr. WEXLER. Thank you.

Mr. CONYERS. The only ex-attorney general we have in the Congress is Dan Lungren. I am pleased to present him to you at this time.

Mr. LUNGREN. Actually, Congressman Udall would be very upset for you to say that.

But that brings up a point. I would just like to say that the enhanced stature with which you are now observed by Members of both sides of the aisle, I think, reflects on the fact that you performed well as Attorney General.

And just a comment. I happen to think it is a good idea to have someone as Attorney General who is both a distinguished attorney and has submitted himself to the voters for different positions. I think that gives you a view of the Constitution that is, in some ways, enriched and, in some ways, helps guide you in your performance. And I want to thank you for your service.

Mr. ASHCROFT. Thank you.

Mr. LUNGREN. Mr. Dellinger, I would like to ask you a question. You set up a scenario by which you think we ought to operate. That is, in certain circumstances, dire circumstances, the President ought to break the law by directing people to do something that would save American lives.

If that had been the case in World War II, should President Truman have submitted himself to the law after he ordered the dropping of the atomic bomb on two occasions?

Mr. DELLINGER. I don't know that that was unlawful, in violation of any statute.

Mr. LUNGREN. Even though it ended up with the loss of a tremendous number of lives of that were innocent men, women and children who were not at that time in any way described as belligerents or combatants?

Mr. DELLINGER. I think that may well have been within the scope of his authority.

Mr. LUNGREN. I was reading "Crusade in Europe" by Eisenhower. And President Eisenhower mentioned that we had a circumstance in which we had some of our ships in the Mediterranean loaded with mustard gas, which we were forced to carry with us because of the uncertainty of German intentions in the use of the weapon. There was damage to this ship. Luckily, the wind was offshore, and the escaping gases caused no casualties.

He said, "Had the wind been in the opposite direction, great disaster could well have resulted. It would have been indeed difficult to explain even though we manufactured and carried this material only for reprisal purposes in case of surprise action on the part of the enemy." And the fact is, during the war against Germany, we had things such as mustard gas, which, as I understand, were illegal under the conventions after World War I. We carried it because we used it as a deterrent to the Germans.

Had we used it in those circumstances under the direction of President Roosevelt—what I am trying to say is, is it practical to assume under those circumstances a President would order that action and then immediately turn himself over to the authorities?

Mr. DELLINGER. No, because there are circumstances in which the President can constitutionally decline to comply with an act of Congress where it would impinge upon the core of his responsibility.

Mr. LUNGREN. So the core of the responsibility of Franklin Delano Roosevelt in that circumstance was to protect this Nation against our enemy, Germany, correct?

Mr. DELLINGER. Yes, but——

Mr. LUNGREN. And the core of the President of the United States at the present time, as least reflected in these actions, is to attempt to protect us against the terrorist threat that we have at the present time, correct?

Mr. DELLINGER. That is correct. But——

Mr. LUNGREN. Okay. I am not trying to catch you in something. I am just trying to follow through with your recommendation. And what I am trying to suggestions these are not easy questions with easy answers. You have said that.

And your prescription is to the President to direct those actions, not allowing criminal liability with respect to those who carry it out, but the President subjecting himself to that, because you said other people make greater sacrifices.

That is in contrast to what Alan Dershowitz has suggested when he said, in an article in the Wall Street Journal, "This brings us to waterboarding. Michael Mukasey is absolutely correct as a mat-

ter of constitutional law that the issue of waterboarding cannot be decided in the abstract. Under the prevailing precedence, the court must examine the nature of the governmental interest at stake and the degree to which the Government actions at issue shock the conscience and then decide on a case-by-case basis. In several cases involving actions at least as severe as waterboarding, courts have found no violations of due process."

I take it you would disagree with that.

Mr. DELLINGER. I disagree with the proposition that we ought to engraft an exception for torture in certain circumstances into the law. And in the most extreme hypothetical, of someone who had information about a weapon in the middle of Manhattan, I thought the President should violate the law and take whatever consequences exist.

Mr. LUNGREN. Okay. Let me ask you then very specifically, not dealing with thousands, but we have been told that, of the three people that have been waterboarded, one was Khalid Sheikh Mohammad, and that he, after being waterboarded for some period of time, gave us information.

One of the things he admitted to was personally murdering Wall Street Journal reporter Daniel Pearl. He said, "I decapitated with the blessed right hand the head of the American Jew Daniel Pearl in the city of Karachi, Pakistan."

So let me ask you this. Both morally and legally, if we knew beforehand that we could find out the location of Daniel Pearl by waterboarding Khalid Sheikh Mohammad, if we had been able to capture him and thus stop Daniel Pearl from being beheaded, would that that be morally justifiable and would that be legal under the law?

Mr. DELLINGER. Morally justifiable, probably yes.

But it seems to me that—one of the things we are in serious danger of missing as a point here when we struggle to define what would be the morally correct thing to do about torture is that the 2002 and 2003 memoranda which say whatever the Congress of the United States decided ought to be the law, the President can simply disregard. It is a breathtaking claim that the President can simply disregard whatever conclusion the Congress reached, enacted into law. And, moreover, the President could decide to keep that secret from the Congress and the American people. I don't want us to lose sight of that.

Mr. LUNGREN. In this case, if he had ordered that and we had saved Daniel Pearl, but then he revealed that to the American people, would that have been justifiable and legal?

Mr. DELLINGER. There is much to be said for transparency because of the toxic combination of an assertion that anything the President could do when Congress has enacted, which I think is a broad range of authority, he can also do after Congress has chosen to make it a crime. And then the fact that we don't know what laws the President is not complying with renders this Congress as if your laws are notes that you are putting in a bottle, never knowing whether anybody is going to find them or pay attention to them or not. And that is an issue that cuts across all of these areas of discussion.

Mr. LUNGREN. Thank you very much.

Mr. CONYERS. The distinguished gentleman from Massachusetts, Mr. Delahunt.

Mr. DELAHUNT. Thank you, Mr. Chairman.

Mr. Dellinger, I think you just hit the gravamen of this whole discussion, which is that this is as much about the constitutional order and the relationship between the branches as it is about the specific issue of torture. And it is a question of whether this Congress will stand and accept the burden and the responsibility of, in a transparent fashion, enumerating what is acceptable under our law and what is unacceptable. I think that you made a significant contribution by responding to the question of the gentleman from California.

I would also—I find interesting, not the hypothetical, but the constant reference to Khalid Sheikh Mohammad and the premise that the information that has been generated from him was, as a proximate cause, a result of waterboarding, because my information contradicts that. It's when the rapport effort was undertaken that information came from Khalid Sheikh Mohammad, and that he was resistant during the course of the efforts to secure information from him as a result of waterboarding.

So I think it's important to put that on the record so that we understand that waterboarding, from my information, was not effective in that case.

So I just wanted to respond to my dear friend, the former attorney general of California.

Mr. LUNGREN. I thank the former district attorney.

Mr. DELAHUNT. I wasn't in the room, but I understand that you stated that you believe that officials relying on the legal opinion issued by OLC should not or could not be subject to criminal prosecution if, at a later point in time, there was a decision by the relevant court that there was a criminal violation of American domestic law.

Is that accurate?

Mr. DELLINGER. Yes. And the only exception to that, in my view, would be where the legal opinion was a sham not issued in good faith, and the action officer knew that the opinion was a sham not offered in good faith.

Mr. WITTES. I agree with that, I mean, not that you asked me——

Mr. DELAHUNT. We have such limited time. I would like to ask everybody.

What I find very interesting here is, in your written testimony, sir, you reference the fact that Jack Goldsmith was extremely critical of the so-called torture memoranda prior to his assuming the lead in the OLC. You quote him as saying, it was deeply flawed, sloppily reasoned, overbroad, and incautious in asserting extraordinary constitutional authorities on behalf of the President.

To me, that is very damning. And I don't know if I share your perspective in terms of exposing people who could very well be acting in good faith in reliance on these memoranda to criminal prosecution, but I would say it could very well be an open question.

Mr. DELLINGER. If I might just say, the fact that I believe an OLC opinion would offer protection to officers who relied upon it

is why it is so terribly important to get the OLC opinions right and to——

Mr. DELAHUNT. One could hypothecate that any OLC opinion, no matter how deeply flawed, would give cover. I am not even talking about torture. I am talking about, you know, any conduct that amounted to criminal violations. If reliance could be demonstrated on an OLC opinion, you get a free pass, you know, a get-out-of-jail card, so to speak.

Mr. DELLINGER. It also works the other way. This formerly obscure office, which I headed for a while, also cannot be overruled in a real sense by superior officers when they say that an action is unlawful. If I offered an opinion that it would be unlawful to do X and the Deputy Attorney General or the Attorney General, the President, overruled me and then did that, they would have no protection. If they ordered the legal opinion reversed and then relied upon it, there would be no reliance because they would know that the real legal opinion was you can't do that.

So the OLC's authority is, in that sense, binding and very important both ways, which is why so many of us were so distressed by the extraordinarily shoddy quality of the 2002-2003 memoranda and their deeply flawed view of almost a Presidential authority beyond anything we know in the rule of law.

Mr. DELAHUNT. I appreciate your embarrassment, but I also now find a Nation that's embarrassed by that opinion.

And I understand that my time has run out despite the fact I would love to ask some other questions, but I thank the Chair.

Mr. CONYERS. The distinguished gentleman from Florida, Ric Keller.

Mr. KELLER. Thank you very much, Mr. Chairman.

And, Mr. Dellinger, let me thank you for being here; and I respect your service and your opinions.

Let me tell you the gist of what I am concerned about from your testimony; and I want to be fair to you, give you the chance to explain. It seems to me that the gist of your testimony is that it was okay for the Clinton Justice Department to authorize the killing of bin Laden, but it is not okay for the Bush administration to aggressively question terrorists who want to kill us, and that seems just a bit inconsistent to me.

Go ahead.

Mr. DELLINGER. I can answer that precisely.

Mr. KELLER. Okay.

Mr. DELLINGER. The reason is quite simple. It was not against—it would not have been against the law of the United States to assassinate bin Laden. It was against the law of the United States to engage in torture. Those are decisions that had been made by Congress.

Mr. KELLER. Isn't killing the ultimate torture? I mean, my God, what worse torture is there than killing somebody?

Mr. DELLINGER. We kill enemy combatants all the time. That is very different than subjecting them to cruelty. And I happen to have a personal belief that the executive order forbidding assassinations, whenever it went into effect, is probably a mistake. But your question goes right to the heart of the matter.

Mr. KELLER. Well, let me just say to you—because we have a Supreme Court, and they just ruled that the death penalty was too cruel and unusual punishment for someone who raped an 8-year-old girl. And so if the death penalty is too cruel of an unusual punishment, how the hell is it okay to kill someone but not okay to aggressively question them?

Mr. DELLINGER. Well, Osama bin Laden is not a United States citizen and not being detained in the United States under the custody of the United States; therefore, has no constitutional rights.

Mr. KELLER. Right. So you agree with me that the Clinton Justice Department specifically authorized the killing of Osama bin Laden.

Mr. DELLINGER. I am not privy to that, nor could I address it if I did. But I will answer the part of your question, which is, had we done so, I would have defended it.

Mr. KELLER. I am privy to that and how I was, you know, in school during that Administration. Because I am looking at page 132 of the 9/11 Commission report, and I will let you be privy to it now.

Quote, the new memorandum would allow the killing of bin Laden. The Administration's position was that, under the law of armed conflict, killing a person who posed an imminent threat to the United States would be an act of self-defense, not assassination. On Christmas Eve, 1998, Berger sent a final draft to President Clinton with an explanatory memo. The President approved the document.

"Because the White House considered this operation highly sensitive, only a tiny number of people knew about this memorandum of notification. A message from Tenet to CIA field agents directed them to communicate to the tribals the instructions authorized by the President of the United States that preferred that bin Laden and his lieutenants be captured, but if a successful capture operation was not feasible, the tribals were permitted to kill them."

Now you see the contradiction? You have testified with respect to questioning from my colleague from California, Mr. Lungren, that even with Khalid Sheikh Mohammad that is not an exceptional extraordinary circumstance that should allow us under the law to question him aggressively. Right?

Mr. DELLINGER. The question——

Mr. KELLER. He is not a U.S. citizen. That was your concern before. He is not a U.S. citizen.

Mr. DELLINGER. The question you are asking I think is a question directed to the Congress of the United States; and if there is a contradiction between our legal authority to assassinate persons who are foreign leaders and the prohibition on torture, that is to be resolved by Congress.

My concern is that the claim in this—the fundamental flaw in these memoranda is they take the term "inherent authority of the President"—that is, what a President could do in the absence of any prohibition by Congress, which I think is a broad area in the area of national defense, and then will say, once Congress has enacted a criminal prohibition, the President can still do it because it is, quote, within his, quote, inherent authority. That I think fun-

damentally disregards the central role of Congress in establishing what the law is.

Mr. KELLER. All right. My time has expired.

Let me just one question to Mr. Wittes. Would you agree with me that Khalid Sheikh Mohammed is a ticking time bomb and that to protect our citizens from further attack failing to get all the information available from him is simply not acceptable?

Mr. WITTES. I say in the book that I don't like the ticking time bomb example, because I think it is something of a—it is something of a fiction. You know, Khalid Sheikh Mohammed in some ways is less than a ticking time bomb and in a very critical respect is more than the prototypical ticking time bomb. Less in the sense that, as best as I know at the time of his capture, we didn't know of a bomb ticking. So, you know, it is not the situation where, you know, you capture somebody and you know there is a bomb planted in Manhattan and it is going to go off and you have got 3 hours and you can hear it in your mind going tick, tick, tick.

On the other hand, you do, knowing who he is, knowing that he is, you know, to the extent that there are ongoing operations he is probably directing them, he is in some sense all the ticking time bombs. And I do think that it is, as a practical matter, sort of unacceptable as an option to not do what you are going to do to find out what he knows.

And that is a different question from the question of what techniques are the optimal way to do that or the morally acceptable way to do that.

Mr. KELLER. Well, look, I thank you both for being here. And I am sorry, Mr. Attorney General, that my time has expired, and I didn't get a chance to ask you some questions.

And, Mr. Chairman, thank you for indulging me, and I will yield back the balance of my time.

Mr. CONYERS. The distinguished Chairwoman of the Administrative and Commercial Law Subcommittee of the Judiciary, Linda Sánchez.

Ms. SÁNCHEZ. Thank you, Mr. Chairman.

I have a number of questions that I am anxious to get through, so I am going to jump in and begin my questioning with Mr. Ashcroft.

At any point during your tenure as Attorney General did the President himself approve or order either of the Office of Legislative Counsel August 1, 2002, OLC memoranda?

Mr. ASHCROFT. Pardon me, did the President order what?

Ms. SÁNCHEZ. Approve or order either of the Office of Legislative Counsel August 1st, 2002, OLC memoranda?

Mr. ASHCROFT. I don't know.

Ms. SÁNCHEZ. You don't know? You didn't discuss it with him?

Mr. ASHCROFT. I don't believe so. If I did, it would be privileged. I wouldn't tell you about it. Because it is the responsibility of the—but in terms of communication to me, I would not share communication with you that the President made to me. I think it is my responsibility as his attorney, and it is the deliberative product that attorneys are supposed to be able to talk to the people they serve confidentially.

Ms. SÁNCHEZ. But if the President ordered it, he would have spoken with more than just you about it. He would have spoken with the OLC about it. Is that not correct?

Mr. ASHCROFT. I can't answer a hypothetical about what the President might or might not have done.

Ms. SÁNCHEZ. Do you—at any point during your tenure as Attorney General, did the President approve of the use of any of the tactics listed in either of the August 1st, 2002, OLC memorandums?

Mr. ASHCROFT. I can't answer that question based on the fact that I believe what the President did in this area is classified information.

Ms. SÁNCHEZ. Do you know at any point during your tenure as Attorney General if the President himself approved the use of waterboarding either as a policy or as applied to a specific detainee?

Mr. ASHCROFT. I believe my previous answer covers that question.

Ms. SÁNCHEZ. Do you know if at any point during your tenure as Attorney General the President himself approved induced hypothermia or forced sleeplessness or stress positions in general as a policy or as applied specifically to any detainee?

Mr. ASHCROFT. My previous answer covers that question.

Ms. SÁNCHEZ. Do you know if the Vice President himself approved or ordered any of these tactics either as a policy or as applied to a specific detainee?

Mr. ASHCROFT. The answer is the same as the previous.

Ms. SÁNCHEZ. Did you ever advise the President or the Vice President that the approval or ordering of any of these tactics could constitute crimes under the War Crimes Act?

Mr. ASHCROFT. The answer to the question is the same as the one previous.

Ms. SÁNCHEZ. Did you ever advise the President or the Vice President that any of these tactics could constitute crimes under the Anti-Torture Act?

Mr. ASHCROFT. My communications with the President are privileged communications.

Ms. SÁNCHEZ. Did you ever advise the President or Vice President that the approval or ordering of any of these tactics could constitute crimes under the Uniform Code of Military Justice for uniformed personnel?

Mr. ASHCROFT. My communications with the President are privileged communications.

Ms. SÁNCHEZ. Did you ever advise the President or the Vice President that the approval or ordering of any of these tactics could constitute crimes under the general Federal criminal laws of the United States?

Mr. ASHCROFT. My communications with the President were privileged communications.

Ms. SÁNCHEZ. In March of 2004, then acting Attorney General James Comey refused to sign an order extending President Bush's warrantless domestic spying program, quote, amid concerns about its legality and oversight, end quote.

Mr. Comey testified in May, 2007, that the White House tried to force you to overrule him, despite the fact that you were debilitated in a hospital with pancreatitis.

Former New Mexico U.S. Attorney David Iglesias, who was fired by the Administration for refusing to file questionable voter fraud charges, has stated that your refusal to support the warrantless wiretapping program led to your being, quote, unquote, pushed out of the Bush administration. Is Mr. Iglesias' statement correct?

Mr. ASHCROFT. I am trying to think of all the reasons that are appropriate for me to refuse to answer that question.

Ms. SÁNCHEZ. I would sure be interested in knowing what they are.

Mr. ASHCROFT. I am not a book writer, like so many other people are. I have written books, but they are not very interesting.

Ms. SÁNCHEZ. Was your departure entirely voluntary?

Mr. ASHCROFT. My departure was a decision of my own. It was a decision I made. It was voluntary.

Ms. SÁNCHEZ. Was it ever suggested that you should step down from that position?

Mr. ASHCROFT. Communications between me and those responsible for my opportunity to serve America as Attorney General are the subject of privilege, and I won't make comments about them.

Ms. SÁNCHEZ. One last question for you. In the June 24th IG OPR report on the politicized hiring in the Department honors program and summer law intern program found that in 2002 the involvement of political appointees in the hiring process was greatly expanded. As Attorney General, did you know that applicants for career positions at the Department were being screened for their political affiliation? Were you aware of that?

Mr. ASHCROFT. I don't have any recollection of an awareness of that.

Ms. SÁNCHEZ. And you don't—as to this day you were not informed of that?

Mr. ASHCROFT. I don't know whether it has ever been mentioned to me. I——

Ms. SÁNCHEZ. Have you read the IG report?

Mr. ASHCROFT. No, I have not.

Ms. SÁNCHEZ. I highly suggest that you do. It might be a very eye-opening experience for you.

I see that my time has expired. I yield back.

Mr. CONYERS. The distinguished gentleman from Indiana, Mike Pence.

Mr. PENCE. Thank you, Mr. Chairman; and I want to apologize to you and to our distinguished panel for my tardiness. I was attending the funeral of a friend, Tony Snow, this morning. And I appreciate very much your written testimony and am grateful for your time.

General Ashcroft, I would like to direct my questions to you in the time that I have. Thank you for being here today. More importantly, thank you for your service to the United States of America.

Mr. ASHCROFT. It was a privilege.

Mr. PENCE. I must say to you I have been through many hearings on the topic of the day, policies of the Department of Justice and the decisions that were made in the immediate aftermath of

9/11. I want to concede that all of my thinking about that day is colored by the fact that I was here, like you were. I was standing on the Capitol grounds at 20 minutes after 10, which, as my wife and children and I paid respects at the now-under-construction memorial to flight 93 this summer, we did the math. And had Khalid Sheikh Mohammed had his way, I would be 7 years dead.

Mr. ASHCROFT. Yeah.

Mr. PENCE. Of that I am convinced, but for the courage and sacrifice of those on that flight.

And so, while legal arguments are fascinating to me, have been since law school, while semantic arguments, ticking time bomb and the like, interesting, I was here. And General, you were here that day. And I remember your service of stepping into the gap and your calm demeanor, and I don't know that I have had the opportunity to thank you publicly for your steady hand at the tiller that day, but I thank you now.

In the course of many of these hearings we have heard suggestions from witnesses in the academic world, authors and others, that many have believed that simply by asking terrorists nicely the United States can obtain the information that it needs to wage the war on terror and protect our country from the advent of another day like that day. Can you explain to this panel why it is that some terrorists do not respond to the so-called rapport-building approach, the noncoercive approach to questioning?

And, secondly, not pulling you into specific methods and tactics that were approved and utilized—I am sure that has been well covered today—but rather how valuable was the information that we were able to extract from Khalid Sheikh Mohammed and others to prevent that kind of violence against this country in the intervening 7 years?

So if you can speak to me about the value of those techniques and what we profited from.

Mr. ASHCROFT. I get a little bit emotional to have you describe where you were that day, because it brings that day back to me rather dramatically.

The information is only valuable if you care about the lives of American citizens, and then it is extremely valuable. And the idea that all prisoners would respond to the same approaches is naive. The idea that we can arrive at a single way of interrogation, inflexible, would be totally absurd. And what is even more I think important is to understand that some detainees would respond to the rapport-building only after they had been shocked out of—I don't mean to use the electric shock analogy—but shocked by some more aggressive techniques. So that techniques are not necessarily uniform or appropriate in one area or not in another or not even individual-specific. There has to be an expertise.

That is why it is important that our people be well trained and that they have reasonable boundaries, and it is important that they know what the law says. And if I misspoke earlier, it is important that they have communicated and they should be able to rely on the protection of an opinion by a Department which says certain things are permissible, certain things aren't.

That is why I was so pleased when I reissued one opinion that was able to say that the conclusions remained intact. Because we

didn't expose our people to additional jeopardy on account of that. That was very important to me, however we let the chips fall as they may on the reissuance.

So, yes, it is very important to take very seriously and to understand in the context of reality.

And Professor—I don't know. Are you both professors?

Mr. WITTES. I am not.

Mr. ASHCROFT. Pardon me, Mr. Wittes.

The ticking time bomb may not be something we are pleased with, but I tell you we ought to think about it, and there may come a day when it is there. I think there was too much we didn't think about prior to 2001. I wish I would have thought more carefully about terrorism prior to 2001. I think all of us need to think about these scenarios.

And so let me just say that I am very grateful for the fact that we had people who were willing to use enhanced interrogation techniques, sometimes shouting, sometimes grabbing the shirt maybe of someone, sometimes going beyond that, within the limits of the law, to save lives. And I think that is—you know, it is not a sacrifice of liberty to protect it and to enhance it.

Mr. CONYERS. Steve Cohen, the distinguished gentleman from Tennessee.

Mr. COHEN. Thank you, Mr. Chairman.

I would like to follow up, General, with what you were saying about our concerns about the ticking time bomb and what we might have perceived and what might happen.

Senator Graham in the 9/11 Commission Report makes clear that we had information about a possible airplane attack on this country or in this world by terrorists. Are you familiar with that?

Mr. ASHCROFT. I am not sure what attack you are making reference to, but the President of the United States I think spoke openly about a proposed attack against the—what is it—the library towers in Los Angeles, I believe.

Mr. COHEN. I believe what was quoted in the intelligence inquiry was that President Bush and his Administration had inaccurately said that it was a surprise, a bolt from the blue, that no one could have imagined such attack. That since no one could have envisioned a commercial aircraft as weapon of mass destruction, that no one could be held accountable.

But the fact is the report showed that there was consideration by the FBI of a possible airplane attack, of a 747 being blown up over the Olympic stadium, or 747 being flown into the Olympic stadium, that Algerian terrorists in 1994 tried to fly an Air France plane into the Eiffel Tower, that there was another project to blow up 11 planes simultaneously and crash one into the Pentagon and one into the CIA.

So isn't the information clear that somebody should have been held responsible for 9/11 when that information was in the public knowledge?

Mr. ASHCROFT. I don't think so.

Mr. COHEN. You don't think that, with this information out there, that the Administration should have been held responsible?

Mr. ASHCROFT. Well, I think the responsibility of the Administration was to pursue and to prevent further terrorist attacks. There

were a number of reasons why what we sought to do to prevent the 9/11 attack were unsuccessful. And thanks to the Congress and others, we were able to remediate a number of the circumstances, for instance, the wall that existed that kept information from being passed from the intelligence community to the law enforcement community. We find out that——

Mr. COHEN. All right. Let me ask you——

Mr. ASHCROFT [continuing]. We knew about—one of those communities knew about the existence of two of the terrorists in the country. The other community was looking for those terrorists but couldn't get the information because of the wall, which the Patriot Act took down. And I think our responsibility is not to try and find somebody to blame for 9/11. Our responsibility is to try and prevent 9/11 from happening again.

Mr. COHEN. Let me ask you this, General. There are torture laws that it is understood that the Bush administration has gone beyond. The memo that Jack Goldsmith gave you that you approved to change what Mr. Yoo and the Bybee proposal had that were contoured down. Do you know if the Bush administration has ever recommended that our torture laws be changed so they extended—so they come within the parameters that they would like to have them be? Or do they think it simply is within the inherent power of the Presidency to do what they want, regardless of what this Congress wants the law to be?

Mr. ASHCROFT. I hope you will let me answer this question.

Mr. COHEN. I hope you will.

Mr. ASHCROFT. First of all, the Bush administration has not engaged in activities, to my knowledge, that constitute torture under either of the memos. The constant and consistent representations of the Justice Department that recount reconsideration on a recurring basis of the law has indicated that, as the law stood prior to the amendments by the Congress, neither of the memos would have disallowed any of the activities in which the Administration has engaged.

I am not in a position to talk about things that have been done with the law changed. So I just wanted to clarify that.

Now the other part of your question has left my mind.

Mr. COHEN. Let me go to a new one. You suggested that when the President—and let me read from your statement. As this Congress and the Nation now turn to reevaluate that work with the altered perception of—no, we are starting here.

It is difficult to imagine an area in which the imperative to afford the President the benefit of genuine doubt is greater than with respect to his judgments as Commander in Chief as to how best to protect the lives and liberty—and I will question that in a minute—of the American people in the war on terror. When was there a benefit of the doubt given to the President?

Mr. ASHCROFT. Well, it is the policy of the Justice Department——

Mr. COHEN. Can you name me specific situations where you had to give him the benefit of the doubt?

Mr. ASHCROFT. We always do. Whenever it is not——

Mr. COHEN. Sometimes there is not a doubt, though, correct? Sometimes there is.

Mr. ASHCROFT. And sometimes you just say no.

Mr. COHEN. Well, Mr. Yoo. Let me ask you about Mr. Yoo. You called him Mr. Yes, did you not?

Mr. ASHCROFT. No, I did not. I don't remember doing that.

Mr. COHEN. Mr. Goldsmith, I think, suggested that you did. Mr. Yoo, how was he appointed? Was he a political appointment by you or did he precede your coming into the Justice Department?

Mr. ASHCROFT. I think he came in after I came into the Justice Department.

Mr. COHEN. And do you know if Vice President Cheney or Mr. Addington recommended him to you?

Mr. ASHCROFT. I don't know.

Mr. COHEN. You don't know.

Let me ask you this. When Mr. Wexler was asking you some questions about statements attributed to you where history will not judge us kindly and history will not treat us kindly, you correctly refused to comment on things you said in hearings that were of a particular nature. I am not asking you to say what you said in those hearings and who said it. I am asking you now, with the benefit of retrospect, how do you think history will judge you and the Administration for what you did?

Mr. ASHCROFT. I think history is already judging this Administration as being successful in the deterring and preventing additional terrorist acts.

Mr. COHEN. How about upholding the Constitution and abiding by the law of the Nation?

Mr. ASHCROFT. I am confident that the Constitution has been upheld, and it will continue to be upheld.

Mr. COHEN. One last question. You said that you believe we have disrupted plots to hurt our liberty and hurt our country. Was one of those plots when Mr. Gonzales and Mr. Card came to your hospital room?

Mr. ASHCROFT. You know, this isn't late night television, so your wink may not appear to everyone else.

No, I don't think that's—let me make a comment on—there should be robust debate. If you take—and I am not in a position to recount, and wouldn't, but say you take the reports as being true. I certainly wouldn't call those people untruthful folks about what happened.

You have a situation where there is people who have differing legal opinions, and eventually somebody has to decide whether they are going to side with the legal professionals or others. And the President comes down on the side of the Department of Justice according to all the accounts, no matter which one you believe. President comes down on the side of the Justice Department with the professionals there at the Department, the career people there at the Department.

What is wrong with that picture? Eventually, you get to the right decision being made. That is something that I would expect a free society to involve vigorous debate, especially if you have got as many lawyers as we do in this country. You get a lot of debate, and you get controversy. You get the decision-maker finally to make the right decision.

You know, I am just right now next to standing up and singing the national anthem. I think that is the way the system ought to work.

Pardon me. Mr. Chairman, I apologize.

Mr. COHEN. I know my time has expired.

Mr. CONYERS. Yes, it has.

Mr. COHEN. So I will yield back the remainder of my time.

Mr. CONYERS. Very good.

The Chair is pleased to recognize Steve King of Iowa, distinguished gentleman of the Judiciary Committee.

Mr. KING. Thank you, Mr. Chairman.

I want to thank the witnesses all for their testimony, and I would like to turn initially to—I am not sure whether to address Mr. Ashcroft as Governor or Senator or Attorney General.

Mr. ASHCROFT. For you and me, it can be John and Steve.

Mr. KING. Let's get to that socially at a subsequent time. I would very much appreciate that.

But I want to make that point, that the long continuum of your service to this country has stepped along on some of the highest standards and some of the most responsible positions that any individual could be called upon to serve this country; and I do regret some of the tone that you have been faced with here that does not reflect their understanding of your contribution to this country.

And so, first, I would ask if you could quickly and briefly just bring this Committee and the folks that are watching on C-SPAN and in this room up to speed on this situation of the moving target of the law. What during your tenure changed specifically on how one interpreted the statute on torture?

Mr. ASHCROFT. Well, the statute on torture has never—there has never been a prosecution under the statute on torture. So when this Administration sought advice as to exactly how it could operate within the law and not violate it, there was not a lot of guidance out there for how it had previously been implemented. So an attempt was made by John Yoo and others in the OLC, Office of Legal Counsel, at the Department of Justice.

That statute—pardon me, that opinion included an evaluation and was done in conjunction with an evaluation of techniques that all were ruled to be acceptable to the extent they did not violate, for al-Qaeda detainees maintained and detained outside the United States, the provisions of the U.S. statute regarding torture and the International Convention Against Torture. That was what they were designed to do.

Mr. KING. If I could just summarize, it is pretty much encapsulated in the analogy that you gave of the 85-mile-an-hour speed limit versus 65-mile-an-hour car.

Mr. ASHCROFT. Yeah.

Mr. KING. And I appreciate that.

And then you said something earlier that I would like to reiterate.

Guessing where the Supreme Court might go is a lot harder than determining where the Supreme Court has been. And yet you are caught in this crossfire here today, the blur of the effort between what did you know at the time versus what did the second-guess-

ers have their staff do last night. And that is what I hear happening in this Committee.

And so I am going to take you to a question that I think is actually a hard one, and it is one that may well illuminate this situation. And it comes from my analysis of this and not this but nearly everything that I deal with.

I would just make this statement.

In the end, I went back to 1802 and I read the Congressional Record on the debates on whether they could eliminate a couple of Federal judicial districts, a profound constitutional debate that took place in 1802 in this Congress. And I read that carefully, very thick, word for word, notes and highlights and all that. And I got through that, and I concluded that everything was political in 1802.

This was 2002, and now it is 2008, and I will submit to you that everything is political 206 years later.

And then, with that being the framework for this question, when you analyze the legal implications of that statute and the controlling, limited amount of case law that was there and memoranda were produced and the two that are the matter of the subject here, did you do an analysis of the political implications at the time and did you really game this out to the scenario where we are today and anticipate that there might be a different majority in the House with a different Chairman of the Judiciary Committee and a different Chairman of the Constitution Subcommittee, a different majority in the Senate, a different political scenario whereby maybe this war wouldn't work as easy as some folks thought it would and now there would be people that were seeking to beat up on the Bush administration as a political tool and try to set the scenario for November elections? Did that all come into mind or were you just simply looking at this cleansed and sanitized from the political implications?

Mr. ASHCROFT. I think, by and large, OLC has a tradition, which is to be respected, of looking at questions to try and figure out what the law is. And, obviously, when you have a moving target that comes with a Supreme Court that characterizes the law as organic and growing, and meaning it is subject to their adjustment, there are challenges in doing that.

So—but I think when Mr. Dellinger was at OLC, which is earlier, and I don't think Administrations really change that much in terms of the good-faith effort on the people of OLC.

It is almost quasi-judicial. In some respects, I think it is less political than the courts from time to time appear to be. It is a desire to find out what does the law say and what can we ascertain from the previous rulings in this arena which would inform our judgment?

One of the problems—and they are related to the law regarding torture—is there hadn't been previous rulings. And there still haven't been. And it is one of the reasons it has been in the interests of this country to have the Congress be more active in this area and to enact things subsequent to this time. But I believe that the conclusions to which those opinions came are both worthy of respect.

Mr. KING. I thank you for your answer, and I just ask if the Chair if I could indulge in one brief follow-up question on this.

If you had had the political looking glass that would allow you to look into the future, to where we are today, how might you then go back and make some different decisions along the way?

Mr. ASHCROFT. Well, I think the opinion would have been written so that I didn't have the responsibility of asking that it be adjusted. But I never thought I was—entered the office thinking I could be perfect, we wouldn't have to make any corrections. My intention is, when you need a correction, make it. That is the best I can do.

The second thing is I don't think I would make any basic fundamental difference. This opinion has been discussed, and there has been numerous allegations that it is wrong. I don't believe it to be wrong, and I believe the careful analysis that persists on a recurrent basis sustains it.

I differ with Mr. Dellinger on whether these things constitute torture. He could be right. I could be wrong. That is not a threat to me. I have been wrong enough times to understand that it can happen, and I don't know whether he has or not. But we will have those differences.

Mr. KING. I thank the General and thank the Chairman, and I yield back.

Mr. CONYERS. The distinguished gentlelady from Houston, Chairwoman of the Subcommittee on Transportation with the Homeland Security Commission, and a distinguished Member of this Committee, Sheila Jackson Lee.

Ms. JACKSON LEE. Chairman, thank you so very much, as well to the Ranking Member, to General Ashcroft. It is certainly good to see you, as it is it to see the other witnesses.

I believe one of the witnesses—and forgive me for being delayed. We were in a hearing dealing with Homeland Security with Secretary Chertoff, and I thank you for the indulgence.

But I understand one of the witnesses said—and it seems that you might have said that yourself—that we should be looking at going forward. I think you said that we should—or you would be willing to correct what was done and go forward. And you raised a good premise.

And I think it is also important to acknowledge the Constitution, which details Founding Fathers' wisdom, probably assisted by founding women who were giving them some of the answers, that we had three branches of government and there was a checks and balance and there was an oversight. So I, frankly, believe it is crucial to be able to go forward, to be reminded of one's past. And we have been consistently troubled by some of the issues that have occurred, some after your tenure. So let me start with some pointed, probably narrow questions and maybe yes or no answers.

Should an independent prosecutor be appointed to evaluate the missteps of the Administration as relates to the Iraq war?

Mr. ASHCROFT. No.

Ms. JACKSON LEE. What power should Congress exercise in the future to ensure that the President does not overstep the authority?

Mr. ASHCROFT. I think the Congress has the responsibility to frame laws that define conduct by the United States and its citi-

zens. The Congress, obviously, has some limits on what it should do.

Ms. JACKSON LEE. So, General, if I might—finish your sentence.

Mr. ASHCROFT. For example, if the Congress sought to pass a law saying the President is not the Commander in Chief, which the Constitution says the President is the Commander in Chief and shall be, it would be an unconstitutional enactment, even if the President signed it.

Ms. JACKSON LEE. And I agree with you. If I might——

Mr. ASHCROFT. So there are limits. There are limits on the Congress. There are limits on the President.

Ms. JACKSON LEE. The good news is no Congress has ever passed that kind of law.

I think Congress has questioned the abuse of power. Mr. Dellinger, that is the point that I am getting at. I am not a fan of the special prosecutor, not necessarily independent prosecutor, but does Congress have an obligation to assess missteps that have occurred?

For example, many of us characterize the Iraq war as a misstep in spite of the statutory—alleged statutory authority. I have legislation that said that, having met all of the standards that was in that 2002 resolution, in fact, the President's powers have expired. Obviously, he is the Commander in Chief. But do we have that responsibility to oversee missteps and to hold back the abuse of power?

Mr. DELLINGER. Certainly.

Ms. JACKSON LEE. And so how would you give us the road map to do so?

Mr. DELLINGER. Well, I think that the series of hearings that this Committee has had afford that ventilation, insofar as possible, of what has happened.

Ms. JACKSON LEE. Could we use a vehicle such as an independent prosecutor?

Mr. DELLINGER. I have long shared the view of the dissenting opinion in the Act upholding the special prosecutor that I think they are generally unwise. One in very special circumstances, for example, to bring actions perhaps involving contempt of Congress, if an Administration would not bring those to the court, is something that might well be worth considering.

Generally, generally, I am hesitant to have it——

Ms. JACKSON LEE. Many scholars are.

In general then, any punitive measures? You consider holding hearings and, of course, potential of processes that are allowed by the Constitution? I am not suggesting you are supporting impeachment but processes allowed by the Constitution. Is that what you would adhere to?

Mr. DELLINGER. Sure. Sure.

Ms. JACKSON LEE. Let me go quickly to the General and just try to go back to this troubled hospital room. And I know the limitations, but would you share with us what you remember of now this widely known visit to the hospital room in March of 2004—I am delighted for your recovery—with White House Counsel—then White House Counsel Gonzales and Andrew Card? Can you describe your condition at the time?

There is a recounting by Deputy Attorney General Jim Comey that mentions that when they came to you—and, by the way, it is on the record that there is some relation to the torture memo of sorts. But when they came to you that you looked at whatever the document was, and you rose from the pillow and said something very direct and seemingly harsh. Maybe you rejected the idea of torture or whatever dastardly memo was there. Can you recall the facts or to the best of your ability, General?

Mr. ASHCROFT. I can recall the facts.

Ms. JACKSON LEE. All right, General.

Mr. ASHCROFT. My health records I consider to be private——

Ms. JACKSON LEE. I do, too.

Mr. ASHCROFT [continuing]. And my communications to the members of the Administration regarding legal matters and deliberations I consider to be private. And, for that reason, while I don't want to argue with people who have made representations of what happened, I am not going to try and recount what happened.

I was in a rather—I had been in intensive care for about a week, and the way they treated me was—my condition was not to give me food or drink. So I was both thirsty and hungry. So I might have been grouchy. Who knows?

Ms. JACKSON LEE. Mr. Chairman, let me just conclude by saying we have had hearings before that have documented the fact that Mr. Gonzales and Mr. Card was in the room, and we have had hearings that have alluded very carefully that they were carrying a memo dealing with the torture issue, and that this might have been one living example of a man who was both dehydrated and without food, an excessive abuse of power. And I think that we are warranted in this hearing and as well warranted in going further in determining the abuse of power that may have occurred on actions by the individuals in this Administration.

Mr. Chairman, I yield back.

Mr. CONYERS. I am pleased now to recognize the distinguished gentleman from California, Darrell Issa.

Mr. ISSA. Thank you, Mr. Chairman.

General, good to see you again.

Mr. ASHCROFT. Thank you.

Mr. ISSA. It is sort of amazing that, as a Member of the Permanent Select Intelligence Committee, I have actually never heard any allegation of any detainee being denied food or water for a week. It is clear—it is clear that we treated our hospital patients at times worse than we do people with al-Qaeda.

Mr. ASHCROFT. What's more, they were poking needles into me all the time.

Mr. ISSA. Clearly, we would never do that, either.

General Ashcroft, a lot of people here want to relive the events of Speaker Pelosi, Jane Harman and others being told about the enhanced interrogation and saying and doing nothing about it, not even sending an opposing letter or minority opinion in a classified setting, and now they want to say this was heinous torture. I think that is really the scandal that we are dealing with here today, is that you can't be informed and then later on pretend like you are shocked.

But, having said that, I want to have something good come out of this experience. I, for one, as a Member of the Committee, have concerns that the current law that would describe in detail, would require the President to avail this information in detail is often limited to just the Speaker, majority and minority members of the HPSCI and SSCI.

From your experience, and you have the luxury—and maybe it is not a luxury. You paid heavily for it. But, you know, you have been in so many parts of government, including, obviously, appreciating the House and Senate, would it be good for the Congress to look at more broadly—insisting that more broadly disseminated information to cleared personnel, both staff and Members, so that we wouldn't have just X Members on the Republican side and X Members on the Democratic side that are a very small group, you know——

And I have some sympathy for the fact that Speaker Pelosi may not have been the one who could determine what torture was, and she may have just seen this as less than she now sees it when more people know about it.

So my question to you is, should the House for future Administrations begin looking at expanding the information pool?

And would you agree that that is constitutionally, with the advice and consent—sometimes the consent the Administration debates—and this would be for both you and Mr. Dellinger—the advice portion, shouldn't we expand that to make sure that we have a large enough pool in the future who were informed who later on have to admit they were informed and therefore are part of the broad conspiracy, to the extent there is one?

Mr. ASHCROFT. This is a very interesting idea, but it has got its plusses and minuses.

With classified matters, when the safety of the Nation is at stake, anytime you expand the pool of individuals who are made aware of something, you elevate the risks of its disclosure. And the risks of disclosure can make a big difference for things like methods of interrogation, because people are trained to resist various methods of interrogation once they are known.

And in all deference to both the House and the Senate—and I served in the Senate, had the privilege of being there for 6 years. You weren't here earlier when I said the easiest job in the world might be to be a spy in Washington, because information just—classified and otherwise—just keeps pouring out of this place.

I remember one briefing, even before an Intelligence Committee—and I won't get more specific than that—that by the time the Committee meeting was over the press knew what was said in the meeting. It turns out that there had been a break taken midway through the meeting.

So we have this tension between the protection of America that is necessary with limiting information and what would obviously I think be very helpful, as what you suggest.

Mr. ISSA. Let me give a quick follow-up before the time expires.

If we were as a body to take the measure of holding our own people accountable, make them eligible for criminal prosecution, those who get the select information also make them do what the CIA and other groups do, submit to polygraph, if we were to discipline

ourselves, would it then be reasonable to insist that we be treated at a peer level to the highest level of people within an Administration?

I know that is a tough hypothetical, but I ask you because this is something we would have to do.

Mr. ASHCROFT. I think that is a very—it changes the equation if there could be more responsibility if it is successful. There is absolutely no reason, in my judgment, that we wouldn't want to have more buy-in by the Congress, the leadership of the country in whatever we are doing. It is valuable. It gives you greater strength. It gives you the opportunity to be more successful. And I think that is where you are going.

Mr. ISSA. It is.

Mr. ASHCROFT. How do you provide a basis for sharing this understanding? And if it can be done without additional risks, I think it is something well worth considering.

Mr. ISSA. Mr. Chairman, thank you for your indulgence, and hopefully we can work on a bipartisan basis to facilitate that happening in the next Administration.

Mr. CONYERS. Thank you for your idea.

The Chair recognizes, finally, a former magistrate and distinguished Member of this Committee, Hank Johnson of Georgia.

Mr. JOHNSON. Thank you, Mr. Chairman; and thank you, witnesses, for appearing today.

And I would just like to comment that, Attorney General Ashcroft, you have served with distinction, both as an attorney and as a Governor, Senator and, finally, as Attorney General.

And as Attorney General—and, by the way, I really respect you as a formidable witness. I think you are probably the most formidable witness that I have experienced during my short tenure as a Member of this Committee.

Mr. ASHCROFT. This is going to be a pretty rough question. This is not a buildup for a good-bye.

Mr. JOHNSON. But now, as Attorney General, you were the President's senior law enforcement officer, were you not?

Mr. ASHCROFT. I think it would be fair to say that.

Mr. JOHNSON. And in that capacity then as senior law enforcement officer, you supervised the FBI?

Mr. ASHCROFT. The FBI is under the Justice Department.

Now, the Director of the FBI is an independently appointed——

Mr. JOHNSON. I understand that.

Mr. ASHCROFT [continuing]. For a 10-year term.

Mr. JOHNSON. But you supervised——

Mr. ASHCROFT. Yes, I did. And I was in the FBI every single day after 9/11, and most of them before then.

Mr. JOHNSON. And you also oversaw terrorism prosecutions nationwide, correct?

Mr. ASHCROFT. The U.S. Attorneys answer to the Attorney General——

Mr. JOHNSON. Yes.

Mr. ASHCROFT [continuing]. Since about 1870.

Mr. JOHNSON. So you would agree that you oversaw terrorism prosecutions nationwide?

Mr. ASHCROFT. Yes, sir.

Mr. JOHNSON. So therefore your position has always been that the Department of Justice would have to have a voice in the military tribunal process to try terrorism suspects. Is that correct? That would have been your opinion? Yes or no.

Mr. ASHCROFT. I had an interest in that. Not that I had the right to insist that I have a voice.

Mr. JOHNSON. But you felt strongly that the Office of the Attorney General—being the senior law enforcement officer, you, and you overseeing the activities of the FBI and the terrorism prosecutions, that your office should have a voice in the military tribunal process. Is that a fair——

Mr. ASHCROFT. I think there are some other things that are important. One, the military tribunals do not try criminal violations.

Mr. JOHNSON. You are going a little bit afar of the question I am asking.

Mr. ASHCROFT. No, I am not. Military tribunals try war crimes, and the Attorney General has no authority to try war crimes. He deals with the laws enacted by Congress.

Mr. JOHNSON. Well, let me take it in this direction then.

Press reports describe a heated meeting in November of 2001 between yourself and Vice President Cheney on the subject of military tribunals for terrorism suspects. And, in particular, it was reported that you were upset because, without your knowledge, Mr. Yoo, who was your subordinate, had advocated keeping the Department of Justice out of the process of trying terrorists. Is that true? Is it true?

Mr. ASHCROFT. Is it true that there was a meeting? Is it true——

Mr. JOHNSON. That you were upset because——

Mr. ASHCROFT. I don't recollect.

Mr. JOHNSON. Because without your knowledge——

Mr. ASHCROFT. I don't recollect that.

Mr. JOHNSON. Well, is it true without your knowledge Mr. Yoo was advocating keeping the Department of Justice out of the process of trying terrorists?

Mr. ASHCROFT. I don't know. I don't know.

Mr. JOHNSON. Now, Mr. Yoo was dealing with the White House and/or the office of the Vice President directly and without your knowledge about his opinions with respect to whether or not the Department of Justice should be included in that process. Is that true?

Mr. ASHCROFT. I am aware of those reports, and there were individuals in the Department who were concerned.

Mr. JOHNSON. Are the reports true?

Mr. ASHCROFT. There were individuals in the Department who came to me and expressed concerns that we would make sure that we always maintained the independence and detachment that would serve the President best with legal advice.

Mr. JOHNSON. Thank you. My time has expired. I will say that history will judge you differently than it will judge your successor. And I appreciate it. Thank you very much.

Mr. ASHCROFT. Thank you.

Mr. CONYERS. The Committee will stand in recess for two short votes, and we will resume immediately thereafter.

[Recess.]

[1:25 p.m.]

Mr. CONYERS. The Committee will come to order. The Chair recognizes the distinguished gentleman from Ohio, Jim Jordan.

Mr. JORDAN. Let me thank our witnesses as well. I know they have been here several hours and done a tremendous job. I will start with the Attorney General. I want to give you a chance to talk about this respect issue that has been raised. I think Mr. Dellinger in his opening comments talked about a country respected by the world. The Subcommittee Chairman, Representative Nadler, and I am quoting from a New York Times story a couple of weeks ago, said that as a result of the harsh interrogations, "the reputation of this Nation and our standing as a leading exponent of human rights and human dignity has been seriously damaged."

I would like your thoughts on that. And I guess I want to give it a little context, too. When I hear statements like that, I think about somehow they have forgotten all the good things our country does. I think they forget about the relief when there is a disaster around the world, helping African nations with AIDS, malaria, what we did with the tsunami relief effort a few years ago.

Again, just your thoughts on those statements and activities that the Justice Department was involved with over the last several years.

We will start with General Ashcroft.

Mr. ASHCROFT. First of all, I am concerned and care about, I guess that is the right word. But I do care about how we are viewed abroad. I do believe, as Ronald Reagan said, that we are a city set on a hill, that we stand for something.

But I also believe that there are forces afoot in the world that are against what we stand for. They don't believe in the freedom we believe in and they believe in what I call imposition, that they want to impose their religion, impose their views on other people, and they are willing not to offer it in the marketplace but to impose it by terror. They seek to force people to their view.

And I think we have to resist them. And in doing so, whenever you fight for what you believe in, there is a risk that someone will misinterpret what you are doing. The risk is enhanced and is expanded when you may be misrepresented in what you are doing.

The suggestion, with the reckless labeling of enhanced interrogation techniques, that they are automatically torture, does little to help our image overseas, in spite of the fact that the best legal minds I know that have looked at this very carefully have concluded that it is not torture.

With that in mind, I think we have to defend ourselves and we have to represent and defend freedom as aggressively as we can, and we should do what we can to make sure that we don't unduly besmirch the representation of the United States by recklessly charging that the officials of the United States are engaged in activities in which they are not engaged.

So my own view is that we have to do what is right. That is the first responsibility we have. The second responsibility we have is, having done what is right, we have to make sure we do our best to market it so that the world doesn't misinterpret it and we don't allow people to take what we have done which is right and try and portray it as being criminal.

Mr. JORDAN. Do you believe, Mr. Wittes, that there are some individuals out there who are so—terrorists who are so evil that all the great things that our country does, there is nothing that is going to diminish the hatred they have for the United States?

Mr. WITTES. I have no doubt of that.

Mr. JORDAN. Mr. Dellinger, you made a comment in your opening statement. I feel like I should give you a chance to respond to the general question about respect. Go ahead.

Mr. DELLINGER. I think that the pictures from Abu Ghraib have hurt our reputation in the world, whatever term one uses to describe that. I also agree with you that there are people who would hate the U.S. regardless of what we did.

Mr. WITTES. May I? I think in some ways the reputational question is more salient less with respect to how much the terrorists hate us than to how wide an audience they have for that hatred. I think to the extent that we have a set of laws that we are proud of, that we observe meticulously, and that we are not sort of constantly chafing at and finding ways to stress, we put a better face to the people who the terrorists are talking to.

But I wouldn't frame it as how the terrorists feel about it. These are not people that we are trying to impress, really.

Mr. JORDAN. I understand. Thank you, Chairman.

Mr. CONYERS. The Chair is proud to recognize Brad Sherman, a distinguished Member of the Committee from California.

Mr. SHERMAN. Thank you, Mr. Chairman. I would comment that there are tens of millions of people who are going to hate us even if we live up to our highest standards. But I agree with the witness that the audience for that hatred would be contracted a bit if we lived up to our highest standards.

General Ashcroft in his book the Terror Presidency, former OLC Chief Jack Goldsmith said this about OLC Deputy John Yoo: In practice, Yoo worked for Gonzalez, who at that time was White House Counsel. He took his instructions mainly from Gonzalez, and at times gave Gonzalez opinions and verbal advice without running the matters by his superiors in the Department of Justice. Actually, the quote says, "without fully running the matters by the Attorney General."

This arrangement was an understandable affront to you, who worried about the advice Yoo was providing in the Attorney General's name. So when the White House wanted to elevate Yoo to lead the office of OLC, you put your foot down and vetoed Yoo for the job.

Mr. ASHCROFT. Sounds like who's on first.

Mr. SHERMAN. I know that. Let me rephrase that. Ashcroft put his foot down and vetoed Mr. Yoo for the job. Is that accurate?

Mr. ASHCROFT. Let me say what I can say here. I think it is very important, and this is consistent with the traditions and responsibility of OLC to have independent, detached, fully vetted advice provided by the OLC, the Office of Legal Counsel, to the President of the United States.

During this time in the Justice Department there were key individuals in the Department that served me and served the Department, served America, that expressed to me reservations that re-

lated to the proximity that characterized the relationship that he had with various individuals in the Administration.

My view is simply this; that I wanted to make sure that that wasn't some singular view and that that wasn't some isolated conclusion.

I developed in my own mind a sense of confidence about the nature of their reservations and that they merited our serious consideration, and so as a result of these items being brought to my awareness, I raised these issues.

Mr. SHERMAN. So you were opposed to Mr. Yoo getting the job as Chief of OLC?

Mr. ASHCROFT. I felt that the United States of America and the President would both be best served, especially as it related to the characteristics I previously mentioned, if there would be an OLC Chief that would emphasize those characteristics more profoundly.

Mr. SHERMAN. Does the OLC speak only for itself, or does it speak for the Department of Justice?

Mr. ASHCROFT. It is part of the Department of Justice, and when it speaks, I think the Department of Justice—we have got an OLC Chief here that can probably answer this.

Mr. SHERMAN. You described to me how much fun you have at these House hearings.

Mr. ASHCROFT. I do, that's right. It is a thrill a minute here.

I have always taken it as the gospel. When OLC speaks, I have given it the highest level of respect. As a matter of fact, I don't know of a better set of attorneys that has existed in any Administration.

Mr. SHERMAN. There are press reports that describe a heated meeting in 2001 between you and Vice President Cheney on the subject of military tribunals for terrorism suspects. In particular, it was reported that you were upset because, without your knowledge, Mr. Yoo had advocated keeping DOJ out of the process of trying terrorists. Is that accurate?

Mr. ASHCROFT. I won't comment on meetings which otherwise would be and are classified or meetings that involved communications by their attorney with the Administration.

Mr. SHERMAN. Thank you. My time has expired.

Mr. CONYERS. The gentleman from Arizona, the Ranking Member of the Constitution Committee, Mr. Trent Franks.

Mr. FRANKS. Thank you, Mr. Chairman. I appreciate it, and I appreciate the tone of the Committee so far, even though we perhaps have some differences here.

General Dellinger, as an associate with the Ranking Member of the Committee, I appreciated some of your comments. I couldn't help but be intrigued by your thoughts of making a law that did not provide for exceptions with dealing with that ticking bomb scenario but that relied upon the courage of people to just do what was necessary to protect their country. I find that very intriguing, quite honestly.

I say this in absolute respect to you. My concern is something like that can only work in an environment where we have an age of congressional reason because this hearing, in my judgment, is proof that we are kind of off track here already.

I think that the Administration and the Attorney General here, in my judgment and evidence I have seen, is they acted well within their constitutional bounds and yet we are still dragging them before this Committee. I wonder what we would do if they had to actually do something along the lines you have talked about.

We have had 11 hearings that in my judgment make the lives of terrorists easier and make it more difficult for us to protect citizens from terrorists in this Committee, and yet I don't know one that we have had that makes it easier for us to defend citizens against terrorists. I think balance is one thing, but 11 to 0, that concerns me. I think it represents essentially a misunderstanding of what we are really up against.

So I want to start with a quote by Mr. Stuart Taylor. He wrote in the National Journal, "The CIA had reason to believe that unlocking the secrets of Khalid Sheikh Mohammad might save hundreds of lives, and perhaps many, many more in one unlikely but then conceivable event that al-Qaeda was preparing a nuclear or biological attack on a major American city. This tough, smart committed jihadist was not about to betray his cohorts to his hated enemies if interrogators stuck to the kid-glove interrogation rules demanded by human rights and recently by most congressional Democrats, unquote. I think Mr. Taylor was correct.

I even in this Committee asked Marjorie Cohn, President of the National Lawyers Guild, how she would write a statute defining how terrorists should be handled; what we should do to try to encourage them to give information that they didn't want to give voluntarily. I want to just read what her reply was. She said, Well, what kind of a statute would I write? I would write a statute that says when you're interrogating a prisoner that you want to get information from him, you treat him with kindness, compassion, and empathy; you gain his trust, get him to like you and trust you, and he will turn over information to you.

I wish the world was like that. I really do. I teach Sunday school for 2 year olds. I really wish the world was like that. Unfortunately, the terrorists have shown that they have a little different mindset than we do. I am convinced that unless we get ahold of that there will be blood on the wall again in this country, and we will look back to Committees like this and wonder why we weren't focusing on more of our primary job, which is to defend our citizens.

My first question is to you, General Ashcroft. I want to be fully open about this. I think General Ashcroft's career is a model to public service. So I am very biased. But I want to ask you, General Ashcroft, what was your goal in these discussions that we are having, what was your goal at that time and in what legal framework were you trying to pursue that goal in trying to accomplish the things that you believed that needed to be done?

Mr. ASHCROFT. Well, I think we wanted to do everything within our power and within the law to provide a basis for defending America. I came back to the Justice Department and I put it this way, I said, We have got to think outside the box. We can't be thinking just like we always thought because the same things will happen to us that happened before. But I said, We can never think outside the Constitution.

That was the way of saying we have got to change. If you don't change, you get what you got before. Albert Einstein put it this way, he said, Ignorance is defined as doing the same thing over and over again and expecting a different result. Well, we needed a different result. We didn't want to get hit again.

So we needed to change, we needed to be able to do things, but we needed to do them within the Constitution. That was the controlling motivator for me. Sounds pretty simple. But my view is that it was the right thing to do and I believe that should be—when it comes to national defense, we ought to be thinking in those terms, what are the tools that are available to us and what are the legal tools that are available to us, and we should use them.

Mr. FRANKS. Mr. Chairman, I can only say that I believe that that perspective will be vindicated in history. The coincidence of terrorism and nuclear proliferation I am afraid make it necessary for us to look at this a little differently than we have. I hope General Ashcroft's perspective prevails in the final analysis.

I yield back.

Mr. CONYERS. The Chair is pleased to recognize the gentlelady from Wisconsin, a distinguished Member of the Committee, Tammy Baldwin.

Ms. BALDWIN. Thank you, Mr. Chairman. General Ashcroft, can you describe for the Committee briefly your understanding with regard to detainee interrogations and discussions regarding concerns that might have been raised with regard to mistreatment of detainees?

Mr. ASHCROFT. The Attorney General of the United States is only occasionally called to meet with the National Security Council, is not a member of the National Security Council, and so for me to try to define the National Security Council and its role would be beyond my expertise.

Ms. BALDWIN. But the principals committee, as I understand, it is one in which you participated.

Mr. ASHCROFT. There were times when I was called to meet with various groups that were part of the National Security Council. But in terms of its jurisdiction and what its function is, it is not something that I am prepared to comment on. I would say that I think they called on me when they thought there were matters that related to my responsibilities that could be of assistance to them and their deliberations.

Ms. BALDWIN. Well, in particular during your time as an NSC principal when you did attend those meetings, or in the years since then in looking back at your NSC principal tenure, did you come across any evidence of what you believe may be crimes by government officials in the headquarters of DOD, DOJ, CIA, State, or the White House and, if so, did you make any referral for criminal investigation?

Mr. ASHCROFT. To the extent that I was involved in meetings of the National Security Council, they were classified meetings, and I will not comment on what I found, didn't find, or what was said or wasn't said.

Ms. BALDWIN. Well, let me then ask you a different question. Where do you believe the ultimate decision on what interrogation tactics would be approved for use on U.S. held detainees was

made? At the White House, the Justice Department headquarters, at the FBI headquarters, at the Defense Department headquarters, at the CIA headquarters, or out in the field?

Mr. ASHCROFT. Part of that answer is yes. I think different agencies make different decisions regarding what techniques would be used in different situations, and the purpose for having a generalized understanding that would help people know what could be done legally and not be done is the basis for the opinions.

I might indicate to you that the opinions that we have been discussing today were very limited in terms of their application. They were opinions relating to the interrogation of al-Qaeda detainees outside the United States, and as a result, they didn't apply to a variety of other detentions in other settings that related to people who were say fighting in the war in Iraq.

Ms. BALDWIN. Let me follow up on that same line of questions but with regard to a specific detainee, Abu Zubaydah. Where do you believe the ultimate decision on the choice of interrogation tactics for his interrogation was made?

Mr. ASHCROFT. I don't know.

Ms. BALDWIN. Are you aware of whether our allies, any of our allies in the war on terror condone or use techniques that the U.S. would define as torture in the course of their interrogations?

Mr. ASHCROFT. In other words, am I aware that some of our allies might use techniques that would be considered torture?

Ms. BALDWIN. Yes, that is the question.

Mr. ASHCROFT. I have not witnessed anything that would cause me to have that awareness.

Ms. BALDWIN. Related to that, are you aware of whether the U.S. has ever turned over any of its detainees to an ally in the war on terror so that they could take the lead on interrogation of such a detainee?

Mr. ASHCROFT. Has the U.S. ever turned over——

Ms. BALDWIN. A detainee to one of our allies in the war on terror to let them take the lead on interrogations.

Mr. ASHCROFT. I don't know. I couldn't name a person that that would apply to.

Ms. BALDWIN. Are you aware of whether it ever has in the course of the war on terror?

Mr. ASHCROFT. I can't say

Ms. BALDWIN. Do you know what the U.S. policy is on turning over a detainee so that an ally in the war on terror could lead the interrogation?

Mr. ASHCROFT. I don't know.

Mr. CONYERS. Judge Gohmert of Texas is a distinguished Member of the Committee and is frequently the acting Ranking Member of the Judiciary Committee.

Mr. GOHMERT. Thank you, Mr. Chairman. It is an honor to be sitting beside you. Maybe one of these days we will be switched. We will talk about that later.

I just wanted again to thank General Ashcroft. Going back to my days as a judge, we never met, but I always had great respect and admiration for the way you conducted yourself with class and veracity, and I have never heard anything that you have ever said either through the media or in person that had the least cloud over

it until earlier today when you made a comment that stretched, I felt, like the bounds of credibility when you said you were thankful for the opportunity to be here to testify. I wasn't real sure about that one. I do want to come back.

Mr. Dellinger, I wanted to ask you, this discussion about waterboarding brought out the comment I think from General Ashcroft that some of our agents may have been hardened in training by the use of waterboarding. So I am wondering, would those people who use waterboarding on one of our trainees be susceptible to being prosecuted for violating the law?

Mr. DELLINGER. One of our U.S. agents who engaged in training on one of our folks?

Mr. GOHMERT. One of our trainees.

Mr. DELLINGER. It has been a while since I have taught criminal law, but I believe there is a mens rea intentional requirement that would clearly not be met and therefore that criminal liability would not apply in those circumstances.

Mr. GOHMERT. It would seem like he would certainly intentionally be waterboarding one of our own agents.

Mr. DELLINGER. Assisted by Mr. Wittes, it reminds me when there is voluntary participation by the subject, that may in and of itself eliminate a requirement of criminality.

Mr. GOHMERT. So it is possible waterboarding could be acceptable in that scenario. You are saying if he volunteered for the service, even though he may not have known that the waterboarding was coming, he knew some tough training was coming, and the goal is to harden him to make him a good agent so he could withstand torture in some other setting. So there are settings where it may be acceptable then, correct?

Mr. DELLINGER. Whether it is wise or acceptable is beyond my ken. I do not think that would be a crime. Indeed, I have heard press accounts of Mr. Levin of the Department of Justice himself who asked to be subjected to this to learn about and gain a sense of what the technique was like.

Mr. GOHMERT. There are probably others we would like to ask if they would volunteer for that technique as well. You had indicated that if we use waterboarding then you would basically agree that that would put our troops at risk, and you are so well-educated you are surely aware that before waterboarding was ever an issue, before Abu Ghraib was ever an issue, that we had extremist radical Islamics who I believe mistakenly believed the Koran gives them and tells them they should destroy infidels. That was going on. We had our soldiers being disemboweled, we had their heads being cut off. What is more risky than being disemboweled and having your head cut off?

Mr. DELLINGER. My answer to that question was that I was not an expert in these matters but I had always been impressed by Senator McCain's arguments that he thought, having been a prisoner of war, that the standards that we set as a country——

Mr. GOHMERT. My time is running out. I wasn't interested in what Mr. McCain had to say, I was interested in your perspective. But when you go back in history to the late 1700's when we had never done anything and Thomas Jefferson was sent to negotiate with the radical Muslims who felt like it was okay to take our sail-

ors and either put them in bondage, torture them, or kill them, we had done nothing. He didn't understand. That is when he bought a Koran.

If I might just ask Attorney General Ashcroft, he has been so patient, what would you say to those who have accused you of war crimes?

Mr. ASHCROFT. I don't think they know what war crimes are. I am glad people care about what their public officials do. I think it is important that they do—I certainly am a Ronald Reagan fan, and he said, Trust but verify. I think that is the way people ought to be about public officials.

So when people and the public and others, people in the Congress want to verify, and they don't want to totally rely on trust, I am for that. I just think it would be very—I think it is important to be very careful before you accuse anybody of committing any crime.

It stuns me that some people want to run around and call other people criminals. That is a serious offense to me to call someone a criminal. I find that the people who do it sometimes are the people who speak about being the most liberal and the most rights-oriented, and for them to announce the criminality of individuals is stunning to me. It takes my breath away.

It was my job to protect their right to do so, and I think that is one of the privileges of serving in government and one of the great aspects of America, is that we are very, very tolerant of people expressing an opinion that others are even criminal. I think, on the other hand, I think that is a term that ought to be reserved and used with great care. And when it is used recklessly, it has a way of diminishing our freedom, if not our respect for each other. I think that is unfortunate.

Mr. GOHMERT. I appreciate it. Thank you very much. Thank you, Mr. Chairman.

Mr. CONYERS. The Chair recognizes Adam Schiff, himself a former U.S. Attorney, and a Member of this Committee, who has been here from the very beginning this morning and has sat through all of the proceedings.

Mr. SCHIFF. Thank you, Mr. Chairman. Assistant U.S. Attorney, but I appreciate the promotion. Thank you all for being here for so long with us. I think it has been a very important hearing.

I have a couple of questions I wanted to ask Mr. Ashcroft and Mr. Dellinger. Mr. Ashcroft, I am not going to ask you about your conversations with the White House, but as Mr. Dellinger has testified, the choice of who runs the OLC is extremely important, given the substance of the opinions that come out of that office. Is it fair to say that you are concerned that the White House was trying to foist an OLC director that, in your opinion, might be too pliable to the wishes of the White House, and that raised a concern for you?

Mr. ASHCROFT. Since you have asked me if it is fair to say, I have got to quibble with some of the words, foist is not—I will say something about that. I don't want to answer your specific question using your words because they are not my word and it is not fair to say. If you want me to answer it, I will. I will say no.

Mr. SCHIFF. I would like you to answer it, so please do.

Mr. ASHCROFT. I am concerned about independence and detached advice and have the right kind of vetting, and sometimes relationships can prevent that from happening. And so I developed that concern when people in the Department came to me and raised them. And I expressed those concerns in order to make sure that the White House eventually would get the best kind of legal advice, and not only the White House, but the rest of the country that depends on OLC. That is the long and short of it.

I felt that with a level of intensity that made me committed to it.

Mr. SCHIFF. Why do you feel the White House rejected the candidates that you offered who were well thought——

Mr. ASHCROFT. I really don't have any feelings about that. The President of the United States is elected by the American people to have people that he is comfortable with in office. To the extent that he wants to have someone that he can rely on and is comfortable with, he ought to.

Mr. SCHIFF. Here is my concern, Mr. Attorney General, and that is—and I want to question Mr. Dellinger. I think there is a dangerous circularity of logic within the Administration that says we can put someone in a position like the head of OLC, which Mr. Dellinger points out is an obscure office; actually for most of America it is on obscure office. The fact that enhanced interrogation techniques are approved by this obscure legal office gives no confidence to people either in the country or around the world that we are distinguishing between what is torture or what is not, or that as the current Attorney General said, because OLC has said something is not torture, ipso facto it is not torture and we don't need to look beyond the opinion of the OLC.

That is why I think the choice of that opinion is so important, and if you had concerns about whether improper considerations were being brought to bear; in other words, they were trying to pick someone for that post, not who was best qualified to make the legal judgments but who was best positioned to approve of what they were doing, that is something this Committee ought to know. That is why I am asking.

Furthermore, it concerns me, and I invite you both, Mr. Ashcroft and Mr. Dellinger, to respond to this, it concerns me when you both seem to be implying that because OLC approved of this, even if it was a flawed opinion, that there is no liability to be had.

I would think the better course for the current Attorney General would be to authorize an investigation into whether the prohibition on torture was violated. If it is determined that in fact the prohibition was violated, then there can be a determination made by the President whether to pardon the interrogators who were following this erroneous opinion.

We don't know whether there were proper considerations brought to bear in the selection of the head of the OLC at the time or whether the opinions were flawed, or whether, as you say, the speed was 65 or 85. You say it was authorized to be 85 in the flawed memo but they were only doing 65. At the same time, you also say, Mr. Ashcroft, you don't know exactly what techniques were being employed. So I don't know how you can say with con-

fidence whether people were going in fact 75 or 80 or maybe 84. I don't know. I haven't heard you say that you know either.

What concerns me is unless we in Congress or the Department of Justice are willing to investigate this issue, we will never know, and we will create a precedent where any President can pick the right person to head the OLC that will do what they wish and through this circularity of immunity and logic will protect themselves.

We see the same circularity of logic in the subpoena issue, which our Chairman has led, where the statute says that when the Congress holds someone in contempt, the U.S. Attorney General shall bring it before a grand jury. Not may, not might, not if they feel like it, but shall. But the President and the Attorney General now say that "shall" doesn't mean "shall" because they disagree with "shall." We seem to be willing to accept that. We have taken it to court in a different way. But this circularity concerns me and I want to know if you can both comment on it.

Mr. ASHCROFT. With all respect, you are saying that there is a circularity, and I think the situation at hand demonstrates that the circle is interrupted. There was an opinion that the Department itself generated a sense of concern about, and it was re-evaluated and it was withdrawn and a new opinion was issued.

Mr. SCHIFF. Let's say it was the conclusion in the second memo that in fact not only was the first OLC opinion wrong but in fact torture had been authorized and torture had been conducted. Where would the liability lay? I think you are saying nowhere. Because we took this corrective action. We stopped doing what we were actually violating the law by doing.

Mr. ASHCROFT. First of all, I am not here to answer hypotheticals like that. I am here to say that if you outlined this as a circular situation, the circle is not complete. The ends don't meet because we did take action. We changed things. We didn't find the conclusion to be wrong, but we wanted to make sure that the opinion reflected the best judgment, and we changed it.

Mr. SCHIFF. Mr. Dellinger, can you comment? Because I think the hypothetical is enormously significant going forward as well as looking backward. How do we provide some accountability for putting the wrong person in the job and then simply saying that we relied on the erroneous opinions of someone who should never have had the position?

Mr. DELLINGER. I am not happy with the answer that the law leads me to, that you can put someone in at OLC who can issue get-out-of-jail-for-free cards and that those cards would be effective. I genuinely understand the problem with that.

The issue is this. Unless you were to show that the individual who was engaged in the action, whether it is an interrogation or rendition from another country, knew that the legal opinion he or she was relying on was in fact part of a plan to engage in the criminal law and to cover it with immunity, in which case I think everybody who did that with knowledge would be criminally liable, you have to have some way of having the executive branch determine what is lawful and what is unlawful. That is the executive power invested in a President. Whoever makes that decision can be

wrong, whether it is a prosecutor, OLC official, the Attorney General.

Once you have an opinion of the Office of Legal Counsel and whoever relies upon it is not shown to have relied upon it in bad faith or a part of a plan to have a fake opinion, I don't see how you can have a different officer, say the U.S. Attorney for Northern Virginia or the District of Columbia, reach a different judgment and prosecute someone for committing a crime when that person was operating——

Mr. GOHMERT. We are so far beyond the time. I need to ask regular order here.

Mr. SCHIFF. May the gentleman be able to finish his answer?

Mr. GOHMERT. It seems to go on and on and on, and that is why I waited so long to bring it up.

Mr. SCHIFF. It is an important answer.

Mr. DELLINGER. There is a footnote in the 2004 opinion about whether the conclusions—they would still stand by the conclusions of the earlier opinion. That is a very ambiguous footnote, footnote 8, and there are some press accounts that Mr. Levin has said that he only meant that they would have reached the 2003 opinion if people reached the same opinion even under the 2004 standards. I read the footnote and I do find it is ambiguous as to whether in 2004 they actually did say that they would agree with the results reached in 2002 and 2003.

Mr. CONYERS. The Chair recognizes another U.S. Attorney, this time from Alabama, a distinguished Member of the Committee, Artur Davis.

Mr. DAVIS. Thank you, Mr. Chairman. As with Mr. Schiff, I appreciate the promotion given by the Chairman.

Let me thank the witnesses for being here.

Let me assert a proposition to you, General Ashcroft, and to you, Professor Dellinger, and get some response to it. We have heard a lot of commentary from the other side about the special circumstances after September 11, and the argument from a lot of my Republican friends on the Committee has been we faced a heightened danger, a heightened threat of weapons of mass destruction, a committed set of terrorist cells that we were working against, and that that somehow changed the state of play in a number of ways. I think there is something to that argument. I think there is something else about the context, the aftermath of 9/11, I want to ask you to comment on.

At the time, there was an incredible spirit of unity in the country. The authorization of force resolution regarding Afghanistan passed with, I think, one vote against it in the combined two bodies of the House and Senate. The PATRIOT Act passed frankly with scant opposition in the House and Senate. A policy decision to that one would think would be highly controversial to launch a preemptive attack on a nation that had not attacked us, that happened with overwhelming bipartisan support in the House and Senate.

Fast forward to today, or fast forward to 2006, 2007. Intense political division around every aspect of this Administration's policies related to the war on terror, intense partisan division, intense ideological debate.

Professor Dellinger tell me, and we only have 5 minutes, I would ask for a brief answer, but tell me briefly, how do we get from a point where we had such a level of bipartisan enthusiasm for this Administration's policies to the divided world we are in now?

Mr. DELLINGER. I think the biggest mistake was the decision by the executive branch to take on this task unilaterally; to exclude the other branches from some of the critical decisions. It is not the benefit of hindsight. In December of 2001, I wrote a piece for the Washington Post saying that the idea to have no judicial review of military commissions was a very big mistake, that the courts would never accept it and that you could channel that judicial review; the decision not to go to Congress to say that we believe that the Foreign Intelligence Surveillance Act provisions are not adequate to the needs. But to unilaterally decide not to comply with its criminal terms and not even to reveal the fact that you were not complying with it, not to comply with the torture statute, and have that known only because of leaks and not releases, that that unilateral approach of not involving respecting the role of the courts or respecting the role of Congress, I think, has got us to a place where we need to reclaim the role of the three branches.

Mr. DAVIS. I agree, Professor Dellinger. I have made the observation to Mr. Addington, made the observation to Mr. Feith, who appeared a few days ago. Even with respect to the interpretation of the torture statutes I was struck that Mr. Addington and Mr. Yoo made a virtue of the fact that an Administration trying to interpret the will of Congress never asked a single Member of Congress, What did you mean in 1996? There were people who helped draft the 1996 statute who still serve in the Congress now, who served in the Congress then, and Mr. Yoo and Mr. Addington blithely mentioned that we didn't feel the need to talk to them.

General Ashcroft, given even the time constraints that we have today, I don't want a long answer from you either on this, but would you concede in retrospect, sir, that the Administration would have benefited from drawing in the legislative branch to shape this detainee policy?

Mr. ASHCROFT. That is a judgment that has to be made.

Mr. DAVIS. I am asking you to make it.

Mr. ASHCROFT. Okay. I see my time has expired.

Mr. SCHIFF. I would happily ask additional time for the able Attorney General to venture his opinion.

Mr. ASHCROFT. We spend a lot of time working together. I spent a considerable amount of time not only assembling the PATRIOT Act but—working for about 40 days.

Mr. DAVIS. What about detainee policy though, sir?

Mr. ASHCROFT. I don't know. We tried to work on military commissions law and things like that recently.

Mr. DAVIS. Let me give you one example. The interpretation of the torture statutes. What would have been the harm——

Mr. ASHCROFT. I am trying to finish my first answer. I am not going to start on the second without the opportunity to finish the first.

Mr. DAVIS. I am trying to point you toward detainee policy.

Mr. ASHCROFT. I think I know where you are trying to point me, sir, but I would really prefer to be pointed toward the door.

Mr. DAVIS. I appreciate your earlier observation about the reasonableness of skepticism; unfortunately, the Congress has reason to be skeptical about this Administration. We appreciate you for being here. You have been a wonderful witness today. I am simply asking why your Administration——

Mr. ASHCROFT. First of all, it is not my Administration, sir, with all due respect to the Congress. We benefited greatly when we did work for things like the PATRIOT Act and even for the reenactment of the PATRIOT Act.

Mr. DAVIS. Would have it benefited——

Mr. CONYERS. The time of the gentleman has expired.

The Chair recognizes the distinguished gentleman Minnesota, Keith Ellison.

Mr. ELLISON. General Ashcroft, as to waterboarding, what changes took place in the legal reasoning that approved this technique when the American soldiers were convicted of war crimes when it was used on prisoners in Vietnam?

Mr. ASHCROFT. Could you speak up just a little louder?

Mr. ELLISON. No problem. As to waterboarding, what changes took place in the legal reasoning that approved this technique when American soldiers were convicted of war crimes when it was used on prisoners in Vietnam?

Mr. ASHCROFT. The process, in my understanding, at OLC for evaluating whether or not waterboarding is criminal was that the statute, which was passed in 19—I think it is 1996, whether or not its terms were violated. The statute is then decades after Vietnam. To the best of my awareness, the Department, in its reassessment of that decision and of that evaluation on several occasions, according to the head of OLC, and last week, according to the now Attorney General, has come to the same conclusion, and it was based on that rather than on any other experiences in other setting, that I know of, and that is my understanding, that the judgment was reached.

Mr. ELLISON. Thank you. I would like to turn away from the detainee policy for a moment and ask you about some other things. You answered a lot of questions about that.

I am sure you would agree with me that there are many Americans who happen to be Muslim, who love our country, support our country, fight for our country. The question I want to ask you revolves around some of the treatment, some of the experiences since 9/11. In particular, there were a few groups that were identified as unindicted coconspirators in a Dallas case. I know that—are you familiar with the case that I am talking about, the Holy Land Foundation case?

Mr. ASHCROFT. That name is familiar to me. I recognize the name.

Mr. ELLISON. Really, I don't want to ask you about the case itself. What I really want to ask you is could you offer your views on the advisability of publicizing a list of unindicted coconspirators? I know some U.S. attorneys don't do it, some do it. In the U.S. attorney manual it is actually frowned upon. What are your views on the publication of an unindicted co-conspirator list in an ongoing prosecution?

Mr. ASHCROFT. It probably makes a difference what the facts are and the circumstances are. So for me to——

Mr. ELLISON. That is fair.

Mr. ASHCROFT. If it is expressed in the manual in one way, but not strictly prohibited, it probably recognizes that it is discretionary.

Mr. ELLISON. Do you think there should be some way for people on a list to get themselves off the list if there is no basis for them to be on it? At this point it is not much they can do. And yet you would agree it is kind of not good for your reputation to be on such a list.

Mr. ASHCROFT. There are a number of aspects in the criminal justice system that sometimes people are spoken of in the process and it presents challenging circumstances for them and they would prefer to be able to clear their name. There aren't a lot of ways for that to happen, and I don't know if I have any good suggestions. The Congress might find those or think of them. But on the spot it is a pretty novel question. I hadn't prepared that here.

Mr. ELLISON. I know that. That is why I just thought you have got a lot of background, I thought you might offer a view.

Here is another one that you weren't asked to prepare for. We have got watchlists in our country; have had them. As I understand it, the names on the watchlist have grown and yet we really don't have a good process for cleaning those lists to make sure that we are watching the people who need to be watched. In so doing, we have got a lot of people on there who we probably don't need to watch but we don't have a good process to get people off these lists.

I actually heard, I can't confirm, but an FBI employee, because they have a name similar to somebody who was associated with the IRS, was on a watchlist. Do you have any views on whether we should clean these lists up, these watchlists, and if so, how should we go about it?

Mr. ASHCROFT. It is certainly not in our interest to have watchlists that have people on them that don't belong on there. It increases the risk of error and inhibits the ability of people to travel without inconvenience. So the quality of the list is important not only to the success of our operation but to the liberty and freedom of the American people. If there are ways to improve that, and I would hope that whoever is involved in the watchlist, I think that is probably in the Department of Homeland Security, but whoever that is would be sensitive to ways of trying to minimize the risks.

The only way not to have errors is not to have a list. We all know that. We are willing to accept some error rate, but our objective ought to be to drive it down.

Mr. ELLISON. Thank you, Mr. Attorney General.

Mr. Wittes, I have got a few questions for you.

Mr. CONYERS. Just a moment. Your time has expired.

Mr. ELLISON. Really?

Mr. CONYERS. Yes, really.

Mr. ELLISON. That was fast.

Mr. CONYERS. The witnesses, Attorney General Ashcroft, Mr. Wittes, Mr. Dellinger, I consider this, and I think most of the Members of the Committee think this was an extremely important hear-

ing. Your testimony was valuable. It has helped us examine the question that brings us here. I am very grateful for your return appearance to the House Judiciary Committee. We thank you very much for your contributions.

We are going to leave the record open for 5 days in case there are questions that Members want to ask you that will be put on the record. So I thank you very, very much for your attendance. The Committee is adjourned.

[Whereupon, at 2:20 p.m., the Committee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND CHAIRMAN, COMMITTEE ON THE JUDICIARY

In recent months, our Constitution Subcommittee has conducted a vigorous and detailed investigation of the Administration's interrogation policy and the extreme legal theories that allowed it. Today, that investigation comes to the full Committee with a remarkable opportunity to hear from our former Attorney General and our other distinguished witnesses. Let me make three short observations as we begin.

First, while the former Attorney General and I will disagree about many of the issues that come before the Congress, on this one I am hopeful that we share some important common ground.

I was impressed, for example, to learn that when Jack Goldsmith determined that the John Yoo interrogation memos needed to be withdrawn, Mr. Ashcroft supported his judgment. That could not have been an easy decision to make and it is one that has done our nation a great deal of good. The well known story of Mr. Ashcroft's support, even from his hospital bed, for his Deputy Jim Comey's actions on the secret warrantless surveillance program also shows an Attorney General trying to uphold the rule of law.

Second, while our narrow subject today is interrogation rules, our overall inquiry is about exactly that—the rule of law. In prior hearings, the Subcommittee heard very disturbing testimony, including claims of Presidential power so extreme that virtually no act was out of bounds if the President thought it necessary. John Yoo would not even rule out burying a suspect alive if the President so desired. That is not the rule of law—it is the rule of one man.

The Subcommittee also heard very troubling testimony about how dissenting views were handled on this issue. Daniel Levin, former head of the Office of Legal counsel under Attorney General Ashcroft, described being forced out of the Office of Legal Counsel by Alberto Gonzales while he was drafting legal opinions that would have imposed some constraints on the use of harsh interrogation methods. I have great concern about an Administration that responds to legal advice it does not like by firing the lawyer providing it and getting one who will tell them what they want to hear, as may have happened in this case.

Third, while one goal of this hearing is to continue to develop the important historical facts on the interrogation issue, I am also grateful for the opportunity to hear from all of our witnesses on what has happened to the rule of law under this Administration and what they think is the best way forward on this issue. After years of confusing and misleading rhetoric, false promises, and horribly damaging revelations, what are the most important steps we can take to restore some concrete meaning to the promise that "America does not torture" and that "America respects the rule of law"?

PREPARED STATEMENT OF THE HONORABLE MAXINE WATERS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND MEMBER, COMMITTEE ON THE JUDICIARY

Mr. Chairman, thank you for arranging today's hearing, the fifth hearing in the Judiciary Committee on interrogation rules and practices at Guantanamo Bay. I'd like to also welcome the witnesses this morning, who are distinguished experts on the law, particularly the former Attorney General. I hope your testimony and answers to our questions will help us better understand what went wrong and what should be done to ensure that in the future, practices at the Department of Justice will in fact protect the rule of law enshrined in our Constitution.

From the inappropriate political considerations in appointments at the bottom of the personnel ladder, including interns, to the firing of qualified and experienced U.S. Attorneys, the Department of Justice has failed to set the standards Americans expect to fairly and impartially implement and enforce the laws of this nation.

I hope that the Department of Justice will never again be complicit in allowing the law to be twisted and contorted for political purposes that resulted in the shameful and inhumane practices that were carried at Guantanamo Bay, and other locations, under the banner of "fighting terrorism." In my mind, terror is having the law turned on its head and secretly manipulated to justify the terrible injustices that were practiced in the name of "protecting freedom."

I hope today's hearing will help us re-establish the highest level of integrity and fidelity to the Constitution that will restore the confidence of all Americans in their government. Our work on this Committee is designed to ensure that under the next administration and future administrations, the Department of Justice will protect constitutional rights and not pervert them.

PREPARED STATEMENT OF THE HONORABLE STEVE COHEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE, AND MEMBER, COMMITTEE ON THE JUDICIARY

STATEMENT OF REP. STEVE COHEN
HOUSE JUDICIARY COMMITTEE
HEARING ON "FROM THE DEPARTMENT OF JUSTICE TO GUANTANAMO BAY: ADMINISTRATION LAWYERS AND ADMINISTRATION INTERROGATION RULES, PART V"
JULY 17, 2008

As a member of the House Judiciary Committee and its Subcommittee on the Constitution, Civil Rights, and Civil Liberties, I have had the opportunity to question many former Bush Administration officials concerning the formulation of an interrogation policy which justified techniques that I believe were illegal and contrary to our Nation's fundamental values. Unfortunately, many of these witnesses showed themselves to be obstinate and unwilling to come clean about how such a disturbing policy came to be and, instead, devoted much of their energy to attacking critics of the policy. Thankfully, I can say that our principal witness today, John Ashcroft, has come before us willingly. While I know that he will defend some of the actions of his subordinates during the early part of the "war on terror," and while I strongly disagree with that fundamental defense, I also know that Mr. Ashcroft has shown himself to be a man of principle and integrity, as demonstrated by his refusal to submit to pressure from the White House to approve the Administration's attempts to circumvent FISA with a secret warrantless surveillance program. I hope that he will be forthright in telling us what he knows about the process by which the Administration's interrogation policy developed.

APPENDICES TO THE PREPARED STATEMENT OF WALTER DELLINGER, FORMER ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE

ATTACHED APPENDICES

The Case for Judicial Review.....Appendix A
The Purse Isn't Congress's Only Weapon .....Appendix B
On NSA Spying: A Letter to Congress .....Appendix C
Memorandum for Abner Mikva .....Appendix D
A Slip of the Pen .....Appendix E
Principles to Guide the Office of Legal Counsel .....Appendix F

APPENDIX A

The Case for Judicial Review

Walter Dellinger and Christopher H. Schroeder

December 6, 2001

Copyright 2001 The Washington Post
The Washington Post

December 06, 2001, Thursday, Final Edition

SECTION: EDITORIAL; Pg. A39

LENGTH: 886 words

HEADLINE: The Case for Judicial Review

BYLINE: Walter Dellinger and Christopher H. Schroeder

BODY:

In spite of understandable concerns of civil libertarians, military commissions clearly have a constitutional role in trying those accused of acts of war against the United States. It is possible, however, to mitigate the threat to the rule of law posed by the use of military courts.

At least three significant changes should be made by the president -- or by Congress -- in the president's recent military order establishing plans for military trials. First, such trials should be possible only for a narrow set of cases; second, procedures should be designed to determine fairly whether the persons accused are in fact guilty terrorists; third -- and most important -- some form of judicial review must be provided. The president's power as commander in chief is extensive. Lincoln, in a breathtaking exercise of military power, unilaterally freed all the slaves in states in rebellion. Military trials commissioned by the president have occurred since the beginning of the republic. In time of war, they represent an effective means of dealing with hostile combatants -- especially those captured on foreign soil -- free of evidentiary rules designed to serve the social goals of ordinary times. Military commissions can function partially or entirely in secret, avoiding disclosure of information that would compromise intelligence sources or reveal vulnerabilities in our defenses. And they can be expeditious.

The threat to civil liberties in their use is always present, but it can be reduced by careful changes in the president's plan. Congress has clear authority to make such alterations. As Justice Robert Jackson once noted, the president is at the apogee of his power when acting pursuant to congressional authorization, and at his least powerful when he claims authority to act in contravention of the will of Congress. In this instance the president did initially act with congressional authorization: The provisions of the Uniform Code of Military Justice cited by the order are the same ones that authorized creation of military commissions in the Nazi sabotage case. It remains open to Congress to revise those provisions in ways that limit and refine the president's plan.

The jurisdiction of such secret military tribunals should be clearly and narrowly

circumscribed. One reason such tribunals have been accommodated within our constitutional system is that their legitimate use is limited to extraordinary cases. The current order fails to observe those limits. It extends, for instance, to any individuals who harbored a member of the al Qaeda organization, even if the persons they harbored have not been involved in any violation of the laws of war. The order exempts U.S. citizens from its coverage, but the Supreme Court has made it plain that the full range of constitutional protections afforded citizens applies also to resident aliens, and a strong argument can be made that the safeguards of a trial in criminal court normally extend to anyone in this country lawfully.

Except for members of al Qaeda actively planning or participating in a terrorist assault, military commissions ought to have no application within the United States itself so long as the regular criminal courts continue functioning. More careful limits on the scope of such procedures must be adopted and enforced by some independent party outside the executive branch.

Congress should also address the disturbing notion that procedures for determining guilt or innocence can be truncated because terrorists attacking the United States deserve no better. That sentiment may well be true: The problem is that we can't know in advance whether the person brought before the tribunal is indeed such a person. In addition, the order itself calls for full and fair trials but leaves the procedures for ensuring that these occur entirely up to the Department of Defense. That is why Congress should carefully review the procedures to be used in these trials.

By far the most important change needed in the president's military order is to reverse its sweeping and unjustified ban on any judicial review of the military proceedings. As it stands, the only review provided for is by either the secretary of defense or the president.

Even if the president were validly exercising his power to suspend the privilege of habeas corpus, it cannot be constitutional to exclude the courts altogether. The attempt to do so might in fact come back to haunt the government, because any federal judge might assert the inherent constitutional power of the courts.

The president and Congress would be well advised to provide for judicial review by a single designated federal appeals court, a special panel of judges established for the purpose or by the Supreme Court itself. Secret evidence alleged to be material to a conviction could be reviewed in camera by the judges or the justices.

Independent review outside the executive branch is essential if the nation is to be assured that such military commissions are fairly designed to ascertain guilt and are limited to the extraordinary circumstances that alone can justify their use.

Walter Dellinger, a Washington lawyer, and Christopher H. Schroeder are law professors at Duke University and former Justice Department officials.

APPENDIX B

The Purse Isn't Congress's Only Weapon

Walter Dellinger and Christopher Schroeder

March 14, 2007

The New York Times
nytimes.com

March 14, 2007

OP-ED CONTRIBUTORS

The Purse Isn't Congress's Only Weapon

By WALTER DELLINGER and CHRISTOPHER SCHROEDER

THE debate that Congress needs to have about the Iraq war is being hijacked by sound-bite arguments. Defenders of President Bush concede that Congress has "the power of the purse" and insist it could use it to completely "cut off the funds to the troops." But that, most of them say, is the only power Congress has to change the course of the war. They then insinuate that exercising this power would be an unspeakable act of disloyalty to our soldiers, leaving them without supplies, ammunition or pay. Congress is thus placed in a box: it has a single awesome power that it would never employ.

There are at least three errors in this line of argument. First, Congress is hardly limited to this seemingly magical power of the purse. It has several sources of constitutional authority over the use of military force, including the express right "to make rules for the government and regulation of the land and naval forces."

When Congress decides, for example, to limit warrantless surveillance of telecommunications, it does not need to say: "No funds appropriated under this act may be used for a search unless a warrant has been obtained." It may instead simply require the executive branch to obtain a warrant.

True, restrictions on spending are often attractive to Congress, because they can be attached to essential spending bills that a president may not be willing to veto. But when the debate gets turned to the spending power, it has been soured by the second false claim: that using the power of the purse would somehow leave the troops high and dry in Iraq.

Suppose that Congress did decide that military forces financed by future defense appropriations acts would, after a certain date, have to be deployed elsewhere than Iraq. Such a requirement would not cut a single penny of support for the troops in Iraq before the redeployment date, or for those same troops redeployed outside Iraq after that date.

How could that possibly be seen as "cutting off" support for our fighting men and women? Only if a president chose to violate both the Congressional provision that the troops were to be

redeployed and the laws providing for the pay, benefits and support of those in the military. Why would a president do something so perverse? Mr. Bush wouldn't. Thus this claim — that he would be forced to defy the law by sending "unfunded" troops into combat — is simply a false threat intended to curtail meaningful debate.

The third incorrect precept in the Iraq debate is the notion that while Congress could bring our troops home via its spending power, it lacks the ability to limit the size of the deployment: it is all or nothing.

Proponents of this argument ignore longstanding executive branch legal opinions as well as Supreme Court precedent. The Supreme Court has long recognized Congress's authority to set limits on the president's military power, as in 1799 when it accepted Congress's power to authorize the seizure of ships going to, but not coming from, French ports.

More important, the legal advisers of presidents have themselves repeatedly recognized this Congressional power. When former Chief Justice William Rehnquist was President Richard Nixon's chief legal adviser in 1970, he flatly rejected the all-or-nothing claim. It is "both utterly illogical and unsupported by precedent," he wrote, to think that Congress "may not delegate a lesser amount of authority to conduct military operations."

Mr. Rehnquist cited numerous historical examples including a 1940 law prohibiting the deployment of drafted soldiers outside the Western Hemisphere. More recently, under President Clinton, we in the office of legal counsel repeatedly recognized the authority of Congress to limit the scope, nature and duration of military engagements.

The all-or-nothing argument defies not only precedent but common sense. Consider this scenario: Congress authorizes the president to send 20,000 American troops to a strife-torn country as part of a coalition to defend refugee camps from ethnic cleansing; however, once our forces are engaged, the president unilaterally decides to vastly increase our involvement by sending 350,000 combat troops to fight for one side in a religious civil war in that country, leaving the refugees undefended.

Surely no one really thinks that in such a situation Congress would be faced with this stark choice: withdraw entirely from a country, or do nothing about the unlimited expansion by presidential fiat. Whatever limits there are on Congressional power to determine particular tactical questions, decisions about the scope and goals of military action are easily within its authority.

One final debate-stifling claim deserves mention: the argument that even to debate our troops'

mission in Iraq somehow undercuts and endangers them. Surely this has it backward. Four years have passed since the Iraq war resolution was passed, in very different circumstances for purposes no longer relevant. We certainly owe those who put their lives on the line every day a renewed determination of whether their continued sacrifice is necessary for the national interest.

Walter Dellinger is a lawyer. Christopher Schroeder is a professor at Duke Law School. Each served as head of the Justice Department's Office of Legal Counsel in the Clinton administration.

Copyright 2007 The New York Times Company

Privacy Policy | Search | Corrections | RSS | First Look | Help | Contact Us | Work for Us | Site Map

APPENDIX C

On NSA Spying: A Letter to Congress

Curtis Bradley, David Cole, Walter Dellinger
Ronald Dworkin, Richard Epstein, Philip B. Heymann, *et al.*

February 9, 2006

The New York Review of Books

VOLUME 53, NUMBER 2 · FEBRUARY 9, 2006

On NSA Spying: A Letter to Congress

By Curtis Bradley, David Cole, Walter Dellinger, Ronald Dworkin, Richard Epstein, Philip B. Heymann et al.

Dear Members of Congress:

We are scholars of constitutional law and former government officials. We write in our individual capacities as citizens concerned by the Bush administration's National Security Agency domestic spying program, as reported in *The New York Times*, and in particular to respond to the Justice Department's December 22, 2005, letter to the majority and minority leaders of the House and Senate Intelligence Committees setting forth the administration's defense of the program.[1] Although the program's secrecy prevents us from being privy to all of its details, the Justice Department's defense of what it concedes was secret and warrantless electronic surveillance of persons within the United States fails to identify any plausible legal authority for such surveillance. Accordingly the program appears on its face to violate existing law.

The basic legal question here is not new. In 1978, after an extensive investigation of the privacy violations associated with foreign intelligence surveillance programs, Congress and the President enacted the Foreign Intelligence Surveillance Act (FISA). Pub. L. 95-511, 92 Stat. 1783. FISA comprehensively regulates electronic surveillance within the United States, striking a careful balance between protecting civil liberties and preserving the "vitally important government purpose" of obtaining valuable intelligence in order to safeguard national security. S. Rep. No. 95-604, pt. 1, at 9 (1977).

With minor exceptions, FISA authorizes electronic surveillance only upon certain specified showings, and only if approved by a court. The statute specifically allows for warrantless *wartime* domestic electronic surveillance—but only for the first fifteen days of a war. 50 U.S.C. § 1811. It makes criminal any electronic surveillance not authorized by statute, *id.* § 1809; and it expressly establishes FISA and specified provisions of the federal criminal code (which govern wiretaps for criminal investigation) as the "*exclusive* means by which electronic surveillance...may be conducted," 18 U.S.C. § 2511(2)(f) (emphasis added).[2]

The Department of Justice concedes that the NSA program was not authorized by any of the above provisions. It maintains, however, that the program did not violate existing law because Congress implicitly authorized the NSA program when it enacted the Authorization for Use of Military Force (AUMF) against al-Qaeda, Pub. L. No. 107-40, 115 Stat. 224 (2001). But the AUMF cannot reasonably be construed to implicitly authorize warrantless electronic surveillance in the United States during

wartime, where Congress has expressly and specifically addressed that precise question in FISA and limited any such warrantless surveillance to the first fifteen days of war.

The DOJ also invokes the President's inherent constitutional authority as Commander in Chief to collect "signals intelligence" targeted at the enemy, and maintains that construing FISA to prohibit the President's actions would raise constitutional questions. But even conceding that the President in his role as Commander in Chief may generally collect "signals intelligence" on the enemy abroad, Congress indisputably has authority to regulate electronic surveillance within the United States, as it has done in FISA. Where Congress has so regulated, the President can act in contravention of statute only if his authority is *exclusive*, that is, not subject to the check of statutory regulation. The DOJ letter pointedly does not make that extraordinary claim.

Moreover, to construe the AUMF as the DOJ suggests would itself raise serious constitutional questions under the Fourth Amendment. The Supreme Court has never upheld warrantless wiretapping within the United States. Accordingly, the principle that statutes should be construed to avoid serious constitutional questions provides an additional reason for concluding that the AUMF does not authorize the President's actions here.

1.

Congress did not implicitly authorize the NSA domestic spying program in the AUMF, and in fact expressly prohibited it in FISA

The DOJ concedes (Letter at 4) that the NSA program involves "electronic surveillance," which is defined in FISA to mean the interception of the *contents* of telephone, wire, or e-mail communications that occur, at least in part, in the United States. 50 U.S.C. §§ 1801(f)(1)-(2), 1801(n). The NSA engages in such surveillance without judicial approval, and apparently without the substantive showings that FISA requires—e.g., that the subject is an "agent of a foreign power." *Id.* § 1805(a). The DOJ does not argue that FISA itself authorizes such electronic surveillance; and, as the DOJ letter acknowledges, 18 U.S.C. § 1809 makes criminal any electronic surveillance not authorized by statute.

The DOJ nevertheless contends that the surveillance is authorized by the AUMF, signed on September 18, 2001, which empowers the President to use "all necessary and appropriate force against" al-Qaeda. According to the DOJ, collecting "signals intelligence" on the enemy, even if it involves tapping US phones without court approval or probable cause, is a "fundamental incident of war" authorized by the AUMF. This argument fails for four reasons.

First, and most importantly, the DOJ's argument rests on an unstated general "implication" from the AUMF that directly contradicts *express* and *specific* language in FISA. Specific and "carefully drawn" statutes prevail over general

statutes where there is a conflict. *Morales* v. *TWA, Inc.*, 504 U.S. 374, 384-85 (1992) (quoting *International Paper Co.* v. *Ouelette*, 479 U.S. 481, 494 (1987)). In FISA, Congress has directly and specifically spoken on the question of domestic warrantless wiretapping, including during wartime, and it could not have spoken more clearly.

As noted above, Congress has comprehensively regulated all electronic surveillance in the United States, and authorizes such surveillance only pursuant to specific statutes designated as the "*exclusive* means by which electronic surveillance...and the interception of domestic wire, oral, and electronic communications may be conducted." 18 U.S.C. § 2511(2)(f) (emphasis added). Moreover, FISA *specifically* addresses the question of domestic wiretapping during wartime. In a provision entitled "Authorization during time of war," FISA dictates that "notwithstanding any other law, the President, through the Attorney General, may authorize electronic surveillance without a court order under this subchapter to acquire foreign intelligence information *for a period not to exceed fifteen calendar days following a declaration of war by the Congress*." 50 U.S.C. § 1811 (emphasis added). Thus, even where Congress has declared war—a more formal step than an authorization such as the AUMF—the law limits warrantless wiretapping to the first fifteen days of the conflict. Congress explained that if the President needed further warrantless surveillance during wartime, the fifteen days would be sufficient for Congress to consider and enact further authorization.[21] Rather than follow this course, the President acted unilaterally and secretly in contravention of FISA's terms. The DOJ letter remarkably does not even *mention* FISA's fifteen-day war provision, which directly refutes the President's asserted "implied" authority.

In light of the specific and comprehensive regulation of FISA, especially the fifteen-day war provision, there is no basis for finding in the AUMF's general language implicit authority for unchecked warrantless domestic wiretapping. As Justice Frankfurter stated in rejecting a similar argument by President Truman when he sought to defend the seizure of the steel mills during the Korean War on the basis of implied congressional authorization:

> It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem, as Congress did to that of seizure, to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is...to disrespect the whole legislative process and the constitutional division of authority between President and Congress. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 609 (1952) (Frankfurter, J., concurring).

Second, the DOJ's argument would require the conclusion that Congress implicitly and *sub silentio* repealed 18 U.S.C. § 2511(2)(f), the provision that identifies FISA and specific criminal code provisions as "the exclusive means by which electronic surveillance...may be conducted." Repeals by implication are strongly disfavored;

they can be established only by "overwhelming evidence," *J.E.M. Ag. Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 137 (2001), and "'the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable,'" *id.* at 141–142 (quoting *Morton* v. *Mancari*, 417 U.S. 535, 550 (1974)). The AUMF and § 2511(2)(f) are not irreconcilable, and there is *no* evidence, let alone overwhelming evidence, that Congress intended to repeal § 2511(2)(f).

Third, Attorney General Alberto Gonzales has admitted that the administration did not seek to amend FISA to authorize the NSA spying program because it was advised that Congress would reject such an amendment.[4] The administration cannot argue on the one hand that Congress authorized the NSA program in the AUMF, and at the same time that it did not ask Congress for such authorization because it feared Congress would say no.[5]

Finally, the DOJ's reliance upon *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004), to support its reading of the AUMF, see DOJ Letter at 3, is misplaced. A plurality of the Court in *Hamdi* held that the AUMF authorized military detention of enemy combatants captured on the battlefield abroad as a "fundamental incident of waging war." *Id.* at 519. The plurality expressly limited this holding to individuals who were "part of or supporting forces hostile to the United States or coalition partners *in Afghanistan and who engaged in an armed conflict against the United States there*." *Id.* at 516 (emphasis added). It is one thing, however, to say that foreign battlefield capture of enemy combatants is an incident of waging war that Congress intended to authorize. It is another matter entirely to treat unchecked war-rantless *domestic* spying as included in that authorization, especially where an existing statute specifies that other laws are the "exclusive means" by which electronic surveillance may be conducted and provides that even a declaration of war authorizes such spying only for a fifteen-day emergency period.[6]

2.

Construing FISA to prohibit warrantless domestic wirctapping does not raise any serious constitutional question, while construing the AUMF to authorize such wiretapping would raise serious questions under the Fourth Amendment

The DOJ argues that FISA and the AUMF should be construed to permit the NSA program's domestic surveillance because there otherwise might be a "conflict between FISA and the President's Article II authority as Commander-in-Chief." DOJ Letter at 4. The statutory scheme described above is not ambiguous, and therefore the constitutional avoidance doctrine is not even implicated. See *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 (2001) (the "canon of constitutional avoidance has no application in the absence of statutory ambiguity"). But were it implicated, it would work against the President, not in his favor. Construing FISA and the AUMF according to their plain meanings raises no serious constitutional questions regarding the President's duties under Article II. Construing the AUMF to *permit* unchecked warrantless wiretapping without probable cause,

however, would raise serious questions under the Fourth Amendment.

A. FISA's Limitations are consistent with the President's Article II role

We do not dispute that, absent congressional action, the President might have inherent constitutional authority to collect "signals intelligence" about the enemy abroad. Nor do we dispute that, had Congress taken no action in this area, the President might well be constitutionally empowered to conduct domestic surveillance directly tied and narrowly confined to that goal—subject, of course, to Fourth Amendment limits. Indeed, in the years before FISA was enacted, the federal law involving wiretapping specifically provided that "nothing contained in this chapter or in section 605 of the Communications Act of 1934 shall limit the constitutional power of the President...to obtain foreign intelligence information deemed essential to the security of the United States." 18 U.S.C. § 2511(3) (1976).

But FISA specifically *repealed* that provision, FISA § 201(c), 92 Stat. 1797, and replaced it with language dictating that FISA and the criminal code are the "exclusive means" of conducting electronic surveillance. In doing so, Congress did not deny that the President has constitutional power to conduct electronic surveillance for national security purposes; rather, Congress properly concluded that "even if the President has the inherent authority *in the absence of legislation* to authorize warrantless electronic surveillance for foreign intelligence purposes, Congress has the power to regulate the conduct of such surveillance by legislating a reasonable procedure, which then becomes the exclusive means by which such surveillance may be conducted." H.R. Rep. No. 95-1283, pt. 1, at 24 (1978) (emphasis added). This analysis, Congress noted, was "supported by two successive Attorneys General." *Id.*

To say that the President has inherent authority does not mean that his authority is exclusive, or that his conduct is not subject to statutory regulations enacted (as FISA was) pursuant to Congress's Article I powers. As Justice Jackson famously explained in his influential opinion in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. at 635 (Jackson, J., concurring), the Constitution "enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." For example, the President in his role as Commander in Chief directs military operations. But the Framers gave Congress the power to prescribe rules for the regulation of the armed and naval forces, Art. I, § 8, cl. 14, and if a duly enacted statute prohibits the military from engaging in torture or cruel, inhuman, and degrading treatment, the President must follow that dictate. As Justice Jackson wrote, when the President acts in defiance of "the expressed or implied will of Congress," his power is "at its lowest ebb." 343 U.S. at 637. In this setting, Jackson wrote, "Presidential power [is] most vulnerable to attack and in the least favorable of all constitutional postures." *Id.* at 640.

Congress plainly has authority to regulate domestic wiretapping by federal agencies under its Article I powers, and the DOJ does not suggest otherwise. Indeed, when FISA was enacted, the Justice Department agreed that Congress had power to regulate such conduct, and could require judicial approval of foreign intelligence

surveillance.[7] FISA does not prohibit foreign intelligence surveillance, but merely imposes reasonable regulation to protect legitimate privacy rights. (For example, although FISA generally requires judicial approval for electronic surveillance of persons within the United States, it permits the executive branch to install a wiretap immediately so long as it obtains judicial approval within seventy-two hours. 50 U.S.C. § 1805(f).)

Just as the President is bound by the statutory prohibition on torture, he is bound by the statutory dictates of FISA.[8] The DOJ once infamously argued that the President as Commander in Chief could ignore even the criminal prohibition on torture,[9] and, more broadly still, that statutes may not "place *any* limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response."[10] But the administration withdrew the August 2002 torture memo after it was disclosed, and for good reason the DOJ does not advance these extreme arguments here. Absent a serious question about FISA's constitutionality, there is no reason even to consider construing the AUMF to have implicitly overturned the carefully designed regulatory regime that FISA establishes. See, e.g., *Reno* v. *Flores*, 507 U.S. 292, 314 n.9 (1993) (constitutional avoidance canon applicable only if the constitutional question to be avoided is a serious one, "not to eliminate all possible contentions that the statute *might* be unconstitutional") (emphasis in original; citation omitted).[11]

B. Construing the AUMF to authorize warrantless domestic wiretapping would raise serious constitutional questions

The principle that ambiguous statutes should be construed to avoid serious constitutional questions works against the administration, not in its favor. Interpreting the AUMF and FISA to permit unchecked domestic wiretapping for the duration of the conflict with al-Qaeda would certainly raise serious constitutional questions. The Supreme Court has never upheld such a sweeping power to invade the privacy of Americans at home without individualized suspicion or judicial oversight.

The NSA surveillance program permits wiretapping within the United States without *either* of the safeguards presumptively required by the Fourth Amendment for electronic surveillance—individualized probable cause and a warrant or other order issued by a judge or magistrate. The Court has long held that wiretaps generally require a warrant and probable cause. *Katz* v. *United States*, 389 U.S. 347 (1967). And the only time the Court considered the question of national security wiretaps, it held that the Fourth Amendment prohibits domestic security wiretaps without those safeguards. *United States* v. *United States District Court*, 407 U.S. 297 (1972). Although the Court in that case left open the question of the Fourth Amendment validity of warrantless wiretaps for foreign intelligence purposes, its precedents raise serious constitutional questions about the kind of open-ended authority the President has asserted with respect to the NSA program. See *id.* at 316-18 (explaining difficulty of guaranteeing Fourth Amendment freedoms if domestic surveillance can be conducted solely in the discretion of the executive branch).

Indeed, serious Fourth Amendment questions about the validity of warrantless

wiretapping led Congress to enact FISA, in order to "provide the secure framework by which the executive branch may conduct legitimate electronic surveillance for foreign intelligence purposes within the context of this nation's commitment to privacy and individual rights." S. Rep. No. 95-604, at 15 (1978) (citing, *inter alia*, *Zweibon* v. *Mitchell*, 516 F.2d 594 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 944 (1976), in which the court of appeals held that a warrant must be obtained before a wiretap is installed on a domestic organization that is neither the agent of, nor acting in collaboration with, a foreign power).

Relying on *In re Sealed Case No. 02-001*, the DOJ argues that the NSA program falls within an exception to the warrant and probable cause requirement for reasonable searches that serve "special needs" above and beyond ordinary law enforcement. But the existence of "special needs" has never been found to permit warrantless wiretapping. "Special needs" generally excuse the warrant and individualized suspicion requirements only where those requirements are impracticable and the intrusion on privacy is minimal. See, e.g., *Griffin* v. *Wisconsin*, 483 U.S. 868, 873 (1987). Wiretapping is not a minimal intrusion on privacy, and the experience of FISA shows that foreign intelligence surveillance can be carried out through warrants based on individualized suspicion.

The court in *Sealed Case* upheld FISA itself, which requires warrants issued by Article III federal judges upon an individualized showing of probable cause that the subject is an "agent of a foreign power." The NSA domestic spying program, by contrast, includes none of these safeguards. It does not require individualized judicial approval, and it does not require a showing that the target is an "agent of a foreign power." According to Attorney General Gonzales, the NSA may wiretap any person in the United States who so much as receives a communication from anyone abroad, if the administration deems either of the parties to be affiliated with al-Qaeda, a member of an organization affiliated with al-Qaeda, "working in support of al Qaeda," or "part of" an organization or group "that is supportive of al Qaeda."[12] Under this reasoning, a US citizen living here who received a phone call from another US citizen who attends a mosque that the administration believes is "supportive" of al-Qaeda could be wiretapped without a warrant. The absence of meaningful safeguards on the NSA program at a minimum raises serious questions about the validity of the program under the Fourth Amendment, and therefore supports an interpretation of the AUMF that does not undercut FISA's regulation of such conduct.

In conclusion, the DOJ letter fails to offer a plausible legal defense of the NSA domestic spying program. If the administration felt that FISA was insufficient, the proper course was to seek legislative amendment, as it did with other aspects of FISA in the Patriot Act, and as Congress expressly contemplated when it enacted the wartime wiretap provision in FISA. One of the crucial features of a constitutional democracy is that it is always open to the President—or anyone else—to seek to change the law. But it is also beyond dispute that, in such a democracy, the President cannot simply violate criminal laws behind closed doors because he deems them obsolete or impracticable.[13]

We hope you find these views helpful to your consideration of the legality of the NSA domestic spying program.

Curtis Bradley, Duke Law School, former Counselor on International Law in the State Department Legal Adviser's Office[14]

David Cole, Georgetown University Law Center

Walter Dellinger, Duke Law School, former Deputy Assistant Attorney General, Office of Legal Counsel and Acting Solicitor General

Ronald Dworkin, NYU Law School

Richard Epstein, University of Chicago Law School, Senior Fellow, Hoover Institution

Philip B. Heymann, Harvard Law School, former Deputy Attorney General

Harold Hongju Koh, Dean, Yale Law School, former Assistant Secretary of State for Democracy, Human Rights and Labor, former Attorney-Adviser, Office of Legal Counsel, DOJ

Martin Lederman, Georgetown University Law Center, former Attorney-Adviser, Office of Legal Counsel, DOJ

Beth Nolan, former Counsel to the President and Deputy Assistant Attorney General, Office of Legal Counsel

William S. Sessions, former Director, FBI, former Chief United States District Judge

Geoffrey Stone, Professor of Law and former Provost, University of Chicago

Kathleen Sullivan, Professor and former Dean, Stanford Law School

Laurence H. Tribe, Harvard Law School

William Van Alstyne, William & Mary Law School, former Justice Department attorney

Notes

[1] The Justice Department letter can be found at www.nationalreview.com/pdf/12%2022%2005%20NSA%20letter.pdf.

[2] More detail about the operation of FISA can be found in Congressional Research Service, "Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information" (January 5, 2006). This letter was drafted

prior to release of the CRS Report, which corroborates the conclusions drawn here.

[3] "The Conferees intend that this [15-day] period will allow time for consideration of any amendment to this act that may be appropriate during a wartime emergency.... The conferees expect that such amendment would be reported with recommendations within 7 days and that each House would vote on the amendment within 7 days thereafter." H.R. Conf. Rep. No. 95-1720, at 34 (1978).

[4] Attorney General Gonzales stated, "We have had discussions with Congress in the past—certain members of Congress—as to whether or not FISA could be amended to allow us to adequately deal with this kind of threat, and we were advised that that would be difficult, if not impossible." Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (December 19, 2005), available at www.whitehouse.gov/news/releases/2005/12/20051219-1.html.

[5] The administration had a convenient vehicle for seeking any such amendment in the USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, enacted in October 2001. The Patriot Act amended FISA in several respects, including in sections 218 (allowing FISA wiretaps in criminal investigations) and 215 (popularly known as the "libraries provision"). Yet the administration did not ask Congress to amend FISA to authorize the warrantless electronic surveillance at issue here.

[6] The DOJ attempts to draw an analogy between FISA and 18 U.S.C. § 4001(a), which provides that the United States may not detain a US citizen "except pursuant to an act of Congress." The DOJ argues that just as the AUMF was deemed to authorize the detention of Hamdi, 542 U.S. at 519, so the AUMF satisfies FISA's requirement that electronic surveillance be "authorized by statute." DOJ Letter at 3-4. The analogy is inapt. As noted above, FISA specifically limits warrantless domestic wartime surveillance to the first fifteen days of the conflict, and 18 U.S.C. § 2511(2)(f) specifies that existing law is the "exclusive means" for domestic wiretapping. Section 4001(a), by contrast, neither expressly addresses detention of the enemy during wartime nor attempts to create an exclusive mechanism for detention. Moreover, the analogy overlooks the carefully limited holding and rationale of the Hamdi plurality, which found the AUMF to be an "explicit congressional authorization for the detention of individuals in the narrow category we describe...who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network," and whom "Congress sought to target in passing the AUMF." 542 U.S. at 518. By the government's own admission, the NSA program is by no means so limited. See Gonzales/Hayden Press Briefing, *supra* note 4.

[7] See, *e.g.*, S. Rep. No. 95-604, pt. I, at 16 (1977) (Congress's assertion of power to regulate the President's authorization of electronic surveillance for foreign intelligence purposes was "concurred in by the Attorney General"); Foreign Intelligence Electronic Surveillance: Hearings Before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence, 95th Cong., 2d Sess., at 31 (1978) (Letter from John M. Harmon, Assistant Attorney General, Office of Legal

Counsel, to Edward P. Boland, Chairman, House Permanent Select Comm. on Intelligence (Apr. 18, 1978)) ("it seems unreasonable to conclude that Congress, in the exercise of its powers in this area, may not vest in the courts the authority to approve intelligence surveillance").

[8] Indeed, Article II imposes on the President the general *obligation* to enforce laws that Congress has validly enacted, including FISA: "he *shall* take Care that the Laws be faithfully executed..." (emphasis added). The use of the mandatory "shall" indicates that under our system of separation of powers, he is duty-bound to execute the provisions of FISA, not defy them.

[9] See Memorandum from Jay S. Bybee, Assistant Attorney General, Department of Justice Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Re: *Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A* (Aug. 1, 2002), at 31.

[10] Memorandum from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, to the Deputy Counsel to the President, Re: *The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them* (September 25, 2001), available at www.usdoj.gov/olc/warpowers925.htm (emphasis added).

[11] Three years ago, the FISA Court of Review suggested in dictum that Congress cannot "encroach on the President's constitutional power" to conduct foreign intelligence surveillance. *In re Sealed Case No. 02-001*, 310 F.3d 717, 742 (FIS Ct. Rev. 2002) (per curiam). The FISA Court of Review, however, did not hold that FISA was unconstitutional, nor has any other court suggested that FISA's modest regulations constitute an impermissible encroachment on presidential authority. The FISA Court of Review relied upon *United States* v. *Truong Dihn Hung*, 629 F.2d 908 (4th Cir. 1980)—but that court did not suggest that the President's powers were beyond congressional control. To the contrary, the *Truong* court indicated that FISA's restrictions were constitutional. 629 F.2d at 915 n.4 (noting that "the imposition of a warrant requirement, beyond the constitutional minimum described in this opinion, *should be left to the intricate balancing performed in the course of the legislative process by Congress and the President*") (emphasis added).

[12] See Gonzales/Hayden Press Briefing, *supra* note 4.

[13] During consideration of FISA, the House of Representatives noted, "The decision as to the standards governing when and how foreign intelligence electronic surveillance should be conducted is and should be a political decision...properly made by the political branches of Government together, not adopted by one branch on its own and with no regard for the other. Under our Constitution legislation is the embodiment of just such political decisions." H.R. Conf. Rep. No. 95-1283, pt. 1, at 21-22.

Attorney General Griffin Bell supported FISA in part because "no matter how well

intentioned or ingenious the persons in the Executive branch who formulate these measures, the crucible of the legislative process will ensure that the procedures will be affirmed by that branch of government which is more directly responsible to the electorate." Foreign Intelligence Surveillance Act of 1978: Hearings Before the Subcommittee on Intelligence and the Rights of Americans of the Senate Select Committee on Intelligence, 95th Cong., 2d Sess. 12 (1997).

[14] Affiliations are noted for identification purposes only.

Copyright © 1983-2008, NYREV, Inc. All rights reserved. Nothing in this publication may be reproduced without the permission of the publisher.

APPENDIX D

Memorandum for the Honorable Abner J. Mikva
Counsel to the President

Walter Dellinger, Assistant Attorney General

November 2, 1994

PRESIDENTIAL AUTHORITY TO DECLINE TO EXECUTE UNCONSTITUTIONAL STATUTES

This memorandum discusses the President's constitutional authority to decline to execute unconstitutional statutes.

November 2, 1994

MEMORANDUM FOR THE HONORABLE ABNER J. MIKVA
COUNSEL TO THE PRESIDENT

I have reflected further on the difficult questions surrounding a President's decision to decline to execute statutory provisions that the President believes are unconstitutional, and I have a few thoughts to share with you. Let me start with a general proposition that I believe to be uncontroversial: there are circumstances in which the President may appropriately decline to enforce a statute that he views as unconstitutional.

First, there is significant judicial approval of this proposition. Most notable is the Court's decision in Myers v. United States, 272 U.S. 52 (1926). There the Court sustained the President's view that the statute at issue was unconstitutional without any member of the Court suggesting that the President had acted improperly in refusing to abide by the statute. More recently, in Freytag v. Commissioner, 501 U.S. 868 (1991), all four of the Justices who addressed the issue agreed that the President has "the power to veto encroaching laws . . . or even to disregard them when they are unconstitutional." Id. at 906 (Scalia, J., concurring); see also Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring) (recognizing existence of President's authority to act contrary to a statutory command).

Second, consistent and substantial executive practice also confirms this general proposition. Opinions dating to at least 1860 assert the President's authority to decline to effectuate enactments that the President views as unconstitutional. See, e.g., Memorial of Captain Meigs, 9 Op. Att'y Gen. 462, 469-70 (1860) (asserting that the President need not enforce a statute purporting to appoint an officer); see also annotations of attached Attorney General and Office of Legal Counsel opinions. Moreover, as we discuss more fully below, numerous Presidents have provided advance notice of their intention not to enforce specific statutory requirements that they have viewed as unconstitutional, and the Supreme Court has implicitly endorsed this practice. See INS v. Chadha, 462 U.S. 919, 942 n.13 (1983) (noting that Presidents often sign legislation containing constitutionally objectionable provisions and indicate that they will not comply with those provisions).

While the general proposition that in some situations the President may decline to enforce unconstitutional statutes is unassailable, it does not offer sufficient guidance as to the appropriate course in specific circumstances. To continue our conversation about these complex issues, I offer the following propositions for your consideration.

1. The President's office and authority are created and bounded by the Constitution; he is required to act within its terms. Put somewhat differently, in serving as the executive created by the Constitution, the President is required to act in accordance with the laws -- including the Constitution, which takes precedence over other forms of law. This obligation is reflected in the Take Care Clause and in the President's oath of office.

2. When bills are under consideration by Congress, the executive branch should promptly identify unconstitutional provisions and communicate its concerns to Congress so that the provisions can be corrected. Although this may seem elementary, in practice there have been occasions in which the President has been presented with enrolled bills containing constitutional flaws that should have been corrected in the legislative process.

3. The President should presume that enactments are constitutional. There will be some occasions, however, when a statute appears to conflict with the Constitution. In such cases, the President can and should exercise his independent judgment to determine whether the statute is constitutional. In reaching a conclusion, the President should give great deference to the fact that Congress passed the statute and that Congress believed it was upholding its obligation to enact constitutional legislation. Where possible, the President should construe provisions to avoid constitutional problems.

4. The Supreme Court plays a special role in resolving disputes about the constitutionality of enactments. As a general matter, if the President believes that the Court would sustain a particular provision as constitutional, the President should execute the statute, notwithstanding his own beliefs about the constitutional issue. If, however, the President, exercising his independent judgment, determines both that a provision would violate the Constitution and that it is probable that the Court would agree with him, the President has the authority to decline to execute the statute.

5. Where the President's independent constitutional judgment and his determination of the Court's probable decision converge on a conclusion of unconstitutionality, the President must make a decision about whether or not to comply with the provision. That decision is necessarily specific to context, and it should be reached after careful weighing of the effect of compliance with the provision on the constitutional rights of affected individuals and on the executive branch's constitutional authority. Also relevant is the likelihood that compliance or non-compliance will permit judicial resolution of the issue. That is, the President may base his decision to comply (or decline to comply) in part on a desire to afford the Supreme Court an opportunity to review the constitutional judgment of the legislative branch.

6. The President has enhanced responsibility to resist unconstitutional provisions that encroach upon the constitutional powers of the Presidency. Where the President believes that an enactment unconstitutionally limits his powers, he has the authority to defend his office and decline to abide by it, unless he is convinced that the Court would disagree with his assessment. If the President does not challenge such provisions (i.e., by refusing to execute them), there often will be no occasion for judicial consideration of their constitutionality; a policy of consistent Presidential enforcement of statutes limiting his power thus would deny the Supreme Court the opportunity to review the limitations and thereby would allow for unconstitutional restrictions on the President's authority.

Some legislative encroachments on executive authority, however, will not be justiciable or are for other reasons unlikely to be resolved in court. If resolution in the courts is unlikely and the President cannot look to a judicial determination, he must shoulder the responsibility of protecting the constitutional role of the presidency. This is usually true, for example, of provisions limiting the President's authority as Commander in Chief. Where it is not possible to construe such provisions constitutionally, the President has the authority to act on his understanding of the Constitution.

One example of a Presidential challenge to a statute encroaching upon his powers that did result in litigation was Myers v. United States, 272 U.S. 52 (1926). In that case, President Wilson had defied a statute that prevented him from removing postmasters without Senate approval; the Supreme Court ultimately struck down the statute as an unconstitutional limitation on the President's removal power. Myers is particularly instructive because, at the time President Wilson acted, there was no Supreme Court precedent on point and the statute was not manifestly unconstitutional. In fact, the constitutionality of restrictions on the President's authority to remove executive branch officials had been debated since the passage of the Tenure of Office Act in 1867 over President Johnson's veto. The closeness of the question was underscored by the fact that three Justices, including Justices Holmes and Brandeis, dissented in Myers. Yet, despite the unsettled constitutionality of President Wilson's action, no member of the Court in Myers suggested that Wilson overstepped his constitutional authority -- or even acted improperly -- by refusing to comply with a statute he believed was unconstitutional. The Court in Myers can be seen to have implicitly vindicated the view that the President may refuse to comply with a statute that limits his constitutional powers if he believes it is unconstitutional. As Attorney General Civiletti stated in a 1980 opinion,

> Myers is very nearly decisive of the issue [of Presidential denial of the validity of statutes]. Myers holds that the President's constitutional duty does not require him to execute unconstitutional statutes; nor does it require him to execute them provisionally, against the day that they are declared unconstitutional by the courts. He cannot be required by statute to retain postmasters against his will unless and until a court says that he may lawfully let them go. If the statute is unconstitutional, it is unconstitutional from the start.

The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. O.L.C. 55, 59 (1980).

7. The fact that a sitting President signed the statute in question does not change this analysis. The text of the Constitution offers no basis for distinguishing bills based on who signed them; there is no constitutional analogue to the principles of waiver and estoppel. Moreover, every President since Eisenhower has issued signing statements in which he stated that he would refuse to execute unconstitutional provisions. See annotations of attached signing statements. As we noted in our memorandum on Presidential signing statements, the President "may properly announce to Congress and to the public that he will not enforce a provision of an enactment he is signing. If so, then a signing statement that challenges what the President determines to be an unconstitutional encroachment on his power, or that announces the President's unwillingness to enforce (or willingness to litigate) such a provision, can be a valid and reasonable exercise of Presidential authority." Memorandum for Bernard N. Nussbaum, Counsel to the President, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel at 4 (Nov. 3, 1993). (Of course, the President is not obligated to announce his reservations in a signing statement; he can convey his views in the time, manner, and form of his choosing.) Finally, the Supreme Court recognized this practice in INS v. Chadha, 462 U.S. 919 (1983): the Court stated that "it is not uncommon for Presidents to approve legislation containing parts which are objectionable on constitutional grounds" and then cited the example of President Franklin Roosevelt's memorandum to Attorney General Jackson, in which he indicated his intention not to implement an unconstitutional provision in a statute that he had just signed. Id. at 942 n.13. These sources suggest that the President's signing of a bill does not affect his authority

to decline to enforce constitutionally objectionable provisions thereof.

In accordance with these propositions, we do not believe that a President is limited to choosing between vetoing, for example, the Defense Appropriations Act and executing an unconstitutional provision in it. In our view, the President has the authority to sign legislation containing desirable elements while refusing to execute a constitutionally defective provision.

We recognize that these issues are difficult ones. When the President's obligation to act in accord with the Constitution appears to be in tension with his duty to execute laws enacted by Congress, questions are raised that go to the heart of our constitutional structure. In these circumstances, a President should proceed with caution and with respect for the obligation that each of the branches shares for the maintenance of constitutional government.

Walter Dellinger
Assistant Attorney General

Brief Description of Attached Materials

Attorney General Opinions

1) Memorial of Captain Meigs, 9 Op. Att'y Gen. 462 (1860): In this opinion the Attorney General concluded that the President is permitted to disregard an unconstitutional statute. Specifically, Attorney General Black concluded that a statute purporting to appoint an officer should not be enforced: "Every law is to be carried out so far forth as is consistent with the Constitution, and no further. The sound part of it must be executed, and the vicious portion of it suffered to drop." Id. at 469.

2) Constitutionality of Congress' Disapproval of Agency Regulations by Resolutions Not Presented to the President, 4A Op. O.L.C. 21 (1980): In this opinion Attorney General Civiletti instructed Secretary of Education Hufstedler that she was authorized to implement regulations that had been disapproved by concurrent congressional resolutions, pursuant to a statutory legislative veto. The Attorney General noted that "the Attorney General must scrutinize with caution any claim that he or any other executive officer may decline to defend or enforce a statute whose constitutionality is merely in doubt." Id. at 29. He concluded, however, that "[t]o regard these concurrent resolutions as legally binding would impair the Executive's constitutional role and might well foreclose effective judicial challenge to their constitutionality. More important, I believe that your recognition of these concurrent resolutions as legally binding would constitute an abdication of the responsibility of the executive branch, as an equal and coordinate branch of government with the legislative branch, to preserve the integrity of its functions against constitutional encroachment." Id.

3) The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. O.L.C. 55 (1980): Attorney General Civiletti, in answer to a congressional inquiry, observed that "Myers holds that the President's constitutional duty does not require him to execute unconstitutional statutes; nor does it require him to execute them provisionally, against the day that they are declared unconstitutional by the courts." Id.

at 59. He added as a cautionary note that "[t]he President has no 'dispensing power,'" meaning that the President and his subordinates "may not lawfully defy an Act of Congress if the Act is constitutional. . . . In those rare instances in which the Executive may lawfully act in contravention of a statute, it is the Constitution that dispenses with the operation of the statute. The Executive cannot." Id. at 59-60.

4) Letter from William French Smith, Attorney General, to Peter W. Rodino, Jr., Chairman, House Judiciary Committee (Feb. 22, 1985): This letter discussed the legal precedent and authority for the President's refusal to execute a provision of the Competition in Contracting Act. The Attorney General noted that the decision "not to implement the disputed provisions has the beneficial byproduct of increasing the likelihood of a prompt judicial resolution. Thus, far from unilaterally nullifying an Act of Congress, the Department's actions are fully consistent with the allocation of judicial power by the Constitution to the courts." Id. at 8. The letter also stated that "the President's failure to veto a measure does not prevent him subsequently from challenging the Act in court, nor does presidential approval of an enactment cure constitutional defects." Id. at 3.

Office of Legal Counsel Opinions

1) Memorandum to the Honorable Robert J. Lipshutz, Counsel to the President, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel (Sept. 27, 1977): This opinion concluded that the President may lawfully disregard a statute that he interprets to be unconstitutional. We asserted that "cases may arise in which the unconstitutionality of the relevant statute will be certain, and in such a case the Executive could decline to enforce the statute for that reason alone." Id. at 13. We continued, stating that "[u]nless the unconstitutionality of a statute is clear, the President should attempt to resolve his doubts in a way that favors the statute, and he should not decline to enforce it unless he concludes that he is compelled to do so under the circumstances." Id. We declined to catalogue all the considerations that would weigh in favor of non-enforcement, but we identified two: first the extent of the harm to individuals or the government resulting from enforcement; and, second, the creation of an opportunity for a court challenge through non-enforcement (e.g., Myers).

2) Appropriations Limitation for Rules Vetoed by Congress, 4B Op. O.L.C. 731 (1980): In this opinion we rejected the constitutionality of a proposed legislative veto, prior to the Court's decision in Chadha. We opined that "[t]o regard this provision as legally binding would impair the Executive's constitutional role and would constitute an abdication of the responsibility of the Executive Branch." Id. at 734. It should be noted that the legislation in question was pending in Congress, and the possibility that President Carter would sign the legislation did not affect our analysis of the constitutional issue. We simply stated that, "if enacted, the [legislative veto provision] will not have any legal effect." Id.

3) Issues Raised by Section 102(c)(2) of H.R. 3792, 14 Op. O.L.C. 38 (1990) (preliminary print): This opinion also addressed then-pending legislation, in this case the foreign relations authorization bill for fiscal years 1990 and 1991. The opinion found that a provision of the bill was unconstitutional and severable. Regarding non-execution, the opinion stated that "at least in the context of legislation that infringes the separation of powers, the President has the constitutional authority to refuse to enforce unconstitutional laws." Id. at 53. The opinion concluded that "if the President chooses to sign H.R. 3792, he would be constitutionally authorized to decline to enforce" the constitutionally objectionable section. Id. at 38.

4) Issues Raised by Section 129 of Pub. L. No. 102-138 and Section 503 of Pub. L. No. 102-140, 16 Op. O.L.C. 18 (1992) (preliminary print): This opinion concluded that two statutory provisions that limited the issuance of official and diplomatic passports were unconstitutional and were severable from the remainder of the two statutes. On the question of non-execution, the opinion rejected "the argument that the President may not treat a statute as invalid prior to a judicial determination." Id. at 40. The opinion concluded that the Constitution authorizes the President to refuse to enforce a law that he believes is unconstitutional.

5) Memorandum for Bernard N. Nussbaum, Counsel to the President, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel (Nov. 3, 1993): This opinion discusses different categories of signing statements, including those construing bills to avoid constitutional problems and those in which the President declares "that a provision of the bill before him is flatly unconstitutional, and that he will refuse to enforce it." Id. at 3. The opinion concludes that such "uses of Presidential signing statements generally serve legitimate and defensible purposes." Id. at 7.

Presidential Signing Statements

1) Statement by the State Department (Announcing President Wilson's Refusal to Carry Out the Section of the Jones Merchant Marine Act of June 5, 1920, directing him to terminate treaty provisions restricting the Government's right to impose discriminatory tonnage dues and tariff duties), 17 A Compilation of the Messages and Papers of the Presidents 8871 (Sept. 24, 1920) (Pres. Wilson): The State Department announced that it "has been informed by the President that he does not deem the direction contained in Section 34 of the so-called Merchant Marine Act an exercise of any constitutional power possessed by the Congress." Id. The statement also defended President Wilson's decision to sign the bill and noted that "the fact that one section of the law involves elements of illegality rendering the section inoperative need not affect the validity and operation of the Act as a whole." 5 Green Haywood Hackworth, Digest of International Law 324 (1943).

2) Special Message to the Congress Upon Signing the Department of Defense Appropriation Act, Pub. Papers of Dwight D. Eisenhower 688 (July 13, 1955): President Eisenhower, in signing a bill (H.R. 6042) that contained a legislative veto, stated that the legislative veto "will be regarded as invalid by the executive branch of the Government in the administration of H.R. 6042, unless otherwise determined by a court of competent jurisdiction." Id. at 689.

3) Memorandum on Informing Congressional Committees of Changes Involving Foreign Economic Assistance Funds, Pub. Papers of John F. Kennedy 6 (Jan. 9, 1963): President Kennedy stated that a provision in the bill he was signing contained an unconstitutional legislative veto. He announced that "[i]t is therefore my intention . . . to treat this provision as a request for information." Id.

4) Statement by the President Upon Approving the Public Works Appropriations Act, Pub. Papers of Lyndon B. Johnson 104 (Dec. 31, 1963): President Johnson also found that a legislative veto provision was unconstitutional and stated that he would treat it as a request for information.

5) Statement About Signing the Public Buildings Amendments of 1972, Pub. Papers of

Richard Nixon 686 (June 17, 1972): President Nixon stated that a clause conditioning the use of authority by the executive branch on the approval of a congressional committee was unconstitutional. He ordered the agency involved to comply with "the acceptable procedures" in the bill "without regard to the unconstitutional provisions I have previously referred to." Id. at 687.

6) Statement on Signing the Department of Defense Appropriation Act of 1976, Pub. Papers of Gerald R. Ford 241 (Feb. 10, 1976): President Ford stated that a committee approval mechanism was unconstitutional and announced that he would "treat the unconstitutional provision . . . to the extent it requires further Congressional committee approval, as a complete nullity." Id. at 242.

7) Statement on Signing Coastal Zone Management Improvement Act of 1980, Pub. Papers of Jimmy Carter 2335 (Oct. 18, 1980): President Carter stated that a legislative veto provision was unconstitutional and that any attempt at a legislative veto would "not [be] regarded as legally binding." Id.

8) Statement on Signing the Union Station Redevelopment Act of 1981, Pub. Papers of Ronald Reagan 1207 (Dec. 29, 1981): President Reagan stated that a legislative veto was unconstitutional and announced that "[t]he Secretary of Transportation will not . . . regard himself as legally bound by any such resolution." Id.

9) Statement On Signing the National and Community Service Act of 1990, Pub. Papers of George Bush 1613 (Nov. 16, 1990): President Bush rejected the constitutionality of provisions that required a Presidentially appointed board exercising executive authority to include, among its 21 members, "seven members nominated by the Speaker of the House of Representatives . . . [and] seven members nominated by the Majority Leader of the Senate." Id. at 1614. He announced that the restrictions on his choice of nominees to the board "are without legal force or effect." Id.

10) 7 A Compilation of the Messages and Papers of the Presidents 377 (Aug. 14, 1876) (Pres. Grant): This is one of the earliest of many instances of a President "construing" a provision (to avoid constitutional problems) in a way that seems to amount to a refusal to enforce a provision of it. An 1876 statute directed that notices be sent to certain diplomatic and consular officers "to close their offices." President Grant, in signing the bill, stated that, "[i]n the literal sense of this direction it would be an invasion of the constitutional prerogatives and duty of the Executive." Id. In order to avoid this problem, President Grant "constru[ed]" this provision "only to exercise the constitutional prerogative of Congress over the expenditures of the Government," not to "imply[] a right in the legislative branch to direct the closing or discontinuing of any of the diplomatic or consular offices of the Government." Id. at 378.

Other Presidential Documents

1) A Presidential Legal Opinion, 66 Harv. L. Rev. 1353 (1953): This was a legal opinion from President Franklin Roosevelt to Attorney General Jackson. President Roosevelt stated that he was signing the Lend-Lease Act despite a provision providing for a legislative veto, "a provision which, in my opinion, is clearly unconstitutional." Id. at 1357. The President stated that, "[i]n order that I may be on record as indicating my opinion that the foregoing provision of the so-called Lend-Lease Act is unconstitutional, and in order that my approval

of the bill, due to the existing exigencies of the world situation, may not be construed as a tacit acquiescence in any contrary view, I am requesting you to place this memorandum in the official files of the Department of Justice. I am desirous of having this done for the further reason that I should not wish my action in approving the bill which includes this invalid clause, to be used as a precedent for any future legislation comprising provisions of a similar nature." Id. at 1358.

2) Message to the Congress on Legislative Vetoes, Pub. Papers of Jimmy Carter 1146 (Jun. 21, 1978): In this memorandum President Carter expressed his strong opposition to legislative vetoes and stated that "[t]he inclusion of [a legislative veto] in a bill will be an important factor in my decision to sign or to veto it." Id. at 1148. He further stated that, "[a]s for legislative vetoes over the execution of programs already prescribed in legislation and in bills I must sign for other reasons, the Executive Branch will generally treat them as 'report-and-wait' provisions. In such a case, if Congress subsequently adopts a resolution to veto an Executive action, we will give it serious consideration, but we will not, under our reading of the Constitution, consider it legally binding." Id. at 1149.

Historical Materials

1) Statement of James Wilson on December 1, 1787 on the Adoption of the Federal Constitution, reprinted in 2 Jonathan Elliot, Debates on the Federal Constitution 418 (1836): Wilson argued that the Constitution imposed significant -- and sufficient -- restraints on the power of the legislature, and that the President would not be dependent upon the legislature. In this context, he stated that "the power of the Constitution was paramount to the power of the legislature acting under that Constitution; for it is possible that the legislature . . . may transgress the bounds assigned to it, and an act may pass, in the usual mode, notwithstanding that transgression; but when it comes to be discussed before the judges,-- when they consider its principles, and find it to be incompatible with the superior power of the Constitution,-- it is their duty to pronounce it void . . . . In the same manner, the President of the United States could shield himself, and refuse to carry into effect an act that violates the Constitution." Id. at 445-46.

2) Letter from Chief Justice Chase to Gerrit Smith (Apr. 19, 1868), quoted in J. Schuckers, The Life and Public Services of Salmon Portland Chase 577 (1874): Chase stated that President Johnson took the proper action in removing Secretary of War Stanton without Senate approval, in light of Johnson's belief that the statutory restriction on his removal authority was unconstitutional. In this regard, Chase commented that "the President had a perfect right, and indeed was under the highest obligation, to remove Mr. Stanton, if he made the removal not in wanton disregard of a constitutional law, but with a sincere belief that the Tenure-of-Office Act was unconstitutional and for the purpose of bringing the question before the Supreme Court." Id. at 578.

Congressional Materials

1) The President's Suspension of the Competition in Contracting Act is Unconstitutional, H.R. Rep. No. 138, 99th Cong., 1st Sess. (1985): The House Committee on Government Operations concluded that the President lacked the authority to refuse to implement any provision of the Competition in Contracting Act. The Committee stated that, "[t]o adopt the view that one's oath to support and defend the Constitution is a license to exercise any available power in furtherance of one's own constitutional interpretation would quickly destroy the entire constitutional scheme. Such a view, whereby the President pledges

allegiance to the Constitution but then determines what the Constitution means, inexorably leads to the usurpation by the Executive of the others' roles." Id. at 11. The Committee also stated that "[t]he Executive's suspension of the law circumvents the constitutionally specified means for expressing Executive objections to law and is a constitutionally impermissible absolute veto power." Id. at 13.

2) Memorandum from the Congressional Research Service to the Committee on Government Operations concerning "The Executive's Duty to Enforce the Laws" (Feb. 6, 1985), reprinted in Constitutionality of GAO's Bid Protest Function: Hearings Before a Subcomm. of the House Comm. on Government Operations, 99th Cong., 1st Sess. 544 (1985): This memorandum stated that the President lacks the authority to decline to enforce statutes. The CRS argued that "[t]he refusal of the President to execute the law is indistinguishable from the power to suspend the laws. That power, as is true of the power to amend or to revive an expired law, is a legislative power." Id. at 554.

Cases (not included in the submitted materials)

1) Myers v. United States, 272 U.S. 52 (1926): The President refused to comply with -- that is, enforce -- a limitation on his power of removal that he regarded as unconstitutional, even though the question had not been addressed by the Supreme Court. A member of Congress, Senator Pepper, urged the Supreme Court to uphold the validity of the provision. The Supreme Court vindicated the President's interpretation without any member of the Court indicating that the President had acted unlawfully or inappropriately in refusing to enforce the removal restriction based on his belief that it was unconstitutional.

2) United States v. Lovett, 328 U.S. 303 (1946): The President enforced a statute that directed him to withhold compensation from three named employees, even though the President believed the law to be unconstitutional. The Justice Department argued against the constitutionality of the statute in the ensuing litigation. (The Court permitted an attorney to appear on behalf of Congress, amicus curiae, to defend the statute.)

3) INS v. Chadha, 462 U.S. 919 (1983): This case involved the withholding of citizenship from an applicant pursuant to a legislative veto of an Attorney General decision to grant citizenship. Despite a Carter Administration policy against complying with legislative vetoes (see Carter Presidential memorandum, supra), the executive branch enforced the legislative veto, and, in so doing, allowed for judicial review of the statute. As with Lovett, the Justice Department argued against the constitutionality of the statute.

4) Morrison v. Olson, 487 U.S. 654 (1988): The President viewed the independent counsel statute as unconstitutional. The Attorney General enforced it, making findings and forwarding them to the Special Division. In litigation, however, the Justice Department attacked the constitutionality of the statute and left its defense to the Senate Counsel, as amicus curiae, and the independent counsel herself.

5) Freytag v. Commissioner, 501 U.S. 868 (1991): A unanimous Court ruled that the appointment of special trial judges by the Chief Judge of the United States Tax Court did not violate the Appointments Clause. Five Justices concluded that the Tax Court was a "Court of Law" for Appointments Clause purposes, despite the fact that it was an Article I court, so that the Tax Court could constitutionally appoint inferior officers. Four Justices, in a concurrence by Justice Scalia, contended that the Tax Court was a "Department" under the

Appointments Clause. The concurrence stated that "Court of Law" did not include Article I courts and that the Framers intended to prevent Congress from having the power both to create offices and to appoint officers. In this regard, the concurrence stated that "it was not enough simply to repose the power to execute the laws (or to appoint) in the President; it was also necessary to provide him with the means to resist legislative encroachment upon that power. The means selected were various, including a separate political constituency, to which he alone was responsible, and the power to veto encroaching laws, see Art. I, § 7, or even to disregard them when they are unconstitutional." Id. at 906 (Scalia, J., concurring).

6) Lear Siegler, Inc., Energy Products Division v. Lehman, 842 F.2d 1102 (9th Cir. 1988), withdrawn in part 893 F.2d 205 (9th Cir. 1990) (en banc): The President refused to comply with provisions of the Competition in Contracting Act that he viewed as unconstitutional and thereby allowed for judicial resolution of the issue. The Ninth Circuit rejected the President's arguments about the constitutionality of the provisions. The court further determined that Lear Siegler was a prevailing party and was entitled to attorneys' fees, because the executive branch acted in bad faith in refusing to execute the contested provisions. In this regard, the court stated that the President's action was "utterly at odds with the texture and plain language of the Constitution," because a statute is part of the law of the land that the President is obligated to execute. Id. at 1121, 1124. On rehearing en banc, the court ruled that Lear Siegler was not a prevailing party and withdrew the sections of the opinion quoted above.

APPENDIX E

A Slip of the Pen

Walter Dellinger

July 31, 2006

The New York Times
nytimes.com

July 31, 2006

OP-ED CONTRIBUTOR

A Slip of the Pen

By WALTER DELLINGER

Correction Appended

Chapel Hill, N.C.

"THIS is one of those historic moments. The threat to our Republic posed by presidential signing statements is both imminent and real unless immediate corrective action is taken."

That is what the head of the American Bar Association said last week as he unveiled a widely publicized report by an association panel criticizing presidential signing statements, by which a president announces his intention not to comply with a provision of a signed law because he believes it to be unconstitutional. The report catalogues President Bush's highly questionable use of such statements, including his apparent intent to execute only selectively legislation he signed last year banning cruel treatment of prisoners in American custody.

Ultimately, however, the bar association report misdiagnoses the problem. It erroneously interprets the Constitution as forbidding the president — any president, in any circumstance — to declare, while signing a bill into law, that the bill has an unconstitutional provision that he will not enforce. Paradoxically, the report studiously avoids addressing the real problem, which is not the president's right to act on his constitutional views, but that some of this president's constitutional views are fundamentally wrong.

Until the bar association panel issued its report, I had thought the matter was settled. Every modern president has agreed that there are circumstances in which the president may appropriately decline to enforce a statute he deems unconstitutional. There is, moreover, significant judicial approval of the practice, most notably the Supreme Court's 1926 decision in Myers v. United States, in which the Court sustained President Calvin Coolidge's refusal to comply with a law that would have restricted the executive's right to fire postmasters. Not a single member of the Court suggested the president had acted improperly in disregarding the statute.

A president's ability to decline to enforce unconstitutional laws is an important safeguard of both separation of powers and individual liberty. What if Congress enacted legislation requiring a president to forcibly seize a brain-dead patient and place her on artificial life support, contrary to her rights? Does the bar association panel really believe the president would have to comply?

Or suppose President Bush signed a law, passed by a lame-duck Congress, which prohibited the removal of the defense secretary for 10 years. If the next president complied with the statute, Secretary Donald Rumsfeld could remain in office against the wishes of the new president, and no one would have standing to challenge this violation in court.

If a president may decline to execute an unconstitutional law enacted before he assumed office, he should retain that right in the case of an unconstitutional provision of a bill he signs himself. Of course, if presented with a bill that is entirely unconstitutional, the proper response is a veto.

But most laws today are passed as part of multiprovision, omnibus legislation. Such measures may contain urgently needed appropriations, or have been passed by a fragile coalition or a Congress that has adjourned. When a bill with a thousand provisions includes one that is unconstitutional, the Constitution does not force the president to choose between two starkly unpalatable options: veto the entire bill or enforce an unconstitutional provision. A signing statement that announces the president's intention to disregard the invalid provision offers a valuable, and lawful, alternative.

The bar association panel's report states that its recommendations should not be viewed "as an attack on the current president." Yet it is precisely this administration's sweeping claims of unilateral executive power to disregard statutes that should be the focus of debate. Distracted by President Bush's abuse of signing statements, the panel failed to address the real and significant risk posed by the administration's extravagant claims of unilateral authority to govern.

In defending the legitimacy of President Bush's signing statements, senior administration officials have repeatedly, and correctly, cited a 1994 memorandum I wrote as head of the Justice Department's Office of Legal Counsel. They have largely ignored, however, the memorandum's cautionary guidelines.

A president, the memo stated, should presume laws are valid and accord great deference to Congress's view that its acts are consistent with the Constitution. A president should also recognize that, while the Supreme Court is not the sole arbiter of constitutionality, it plays a

special role in resolving such questions.

In some instances, only a president's decision to refuse to execute a law will create the opportunity for judicial review of the disputed issue. In other cases, the reverse may be true. Proper deference to the court, the memo suggested, generally favors whichever course of action facilitates the court's involvement.

If conscientiously followed, these principles reduce the risk that a president will assert a dubious claim of unconstitutionality in order to sidestep a law he simply doesn't like.

The Bush administration's frequent and seemingly cavalier refusal to enforce laws, which is aggravated by its avoidance of judicial review and even public disclosure of its actions, places it at odds with these principles and with predecessors of both parties.

It is a mistake, however, to respond to these abuses by denying to this and future presidents the essential authority, in appropriate and limited circumstances, to decline to execute unconstitutional laws. A president is right to use signing statements to explain how he intends to faithfully execute the law and uphold the Constitution.

Walter Dellinger, a law professor at Duke University, was the head of the Justice Department's Office of Legal Counsel from 1993 to 1996.

Correction

An Op-Ed article on Monday, about presidential signing statements, misidentified the president whose right to fire postmasters was upheld by the Supreme Court. It was Woodrow Wilson, not Calvin Coolidge.

Copyright 2006 The New York Times Company

Privacy Policy | Search | Corrections | XML | Help | Contact Us | Work for Us | Site Map

APPENDIX F

Principles to Guide the Office of Legal Counsel

Walter Dellinger, *et al.*

December 21, 2004

Principles to Guide the Office of Legal Counsel
December 21, 2004

The Office of Legal Counsel (OLC) is the Department of Justice component to which the Attorney General has delegated the function of providing legal advice to guide the actions of the President and the agencies of the executive branch. OLC's legal determinations are considered binding on the executive branch, subject to the supervision of the Attorney General and the ultimate authority of the President. From the outset of our constitutional system, Presidents have recognized that compliance with their constitutional obligation to act lawfully requires a reliable source of legal advice. In 1793, Secretary of State Thomas Jefferson, writing on behalf of President Washington, requested the Supreme Court's advice regarding the United States' treaty obligations with regard to the war between Great Britain and France. The Supreme Court declined the request, in important measure on the grounds that the Constitution vests responsibility for such legal determinations within the executive branch itself: "[T]he three departments of government ... being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extrajudicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions seems to have been purposely as well as expressly united to the executive departments." Letter from John Jay to George Washington, August 8, 1793, *quoted in* 4 The Founders' Constitution 258 (Philip B. Kurland & Ralph Lerner, eds. 1987).

From the Washington Administration through the present, Attorneys General, and in recent decades the Office of Legal Counsel, have served as the source of legal determinations regarding the executive's legal obligations and authorities. The resulting body of law, much of which is published in volumes entitled Opinions of the Attorney General and Opinions of the Office of Legal Counsel, offers powerful testimony to the importance of the rule-of-law values that President Washington sought to secure and to the Department of Justice's profound tradition of respect for the rule of law. Administrations of both political parties have maintained this tradition, which reflects a dedication to the rule of law that is as significant and as important to the country as that shown by our courts. As a practical matter, the responsibility for preserving this tradition cannot rest with OLC alone. It is incumbent upon the Attorney General and the President to ensure that OLC's advice is sought on important and close legal questions and that the advice given reflects the best executive branch traditions. The principles set forth in this document are based in large part on the longstanding practices of the Attorney General and the Office of Legal Counsel, across time and administrations.

1. When providing legal advice to guide contemplated executive branch action, OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration's pursuit of desired policies. The advocacy model of lawyering, in which lawyers craft merely plausible legal arguments to support their clients' desired actions, inadequately promotes the President's constitutional obligation to ensure the legality of executive action.

OLC's core function is to help the President fulfill his constitutional duty to uphold the Constitution and "take care that the laws be faithfully executed" in all of the varied work of the executive branch. OLC provides the legal expertise necessary to ensure the lawfulness of presidential and executive branch action, including contemplated action that raises close and difficult questions of law. To fulfill this function appropriately, OLC must provide advice based on its best understanding of what the law requires. OLC should not simply provide an advocate's best defense of contemplated action that OLC actually believes is best viewed as unlawful. To do so would deprive the President and other executive branch decision makers of critical information and, worse, mislead them regarding the legality of contemplated action. OLC's tradition of principled legal analysis and adherence to the rule of law thus is constitutionally grounded and also best serves the interests of both the public and the presidency, even though OLC at times will determine that the law precludes an action that a President strongly desires to take.

2. *OLC's advice should be thorough and forthright, and it should reflect all legal constraints, including the constitutional authorities of the coordinate branches of the federal government–the courts and Congress–and constitutional limits on the exercise of governmental power.*

The President is constitutionally obligated to "preserve, protect and defend" the Constitution in its entirety–not only executive power, but also judicial and congressional power and constitutional limits on governmental power–and to enforce federal statutes enacted in accordance with the Constitution. OLC's advice should reflect all relevant legal constraints. In addition, regardless of OLC's ultimate legal conclusions concerning whether proposed executive branch action lawfully may proceed, OLC's analysis should disclose, and candidly and fairly address, the relevant range of legal sources and substantial arguments on all sides of the question.

3. *OLC's obligation to counsel compliance with the law, and the insufficiency of the advocacy model, pertain with special force in circumstances where OLC's advice is unlikely to be subject to review by the courts.*

In formulating its best view of what the law requires, OLC always should be mindful that the President's legal obligations are not limited to those that are judicially enforceable. In some circumstances, OLC's advice will guide executive branch action that the courts are unlikely to review (for example, action unlikely to result in a justiciable case or controversy) or that the courts likely will review only under a standard of extreme deference (for example, some questions regarding war powers and national security). OLC's advice should reflect its best view of all applicable legal constraints, and not only legal constraints likely to lead to judicial invalidation of executive branch action. An OLC approach that instead would equate "lawful" with "likely to escape judicial condemnation" would ill serve the President's constitutional duty by failing to

describe all legal constraints and by appearing to condone unlawful action as long as the President could, in a sense, get away with it. Indeed, the absence of a litigation threat signals special need for vigilance: In circumstances in which judicial oversight of executive branch action is unlikely, the President–and by extension OLC–has a special obligation to ensure compliance with the law, including respect for the rights of affected individuals and the constitutional allocation of powers.

4. OLC's legal analyses, and its processes for reaching legal determinations, should not simply mirror those of the federal courts, but also should reflect the institutional traditions and competencies of the executive branch as well as the views of the President who currently holds office.

As discussed under principle 3, jurisdictional and prudential limitations do not constrain OLC as they do courts, and thus in some instances OLC appropriately identifies legal limits on executive branch action that a court would not require. Beyond this, OLC's work should reflect the fact that OLC is located in the executive branch and serves both the institution of the presidency and a particular incumbent, democratically elected President in whom the Constitution vests the executive power. What follows from this is addressed as well under principle 5. The most substantial effects include the following: OLC typically adheres to judicial precedent, but that precedent sometimes leaves room for executive interpretive influences, because doctrine at times genuinely is open to more than one interpretation and at times contemplates an executive branch interpretive role. Similarly, OLC routinely, and appropriately, considers sources and understandings of law and fact that the courts often ignore, such as previous Attorney General and OLC opinions that themselves reflect the traditions, knowledge and expertise of the executive branch. Finally, OLC differs from a court in that its responsibilities include facilitating the work of the executive branch and the objectives of the President, consistent with the requirements of the law. OLC therefore, where possible and appropriate, should recommend lawful alternatives to legally impermissible executive branch proposals. Notwithstanding these and other significant differences between the work of OLC and the courts, OLC's legal analyses always should be principled, thorough, forthright, and not merely instrumental to the President's policy preferences.

5. OLC advice should reflect due respect for the constitutional views of the courts and Congress (as well as the President). On the very rare occasion when the executive branch—usually on the advice of OLC—declines fully to follow a federal statutory requirement, it typically should publicly disclose its justification.

OLC's tradition of general adherence to judicial (especially Supreme Court) precedent and federal statutes reflects appropriate executive branch respect for the coordinate branches of the federal government. On very rare occasion, however, Presidents, often with the advice of OLC, appropriately act on their own understanding of constitutional meaning (just as Congress at times enacts laws based on its own constitutional views). To begin with relatively uncontroversial examples, Presidents at

times veto bills they believe are unconstitutional and pardon individuals for violating what Presidents believe are unconstitutional statutes, even when the Court would uphold the statute or the conviction against constitutional challenge. Far more controversial are rare cases in which Presidents decide to refuse to enforce or otherwise comply with laws they deem unconstitutional, either on their face or in some applications. The precise contours of presidential power in such contexts are the subject of some debate and beyond the scope of this document. The need for transparency regarding interbranch disagreements, however, should be beyond dispute. At a bare minimum, OLC advice should fully address applicable Supreme Court precedent, and, absent the most compelling need for secrecy, any time the executive branch disregards a federal statutory requirement on constitutional grounds, it should publicly release a clear statement explaining its deviation. Absent transparency and clarity, client agencies might experience difficulty understanding and applying such legal advice, and the public and Congress would be unable adequately to assess the lawfulness of executive branch action. Indeed, federal law currently requires the Attorney General to notify Congress if the Department of Justice determines either that it will not enforce a provision of law on the grounds that it is unconstitutional or that it will not defend a provision of law against constitutional challenge.

6. OLC should publicly disclose its written legal opinions in a timely manner, absent strong reasons for delay or nondisclosure.

OLC should follow a presumption in favor of timely publication of its written legal opinions. Such disclosure helps to ensure executive branch adherence to the rule of law and guard against excessive claims of executive authority. Transparency also promotes confidence in the lawfulness of governmental action. Making executive branch law available to the public also adds an important voice to the development of constitutional meaning–in the courts as well as among academics, other commentators, and the public more generally–and a particularly valuable perspective on legal issues regarding which the executive branch possesses relevant expertise. There nonetheless will exist some legal advice that properly should remain confidential, most notably, some advice regarding classified and some other national security matters. OLC should consider the views regarding disclosure of the client agency that requested the advice. Ordinarily, OLC should honor a requestor's desire to keep confidential any OLC advice that the proposed executive action would be unlawful, where the requestor then does not take the action. For OLC routinely to release the details of all contemplated action of dubious legality might deter executive branch actors from seeking OLC advice at sufficiently early stages in policy formation. In all events, OLC should in each administration consider the circumstances in which advice should be kept confidential, with a presumption in favor of publication, and publication policy and practice should not vary substantially from administration to administration. The values of transparency and accountability remain constant, as do any existing legitimate rationales for secret executive branch law. Finally, as discussed in principle 5, Presidents, and by extension OLC, bear a special responsibility to disclose publicly and explain any actions that conflict with federal statutory requirements.

7. OLC should maintain internal systems and practices to help ensure that OLC's legal advice is of the highest possible quality and represents the best possible view of the law.

OLC systems and processes can help maintain high legal standards, avoid errors, and safeguard against tendencies toward potentially excessive claims of executive authority. At the outset, OLC should be careful about the form of requests for advice. Whenever possible, agency requests should be in writing, should include the requesting agency's own best legal views as well as any relevant materials and information, and should be as specific as circumstances allow. Where OLC determines that advice of a more generally applicable nature would be helpful and appropriate, it should take special care to consider the implications for its advice in all foreseeable potential applications. Also, OLC typically should provide legal advice in advance of executive branch action, and not regarding executive branch action that already has occurred; legal "advice" after the fact is subject to strong pressures to follow an advocacy model, which is an appropriate activity for some components of the Department of Justice but not usually for OLC (though this tension may be unavoidable in some cases involving continuing or potentially recurring executive branch action). OLC should recruit and retain attorneys of the highest integrity and abilities. OLC should afford due respect for the precedential value of OLC opinions from administrations of both parties; although OLC's current best view of the law sometimes will require repudiation of OLC precedent, OLC should never disregard precedent without careful consideration and detailed explanation. Ordinarily OLC legal advice should be subject to multiple layers of scrutiny and approval; one such mechanism used effectively at times is a "two deputy rule" that requires at least two supervising deputies to review and clear all OLC advice. Finally, OLC can help promote public confidence and understanding by publicly announcing its general operating policies and procedures.

8. Whenever time and circumstances permit, OLC should seek the views of all affected agencies and components of the Department of Justice before rendering final advice.

The involvement of affected entities serves as an additional check against erroneous reasoning by ensuring that all views and relevant information are considered. Administrative coordination allows OLC to avail itself of the substantive expertise of the various components of the executive branch and to avoid overlooking potentially important consequences before rendering advice. It helps to ensure that legal pronouncements will have no broader effect than necessary to resolve the question at hand. Finally, it allows OLC to respond to all serious arguments and thus avoid the need for reconsideration.

9. OLC should strive to maintain good working relationships with its client agencies, and especially the White House Counsel's Office, to help ensure that OLC is consulted,

before the fact, regarding any and all substantial executive branch action of questionable legality.

Although OLC's legal determinations should not seek simply to legitimate the policy preferences of the administration of which it is a part, OLC must take account of the administration's goals and assist their accomplishment within the law. To operate effectively, OLC must be attentive to the need for prompt, responsive legal advice that is not unnecessarily obstructionist. Thus, when OLC concludes that an administration proposal is impermissible, it is appropriate for OLC to go on to suggest modifications that would cure the defect, and OLC should stand ready to work with the administration to craft lawful alternatives. Executive branch officials nonetheless may be tempted to avoid bringing to OLC's attention strongly desired policies of questionable legality. Structures, routines and expectations should ensure that OLC is consulted on all major executive branch initiatives and activities that raise significant legal questions. Public attention to when and how OLC generally functions within a particular administration also can help ensure appropriate OLC involvement.

10. OLC should be clear whenever it intends its advice to fall outside of OLC's typical role as the source of legal determinations that are binding within the executive branch.

OLC sometimes provides legal advice that is not intended to inform the formulation of executive branch policy or action, and in some such circumstances an advocacy model may be appropriate. One common example: OLC sometimes assists the Solicitor General and the litigating components of the Department of Justice in developing arguments for presentation to a court, including in the defense of congressional statutes. The Department of Justice typically follows a practice of defending an act of Congress against constitutional challenge as long as a reasonable argument can be made in its defense (even if that argument is not the best view of the law). In this context, OLC appropriately may employ advocacy-based modes of analysis. OLC should ensure, however, that all involved understand whenever OLC is acting outside of its typical stance, and that its views in such cases should not be taken as authoritative, binding advice as to the executive branch's legal obligations. Client agencies expect OLC to provide its best view of applicable legal constraints and if OLC acts otherwise without adequate warning, it risks prompting unlawful executive branch action.

The following former Office of Legal Counsel attorneys prepared and endorse this document:

Walter E. Dellinger, Assistant Attorney General 1993-96
Dawn Johnsen, Acting Assistant Attorney General 1997-98; Deputy AAG 1993-97
Randolph Moss, Assistant Attorney General 2000-01, Acting 1998-2000; Deputy AAG 1996-98
Christopher Schroeder, Acting Assistant Attorney General 1997; Deputy AAG 1994-96
Joseph R. Guerra, Deputy Assistant Attorney General 1999-2001

Beth Nolan, Deputy Assistant Attorney General 1996-99; Attorney Advisor 1981-85
Todd Peterson, Deputy Assistant Attorney General 1997-99; Attorney Advisor 1982-85
Cornelia T.L. Pillard, Deputy Assistant Attorney General 1998-2000
H. Jefferson Powell, Deputy Assistant Attorney General and Consultant 1993-2000
Teresa Wynn Roseborough, Deputy Assistant Attorney General 1994-1996
Richard Shiffrin, Deputy Assistant Attorney General, 1993-97
William Michael Treanor, Deputy Assistant Attorney General 1998-2001
David Barron, Attorney Advisor 1996-99
Stuart Benjamin, Attorney Advisor 1992-1995
Lisa Brown, Attorney Advisor 1996-97
Pamela Harris, Attorney Advisor 1993-96
Neil Kinkopf, Attorney Advisor 1993-97
Martin Lederman, Attorney Advisor 1994-2002
Michael Small, Attorney Advisor, 1993-1996