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

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

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

THURSDAY, JUNE 26, 2008

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

The Subcommittee met, pursuant to notice, at 10:12 a.m., in room 2141, Rayburn House Office Building, the Honorable Jerrold Nadler (Chairman of the Subcommittee) presiding.

Present: Representatives Conyers, Nadler, Davis, Wasserman Schultz, Ellison, Scott, Watt, Cohen, Franks, and King.

Also present: Representative Delahunt.

Staff present: Sam Sokol, Majority Counsel; David Lachmann, Subcommittee Majority Chief of Staff; Caroline Mays, Majority Professional Staff Member; and Paul B. Taylor, Minority Counsel.

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

Today's hearing will be the third in our series of hearings on the role of Administration lawyers in the formulation of interrogation policy.

I want to say at the outset that the subject matter we are considering today is of utmost importance to the integrity and honor of this nation.

This hearing is very important and it will not be permitted to be disrupted by anyone in the audience for any purpose. Anyone who is disruptive in any way will be expelled immediately and without further proceedings.

Without objection, the Chair is authorized to declare a recess of the hearing, which I hopefully will not have to do, except if there are votes on the floor.

We will now proceed to Members' opening statements.

As has been the practice in this Subcommittee, I will recognize the Chair and Ranking Members of the Subcommittee and of the full Committee to make opening statements.

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

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

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

Today, we commence the third in our series of hearings on the role of Administration lawyers in the development and implementation of interrogation rules, which have drawn criticism here in the United States and around the world.

I think it does not go too far to say that the reputation of this nation and our standing as the leading exponent of human rights and human dignity have been besmirched by the policies of this Administration.

Legal memos have been written defining torture out of existence and what almost everyone except this Administration regards torture has been inflicted on prisoners.

Today, we will look at how these policies came into being and how they were applied.

I think I speak for many of my colleagues when I say that the more we find about what was done and how it was concerned and how it was justified, the more appalled we become.

These policies have been kept from the Congress and the American people by assertions of secrecy, assorted privileges and flat refusals to disclose what has been done and why, even in classified settings.

As a result, the information that we do know has come out in dribs and drabs, often through the press.

That is unacceptable.

We live in a democracy composed of three equal branches of government. No one has the right to arrogate to themselves the complete non-checked power of the power state. That simply defeats the design of our system of checks and balances, which the founders of this nation crafted to ensure our freedom and protect us from the unaccountable monarchy against which we rebelled and to which we do not want to return.

Today, we are joined by two of the architects of those policies, one testifying voluntarily and one testifying under subpoena, and I hope we will be able to have a free and open discussion of these very important questions.

Clearly, we do not want to reveal classified information in this open setting, but neither will we be deterred by expansive and unjustified claims of assorted privileges.

I would ask that if the witnesses feel the need to invoke a privilege, they do so judiciously and that they provide the specific basis for that claim of privilege.

I look forward to the testimony of our witnesses and I hope we can finally begin getting to the bottom of these important questions.

I yield back the balance of my time.

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

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

I thank all the panelists who are here with us today.

Mr. Chairman, as I have said before, the subject of detainee treatment has been the subject of over 60 hearings, markups and briefings during the last Congress in the House Armed Services Committee alone, of which I am a Member.

And I will say, then, as I have said in this Committee many times, torture is banned by various provisions of law, including the 2005 Senate amendment prohibiting the cruel, inhuman or degrading treatment of anyone in U.S. custody.

Severe interrogations, by contrast, do not involve torture and they are legal. The CIA waterboarded 9/11 mastermind, Khalid Sheikh Mohammed, Abu Zubaydah, and Abdul Rahim al-Nashiri.

The results of these severe interrogations were of immeasurable benefits and perhaps saved lives in the American society.

CIA Director Hayden has said that Mohammed and Zubaydah provided roughly 25 percent of the information the CIA had on al-Qaeda from human sources.

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

And, again, these are Alan Dershowitz's words, not mine.

Torture, as I have said, again, should be illegal. But when severe interrogation methods that are not torture are contemplated, the law requires that their legitimacy be evaluated in context.

To put some of this in context, it is useful to note that the comments of Jack Goldsmith, who formerly served as the assistant Attorney General with the Office of Legal Counsel, at a November 12, 2007 discussion at Duke Law School, Jack Goldsmith said the following, "It is widely thought that the Administration is exaggerating the terrorist threat for public consumption.

In my experience, the opposite is true. The threat, as the government perceives it, is much more intense, fear-inducing, than the government lets on to the public."

Mr. Goldsmith went on to say of his experience in this Administration, "I don't think it is right to characterize it as policymakers using the fear of an attack to try to influence the lawyers, because everyone understood those stakes, because we were all reading the same reports."

Stuart Taylor has written the following in the National Journal, "The CIA had reason to believe that unlocking the secrets in Khalid Sheikh Mohammed's mind might save hundreds of lives, perhaps many, many more, in the unlikely, but then conceivable event that al-Qaeda was preparing a nuclear or biological attack on an American city."

Mr. Chairman, Mr. Taylor is correct. For example, at a May 6 Constitutional Subcommittee hearing, I asked the Democrat witness, Marjorie Cohn, president of the National Lawyers Guild, how she would write a statute defining how terrorists should be treated when they refuse to provide vital information voluntarily.

And I want to just have us listen to her reply.

[Begin audio clip.]

MS. COHN. What kind of statute would I write? I would write a statute that says that when you are interrogating a prisoner and you want to get information from him, you treat him with kindness, compassion and empathy. You gain his trust.

You get him to like and trust you and then he will turn over information to you.

[End audio clip.]

Mr. FRANKS. Mr. Chairman, I want you to know, as sincerely as I can say, that I wish that this lady were correct. I wish it were that simple. I wish it could be that way.

But I would suggest that the statement she made is dangerously naive and any successful effort to stop another devastating terrorist attack must necessarily involve a more serious and realistic response than that offered by Ms. Cohn.

And I hope our discussion today rises to a higher level of analysis. It is critical to American national security.

And, finally, I would like to note that the dangers of moving back toward the failed model of treating terrorists like ordinary criminals was made perfectly clear in a recently written article on the interrogation of Khalid Sheikh Mohammed.

The article appeared last Sunday in the New York Times and it makes clear how we can expect terrorists to react when they are granted the rights of criminal defendants.

According to the New York Times, Khalid Sheikh Mohammed met his captors at first with a cocky defiance, telling one veteran CIA officer, a former Pakistan station chief, that he would talk only when he got to New York and was assigned a lawyer.

Of course, this was the experience of his nephew and partner in terrorism, Ramzi Yousef, after Yousef's arrest in 1995.

Unfortunately, the Supreme Court of the United States has taken steps to grant Khalid Sheikh Mohammed's wish, and I hope the Congress does not make the same mistake.

Before I yield back, I would also like to ask unanimous consent that a small set of exhibits provided by Mr. Addington would be entered into the hearing record.

Mr. NADLER. We would have liked testimony, too, but without objection.

[The information referred to is available in the Appendix.]

Mr. FRANKS. Thank you. Thank you, Mr. Chairman.

I understand Mr. Addington may be referring to some of these things during his testimony here today. Electronic copies have been made available to Member offices.

And I thank you for your indulgence, Mr. Chairman.

Mr. NADLER. Well, you are quite welcome. But what I was referring to was the fact that we normally expect witnesses to submit written testimony and Mr. Addington hasn't done that, but has submitted these exhibits 1 through 10, which will be entered into the record.

Before we go on to our next statement, I want to defend the reputation of Mr. Dershowitz against allegations that he is an ultraliberal.

He would not so regard himself and he did write a book recently in which he advocated torture through warrant. He is not the best witness as to what constitutes torture.

In any event, we will now recognize the distinguished Chairman of the full Committee for 5 minutes, Mr. Conyers.

Mr. CONYERS. Thank you, Chairman Nadler, Ranking Member Franks, and all of my colleagues here.

This is an important day. I am so glad to see the witnesses that are here.

Now, I don't want to begin a dialogue with Trent Franks, because have plenty time for that, but Marjorie Cohn's response was to a question asked by Republicans on the Committee. She didn't come here as a person to give us advice on what we ought to do.

Someone asked her that and that is what she said.

I am more interested in what we are going to say in response to that question, not to any individual lawyer or individual citizen, and where we want to go with another person that was given a lawyer in New York.

I don't know if that is shocking to anybody. We normally provide people that are going to be tried criminally with counsel. That has been the custom in the United States for quite a period of time now.

So I just want to thank the Committee, this Judiciary Committee I am so proud of, the Constitution Committee in particular, and the way we go about making history around these questions.

Now, we have several points here that will be examined. We have reports stating that our witnesses today played a central role in drafting Justice Department legal opinions on interrogations.

Some of those opinions have been withdrawn. But let's listen to Senator Lindsey Graham of the Armed Forces Committee, what he said last week about these memos.

[Begin audio clip.]

Mr. GRAHAM. What we are trying to do here today is important. Now, the guide that was provided during this period of time, I think, will go down in history as some of the most irresponsible and shortsighted legal analysis ever provided to our nation's military and intelligence communities.

[End audio clip.]

Mr. CONYERS. And he also said that while he thought that Administration lawyers may have had good intentions, but he said "they used bizarre legal theories to justify harsh interrogation techniques."

Now, Mr. Addington, Professor Yoo, I come here to give you the benefit of the doubt and we want to hear your side of it. I would like to understand how these memos came to be written and why. I would like to learn more about your view of the unitary executive theory of government in which the President is supposed to be superior to some or all of the laws or wherever that leads.

I am interested in Professor Yoo's description of this public debate that he entered into of if the President could order that a suspect's child be tortured in gruesome fashion and that his response was "I think it depends on why the President thinks he needs to do that" or is there anything that the President could not order to be done to a suspect if he believed it necessary for the national defense.

And that line of questions are all very important to me. We want to understand this and we want to have a fair discussion about it.

So thank you, Chairman Nadler, for permitting me these opening comments.

Mr. NADLER. I thank the distinguished Chairman.

I now want to welcome our distinguished panel of witnesses today and introduce them.

David Addington is the chief of staff and former counsel to Vice President Dick Cheney.

Mr. Addington was assistant general counsel to the Central Intelligence Agency from 1981 to 1984. From 1984 to 1987, he was counsel for the House Committees on Intelligence and International Relations.

He served as a staff attorney on the joint U.S. House-Senate Committee investigation of the Iran Contra scandal, was an assistant to Congressman and now Vice President Dick Cheney, and was one of the principal authors of a controversial minority report issued at the conclusion of the Joint Committee's investigation.

Mr. Addington was also a special assistant to President Ronald Reagan for 1 year in 1987, before becoming President Reagan's deputy assistant.

From 1989 to 1992, Mr. Addington served as special assistant to Mr. Cheney, who was then the secretary of defense, before being confirmed as the Department of Defense's general counsel in 1992.

From 1993 to 2001, he worked in private practice. Mr. Addington is a graduate of the Edmond A. Walsh School of Foreign Service at Georgetown University and holds a J.D. from Duke University School of Law.

John Yoo is a professor of law at the University of California at Berkeley School of Law, where he has taught since 1993. From 2001 to 2003, he served as a deputy assistant Attorney General in the Office of Legal Counsel of the U.S. Department of Justice.

He served as general counsel of the U.S. Senate Judiciary Committee from 1995 to 1996. Professor Yoo received his BA summa cum laude in American history from Harvard and his J.D. from Yale Law School in 1992.

In law school, he was an articles editor of the law journal. He clerked for Judge Lawrence H. Silverman of the U.S. Court of Appeals for the District of Columbia Circuit.

He joined the Boalt faculty in 1993 and then clerked for Justice Clarence Thomas of the U.S. Supreme Court.

Chris Schroeder is the Charles S. Murphy Professor of Law and Public Policy Studies at Duke University.

He served in the Office of Legal Counsel for 3.5 years, including 6 months as acting assistant Attorney General in charge of the office.

He has also served as chief counsel to the Senate Judiciary Committee. He is of counsel to the firm of O'Melveny and Myers, where he works primarily on appellate matters.

He received his BA degree from Princeton University in 1968, a master of divinity from Yale University in 1971, and his J.D. degree from the University of California at Berkeley Boalt in 1974, where he was editor in chief of the "California Law Review."

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

Do you swear or affirm, under penalty of perjury, that the testimony you are about to give is true and correct, to the best of your knowledge, information and belief?

Thank you. Let the record reflect that the witnesses answered in the affirmative. And you may be seated.

Without objection, the written statements of the witnesses will be made a part of the record in their entirety. We would ask each of you to summarize your testimony in 5 minutes or less.

To help you keep time, there is a timing light at your table. Assuming it works properly, when 1 minute remains, the light will switch from green to yellow and then to red when the 5 minutes are up.

I will ask the first witness, Mr. Addington is recognized for 5 minutes for the purpose of an opening statement.

TESTIMONY OF DAVID ADDINGTON, CHIEF OF STAFF, VICE PRESIDENT OF THE UNITED STATES

Mr. ADDINGTON. Thank you, Mr. Chairman.

Just three quick points, two of which are technical.

In the introduction, you mentioned that on the Iran Contra Committee, I was working for Mr. Cheney. I was, in fact, the designee of Mr. Brumfield of Michigan in that Committee.

Second, I think there was a reference, and I don't remember exactly what you said, but something like being an author or involved in the preparation of the minority views in that report.

I think I had actually left and gone to the White House in the Reagan administration before it was written and I really didn't have anything to do, that I recall, with writing the report.

Lastly and more importantly, Chairman Conyers mentioned he wanted to give us the benefit of the doubt, which I appreciate very much. He has a long history of being respectful and looking for the fact-finding and so forth.

There is one subject on which I think there is no doubt and I thought I would point it out, given that the hallways here are full of protests and so forth on the subject, and, that is, I believe everyone on this Committee, and I am certain the three witnesses, want to defend this country, protect it from terrorism.

That is not a partisan issue. There are obviously differences on how that is accomplished that we will be discussing today, no doubt, but I think everyone has that view in this group.

Thank you, Mr. Chairman.

Mr. NADLER. Is that—well, let me say, first, that I suppose I am sorry I gave you too much credit for that 1987 or 1988 memo or whatever.

But is that the entirety of your statement?

Mr. ADDINGTON. Yes. Thank you. I am ready to answer your questions.

Mr. NADLER. Okay. Recognize Professor Yoo for 5 minutes.

TESTIMONY OF JOHN YOO, PROFESSOR, BOALT HALL SCHOOL OF LAW, UNIVERSITY OF CALIFORNIA AT BERKELEY

Mr. YOO. Thank you, Mr. Chairman. I appreciate the opportunity to appear before the Committee.

I also appreciate Mr. Conyers' commitment to having an open and fair discussion and to clarify things for the public record, and I appreciate that very much.

I presented extensive opening statement to the Committee and the text. So I don't have anything more. I don't want to waste the Committee's time in reading it.

So I will just waive the rest of my time, because I provided the statement.

Mr. NADLER. That is rather unusual. You don't want to summarize the statement?

Mr. YOO. I don't need to, unless you would like me to.

Mr. NADLER. Well, I think it would serve not everyone in this room, perhaps not even everyone on this Committee has read your statement.

So why don't you summarize the key points of it?

Mr. YOO. Sure. The first thing I just wanted to make clear, in response to your comments about privilege, as you know, I have been a lawyer in the executive and legislative branches and I have received instructions from the Department of Justice about exactly what kinds of things I am allowed to talk about and which I cannot.

I provided a text of that e-mail to the Committee. I just want to make clear, I have every desire to help the Committee, but I also have a professional obligation to the Department of Justice to obey their instructions.

I, myself, don't have the authority to resolve any conflict that you as a Committee might have with them.

As a former staff member for the Senate Judiciary Committee, I would never, of course, share conversations I had with the Member I worked for either. And so I understand that there could be conflict between the Committee and the——

Mr. NADLER. Let me just say, as I said at the outset, we understand that there are legitimate privileges and all we ask is that if any one of the witnesses asserts a privilege, you do so judiciously and you assert—you state, rather, the exact grounds for the assertion of the privilege.

And now, please summary, if you want to, your statement.

Mr. YOO. Yes. I just wanted to make it clear when we start at the beginning.

Mr. NADLER. Fine.

Mr. YOO. Just a few points.

One point I would just like to make clear is that we are talking about events that happened 6 to 7 years ago and I think it is important to remember the context within which these questions arose.

Some of the events occurred no more than 6 months after the 9/11 attacks, in which 3,000 of our fellow citizens were killed.

I know, having worked in the government at that time and dealt with the Congress, that Members of both branches were very concerned that there would be follow-up attacks by al-Qaeda, which is one of their trademarks.

I believe we in the Justice Department, in examining these questions, did the best we could under the circumstances to call the

legal questions as best we could with the materials that we had available under those circumstances.

I want to make clear, and I don't think anyone in the department would make any claim of infallibility about our legal judgments. These are very difficult legal questions. I think they are the hardest questions that a government lawyer can face.

I openly accept that reasonable people can differ in good faith about their answer to these questions.

One last thing I want to make clear is also that we were functioning as lawyers. We don't make policy. Policy choices in these matters were up to the National Security Council or the White House or the Department of Defense.

Our job was to provide legal advice about the meanings of different Federal laws, but our job wasn't to—I am sorry. As lawyers, it wasn't our purpose and we were not in the business of choosing amongst different policy options.

Let me say, though, and, for that matter, in response to these questions about privilege and so on, I can't provide any information to the Committee about why different policy choices were made, because we weren't privy to those decisions.

I do think, though, and I will close here, that as someone who has seen the results of those policies, to the extent they have been publicly disclosed by the head of the intelligence agencies and the President, I think that those policies have successfully provided information to the government that have allowed this country to prevent terrorist attacks by al-Qaeda on our homeland.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Yoo follows:]

PREPARED STATEMENT OF JOHN YOO

Testimony by John Yoo
Professor of Law
University of California, Berkeley School of Law
Visiting Scholar, American Enterprise Institute

Committee on the Judiciary, United States House of Representatives
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

June 26, 2008

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

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

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

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

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

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

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

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

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

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

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

CIA and NSC Request for Opinion in 2002

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Revised 2004 OLC Opinion on Interrogation

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

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

Request from the Defense Department

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

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

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

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

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

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

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

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

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[1] The email guidance reads:

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

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

Mr. NADLER. I thank the witness.

Now recognized for 5 minutes for an opening statement, Professor Schroeder.

TESTIMONY OF CHRISTOPHER SCHROEDER, CHARLES S. MURPHY PROFESSOR OF LAW AND PUBLIC POLICY STUDIES AT DUKE UNIVERSITY

Mr. SCHROEDER. Thank you, Chairman Nadler.

Mr. NADLER. Use your mic, please.

Mr. SCHROEDER. Thank you, Chairman Nadler and Mr. Franks and Mr. Chairman. It is a privilege to be here today.

I am not here to question anyone's good faith, either my two colleagues here before us today or anyone else who worked in the Administration under what were extraordinarily difficult circumstances.

We are all eager in providing the country the best and most effective defense against any additional attacks.

At the same time, it has become clear, as events have unfolded and been revealed, that events have taken place with respect to how detainees have been treated, with respect to how military commissions have been established and their procedures with respect to how surveillance activities have been undertaken by the National Security Agency, that we find out, as events unfold, that behind each of these occurrences, these policy decisions, there has frequently been a substantial legal analysis from the Office of Legal Counsel.

And I have to say, reluctantly, that I think a number of these analyses have serious mistakes in them. And so I think it is important to look back in an effort so that going forward, we can establish methods whereby the President will be getting the best legal advice in good times, as well as bad, and to do that to the extent that it is humanly possible.

So I would just make three points about the memorandum, and this is mildly repetitive of my prepared statement, which you have, but just let me emphasize three points.

One I think the memoranda reflect, starkly reflect an extreme view of absolute and uncontrollable presidential power that has been pursued by this Administration, not without dissent among the lawyers inside the Justice Department and other places, but it seems that those dissenting voices don't remain around for very long and that the prevailing view has been one in which the President is purported to have almost un-definable limits on the power that he apparently is entitled to exercise as commander in chief to control the conduct and operations of a war.

Now, this power, if it is applied to the war on terror, is breathtaking in its scope, because the President, first, has warned us, and I think it is plausible to believe, that the war on terror is going to be going on for a long time.

Secondly, we have defined, as we ought to, that the battlefield of this war on terror includes the United States, as much as Iraq or Afghanistan.

And, third, the tactical strategic decisions about how to go after terrorists, about how to interrogate them once you have detained them, about whether they can be detained for some period of time

or have to be put on trial, if they are tried, what the conditions of those trials ought to be, are enormous authorities.

And for the President to assert that in each and every of these respects affecting American citizens, as well as foreign nationals, as well as aliens who have never set foot in this country, that the President has unilateral and unreviewable authority, even to disobey the criminal statutes that the Congress has passed and a President has ratified, is a position that is far outside the mainstream of jurisprudence in this country, of what the Supreme Court has held, and, indeed, what prior Presidents have asserted.

The second point I want to say is this is not a criticism that has been raised simply by President Bush's political opponents or by liberal law professors.

Jack Goldsmith is a staunch Republican. When he came into the Office of Legal Counsel and reviewed some of these memos, he called them "deeply flawed, sloppily reasoned, and overbroad."

When the Attorney General, the acting Attorney General, Mr. Goldsmith, the director of the FBI were confronted with the national security surveillance program, they refused to reauthorize it.

They refused to agree with the analysis that had been done earlier that purported to find that this was also something within the President's constitutional authority, and our understanding is that they and perhaps several other high ranking officials in the Justice Department threatened to resign over this legal analysis.

You have Mr. Goldsmith telling a story in his book of needing to review and eventually to revise or reauthorize, under quite different legal analyses, what he calls "a small stack" of these memoranda.

So this is not just outsiders carping at the President. This is reflective, I think, of a deeply flawed view of the jurisprudence that ought to be applied in understanding both the strengths and the limits of what the President can do in the face of statutory prohibitions.

And the last point I will mention is just with respect to how these memos have been put together.

In my testimony, I express some concerns that they don't seem to have followed internally in the Office of Legal Counsel the good practices that the office has tried to pursue over the years.

Mr. Yoo supplied some information and some more details, which I am glad to have received, in his prepared testimony. I think they still leave a number of questions, in my mind, that would be worth pursuing, but I see my red light is on and I will stop at this point and perhaps be able to say more in response to some of your questions.

Thank you.

[The prepared statement of Mr. Schroeder follows:]

PREPARED STATEMENT OF CHRISTOPHER H. SCHROEDER

Christopher H. Schroeder

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

Prepared Testimony to the
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
Committee on the Judiciary
United States House of Representatives
June 26, 2008
2141 Rayburn House Office Building

Chairman Nadler, Ranking Minority Member Franks, members of the Subcommittee, thank you for giving me the opportunity to testify before you today. My name is Christopher H. Schroeder, and I am currently a professor of law and public policy studies at Duke University, as well as of counsel with the law firm of O'Melveny & Myers. In the past, I have had the privilege to serve as a Deputy Assistant Attorney General in the Office of Legal Counsel in the Department of Justice, including a period of time in 1996-97 when I was the acting head of that office. Before that, I have also had the privilege of serving on the staff of the Senate Judiciary Committee, including as its Chief Counsel in 1992-93.

As you know, the Office of Legal Counsel's primary responsibility is to provide sound legal advice to other components of the Executive Branch, especially the President and the White House, so that the President can meet his constitutional obligation to take care that the laws are faithfully executed. When asked to provide legal analysis by the President or others in the Executive Branch, the attorneys in the office do not function as policy makers, although they may participate in meetings in which matters of both policy and law are being discussed. Even when they do participate in such discussions, Office of Legal Counsel attorneys must be mindful of the difference between law and policy, a difference that it is essential for us to maintain if we are to continue to be a government of laws and not of men and women.

The work of the Office of Legal Counsel, or OLC as it is often called, is well known within the executive branch as well as here on Capitol Hill, but its work typically is done without gaining much public notoriety. That has changed in recent years, when the public's attention has focused on controversial administration actions such as the National Security Agency's warrantless surveillance program, the use of military commissions to try suspected terrorists, and the use of aggressive interrogation techniques on some of the detainees in the war on terror. As each of these activities has become known, the President and the administration have staunchly defended them as perfectly legal. And then we have learned that behind each of those assertions has been an Office of Legal Counsel memorandum or analysis defending that assertion.

The attention given to the Office as a result of its association with these controversies has been overwhelmingly negative. Legal commentators have roundly criticized the quality of the work that is contained in these memoranda and analyses. Criticisms have come from a wide variety of sources, including from people who are otherwise sympathetic to the efforts being undertaken by the President and even to the very programs that were the subjects of OLC analysis. For example, Jack Goldsmith, who was the head of OLC from 2003 to 2004, examined some of the most controversial opinions issued by the Office prior to his arrival. He concluded that they were "deeply flawed: sloppily reasoned, overbroad, and incautious in asserting extraordinary constitutional authorities on behalf of the President."[1] Former Attorney General John Ashcroft, former Deputy Attorney General James Comey and other high ranking DOJ officials concluded that earlier OLC analysis of the legality of the NSA surveillance program were unsound. Numerous legal scholars have critically analysed the OLC's work and found it wanting for many reasons.

One group of OLC memoranda that has received a particularly large amount of negative attention relates to the use of aggressive interrogation techniques at Guantanamo Bay and elsewhere, especially the Memorandum for Alberto Gonzales, Counsel to the President, dated August 1, 2002 and signed by Jay Bybee. To this day, we might not know of the existence of this memo had it not been leaked around the time that the photographs from Abu Ghraib were being exposed. We now know that it was prepared by OLC after people in the CIA had expressed concern about whether the federal criminal statute prohibiting torture would apply to CIA personnel using abusive interrogation methods in attempts to extract information from key Al Qaeda operatives, including Abu Zubaydah and Khalid Sheikh Mohammed.

Of all the memoranda that have been disclosed to date, the August 1, 2002 memorandum has received the most public criticism.[2] That memorandum provides an

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[1] Jack Goldsmith, THE TERROR PRESIDENCY 10 (2007). *See also* the recent testimony of former Acting Assistant Attorney General Daniel Levin before this Subcommittee. When 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?," he replied: "I don't."

[2] A partial list of published work criticizing the legal analysis in the August 1, 2002 memorandum includes: 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*

analysis that in its cumulative effect is quite breathtaking. According to it, the criminal anti-torture statute is limited to extreme acts that cause severe pain equivalent to "serious physical injury, such as organ failure or impairment of bodily function, or even death," or prolonged mental harm, and then only when it is the specific objective of the actor to inflict this level of pain or harm. The memorandum goes on to argue that even if someone committed acts that met its narrow definition of torture, the criminal defenses of necessity and self-defense could be available. Finally, it concludes that any person who acts under the President's direction in conducting interrogations would be protected from criminal liability because statutes cannot limit the President's powers as commander-in-chief. Along the way, the memorandum also concludes that the protections of Common Article 3 of the Geneva Conventions, which the United States has obligated itself to respect, do not apply to Al Qaeda. In the words of Philippe Sands, the result was a complete "Green Light" to subject Al Qaeda detainees to interrogation techniques that are well beyond the bounds of what our military personnel have been trained to employ, that would be prohibited "cruel treatment" if Common Article 3 were to apply (as the Supreme Court has held it does), and that are plainly unlawful.

The August 1, 2002 memorandum was apparently accompanied by a second memorandum, which is still classified and undisclosed, that identifies numerous specific interrogation techniques that were said not to contravene the criminal anti-torture statute. The legal sign-off on these techniques – and a similar analysis by OLC in early 2003 (and perhaps even earlier) that the Department of Defense was not legally obliged to adhere to several federal statutes and treaties restricting abusive conduct -- played an important role in the eventual migration of many of the techniques to Guantanamo, as well as to Iraq and Afghanistan, where they seem to have contributed to the general perception of an absence of any legal limits, which in turn resulted in the behavior at Abu Ghraib. The exact details of this migration are still somewhat uncertain, but the larger outlines of what occurred have been pieced together through investigative reporting by Jane Mayer, Dana Priest, Sy Hersh, Philippe Sands and others.

Because memoranda whose legal analyses have been so roundly criticized played an important role in the critical decisions that led to such controversial interrogation techniques, it is important to understand how they were produced – and what can be done to help ensure that episodes like this one will not be repeated.

There are two distinct messages to take away from the story of these memoranda. The first relates to something mentioned in the quotation from Jack Goldsmith a moment ago. The analysis in the August, 2002 memorandum and others is driven not only by tendentious statutory interpretations, and by implausible theories of defenses to criminal statutes, but also, and above all, by assertions of "extraordinary constitutional authorities on behalf of the President." Throughout this administration, the key people responsible

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Violate International Law Concerning Treatment and Interrogation of Detainees, 43 Colum. J. Transnat'l L. 811, 813-23 (2005; Jack Balkin, *Youngstown and the President's Power to Torture* (July 16, 2004), http://balkin.blogspot.com/2004/07/youngstown-and-presidents-power-to.html. We also know of a number of JAG memos written in early 2003 critical, among other things, of the application of the reasoning of the August 1, 2002 memorandum to the military.

for giving the final sign-off on legal analysis have too often embraced a view of presidential power that, like the August 1, 2002 memorandum, is breathtaking. Their view is that anything that the President considers it prudent to do to protect the national security is lawful, including actions that violate federal criminal statutes.

This is a deeply flawed view of presidential authority. I will be happy to engage in discussion with the members of this Committee regarding why I believe so firmly that the broad view of presidential power embodied in these two memoranda is unsound. For present purposes, I want to emphasize that it is far outside the mainstream of legal thought.[3] No President except possibly Richard Nixon has subscribed to such a sweeping understanding of his powers. To be sure, other presidents, including President Clinton, from time to time have received advice from their lawyers that a particular law was unconstitutional as applied to a particular circumstance and that he was not bound to comply with it for that reason. Such decisions are always controversial, and many in the Congress criticize them when they are made. But no prior President has believed, nor has he received regular legal advice, that his powers to ignore federal criminal statutes are as sweeping as they are claimed to be by this Administration. Legal advisers to the have concluded on numerous occasions that the President lacked the authority to break federal laws. Indeed, even in this administration, Department of Justice officials other than those who authored these much-criticized memoranda have determined that the virtually limitless commander-in-chief authority that is advocated in the August 1, 2002 memorandum and elsewhere is wrong. That became evident when we learned about the refusal of John Aschcroft, James Comey, Jack Goldsmith and others agree to reauthorizing the NSA surveillance program, as well as when the August 1, 2002 memorandum was re-evaluated within OLC. In prior administrations as well, the Office of Legal Counsel has concluded that presidential authority is subordinate to duly enacted statutes. For example, when William Rehnquist was head of OLC under President Nixon, he testified that the President could not impound funds when Congress had directed their expenditure.[4] Attorney General Edward Levi, under President Ford, testified that if Congress enacted the Foreign Intelligence Surveillance Act, presidents would be bound to follow its procedures.[5] Walter Dellinger, head of OLC under President Clinton, wrote that Defense Department personnel who informed foreign governments of the location of planes suspected of carrying narcotics could be guilty of a

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[3] Also testifying before this Subcommittee, Dan Levin concurs in this assessment. See note 1.

[4] "It is in our view extremely difficult to formulate a constitutional theory to justify a refusal by the President to comply with a Congressional directive to spend .... T]he execution of any law is, by definition, an executive function, and it seems an anomalous proposition that because the Executive Branch is bound to execute the laws, it is free to decline to execute them." *See* Hearings on the Executive Impoundment of Appropriated Funds Before the Subcommittee on Separation of Powers of the Senate Judiciary Committee, 92nd Cong., 1st Sess. 279, 283 (1971).

[5] "As you know, a difference of opinion may exist as to whether it is within the constitutional power of Congress to prescribe, by statute, the standards and procedures by which the President is to engage in foreign intelligence surveillance essential to the national security. I believe that the standards and procedures mandated by the bill are constitutional. The Supreme Court's decision in the Steel Seizure case seems to me to indicate that when a statute prescribes a method of domestic action adequate to the President's duty to protect the national security, the President is legally obligated to follow it." Foreign Intelligence Surveillance Act: Hearing Before the Subcomm. On Courts, Civil Rights, Civil Liberties, and the Administration of Justice of the H. Comm. On the Judiciary, 94th Cong. 92 (1976).

crime under the Aircraft Sabotage Act of 1984 if the foreign government then shot down those planes.[6] President Clinton also signed both the anti-torture federal criminal statute and the War Crimes Act into law, voicing no constitutional objection that their enforcement would somehow infringe on the president's commander-in-chief authority.[7]

Nor has the Supreme Court has never come close to endorsing anything approaching this expansive a 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] Back in the Truman administration, when existing laws did not permit the President to seize industrial property and in fact provided alternative means to resolve labor-management disputes, thereby implicitly limiting the tools available to the President, the Court denied the President had authority to seize the steel mills even though he thought it was a national security imperative to keep them operating in order to supply our troops fighting in Korea.[9]

The current Supreme Court continues the long history of rejecting the idea that the President has broad authority to ignore existing law in the name of national security. In fact, several specific Bush Administration claims that can be found in the OLC's legal analysis of interrogation techniques have reached the Supreme Court – and the Supreme Court has rejected each of them. For instance, the interrogation memoranda largely ignored the reasoning of the *Steel Seizure* case because its authors claimed its reasoning was restricted to questions of the President's domestic powers, whereas the president's broad assertions of authority were based on the President's power as commander-in-chief.[10] In *Hamdan v. Rumsfeld*,[11] the Supreme Court rejected the argument that *Steel Seizure* does not apply to the exercise of the President's commander-in-chief authority, even as applied to *aliens* held outside the United States who were alleged to have violated the laws of war. *Hamdan* involved a challenge to the procedures for trying detainees by military commission, which had been established under the President's commander-in-chief powers, which was emphasized by the President's naming the order creating them Military Order No. 1. The Supreme Court nonetheless held that the President's military commissions were unlawful because they violated requirements Congress had imposed

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[6] Office of Legal Counsel, U.S. Department of Justice, "United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking," 18 Op. O.L.C. 148, June 14, 1994.

[7] Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, tit. V, §506(a), 108 Stat. 382, 463-64 (1994) (codified as amended at 18 U.S.C. §§2340-2340B (2000 & Supp. IV 2004)).War Crimes Act of 1996, Pub. L. No. 104-192, 110 Stat. 2104 (codified as amended at 18 U.S.C.A. §2441 (West 2000 & Supp. 2007))

[8] Little v. Barreme, 6 U.S. 170 (1804).

[9] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)

[10] Jay S. Bybee, Memorandum for Alberto R. Gonzales, Counsel to the President, re Standard of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002), at p. 31. The claim about the limited application of *Youngstown* was made explicitly in an interview with one of the memo authors, John Yoo. *See* Jane Mayer, "The Memo: How an internal effort to ban the abuse and torture of detainees was thwarted," *The New Yorker*, February 2006, 7

[11] 548 U.S. 557, 126 S. Ct. 2749.

by statute in the Uniform Code of Military Justice. Justice Stevens' opinion for the Court states that "[w]hether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers."[12] It cited *Steel Seizure* as the controlling authority on this point.

Several years prior to that, the Department of Justice specifically argued to the Court that the habeas corpus statute *could not* be construed to give Guantanamo detainees the right to petition the courts challenging their detention, because to do so would impinge upon the Commander-in-Chief's exclusive authority to determine how to treat suspected alien enemies.[13] Not only did the Court hold that the President was bound by the habeas statute, but not a single Justice accepted the Department's view that Congress could not regulate enemies' access to U.S. courts.

As another example, one of the interrogation memoranda baldly states that that "Congress cannot exercise its authority to make rules for the Armed Forces to regulate military commissions,"[14] because that statute would interfere with the President's commander-in-chief powers. But once again *Hamdan* holds directly the opposite.

Finally, the interrogation memoranda – relying on still earlier memoranda from OLC -- conclude that the detainee treatment provisions of Common Article 3 of the Geneva Conventions do not apply to our conflict with Al Qaeda. Although the memoranda rest this conclusion on an interpretation of the terms of Geneva, it is clear from the logic of the memoranda that had they not found Geneva to be inapplicable on that ground, they would have claimed that its requirements were no more binding on the President as commander-in-chief than were domestic criminal laws. The Supreme Court has rejected that argument. It found that Common Article 3 does apply to our conflict with Al Qaeda, and that the failure of the military commissions to comply with the requirements of Common Article 3 constituted a reason for striking them down.[15]

In sum, one reason these memoranda went astray, and one reason they have been subjected to withering criticism, is that they embrace an unsound theory of presidential power. To the extent their conclusions were driven by an unsound theory, those conclusions are also unsound.

The second message to take away from the story of these memoranda relates to the procedures that were followed when these memos were produced. Several years ago, I along with eighteen other former employees of the Office of Legal Counsel looked back on the experiences of OLC across different administrations to see if we could articulate the most important practices that have guided the work of the Office over the years, in

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[12] Id., at 2774.

[13] Brief of the Respondents, Rasul v. Bush, Nos. 03-334 and 03-343, March, 2004 at 41-46.

[14] John C. Yoo. Memorandum for William J. Haynes IT, General Counsel of the Department of Defense Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States (March 14, 2003), footnote 13) (citing a 2002 OLC memo that apparently rested on this argument).

[15] *Hamdan*, at 2798.

order to identify a set of best practices for the Office. What resulted was a statement of ten Guidelines that we think capture those best practices. The group of nineteen who participated in this exercise believe that when followed these Guidelines greatly improve the prospect that the Office will deliver high quality legal advice. I have attached a copy of the Guidelines to this prepared testimony.

As the name implies, a set of best practices seeks to identify the practices that work best toward ensuring that the quality of the eventual legal advice the office produces will be the highest possible caliber. In some specific instances, best practices are not achieved, and I am sure it will be possible to locate decisions in every past administration when the Office has fallen short. At the same time, these Guidelines are not unrealistic, abstract inventions divorced from the real experience of the Office. To the contrary, each grows out of the practical experiences of lawyers across administrations.

How do these Guidelines relate to the interrogation memoranda? First, the interrogation memoranda did not follow the practices identified in the Guidelines. In fact, they may well have violated eight of them.[16] Also, a number of elements of the legal analysis of the August 1, 2002 memorandum have been criticized for presenting an inaccurate and implausible assessments of the applicable law, extending beyond criticism of their expansive claims of presidential authority.[17] These two facts are related: Failure to follow the Guidelines quite likely contributed to the poor quality of the memorandum's analysis of applicable law.

This point is also supported by evidence beyond my own testimony or speculation. Because the August 1, 2002 memorandum was subjected to so much criticism once it was made public, the administration formally withdrew it and announced that it would ask the Office of Legal Counsel to prepare a new analysis of the scope of the anti-torture law. On December 30, 2004 OLC, which was then being managed by other individuals than those responsible for the original memoranda, issued that new analysis. The second memorandum applied the best practices of the Office more successfully than the first, and the legal analysis of the second better reflects the state of the law than the first.

As for the legal analysis, the 2004 memorandum differs materially from the first. Notably it entirely avoids assertions of presidential authority to override statutory law. It concludes that the definition of torture covers a wider range of actions than the 2002 memorandum had done, it candidly acknowledges that the requirement that the actor have a specific intention to commit torture is more ambiguous than had the 2002 memorandum, and it unequivocally rejects in a single, obviously correct sentence – "There is no exception under the statute permitting torture to be used for a 'good

[16] Guideline Number Nine recommends that the Office strive to maintain good working relations with the White House Counsel's office, which it seems to have done during the period the interrogation memoranda were being written. Guideline Number Ten does not apply to standard legal advice of the kind found in the memoranda.

[17] See the sources cited in note 2.

reason.'" -- the absurd notion that the torture statute recognizes the criminal defenses of self-defense and necessity. Throughout its analysis the 2004 memorandum is more forthcoming in explaining points at which giving a precise legal answer is difficult. Some of its legal conclusions are still controversial, but to my knowledge it has not been attacked as deeply flawed, sloppily reasoned or overbroad.[18]

As for evaluating the two memoranda under the Guidelines, I will not take the Subcommittee's time to identify all the differences, but instead will concentrate on three general differences, which address the issues of consultation, candor, and transparency through disclosure.

Guideline Number Eight states that "Whenever time and circumstances permit, OLC shall seek the views of all affected agencies and components of the Department of Justice before rendering final advice." Wide consultation increases the chances of drawing on relevant expertise located elsewhere, both inside Justice and outside. Departments and agencies charged with administering statutes and other laws often have had lengthy experience with the legal ambiguities and issues raised by them. OLC may not always agree with the legal positions taken by other components of the executive branch, but carefully listening to them can only improve the quality of the product.

Specifically, whenever OLC is asked to analyze a criminal statute, it typically consults with the Criminal Division of the Department of Justice, which as the component charged with overseeing the prosecution of individuals for violating the criminal laws naturally must regularly engage in interpreting them. Full consultation ought normally to include advice from both the leadership of the Division and also the career professionals there, to ensure that benefit is gained from their experience as well. When addressing questions that relate directly to how any specific statute is actually administered, the departments or agencies responsible for the day-to-day administration of the statute should also be consulted. When disputes arise between departments or agencies about how a statute is interpreted, there is a formal procedure for submitting that dispute to OLC and for each agency to submit their views, but even outside this formal process, consultation often involves multiple divisions, departments or agencies.

We know that the writers of the 2004 memorandum consulted with the Criminal Division, because the memorandum explicitly states that has the Criminal Division "reviewed this memorandum and concurs in the analysis." The 2002 memorandum is silent with regard to consultation. Most of the investigative reporting on how these memoranda were constructed concludes that only a very small group of high level officials had access to their contents until after they became final. Both the State

[18] In fact, when Dan Levin, who directed the production of the second memorandum and signed it, testified before this Subcommittee last week, he explained that one part of the second memorandum that had come under some criticism had been misinterpreted. Footnote 8 of the December, 2004 memorandum states that "we have reviewed this Office's prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum." Levin stated that this footnote was not intended to endorse the authorization of any of the extreme interrogation techniques, and that he was never able to complete a thorough, individual analysis of those techniques.

Department and the INS administer applications of the anti-torture statute in making asylum and immigration status determinations, but we have no indication that their advice was sought. Some investigative reporting has disclosed that the leadership of the Criminal Division endorsed the general criminal defense portions of the 2002 memo, but it is not clear what the views of the career professionals were. We do not have a full picture of who was consulted as the August, 2002 memo was being prepared, and it would be useful if its authors could speak to this point.

Guideline Number Two states that "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." There is a lot of content in this Guideline. The part of it I want to stress here is the instruction to be "thorough and forthright." One of the shortcomings of the 2002 memorandum is that it appears to reach firm legal conclusions without disclosing that there are some substantial counter arguments to or weaknesses in the reasoning that has been used to justify those results. For example, it concludes that the criminal law defenses of self-defense and necessity may be available to someone who has engaged in interrogation techniques later judged by a court to amount to torture. The memorandum's interpretation of the availability of these two defenses is open to significant question simply in terms of the available case law and authorities on the subject in American law. (One reason to doubt that the Criminal Division was fully consulted is that it is hard to believe that lawyers who regularly prosecute cases would concur in such a broad analysis of these defenses as the memoranda contain.) Exacerbating the problem, no mention is made of the fact that the Convention Against Torture expressly states that the prohibition on torture is absolute, countenancing no exceptions, regardless of any claim of necessity. Nor does the memo even mention the official position of the United States, articulated in the U.S.'s Report to the UN Committee Against Torture in 1999: "No official of the government, federal, state or local, civilian or military, is authorized to commit or to instruct anyone else to commit torture. Nor may any official condone or tolerate torture in any form. No exceptional circumstances may be invoked as a justification of torture. U.S. law contains no provision permitting otherwise prohibited acts of torture or other cruel, inhuman or degrading treatment or punishment to be employed on grounds of exigent circumstances (for example, during a 'state of public emergency') or on orders from a superior officer or public authority." In contrast, as noted before, the 2004 memorandum rejects these criminal defenses out of hand, in a single sentence.

Whenever possible, written advice from the Office of Legal Counsel should acknowledge counter arguments or difficulties that its reasoning may face when it is reviewed by others. For one thing, acknowledging the counter arguments shows to the reader that the arguments have been considered and, if the memorandum is thorough, will also indicate why in the end the OLC advice finds them not sufficiently compelling to alter the conclusions reached. For another, it allows the ultimate "clients" of the analysis, who will frequently include law-trained individuals, to evaluate the quality of the advice, not having simply to rely upon an OLC conclusion. This empowers the Attorney General and President to evaluate whether to overrule the advice, or far short of that, for all

policymakers to assess whether they will decline to take action even though OLC has concluded they may take that action.

Finally, Guideline Number Six states that "OLC should publicly disclose its written legal opinions in a timely manner, absent strong reasons for delay or nondisclosure." In addition, Number Five provides that "[o]n the very rare occasion when the executive branch ... declines fully to follow a federal statutory requirement, it typically should publicly disclose its justification." As the qualifying language in these Guidelines suggests, there can be legitimate reasons for non-disclosure of OLC opinions, including but not limited to potentially compromising the national security. Nonetheless, the presumption should be that OLC legal advice will be disclosed and, if held in confidence, will be withheld no longer than necessary to serve the interest that counsels confidentiality – especially where that advice is that the Executive branch can ignore statutory commands. It is vital to the operation of our constitutional democracy that the executive branch be prepared to supply the legal basis for decisions made and actions taken. Our federal government is a government of great but limited power, and everything it does must ultimately be bottomed on a legitimate source of legal authority. Making public the legal justification for a course of action can be as important to the public's appraisal of the quality of its government as disclosure of the course of action itself.

On the question of transparency through disclosure, the contrasts between the two earlier memoranda and the later one are also stark. The August 2002 memorandum and its bold claims that the President can ignore federal criminal law to order torture were held in secret until someone with access to them leaked the memorandum. Once that happened, the administration quickly distanced itself from the memorandum by withdrawing it. The more modest and cautious 2004 memorandum was immediately disclosed to the public. This may well imply that a practice of disclosing analysis like that of the 2002 memorandum would have prevented the Office of Legal Counsel from issuing such a broad assertion of presidential authority to violate the federal criminal laws..

In conclusion, I want to urge strongly the importance of adhering to a group of best practices going forward, whether these that I have discussed today or some improved articulation of them. Such practices are not guarantees that legal advice coming from the Office of Legal Counsel can be kept free from legal error, but they are time-tested means for reducing the likelihood of such errors and improving the quality of advice that is given. They ought to be valued for those reasons.

Thank you. I will be glad to answer any questions the members of the Subcommittee may have.

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.

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Michael Small, Attorney Advisor, 1993-1996

Mr. NADLER. Thank you. I thank the witnesses for their statements.

And we will now go to the questioning. As we ask questions of our witnesses, the Chair will recognize Members in the order of their seniority on the Subcommittee, alternating between majority and minority, provided that the Member is present when his or her turn arrives.

Members who are not present when their turn begins will be recognized after the other Members have had the opportunity to ask their questions.

The Chair reserves the right to accommodate a Member who is unavoidably late or only able to be with us for a short time.

I will inform the Members of the Subcommittee that we do anticipate having more than one round of questioning.

I will begin by recognizing myself for 5 minutes to question the witnesses.

Mr. Addington, It has been reported in several books and in the *The Washington Post* that you contributed to the analysis or assisted in the drafting of the August 1, 2002 interrogation memo signed by Jay Bibey.

Is this correct?

Mr. ADDINGTON. No.

Mr. NADLER. You had nothing to do with that.

Mr. ADDINGTON. No. I didn't say I had nothing to do with it. You asked if I assisted in contribution, and let me read to you something I think will be helpful to you.

This is an excerpt from the book that I recommend that all of you——

Mr. NADLER. Make it briefly, because I have a number of questions.

Mr. ADDINGTON. I will make it very brief. "War by Other Means" by Professor Yoo, page 33, two sentences to read. "Various media reports claim that his influence," I am the "his," "was so outsized, he even had a hand in drafting Justice Department legal opinions in the war on terrorism. As the drafter of many of those opinions, I," Professor Yoo, "find this claim so erroneous as to be laughable, but it does show how wrong the press can get the basic facts."

Same book, page 169——

Mr. NADLER. Wait a minute. Mr. Addington, please, we don't need all these quotes.

Mr. ADDINGTON. Okay.

Mr. NADLER. Just tell us what your role was, if you can.

Mr. ADDINGTON. Yes, I will.

Mr. NADLER. Because you said it wasn't nonexistant but you didn't help shape it. So what was it?

Mr. ADDINGTON. Mr. Chairman, my recollection, first of all, I would be interested in seeing the document you are questioning me about. I think you are talking about a document of August 2002.

Mr. NADLER. Yes.

Mr. ADDINGTON. It would be useful to have that in front of me so I can make sure that what I am remembering relates to the document you have and not a lot of other legal opinions I looked at.

But assuming you and I are talking about the same opinion, my memory is of Professor Yoo coming over to see the counsel of the

President and I was invited in the meeting, with the three of us, and he gave us an outline of here are the subjects I am going to address.

And I remember, when he was done, saying, "Here are the subjects I am going to address," saying, "Good," and he goes off and writes the opinion.

Now, in the course of my work—thank you. You have a copy of it? Thanks. Let me just look at it. I will give it back to you.

It is August 1, 2002, memorandum for Alberto Gonzales, counsel of the President, re: standards of conduct for interrogation under 18 USC Sections 2340 and 2340(a).

I believe that this is the result of the process I was just describing where he came over and said, "These are the subjects I am going to address," and we said, "Good."

Now, there is one thing worth pointing out in there in defense of Mr. Yoo, who, as any good attorney would, has, I presume, not felt free to explain and defend himself on the point.

I can do this in my capacity essentially as the client on this opinion. It was later said about this opinion, "It unnecessarily addressed constitutional issues, defenses that could be raised."

You don't want to hear that, Mr. Chairman?

Mr. NADLER. Not right now, because I have a number of questions and we are running out the clock.

Mr. ADDINGTON. Please, go ahead.

Mr. NADLER. *The Washington Post* reported that, "The vice president's lawyer," referring to you, I believe, "advocated what was considered the memo's most radical claim that the President may authorize any interrogation method, even if it crosses the line into torture."

Is that accurate?

Mr. ADDINGTON. That *The Washington Post* said that?

Mr. NADLER. No, not that *The Washington Post* said it. Is *The Washington Post* correct in saying that?

Mr. ADDINGTON. Could you repeat it? I have to listen closely before I answer.

Mr. NADLER. That you advocated what was considered the memo's most radical claim that the President may authorize any interrogation method, even if it crosses the line into torture.

Mr. ADDINGTON. No, I don't believe I did advocate that. What I said was, in the meeting we had with Mr. Gonzales and Mr. Yoo and me present, Mr. Yoo ran through "here are the topics I am going to be addressing," one of which is the constitutional authority of the President, separate from issues of statutes.

My answer is, "Good, I am glad you are addressing these issues."

Mr. NADLER. So in other words, you didn't advocate any position. You simply said, "I am glad you are going over these topics."

Mr. ADDINGTON. Correct.

Mr. NADLER. Okay. Now, do you believe that the President can order violations of the Federal torture statute if he believes it necessary for national security under his Article 2 or any other powers?

Mr. ADDINGTON. I will answer that carefully, because although, in common conversation, we are used to using words like "torture"

and meaning a common conversation, what we are talking about are laws here.

The Federal statute which implements a——

Mr. NADLER. Let me just read now the question. Do you believe the President can order violations of a Federal statute if he believes it necessary for the national security?

Mr. ADDINGTON. As a general proposition, no. I qualify that is a general proposition because I think we all agree, in fact, there was testimony here and I think some of the Members of this Committee agreed that facts matter for lawyers in rendering opinions, and I wouldn't render a legal opinion in the absence—I wouldn't render one to the Committee——

Mr. NADLER. When do you believe that the President is justified in violating a statute?

Mr. ADDINGTON. You are assuming a fact not in evidence. I didn't say I did believe that.

Mr. NADLER. You said under certain circumstances.

Mr. ADDINGTON. No. I said reserving the fact that you need to have facts in order to render legal opinions.

Mr. NADLER. Are there any——

Mr. ADDINGTON. And as I said——

Mr. NADLER. Excuse me. Is there any set of facts——

Mr. ADDINGTON. I won't render a legal opinion.

Mr. NADLER. Is there any set of facts that would justify the President in violating a statute?

Mr. ADDINGTON. I am not going to answer. A legal opinion on every imaginable set of facts, any human being could think of, Mr. Chairman.

Mr. NADLER. Do you believe that the torture of—torture, never mind how you define it, assume it is torture, do you believe that torture of a restrained detainee could be allowed under a theory of self-defense and necessity?

Mr. ADDINGTON. I haven't expressed an opinion on that, Mr. Chairman.

Mr. NADLER. You have not expressed an opinion.

Do you have such an opinion?

Mr. ADDINGTON. I haven't researched the issue myself. I have relied on opinions on the subject issued by the Department of Justice.

Mr. NADLER. But you did express the opinion, I believe, that the President could—or that his Article 2 powers as commander in chief, in effect, allowed him to take actions which the FISA statute would prohibit. Is that correct?

Mr. ADDINGTON. I don't believe I have expressed those here. I think there is a serious question, constitutional questions raised to the extent Congress, instead of carrying into—helping bypassing statutes to carry into execution the President's power would instead try to block the President's power.

There are court cases at the circuit level, not at the Supreme Court level, and, also, the foreign intelligence surveillance quarter review that refer to the President's commander in chief powers as——

Mr. NADLER. Let me ask you one further question.

Mr. KING. Mr. Chairman? I would ask unanimous consent to grant the Chairman an additional minute to complete his questioning.

Mr. NADLER. Thank you. Without objection.

Mr. Addington, Mr. Yoo, Professor Yoo is quoted as saying that under certain circumstances, it would be proper and legal to torture a detainee's child to get necessary information.

Do you agree with that?

Mr. ADDINGTON. I don't agree or disagree with it, Mr. Chairman. I don't plan to address it. You are seeking legal opinion and, as we told you in Exhibit 4, I am not here to render legal advice to your Committee. You do have attorneys of your own to give you legal advice.

Mr. NADLER. Let me ask Mr. Yoo one opinion—one question. In your memo, Professor Yoo, you talked about, the memo that has been quoted repeatedly from August—the Bibey memo which you helped prepare—that severe pain, as used in the Federal statute, prohibiting torture, must rise to the level that would ordinarily be associated with a sufficiently serious physical condition such as death, organ failure or serious impairment of body functions.

Where did you get that from? I mean, I know that that language is in a different statute.

But where did you derive that that is what torture means under the Federal statute?

Mr. YOO. Mr. Chairman, you are referring to the August 1, 2002 memo.

Mr. NADLER. Yes.

Mr. YOO. Not the March 2003.

Mr. NADLER. Yes.

Mr. YOO. Again, I want to say—your question is where did it come from.

Mr. NADLER. No. How did you reach that conclusion? You made a very specific statement that this is what—in order to violate the statute, it has got to meet this criterion.

Mr. YOO. Yes.

Mr. NADLER. Where did you get that criterion from?

Mr. YOO. So let me make clear, when Congress passed that statute, there is no further definition of that phrase in the statute itself.

We looked at the legislative history. There was no legislative history from the time of the passage of the statute that produced any kind of definition.

There was no—the United States Justice Department had never brought a prosecution under this statute. There had been no judicial decisions of that language.

So we applied, I think, as the memo says, a can of construction to try to find anywhere else in the U.S. Code where Congress, where you have defined those terms in any other kind of statute.

And as the opinion says, and the 2003 opinion also says, we recognize that that statute was on a subject that was different than the torture statute, but we used a can of construction to try to infer from what Congress has passed in other contexts to see if it can provide some help to us in trying to interpret what I think is—I think then, I think now is a very difficult statutory language, be-

cause there was no further judicial interpretation or congressional guidance.

Mr. NADLER. Thank you.

The time of the Chairman has expired.

I will now recognize the distinguished Ranking Member on this Subcommittee, Mr. Franks.

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

And thank you, Mr. Addington, Mr. Yoo and Mr. Schroeder, for appearing here.

Is it Mr. Schroeder or Mr. Schroeder?

Mr. SCHROEDER. Half of my family says Schroeder, the other half says Schroeder. You can take your pick.

Mr. FRANKS. I will stick with your family on this one.

Professor, are you familiar with the report of the 9/11 commission?

Mr. SCHROEDER. Yes, I am.

Mr. FRANKS. According to page 132 of that report, in December 1998, the Clinton administration, Justice Department, issued a legal opinion authorizing the assassination of Osama Bin Laden on the apparent ground that he was waging war on the United States and that assassinating him would be self-defense, not murder.

Incidentally, I think assassinating him might have interfered with some of his major bodily functions. I am just positing an opinion there.

Do you believe that this is one of the implausible theories of defenses to criminal statutes that you decry on page 3 of your prepared testimony?

Mr. SCHROEDER. Well, Mr. Franks, I haven't reviewed either that opinion or the Committee report. I do believe that if we are talking about the formulation of the defense of self-defense a necessity as it appears in the August 2002 memorandum, that, yes, that is—the way those defenses are articulated there are among the pieces of legal reasoning in that memo that I think are far-fetched.

And I am surprised actually to read in Professor Yoo's testimony that he says the criminal division reviewed the memo. He doesn't say the criminal division approved of the contents of the memo, and I would be surprised if they did.

I would be interested in knowing. And by they, I mean not only the political appointees, but the career professionals in the Justice Department, and I say that because, in my, experience, the prosecutors in the criminal division labor mightily to keep those defenses as narrow as possible, as you can imagine, since they are in the business of prosecuting criminals.

And, in fact, in 2001, the Supreme Court had just recently decided a case that the government argued, in which the government argued that unless the defense of necessity was explicitly stated in a Federal statute, it wasn't available to a defendant in opposing——

Mr. FRANKS. Thank you, Mr. Schroeder.

Mr. SCHROEDER [continuing]. A conviction under a Federal statute.

So it surprises me to learn that the criminal division was part of this process, and yet nothing about their—what I think the full range of their views would be on self-defense and that——

Mr. FRANKS. Professor, thank——

Mr. SCHROEDER [continuing]. Have revealed in the memo.

Mr. FRANKS. Thank you.

It does appear a little interesting to me that the Clinton Justice Department can issue a memo saying that assassinating someone is a self-defense of the country, but now we are debating today whether waterboarding someone like Khalid Sheikh Mohammed to save perhaps thousands of American lives here is the big question.

Mr. Yoo, let me read part of an interview that you had with *Esquire* magazine. In that interview, you discussed the need for precise legal guidance when you help draft legal opinions at the Office of Legal Counsel (OLC).

And incidentally, I think this is very well stated. "The other thing I was quite conscious of was that I didn't want the opinion to be vague so that people who actually have to carry out these things don't have a clear line, because I think that would be very damaging and unfair to the people who are asked actually to do these things."

Do you have any elaboration on that?

Mr. YOO. Mr. Franks, I think the interview speaks for itself, but let me just say, now, not putting myself in the position back then, but now, I think when you are called on to interpret a statute which provides language which Congress hasn't otherwise defined and the courts haven't otherwise defined, that it is important to give the client, the people who have to undertake action very clear definition, the best we can do, of what those terms mean.

Mr. FRANKS. Well, I think that is what you tried to do, Mr. Yoo.

Mr. Chairman, I would just say, try as they might, the majority should not be spinning matters of life and death into a soap opera.

The fact remains that the special terrorist interrogations program was approved through a normal process for classified covert operations. It was disclosed to Speaker Pelosi. She did not object at the time.

It was rarely used and it was immensely successful in preventing future terrorist attacks.

Mr. Addington, is there anything that you would like to add here?

Mr. ADDINGTON. Just one brief point. Professor Schroeder mentioned that it was unnecessary or even not a good idea that Mr. Yoo's opinion of—excuse me—Mr. Bibey's opinion of August 1, 2002 addressed the defenses of necessity and justification and I think the constitutional issue.

In defense of Mr. Yoo, I would simply like to point out that is what his client asked him to do. So it is the professional obligation of the attorney to render the advice on the subjects that the client wants advice on.

Mr. FRANKS. Thank you, Mr. Chairman.

Mr. NADLER. I will now recognize the distinguished Chairman of the full Committee, Mr. Conyers.

Mr. CONYERS. Thank you very much, Chairman Nadler.

Professor Yoo, I appreciate your appearance here today.

During a public debate, it was reported you were asked if the President could order that a suspect's child be tortured in grue-

some fashion, and you responded that "I think it depends on why the President thinks he needs to do that."

Is that accurate?

Mr. YOO. Mr. Chairman, I don't believe it is accurate, because it took what I said out of context.

The quote stopped right before I continued to explain a number of things, which I appreciate the opportunity to do now.

Mr. CONYERS. But so far, what I read was accurate, but there was more.

Mr. YOO. It stops like mid-sentence. So I didn't get to finish—I mean, I finished the sentence during the debate, but I didn't——

Mr. CONYERS. Okay.

Mr. YOO [continuing]. Get a chance to——

Mr. CONYERS. Thank you.

Is there anything, Professor Yoo, that the President could not order to be done to a suspect if he believed it necessary for national defense?

Mr. YOO. Mr. Chairman, I think that goes back to the quote you just read, because——

Mr. CONYERS. No. I am just asking you the question. Maybe it does or doesn't, but what do you think?

Mr. YOO. I think it is the same question that I was asked——

Mr. CONYERS. Well, what is the answer?

Mr. YOO. First, can I make clear, I am not talking about——

Mr. CONYERS. You don't have to make anything clear. Just answer the question, counsel.

Mr. YOO. I just want to make sure I am not saying anything——

Mr. CONYERS. You don't have to worry about not saying—just answer the question.

Mr. YOO. Okay. My thinking right now——

Mr. CONYERS. Yes, right now.

Mr. YOO. My thinking right now——

Mr. CONYERS. This moment.

Mr. YOO. This moment, Mr. Chairman, is that, first, the question you are posing——

Mr. CONYERS. What is the answer?

Mr. YOO. Mr. Chairman, I am not trying to make you——

Mr. CONYERS. I get it, okay.

Mr. YOO. Let me answer—I will answer the question.

Mr. CONYERS. No. You are wasting my time. Look, counsel, we have all practiced law.

Mr. YOO. I don't think the President——

Mr. CONYERS. Hold it. Could the President order a suspect buried alive?

Mr. YOO. Mr. Chairman, I don't think that I have ever——

Mr. CONYERS. I am asking you that.

Mr. YOO [continuing]. Given the advice that the President could bury somebody alive.

Mr. CONYERS. I didn't ask you if you ever gave him advice. I asked you, do you think the President could order a suspect buried alive.

Mr. YOO. Mr. Chairman, my view right now is that I don't think a President would—no American President would ever have to order that or feel it necessary to order that.

Mr. CONYERS. I think we understand the games that are being played.

Okay. Now, let me turn to Attorney Addington about the ABC News report that there was a so-called principals meeting in which Vice President Cheney sat around with other cabinet level officials to approve specific interrogation techniques.

Is this true?

Mr. ADDINGTON. I don't know of any such meeting, Mr. Chairman. It doesn't mean one did or didn't occur. I certainly wasn't at one.

Mr. CONYERS. None.

Mr. ADDINGTON. I was not at a meeting that fits the description you have given.

Mr. CONYERS. Right. Do you feel that the unitary theory of the executive allows the President to do things over and above the stated law of the land?

Mr. ADDINGTON. The Constitution binds all of us, Congressman, the President, all of you as Members of Congress, all of the Federal judges. We all take an oath to support and defend it.

I, frankly, don't know what you mean by unitary theory of government. I don't have——

Mr. CONYERS. Have you ever heard of that theory before?

Mr. ADDINGTON. Oh, I have. I have seen it in the newspapers all——

Mr. CONYERS. Do you support it?

Mr. ADDINGTON. I don't know what it is.

Mr. CONYERS. You don't know what it is.

Mr. ADDINGTON. No, and it is always described as something Addington is a great advocator of.

Mr. CONYERS. I see.

Mr. ADDINGTON. Now, let me tell you where I have used the word "unitary," in quoting OLC opinions, in drafting signing statements, and you will find OLC opinions that refer to the unitary executive branch.

And by that, they simply mean——

Mr. CONYERS. I don't need you to interpret to me what other people have used.

Mr. ADDINGTON. No. I am answering your question.

Mr. CONYERS. You are telling me——

Mr. ADDINGTON. I have used the word——

Mr. CONYERS [continuing]. You don't know what the unitary theory means.

Mr. ADDINGTON. I don't know what you mean by it, no, Mr. Chairman.

Mr. CONYERS. You don't know what I mean by it.

Mr. ADDINGTON. Or anyone else.

Mr. CONYERS. Do you know what you mean by it?

Mr. ADDINGTON. I know exactly what I mean by it and——

Mr. CONYERS. So what do you mean?

Mr. ADDINGTON [continuing]. Sentences.

Mr. CONYERS. Tell me.

Mr. ADDINGTON. The use of the word "unitary" by me has been in the context of unitary executive branch and all that refers to is—I think it is the first sentence of Article 2 of the Constitution,

which says all of the executive power is vested in, A, the President of the United States, one President, all of the executive power, not some of it, not part of it, not the parts Congress doesn't want to exercise itself.

That is all it refers to.

Mr. CONYERS. Thank you very much.

Mr. ADDINGTON. Yes, sir.

Mr. NADLER. The gentleman from Iowa is recognized for 5 minutes.

Mr. KING. Thank you, Mr. Chairman. And perhaps I would quote the Chairman of the full Committee and we could take the temperature down in here just a little bit, and I have always found the Chairman to be a gentleman and I point that out to the witnesses today.

Mr. ADDINGTON. I do, too, sir. Chairman Conyers has a long and distinguished history.

Mr. KING. That is a unanimous opinion on the Judiciary Committee, I believe.

I wanted to take you back, Mr. Addington, and just simply give you a little latitude to express yourself here.

The book, "Torture Team" by Philippe Sands, which has been quoted here a number of times and seems to be the source of the criticism, refuted by at least two of the witnesses here at the panel today, and I would ask—what do you have to say about the credibility of the information that is in that book and without necessarily impugning the author, if that can be done?

Mr. ADDINGTON. Yes. I have read the book. I can't, of course, as a witness who is under oath, address every word on every page in the book. There are things in there, as I recall from reading it, that were accurate and there were things in there that weren't.

Mr. KING. And, Professor Yoo, the same question.

Mr. YOO. Sir, I haven't read the book. I did read Mr. Sands' testimony before this Committee and I noticed in the testimony he said that he had interviewed me for the book, and I can say that he did not interview me for the book.

He asked me for an interview and I declined. So I didn't quite understand why he would tell the Committee that he had actually interviewed me.

Mr. KING. And with that answer, Professor Yoo, then, I am going to interpret that to mean that at least with regard to that statement that he had interviewed you, you find that to be a false statement and that would perhaps reflect on the veracity of the balance of the book.

Mr. YOO. I can't tell what else is in the book, but I don't understand why he would say that he interviewed me for the book.

I can tell the Committee that he contacted me once. He wanted an interview for the book and I said, "I don't want to talk to you. I wrote my own book. You can look at my own book. Everything I have to say is in my book.

And then he told the Committee that he had interviewed me.

Mr. KING. Thank you, Professor Yoo.

Let me just take this a little bit a different way. And we are here, the Constitution Subcommittee of the House Judiciary Committee, reviewing apparently the process by which the Administra-

tion reached a conclusion which seems to be a little bit amorphous at this point.

And it is still in the middle of a war, trying to put it within the context of 2008 rather than the context of 2001, with the smoking hole at ground zero, still a smoking hole, with the reconstruction of the Pentagon not perhaps yet begun, and an entirely different environment.

And I would make this point, that without regard to constitutionality or statute with regard to torture, there was a different environment and a different context with which the President had to make decisions.

And I am, I believe, reliably informed that the President has taken the position consistently that prisoners will be treated humanely. Now, that definition of humane may be up for question.

But within this context, it is a similar context with which we went into liberate Iraq. And I will make this point, that had the President not taken action, if the President had said we are going to make sure that we treat every prisoner with the idea, the advice that the Ranking Member of the Committee put up on the screen at the beginning of—during his opening statement, we are going to make friends with them and cuddle up to them and gain their trust and then we will find out everything we need to know and we can surely rely on somebody we are nice to tell us the truth.

If the President had taken that approach, that the President had also taken the approach that in spite of the global evidence, the global intelligence evidence that weapons of mass destruction that Iraq had, if he had either said "I don't believe that that exists" and if we do send troops, they are going to go in without, let's just say, weapons against chemical weapons or without defense against chemical weapons of mass destruction, the President had misstepped anywhere along the way and misinterpreted that very cautionary evidence that was out there, and we had been attacked again by the terrorists, which we have not effectively been so on this soil since September 11, 2001, any little trip along the way would have been turned back on him as having either not taken action against weapons of mass destruction in Iraq or not extracting the intelligence that was necessary to protect the American people from a terrorist attack.

If he had been soft on this, the President might well be brought before this Committee or at least as the subject of the Committee. We might have seen another series of hearings like we saw in this same room in 1998 if the President hadn't taken action.

And I would ask, Mr. Addington, if you would care to characterize this within the context of the circumstances during the time that is at question here today.

Mr. ADDINGTON. Yes, Mr. Chairman.

I am careful in doing so because of the point I made at the outset, that everyone here, I recognize, wants to defend the United States of America and their constituents from attack.

Chairman Nadler, for example, lost several thousand in his district. I mean, he had the twin towers in his district. So I don't want to appear to be lecturing on "I care more about protecting Americans than you do," and I don't and I know you don't either, Mr. Franks, want to be seen that way.

I am sorry, Mr. King.

Mr. KING. Thank you.

Mr. ADDINGTON. We looked—I looked, I should say, through basically three filters as we considered these kinds of issues back, as you say, when they were still smoking, the twin towers and the Pentagon.

The first filter in deciding what we have to do is support and defend the Constitution of the United States. We all have to start there. Every one of us, Members of Congress, me, everybody in the executive branch takes the same oath.

We have to take the oath to support and defend. The President has a different oath, but the rest of us all took the oath to support and defend the Constitution.

The second filter you look through in deciding how are we going to approach these issues, at least I did, was how, within the law, I emphasize that, within the law, I help maximize the President's options in dealing with it.

The third filter is when you go to war, you ask a lot of people to do very tough things. On this Committee, I know there are some veterans. Chairman Conyers I know served in the Korean War era and there are others who served.

You ask people to do—young men to do tough things, young women to do tough things in wartime. Same with our intelligence agents. You want to make sure that whatever orders they are given, they are legally protected.

You don't want to find out later somebody things, "Oh, let's investigate that, maybe they are wrong." You want to be careful about it.

So everything we did in that era, at least that is what I carried in my head to measure recommendations or legal advice as they were going through.

Now, the one thing I would add to what you said, Mr. King, is things were different back then. The smoke is still rising. It was fresh in our memories that 3,000 Americans were just killed by al-Qaeda terrorists, and that is true.

Things are not as different today as people seem to think. We are dealing with intelligence on threats every day. We have to consider these things.

Now, there can be legitimate judgments and disputes, and this Committee has had them and they go on throughout the government about what combination of activities should deal with these sorts of things.

But no American should think we are free, the war is over, al-Qaeda is not coming and they are not interested in getting us, because that is wrong.

Mr. KING. Thank you, Mr. Addington and all the witnesses.

Mr. Chairman, I yield back.

Mr. NADLER. I thank the gentleman.

I now recognize, for 5 minutes, the gentleman from Alabama.

Mr. DAVIS. Thank you, Mr. Chairman.

Gentlemen, thank you for coming today.

Mr. Yoo, I have not read your book, but I did do you the courtesy of reading your opening statement and I want to have some conversation with you about it.

In your opening statement, your written statement, you make the observation that it was your analysis, 2001-2002, rather, that the anti-torture statute passed by Congress in the 1990's, the interpretation of that statute would depend, as you put it, "not just on the particular interrogation method, but on the subject's mental and physical condition."

I interpret your observations as meaning that the test of torture is, in part, a subjective standard, that one has to do an inquiry into what you describe as the subject's physical and mental condition.

Now, in response to Chairman Conyers' questions, you said that that interpretation did not come from legislative history, because there was very little. You said it did not come from reviewing judicial opinions, because there were none.

And your phrase today was that there was very little—there was no congressional guidance—no congressional guidance.

One good source of congressional guidance is Members of Congress. So I would ask you if you or, in your knowledge, anyone else in the Administration consulted, for example, the Chairman of the House Judiciary Committee, Mr. Sensenbrenner at that time, or other Republicans about the meaning of the anti-torture statute?

Mr. YOO. Mr. Davis, thanks for the——

Mr. DAVIS. That is a simple question. Was Mr. Sensenbrenner consulted?

Mr. YOO. First, I just want to correct one thing I said that you quoted, just to be clear here.

There are judicial opinions on a related statute called the torture——

Mr. DAVIS. I understand that. Was Mr. Sensenbrenner consulted?

Mr. YOO. I would not know one way or the other.

Mr. DAVIS. Mr. Addington, do you know if Mr. Sensenbrenner was consulted? That is a simple was he or wasn't he.

Mr. ADDINGTON. I did not consult him and I do not know whether anyone else did or did not.

Mr. DAVIS. The Chairman of the Senate Judiciary Committee, I believe, was Mr. Specter, a Republican. Do either of you know if Mr. Specter was consulted regarding the meaning of the anti-torture statute?

Mr. ADDINGTON. I did not consult him. I don't know whether he was or wasn't and——

Mr. DAVIS. Mr. Yoo, do you happen to know——

Mr. ADDINGTON [continuing]. Not necessarily relevant to the legal interpretation.

Mr. DAVIS. Mr. Yoo, do you happen to know if Chairman Specter was consulted?

Mr. YOO. I don't know one way or the other.

Mr. DAVIS. And there is a process that has been alluded to today of consulting with Members of the House and Senate Intelligence Committees regarding certain matters that, frankly, we wouldn't want disclosed in open forum.

Mr. Yoo, did you or anyone else in the Administration consult Members of the House or Senate Intelligence Committees regarding Congress' intent regarding the anti-torture statute?

Mr. YOO. All I know is what I have read in the newspapers.

Mr. DAVIS. That is a simple were they or were they not consulted. Do you know if they were?

Mr. YOO. Again, all I know is what I have read in the papers about it.

Mr. DAVIS. To your knowledge, were they or were they not consulted, Mr. Yoo?

Mr. YOO. You mean to my knowledge back——

Mr. DAVIS. Yes. To your knowledge, they were not, were they?

Mr. YOO. I don't know.

Mr. DAVIS. Mr. Addington, to your knowledge, were any Members of the House or Senate Intelligence Committees consulted regarding the question of Congress' intent regarding the anti-torture statute?

Mr. ADDINGTON. There is no reason their opinion on that would be relevant and——

Mr. DAVIS. Is that a no?

Mr. ADDINGTON. I did not consult them and I do not know whether——

Mr. DAVIS. Now, let me make—thank you all for answering those questions without too much struggle.

One of the interesting things here today, Mr. Yoo and Mr. Addington, is that, frankly, we have heard this word "context" over and over again and I have heard both of you say, and I have heard my colleagues and my friends on this side of the aisle say you have got to remember the context.

We had been threatened. We had been attacked. There was a possibility of follow-up attacks. All of that is accurate. But let me tell you the rest of the context.

You had a Congress that was a rubber stamp for the Administration's entire security agenda. You had Chairmen of the House and Senate Judiciary Committees who were strongly supportive of your agenda.

You came to Congress and asked for the Patriot Act and you got it easily. You came to Congress and asked for an authorization of force resolution and you got it easily.

You got bipartisan support for both of them.

During the 107th, 108th and 109th Congresses, there was not a single time the Bush administration was rebuffed on any issue related to national security.

You got an expansion of FISA that met your interests. You got a Military Tribunal Commissions Act that met your interests.

We wouldn't be here today, gentlemen, if you had come to this Congress and you had said one of two things, either give us a stronger, clearer definition of what torture means or if you had even gone to congressional leadership and said you are a source of guidance on what Congress meant, tell us, Chairman Sensenbrenner, you were there, tell us, Chairman Specter, you were there.

The problem, Mr. Addington, and I will direct my last observation to you, because you still serve with this Administration, when you have got a Congress that is a rubber stamp for what you want, you ought not be disrespectful of the legislative branch of government.

If you had come to this Congress, everyone in this room knows to an absolute certainty, they would have given you anything you

asked for in October 2001. If you had said, "Give me a definition that fits," and Mr. Yoo had written the statute, if he had said, "Give us a torture statute that makes torture a subjective condition, depending on the person's mental or physical state," you could have gotten that.

You didn't even trust people who were rubber stamps for you.

And I will yield back the balance of my time.

Mr. NADLER. I thank the gentleman.

I now recognize, for 5 minutes, the gentleman from Minnesota.

Mr. ELLISON. Mr. Yoo, you wrote the Bibey memo of August 2002. Is that right?

Mr. YOO. Mr. Ellison, as I described in the opening statement——

Mr. ELLISON. I need a yes or no, sir.

Mr. YOO. I did not write it by myself.

Mr. ELLISON. Did you write it in any part?

Mr. YOO. I contributed to a drafting of it.

Mr. ELLISON. Okay. So you contributed to a drafting of it.

What percentage of the drafting did you write?

Mr. YOO. It is difficult for me to——

Mr. ELLISON. And do you check—you checked in with Addington about what you were going to cover. He said you did.

Mr. YOO. Can I——

Mr. ELLISON. Were you——

Mr. YOO. We are talking about the August 1, 2002 memo.

Mr. ELLISON. Of course. Did you check in with Addington, as he just said you did?

Mr. YOO. I, unfortunately, do not have the same——

Mr. ELLISON. So you can't——

Mr. YOO [continuing]. Guidance as Mr. Addington does, because the Justice Department has told me I am not allowed to talk about any individuals. I am only allowed to talk about——

Mr. ELLISON. Was Mr. Addington telling the truth when he said you checked in with him over what you were going to cover?

Mr. YOO. Let me describe it.

Mr. ELLISON. No. I want you to say yes or no.

Mr. YOO. I gave the draft of the opinion to the White House counsel's office, which would be——

Mr. ELLISON. So when he just said you came in to tell us what he is going to cover, you cannot confirm that. Is that right?

Mr. YOO. No, I am not saying that at all, Mr. Ellison.

Mr. ELLISON. Well, answer my question. It is a yes or no.

Mr. YOO. And so it is up to the White House counsel to decide who within the White House——

Mr. ELLISON. Stop, sir. I am asking you to tell me to confirm whether what Mr. Addington reported to this Committee was right or not right. That is simple.

I hope this isn't coming out of my time, Mr. Chairman.

Mr. NADLER. We are a little flexible.

Mr. YOO. Mr. Ellison, I am afraid I have to follow the guidance provided by the Justice Department on this question.

Mr. ELLISON. So confirm what Addington said, deny what Addington said, or say "I cannot answer the question." And what privilege are you asserting?

Mr. YOO. I can't answer the question because of the instruction by the Justice Department that——

Mr. ELLISON. Thank you.

Mr. YOO [continuing]. I am not allowed to——

Mr. ELLISON. Thank you.

Mr. YOO [continuing]. Discuss——

Mr. ELLISON. Who else was present when Addington—when you checked in with Addington?

Mr. YOO. Sir, you are assuming I answered your last question.

Mr. ELLISON. Is that a repeat of the last answer? Do you stick with the last answer?

Mr. YOO. Your question was who else was in the room when I checked in with Addington.

Mr. ELLISON. Right. And you can assert your privilege again, if you choose. Do you?

Mr. YOO. It is not my choice. The Justice Department has told me I can only talk about the office——

Mr. ELLISON. So at some point, this 2002 memo was implemented. Is that right?

Mr. YOO. What do you mean by implemented, sir?

Mr. ELLISON. Well, do you know what the word "implemented"——

Mr. NADLER. If the gentleman would suspend for a moment and stop the clock, please.

Professor, are you asserting a privilege?

Mr. YOO. On the last question or the previous two?

Mr. NADLER. Either one of them.

Mr. YOO. On the first two he asked me, I have to because of the instructions by the Justice Department that I can't discuss internal deliberations.

I can discuss——

Mr. NADLER. And exactly what privilege are you asserting?

Mr. YOO. I assume the Justice Department—I can't say what the Justice Department's belief for the——

Mr. NADLER. No, no. Wait a minute.

Mr. YOO. They ordered me not to——

Mr. NADLER. Hold on. You are testifying before a congressional Committee.

Mr. YOO. Okay.

Mr. NADLER. The Justice Department cannot order you with regard to your testimony. It can instruct you to take a privilege, if you are entitled to a privilege. You can take the privilege without their instructions, if you are entitled to the privilege.

If you are asserting a privilege, you are entitled to do so, but we are entitled to ask you what privilege is it is you are asserting.

Mr. YOO. Yes, sir.

Mr. NADLER. And whether they are ordering you to assert a privilege or not, if the privilege is there, you can assert it. If it isn't there, you can't assert it, whatever they say.

Mr. YOO. I believe it is the attorney-client privilege, sir.

Mr. NADLER. So you are asserting the attorney-client privilege in not answering the question you were asked.

We will take that—since you are not here under subpoena, we will take that under advisement and consider that at the end of the hearing.

We will resume the questioning and the clock will resume.

Mr. ELLISON. Mr. Yoo, are you denying knowledge of what the word "implement" means?

Mr. YOO. No. I wanted to——

Mr. ELLISON. What does "implement" mean, sir?

Mr. YOO. You are asking me to define what you mean by the word?

Mr. ELLISON. No. I am asking you to define what you mean by "implement." What do you understand the term to mean?

Mr. YOO. It can mean a wide number of things.

Mr. ELLISON. Okay. Look, you contributed to the writing of the 2002 memo. Is that right?

Mr. YOO. Yes, I do——

Mr. ELLISON. The name on the memo was Bibey, but you contributed to the memo, right?

Mr. YOO. Yes, sir.

Mr. ELLISON. The memo was implemented at some point. Is that right?

Mr. YOO. What do you mean by implemented, sir?

Mr. ELLISON. What I mean by implemented is the guidance that was set forth in that legal memorandum was followed and put into action. Do you understand what I mean by implemented now, sir?

Mr. YOO. So you are asking me was the memo followed, was the memo followed by——

Mr. ELLISON. I am not going to get into semantical games with you in this 5 minutes. I need you to answer the question or refuse to.

Was the memo implemented?

Mr. YOO. The memo was signed and provided——

Mr. ELLISON. I know what signed means and so do you. Stop wasting my time, Mr. Yoo.

Mr. YOO. I am not trying to, sir.

Mr. ELLISON. Was the memo followed? Will you accept followed?

Mr. YOO. I don't have personal knowledge about how it was followed, but I expect——

Mr. ELLISON. I didn't ask you about how. I asked you whether it was followed, sir.

Mr. YOO. Sir, you are asking me about things that other people would have done, not me.

Mr. ELLISON. So the fact is—so the memo was never put into effect. Are you making that claim?

Mr. YOO. No, no, no, sir. Let me go back and refer to my opening statement.

Mr. ELLISON. Forget it.

Mr. Schroeder, do you understand what implement means?

Mr. SCHROEDER. I think I do. Yes, sir.

Mr. ELLISON. Was this memo, this 2002 memo which Mr. Yoo refuses to answer questions about, ever put into effect?

Mr. SCHROEDER. Of course, I have no personal knowledge. I wasn't in the Administration——

Mr. ELLISON. I am not asking you about personal knowledge. Based on your study.

Mr. SCHROEDER. My understanding is that the memo was prompted, at least in part, by a specific request of the CIA with respect to what kinds of procedures their operatives would be able to use in interrogating some high level al-Qaeda detainees and that once the advice was forthcoming, my understanding, it is all from published investigative reporting, I have no firsthand knowledge myself, is that some of the techniques that fell on the legal side of the line, according to the memorandum, were employed.

Mr. ELLISON. So is that right, Mr. Yoo? Were the legal techniques that you outlined in this memo employed?

Mr. YOO. Were the techniques that were legal—let me say this. We did not make decisions about policy——

Mr. ELLISON. I didn't ask you about that.

Mr. YOO. We didn't——

Mr. ELLISON. I did not ask you about that, sir. I want to know if the legal advice that you gave in that memo was followed or if you expect that it was followed.

Mr. YOO. Again, Mr. Ellison, I don't——

Mr. ELLISON. Did anyone ever come to you and ask you for an interpretation of your memo?

Mr. YOO. Interpretation of my memo?

Mr. ELLISON. Did the interrogators ever come back and say, "We got the memo"——

Mr. NADLER. Without objection, the gentleman will have 1 additional minute to finish his line of questioning.

Mr. ELLISON. Did the interrogators ever return to you and say, "You know, you have given us this memo, but we want to implement a certain technique. Do we fall within the memo?" Was that scenario ever played out?

Mr. YOO. Again, sir, because of the instructions of the Justice Department, I can't tell—that is not my clock, I assume.

Mr. ELLISON. Mr. Schroeder, what——

Mr. YOO. I can't——

Mr. ELLISON. Mr. Schroeder, was the memo in effect during Abu Ghraib?

Mr. NADLER. The gentleman will suspend, again.

Professor, are you asserting a privilege?

Mr. YOO. Sir, I am afraid Mr. Ellison's questions may involve a discussion of classified information, which, because of congressional statute, I am not at liberty to discuss in a public setting.

Mr. NADLER. So you are asserting the privilege against the revelation of classified information in answering the question.

Mr. YOO. I don't know if that is a privilege. I just can't do that, sir. I am not saying it is a privilege. I just can't—that is a violation of the law.

Mr. NADLER. You are asserting that in order to answer Mr. Ellison's question, you would have to reveal classified information.

Mr. YOO. I might have to, sir.

Mr. NADLER. Might have to or do have to? Let me rephrase the question.

Mr. YOO. If I understand the question——

Mr. NADLER. Let me rephrase the question.

Is there any way you can answer Mr. Ellison's question without revealing classified information?

Mr. YOO. As I understand the question, I would have to discuss classified information to provide him a complete answer. I don't——

Mr. NADLER. Okay.

Mr. YOO [continuing]. Do that, sir.

Mr. NADLER. Again, we will take that under advisement.

Mr. DAVIS. Mr. Chairman, may I make a parliamentary inquiry?

Mr. NADLER. Yes. The gentleman will state his parliamentary inquiry.

Mr. DAVIS. I would inquire of the Chair, after we come back from our break from voting on the floor, if the Chair would consider directing particularly the two government witnesses, Mr. Yoo and Mr. Addington—I have noticed, Mr. Chairman, I have been on the Committee for a year and a half, and I have never seen two witnesses, frankly, struggle as much to appreciate the ordinary use of terms and questions.

Would you consider instructing the two witnesses to answer the questions and if they wish to elaborate or clarify, then they can ask to do so?

But given that we have time constraints, I would ask that the Chair admonish the witnesses to err on the side of being responsive as opposed to constantly quibbling over word choice, because I have never seen it to the degree I am seeing it today.

Mr. NADLER. I will certainly consider that as we break, which we will recess in a few minutes for the votes on the floor.

The gentleman can finish his questioning.

Mr. ELLISON. My question is: when the interrogators, the ones who were addressing the witnesses who were being interrogated, were those individuals—did they have a lawyer that they could go to to ask about guidance as to what they could do or could not do under the guidance of the memo that you contributed to writing?

Mr. ADDINGTON. Mr. Ellison, as I understand the structure of our government, the CIA has its own general counsel's office and I believe it is about 100 lawyers.

So if you—I assume you believe that the CIA conducted interrogations and if you did, they have a general counsel's office to ask legal questions.

Mr. ELLISON. Were you ever asked questions about whether certain techniques or others were permissible under the guidance you gave in that memo?

Mr. YOO. As I said to the Chairman just a second ago, I am afraid I think your question asks——

Mr. ELLISON. You are asserting a privilege. Were you ever asked whether waterboarding was permissible under the advice you gave?

Mr. YOO. Sir, if you will let me finish. I can't answer your question——

Mr. ELLISON. Okay.

Mr. YOO [continuing]. Because I believe it——

Mr. NADLER. The gentleman will suspend again. You are asserting that you cannot answer the question as to whether the CIA asked you questions regarding the legality of waterboarding without revealing classified information.

Is that your assertion?

Mr. YOO. Yes, sir.

Mr. NADLER. Okay.

Mr. ELLISON. Did you ever——

Mr. NADLER. We will hold that—we will hold that under advisement, and the gentleman's time has expired.

Mr. ELLISON. One last question?

Mr. NADLER. Without objection, the gentleman will have 30 additional seconds.

Mr. ELLISON. Did your memo allow for the use of sicking dogs on interrogated individuals?

Mr. YOO. I am afraid I have to give the same answer, but I will point out to the——

Mr. NADLER. Excuse me a second. The question was did your memo allow for that. That is not confidential. Your memo has been revealed to the public.

Mr. KING. Mr. Chairman, parliamentary inquiry.

Mr. NADLER. One second. Let him answer the question.

Mr. YOO. You are referring again to the August 1, 2002 memo. The memo speaks for itself. It does not discuss what you just mentioned.

Mr. NADLER. Thank you. The gentleman's time has expired.

The gentleman——

Mr. KING. I just simply want to make the parliamentary inquiry, the procedure here, whether who is actually asking the questions and if the privilege of the Chair is reflective of the executive privilege that has been denied the President of the United States, I just can't keep with the flow when the Chair is asking questions on behalf of the Member who has been recognized.

Mr. NADLER. Excuse me. The Chair was not asking questions, but trying to ascertain what privilege is being asserted, and, at one point, trying to clarify so that we don't go back and forth with a misunderstanding, and I think I saved a little time.

The gentlelady from Florida is recognized for 5 minutes, after which we will recess.

Ms. WASSERMAN SCHULTZ. Thank you, Mr. Chairman.

Mr. Addington, there are press reports that state that in September of 2002, you and other Administration lawyers visited Guantanamo Bay.

A JAG attorney in Guantanamo, Diane Beaver, is quoted in a "Vanity Fair" article as saying that the message from you and the other visitors was "do whatever needed to be done."

And just weeks after that visit, interrogators at Guantanamo Bay began to developing a far harsher interrogation program than they had ever used before.

Did you visit Guantanamo Bay in September of 2002, as has been reported?

Mr. ADDINGTON. I don't remember the exact date, but I went there a number of times.

Ms. WASSERMAN SCHULTZ. Well, do you recall going to Guantanamo Bay around that time?

Mr. ADDINGTON. I really don't remember the dates, ma'am, but I remember going in the——

Ms. WASSERMAN SCHULTZ. How many times have you been—did you go to Guantanamo Bay during that period?

Mr. ADDINGTON. During that—well, I am not sure what period you are describing. I would say I have probably been to Guantanamo, I guess, maybe five times. The first time would have been years ago, which isn't relevant to this, when I worked at the Department of Defense

And then I have probably been, I would guess, three or four——

Ms. WASSERMAN SCHULTZ. On one of those trips, did you meet with JAG attorneys?

Mr. ADDINGTON. I don't recall it. I remember when Ms. Beaver, Col. Beaver, who was referenced, I think, in Mr. Sands' "Vanity Fair" article, I did not remember meeting her there.

The only time I remember meeting her is over at the office of general counsel at the Department of Defense many years later.

Ms. WASSERMAN SCHULTZ. What generally prompted your trips to Guantanamo Bay when you made them?

Mr. ADDINGTON. I was invited by the Department of Defense to go and I accepted. I thought it would be good to go and see what they were doing to implement the decisions made in January and February at the White House to have detainees held there by the Department of Defense.

Ms. WASSERMAN SCHULTZ. Did you have any discussions on those trips about interrogation methods?

Mr. ADDINGTON. I don't know about methods. I would say we probably did, only in the sense that I can remember, and I am not sure it is this particular trip, but at least on some of the trips, and it may——

Ms. WASSERMAN SCHULTZ. On any of the trips?

Mr. ADDINGTON. Yes. That they would show us an interrogation room, with no one in it, so you could see what the room looked like and then, separately, look through, I assume, and I don't know, that the person being interrogated and the interrogator couldn't see us.

In other words, like a one-way mirror kind of set, where you could see into that. So having done that, I am sure they must have discussed——

Ms. WASSERMAN SCHULTZ. On any of the trips, did you discuss interrogation methods that were directly referenced in the memo that we have been discussing here for this hearing?

Mr. ADDINGTON. I am not sure I remember this memo having methods discussed in it, frankly.

Ms. WASSERMAN SCHULTZ. Did you discuss specific types of interrogation methods that interrogators should use while at Guantanamo Bay on the detainees?

Mr. ADDINGTON. I don't recall doing that, no.

Ms. WASSERMAN SCHULTZ. That means you didn't or you don't recall doing it?

Mr. ADDINGTON. It means I don't recall doing it, as I said.

Ms. WASSERMAN SCHULTZ. Well, it is hard to fathom that you would not have a recollection on specific conversations about types of interrogation methods as opposed to just generally talking about interrogation.

Mr. ADDINGTON. Is there a question pending, ma'am?

Ms. WASSERMAN SCHULTZ. The question is I don't believe that you don't recall whether you discussed specific interrogation methods. So I will ask you again.

Did you discuss specific interrogation methods on any of your trips to Guantanamo Bay with people who would be administering the interrogation?

Mr. ADDINGTON. And as I said to you, I don't recall. Let me be clear to you that there are two different things that may be helpful to you in asking your questions.

The Department of Defense interrogations——

Ms. WASSERMAN SCHULTZ. I really don't need——

Mr. ADDINGTON. Well, the CIA program, and you will find when you question me the participation with respect to the CIA program is more extensive than the DOD program.

And I wouldn't find it so unusual that I don't recall the details——

Ms. WASSERMAN SCHULTZ. Except that interrogations, your—there is an accusation that interrogation methods went far beyond and up to and past torture following your visits to Guantanamo Bay.

So I am trying to get a sense of whether you actually went there, encouraged those specific interrogation methods and whether they crossed the line.

Mr. ADDINGTON. I did not.

Ms. WASSERMAN SCHULTZ. So I am pretty clear on why I am asking you the questions and which one I am asking you.

On one of the trips that you took, it was weeks after the August 1, 2002 interrogation memo was issued by the Office of Legal Counsel.

Did you have any discussions on that trip about that recent Department of Justice legal advice on interrogations? Did you ever discuss the memo which offered legal advice on interrogations with anyone at Guantanamo Bay on any of your trips there?

Mr. ADDINGTON. I am fairly certain, I won't be absolute, but fairly certain that I did not.

Ms. WASSERMAN SCHULTZ. That you did not ever——

Mr. ADDINGTON. Discuss this August 1, 2002 legal opinion to the counsel of the President from the Department of Justice.

Ms. WASSERMAN SCHULTZ. So you deny the suggestion then in their report that you encouraged Guantanamo Bay interrogators to do whatever needed to be done.

Mr. ADDINGTON. No—yes, I do deny that.

Ms. WASSERMAN SCHULTZ. You do deny that.

Mr. ADDINGTON. Yes. That quote is wrong.

Ms. WASSERMAN SCHULTZ. Okay. Did you observe an interrogation during the trip, as has been reported?

Mr. ADDINGTON. I think we probably did, as I described earlier.

Ms. WASSERMAN SCHULTZ. And why did you observe an interrogation?

Mr. ADDINGTON. The Department of Defense took us around to show us the camp and what was going on, showed us that. Now, I emphasize, I am not sure it is the particular September 2002 trip you are describing, but on at least several of those trips, I——

Ms. WASSERMAN SCHULTZ. What did you observe?

Mr. ADDINGTON. Observed a detainee in, I believe, an orange jumpsuit sitting in a chair.

Ms. WASSERMAN SCHULTZ. What kind of interrogation was used?

Mr. ADDINGTON. They were talking to him during the brief time that we went.

Ms. WASSERMAN SCHULTZ. Simply just conversation, no other methods, just conversation.

Mr. ADDINGTON. During the brief time that we were there, yes. And I don't recall that we could actually hear what was being said. You could look and see mouths moving. I infer that there was communication going on.

Ms. WASSERMAN SCHULTZ. But you saw no physical contact with the interrogators.

Mr. ADDINGTON. Correct.

Ms. WASSERMAN SCHULTZ. The only thing you witnessed——

Mr. ADDINGTON. It was a very brief look.

Ms. WASSERMAN SCHULTZ [continuing]. Was discussion.

Mr. ADDINGTON. Yes.

Ms. WASSERMAN SCHULTZ. Okay. I yield back the balance of my time.

Mr. NADLER. Thank the gentlelady.

There are now three votes on the floor. The Subcommittee will stand in recess until immediately after the third vote.

We ask the witnesses to remain. We thank you for your participation and for your indulgence and patience.

The Committee is in recess.

[Recess.]

Mr. NADLER. The Committee will come to order again. I thank the witnesses for their patience in awaiting our votes on the House floor.

Without objection, the two quotes from the "War by any Means" by Mr. Yoo that I think it was Mr. Addington asked be entered into the record, are entered into the record.

Mr. ADDINGTON. Thank you. It is Exhibits 10 and 11.

Mr. NADLER. Well, they are entered into the record, whatever they are.

Before we proceed, let me simply, again, admonish those present in the room that this is a very serious hearing involving very serious and very emotional questions and we must consider them as dispassionately as possible.

And any disruption or demonstration of any kind will not be tolerated and any person engaging in such will be immediately escorted from the room. So I hope we don't have the necessity to do that.

When we recessed, we were about to recognize the gentleman from Virginia.

The gentleman from Virginia is now recognized for 5 minutes for the purposes of asking questions.

Mr. SCOTT. Thank you, Mr. Chairman.

Let me see if I can get a quick answer to the question, because there was much discussion of military training techniques in the Senate Armed Services Committee last week.

These are called the SERE techniques, S-E-R-E, survival, evasion, resistance and escape.

Now, Mr. Yoo, did you ever discuss or get information about that program as you prepared the August 1, 2002 memorandum?

Mr. YOO. Mr. Scott, I am afraid the Justice Department has instructed me that I can't answer questions of that nature.

Mr. SCOTT. Mr. Addington, did you ever discuss the SERE program in connection with the——

Mr. NADLER. The gentleman will suspend.

Mr. Yoo, in order for you to assert a privilege as a basis for refusing to answer a question, we need you to tell us what the privilege is and the specific basis on which you are asserting it.

That is, precisely why and what aspect of the question you cannot answer further and still maintain the privilege.

We need you to be specific and detailed enough that we can determine whether the basis you are asserting is valid for the line you are drawing in refusing or limitin your answer.

Mr. YOO. Mr. Chairman, according to the Justice Department's instructions, I believe the privileges would be both the attorney-client privilege and the protection of classified information.

Mr. NADLER. So you are asserting that the answer to Mr. Scott's question would necessitate the revelation of classified information.

Mr. YOO. As I understand the instructions the Justice Department——

Mr. NADLER. No, no, no, I am not asking you that. You are asserting the privilege, not the Justice Department.

You are asserting their privilege. You have to be satisfied that—well, let me just back up a bit.

The attorney-client privilege is not a valid privilege in Congress. It may be in court, but it is a common law privilege. It is not a valid privilege here, number one.

But your classified information is. That is, it is valid if it applies.

So what I am asking you is that you must state that an answer to Mr. Scott's question would necessitate the revelation of classified information, not that someone else believes it, you believe it.

Mr. YOO. I have to say this, sir, that the Justice Department gave me these instructions. I can't go out beyond them, sir. I am not sure what you are asking me to say.

I mean, if your view is that my saying that this is the privilege, this is what the Justice Department communicated to me in an e-mail. So I have to follow it, sir.

I don't have the right to go beyond or to go——

Mr. NADLER. It is difficult to credit your assertion of privilege on this question because Steven Bradbury, the current assistant Attorney General of the OLC, testified before this Committee earlier this year.

When he testified, he said that "The CIA's use of the waterboarding procedure was adapted from the SERE training program."

In light of his saying that, how can your answer to Mr. Scott's question be privileged?

Mr. YOO. Sir, I recognize that it is your view that the attorney-client privilege does not apply. However, sir, that is the instructions I received from the Justice Department.

It is their privilege to raise and those are the instructions I received.

I don't want to be in the middle of a privilege fight myself if you and the Justice Department have a disagreement about it.

Mr. NADLER. It is difficult. I gather Steven Bradbury is, I am told, the person giving these instructions to the Justice Department. He answered this question before this Committee.

So I fail to see how, in effect, the repetition of the answer could be—unless you are going to disagree with him—could be privileged.

Mr. YOO. Sir, I recognize that Mr. Bradbury gave me the instructions, but I personally can't go beyond what he has——

Mr. NADLER. All right. The Chair will have to—I can't say anything further. The Chair will take your assertion of privilege regarding this question under advisement and we will come back to you later as may be warranted.

The gentleman from Virginia's time is resumed.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Addington, did you ever discuss the SERE program in connection with the August 1, 2002 memorandum?

Mr. ADDINGTON. No. I didn't think I did so, but I don't have any reason to dispute the quotation from Mr. Bradbury that the Chairman just read.

Mr. SCOTT. Mr. Yoo, let me ask a kind of basic question. Is torture by United States officials illegal?

Mr. YOO. You are asking me—my current view is if it is a violation of torture as it is defined in the statute, in the criminal code, then it would be illegal under that statute.

Mr. SCOTT. Thank you. Now, is there an international agreement of what torture is and what it isn't? I mean, doesn't everybody in the world kind of know when it is torture and when it isn't?

Mr. YOO. Mr. Scott, you are referring to the convention against torture, I believe.

Mr. SCOTT. Sure.

Mr. YOO. So there is a treaty in effect called the convention against torture.

Mr. SCOTT. Don't most countries kind of understand when it is torture and when it is not?

Mr. YOO. I think, looking at that treaty, that there has been disagreement by the United States itself as to——

Mr. SCOTT. You put some disagreement in it. I am talking about everybody else in the world.

Mr. YOO. No, sir. When the Senate ratified the treaty, the convention against torture, it put in a reservation about its definition of torture.

Mr. SCOTT. Okay. Whatever the definition is, did 9/11 change that definition?

Mr. YOO. 9/11 did not change the definition of torture under the convention against torture, no.

Mr. SCOTT. Now, if people—if United States officials torture people based on your memo, would they be protected if they follow your memo? If they followed your memo, would they be protected from prosecution, even though your memo has been pretty much disparaged?

Mr. YOO. Mr. Scott, putting aside whether it has been disparaged or not, the purpose of the memo was to define torture so that people would not commit torture.

The memo itself does not——

Mr. SCOTT. Mr. Schroeder, Professor Schroeder, can a legal opinion be so ridiculous that it does not protect those who follow the definition in such a memo?

Mr. SCHROEDER. Well, it could be, Congressman. But if you are talking about the effect it would have on somebody, say, down the line, actually, an operative in the field and hasn't had a chance to read the memo, but is simply getting advice that an authoritative interpretation exists, then I think it would be very difficult for that person to be held responsible for having analyzed and rejected the law on his or her own behalf.

Mr. SCOTT. Well, can the opinion be so ridiculous that as it goes down the line, people ought to have the common sense to reject the analysis and use their common sense as to when it is torture and when it is not, or does the Administration have the power to just write up such a memo and protect people who torture people based on a ridiculous legal opinion?

Mr. SCHROEDER. No. I don't believe they do. I think that people—and you would expect that members of the military would use their own common sense as to what is permissible or not.

Mr. SCOTT. Now, is it an excuse to torture if you got good information from the torture?

Mr. SCHROEDER. Not under the treaty and I think not under the statute that implements the treaty, no.

Mr. SCOTT. Is it an excuse to torture if you can't get the information you are looking for using less aggressive techniques?

Mr. SCHROEDER. No, sir. The treaty admits of no exceptions.

Mr. SCOTT. Now, Mr. Yoo, if you are going to go around torturing people based on your memo, how do you know before you get information whether or not you are going to get good information from someone?

Mr. YOO. Sir, I am not going around torturing people, as you just said, and the memo does not authorize anyone to torture anybody.

So unfortunately, I don't agree with the premise of your question.

Mr. SCOTT. Are you suggesting that the activities allowable under your memo do not constitute torture by everybody's definition in the world except yours?

Mr. YOO. Sir, I don't know what everybody else's definition in the world is.

Mr. SCOTT. Now, is it an excuse to use more aggressive techniques, the techniques that you can use, do you get—do you consider the information you are going to get or the fact that you couldn't get it using less aggressive techniques?

Does that excuse more aggressive techniques?

Mr. YOO. Sir, as I understand the statute, as it is written now, does not provide—it does not provide an exception for whether the information is good, as you said, or whether the interrogation techniques are less—you could less or more aggressive interrogation techniques.

There is nothing in the statute that says anything about that.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. NADLER. Thank you.

The gentleman from North Carolina is recognized for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman.

I thank the witnesses for being here.

I have kind of observed from the earlier questioning that if I really want some answers, I probably ought to focus on Professor Schroeder here.

Otherwise, I will probably be just pretty much banging my head against the wall and wasting my 5 minutes.

So let me ask Mr. Schroeder a couple of questions here.

I am fascinated by the comment on the first page of your written testimony, where you say we must be mindful of the difference between law and policy.

I was kind of reflecting on that during the time we went to vote and recalled that in the 22 years that I practiced law, I had a particular client who, when he didn't like the legal advice I would give him, would always tell me that the Lord told him to do otherwise.

And I was very insistent with him that I never wanted to argue with the Lord, but I stood by the legal advice that I gave him. And so I have some appreciation for the difference between policy and law.

I guess when somebody, the Lord or somebody other than a lawyer, tells you that you should do something that the lawyer has told you he thinks is illegal, that is the distinction you are drawing between policy and legal advice, I take it.

Mr. SCHROEDER. Yes, sir.

Mr. WATT. All right. I think I understand the concept then.

Well, let me, first of all, ask you, are there things that you understand—I know you have not been a party to all of the torture techniques and what have you that this Administration has pursued.

Are there things that you understand that this Administration has pursued that go beyond Mr. Yoo's memo and basically the President was told or the Vice President or somebody in the CIA was told by somebody other than Mr. Yoo that the Lord or whoever told them, that—have those kinds of things been engaged in based on what you understand?

Mr. SCHROEDER. Congressman, I hope I am now not going to join Mr. Yoo and Mr. Addington in being unable to respond to your question, but I really don't have knowledge of what exactly was being—now, we have read reports that waterboarding was used on some suspects.

Mr. WATT. Would that be authorized by Mr. Yoo's memo?

Mr. SCHROEDER. I would have to, frankly, know more about waterboarding than I do.

Mr. WATT. That is fine. This is not a trick question. I am just trying to get——

Mr. SCHROEDER. I wish I could be helpful, but I just don't have——

Mr. WATT. Assume that a policy decision was made to go beyond the legal memorandum and advice that Mr. Yoo gave. The recourse that I suppose the public and Congress would have, only recourse probably would be an impeachment proceeding. Isn't that correct or is that correct?

Don't ponder too long. My clock is ticking here.

Mr. SCHROEDER. I just hate to use the word in this Committee, which has had to consider these matters in the past.

It would be difficult under the legal theory in the August 2002 memo to think of what remedy would be available other than impeachment.

Mr. WATT. And I guess this is the same question that Mr. Scott was asking at some level. When an attorney gives a piece of advice that is legal advice, we presume attorneys have a sense of responsibility to the law, to the Constitution.

What recourse does Congress or the public have against the attorney, if any?

Mr. SCHROEDER. Well, proceedings with a bar association is one possibility. But you have to understand that I am not remotely in a position to say anything——

Mr. WATT. I am not suggesting that——

Mr. SCHROEDER [continuing]. That the advice being given by the individuals who gave them was under their understanding of the law, at the time, the best advice that they could give.

I happen to think it was wrong, but there is a big difference between being wrong——

Mr. WATT. Just a hypothetical question that has nothing—I am separating it from Mr. Yoo's opinion.

Is there some recourse that Congress has if we find that the advice was outrageous, as Mr. Scott said?

Mr. SCHROEDER. Well, I think as far as this institution goes, I am not aware of laws on the books that would reach that situation.

Certainly, the bar associations responsible for someone's professional license could evaluate the advice that was being given and seeing if it constituted malpractice or an abuse of that person's responsibility as an officer of the court to uphold the law.

Mr. WATT. So really Congress and the public really have little recourse other than malpractice.

Mr. SCHROEDER. I would think a disciplinary proceeding before the bar association leading to disbarment would be the kind of remedy that I would think of first. But this is not a question I have investigated.

Mr. WATT. Okay. My time has expired, and I appreciate you being responsive to my questions.

I yield back.

Mr. NADLER. I thank the gentleman.

I now recognize for 5 minutes the gentleman from Tennessee.

Mr. COHEN. Thank you, Mr. Chairman.

And thank you, the gentleman from North Carolina.

Mr. Yoo, you worked for Mr. Ashcroft, did you not?

Mr. YOO. Mr. Ashcroft was the Attorney General when I was at the Justice Department.

Mr. COHEN. Right. Did you consider yourself an employee of his?

Mr. YOO. I am sorry, sir?

Mr. COHEN. You were an employee of his. You were in the chain of command. You were underneath him, correct? Is that right?

Mr. YOO. Yes, sir.

Mr. COHEN. Did you communicate with Mr. Addington sometimes and not relay those communications through Mr. Ashcroft's office and keep him outside the loop?

Mr. YOO. Sir, I never did anything to keep Mr. Ashcroft out of the loop.

Mr. COHEN. So Mr. Ashcroft had knowledge of everything that you discussed with Mr. Addington, is that correct, sir?

Mr. YOO. As I explained in my opening statement, in the development of the August 2002 memo, we notified the Attorney General's office that we had received a request for the memo.

They, the Attorney General's office, dictated who and whom we could not discuss it with. We shared drafts of the memo with the office of the Attorney General and the office of Attorney General approved the memo.

There is no way that we——

Mr. COHEN. Did General Ashcroft ever express to you concerns about your relationship to his office vis-a-vis the communications you had had with Mr. Addington and keeping him outside of the loop?

Mr. YOO. I don't think that I—I don't think, according to the Justice Department's guidelines, I am allowed to discuss with you any particular conversation that I had with Mr. Ashcroft——

Mr. COHEN. Did the conversation exist?

Mr. NADLER. The gentleman will suspend.

Again, Mr. Yoo, in order for you to assert a privilege as a basis for answering a question, we need you to tell us what the privilege is and the specific basis on which you are asserting it.

Mr. YOO. Sir, any information or conversations I had with any individual in the executive branch is covered by the instruction of the Justice Department by either attorney-client privilege or deliberative process privilege, and that is the decision of the Justice Department, sir.

Mr. NADLER. No, no, no, no. This particular question, which privilege are you asserting?

Mr. YOO. First of all, I just want to make clear it is the Justice Department that is asserting it and it is the attorney-client privilege, along with, as I said before, in response to the previous questions.

Mr. NADLER. Well, wait a minute. How is the attorney-client privilege implicated in a question about your communication with your superior in the—you weren't his attorney.

The Justice Department may be—I mean, are you the attorney in your position or were you the attorney in your position at OLC of the attorney of the Attorney General?

Was he your client?

Mr. YOO. Sir, it is the Justice Department that has already decided, in giving me these instructions, that all these communications are covered by either the attorney-client privilege or the executive deliberation privilege.

Mr. NADLER. The instructions, we were given a copy of the instructions. He is not authorized to discuss the specific deliberative communications, including the substance of comments on opinions or policy questions or the confidential pre-decisional advice, recommendations or other positions taken by individuals or entities of the executive branch.

The question, as I understand it, was did Attorney General Ashcroft express concerns about your relationship with Mr. Addington.

That does not seem to fall within these instructions. He either did or did not express concerns. The question does not ask about specific deliberative communications or the substance of comments or opinions.

Mr. YOO. Can I just consult with my attorney?

Mr. NADLER. Certainly.

Mr. YOO. After consultation with our attorneys, I will answer the question, which is my recollection is that, no, I never had such a conversation with the Attorney General.

Mr. COHEN. Did you have any discussions with the Attorney General at all where he expressed any concern that you were not operating within your line of authorities?

Mr. YOO. Mr. Cohen, I do not recall any conversation of that nature.

Mr. COHEN. So if *The Washington Post* reported that General Ashcroft was upset and if General Ashcroft said he was upset about communications between you and Mr. Yoo, *The Washington Post* and General Ashcroft would be mistaken or not have proper recall. Is that correct?

Mr. YOO. No, sir. Let me explain.

First of all, what General Ashcroft expressed to other people or if he talked to *The Washington Post* at all is beyond my knowledge.

Mr. COHEN. Right, beyond you. Let me ask you this.

Mr. YOO. Your question was whether he expressed it to me.

Mr. COHEN. To you, and you don't recall that.

Mr. YOO. And my answer is he——

Mr. COHEN. You don't recall it. I have been here for a while.

You articulated a definition of illegal conduct in interrogations, explaining that it must "shock the conscience."

Do you remember that? Is that accurate?

Mr. YOO. Sir, I believe you are referring to the memo that was sent by the Justice Department to the Department of Defense in 2003 that defined cruel, inhumane and degrading treatment.

Mr. COHEN. Yes. What is the answer, yes or no? Do you remember that, "shock the conscience?"

Mr. YOO. I am just saying that the—I am just trying to tell you where it arises, sir, which was in this memo, where the Justice Department was interpreting the phrase "cruel, inhumane and degrading treatment," which was subject to a reservation by the United States that said it is equivalent to—and it cited the 5th and 8th and 14th amendments, which those amendments use the phrase "shock the conscience."

Mr. COHEN. All right. But you also said that and you explained that whether the conduct is conscience-shocking depends, in part, on whether it is without any justification. Is that right?

Mr. YOO. I am sorry, sir. Can you repeat the question?

Mr. COHEN. Right. Did you also go further and say that whether the conduct is conscience-shocking depends on whether it is without any justification? Do you recall that?

Mr. YOO. Well, sir, it is in the memo. The memo——

Mr. COHEN. So that is true, then, yes. The answer is yes.

Mr. YOO. The memo says that.

Mr. COHEN. And it would have to be inspired by malice or sadism before it could be prosecuted. Is that right?

Mr. YOO. Sir, I think that language is taken out of context in the sense that the memo, as I read it, does not say that you must have those characteristics.

Mr. COHEN. Where did those words come from?

Mr. YOO. They come from, sir—in the memo, they come from the case law. They come from the decisions of the Federal courts interpreting—when they interpret what does the due process clause require and then they say—the courts have said we interpret it to mean shocks the conscience standard.

There are Federal courts that have—I did not create those words. They are——

Mr. COHEN. Are you saying that the law states it is not how the person that is being tortured is receiving the treatment, but the intent of the person who is torturing?

So if I want to take somebody's fingernails out, if I think it is for the good of the country, that is not torture? If I want to cut somebody's appendage off, it is okay as long as I think it is important for the country?

Mr. YOO. Sir, the memo does not say that. The memo quotes Federal cases that cite this as one amongst many factors that courts consider when they to determine what shocks the conscience.

Mr. COHEN. Let me ask you this. Is there anything you think that the President cannot order in the terms of interrogation of these prisoners in a state of war?

Mr. YOO. Sir, you are asking my opinion now, not what we addressed in the opinion, because the opinion——

Mr. COHEN. Right. Now, what is your opinion now?

Mr. YOO. The opinions in 2002 and 2003 do not address that question.

Mr. COHEN. What is your opinion now?

Mr. YOO. Because they were not at the——

Mr. COHEN. What is your opinion now?

Mr. YOO. Sir, let me finish. I am just trying to finish my answer, sir.

Mr. COHEN. No. You are trying to stretch out 5 minutes.

Mr. YOO. No, I am not. I have no idea what time it is.

Mr. COHEN. You guys are great on "Beat the Clock."

Mr. YOO. I don't play basketball, but I watch it.

Mr. COHEN. That was a game show. Maybe it was BYT.

Mr. YOO. I guess it was before my time, sir.

Mr. COHEN. That is it, BYT.

Mr. YOO. Sir, to answer the question. Those questions are not addressed in those memos. They were not before us.

Today, I would say there are a number of things a President—I don't think any American President would order, in order to protect the national security, and I think one of those things is the torture of detainees.

I do not believe, and I have said so many times, that the President—I don't think the President should ever——

Mr. NADLER. Without objection, the gentleman is granted 1 additional minute.

Would the gentleman yield for a second?

Mr. COHEN. Yes, sir.

Mr. NADLER. Thank you.

Mr. Yoo, this is the second or third time today that you have said that you don't believe an American President would order certain heinous acts.

Would you answer the question not would he order it, but could he order it under the law, in your opinion?

That is your question. The question is to you.

Mr. COHEN. I am not Edgar Bergen. That was a question.

Mr. YOO. That is your question, whether——

Mr. NADLER. No. The question is not would an American President order such terrible things, but could he legally do so.

Mr. YOO. I think it is not fair to ask that question without any kind of facts, any kind of—I mean, you are asking me to state some kind of——

Mr. NADLER. So in other words, there is nothing conceivable——

Mr. YOO. No, sir, I am not saying that.

Mr. NADLER. No, no. Let me finish the question, because you don't know what I am going to ask.

There is nothing conceivable to which you could answer, no, an American President could not order that without knowing facts and context.

Mr. YOO. Sir, I have told you I don't agree with that, because you are trying to put words in my mouth about—attempting to get me to answer some broad question covering all circumstances, and I can't do that.

I don't agree with the way you are characterizing my answer.

Mr. NADLER. I will yield back to the gentleman.

Mr. COHEN. Let me ask Mr. Addington. What branch of government is the Vice President's office in?

Mr. KING. Mr. Chairman, can we return to regular order?

Mr. NADLER. We just did.

Mr. COHEN. If I can pursue the question.

Mr. NADLER. The gentleman is granted another additional minute.

Mr. COHEN. Mr. Addington, what branch of government——

Mr. KING. Objection.

Mr. COHEN [continuing]. Is the Vice President in?

Mr. KING. Objection, Mr. Chairman.

Mr. NADLER. Objection to 1 additional minute?

Mr. KING. I am objecting to the extenuation of this interrogation that is going on and some of this process. And there wasn't a unanimous request for that additional minute.

Mr. NADLER. I will ask unanimous request for an additional minute.

Mr. KING. Now I don't object.

Mr. NADLER. Thank you.

The gentleman is granted an additional minute by unanimous consent.

Mr. COHEN. Thank you, Mr. Chairman.

Mr. Addington, what branch are we in?

Mr. ADDINGTON. Sir, perhaps the best that can be said is that the Vice President belongs neither to the executive nor to the legislative branch, but is attached by the Constitution to the latter. Closed quote. That is from two legal opinions issued by the Office of Legal Counsel of the Department of Justice dated March 9, 1961

and April, I believe it is 18, 1961 by, I believe, Mr. Katzenbach, if I remember.

Mr. COHEN. So he is a member of the legislative branch.

Mr. ADDINGTON. To Vice President Johnson, and I offer those as Exhibits 13 and 14——

Mr. COHEN. Mr. Addington, is he a member then, you are saying——

Mr. NADLER. Without objection, they will be entered into the record.

Mr. COHEN [continuing]. So he is a member of the legislative branch.

Mr. ADDINGTON. No. I said attached by the Constitution to the latter. He is not a member of the legislative branch, because the Constitution says that the Congress consists of a Senate and a House of Representatives.

The Constitution further says that the Senate consists of Senators and the House of Representatives consists of Representatives, and he is neither a Senator nor a Representative.

Mr. COHEN. But he is attached to the legislative branch.

Mr. ADDINGTON. That is the quote I read you.

Mr. COHEN. So he is kind of a barnacle.

Mr. ADDINGTON. He is attached by the Constitution to the latter. I don't consider the Constitution a barnacle, Mr. Cohen.

Mr. COHEN. No, the Vice President. Since he is really not fish nor fowl, he is just attached to something.

Mr. ADDINGTON. It is not exclusive in the Constitution to have that situation.

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

Mr. COHEN. Thank you, Mr. Chairman.

Mr. NADLER. You are quite welcome.

The gentleman from Massachusetts, Mr. Delahunt, who is a Member of the Committee, but not the Subcommittee, has requested an opportunity to question the witnesses.

As a matter of courtesy, without objection, I will grant that.

Mr. KING. Mr. Chairman?

Mr. NADLER. The gentleman from Iowa.

Mr. KING. I thank the Chairman.

Mr. Chairman, at the request of the Ranking Member Smith, I object to the participation of a non-Subcommittee Member.

House rules provide for participation in hearings only by Members of the Committee or Subcommittee. House Rule 11 states "Each committee shall apply the 5-minute rule during the questioning of witnesses in a hearing until such time as each member of the committee would so desire an opportunity to question each witness."

The Committee rules explicitly allow only the participation of non-members of a Subcommittee in one instance, and that is the Chairman and Ranking Member to participate as ex officio Members of any Subcommittee.

Subcommittee membership should mean something. It allows Members the privilege of participation.

Setting a precedent that allows a non-Member of a Subcommittee to participate could lead to a situation where 10 other Members might also want to participate.

That would not serve the Committee well, Mr. Chairman.

This objection has nothing to do with the Member in question, as you well know, or the subject matter at hand; rather, participation in a hearing that should be a privilege of the Members of the Subcommittee.

And so I, therefore, object to his participation.

Mr. NADLER. The gentleman's objection is, unfortunately, grounded in the rules and the gentleman's objection is correct.

I would observe that the precedent of allowing Members of the full Committee who are not Members of the Subcommittee to participate in Subcommittee hearings by asking questions of witnesses has been set many times over, and I regret—without causing chaos—and I regret that the gentleman insists on the point of order.

But if he does insist, it must be enforced.

I apologize to the gentleman from Massachusetts.

The Chair recognizes himself for 5 minutes to question the witnesses.

Mr. Addington, you stated to Ms. Wasserman Schultz earlier in this hearing that your involvement in the CIA interrogation program was greater than your involvement in the military program.

What was your involvement in the CIA interrogation program?

Mr. ADDINGTON. We had a number of meetings, as you might imagine. An example was the one I described earlier with the Justice Department to obtain legal advice on the program.

A number of the lawyers and the relevant parts of the executive branch would be involved in working on the legal advice on such a matter.

Mr. NADLER. Firstly, you just said you are part of the executive branch or the Vice President's office, but leave that aside.

Mr. ADDINGTON. There is a number of us lawyers. All I am, sir, is an employee of the Vice President.

Mr. NADLER. Why was a lawyer from the Vice President's office involved in CIA business?

Mr. ADDINGTON. As you know, in modern times, the Vice Presidents often provide advice and assistance to Presidents. In fact, that is what they spend a majority of their time doing.

Vice Presidents are not in charge of anything. They simply gather information. They provide advice. They have whatever functions Presidents give them, but it is basically advice and assistance.

Mr. NADLER. And they participate in various agencies' business?

Mr. ADDINGTON. No. Congress has recognized that function. If you look at Section 106 of Title 3, that modern Presidents provide advice and assistance, and they provide staffs.

Part of the Vice President's staff is paid for under the appropriation that goes with the statute I just cited. Part of the Vice President's staff is paid out of the legislative branch appropriation.

And when the President's staff wishes to have us participate and provide advice, then we——

Mr. NADLER. So the President asked you, in effect, or someone on behalf of the President authorized that.

Mr. ADDINGTON. We were included because it is the practice in this Administration, stronger at some times than others, but generally, that the President's staff and the Vice President's staff——

Mr. NADLER. In other words, pursuant to the President——

Mr. ADDINGTON [continuing]. Work together.

Mr. NADLER. Okay. Pursuant to the President's authorization.

Did you have any involvement in the CIA's decision to destroy any interrogation videotapes?

Mr. ADDINGTON. To destroy? No, sir.

Mr. NADLER. If the CIA program is found to be unlawful, would you bear any responsibility for that?

Mr. ADDINGTON. If the CIA program is found to be unlawful?

Mr. NADLER. Yes.

Mr. ADDINGTON. Would I bear responsibility for that?

Mr. NADLER. Any responsibility.

Mr. ADDINGTON. Is that a moral question or a legal question? Let me distinguish——

Mr. NADLER. Interpret it as you will, either way.

Mr. ADDINGTON. I believe, and I am somewhat sympathetic to the approach Professor Schroeder took, that the legal opinions issued by the Department of Justice, to the extent they are relied upon by those who are implementing the——

Mr. NADLER. No. We are not talking about legal opinions. Excuse me. We are not talking about legal opinions of the Department of Justice.

Given your involvement in discussions with the CIA, did these discussions implicate what they did and if what they did was unlawful, would your discussions have any bearing on that? That is my real question.

Mr. ADDINGTON. No. I wouldn't be responsible is the answer to your question.

Mr. NADLER. Thank you.

Mr. Yoo?

Mr. ADDINGTON. Legally or morally.

Mr. NADLER. Mr. Yoo, *The Washington Post* has reported that Attorney General Ashcroft and his deputy, Larry Thompson, were not aware of the March 2003 memorandum when you wrote it and transmitted it to the Pentagon.

Is that accurate that the Attorney General and his deputy AG were not aware of that memo?

Mr. YOO. Mr. Nadler—I am sorry. Mr. Chairman, we received a request from the Defense Department. We notified the office of the Attorney General immediately that we had received the request.

Mr. NADLER. You notified them of the request. Did you notify them and send them a copy of the memo?

Mr. YOO. Sir, we also notified the deputy Attorney General's office and——

Mr. NADLER. Did you notify them and send them a copy of the memo when you sent it to——

Mr. YOO. We sent them drafts of the memo, both offices.

Mr. NADLER. And the final one?

Mr. YOO. Yes, sir. We also sent versions of the final ones to both the deputy Attorney General's office and the office of the Attorney General.

Mr. NADLER. Thank you. What?

What do you mean versions? You sent them a copy of the final memo?

Mr. YOO. Yes, sir.

Mr. NADLER. Okay. Thank you.

Your prepared testimony says that the offices of the Attorney General and the deputy AG and the criminal division received drafts of the opinion. You just said that.

Who in those offices received those drafts?

Mr. YOO. In response to your question, sir, as you know, the Justice Department has instructed me not to discuss the particular individuals——

Mr. NADLER. Not to name those who received the draft? I don't think that was in the instructions, number one, and I don't think they have the power to issue such an instruction.

Mr. YOO. Excuse me 1 second, sir.

Mr. Chairman, I think that my recollection at the time was that in delivering the drafts of the memo to the office of the Attorney General, that we delivered it to the counselor to the Attorney General.

Mr. NADLER. And who is the counselor?

Mr. YOO. His name was Adam Ciongoli.

Mr. NADLER. Thank you.

Mr. YOO. And my recollection as to the deputy Attorney General's office—and let me—also, I can't say definitively everybody who got a copy either.

I am just saying because these were sensitive matters, we had to transmit them. I believe we may have given it to the principal associate deputy Attorney General at the time, who name was Chris Wray.

Mr. NADLER. Chris Wray. Thank you.

Now, without divulging the contents of any discussions, did those offices make comments or revisions to the opinions?

Mr. YOO. Without divulging the——

Mr. NADLER. Without divulging the content, did they make any——

Mr. YOO. Yes, they did. I can say that there were—is your questions comments or——

Mr. NADLER. Comments or revisions.

Mr. YOO. I can say that we received——

Mr. NADLER. Well, how about separating that? Comments? Yes. Revisions?

Mr. YOO. I would say we received comments. I don't recall revisions one way or the other, sir.

Mr. NADLER. Okay. And can you say who made those comments?

Mr. YOO. Any comments we would have received would have come from the people I just mentioned, the counselor to the Attorney General or the principal associate deputy Attorney General.

Mr. NADLER. Thank you. Without objection, I will grant the Chairman 1 additional minute.

Did you ever understand that the Attorney General or the deputy AG had personally approved this opinion, that is, the March 2003 memorandum?

Mr. YOO. Let me say, sir, we could not have issued such an opinion without the approval of the office of the Attorney General or the office of the deputy Attorney General. I can't recall whether——

Mr. NADLER. But you don't whether they personally approved it.

Mr. YOO. Well, I can't recall whether they sent a memo or something signing it, signing off on it.

Mr. NADLER. When you say the office—you couldn't have issued it without the approval of the office of the AG or deputy AG, what do you mean by that other than by them personally?

Mr. YOO. Sir, you are asking—I mean, I wouldn't know, sir, just personally, whether the Attorney General himself personally approved it, but we would receive—the way the Justice Department works, we received communications from the office of the Attorney General.

Mr. NADLER. Okay. And finally, why was the memo or the opinion, rather, signed by you instead of by the head of the OLC at the time?

Mr. YOO. The 2003, March 2003 memo.

Mr. NADLER. Yes.

Mr. YOO. I don't have the dates in front of me, right in front of me, but my recollection is that Jay Bibey, who was the head of the office, was just about to go onto the bench.

As you know, he is now currently a judge of the U.S. court of appeals for the ninth circuit. And so I believe that the timing of the memo and when he was going to go on the bench were very close to each other and couldn't be certain whether he would still——

Mr. NADLER. Have been there or not.

Mr. YOO [continuing]. Been in office at the time the opinion issued.

Mr. NADLER. Professor Schroeder, could you comment briefly on that answer—on that question, rather?

Mr. SCHROEDER. Well, I only know what has been reported back, which is that Jay Bibey went onto the bench about 10 days after the memo was signed on March 14. So at the time, so far as I think the public record discloses, he was still assistant Attorney General in the Office of Legal Counsel.

Mr. NADLER. And after he went on the bench, who was the assistant Attorney General? Who took that position immediately thereafter? Anybody?

Mr. YOO. There was an acting assistant. There was no nominee or there was——

Mr. NADLER. But there was someone acting in that.

Mr. YOO. There was an acting assistant Attorney General.

Mr. NADLER. And if it was too late for Mr. Bibey to sign it, why didn't that gentleman or lady sign it?

Mr. YOO. As you know, Mr. Chairman, classified matters can only be discussed with people who are cleared to know about them. When the Justice Department——

Mr. NADLER. So just to cut to the chase, that person may not have been cleared at that point.

Mr. YOO. I am trying to remember, sir, but I do not believe, at that time—my recollection is I don't believe they were cleared at that time.

Mr. NADLER. Okay. Thank you. My time has expired.

I will recognize, for 5 minutes, the distinguished Chairman of the full Committee, Mr. Conyers.

Just for information, since we normally rotate by parties, Mr. King has asked to pass for a number of witnesses, and we are granting him that privilege.

Mr. CONYERS. Thank you, Steve King.

Professor Schroeder, as the former acting director of the Office of Legal Counsel in the department, can you elaborate on any irregularities or improprieties that you may see in how the OLC memos we are discussing today were put together?

Mr. SCHROEDER. Yes, Mr. Chairman.

It is unusual, in my experience, for memoranda as significant as the March 2003 memo and, say, the September 25, 2001 memo on the commander in chief authority to be signed by a deputy.

If the assistant position was vacant, I can understand how that might happen. But otherwise, in my experience, those would be the kind of detailed memoranda that would be—and significant memoranda that would be issued by the assistant Attorney General.

It is also the practice, as Professor Yoo has said in his testimony, to solicit the advice of other components of the Justice Department and where there are any disagreements about the content of the memos, to note that fact in the memos themselves.

In this case, there was either unanimity throughout the Justice Department on the controversial legal interpretations that were being given or that some disagreements were not noted for the record.

Finally, with respect to the memoranda that deal with interrogation techniques and torture specifically, there is some expertise in the executive branch on what torture means, because both the State Department and the INS have responsibilities for applying the idea of torture in the context of requests for aliens to seek relief from removal decisions in immigration matters or the State Department receiving asylum requests from aliens.

And in both of those contexts, the two departments have developed their own administrative understanding of what constitutes torture or not.

I would have expected that those internal executive branch reservoirs of knowledge on what torture means would have been accessed by OLC.

Now, I understand from Professor Yoo's prepared testimony that the CIA specifically prohibited the State Department from participating or didn't allow them to be contacted.

That strikes me as very unusual, because it is cutting out a source of knowledge within the Administration that I think could have been quite helpful in articulating the working standard of what constitutes torture or not under the statute and under the treaty.

Mr. CONYERS. Our witness, Professor Yoo, has claimed that there was a lack of guidance on the meaning of torture, which was why he used a health care-related statute in drafting the 2002 opinion.

Do you have any comment on that circumstance?

Mr. SCHROEDER. Well, I think, to amplify on what I just said, I think there are sources of understanding, working knowledge as to what constitutes torture or not, that would have provided more guidance, not necessarily in statutory law, but in the working experience of expert agencies who have handled the matters.

Some of them, like the immigration process, result in decisions by the board of immigration appeals that could have been accessed to give you some reference points at least for purposes of discussion.

Now, maybe they are not going to be conclusive, because torture—I think if you try to define the precise boundary where just an inch to one side it is torture and just an inch to the other side it is not torture, you are going to have a very difficult time.

Mr. CONYERS. Of course.

And the last comment with reference to Professor Yoo's testimony. It seems he has claimed that even though the August 2002 memo was revoked, that there is a footnote in the revocation memo stating that the conclusions in the memo remain in force.

Am I missing something there?

Mr. SCHROEDER. Well, Mr. Chairman, that is not my understanding. Dan Levin, who authored the December 31, 2004 memo, has testified before this Committee that that is an erroneous interpretation of that footnote and that, in fact, he had not completed a review of any of the specific interrogation techniques at the time the December 2004 memo issued, and that footnote is not be interpreted as endorsing the outcomes of the 2002 evaluation process.

Mr. CONYERS. Thank you very much.

Mr. NADLER. I thank the gentleman.

The gentleman from Minnesota is recognized for 5 minutes.

Mr. ELLISON. Professor Schroeder, when a person who was at the OLC or in a policy—well, a lawyer at the OLC drafts a memorandum advising agencies on any legal matter, I don't want us to drill down just on torture right now, but when they offer advice, legal advice in the form of memoranda, do they—in your experience, is there an ongoing role after the memoranda is written in helping to advise how to implement that advice that is offered?

Mr. SCHROEDER. Well, it will vary from topic to topic, but it would not be unusual for Office of Legal Counsel attorneys, after issuing a written opinion, to be asked follow-on questions or variations on the first question that had been asked or questions about what certain language in the opinion ought—how that ought to be applied in light of circumstances that the agency or the executive office of the President is considering.

And some back-and-forth is not at all unusual, I think.

Mr. ELLISON. And in your experience, would it be at all unusual if somebody who was actually trying to carry out and implement an activity which they received guidance on from a legal memoranda would say, "Well, the memo doesn't speak specifically to this instance. Does it apply or how would it apply in a given situation?"

Mr. SCHROEDER. No, that wouldn't be unusual at all.

Mr. ELLISON. So I guess my question is—one of the things I would like—that I think that we should know more about is to what degree did people who were doing interrogation, in the light of the memo, the August 2002 memo, get advice on how to implement and how to interpret that memo.

Now, I know you weren't part of that, but do you have any views on this subject? Is there anything you could tell us about it?

Mr. SCHROEDER. Well, typically, those sorts of additional questions would come, I think, first, if you are talking about an admin-

istrative agency or a branch of the services, would tend to go through their lawyer chain of command and it wouldn't be necessarily, and I think it would probably be unusual for somebody in the field to call an Office of Legal Counsel lawyer directly.

What they typically do, and because most—many of the requests that the Office of Legal Counsel receives for legal advice come, in the first instance, from a general counsel or a chief counsel.

So the communication is lawyer to lawyer. So there would be a communication. If someone in the other department or branch was confused, the tendency would be for them to inquire of their general counsel's office and then for a communication to come over to the Office of Legal Counsel from there.

Mr. ELLISON. Now, Mr. Addington, you have been to Guantanamo Bay, obviously. Were you there during an interrogation of suspects?

Mr. ADDINGTON. As I mentioned this morning to Ms. Wasserman Schultz, I have a recollection, perhaps not on the September 2000 trip she was referring to, but perhaps, at least on one of the trips, I can recall seeing people in a room, I guess you would call it, and we could see through an observation window or up on a video screen, or maybe both.

I do remember that.

Mr. ELLISON. Now, did the interrogators ever ask you any questions about how the interrogation could be legally conducted as it was going on?

Mr. ADDINGTON. I don't recall them doing that, no, sir, and I don't believe they did. It wouldn't be appropriate for me to be talking to an interrogator about what he would be doing outside of his chain of command, or her.

Mr. ELLISON. What about indirect? What about indirect? For example, if an interrogator went out, they might talk to someone in their agency, do you have occasion for somebody in the agency to confer with them about how the interrogation might be continued on?

Mr. ADDINGTON. I spoke with the general counsel's office of the Central Intelligence Agency, as did a number of other folks, as I described, when the executive branch would have a meeting that they would invite me to and we would talk about it, both at the CIA and at DOD, although less so at DOD, the Department of Defense.

Mr. ELLISON. So at DOD, you are speaking with regard to Mr. Haynes, is that right?

Mr. ADDINGTON. The general counsel.

Mr. ELLISON. And who is the individual you have in mind at the Central Intelligence Agency?

Mr. ADDINGTON. Well, early on, it was their general counsel and he left and went back to New York to practice law and there was——

Mr. ELLISON. What is his name?

Mr. ADDINGTON [continuing]. An acting general counsel. The general counsel is a fellow named Scott Muller, M-U-L-L-E-R. And then he left, as I say, and there was as acting general counsel, who I believe is still the acting general counsel.

Mr. ELLISON. Did you witness the interrogation process going forward while you were in Gitmo?

Mr. ADDINGTON. I don't know what else to say other than what I have already said, that I remember seeing, through the observation window, an orange suit in there and someone talking.

Mr. ELLISON. Could you hear it?

Mr. ADDINGTON. I don't recall you could hear it. You could just see it.

Mr. ELLISON. Were you part of a group of folks who made legal decisions on a regular and routine basis that would include Alberto Gonzales, William Haynes, Jim Haynes, and yourself?

Were you part of that?

Mr. ADDINGTON. I talked regularly in lots of different meetings with the counsel of the President and his deputy, with the department of defense general counsel, less frequently with the CIA general counsel or acting general counsel, but yes.

Mr. ELLISON. So did you and Messrs. Gonzales and Haynes have sort of an ongoing responsibility or authority to guide and make decisions about legal matters for the Administration with regard to torture of detainees, the conduct of the war on terror?

Mr. ADDINGTON. No. I think it is more monitoring what is going on, discussing it and if you need legal advice on the subject, you would ask a question to the Office of Legal Counsel, which typically would be done either by the counsel to the President, if it is the White House that wants the advice, which the law, by the way, that you all passed provides for.

It is 28 UCS something like 511, 512, in that range. And also heads of agencies have the authority to go to OLC and get that legal advice. So they usually do that through their general counsels, either DOD or CIA.

Mr. ELLISON. Do you deny being a member of a war council that includes Alberto Gonzales, Mr. Haynes and yourself?

Mr. ADDINGTON. No, that—it is interesting. I never heard that label until Jack Goldsmith wrote his book, "The Terror Presidency," which has been quoted earlier in this hearing.

We had meetings all the time. That is the same group of folks I was talking about earlier.

I asked Jim about it once and he said, "Oh, yeah, we call it the war council over here." I am not actually a fan of cute little names for meetings. It is a common executive branch habit and I think that is where it came from.

Mr. ELLISON. So do you deny it or do you admit it?

Mr. ADDINGTON. No. I think I just said—I just answered that question.

Mr. ELLISON. I don't think you did.

Mr. ADDINGTON. Well, as I said, I met regularly with Mr. Haynes, sometimes the CIA general counsel, the counsel of the President and deputy counsel of the President, and me on a range of issues, some of which dealt with interrogation of enemy combatants in the war on terror.

At the Department of Defense, apparently, when some of those meetings were held, they were list on their schedules "war council," as if that is some great name for this group.

To me, it was just the lawyers getting together to talk.

Mr. NADLER. [OFF MIKE]
Mr. ELLISON. That fast?
Mr. NADLER. The time of the gentleman has expired.
The gentleman from Iowa is recognized for 5 minutes.
Mr. KING. Thank you, Mr. Chairman.
Just to bring this back to a bit of a focus here, this hearing is about focusing on the role of Administration lawyers in developing, approving and implementing aggressive interrogation techniques.
I will concede that much of this has focused on how that is developed and focused and refocused and reworded and reposed the questions, and so I am wondering what a person that is watching on C-SPAN thinks of all of this that they have seen and heard.
And I realize that is a rhetorical question to the witnesses, but I do want to ask a more specific question, first, to Mr. Addington and then perhaps to Professor Yoo.
And that is, do you believe that it is possible to precisely define torture in law?
Mr. ADDINGTON. Just off the top of my head, you are getting me here in front of the cameras and the microphones——
Mr. KING. I am not trying to.
Mr. ADDINGTON. And as I said earlier, lawyers have to be very precise and careful, as you all clearly do when you actually draft and pass legislation.
About the only way I could think of it doing is something like you did with the Military Commissions Act of 2006, which is you laid out you can't do this, you can't do this, you can't do this, you can't do this.
And then you got to the end and there was a catch-all in there for dealing with certain categories of other things that aren't listed here.
The difficulty in drafting such a thing, of course, is you have to think of everything. You have to think of every circumstance.
So I think you all would have a challenge trying to come up with a statute that could contemplate everything and put those who do these sorts of things in our intelligence agencies on the fair notice they are constitutionally entitled to that their conduct would be illegal.
Mr. KING. I appreciate that.
Mr. Yoo?
Mr. YOO. Again, speaking now, I think that it is a difficult problem. I think the way that the statute was first written was—it did use language that was vague or ambiguous and was not defined by Congress.
And I think over time, Congress has become more specific referring to, for example, Army manuals and so on is a much better way to do it.
It is much clearer. I will say that even in attempting to interpret that language in the opinion, we attached, as an appendix, every judicial decision we could find in the Federal system that did define torture and exactly what acts, some of them involving some of the issues that Professor Schroeder mentioned involving INS and so on.
So we tried to provide a complete appendix in that fashion. But Congress didn't do that. It only did that later in the Military Commissions Act.

Mr. KING. And just to restate my question, is it possible to precisely define torture in law? And to add some completeness to the question, but with regard to the Army manual, do you believe there is room between the manual and the law to expand beyond the level that is part of the manual?

Mr. YOO. Well, I think that——

Mr. KING. To take torture to a level—is there a level between the Army manual and that is limited by the law?

Mr. YOO. Sir, let me say that I haven't written any opinions about this issue. This all happened after I left government.

My understanding is that the statute directly incorporates the manual. So it seems to me the law and the manual—there is no space.

There is a difference in which agency it applies to. My understanding of the McCain amendment is that it applies the manual to the military, but not to the CIA.

Mr. KING. Mr. Addington, on that same——

Mr. ADDINGTON. Repeat the question, please.

Mr. KING. Is there room, do you believe, between United States Army Field Manual on Intelligence Interrogation and between the controlling statutes against torture?

Mr. ADDINGTON. In other words, are there things that are not permitted by the Army manual that are, nevertheless, short of torture?

Mr. KING. Yes.

Mr. ADDINGTON. I believe the legal opinions of the Office of Legal Counsel or Department of Justice indicate yes and that, if you will recall, the Military Commissions Act of 2006 and the executive order that the President issued under that, I believe, sometime early, I think, but sometime in 2007, in fact, were all about that, what could the Central Intelligence Agency do that was beyond was in the Army field manual.

Mr. KING. And I would agree with that answer. And so as we sit here and the military interrogators and their legal advisers are watching these hearings today, can you enlighten us a little bit about what you might think they can draw from this?

Does it further define the law? Do they know what is the law? Will that intimidate them, do you believe, from gathering information in a legal fashion to help our intelligence to protect the American people?

What can you tell us that came out of this hearing at this point that is constructive that secures the American people?

Mr. ADDINGTON. As I mentioned at the beginning, there were three filters, I said, were in my mind, as I looked at all these issues over the years, and the third filter—the third filter is the crucial one of making sure that after all the policy level and senior lawyer level review of this is done and somebody gets an order to do something, that person who gets that order, especially on a subject matter like this, needs to know.

I have got an order here, it has been reviewed carefully by the senior lawyers of this government that I am entitled to rely on legally to know that my activity is lawful.

That is what going to the Office of Legal Counsel was all about in getting those legal opinions and as you know, this August 1,

2002 opinion is not the only legal opinion issued by the Office of Legal Counsel.

I can think of five off the top of my head on this subject. Those people out in the field, particularly the folks at the CIA, would not have engaged in their conduct and the head of the CIA would not have ordered them to engage in that conduct without knowing that the Attorney General of the United States or his authorized designee, which is what OLC is, had said this is lawful and they relied on that.

And they need to be able to rely on that. We can't leave the folks in the field hanging out there because we are going to have battles, whether you characterize them as political or otherwise, here in Washington.

Mr. KING. Thank you.

Thank you, Mr. Chairman. Yield back.

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

I now recognize the gentleman from Alabama for 5 minutes.

Mr. DAVIS. Mr. Chairman, thank you for forgiving me not being in place when my turn came up earlier.

I want to go back, Mr. Addington and Mr. Yoo, to the line of questions I pursued earlier, because the clock cut us off before I had a chance to make some points I wanted to make.

A lot of what we are talking about today, Professor Yoo, is the interpretation of the statute. You have conceded that there was a relevant on point anti-torture statute in place in early 2001-2002. It was passed by Congress.

You have correctly pointed out it is not at all unusual. There wasn't a massive amount of legislative history.

I questioned you earlier about why it would not have been helpful or important for the Administration to reach out to the body that drafted the statute to get its own interpretation of what the words meant.

Mr. Addington, I think you were telling me, at one point, or you were conceding that Mr. Specter, the Republican Chairman of judiciary, wasn't consulted, Mr. Sensenbrenner wasn't consulted.

Tell me, sir, why it would not have been helpful for the Bush administration to have reached out to the congressional leadership, even of its own party, to ask what the statute meant.

Mr. ADDINGTON. Sir, you asked that question earlier today and I would give you the same answer.

Actually, as a legal matter, I think you are wrong and that doing so would be irrelevant.

As a political matter——

Mr. DAVIS. I didn't ask you as a matter of policy.

Mr. ADDINGTON [continuing]. That is different. As a matter of policy, that can be different.

As a practical matter, back when all this first came up, I am not sure the exact timeframe, let's say the year 2002, these were highly classified. This was a highly classified program conducted by the——

Mr. DAVIS. No, sir. Very simple question.

Mr. ADDINGTON. I am explaining to you why some members——

Mr. DAVIS. Let me reframe my question then and perhaps make it a little bit easier, sir.

All I am asking—I am picking up on the analysis Mr. Yoo makes in his opening statement.

He talks about a particular interpretation of the anti-torture statute.

And, Professor, you said that he believed that the anti-torture statute was a subjective test that depended on the physical and mental condition of the individual being interrogated.

That is an interpretation of Congress' intent.

I happen to think, sir, from a policy standpoint, as well as from a legal standpoint, there were two options for the people you work for. They could have come to Congress and they could have asked for the statute to be clarified.

They could have asked for new powers. You all did that with respect to the Patriot Act.

I suppose, theoretically, the Bush administration could have said we don't need a Patriot Act, we are just going to assume that we have some plenary executive power, but you didn't do that.

You came to Congress and you asked for new intelligence-gathering, new information-gathering capabilities and the Congress gave it to you in overwhelming bipartisan fashion.

Authorization of force. You could have said there is some plenary executive power to protect the United States using all means necessary. You came to Congress.

All of those things involve potentially confidential, classified matters.

Was there even anyone in the executive branch who advocated, Mr. Addington, coming to Congress and asking for a new torture statute?

Mr. ADDINGTON. Of course, I can't answer for everyone in the executive branch. I don't know what they thought about.

Mr. DAVIS. Did you advocate it?

Mr. ADDINGTON. As for me——

Mr. DAVIS. That is a simple yes or no. Did you advocate it?

Mr. ADDINGTON. I don't recall advocating that to anyone and I wouldn't today.

Mr. DAVIS. Just a simple yes or no.

Do you know of anyone, Professor Yoo, I include you in this, do either of you know of anyone in the executive branch or the Department of Justice who advocated coming to Congress and asking for a new statute?

That is a simple yes or no.

Mr. ADDINGTON. On the subject of interrogations?

Mr. DAVIS. Torture, the definition of it.

Mr. ADDINGTON. No. I don't recall it.

Mr. DAVIS. Professor Yoo, do you know of anyone who even advocated coming to Congress and asking for a new statute?

Mr. YOO. I don't remember anyone doing that.

Mr. DAVIS. Do you know of anyone who advocated going to the House and Senate Intelligence Committees and asking for their judgment as to what the torture statutes meant?

Mr. YOO. No, and I wouldn't recommend that. I would recommend going where the law requires, which is OLC.

Mr. DAVIS. And this is the problem, gentlemen.

If your Administration had come to what was a Republican Congress and gotten its imprimatur for your definition of torture, you would have shared responsibility.

If you haven't figured it out by now, one of the critiques that a number of Members on both sides of the aisle have of the way you all have done business is, frankly, you haven't shared the responsibility of making the decisions.

Sometimes you have had to, when the Supreme Court has told you you had to with respect to tribunals and FISA. But, frankly, on your own, you have never done it.

And I would submit that that is the core thing that this Committee ought to be focused on, a policy that was derived by the executive branch.

You didn't even feel the need to even consult or to share your thoughts or your analysis of congressional intent with Congress. It has left you now with a policy that has only your fingerprints on it.

It has left you with a policy with which the legislative branch was completely cut out. That is a very negative legacy for your Administration.

Mr. ADDINGTON. You are leaving one bad implication on the record that I want to clear up that is not accurate, which it sounds like you are implying that the House and Senate Intelligence Committees didn't know anything about the CIA program.

Mr. DAVIS. No, no, no. I am talking about your interpretation of the definition of torture. You are not suggesting the House and Senate Intelligence Committees knew about the interpretation of torture that Mr. Yoo advanced in his opening statement, are you?

Mr. ADDINGTON. At some point they did, I don't know when.

Mr. DAVIS. Would you tell us that point?

Mr. ADDINGTON. I said I don't know when. I am fairly confident that these were discussed and they have held a lot of hearings on it. But I don't know when it first occurred.

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

I now recognize, for 5 minutes, the gentleman from North Carolina.

Mr. WATT. Thank you, Mr. Chairman.

Before I start, I wanted to do this while Mr. King was here, the basis of his objection to allowing Mr. Delahunt to ask questions was that it would prolong the hearing.

I wanted to ask a different unanimous consent request that he be allowed to take my time in the rotation so that he—and I didn't want to do it——

Mr. NADLER. Do you want to do that now?

Mr. WATT. I would like to do that.

Mr. NADLER. Without objection.

Mr. WATT. Well, I just wanted to make it clear that I wasn't doing it because he was out of the room. I actually sent a message to him that I was planning to do that.

Mr. NADLER. Okay. Well, he apparently didn't care enough to stay. Without objection.

Mr. DELAHUNT. Well, Mr. Chairman, I don't want to proceed unless staff has been able to communicate.

Well, I won't take all the 5 minutes. I will try to be very brief. In fact, I——

Mr. WATT. Whatever you don't use I will use myself.

Mr. DELAHUNT. Well, thank you. And this has been a very informative hearing.

And I am going to request both witnesses or I will extend an invitation to both witnesses to appear before the Subcommittee that I Chair, because this obviously has foreign policy implications, which is the Foreign Affairs Subcommittee on Oversight, and I would hope they would accept that invitation for a more expansive conversation and dialogue about this very important issues.

It is true that the United States is a signatory to the convention against torture. Is that accurate, Professor?

Mr. SCHROEDER. Yes.

Mr. DELAHUNT. Either one.

Mr. YOO. Yes, it is.

Mr. DELAHUNT. And the domestic legislation we are talking about was to implement the convention against torture.

Mr. SCHROEDER. That is correct.

Mr. DELAHUNT. And the whole issue of what constitutes torture, what techniques are implicated in that definition, would you all agree that there are some techniques that are, per se, considered torture, such as electric shocks?

Professor Yoo?

Mr. YOO. I am sorry. It is Yoo.

Mr. DELAHUNT. Yoo. I apologize.

Mr. YOO. In the memo, we have a list—an appendix.

Mr. DELAHUNT. I haven't had an opportunity to review the memo. But would you consider the use of electric shock——

Mr. YOO. Yes. It is one of the things that are listed in the back of the memo as things that courts have found to violate the—not this statute, but the other statute, because there was a second statute, the Torture Victim Protection Act, which is a little different than the criminal statute, but we thought close enough.

Mr. DELAHUNT. What about waterboarding?

Mr. YOO. I would have to know exactly what you mean by waterboarding, but there is a description in the appendix of—in the appendix to the 2002 memo that talks about trying to drown somebody.

But when people say waterboarding, they seem to have lots of different—they are referring to lots of different things.

So I think it is important to be precise if we are talking about what the courts approve. I am sorry. Not that courts approve—courts have interpreted the language to mean or not.

Mr. DELAHUNT. Well, it has been reported that on three different occasions, the Central Intelligence Agency utilized waterboarding and at least that was the term that was used in the reports in the media.

Is that your understanding, Professor? Professor Yoo? Are you aware of that?

Mr. YOO. Well, sir, I have read the same press accounts that you have, I am sure, and I have seen it in the press accounts and I have also seen it in, I believe, a statement made by the President or, I am sorry, by the head of the CIA.

Mr. DELAHUNT. By the head of the CIA. And that was my understanding, as well, that it was acknowledged by the head of the CIA.

And I think you, Mr. Addington, indicated that you had multiple conversations regarding enhanced interrogation techniques at the CIA.

Mr. ADDINGTON. With the Office of Legal Counsel, office of general counsel at CIA.

Mr. DELAHUNT. Did the issue of waterboarding arise during the course of those conversations?

Mr. ADDINGTON. I think you will find that over the years, as lawyers in the group talk, at various times, there would be discussion of particular techniques.

As I indicated to the Chairman at the beginning of this, when the subject came up——

Mr. DELAHUNT. Was waterboarding one of them?

Mr. ADDINGTON. That is what I am answering, because I know where you are headed. As I indicated to the Chairman at the beginning of this thing, I am not in a position to talk about particular techniques, whether they are or aren't used or could or couldn't be used or their legal status.

And the reasons I would give for that, if you will look at, I think, Exhibit 9, the President's speech of September 6, 2006, explains why he doesn't talk about what particular techniques——

Mr. DELAHUNT. Oh, I can understand why he doesn't talk about it.

Mr. ADDINGTON. But you have got to communicate with al-Qaeda. I can't talk to you. Al Qaeda may watch C-SPAN.

Mr. DELAHUNT. Right. Well, I am sure they are watching and I am glad they finally have a chance to see you, Mr. Addington.

Mr. ADDINGTON. I am sure you are pleased.

Mr. DELAHUNT. Given your pension for being unobtrusive.

In any event, there would appear to be a question then as to whether the use on those three occasions that have been acknowledged by the CIA and reported on the media as to the technique that was used, as to whether it was a violation, a per se violation of the convention against torture or not.

Would you agree with me, Professor Yoo?

Mr. YOO. Your question is you are saying there is an open question whether waterboarding in the way used by the CIA violated the convention against torture.

Mr. DELAHUNT. That is what I am saying. It is an open question.

Mr. YOO. I understand. I just want to make sure.

Mr. DELAHUNT. Sure.

Mr. YOO. I think one of the problems is that the convention against torture is interpreted different ways by different countries. And so if your question is does waterboarding—is the way it has been described by the director of the CIA, Mr. Hayden, violate the treaty, it may violate the treaty as understood by some countries.

Our understanding of the treaty is defined by the criminal statute and the Torture Victims Protection Act.

Mr. NADLER. Without objection, Mr. Watt has 1 additional minute, which he has yielded to Mr. Delahunt.

Mr. DELAHUNT. I would pose this. The techniques, whatever was utilized on those occasions, and I think we can agree it is an open

question, if they were used on American military personnel, it would still be an open question as to whether they violated the convention against torture then.

Mr. YOO. I assume you are still asking me.

Mr. DELAHUNT. I am asking you.

Mr. YOO. Mr. Delahunt, my understanding of the testimony that the head of OLC gave before the Committee was that it was his view that if we were using it as part of the training on our own servicemen and officials who might be captured, that I thought it was his view and his testimony that that would not be a violation of the statute.

Mr. DELAHUNT. So if it was used by an enemy, because we considered that it did not constitute torture, then the enemy that utilized that on American military personnel would not be in violation of the convention against torture.

Is that a fair statement?

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

The witness will answer this question, please.

Mr. YOO. Sir, I don't remember whether Mr. Bradbury went that far and reached that conclusion. That could be an implication of what his statement was, but I don't——

Mr. NADLER. The question was of you, not of Mr. Bradbury.

Mr. YOO. I know, sir, but I wanted to make sure that I am not—that it is clear what the Administration's position is. I understand it is, because they directly answered the question to the Committee.

Mr. NADLER. But would you answer the question? If some enemy interrogator used that technique on an American prisoner of war, would that be——

Mr. YOO. My view now is that it would depend on the circumstances. I think that there would—I agree with the Congressman that——

Mr. NADLER. Okay. Thank you. Thank you.

It would depend on the circumstances.

Mr. YOO. But I just want to—okay.

Mr. NADLER. Go ahead.

Mr. YOO. I mean, I just want to fully answer your question, sir, and you are cutting me off.

Mr. NADLER. Go ahead, go ahead. Go ahead.

Mr. YOO. Oh, I am sorry. I thought you were cutting me off again and I was accepting the cutoff that time.

My only point is it would depend on the circumstances, but I am not saying it would never—that it would always not be torture, sir. Again, there is an appendix at the back of the opinion that lists trying to drown somebody as something that violates the Torture Victims Protection Act.

Mr. NADLER. Thank you.

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

Before we conclude the hearing, I want to observe there have been a number of unanswered questions today, some on grounds of privilege, others on the basis that any answer to the question would unavoidably get into classified information.

We will take those matters under advisement. Depending on our determination, we may need to revisit some of these questions with

you, perhaps in executive session for any matters that are classified.

Can I get a commitment from each of you to make ourselves available for any follow-up hearings that may be warranted?

Mr. ADDINGTON. No, Mr. Chairman, but I will wait here as long as you like, if you have more questions today.

Mr. NADLER. We have to take under advisement the question of——

Mr. ADDINGTON. I didn't invoke any privileges in my communications.

Mr. NADLER. No, but you invoked classified information.

Mr. ADDINGTON. I think what I said was for the same reasons the President, in his speech, stated that I couldn't discuss——

Mr. NADLER. That is invoking classified information. We may have to——

Mr. ADDINGTON. I didn't.

Mr. NADLER. What?

Mr. ADDINGTON. I didn't do that. I didn't invoke any privilege.

Mr. NADLER. Well, we will decide.

We will determine if you did and if—I don't think you invoked any privileges except for classified information. But if we determine that we have to have a session, an executive session to go into those classified matters, would you make yourself available?

Mr. ADDINGTON. If you issue a subpoena, we will go through this again. But I am willing to stay here as long as you like today.

Mr. NADLER. And, Mr. Yoo—and, Professor Yoo?

Mr. YOO. Subject to reasonable accommodation of schedule, which there has been so far.

Mr. NADLER. Fine, of course.

Mr. YOO. I would be willing to, yes, sir.

Mr. NADLER. Professor Schroeder didn't invoke any privileges.

Mr. CONYERS. Mr. Chairman, Conyers here.

Mr. NADLER. The Chairman is recognized.

Mr. CONYERS. Thank you.

On balance, I would like to thank all the witnesses for coming forward today. They, from their perspective, have been as candid as they could and I think I sense an impression that for reasonable reasons and coordinating with all of our schedules, they might most probably be likely to return.

And I want to thank them for that.

Mr. NADLER. I thank the gentleman.

I thank the witnesses for their appearances and their cooperation.

I want to just clarify one other thing. I made a hasty observation with respect to a Member's not objecting to—not repeating his objection to Mr. Delahunt's testimony.

I didn't mean to cast any aspersions on his being here or his caring or anything else. And I want to correct the record in that respect.

Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses, which we will forward, and for the witnesses to respond as promptly as they can so their answers may be made part of the record.

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

Again, I want to thank the witnesses and the Members.

And with that, this hearing is adjourned.

[Whereupon, at 1:48 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

EXHIBITS SUBMITTED BY DAVID ADDINGTON, CHIEF OF STAFF, VICE PRESIDENT OF THE UNITED STATES

OFFICE OF THE VICE PRESIDENT
WASHINGTON

June 23, 2008

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

Dear Mr. Chairman:

With regard to my scheduled appearance at a hearing of your Subcommittee on June 26, 2008 at 10 a.m., I ask that you enter into the record of the hearing the following enclosed documents as exhibits:

Exhibit No.	Description of Exhibit
DSA 1	Letter from House Judiciary Committee Chairman John Conyers to Chief of Staff to the Vice President David S. Addington, dated April 11, 2008
DSA 2	Letter from Counsel to the Vice President Kathryn L. Wheelbarger to House Judiciary Committee Chief of Staff and Counsel Perry Apelbaum, dated April 18, 2008
DSA 3	Letter from House Judiciary Committee Chairman John Conyers to Chief of Staff to the Vice President David S. Addington, dated April 28, 2008
DSA 4	Letter from Counsel to the Vice President Kathryn L. Wheelbarger to House Judiciary Committee Chief of Staff and Counsel Perry Apelbaum, dated May 1, 2008
DSA 5	Fax Cover Sheet, Letter and Subpoena from House Judiciary Committee Chairman John Conyers to Chief of Staff to the Vice President David S. Addington, each dated May 7, 2008
DSA 6	Acceptance of Service of Subpoena, from Chief of Staff to the Vice President David S. Addington to House Judiciary Committee, Attn: Mr. Perry Apelbaum, dated May 7, 2008, 4:42 p.m., eastern time
DSA 7	Opinion of the Office of Legal Counsel, Department of Justice, "Immunity of Former Counsel to the President from Compelled Congressional Testimony," dated July 10, 2007 (from OLC public website)
DSA 8	Presidential Memorandum, "Humane Treatment of al Qaeda and Taliban Detainees," dated February 7, 2002 (declassified)
DSA 9	Remarks By the President on the Global War on Terror, The East Room, The White House, September 6, 2006 (Office of the Press Secretary released transcript)
DSA 10	Executive Order 13440, "Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency" (July 20, 2007)

Thank you for your assistance.

Sincerely,

David S. Addington
Chief of Staff

EXHIBIT NO. DSA 1

ONE HUNDRED TENTH CONGRESS

Congress of the United States
House of Representatives
COMMITTEE ON THE JUDICIARY
2138 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6216
(202) 225–3951
http://www.house.gov/judiciary

April 11, 2008

By Fax and U.S. Mail

Mr. David S. Addington
Chief of Staff to the Vice President
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear Mr. Addington:

I write to invite you to appear before the Committee on the Judiciary at our May 6 hearing scheduled to explore issues regarding the nature and scope of Presidential power in time of war and the Administration's approach to these questions under U.S. and international law. Given your personal knowledge of key historical facts, as well as your professional expertise and long engagement with these issues, your testimony would be invaluable to the Committee.

Among the subjects likely to be explored at the hearing are United States policies regarding interrogation of persons in the custody of the nation's intelligence services and armed forces, issues on which you appear to have played an important role. As early as 2004, written reports described you as "a principal author of the White House memo justifying torture of terrorism suspects."[1] Other sources describe you as participating in the preparation of the key legal memorandum concluding that the protections of the Geneva Conventions are "obsolete" when considered against the exigencies of the struggle against global terrorism.[2]

While many of the individuals involved in the development and legal review of the Administration's programs and policies related to such matters have either testified or commented in public, your views have not been significantly heard outside the executive branch. In consideration of the abiding interest of all Americans in these matters, and the unique

[1]Milbank, *In Cheney's Shadow, Counsel Pushes the Conservative Cause*, Washington Post, Oct. 11, 2004.

[2]Sands, *The Green Light*, Vanity Fair, May 2008.

information and perspective that you bring to the issues, I therefore hope that you will agree to testify at our scheduled hearing. If the date of May 6 poses a particular scheduling problem, please contact my staff as described below and we will be happy to discuss reasonable alternatives. Should you decline to testify on a cooperative basis, however, the Committee must of course proceed with its investigation and will be left with no option but compulsory process.

Thank you for your careful consideration of this invitation. So that we may plan accordingly, please contact Committee staff at (202) 225-3951 as soon as possible and no later than the close of business on Monday, April 21, 2008, to discuss the details of your appearance. Any further responses and questions should similarly be directed to the Judiciary Committee office, 2138 Rayburn House Office Building, Washington, DC 20515 (tel: 202-225-3951, fax: 202-225-7680).

Sincerely,

John Conyers, Jr.
Chairman

cc: Hon. Lamar S. Smith
Hon. Jerrold Nadler
Hon. Trent Franks
Hon. Brian A. Benczkowski
Ms. Margaret Stewart

EXHIBIT NO. DSA 2

OFFICE OF THE VICE PRESIDENT
WASHINGTON

April 18, 2008

Mr. Perry Apelbaum
Chief of Staff and Counsel
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

Dear Mr. Apelbaum:

The letter of April 11, 2008 from the Chairman of the Committee on the Judiciary of the House of Representatives ("Committee request") informed the Office of the Vice President that the Committee plans to hold a hearing on May 6 to explore: (1) "issues regarding the nature and scope of Presidential power in a time of war;" (2) "the Administration's approach to these questions under U.S. and international law;" and (3) "United States policies regarding interrogation of persons in the custody of the nation's intelligence services and armed forces." The letter invited the Chief of Staff to the Vice President to appear at the hearing.

The Committee request seeks authoritative representation on the three subjects identified in the Committee request. The Chief of Staff to the Vice President is an employee of the Vice President, and not the President, and therefore is not in a position to speak on behalf of the President. With respect to Presidential power in wartime and related issues under U.S. and international law, the Attorney General or his designee would be the appropriate witness. Regarding interrogation of persons by U.S. intelligence agencies or the armed forces, the Director of National Intelligence or his designee and the Secretary of Defense or his designee, respectively, would be the appropriate witness. You may wish to invite the appropriate subordinates of the President in lieu of your invitation to the Chief of Staff to the Vice President.

As the U.S. Supreme Court made clear in Barenblatt v. United States, 360 U.S. 109 (1959), the power of Congress under the Constitution to inquire (which Members of Congress and congressional employees often refer to by the term "oversight") is coextensive with its power to legislate. The power of Congress to legislate is not limitless and therefore neither is the power to inquire. For example, Congress lacks the constitutional power to regulate by a law what a Vice President communicates in the performance of the Vice President's official duties, or what a Vice President recommends that a President communicate in the President's performance of official duties, and therefore those matters are not within the Committee's power of inquiry. In addition to a constitutional basis for a House inquiry, a particular committee of the House also

needs jurisdiction assigned by the House for the inquiry. It would be helpful to know from the Committee the scope of the Committee's inquiry and the legal basis for it.

Finally, even if, separate from any question of immunity from testimony, a case were to arise in which a voluntary appearance might be appropriate under the law, questions of privilege may arise with respect to information sought by questions, such as with respect to privileges protecting state secrets, attorney-client communications, deliberations, and communications among Presidents, Vice Presidents, and their advisers. For example, the amount of useful information a Committee of Congress would be likely to receive from a person who served as Counsel to the Vice President and then Chief of Staff to the Vice President concerning official duties is quite limited, given that a principal function of such a person is engaging in privileged communications, such as the giving of privileged advice. Also, inquiry by a House Committee concerning the Senate functions of the Vice President would not, in any event, be appropriate.

The Committee may wish to hold the Committee request in abeyance while it exhausts other sources for the kinds of information the Committee seeks, or the Committee may wish to forgo the Committee request altogether. If, however, the Committee wishes to pursue the Committee request, please advise of the time for which you have invited the Chief of Staff to the Vice President, and of the legal basis for the request under the Constitution and the House Rules. We look forward to receiving such information from the Committee to enable us to further evaluate the request and communicate with you. Please direct to me (Tel. (202) 456-9089, Fax (202) 456-0387) any further communications to the Office of the Vice President on this matter.

This letter is provided as a matter of comity, with respect for the constitutional role of the House of Representatives, and reserving all legal authorities and privileges that may apply.

Sincerely,

Kathryn L. Wheelbarger
Counsel to the Vice President

cc: Mr. Sean McLaughlin
Minority Chief Counsel
Committee on the Judiciary

ONE HUNDRED TENTH CONGRESS

Congress of the United States
House of Representatives
COMMITTEE ON THE JUDICIARY
2138 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6216
(202) 225–3951
http://www.house.gov/judiciary

April 11, 2008

By Fax and U.S. Mail

Mr. David S. Addington
Chief of Staff to the Vice President
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear Mr. Addington:

I write to invite you to appear before the Committee on the Judiciary at our May 6 hearing scheduled to explore issues regarding the nature and scope of Presidential power in time of war and the Administration's approach to these questions under U.S. and international law. Given your personal knowledge of key historical facts, as well as your professional expertise and long engagement with these issues, your testimony would be invaluable to the Committee.

Among the subjects likely to be explored at the hearing are United States policies regarding interrogation of persons in the custody of the nation's intelligence services and armed forces, issues on which you appear to have played an important role. As early as 2004, written reports described you as "a principal author of the White House memo justifying torture of terrorism suspects."[1] Other sources describe you as participating in the preparation of the key legal memorandum concluding that the protections of the Geneva Conventions are "obsolete" when considered against the exigencies of the struggle against global terrorism.[2]

While many of the individuals involved in the development and legal review of the Administration's programs and policies related to such matters have either testified or commented in public, your views have not been significantly heard outside the executive branch. In consideration of the abiding interest of all Americans in these matters, and the unique

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[1] Milbank, *In Cheney's Shadow, Counsel Pushes the Conservative Cause*, Washington Post, Oct. 11, 2004.

[2] Sands, *The Green Light*, Vanity Fair, May 2008.

information and perspective that you bring to the issues, I therefore hope that you will agree to testify at our scheduled hearing. If the date of May 6 poses a particular scheduling problem, please contact my staff as described below and we will be happy to discuss reasonable alternatives. Should you decline to testify on a cooperative basis, however, the Committee must of course proceed with its investigation and will be left with no option but compulsory process.

Thank you for your careful consideration of this invitation. So that we may plan accordingly, please contact Committee staff at (202) 225-3951 as soon as possible and no later than the close of business on Monday, April 21, 2008, to discuss the details of your appearance. Any further responses and questions should similarly be directed to the Judiciary Committee office, 2138 Rayburn House Office Building, Washington, DC 20515 (tel: 202-225-3951, fax: 202-225-7680).

Sincerely,

John Conyers, Jr.
Chairman

cc: Hon. Lamar S. Smith
Hon. Jerrold Nadler
Hon. Trent Franks
Hon. Brian A. Benczkowski
Ms. Margaret Stewart

EXHIBIT NO. DSA 3

ONE HUNDRED TENTH CONGRESS

Congress of the United States
House of Representatives
COMMITTEE ON THE JUDICIARY
2138 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6216
(202) 225–3951
http://www.house.gov/judiciary

April 28, 2008

By Fax and U.S. Mail

Mr. David S. Addington
Chief of Staff to the Vice President
Office of the Vice President
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear Mr. Addington:

I am in receipt of the April 18, 2008, letter from counsel to the Vice President responding to my invitation for your voluntarily appearance before the Committee. I was disappointed to receive such a legalistic and argumentative response to my invitation. I address counsel's particular concerns below, but let me first state once again that my invitation for your voluntary appearance remains open. I continue to hope that you will accept this opportunity to present your views and explain your actions to the public that you serve. As discussed below, counsel's letter has not identified any meaningful obstacles to your appearance, which I hope we can readily arrange without even considering the need for formal process. If I we are not able to reach such an accommodation sometime this week, however, I will have no choice but to consider the use of compulsory process.

Reason for the Invitation

Counsel's letter recites three broad quotations from the invitation letter describing the general scope of the hearing and states "[t]he Committee request seeks authoritative representation on the three subjects identified in the Committee request."[1] The letter further cautions that "[t]he Chief of Staff to the Vice President is an employee of the Vice President, and not the President, and therefore is not in a position to speak on behalf of the President,"[2]

[1]April 18, 2008, Letter from Kathryn L. Wheelbarger to Perry Apelbaum.

[2]April 18, 2008, Letter from Kathryn L. Wheelbarger to Perry Apelbaum.

apparently believing that you have been invited to testify as a policy representative of the President. Finally, counsel suggests a series of potential witnesses that she believes would be "appropriate" to call "in lieu of [the] invitation to the Chief of Staff to the Vice President."[3]

These comments appear to reflect a serious misreading of my prior letter. Nowhere does that letter ask for "authoritative representation" on the quoted subjects, nor does it request any statement on behalf of the President. Instead, the letter quite directly asks you to share your "personal knowledge of key historical facts" and "professional expertise" with the Committee.[4] Furthermore, while counsel has selected several quotations describing the broad subject matter of the proposed hearing to quote in the response letter, she has simply ignored the careful description of specific issues on which you have unique, personal knowledge about which the Committee would like to hear testimony. For example, the letter simply omits the central statement that "[a]s early as 2004, written reports described you as 'a principal author of the White House memo justifying torture of terrorism suspects.' Other sources describe you as participating in the preparation of the key legal memorandum concluding that the protections of the Geneva Conventions are 'obsolete' when considered against the exigencies of the struggle against global terrorism."[5] In my view, there clearly is ample reason for inviting you to testify.

Power of Congress to Conduct Oversight

I appreciate counsel's citation to Barenblatt v. United States, 360 U.S. 109 (1959), a case in which the Supreme Court upheld the power of Congress to conduct the oversight at issue and affirmed the petitioner's conviction for contempt of Congress based on his refusal to answer questions put by a Congressional committee. However, while counsel cites Barenblatt for the principle that some limits do exist on the oversight power, she seems to overlook the more fundamental description of the scope and breadth of the oversight power in the opinion. As explained by Justice Harlan:

> The power of inquiry has been employed by Congress throughout our history, over the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate; it has similarly been utilized in determining what to appropriate from the national purse, or whether to appropriate. The scope of the power

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[3]April 18, 2008, Letter from Kathryn L. Wheelbarger to Perry Apelbaum.

[4]April 11, 2008, Letter from John Conyers, Jr. to David S. Addington.

[5]April 11, 2008, Letter from John Conyers, Jr. to David S. Addington (footnotes omitted).

of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.[6]

On the issue of legislative authority, counsel's discussion of the Committee's purported lack of power "to regulate by a law what a Vice President communicates in the performance of the Vice President's official duties or what a Vice President recommends that a President communicate in the President's performance of official duties" simply has no bearing on the issues at hand. It is hard to know what aspect of the invitation has given rise to concern that the Committee might seek to regulate the Vice President's recommendations to the President. Especially since far more obvious potential subjects of legislation are plentiful, such as, at a minimum, revisions to U.S. law on torture and treatment of detainees -- including the federal torture statue,[7] the federal War Crimes Act,[8] and the Detainee Treatment Act of 2005,[9] – and possible revisions to the organization and functions of the Department of Justice, its Office of Legal Counsel,[10] or other executive departments.

Counsel's letter asks for the basis under the Constitution and the House Rules for the Committee's inquiry. The constitutional basis for such oversight is discussed in McGrain v. Daugherty, 273 U.S. 135 (1927), and its progeny, including Barenblatt, and the Committee's authority to proceed is reflected in Rules X(1)(k), X(2), and XI of the Rules of the House of Representatives (110th Congress).

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[6] Barenblatt v. United States, 360 U,S, 109, 111 (1959). This quotation also makes clear that counsel's statement that "the power of Congress under the Constitution to inquire (which Members of Congress and congressional employees often refer to by the term 'oversight') is coextensive with its power to legislate" is incomplete, as it omits the equally important constitutional foundation for oversight of the appropriations power. While the Judiciary Committee is not a direct appropriator, counsel's comment speaks broadly to the power of Congress. Congress of course provides funding for the Executive Branch, including Office of the Vice President, and could adjust that funding if it concluded, for example, that a Vice Presidential employee was improperly interfering with operations of other government agencies or for any other appropriate policy reason. The appropriations power thus should not be overlooked when considering Congressional authority.

[7] 18 U.S.C. § 2340 et seq.

[8] 18 U.S.C. § 2441.

[9] Pub. L. No. 109-148, §§ 1001–1006 (2005).

[10] 28 U.S.C. § 510 et seq.

Concerns About Privilege and Immunity

Finally, counsel raises concern that your testimony would not be useful to the Committee because it might be constrained by various privileges, and also refers briefly to the "question of immunity from testimony."[11] As to immunity, Vice Presidential staff have previously testified before Congress and I am aware of no authority – and counsel's letter cites none – for the proposition that such staff could be immune from testimony before Congress. While the issue of the immunity of senior advisors *to the President* is currently under litigation, there has been no suggestion that such immunity, even if recognized, would reach to the *Vice President's* office, an entity that, as you well know, is constitutionally quite different from the Office of the President. As to privilege, such concerns are traditionally and appropriately raised in response to specific questions and not as a threshold reason to decline a Congressional Committee's invitation to appear. I note that the sitting head of the Office of Legal Counsel Steven Bradbury recently testified before a Judiciary Subcommittee on issues related to Administration interrogation policy, so I have no doubt we can accommodate the concerns that counsel has raised. Given the scope of your reported actions and the subject of our inquiry, such as claims that you may have interacted with individuals in the Justice Department and the Department of Defense, including field military officers at Guantanamo Bay, it seems clear that many relevant questions exist that do not implicate executive privilege.

* * * * *

Despite the tenor of counsel's letter, senior White House officials, including White House Counsels and Chiefs of Staff, and even the Chief of Staff to the Vice President, have previously testified before committees of Congress.[12] On October 17, 1974, I was present when President Ford himself testified before a House Judiciary subcommittee on issues related to the Nixon pardon. The invitation to appear is thus based on a long tradition of comity between the branches and our shared recognition that public officials ultimately serve and should be accountable to the American people. These principles have served our nation well, and I trust that you will not turn your back on them now.

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[11] April 18, 2008, Letter from Kathryn L. Wheelbarger to Perry Apelbaum. While the main privilege issues are addressed above, I assume that counsel's citation to the "state secrets" privilege was an oversight as that is a judge-made litigation privilege that has no application before a Committee of Congress. Similarly, counsel's stated concern that "inquiry by a House Committee concerning the Senate functions of the Vice President would not, in any event, be appropriate" seems especially out of place given the subject matter of the proposed hearing and the nature of the invitation to you.

[12] For example, White House Counsels Nussbaum, Cutler, Quinn, and Ruff, and Chiefs of Staff McLarty, Bowles, Podesta, and Neel all provided sworn testimony to the Congress during the 1990s. See, e.g., March 21, 2007, Letter from Chairman Henry A. Waxman to Chairman Patrick Leahy and Chairman John Conyers, Jr.

Today we face a severe national challenge over charges related to the allegedly harsh treatment of detainees in U.S. custody, reportedly done with legal authorization of the Department of Justice and explicit approval from the highest officials in our government. These are serious matters that substantially impact our national security, the safety and well-being of our troops around the world, and our nation's legal and moral standing. As referenced in the invitation letter, multiple sources place you at the center of these momentous events. Thus:

- You are reported to have "assisted in the drafting" of the now-withdrawn August 1, 2002, interrogation memorandum issued by Jay Bybee and John Yoo in the Department of Justice Office of Legal Counsel.[13] Another source states that you "helped shape" this memorandum.[14]

- You are "believed to have been written" a January 25, 2002, memorandum issued by White House counsel Alberto Gonzales that advised President Bush that the fight against terrorism "renders obsolete Geneva's strict limitation on questioning of enemy prisoners and renders some of its provisions quaint."[15]

- Reports state that some in the Justice Department complained that you improperly maintained a "private legal channel" to John Yoo at the Office of Legal Counsel.[16]

- Reports indicate that you participated in a "war council" along with the White House Counsel, the General Counsel to the Defense Department, and OLC Deputy John Yoo that shaped the "most important legal-policy decisions in the war on terror" outside of normal channels and "sometimes to the exclusion of the intragency process altogether ".[17]

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[13]Sands, *The Green Light*, Vanity Fair, May 2008; See also *Gelman and Becker, Pushing the Envelope on Presidential Power*, Washington Post, June 25, 2007 ("In an interview, Yoo said that Addington, as well as Gonzales and deputy White House counsel Timothy E. Flanigan, contributed to the analysis.").

[14]Ragavan, *Cheney's Guy*, US News and World Report, May 21, 2006.

[15]Sands, *The Green Light*, Vanity Fair, May 2008; Mayer, *The Hidden Power*, The New Yorker, July 3, 2006.

[16]Gelman and Becker, *Pushing the Envelope on Presidential Power*, Washington Post, June 25, 2007.

[17]Goldsmith, *The Terror Presidency* at 22 (2007); Rosen, *Conscience of a Conservative*, New York Times, Sept 9, 2007.

- Military officials have stated that you took the lead during a September 2002 visit of high ranking administration lawyers to the detention facility at Guantanamo Bay, Cuba that "brought ideas" on interrogation methods from Washington sources to the facility.[18]

- According to one former high-ranking Administration lawyer who worked extensively on national-security issues, "the Administration's legal positions were, to a remarkable degree, 'all Addington.'"[19]

These reports describe an extraordinary change in the traditional lines of legal authority between the Department of Justice, the White House Counsel, and the President, placing you at the center of the Administration's legal policy process on this most sensitive of national issues. Presumably, you believe that whatever actions you took were necessary and comported with the law; in such circumstances, I cannot imagine why you would decline to appear and set the record straight. The American people deserve no less.

We are certainly willing to accommodate your schedule and I hope that we can work together to arrange a specific time and date for this appearance if May 6 is not convenient. Please have your counsel contact the Judiciary Committee staff at (202) 225-3951 as soon as possible and no later than the close of business on Friday, May 2, 2008, to make these arrangements. Any further responses and questions should similarly be directed to the Judiciary Committee office, 2138 Rayburn House Office Building, Washington, DC 20515 (tel: 202-225-3951; fax: 202-225-7680).

Sincerely,

John Conyers, Jr.
Chairman

cc: Hon. Lamar S. Smith
Hon. Jerrold Nadler
Hon. Trent Franks
Ms. Kathryn L. Wheelbarger

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[18]Sands, *The Green Light*, Vanity Fair, May 2008.

[19]Mayer, *The Hidden Power*, The New Yorker, July 3, 2006.

EXHIBIT NO. DSA 4

OFFICE OF THE VICE PRESIDENT
WASHINGTON

May 1, 2008

Mr. Perry Apelbaum
Chief of Staff and Counsel
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

Dear Mr. Apelbaum:

This letter follows up on the letter from the Committee on the Judiciary of the House of Representatives ("Committee") to the Chief of Staff to the Vice President ("Chief of Staff") of April 11, 2008, my letter to the Committee of April 18, 2008, and the Committee's letter to the Chief of Staff of April 28, 2008. The legal views of the Office of the Vice President regarding your request for the Chief of Staff's attendance at the investigative hearing you propose for May 6, 2008 remain as stated in my letter of April 18 and this letter.

The Office of the Vice President remains of the view that the courts, to protect the institution of the Vice Presidency under the Constitution from encroachment by committees of Congress, would recognize that a chief of staff or counsel to the Vice President is immune from compulsion to appear before committees of Congress to testify concerning official duties performed for the Vice President.

In deciding whether to invoke that immunity in this particular case, the Office of the Vice President has taken account of the Committee letter of April 28, 2008, which confirmed that the Committee proposal to ask questions of the Chief of Staff is substantially narrower in scope than first appeared from the Committee's letter of April 11, 2008. The Committee letter of April 28, 2008 made clear, with respect to the proposed questioning, that:

-- first, the Committee recognizes that the Chief of Staff is not in a position to provide authoritative representation of the President on issues regarding "the nature and scope of Presidential power in time of war," "the Administration's approach to these questions under U.S. and international law," or "United States policies regarding interrogation of persons in the custody of the nation's intelligence services and armed forces" (Page Two of Committee Letter of April 28, 2008; quotations from Page One of Committee Letter of April 11, 2008);

-- second, the Committee questions to the Chief of Staff would seek only "personal knowledge of key historical facts" relating to the three subjects quoted above (Page Two of Committee Letter of April 28, 2008);

-- third, the Committee does not seek information relating to Vice Presidential communications or to Vice Presidential recommendations to the President (Page Three of Committee Letter of April 28, 2008);

-- fourth, the Committee does not seek information relating to the Senate functions of the Vice Presidency (Footnote 11 of Committee Letter of April 28, 2008); and

-- fifth, applicable legal privileges may be invoked in response to questions (Page Four of Committee Letter of April 28, 2008).

The Committee letter of April 28 refers vaguely to asking questions in response to which the Committee would expect the Chief of Staff to share "professional expertise" with the Committee. Because the Chief of Staff's profession is that of an attorney, we assume that the practice of law is the profession to which you refer. To avoid any misunderstanding or surprise, please be clear that the Committee is not the Chief of Staff's client and the Chief of Staff is not in a position to render legal advice, opinions or services to the Committee.

The Office of the Vice President notes that the Committee has not, by the general citation to "McGrain v. Daugherty, 273 U.S. 135 (1927), and its progeny," met its burden of demonstrating a satisfactory constitutional basis under the principles set forth in Barenblatt v. United States, 360 U.S. 109 (1959) for inquiry by the House of Representatives of the Office of the Vice President. Further, the Committee has not, by the general citations to "Rules X(1)(k), X(2), and XI" of the House of Representatives for the 110th Congress, met its burden of demonstrating that, if the House had a constitutional basis for such inquiry, the House has assigned jurisdiction of the matter to the Committee on the Judiciary.

For the reasons stated in my letter of April 18 and above, the Committee may wish to hold the Committee request for testimony in abeyance while it exhausts other sources for the kinds of information the Committee seeks, or the Committee may wish to forgo the request altogether. If, however, the Committee wishes to pursue its request, then -- as a matter of comity, relying on the representations in your letters of April 11 and 28, including especially the five points set forth above, and reserving all legal authorities, immunities, questions and privileges, including with respect to the lawfulness of the inquiry under the Constitution and House rules -- the Chief of Staff to the Vice President is prepared to accept timely service of a Committee subpoena for testimony for a hearing on May 6, 2008.

We hope and expect that the Committee will recognize the importance of protecting the institution of the Vice Presidency under the Constitution, so that present and future Vice Presidents can continue to serve America effectively.

Sincerely,

Kathryn L. Wheelbarger
Counsel to the Vice President

cc: Mr. Sean McLaughlin
Minority Chief Counsel
Committee on the Judiciary

EXHIBIT NO. DSA 5

MAY-07-2008 16:28 JUDICIARY COMMITTEE P.001

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ONE HUNDRED TENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6216

(202) 225–3951

http://www.house.gov/judiciary

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FAX COVER SHEET

DATE: May 7, 2008

TO: David S. Addington c/o Kathryn Wheelbarger

FAX NO.: (202) 456-6429

FROM: Chairman Conyers **Fax No.: (202) 225-4423**

NUMBER OF PAGES IN THIS TRANSMISSION: 4 (including cover)

COMMENTS: Please contact Andrea Calebras with any questions

PLEASE CALL IF THERE ARE ANY PROBLEMS WITH THIS TRANSMISSION
(202) 225-3951

ONE HUNDRED TENTH CONGRESS

Congress of the United States
House of Representatives
COMMITTEE ON THE JUDICIARY
2138 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6216
(202) 225–3951
http://www.house.gov/judiciary

May 7, 2008

By Fax

Mr. David S. Addington
Assistant to the President and
Chief of Staff to the Vice President and Counsel
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear Mr. Addington:

As discussed with Counsel to the Vice President Kathryn Wheelbarger, enclosed is a subpoena for your testimony at a hearing before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the House Judiciary Committee on June 26, 2008. We appreciate very much the cooperation of you and Ms. Wheelbarger in agreeing to accept service by fax and on the June 26 date for the hearing, and we look forward to your testimony. If you have any questions, problems, or concerns, please direct them to the Judiciary Committee office, 2138 Rayburn House Office Building, Washington, DC 20515 (tel: 202-225-3951, fax: 202-225-7680).

Sincerely,

John Conyers, Jr.
Chairman

cc: Hon. Lamar S. Smith
Hon. Jerrold Nadler
Hon. Trent Franks
Kathryn L. Wheelbarger

SUBPOENA

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE CONGRESS OF THE UNITED STATES OF AMERICA

To David S. Addington, Assistant to the President and Chief of Staff to the Vice President and Counsel

You are hereby commanded to be and appear before the Committee on the Judiciary

Subcommittee on the Constitution, Civil Rights, and Civil Liberties

of the House of Representatives of the United States at the place, date and time specified below.

☑ **to testify** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: 2141 Rayburn House Office Building, Washington, DC 20515

Date: June 26, 2008 Time: 10:00 a.m.

☐ **to produce the things identified on the attached schedule** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of production: _____

Date: _____ Time: _____

To Any authorized Committee staff to accomplish by fax to 202-456-6429 pursuant to the authorization of Kathryn Wheelbarger, Counsel to the Vice President, on behalf of Mr. Addington to serve and make return.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, this 7th day of May, 2008.

Attest: Lorraine C. Miller
Clerk

Chairman or Authorized Member

PROOF OF SERVICE

Subpoena for David S. Addington, Assistant to the President and Chief of Staff to the Vice President and Counsel

Address The White House, 1600 Pennsylvania Ave., NW, Washington, DC 20500

before the Committee on the Judiciary

Subcommittee on the Constitution, Civil Rights, and Civil Liberties

U.S. House of Representatives
110th Congress

Served by (print name) Andrea Culebras

Title Professional Staff Member

Manner of service Faxing to (202) 456-6429 to David Addington c/o Kathryn Wheelbarger

Date May 7, 2008

Signature of Server Andrea Culebras

Address Committee on the Judiciary, 2138 Rayburn House Office Building, Washington, DC 20515

EXHIBIT NO. DSA 6

*************** -COMM. . -AL- ******************* DATE MAY-07-2008 *** TIME 17:44 ********

MODE = MEMORY TRANSMISSION START=MAY-07 17:43 END=MAY-07 17:44

FILE NO.=581

STN NO.	COMM.	ONE-TOUCH/ ABBR NO.	STATION NAME/TEL NO.	PAGES	DURATION
001	OK	#	912022254423	001/001	00:00:17

-DUPCOS -

************************************* - - ***** - 2024566429- **********

VIA FAX TO 202-225-7680

TO: COMMITTEE ON THE JUDICIARY
ATTN: MR. PERRY APPELBAUM

Service accepted per the Counsel to the Vice President's letter to the Committee of May 6, 2008.

David S. Addington
May 7, 2008
4:42 PM, ET

SUBPOENA

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE
CONGRESS OF THE UNITED STATES OF AMERICA

To David S. Addington, Assistant to the President and Chief of Staff to the Vice President and Counsel

You are hereby commanded to be and appear before the Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
of the House of Representatives of the United States at the place, date and time specified below.

☑ to testify touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: 2141 Rayburn House Office Building, Washington, DC 20515
Date: June 26, 2008 Time: 10:00 a.m.

☐ to produce the things identified on the attached schedule touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of production:
Date: Time:

To Any authorized Committee staff to accomplish by fax to 202-456-6429 pursuant to the authorization of Katheryn Wheelbarger, Counsel to the Vice President, on behalf of Mr. Addington to serve and make return.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, this 7th day of May, 2008.

Attest: Lorraine C. Miller
Clerk

John Conyers, Jr.
Chairman or Authorized Member

-07-2008 16:29 JUDICIARY COMMITTEE P.003

VIA FA D 202-225-4423

TO: COMMITTEE ON THE JUDICIARY
ATTN: MR. PERRY APELBAUM

Service accepted per the Counsel to the Vice President's letter to the Committee of May 6, 2008.
David S. Addington
May 7, 2008
4:42 pm, ET

SUBPOENA

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE CONGRESS OF THE UNITED STATES OF AMERICA

To David S. Addington, Assistant to the President and Chief of Staff to the Vice President and Counsel

You are hereby commanded to be and appear before the Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
of the House of Representatives of the United States at the place, date and time specified below.

☑ **to testify** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: 2141 Rayburn House Office Building, Washington, DC 20515
Date: June 26, 2008 Time: 10:00 a.m.

☐ **to produce the things identified on the attached schedule** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of production: _____
Date: _____ Time: _____

To Any authorized Committee staff to accomplish by fax to 202-456-6429 pursuant to the authorization of Kathryn Wheelbarger, Counsel to the Vice President, on behalf of Mr. Addington to serve and make return.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, this 7th day of May, 2008.

Attest: Lorraine C. Miller
Clerk

John Conyers, Jr.
Chairman or Authorized Member

MAY-07-2008 17:30

EXHIBIT NO. DSA 7

IMMUNITY OF FORMER COUNSEL TO THE PRESIDENT FROM COMPELLED CONGRESSIONAL TESTIMONY

The former Counsel to the President is immune from compelled congressional testimony about matters that arose during her tenure as Counsel to the President and that relate to her official duties in that capacity and is not required to appear in response to a subpoena to testify about such matters.

July 10, 2007

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked whether Harriet Miers, the former Counsel to the President, is legally required to appear and provide testimony in response to a subpoena issued by the Committee on the Judiciary of the House of Representatives. The Committee, we understand, seeks testimony from Ms. Miers about matters arising during her tenure as Counsel to the President and relating to her official duties in that capacity. Specifically, the Committee wishes to ask Ms. Miers about the decision of the Justice Department to request the resignations of several United States Attorneys in 2006. *See* Letter for Harriet E. Miers from the Hon. John Conyers, Jr., Chairman, House Committee on the Judiciary (June 13, 2007). For the reasons discussed below, we believe that Ms. Miers is immune from compulsion to testify before the Committee on this matter and, therefore, is not required to appear to testify about this subject.

Since at least the 1940s, Administrations of both political parties have taken the position that "'the President and his immediate advisers are absolutely immune from testimonial compulsion by a Congressional committee.'" *Assertion of Executive Privilege With Respect to Clemency Decision*, 23 Op. O.L.C. 1, 4 (1999) (opinion of Attorney General Janet Reno) (quoting Memorandum from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Executive Privilege* at 5 (May 23, 1977)). This immunity "is absolute and may not be overborne by competing congressional interests." *Id.*

Assistant Attorney General William Rehnquist succinctly explained this position in a 1971 memorandum:

> The President and his immediate advisers—that is, those who customarily meet with the President on a regular or frequent basis—should be deemed absolutely immune from testimonial compulsion by a congressional committee. They not only may not be examined with respect to their official duties, but they may not even be compelled to appear before a congressional committee.

Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: Power of Congressional Committee to Compel Appearance or Testimony of "White House Staff"* at 7 (Feb. 5, 1971) ("*Rehnquist Memo*"). In a 1999 opinion for President Clinton, Attorney General Reno concluded that the Counsel to the President "serves as an immediate adviser to the President and is therefore immune from compelled congressional testimony." *Assertion of Executive Privilege*, 23 Op. O.L.C. at 4.

The rationale for the immunity is plain. The President is the head of one of the independent Branches of the federal Government. If a congressional committee could force the President's appearance, fundamental separation of powers principles—including the President's independence and autonomy from Congress—would be threatened. As the Office of Legal Counsel has explained, "[t]he President is a separate branch of government. He may not compel congressmen to appear before him. As a matter of separation of powers, Congress may not compel him to appear before it." Memorandum for Edward C. Schmults, Deputy Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel at 2 (July 29, 1982) ("*Olson Memorandum*").

The same separation of powers principles that protect a President from compelled congressional testimony also apply to senior presidential advisers. Given the numerous demands of his office, the President must rely upon senior advisers. As Attorney General Reno explained, "in many respects, a senior advisor to the President functions as the President's alter ego, assisting him on a daily basis in the formulation of executive policy and resolution of matters affecting the military, foreign affairs, and national security and other aspects of his discharge of his constitutional responsibilities." *Assertion of Executive Privilege*, 23 Op. O.L.C. at 5.[1] Thus, "[s]ubjecting a senior presidential advisor to the congressional subpoena power would be akin to requiring the President himself to appear before Congress on matters relating to the performance of his constitutionally assigned functions." *Id.*; *see also Olson Memorandum* at 2 ("The President's close advisors are an extension of the President.").[2]

The fact that Ms. Miers is a former Counsel to the President does not alter the analysis. Separation of powers principles dictate that former Presidents and former senior presidential advisers remain immune from compelled congressional testimony about official matters that occurred during their time as President or senior presidential advisers. Former President Truman explained the need for continuing immunity in November 1953, when he refused to comply with a subpoena directing him to appear before the House Committee on Un-American Activities. In a letter to that committee, he warned that "if the doctrine of separation of powers and the independence of the Presidency is to have any validity at all, it must be equally applicable to a President after his term of office has expired when he is sought to be examined with respect to any acts occurring while he is President." *Texts of Truman Letter and Velde Reply*, N.Y. Times, Nov. 13, 1953, at 14 (reprinting November 12, 1953 letter by President Truman). "The doctrine

[1] In an analogous context, the Supreme Court held that the immunity provided by the Speech or Debate Clause of the Constitution to Members of Congress also applies to congressional aides, even though the Clause refers only to "Senators and Representatives." U.S. Const. art I, § 6, cl. 1. In justifying expanding the immunity, the Supreme Court reasoned that "the day to day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos." *Gravel v. United States*, 408 U.S. 606, 616-17 (1972). Any other approach, the Court warned, would cause the constitutional immunity to be "inevitably . . . diminished and frustrated." *Id.* at 617.

[2] *See also History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress*, 6 Op. O.L.C. 751, 771-72 (1982) (documenting how President Truman directed Assistant to the President John Steelman not to respond to a congressional subpoena seeking information about confidential communications between the President and one of his "principal aides").

would be shattered, and the President, contrary to our fundamental theory of constitutional government, would become a mere arm of the Legislative Branch of the Government if he would feel during his term of office that his every act might be subject to official inquiry and possible distortion for political purposes." *Id.* In a radio speech to the Nation, former President Truman further stressed that it "is just as important to the independence of the Executive that the actions of the President should not be subjected to the questioning by the Congress after he has completed his term of office as that his actions should not be questioned while he is serving as President." *Text of Address by Truman Explaining to Nation His Actions in the White Case*, N.Y. Times, Nov. 17, 1953, at 26.

Because a presidential adviser's immunity is derivative of the President's, former President Truman's rationale directly applies to former presidential advisers. We have previously opined that because an "immediate assistant to the President may be said to serve as his alter ego . . . . the same considerations that were persuasive to former President Truman would apply to justify a refusal to appear [before a congressional committee] by . . . a former [senior presidential adviser], if the scope of his testimony is to be limited to his activities while serving in that capacity." Memorandum for the Counsel to the President from Roger C. Cramton, Assistant Attorney General, Office of Legal Counsel, *Re: Availability of Executive Privilege Where Congressional Committee Seeks Testimony of Former White House Official on Advice Given President on Official Matters* at 6 (Dec. 21, 1972).

Accordingly, we conclude that Ms. Miers is immune from compelled congressional testimony about matters, such as the U.S. Attorney resignations, that arose during her tenure as Counsel to the President and that relate to her official duties in that capacity, and therefore she is not required to appear in response to a subpoena to testify about such matters.

/s/

STEVEN G. BRADBURY
Principal Deputy Assistant Attorney General

EXHIBIT NO. DSA 8

[redacted]

UNCLASSIFIED

THE WHITE HOUSE
WASHINGTON

February 7, 2002

MEMORANDUM FOR THE VICE PRESIDENT
THE SECRETARY OF STATE
THE SECRETARY OF DEFENSE
THE ATTORNEY GENERAL
CHIEF OF STAFF TO THE PRESIDENT
DIRECTOR OF CENTRAL INTELLIGENCE
ASSISTANT TO THE PRESIDENT FOR NATIONAL SECURITY AFFAIRS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF

SUBJECT: Humane Treatment of al Qaeda and Taliban Detainees

1. Our recent extensive discussions regarding the status of al Qaeda and Taliban detainees confirm that the application of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (Geneva) to the conflict with al Qaeda and the Taliban involves complex legal questions. By its terms, Geneva applies to conflicts involving "High Contracting Parties," which can only be states. Moreover, it assumes the existence of "regular" armed forces fighting on behalf of states. However, the war against terrorism ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians, sometimes with the direct support of states. Our Nation recognizes that this new paradigm -- ushered in not by us, but by terrorists -- requires new thinking in the law of war, but thinking that should nevertheless be consistent with the principles of Geneva.

2. Pursuant to my authority as Commander in Chief and Chief Executive of the United States, and relying on the opinion of the Department of Justice dated January 22, 2002, and on the legal opinion rendered by the Attorney General in his letter of February 1, 2002, I hereby determine as follows:

a. I accept the legal conclusion of the Department of Justice and determine that none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva.

b. I accept the legal conclusion of the Attorney General and the Department of Justice that I have the authority under the Constitution to suspend Geneva as between the United States and Afghanistan, but I decline to

[redacted]
Reason: 1.5 (d)
Declassify on: 02/07/12

[redacted]

exercise that authority at this time. Accordingly, I determine that the provisions of Geneva will apply to our present conflict with the Taliban. I reserve the right to exercise this authority in this or future conflicts.

c. I also accept the legal conclusion of the Department of Justice and determine that common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to "armed conflict not of an international character."

d. Based on the facts supplied by the Department of Defense and the recommendation of the Department of Justice, I determine that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva. I note that, because Geneva does not apply to our conflict with al Qaeda, al Qaeda detainees also do not qualify as prisoners of war.

3. Of course, our values as a Nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment. Our Nation has been and will continue to be a strong supporter of Geneva and its principles. As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.

4. The United States will hold states, organizations, and individuals who gain control of United States personnel responsible for treating such personnel humanely and consistent with applicable law.

5. I hereby reaffirm the order previously issued by the Secretary of Defense to the United States Armed Forces requiring that the detainees be treated humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.

6. I hereby direct the Secretary of State to communicate my determinations in an appropriate manner to our allies, and other countries and international organizations cooperating in the war against terrorism of global reach.

[redacted]

EXHIBIT NO. DSA 9

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release September 6, 2006

REMARKS BY THE PRESIDENT
ON THE GLOBAL WAR ON TERROR

The East Room

1:45 P.M. EDT

THE PRESIDENT: Thank you. Thanks for the warm welcome. Welcome to the White House. Mr. Vice President, Secretary Rice, Attorney General Gonzales, Ambassador Negroponte, General Hayden, members of the United States Congress, families who lost loved ones in the terrorist attacks on our nation, and my fellow citizens: Thanks for coming.

On the morning of September the 11th, 2001, our nation awoke to a nightmare attack. Nineteen men, armed with box cutters, took control of airplanes and turned them into missiles. They used them to kill nearly 3,000 innocent people. We watched the Twin Towers collapse before our eyes -- and it became instantly clear that we'd entered a new world, and a dangerous new war.

The attacks of September the 11th horrified our nation. And amid the grief came new fears and urgent questions: Who had attacked us? What did they want? And what else were they planning? Americans saw the destruction the terrorists had caused in New York, and Washington, and Pennsylvania, and they wondered if there were other terrorist cells in our midst poised to strike; they wondered if there was a second wave of attacks still to come.

With the Twin Towers and the Pentagon still smoldering, our country on edge, and a stream of intelligence coming in about potential new attacks, my administration faced immediate challenges: We had to respond to the attack on our country. We had to wage an unprecedented war against an enemy unlike any we had fought before. We had to find the terrorists hiding in America and across the world, before they were able to strike

our country again. So in the early days and weeks after 9/11, I directed our government's senior national security officials to do everything in their power, within our laws, to prevent another attack.

Nearly five years have passed since these -- those initial days of shock and sadness -- and we are thankful that the terrorists have not succeeded in launching another attack on our soil. This is not for the lack of desire or determination on the part of the enemy. As the recently foiled plot in London shows, the terrorists are still active, and they're still trying to strike America, and they're still trying to kill our people. One reason the terrorists have not succeeded is because of the hard work of thousands of dedicated men and women in our government, who have toiled day and night, along with our allies, to stop the enemy from carrying out their plans. And we are grateful for these hardworking citizens of ours.

Another reason the terrorists have not succeeded is because our government has changed its policies -- and given our military, intelligence, and law enforcement personnel the tools they need to fight this enemy and protect our people and preserve our freedoms.

The terrorists who declared war on America represent no nation, they defend no territory, and they wear no uniform. They do not mass armies on borders, or flotillas of warships on the high seas. They operate in the shadows of society; they send small teams of operatives to infiltrate free nations; they live quietly among their victims; they conspire in secret, and then they strike without warning. In this new war, the most important source of information on where the terrorists are hiding and what they are planning is the terrorists, themselves. Captured terrorists have unique knowledge about how terrorist networks operate. They have knowledge of where their operatives are deployed, and knowledge about what plots are underway. This intelligence -- this is intelligence that cannot be found any other place. And our security depends on getting this kind of information. To win the war on terror, we must be able to detain, question, and, when appropriate, prosecute terrorists captured here in America, and on the battlefields around the world.

After the 9/11 attacks, our coalition launched operations across the world to remove terrorist safe havens, and capture or kill terrorist operatives and leaders. Working with our allies, we've captured and detained thousands of terrorists and enemy

fighters in Afghanistan, in Iraq, and other fronts of this war on terror. These enemy -- these are enemy combatants, who were waging war on our nation. We have a right under the laws of war, and we have an obligation to the American people, to detain these enemies and stop them from rejoining the battle.

Most of the enemy combatants we capture are held in Afghanistan or in Iraq, where they're questioned by our military personnel. Many are released after questioning, or turned over to local authorities -- if we determine that they do not pose a continuing threat and no longer have significant intelligence value. Others remain in American custody near the battlefield, to ensure that they don't return to the fight.

In some cases, we determine that individuals we have captured pose a significant threat, or may have intelligence that we and our allies need to have to prevent new attacks. Many are al Qaeda operatives or Taliban fighters trying to conceal their identities, and they withhold information that could save American lives. In these cases, it has been necessary to move these individuals to an environment where they can be held secretly [sic], questioned by experts, and -- when appropriate -- prosecuted for terrorist acts.

Some of these individuals are taken to the United States Naval Base at Guantanamo Bay, Cuba. It's important for Americans and others across the world to understand the kind of people held at Guantanamo. These aren't common criminals, or bystanders accidentally swept up on the battlefield -- we have in place a rigorous process to ensure those held at Guantanamo Bay belong at Guantanamo. Those held at Guantanamo include suspected bomb makers, terrorist trainers, recruiters and facilitators, and potential suicide bombers. They are in our custody so they cannot murder our people. One detainee held at Guantanamo told a questioner questioning him -- he said this: "I'll never forget your face. I will kill you, your brothers, your mother, and sisters."

In addition to the terrorists held at Guantanamo, a small number of suspected terrorist leaders and operatives captured during the war have been held and questioned outside the United States, in a separate program operated by the Central Intelligence Agency. This group includes individuals believed to be the key architects of the September the 11th attacks, and attacks on the USS Cole, an operative involved in the bombings of our embassies in Kenya and Tanzania, and individuals involved in other attacks that have taken the lives of innocent civilians

across the world. These are dangerous men with unparalleled knowledge about terrorist networks and their plans for new attacks. The security of our nation and the lives of our citizens depend on our ability to learn what these terrorists know.

Many specifics of this program, including where these detainees have been held and the details of their confinement, cannot be divulged. Doing so would provide our enemies with information they could use to take retribution against our allies and harm our country. I can say that questioning the detainees in this program has given us information that has saved innocent lives by helping us stop new attacks -- here in the United States and across the world. Today, I'm going to share with you some of the examples provided by our intelligence community of how this program has saved lives; why it remains vital to the security of the United States, and our friends and allies; and why it deserves the support of the United States Congress and the American people.

Within months of September the 11th, 2001, we captured a man known as Abu Zubaydah. We believe that Zubaydah was a senior terrorist leader and a trusted associate of Osama bin Laden. Our intelligence community believes he had run a terrorist camp in Afghanistan where some of the 9/11 hijackers trained, and that he helped smuggle al Qaeda leaders out of Afghanistan after coalition forces arrived to liberate that country. Zubaydah was severely wounded during the firefight that brought him into custody -- and he survived only because of the medical care arranged by the CIA.

After he recovered, Zubaydah was defiant and evasive. He declared his hatred of America. During questioning, he at first disclosed what he thought was nominal information -- and then stopped all cooperation. Well, in fact, the "nominal" information he gave us turned out to be quite important. For example, Zubaydah disclosed Khalid Sheikh Mohammed -- or KSM -- was the mastermind behind the 9/11 attacks, and used the alias "Muktar." This was a vital piece of the puzzle that helped our intelligence community pursue KSM. Abu Zubaydah also provided information that helped stop a terrorist attack being planned for inside the United States -- an attack about which we had no previous information. Zubaydah told us that al Qaeda operatives were planning to launch an attack in the U.S., and provided physical descriptions of the operatives and information on their general location. Based on the information he provided, the

operatives were detained -- one while traveling to the United States.

We knew that Zubaydah had more information that could save innocent lives, but he stopped talking. As his questioning proceeded, it became clear that he had received training on how to resist interrogation. And so the CIA used an alternative set of procedures. These procedures were designed to be safe, to comply with our laws, our Constitution, and our treaty obligations. The Department of Justice reviewed the authorized methods extensively and determined them to be lawful. I cannot describe the specific methods used -- I think you understand why -- if I did, it would help the terrorists learn how to resist questioning, and to keep information from us that we need to prevent new attacks on our country. But I can say the procedures were tough, and they were safe, and lawful, and necessary.

Zubaydah was questioned using these procedures, and soon he began to provide information on key al Qaeda operatives, including information that helped us find and capture more of those responsible for the attacks on September the 11th. For example, Zubaydah identified one of KSM's accomplices in the 9/11 attacks -- a terrorist named Ramzi bin al Shibh. The information Zubaydah provided helped lead to the capture of bin al Shibh. And together these two terrorists provided information that helped in the planning and execution of the operation that captured Khalid Sheikh Mohammed.

Once in our custody, KSM was questioned by the CIA using these procedures, and he soon provided information that helped us stop another planned attack on the United States. During questioning, KSM told us about another al Qaeda operative he knew was in CIA custody -- a terrorist named Majid Khan. KSM revealed that Khan had been told to deliver $50,000 to individuals working for a suspected terrorist leader named Hambali, the leader of al Qaeda's Southeast Asian affiliate known as "J-I". CIA officers confronted Khan with this information. Khan confirmed that the money had been delivered to an operative named Zubair, and provided both a physical description and contact number for this operative.

Based on that information, Zubair was captured in June of 2003, and he soon provided information that helped lead to the capture of Hambali. After Hambali's arrest, KSM was questioned again. He identified Hambali's brother as the leader of a "J-I" cell, and Hambali's conduit for communications with al Qaeda.

Hambali's brother was soon captured in Pakistan, and, in turn, led us to a cell of 17 Southeast Asian "J-I" operatives. When confronted with the news that his terror cell had been broken up, Hambali admitted that the operatives were being groomed at KSM's request for attacks inside the United States -- probably [sic] using airplanes.

During questioning, KSM also provided many details of other plots to kill innocent Americans. For example, he described the design of planned attacks on buildings inside the United States, and how operatives were directed to carry them out. He told us the operatives had been instructed to ensure that the explosives went off at a point that was high enough to prevent the people trapped above from escaping out the windows.

KSM also provided vital information on al Qaeda's efforts to obtain biological weapons. During questioning, KSM admitted that he had met three individuals involved in al Qaeda's efforts to produce anthrax, a deadly biological agent -- and he identified one of the individuals as a terrorist named Yazid. KSM apparently believed we already had this information, because Yazid had been captured and taken into foreign custody before KSM's arrest. In fact, we did not know about Yazid's role in al Qaeda's anthrax program. Information from Yazid then helped lead to the capture of his two principal assistants in the anthrax program. Without the information provided by KSM and Yazid, we might not have uncovered this al Qaeda biological weapons program, or stopped this al Qaeda cell from developing anthrax for attacks against the United States.

These are some of the plots that have been stopped because of the information of this vital program. Terrorists held in CIA custody have also provided information that helped stop a planned strike on U.S. Marines at Camp Lemonier in Djibouti -- they were going to use an explosive laden water tanker. They helped stop a planned attack on the U.S. consulate in Karachi using car bombs and motorcycle bombs, and they helped stop a plot to hijack passenger planes and fly them into Heathrow or the Canary Wharf in London.

We're getting vital information necessary to do our jobs, and that's to protect the American people and our allies.

Information from the terrorists in this program has helped us to identify individuals that al Qaeda deemed suitable for Western operations, many of whom we had never heard about before. They include terrorists who were set to case targets

inside the United States, including financial buildings in major cities on the East Coast. Information from terrorists in CIA custody has played a role in the capture or questioning of nearly every senior al Qaeda member or associate detained by the U.S. and its allies since this program began. By providing everything from initial leads to photo identifications, to precise locations of where terrorists were hiding, this program has helped us to take potential mass murderers off the streets before they were able to kill.

This program has also played a critical role in helping us understand the enemy we face in this war. Terrorists in this program have painted a picture of al Qaeda's structure and financing, and communications and logistics. They identified al Qaeda's travel routes and safe havens, and explained how al Qaeda's senior leadership communicates with its operatives in places like Iraq. They provided information that allows us -- that has allowed us to make sense of documents and computer records that we have seized in terrorist raids. They've identified voices in recordings of intercepted calls, and helped us understand the meaning of potentially critical terrorist communications.

The information we get from these detainees is corroborated by intelligence, and we've received -- that we've received from other sources -- and together this intelligence has helped us connect the dots and stop attacks before they occur. Information from the terrorists questioned in this program helped unravel plots and terrorist cells in Europe and in other places. It's helped our allies protect their people from deadly enemies. This program has been, and remains, one of the most vital tools in our war against the terrorists. It is invaluable to America and to our allies. Were it not for this program, our intelligence community believes that al Qaeda and its allies would have succeeded in launching another attack against the American homeland. By giving us information about terrorist plans we could not get anywhere else, this program has saved innocent lives.

This program has been subject to multiple legal reviews by the Department of Justice and CIA lawyers; they've determined it complied with our laws. This program has received strict oversight by the CIA's Inspector General. A small number of key leaders from both political parties on Capitol Hill were briefed about this program. All those involved in the questioning of the terrorists are carefully chosen and they're screened from a pool of experienced CIA officers. Those selected to conduct the

most sensitive questioning had to complete more than 250 additional hours of specialized training before they are allowed to have contact with a captured terrorist.

I want to be absolutely clear with our people, and the world: The United States does not torture. It's against our laws, and it's against our values. I have not authorized it -- and I will not authorize it. Last year, my administration worked with Senator John McCain, and I signed into law the Detainee Treatment Act, which established the legal standard for treatment of detainees wherever they are held. I support this act. And as we implement this law, our government will continue to use every lawful method to obtain intelligence that can protect innocent people, and stop another attack like the one we experienced on September the 11th, 2001.

The CIA program has detained only a limited number of terrorists at any given time -- and once we've determined that the terrorists held by the CIA have little or no additional intelligence value, many of them have been returned to their home countries for prosecution or detention by their governments. Others have been accused of terrible crimes against the American people, and we have a duty to bring those responsible for these crimes to justice. So we intend to prosecute these men, as appropriate, for their crimes.

Soon after the war on terror began, I authorized a system of military commissions to try foreign terrorists accused of war crimes. Military commissions have been used by Presidents from George Washington to Franklin Roosevelt to prosecute war criminals, because the rules for trying enemy combatants in a time of conflict must be different from those for trying common criminals or members of our own military. One of the first suspected terrorists to be put on trial by military commission was one of Osama bin Laden's bodyguards -- a man named Hamdan. His lawyers challenged the legality of the military commission system. It took more than two years for this case to make its way through the courts. The Court of Appeals for the District of Columbia Circuit upheld the military commissions we had designed, but this past June, the Supreme Court overturned that decision. The Supreme Court determined that military commissions are an appropriate venue for trying terrorists, but ruled that military commissions needed to be explicitly authorized by the United States Congress.

So today, I'm sending Congress legislation to specifically authorize the creation of military commissions to try terrorists

for war crimes. My administration has been working with members of both parties in the House and Senate on this legislation. We put forward a bill that ensures these commissions are established in a way that protects our national security, and ensures a full and fair trial for those accused. The procedures in the bill I am sending to Congress today reflect the reality that we are a nation at war, and that it's essential for us to use all reliable evidence to bring these people to justice.

We're now approaching the five-year anniversary of the 9/11 attacks -- and the families of those murdered that day have waited patiently for justice. Some of the families are with us today -- they should have to wait no longer. So I'm announcing today that Khalid Sheikh Mohammed, Abu Zubaydah, Ramzi bin al-Shibh, and 11 other terrorists in CIA custody have been transferred to the United States Naval Base at Guantanamo Bay. (Applause.) They are being held in the custody of the Department of Defense. As soon as Congress acts to authorize the military commissions I have proposed, the men our intelligence officials believe orchestrated the deaths of nearly 3,000 Americans on September the 11th, 2001, can face justice. (Applause.)

We'll also seek to prosecute those believed to be responsible for the attack on the USS Cole, and an operative believed to be involved in the bombings of the American embassies in Kenya and Tanzania. With these prosecutions, we will send a clear message to those who kill Americans: No longer -- how long it takes, we will find you and we will bring you to justice. (Applause.)

These men will be held in a high-security facility at Guantanamo. The International Committee of the Red Cross is being advised of their detention, and will have the opportunity to meet with them. Those charged with crimes will be given access to attorneys who will help them prepare their defense -- and they will be presumed innocent. While at Guantanamo, they will have access to the same food, clothing, medical care, and opportunities for worship as other detainees. They will be questioned subject to the new U.S. Army Field Manual, which the Department of Defense is issuing today. And they will continue to be treated with the humanity that they denied others.

As we move forward with the prosecutions, we will continue to urge nations across the world to take back their nationals at Guantanamo who will not be prosecuted by our military commissions. America has no interest in being the world's

jailer. But one of the reasons we have not been able to close Guantanamo is that many countries have refused to take back their nationals held at the facility. Other countries have not provided adequate assurances that their nationals will not be mistreated -- or they will not return to the battlefield, as more than a dozen people released from Guantanamo already have. We will continue working to transfer individuals held at Guantanamo, and ask other countries to work with us in this process. And we will move toward the day when we can eventually close the detention facility at Guantanamo Bay.

I know Americans have heard conflicting information about Guantanamo. Let me give you some facts. Of the thousands of terrorists captured across the world, only about 770 have ever been sent to Guantanamo. Of these, about 315 have been returned to other countries so far -- and about 455 remain in our custody. They are provided the same quality of medical care as the American service members who guard them. The International Committee of the Red Cross has the opportunity to meet privately with all who are held there. The facility has been visited by government officials from more than 30 countries, and delegations from international organizations, as well. After the Organization for Security and Cooperation in Europe came to visit, one of its delegation members called Guantanamo "a model prison" where people are treated better than in prisons in his own country. Our troops can take great pride in the work they do at Guantanamo Bay -- and so can the American people.

As we prosecute suspected terrorist leaders and operatives who have now been transferred to Guantanamo, we'll continue searching for those who have stepped forward to take their places. This nation is going to stay on the offense to protect the American people. We will continue to bring the world's most dangerous terrorists to justice -- and we will continue working to collect the vital intelligence we need to protect our country. The current transfers mean that there are now no terrorists in the CIA program. But as more high-ranking terrorists are captured, the need to obtain intelligence from them will remain critical -- and having a CIA program for questioning terrorists will continue to be crucial to getting life-saving information.

Some may ask: Why are you acknowledging this program now? There are two reasons why I'm making these limited disclosures today. First, we have largely completed our questioning of the men -- and to start the process for bringing them to trial, we must bring them into the open. Second, the Supreme Court's

recent decision has impaired our ability to prosecute terrorists through military commissions, and has put in question the future of the CIA program. In its ruling on military commissions, the Court determined that a provision of the Geneva Conventions known as "Common Article Three" applies to our war with al Qaeda. This article includes provisions that prohibit "outrages upon personal dignity" and "humiliating and degrading treatment." The problem is that these and other provisions of Common Article Three are vague and undefined, and each could be interpreted in different ways by American or foreign judges. And some believe our military and intelligence personnel involved in capturing and questioning terrorists could now be at risk of prosecution under the War Crimes Act -- simply for doing their jobs in a thorough and professional way.

This is unacceptable. Our military and intelligence personnel go face to face with the world's most dangerous men every day. They have risked their lives to capture some of the most brutal terrorists on Earth. And they have worked day and night to find out what the terrorists know so we can stop new attacks. America owes our brave men and women some things in return. We owe them their thanks for saving lives and keeping America safe. And we owe them clear rules, so they can continue to do their jobs and protect our people.

So today, I'm asking Congress to pass legislation that will clarify the rules for our personnel fighting the war on terror. First, I'm asking Congress to list the specific, recognizable offenses that would be considered crimes under the War Crimes Act -- so our personnel can know clearly what is prohibited in the handling of terrorist enemies. Second, I'm asking that Congress make explicit that by following the standards of the Detainee Treatment Act our personnel are fulfilling America's obligations under Common Article Three of the Geneva Conventions. Third, I'm asking that Congress make it clear that captured terrorists cannot use the Geneva Conventions as a basis to sue our personnel in courts -- in U.S. courts. The men and women who protect us should not have to fear lawsuits filed by terrorists because they're doing their jobs.

The need for this legislation is urgent. We need to ensure that those questioning terrorists can continue to do everything within the limits of the law to get information that can save American lives. My administration will continue to work with the Congress to get this legislation enacted -- but time is of the essence. Congress is in session just for a few more weeks,

and passing this legislation ought to be the top priority. (Applause.)

As we work with Congress to pass a good bill, we will also consult with congressional leaders on how to ensure that the CIA program goes forward in a way that follows the law, that meets the national security needs of our country, and protects the brave men and women we ask to obtain information that will save innocent lives. For the sake of our security, Congress needs to act, and update our laws to meet the threats of this new era. And I know they will.

We're engaged in a global struggle -- and the entire civilized world has a stake in its outcome. America is a nation of law. And as I work with Congress to strengthen and clarify our laws here at home, I will continue to work with members of the international community who have been our partners in this struggle. I've spoken with leaders of foreign governments, and worked with them to address their concerns about Guantanamo and our detention policies. I'll continue to work with the international community to construct a common foundation to defend our nations and protect our freedoms.

Free nations have faced new enemies and adjusted to new threats before -- and we have prevailed. Like the struggles of the last century, today's war on terror is, above all, a struggle for freedom and liberty. The adversaries are different, but the stakes in this war are the same: We're fighting for our way of life, and our ability to live in freedom. We're fighting for the cause of humanity, against those who seek to impose the darkness of tyranny and terror upon the entire world. And we're fighting for a peaceful future for our children and our grandchildren.

May God bless you all. (Applause.)

END 2:22 P.M. EDT

EXHIBIT NO. DSA 10

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Presidential Documents

Title 3—

The President

Executive Order 13440 of July 20, 2007

Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency

By the authority vested in me as President and Commander in Chief of the Armed Forces by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force (Public Law 107–40), the Military Commissions Act of 2006 (Public Law 109–366), and section 301 of title 3, United States Code, it is hereby ordered as follows:

Section 1. *General Determinations.* (a) The United States is engaged in an armed conflict with al Qaeda, the Taliban, and associated forces. Members of al Qaeda were responsible for the attacks on the United States of September 11, 2001, and for many other terrorist attacks, including against the United States, its personnel, and its allies throughout the world. These forces continue to fight the United States and its allies in Afghanistan, Iraq, and elsewhere, and they continue to plan additional acts of terror throughout the world. On February 7, 2002, I determined for the United States that members of al Qaeda, the Taliban, and associated forces are unlawful enemy combatants who are not entitled to the protections that the Third Geneva Convention provides to prisoners of war. I hereby reaffirm that determination.

(b) The Military Commissions Act defines certain prohibitions of Common Article 3 for United States law, and it reaffirms and reinforces the authority of the President to interpret the meaning and application of the Geneva Conventions.

Sec. 2. *Definitions.* As used in this order:

(a) "Common Article 3" means Article 3 of the Geneva Conventions.

(b) "Geneva Conventions" means:

(i) the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, done at Geneva August 12, 1949 (6 UST 3114);

(ii) the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, done at Geneva August 12, 1949 (6 UST 3217);

(iii) the Convention Relative to the Treatment of Prisoners of War, done at Geneva August 12, 1949 (6 UST 3316); and

(iv) the Convention Relative to the Protection of Civilian Persons in Time of War, done at Geneva August 12, 1949 (6 UST 3516).

(c) "Cruel, inhuman, or degrading treatment or punishment" means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

Sec. 3. *Compliance of a Central Intelligence Agency Detention and Interrogation Program with Common Article 3.* (a) Pursuant to the authority of the President under the Constitution and the laws of the United States, including the Military Commissions Act of 2006, this order interprets the meaning and application of the text of Common Article 3 with respect to certain detentions and interrogations, and shall be treated as authoritative for all

purposes as a matter of United States law, including satisfaction of the international obligations of the United States. I hereby determine that Common Article 3 shall apply to a program of detention and interrogation operated by the Central Intelligence Agency as set forth in this section. The requirements set forth in this section shall be applied with respect to detainees in such program without adverse distinction as to their race, color, religion or faith, sex, birth, or wealth.

(b) I hereby determine that a program of detention and interrogation approved by the Director of the Central Intelligence Agency fully complies with the obligations of the United States under Common Article 3, provided that:

(i) the conditions of confinement and interrogation practices of the program do not include:

(A) torture, as defined in section 2340 of title 18, United States Code;

(B) any of the acts prohibited by section 2441(d) of title 18, United States Code, including murder, torture, cruel or inhuman treatment, mutilation or maiming, intentionally causing serious bodily injury, rape, sexual assault or abuse, taking of hostages, or performing of biological experiments;

(C) other acts of violence serious enough to be considered comparable to murder, torture, mutilation, and cruel or inhuman treatment, as defined in section 2441(d) of title 18, United States Code;

(D) any other acts of cruel, inhuman, or degrading treatment or punishment prohibited by the Military Commissions Act (subsection 6(c) of Public Law 109–366) and the Detainee Treatment Act of 2005 (section 1003 of Public Law 109–148 and section 1403 of Public Law 109–163);

(E) willful and outrageous acts of personal abuse done for the purpose of humiliating or degrading the individual in a manner so serious that any reasonable person, considering the circumstances, would deem the acts to be beyond the bounds of human decency, such as sexual or sexually indecent acts undertaken for the purpose of humiliation, forcing the individual to perform sexual acts or to pose sexually, threatening the individual with sexual mutilation, or using the individual as a human shield; or

(F) acts intended to denigrate the religion, religious practices, or religious objects of the individual;

(ii) the conditions of confinement and interrogation practices are to be used with an alien detainee who is determined by the Director of the Central Intelligence Agency:

(A) to be a member or part of or supporting al Qaeda, the Taliban, or associated organizations; and

(B) likely to be in possession of information that:

(1) could assist in detecting, mitigating, or preventing terrorist attacks, such as attacks within the United States or against its Armed Forces or other personnel, citizens, or facilities, or against allies or other countries cooperating in the war on terror with the United States, or their armed forces or other personnel, citizens, or facilities; or

(2) could assist in locating the senior leadership of al Qaeda, the Taliban, or associated forces;

(iii) the interrogation practices are determined by the Director of the Central Intelligence Agency, based upon professional advice, to be safe for use with each detainee with whom they are used; and

(iv) detainees in the program receive the basic necessities of life, including adequate food and water, shelter from the elements, necessary clothing, protection from extremes of heat and cold, and essential medical care.

(c) The Director of the Central Intelligence Agency shall issue written policies to govern the program, including guidelines for Central Intelligence Agency personnel that implement paragraphs (i)(C), (E), and (F) of subsection 3(b) of this order, and including requirements to ensure:

(i) safe and professional operation of the program;

(ii) the development of an approved plan of interrogation tailored for each detainee in the program to be interrogated, consistent with subsection 3(b)(iv) of this order;

(iii) appropriate training for interrogators and all personnel operating the program;

(iv) effective monitoring of the program, including with respect to medical matters, to ensure the safety of those in the program; and

(v) compliance with applicable law and this order.

Sec. 4. *Assignment of Function.* With respect to the program addressed in this order, the function of the President under section 6(c)(3) of the Military Commissions Act of 2006 is assigned to the Director of National Intelligence.

Sec. 5. *General Provisions.* (a) Subject to subsection (b) of this section, this order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

(b) Nothing in this order shall be construed to prevent or limit reliance upon this order in a civil, criminal, or administrative proceeding, or otherwise, by the Central Intelligence Agency or by any individual acting on behalf of the Central Intelligence Agency in connection with the program addressed in this order.

THE WHITE HOUSE,
July 20, 2007.

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Filed 7–23–07; 10:16 am]
Billing code 3195–01–P

the ties to the broader Washington political and legal community, while Gonzales provided the personal relationship with Bush.

The State Department was usually represented by one of the most experienced officials to have served as its legal adviser, William Howard Taft IV. Taft was a thin man who bore little resemblance to his prodigious presidential progenitor. He had already enjoyed a long career as deputy secretary of defense and DOD's general counsel during the Reagan administration. Another regular participant at meetings on terrorism policy was John Bellinger, the legal adviser to the NSC, who would succeed Taft when Rice became secretary of state. An official in the Clinton Justice Department, Bellinger often shared Taft's accommodating attitude toward international law.

William "Jim" Haynes represented the Defense Department as its general counsel. Haynes was a charming, athletic man; D.C.'s legal newspaper, the *Legal Times*, had done an early profile comparing him to James Bond, which prompted no end of teasing from his colleagues. Haynes was a natural leader who inspired trust from those he worked with. He never sought the spotlight, never sought to dominate a meeting, but instead wanted to hear the positions of the different agencies. He saw his mission as preserving the Defense Department's legal and policy options and the prerogatives of his boss, Secretary Donald Rumsfeld. He attended Harvard Law School, served in the Army, and later became general counsel of the Army under Bush 41. After working for defense contractors and law firms during the Clinton years, Haynes was chosen by Rumsfeld to help transform the military, which made him a target of military lawyers, just as Rumsfeld had encountered resistance from the military brass. Haynes would later be nominated for a federal judgeship in Virginia, but his nomination would be held up by senators critical of the Bush administration's terrorism policies.

Some in the media have become obsessed with another lawyer, David Addington, then counsel to Vice President Cheney, now his chief of staff.[21] No doubt the fascination with Addington is part of a broader effort to claim that Cheney is really in charge of the White

House rather than merely fulfilling the vice president's traditional role as the defender of the President and his party. The punditry's fixation on Addington is, I believe, in large part a response to his colorful personality. In the usual sea of colorless, blue-suited, white-shirted, stripe-tied bureaucrats, men and women whose main goal is to create no waves and make no enemies, Addington stands out. A tall, white-bearded man with a booming voice and a confident, combative manner, Addington always does his homework—he reads voraciously, not just cases, laws, and treaties, but the daily flow of memoranda that course through the White House. He never declines the opportunity to press agency general counsels on whether they are interpreting the law or making policy.

He was the equal of any other lawyer in experience, having served as DOD general counsel under Cheney, special assistant to President Reagan, and lawyer for the House Intelligence Committee. Yet, Addington was always conscious of his position. He enjoyed saying that the vice president "was not in charge of anything" so all he could do "was ask lots of questions"—which often flowed in a torrent, replete with references to CIA practice, military jargon, Marshall Court opinions, and sometimes sarcastic comments. Various media reports claim that his influence was so outsized he even had a hand in drafting Justice Department legal opinions in the war on terrorism. As the drafter of many of those opinions, I find this claim so erroneous as to be laughable, but it does show how wrong the press can get basic facts.

The State Department and OLC often disagreed about international law. State believed that international law had a binding effect on the President, indeed on the United States, both internationally and domestically. Following its traditional view since at least Bush 41, OLC usually argued that international law that did not take the form of a treaty was not federal law because it was not given such authority by the Constitution's Supremacy Clause. In our arguments, State would authoritatively pronounce what the international law was. OLC usually responded "Why?"—as in why do you believe that, why should we follow Europe's view of international law, why should we not fall back on our traditions and historical state practices?

acknowledged, all three were involved in approving, training, and preparing Jose Padilla for his mission to the United States.[9] Both Porter Goss, the past director of the CIA, and Vice President Cheney, who know far more than they can reveal publicly, have said that such operations, are vital to protect the United States from attack.[10]

Law

If administration critics had their way, however, it is likely that none of this information would ever have come into our hands. They want us to question al Qaeda leaders only verbally, no matter how much information they might have or what attacks might be planned in the future. Further, they argue that any effort to coerce a detainee, even an Abu Zubaydah or Ramzi bin al Shibh or KSM, constitutes prohibited "torture."

Critics tell a "torture narrative," which goes like this: The Bush administration used torture to extract information from al Qaeda leaders, and decided to use the same methods on the detainees at Guantanamo Bay, whom it deprived of Geneva Conventions protections precisely for this purpose.[11] Harsh interrogation methods became part of military culture and "migrated" to Iraq, where they produced the horrible abuses at Abu Ghraib.

This argument is an exercise in hyperbole and partisan smear. The Bush administration researched and debated the Geneva issue three months after the 9/11 attacks. Iraq presented a different situation entirely because Iraq clearly *was* a war covered under the Geneva Conventions. Iraq was never once mentioned by anyone during the debates within the administration in December 2001 and January 2002. American forces were still in Afghanistan and President Bush would not launch his political offensive on Iraq until the fall of 2002. The invasion of Iraq was more than a year in the future.

There is a clear legal difference between the war against al Qaeda and the war in Iraq. Iraq is a party to the Geneva Conventions. Its troops have fought in accordance with the requirements for POW status (as

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they did in the first Persian Gulf War in 1991). At the outset of the invasion, President Bush and the Pentagon declared that the Geneva Conventions applied. Nonetheless, the pictures of the appalling abuses at Abu Ghraib, which emerged in the summer of 2004, allowed some to jump to a conclusion—one that was utterly false—that the Pentagon had ordered the torture of Iraqis. Believers of the narrative refuse to trust a word of the bipartisan investigations that have demolished the link between the decisions about Guantanamo Bay and Abu Ghraib, or between decisions in Washington and the prison abuses.

The Abu Ghraib photos sparked extensive leaking inside the Beltway. Classified memos prepared by OLC analyzing how the Geneva Conventions, the Convention Against Torture (CAT), and a federal law banning torture applied to captured al Qaeda and Taliban fighters were handed to the press. After administration opponents had finished scouring them for juicy passages for popular consumption, the charges that the Bush administration had sought to undermine or evade the law flew fast and furious. Senator Dianne Feinstein claimed that the analyses appeared "to be an effort to redefine torture and narrow prohibitions against it."

In August 2002, Bybee signed an opinion that concluded, after a thorough review of the law, that "physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture (under U.S. law), it must result in significant psychological harm of significant duration, e.g., lasting for months or even years." While the advice was entirely accurate, conspiracy theories have since grown up around our work. One has it that it was really Vice President Dick Cheney's office, led by David Addington, which wrote parts of the memorandum to promote Cheney's drive to expand the powers of the executive branch.[12] Others claim that OLC had allied with "neo-cons" in other agencies, such as the Defense Department's civilian leadership and Cheney's office, to promote the violation of international and federal law without proper controls by other offices in the Justice Department and other agencies.

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Bandied about as they may be, these theories are utterly without foundation in the truth. The subject matter was certainly extraordinary and demanded unusually tight controls because of its sensitivity. Justice Department officials have prohibited any specific discussion of the process that produced the 2002 memo, out of concern about revealing confidential information. But I can describe the standard process for opinions involving intelligence matters. Normally, the general counsel of one of the intelligence agencies would identify a legal issue involving a proposed operation or program. The NSC's legal adviser would formally ask OLC for the opinion. He would set the classification level of the work and would dictate, in consultation with the White House counsel, which agencies and personnel would have access to it. Sometimes neither State nor Defense lawyers would know about the opinion. We regularly notified the offices of the attorney general and the deputy attorney general about all pending opinions, and gave them periodic updates on our progress. Within OLC, career attorneys handle the initial research and drafting of opinions, with editing and review by two political appointees at my level, and then final rewriting and editing by the head of the office. Any opinion would circulate to the NSC legal advisor, the White House counsel's office, and the intelligence agencies for their comments. OLC always welcomed comments, suggested edits, and questions. But in no case was a single word of any opinion every written by anyone outside the Justice Department.

Some in the media have speculated that the opinion somehow did not move through the proper channels within the Justice Department. That too is wrong. Aside from the restricted circle of personnel who could work on it, the opinion went through the normal process of review. No one urged us to make any significant changes in the opinion, and I do not recall anyone disagreeing with the basic conclusions of the opinion. That is not to say that anyone thought it was an easy question to answer; everyone understood that the opinion addressed difficult questions fraught with serious consequences.

Controversy has surrounded OLC's opinion ever since. In December 2004, just a few days before Alberto Gonzales's confirmation hearings

to become attorney general, DOJ replaced the memo with a superseding legal opinion in an effort to satisfy the administration critics, who were having a field day attributing the Abu Ghraib photos to the 2002 legal memos. I felt it was a disservice to the personnel, especially those in the field, who had to rely on the Justice Department's advice to take risks in fighting the war on terrorism. Since the legal conclusions in the new memo were basically the same, this exercise in political image-making may have seemed worth it simply to ease Gonzales's confirmation (though not by much, as it turned out). But it was a misguided politicization of the Justice Department's job of giving legal advice. The second opinion not only retracted the bright lines the 2002 memo attempted to draw, replacing them with vague language that gave less offense, it provided much less guidance or clarity. The men and women risking their lives in the field to protect the country would now not be allowed to know specifically what they could and could not do.

Because the federal antitorture law used words rare in the federal code, no prosecutions had been brought under it, and it had never been interpreted by a federal court. We wrote the memo to give the executive branch guidance on these specifics. The 2002 memo was, in effect, rewritten in 2004 to take out language about what torture was or wasn't, to placate the sensibilities of those who didn't like seeing the law of torture and harsh interrogation even discussed. Nothing of substance about the law had changed.

The harder question was what interrogation methods fell short of the torture ban and could be used against al Qaeda leaders. Federal law commands that al Qaeda and Taliban operatives not be tortured. The President had gone much farther than that, ordering from the outset that they be treated *humanely*. In its antitorture law in force at the time of the 2002 memos, Congress made clear that the United States could not use interrogation methods that caused "severe physical or mental pain or suffering," and no one in the government questioned that ban, or suggested methods to violate it. But would limiting a captured terrorist to six hours' sleep, isolating him, interrogating him for several hours, or requiring him to exercise constitute

EXHIBIT NO. DSA 13

Exhibit DSA 13

Files
Mr. Katzenbach
Mrs. Copeland
Mr. Lindenbaum

MAR 9 1961

MEMORANDUM FOR THE VICE PRESIDENT

Re: Participation by the Vice President in the affairs of the Executive Branch.

This memorandum is in response to your recent request concerning the extent to which the Vice President may properly perform functions in the Executive Branch of the Government.

The Constitution allots specific functions to the Vice President in the transaction of business by the Legislative Branch of the Government (Art. I, sec. 3) but neither grants nor forbids him functions in the conduct of affairs of the Executive Branch. The extent to which he may properly take part in those affairs must be assessed primarily in terms of historical precedents. 1/ The courts have not had occasion to consider this matter and judicial precedents do not exist.

1. Presidential Powers of Delegation. As will be seen below, the role of the Vice President in the Executive Branch has varied greatly through the years and at any given time has been determined largely by the President. A brief reference to the latter's powers of delegation is thus pertinent. It has long been recognized that the President has the power to delegate tasks for which he is responsible and that "in general, when Congress speaks of acts to be performed by the President, it means by the executive authority of the President." 7 Op. A.G. 453, 467 (1855). In 1950 Congress expressly gave the President broad authority to delegate to department and agency heads, and to certain lesser officials, functions

1/ There is no inherent conflict between the legislative role given to the Vice President by the Constitution and any executive duties he may be called upon to carry out. As pointed out by one writer, "The Founding Fathers never intended to immobilize the second officer in the chair of the Senate, for they empowered that body to choose 'a President pro tempore, in the absence of the Vice President. . . .'" Williams, The American Vice Presidency: New Look (1954), p. 70. Nixon once estimated that he spent only 10 per cent of his time presiding over the Senate. U.S. News & World Report, June 26, 1953, p. 71.

vested in him by law if such law did not affirmatively prohibit delegation. 64 Stat. 419, 3 U.S.C. §§ 301-303. This legislation, which was designed to lighten the burden of the President by permitting him to slough off without question a substantial number of tasks thought by some authorities to require his personal attention, 2/ recognized the "inherent right of the President to delegate the performance of functions vested in him by law" and specifically disavowed any intention to limit or derogate from that right. 3 U.S.C. § 302. Thus, there is no general bar, either of a Constitutional or statutory nature, against the President's transfer of duties to the Vice President. It remains to be noted, however, that

> "where . . . from the nature of the case, or by express constitutional or statutory declaration, it is evident that the personal, individual judgment of the President is required to be exercised, the duty may not be transferred by the President to anyone else." Willoughby, Constitutional Law of the United States (2d ed. 1929), Vol. III, p. 1482.

The President's obligation to pass on bills sent to him by Congress is one example of a non-delegable duty. The exercise of judgment required by 49 U.S.C. § 1461 in the matter of the certification of overseas air transport routes may well be another.

2. History. The history of the Vice Presidency begins with the last period of the Constitutional Convention of 1787. 3/ During most of the Convention the delegates had sought to perfect a plan whereby the Congress would elect the President and, if necessary, his successor to fill an unexpired term. However, dissatisfaction with this method ultimately led to the creation of the Electoral College and the office of Vice President. Under the original provisions of the Constitution (Art. II, sec. 1) each elector voted for two persons for President, and the person receiving the highest number of votes became President if such

2/ S. Rept. 1867, 81st Cong., 2d sess.

3/ The brief history set forth in the following portion of this memorandum has been digested mainly from the work of Irving G. Williams cited in footnote 1 above and a later and expanded work by the same author, The Rise of the Vice Presidency (1956). Attached as an appendix to this memorandum is a list containing other recent source material bearing on the office of the Vice Presidency.

number was a majority of the whole number of electors appointed by the States. The runnerup in the balloting became Vice President. The present system of separate electoral balloting for the offices of President and Vice President was established following the tie in the electoral vote of 1800 between Jefferson, who was the first choice of the Republican Party of the day, and Burr, also a Republican, intended by his Party for the Vice Presidency. Burr's refusal to step aside together with the tactics of the strong Federalist bloc in the "lame duck" House of Representatives into which the election was thrown necessitated 36 ballots before Jefferson was elected. This crisis, which was the outcome of the unforeseen growth of the party system, four years later produced the Twelfth Amendment requiring the members of the Electoral College to vote for one individual for President and another for Vice President.

John Adams, the first Vice President, was one of the most influential. He originally conceived of his Constitutional duties in the Chair of the Senate as tantamount to leadership, and, to some extent because of the great number of casting votes occasioned by the small roster of the Senate, played a decisive part in its work during the first few years of its existence. Later, as it increased in membership and its organization and procedures were strengthened, his influence was greatly diminished. On the executive side, he enjoyed Washington's confidence and was consulted by him frequently, particularly in regard to diplomatic matters. However, despite his extensive experience in diplomacy abroad, Adams in 1794 rejected a suggestion that he travel to England to negotiate a commercial treaty, taking the position that the Constitution required him to preside over the Senate. In addition, he questioned the propriety of leaving the country in view of the necessity of his taking over the Presidency in case the office became vacant. This dubious precedent, followed in 1797 by a similar refusal by Jefferson to carry on diplomatic negotiations in France when he was Vice President under Adams, held good until 1936 when Garner made trips to the Far East and to Mexico on official business.

The Twelfth Amendment had a prompt and unfortunate effect on the Vice Presidency as appears from the contrast between the abilities and attainments of Adams, Jefferson and Burr, who held it prior to the adoption of the Amendment, and the lackluster

of Clinton, Gerry, and Tompkins, who served during the next two decades. Calhoun and Van Buren, the next occupants of the office, lent great prestige to it, but not Van Buren's successor, Richard M. Johnson, whose main claim to distinction seems to be that he failed of a majority in the Electoral College and became the only Vice President in the country's history to be elected by the Senate. John Tyler, the next Vice President, served a term of one month, succeeding to the Presidency upon the death of William Henry Harrison on April 4, 1841, the first of a Chief Executive in office. Tyler took the Presidential oath believing and contending that the office of President had devolved on him and not merely its powers and duties. 4/ Many members of the Congress and others, including former President John Quincy Adams, took sharp issue and argued that Tyler was merely "acting" President. Whatever the merits of the controversy, Tyler's position prevailed. All Vice Presidents succeeding to the Presidency after him followed his lead, and his view was written into the Constitution by the language of the Twenty-second Amendment.

From Tyler's time to that of Woodrow Wilson, the office of the Vice Presidency by and large played an unimportant part in the Government except for providing Fillmore, Andrew Johnson, Arthur and Theodore Roosevelt as successors to the Presidency upon the deaths of Taylor, Lincoln, Garfield and McKinley.

Thomas R. Marshall, Vice President during both of Wilson's terms, brought the office back into public esteem and ultimately became the most popular Vice President up to his time. The first after Calhoun to win reelection, Marshall was also the first after John Adams to attend a Cabinet meeting. Adams had sat in at a meeting in 1791 on Washington's request while the latter was on a tour of the South. Similarly, at the request of Wilson, concurred in by the Cabinet, Marshall presided over its meetings during Wilson's attendance at the Paris Peace Conference. The temporary seat in the Cabinet afforded to Marshall became Coolidge's permanent seat at the invitation of Harding. On the

4/ Art. II, sec. 1, of the Constitution provides that "In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President. . . ." Tyler took the position that the word "same" related back to the word "Office".

other hand, Dawes, who was Vice President during Coolidge's elected term, refused to follow his example and attended no meetings of the Cabinet whatever. Curtis was not asked to sit during Hoover's term and it was only after the election of Franklin D. Roosevelt, and beginning in 1933 with Garner, that participation by the Vice President in the deliberations of the Cabinet became a matter of course.

What has been called the "contemporary renaissance" of the Vice Presidency 3/ stems in large part from the second Roosevelt's reliance on the men who served in that office during his administrations. Garner's aid to Roosevelt was important in his first term, particularly in the area of Congressional liaison. Garner also made his presence felt in the Cabinet and, further, was often asked by Roosevelt for his views on matters of foreign policy. As mentioned above, Garner broke the negative precedent set by the first Adams, and in 1936 became the first Vice President in office to travel beyond the country's borders in an official capacity.

By the end of his first term, Garner began to have misgivings about the New Deal and by the middle of his second he was completely out of sympathy with Roosevelt's policies. In the last days of 1938 both Roosevelt and he recognized that they had come to the parting of the ways and at the close of 1939 Garner announced himself a candidate for the Presidency in the election of the following year. Although Garner continued to attend Cabinet meetings until the expiration of his second term, he obviously was little more than an observer after 1938. Thus, the powerful and useful partnership of the President and Vice President, probably without prior parallel except for the Washington-Adams relationship, came to an unfortunate end after some five years and the Executive Branch reverted to a sole proprietorship.

During Roosevelt's third term the Executive partnership with the Vice Presidency was revived and Wallace received responsibility and power in measures never known to a Vice President before and, in certain aspects, not known to one since. Only in the more or less traditional task of Congressional liaison were Wallace's activities limited -- and then not because of

3/ Williams, The American Vice Presidency: New Look, p. 9.

a Presidential interdiction but rather by reason of Wallace's lack of talent for and interest in this facet of the Vice President's work.

Wallace's major duties in the Executive Branch began on July 30, 1941 when the President issued Executive Order No. 8839 (6 F.R. 3823) creating the Economic Defense Board composed of the Vice President, who was designated Chairman, and several Cabinet officers. The stated purpose of the Board was to develop and coordinate plans, policies and programs designed to strengthen the international economic relations of the United States in the interest of national defense. Four weeks later, Executive Order No. 8875 of August 28, 1941 (6 F.R. 4483) created the Supply Priorities and Allocations Board (SPAB), consisting of the Chairman of the Economic Defense Board (Wallace), a number of Cabinet officers, and the heads of a number of emergency agencies. Wallace was named Chairman of the SPAB presumably to coordinate the domestic and international economic defense programs. Finally, Wallace was made a member of a Presidential advisory committee on atomic energy created in October 1941, together with Secretary of War Stimson, Chief of Staff Marshall, Dr. Vannevar Bush, and Dr. James B. Conant. According to Stimson, this committee was the basic agency for making major policy decisions on the development and use of atomic energy.

Wallace's work on the SPAB was of relatively short duration because the Agency was abolished shortly after Pearl Harbor and replaced by the greatly expanded War Production Board with Donald Nelson, the Executive Director of the superseded SPAB, as its full time Chairman. Wallace's membership on the atomic energy committee continued throughout his whole term but because of the secret nature of the committee it is of course impossible to evaluate his contribution to its work.

It was in the first of his major Executive Branch assignments, the Economic Defense Board (renamed the Board of Economic Warfare (BEW) a few days after Pearl Harbor), that Wallace had responsibilities and carried out duties unique in the history of the Vice Presidency. The order setting up the Board had directed that the administration of economic defense activities in the international field by the various Government departments and agencies "shall conform to the policies formulated or approved by the Board." Thus, owing to the scope of the activities embraced within the concept of "economic defense," Wallace in a

variety of situations became the superior of every Cabinet officer and most of the important independent agency heads. The ubiquity of the BEW and the boldness and tenacity of its staff embroiled it soon after Pearl Harbor in a series of running battles over policy with other Government agencies, including specifically the Department of State and the Reconstruction Finance Corporation. The course of these battles need not be detailed here and it is enough to note that conflicts with the latter two powerful agencies led to the BEW's downfall. In the summer of 1943 the President removed Wallace as its Chairman and then terminated it.

It is generally agreed that the BEW performed its work well and substantially furthered the war effort. Its demise is therefore not to be laid to any difficulties inherent in the dual role of Vice President and Chairman played by Wallace. The real trouble was frequent policy disagreement reflecting a clash of Wallace's liberal views with the relatively conservative views of Secretary of State Hull and RFC Chairman Jones.

In addition to his domestic duties Wallace undertook tasks farther afield. Continuing Garner's example, he made several trips to Latin America as a good-will ambassador and in 1944 traveled to the Far East on a combined political and good-will mission.

Following Wallace, Truman sat with the Cabinet during his short service as Vice President, as did Barkley after he became Vice President in 1949. In the same year Congress at the request of Truman made the Vice President a statutory member of the National Security Council. 63 Stat. 579, 50 U.S.C. § 402(a). Thus the combination of Cabinet and National Security Council service placed the Vice President in a position to keep informed about the most important affairs of the Nation and to join in the making of policy at the highest levels.

Nixon carried out perhaps a greater variety of duties than any of his predecessors. In his first year of office he became and thereafter remained Chairman of the President's Committee on Government Contracts. He attended and in the absence of the President presided at Cabinet meetings and meetings of the National Security Council. He acted as a "trouble-shooter" for the White House in its dealings with Congress and in matters political. And he was prominent in the field of foreign relations, traveling in other lands to an extent much greater than

any of his predecessors and apparently having a significant voice from time to time in the Eisenhower Administration's formulation of foreign policy.

From this brief outline of the history of the Vice Presidency, it is apparent that during the past half century, and markedly since 1933, the office has moved closer and closer to the Executive. This development, aided by the deference of the party nominating conventions to their Presidential nominees in the selection of running mates, is easily understandable when related to the enormous increase in the responsibilities and burdens of the Presidency which took place concurrently.

3. Limits of Vice President's Part in Work of Executive Branch. In considering what the proper limits of the role of the Vice President in the Executive Branch may be, it is convenient to discuss separately the two areas of foreign affairs and domestic administration. In the former area, it is evident that at the will and as the representative of the President, the Vice President may engage in activities ranging into the highest levels of diplomacy and negotiation and may do so anywhere in the world. 6/ The refusal of John Adams during the Washington Administration to engage in such activities abroad cannot be given any weight at the present time. His reasons, good or bad as they were, have been obviated by the fact that lengthy absences of the Vice President from the Senate have become the custom and not the exception and the fact that even if abroad, the Vice President would today be able to return to the seat of Government within hours in the event the office of President became vacant. Indeed, Adams either advanced the reasons merely as an excuse or soon changed his mind, for the day before his own Presidential administration began he asked Vice President-elect Jefferson to undertake the same kind of task he himself had declined. Jefferson's rejection of the request, ostensibly based on Adams' own grounds, was really motivated by political considerations. 7/ At any rate, aside from location, the propriety of assignments to

6/ For a discussion of the President's right to employ diplomatic agents without the concurrence of the Senate despite his obligation under Art. II, sec. 2, cl. 2 of the Constitution to submit for its advice and consent his nominations of "Ambassadors, other public Ministers and Consuls," see Corwin, Constitution of the United States, Annotated (1952), pp. 447, 449.

7/ Williams, The American Vice Presidency: New Look, p. 24.

the Vice President in the field of foreign relations was plainly taken for granted in the beginning years of our history and justifiably so in the absence of any Constitutional proscription, express or implied. Nothing that has occurred since then suggests that this earlier assumption was incorrect.

In matters of domestic administration, the nature and number of the Vice President's executive duties, with the recent and important exception of statutory membership in the National Security Council, are, as a practical matter, within the discretion of the President. Since the Vice President is not prevented either by the Constitution or by any general statute from acting as the President's delegate, the range of transferrable duties would seem to be co-extensive with the scope of the President's power of delegation. The outer limits of that range were approached, if not touched, by Wallace's post as Chairman of the BEW. Although that Presidential assignment was the outgrowth of war, there is no visible bar to commensurate posts for the Vice President in other times.

The Vice President's formal domestic assignments from the President in recent years -- that is, his seat with the Cabinet and his chairmanship of the Committee on Government Contracts -- are beyond doubt consistent with the Constitution and laws. The statutory duty of the Vice President as a member of the National Security Council is to advise the President. 50 U.S.C. § 402(a). Thus, the Vice President's affiliation with that body partakes of the same character as his service with the Cabinet and raises no Constitutional questions. The same would be true of his statutory membership on the advisory National Aeronautics and Space Council (42 U.S.C. § 2471) if, as the President recently stated he would recommend to Congress, [4/] the latter body were to amend the present law to provide for such membership.

A grant is appropriate with respect to bestowals of functions upon the Vice President by Congress. To the extent that legislation might attempt to place power in the Vice President to be wielded independently of the President, it no doubt would run afoul of Article II, section 1 of the Constitution, which provides flatly that "the executive power shall be vested in a President of the United States." Furthermore, since the

4/ Press Conference of the President, March 1, 1961.

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Vice President is an elective officer in no way answerable or subordinate to the President, the practical difficulties which might arise from such legislation are as patent as the Constitutional problem.

4. Separation of Powers. In the course of the brief discussion of the office of the Vice President at the Constitutional Convention some of the delegates complained that making him the presiding officer of the Senate would blur the separation of powers between the Executive and Legislative Branches. In particular, they seemed to fear that the President would somehow gain ascendance over the Senate through the Vice President./9/ Inasmuch as the chair of the Senate has had a relatively unimportant part in its proceedings since the time it was held by John Adams, this complaint has proved groundless. Thus, active as a Vice President may be in the conduct of the business of the Executive, it is difficult to perceive that as a practical matter his service in the Senate would diminish the powers of the Legislature. However, in the event that the Senate were to take up a bill affecting a specific Executive activity the Vice President was engaged in, it would of course be the better part of decorum and prudence for him to absent himself from the chair.

Aside from practicalities, it does not appear that doctrinal considerations block the Vice President's performance of important functions in the Executive Branch. Despite his position as President of the Senate, he is certainly not one of its members/10/ Nor can he be convincingly described as a third member of the Legislative Branch alongside the two Houses of Congress. His office was created by Article II of the Constitution dealing with the Executive Branch, and section 4 of that Article makes him, just as the President, subject to impeachment by the Legis-

9/ Williams, The Rise of the Vice Presidency, p. 19.

10/ Art. I, sec. 6, cl. 2 of the Constitution provides that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." Since the Vice President holds "an Office under the United States," it would do violence to this language to argue that the Founding Fathers conceived of him as a member of the Senate. Moreover, clauses 1 and 2 of Art. I, sec. 5, which provide that each House shall be the judge of the elections, returns and qualifications of its own members and may punish and expel them, plainly do not apply to the Vice President.

lative Branch. Since the power of impeachment is a check devised to safeguard the principle of separation of powers against depredations by the Executive, it is troublesome conceptually to categorize the Vice President as a member of the Legislature.

Perhaps the best thing that can be said is that the Vice President belongs neither to the Executive nor to the Legislative Branch but is attached by the Constitution to the latter. Whatever the semantic problems, however, they would not seem to be especially relevant to the question whether the President or Congress may designate the Vice President to undertake Executive responsibilities. As Mr. Justice Holmes once noted in a similar context, "The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other." 11/ If a judicial test of the employment of the Vice President in the affairs of the Executive were ever to occur, there is little reason to think that it would be decided purely on the basis of abstractions. To the contrary, the comparative silence of the Constitution in regard to the Office of the Vice President virtually guarantees that the decision would be based primarily on considerations of practice and precedent. In short, theoretical arguments drawn from the doctrine of separation of powers merit little attention in the face of history, like that to the present, disclosing that the Office of the Vice President has become a useful adjunct to the Office of the President without causing harm to the Legislative Branch.

5. Conclusion. To sum up, what was once essentially a bare waiting room for the Presidency has become a lively office participating more and more in the affairs of the Executive. Such participation has not threatened the unity of the Executive. Unless it should do so in the future, it will not meet a Constitutional bar.

Nicholas deB. Katzenbach
Assistant Attorney General
Office of Legal Counsel

Attachment

11/ Springer v. Philippine Islands, 277 U.S. 189, 209 (1928), dissenting opinion.

3/9/61

4 SELECT BIBLIOGRAPHY OF RECENT MATERIAL ON THE VICE PRESIDENCY

4 BOOKS

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Senate Report No. 1960, 84th Cong., 2d sess., submitted by above-mentioned Senate Subcommittee on Reorganization (1956).

EXHIBIT NO. DSA 14

Exhibit DSA 14

~~NdeBKrShreve~~

4/ APR 1961

Files
Mr. Katzenbach
Mrs. Copeland
Mr. Leibenbaum

4/ MEMORANDUM FOR THE VICE PRESIDENT

4/ Re: Constitutionality of the Vice President's service as chairman of the National Aeronautics and Space Council.

H.R. 6169, 87th Congress, introduced at the request of the President, would amend section 201 of the National Aeronautics and Space Act of 1958 (42 U.S.C. § 2471) to remove the President and certain other persons from membership on the National Aeronautics and Space Council and make the Vice President a member and chairman. The function of the reconstituted Council, as stated in the bill, would be "to advise and assist the President, as he may request, with respect to the performance of functions in the aeronautics and space field."

The question has arisen whether there is any Constitutional bar to the proposed service of the Vice President on the Council.

Although the Constitution allots specific functions to the Vice President in the transaction of business by the Legislative Branch of the Government (Art. I, sec. 3), it neither grants nor forbids him functions in the conduct of affairs of the Executive Branch. The courts have never had occasion to consider the extent to which he may properly take part in those affairs. It is necessary therefore to look mainly to historical precedents for guidance.

The role of the Vice President in the Executive Branch has varied greatly through the years and in any given Administration has been determined largely by the President. In general, however, the role was not a significant one until 1933, when Roosevelt and Garner took office. Until then, for example, only three Vice Presidents had ever sat with the Cabinet: Adams on one occasion in 1791 during Washington's

absence, Marshall on a few occasions while Wilson attended the Paris Peace Conference and Coolidge regularly, at Harding's invitation. Beginning with Garner, participation by the Vice President in the deliberations of the Cabinet became a matter of course. Garner was also consulted by the President on foreign policy matters and in 1936 became the first Vice President in office to travel beyond the country's borders on an official mission. Since then it has become commonplace for the Vice President to undertake assignments abroad ranging from good will trips to missions as a diplomatic agent of the President.

The Office of Vice President experienced perhaps its greatest growth as a consequence of World War II. By order of President Roosevelt, Wallace served as chairman of the powerful Board of Economic Warfare and for a period of two years was the superior of a number of department and agency heads in connection with a variety of economic defense activities in the international field. He also served pursuant to a Presidential executive order as chairman of the Supply Priorities and Allocations Board until it was replaced by the War Production Board shortly after Pearl Harbor. And together with the Secretary of War, the Chief of Staff and others, he was named by Roosevelt in October 1941 to a Presidential advisory committee which participated in the making of the major policy decisions on the development and use of atomic energy.

More recently, Vice President Nixon acted from 1953 to 1961 as chairman of the President's Committee on Government Contracts and of course the Vice President is now chairman of the successor President's Committee on Equal Employment Opportunity.

In addition to his Presidential assignments, the Vice President presently has two functions prescribed by statute. One, which dates back more than a century but is of little interest here, consists of membership in the Smithsonian Institution and on its Board of Regents (20 U.S.C. §§ 41, 42). The other, instituted in 1949, is membership on the National Security Council (50 U.S.C. § 402(a)).

Since the Vice President is not prevented by the Constitution or, it might be added, by any general statute, from acting as the President's delegate, the range of duties he may undertake at the instance of the President would seem to be co-extensive with the latter's power of delegation. But in considering

Congressional, as distinguished from Presidential, bestowals of functions it is necessary to advert to a limiting provision of the Constitution (Article II, section 1) which declares flatly that "the executive power shall be vested in a President of the United States." Legislation which might threaten the unity of the Executive by attempting to place power in the Vice President to be wielded independently of the President would undoubtedly run afoul of this provision. As for H.R. 6169 specifically, however, it would not contravene the provision since it would mark the duties of the National Aeronautics and Space Council, and thus of its chairman, as purely advisory. Furthermore, the bill is supported, as a matter of historical precedent, by the more than a decade of Vice Presidential service on the advisory National Security Council.

The doctrine of separation of powers needs to be mentioned by reason of the Vice President's designation by the Constitution as the presiding officer of the Senate. At first glance it might seem that any close affiliation with the Executive Branch would be inconsistent with this function. However, except for a very few years during the incumbency of the first Vice President, the chair of the Senate has had a relatively unimportant part in its proceedings. Thus, active as a Vice President may be in the conduct of the business of the Executive, it is difficult to perceive that as a practical matter he would be in a position to diminish the powers of the Legislature.

Aside from practicalities, it does not appear that doctrinal considerations block the Vice President's performance of important functions in the Executive Branch. Despite his position as President of the Senate, he is certainly not one of its members. 1/ Nor can he be convincingly described as a third member of the Legislative Branch alongside the two Houses of Congress.

1/ Art. I, sec. 6, cl. 2 of the Constitution provides that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." Since the Vice President holds "an Office under the United States," it would do violence to this language to argue that the Founding Fathers conceived of him as a member of the Senate. Moreover, clauses 1 and 2 of Art. I, sec. 5, which provide that each House shall be the judge of the elections, returns and qualifications of its own members and may punish and expel them, plainly do not apply to the Vice President.

His office was created by Article II of the Constitution dealing with the Executive Branch, and section 4 of that Article makes him, just as the President, subject to impeachment by the Legislative Branch. Since the power of impeachment is a check devised to safeguard the principle of separation of powers against depredations by the Executive, it is troublesome conceptually to categorize the Vice President as a member of the Legislature.

Perhaps the best thing that can be said is that the Vice President belongs neither to the Executive nor to the Legislative Branch but is attached by the Constitution to the latter. Whatever the semantic problems, however, they would not seem to be especially relevant to the question whether Congress may designate the Vice President to undertake Executive responsibilities. As Mr. Justice Holmes once noted in a similar context, "The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other." 2/ If a judicial test of the employment of the Vice President in the affairs of the Executive were ever to occur, there is little reason to think that it would be decided purely on the basis of abstractions. To the contrary, the comparative silence of the Constitution in regard to the Office of the Vice President virtually guarantees that the decision would be based primarily on considerations of practice and precedent and that theoretical arguments drawn from the doctrine of separation of powers would gain little attention.

Consistent with the foregoing, I am of the opinion that service of the Vice President as chairman of the National Aeronautics and Space Council under the provisions of H.R. 6169 would not violate the Constitution.

/s/ Nicholas deB. Katzenbach
Assistant Attorney General
Office of Legal Counsel

###END

2/ Springer v. Philippine Islands, 277 U.S. 189, 209 (1928), dissenting opinion.

POST-HEARING QUESTIONS SUBMITTED TO DAVID ADDINGTON, CHIEF OF STAFF, VICE PRESIDENT OF THE UNITED STATES*

QUESTIONS FOR THE RECORD FOR DAVID ADDINGTON FOLLOWING HEARING HELD ON JUNE 26, 2008

1. During your testimony, you refused to answer the question whether the was any set of facts that would justify the President violating a statute and refused to answer whether the President could order a suspect's child be tortured if he believed it necessary on the grounds that you would not provide legal advice to the Committee.

   The Committee is not seeking legal advice, but instead wishes to understand your own legal views as a senior government official. With that understanding, will you reconsider and answer the question? In your view, are there any methods of interrogation, including abusing a suspect's child or burying a suspect alive, that the President could not order if he believed it necessary for the protection of the nation?

2. Are you aware of any instances in which a senior Bush Administration official violated any U.S. laws or constitutional provisions? Please describe.

3. Press reports state that you "assisted in the drafting of" or "helped shape" the August 1, 2002, interrogation memorandum signed by Jay Bybee.[1]

   Are these reports accurate? In what way do you contend that they are inaccurate?

[1]Sands, *The Green Light*, Vanity Fair, May 2008; Ragavan, *Cheney's Guy*, US News and World Report, May 21, 2006.

*Note: The Subcommittee had not received a response to these questions prior to the printing of this hearing.

QUESTIONS FOR THE RECORD FOR DAVID ADDINGTON FOLLOWING HEARING HELD ON JUNE 26, 2008

4. The Washington Post reports that you "advocated what was considered the memo's most radical claim: that the president may authorize any interrogation method, even if it crosses the line into torture."[2] Is this true that you advocated this position? Do you agree with this position?

5. The Washington Post reports that, when the August 1, 2002, memorandum signed by Jay Bybee was withdrawn, "Addington was furious"?[3]

   Were you"furious" when the 2004 Bybee memorandum was withdrawn? Why or why not?

   Is it accurate that you "pushed" OLC to prepare this memo?

6. Former Head of the Office of Legal Counsel Daniel Levin testified on June 18, 2008, before the Subcommittee that he believed it was a mistake for the August 1, 2002, interrogation memorandum to be so closely held, and that the memorandum would have benefitted from greater vetting?

   Do you agree or disagree with that criticism? Please explain.

7. At the Committee's June 26, 2008, hearing, you testified that you played a more significant role in the CIA detention and interrogation program than you did regarding military interrogations and detentions.

   Please describe your role in the CIA's interrogation and detention program, including the role you played regarding the establishment

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[2]Gelman and Becker, *Pushing the Envelope on Presidential Power*, Washington Post, June 25, 2007.

[3]Ignatius, *Cheney's Cheney*, Washington Post, January 6, 2006.

QUESTIONS FOR THE RECORD FOR DAVID ADDINGTON FOLLOWING HEARING HELD ON JUNE 26, 2008

and operation of secret overseas facilities.

Did you play a role in the decision announced by the President on September 6, 2006, to close those secret facilities? If so, please describe.

8. Press reports assert that you were the real drafter of a January 25, 2002, memo to the President on the Geneva Conventions that was signed by Alberto Gonzales.[4] Is that true?

What role did you play in drafting this memorandum?

If the reports that you basically drafted this memorandum are true, why isn't your name on it?

Please describe your complete role in the President's February 7, 2002, decision regarding the application of the Geneva conventions to al Qaeda, Taliban, and other enemy combatants.

9. Numerous press reports assert that you blocked the promotion of Patrick Philbin to the position of Deputy Solicitor General. According to one such report "When a young Justice Department lawyer named Pat Philbin crossed Addington in a policy dispute, Addington made it his mission to block Philbin's promotion to a top Justice job."[5]

In response to questions from the Senate Judiciary Committee, former Deputy Attorney General James Comey has stated under his oath his

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[4]"It was Addington who drafted the January 2002 Alberto Gonzales memo which argued that captured Taliban and Qaeda fighters shouldn't be covered by the Geneva Conventions." – Klaidman & Isikoff, *Cheney in the Bunker*, Newsweek, Oct. 16, 2007; *see also* Sands, *The Green Light*, Vanity Fair May 2008; Mayer, *The Hidden Power*, New Yorker, July 3, 2006.

[5]Klaidman & Isikoff, *Cheney in the Bunker*, Newsweek, Oct. 16, 2007

QUESTIONS FOR THE RECORD FOR DAVID ADDINGTON FOLLOWING HEARING HELD ON JUNE 26, 2008

belief that these reports are accurate.[6]

Please describe your involvement in blocking the promotion of Mr. Philbin.

Do you dispute any aspect of these reports?

10. Discussing your actions regarding Administration interrogation policies, the Washington Post reported that "Addington was so adamant in resisting the efforts of a Pentagon official named Matthew Waxman to limit interrogation that Waxman eventually quit and is now moving to the State Department."[7]

Is that report accurate?

Did you ever have any conflicts with Mr. Waxman regarding interrogation practices? Please describe.

11. The Washington Post has reported that Attorney General Ashcroft was upset about communications between you and John Yoo that circumvented his office.[8]

Did you in fact have direct communications with Mr. Yoo that did not go through the Mr. Ashcroft's office?

Did you know that Attorney General Ashcroft had concerns about these communications?

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[6]*See* Mr. Comey's Response to Written Questions from Senator Charles Schumer after Mr. Comey's May 15, 2007, Appearance before the Senate Judiciary Committee.

[7]Ignatius, *Cheney's Cheney*, Washington Post, January 6, 2006.

[8]Gelman and Becker, *Pushing the Envelope on Presidential Power*, Washington Post, June 25, 2007.

QUESTIONS FOR THE RECORD FOR DAVID ADDINGTON FOLLOWING HEARING HELD ON JUNE 26, 2008

Did Attorney General Ashcroft ever express such objections to you?

12. What was your role in the the decisionmaking process regarding the establishment of military commissions.

Are reports that, at your direction, Secretary of State Powell and National Security Rice were not consulted on this issue accurate?[9]

Was Michael Chertoff, head of the Justice Department's Criminal Division, consulted on this issue? Why or why not?

Were the Judge Advocate Generals consulted on this issue? Why or why not?

Press Reports further describe Attorney General Ashcroft as being extremely angry that he had been cut out of the decisionmaking on this issue while his subordinate John Yoo was included.[10]

Are those reports accurate? How are they inaccurate?

13. Former Office of Legal Counsel head Jack Goldsmith writes in his book that, during a discussion on the Geneva Conventions, you became livid. According to Goldsmith you said: "The president has already decided that terrorists do not receive Geneva Convention protections. You cannot question his decision."

Did you say this?

Does that accurately reflect your views?

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[9]Mayer, *The Hidden Power*, New Yorker, July 3, 2006.

[10]Gelman and Becker, *Pushing the Envelope on Presidential Power*, Washington Post, June 25, 2007.

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14. What is your response to those, like former Colin Powell chief of staff Larry Wilkerson, who have long argued "that the Office of the Vice President bears responsibility for creating an environment conducive to the acts of torture and murder committed by U.S. forces in the war on terror"?[11]

15. Have you ever viewed a videotape of a CIA or a military interrogation? Under what circumstances? For what purpose?

16. Please describe your role in the drafting of signing statements issued by President Bush.

    a. During the Administration of George W. Bush, how many Presidential signing statements have you drafted, edited, or reviewed?

    b. Are you aware of any instance in which the President or any other Executive Branch official has declined to follow, enforce, or implement a statute or other provision of law in reliance on a Presidential signing statement (or the concerns or reasoning reflected in such a statement)? Please describe each such instance.

[11] Wilkerson, *Dogging the Torture Story*, Nieman Watchdog, July 11, 2006.

QUESTIONS FOR THE RECORD FOR DAVID ADDINGTON FOLLOWING HEARING HELD ON JUNE 26, 2008

c. Journalist Charlie Savage has stated that you were the "primary architect and greatest advocate of this increased use of signing statements" by this Administration.[12]

I. Is this accurate?

II. If you dispute this characterization, please explain why.

d. Did you draft, edit, or review the signing statement issued when President Bush signed the Detainee Treatment Act of 2005 into law, as Jack Goldsmith asserts?[13]

> That statement reads in part "[t]he executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power."[14]

As you understand it, what is the legal effect of this signing statement?

Please explain the "unitary executive" theory, or what is meant by the President's alleged authority to "supervise the unitary executive branch," in the context of this signing statement, and what authority it allegedly provides to the President in

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[12]http://www.pbs.org/wgbh/pages/frontline/cheney/themes/statements.html

[13]http://www.pbs.org/wgbh/pages/frontline/cheney/themes/statements.html

[14]http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html

construing or purporting to challenge laws enacted by Congress.

Did this signing statement, or the reasoning that it expresses, ever impact the treatment of any U.S. detainee? Please describe.

Regarding this statement, Jack Goldsmith has said "There was nothing, no point served by the signing statement and lots of negative consequences from this in-your-face signing statement after this moment of reconciliation."[15]

Do you agree with Mr. Goldsmith's statement? If not, why not?

17. In remarks on the Senate Floor, Senator Whitehouse recently recited this declassified legal conclusion of an Office of Legal Counsel memorandum: "An Executive order cannot limit a President. There is no constitutional requirement for a President to issue a new Executive order whenever he wishes to depart from the terms of a previous Executive order. Rather than violate an Executive order, the President has instead modified or waived it."[16]

Do you agree with this proposition?

To your knowledge, has the President ever violated or departed from the terms of a published Executive Order,or directed the violation or departure from the terms of a published Executive Order, based on such reasoning?

May the President delegate to others in the Executive Branch the

[15] http://www.pbs.org/wgbh/pages/frontline/cheney/themes/statements.html

[16] http://www.fas.org/irp/congress/2007_cr/fisa120707.html

authority to decide when to modify or waive an Executive Order in this fashion, or must there be a personal decision of the President?

Do you agree that, if the President wishes to take or have taken action contrary to the terms of a published Executive Order, it would be appropriate to modify the published order? In what circumstances, if any, do you believe the Executive Order should not be so modified? If the Executive Order is not modified, how are the American people to know what rules govern the Executive Branch?

POST-HEARING QUESTIONS SUBMITTED TO JOHN YOO, PROFESSOR, BOALT HALL SCHOOL OF LAW, UNIVERSITY OF CALIFORNIA AT BERKELEY*

QUESTIONS FOR THE RECORD FOR JOHN YOO FOLLOWING HEARING HELD ON JUNE 26, 2008

1. **Unanswered Questions on Accuracy of Mr. Addington's Testimony**

   a. During your testimony before the Subcommittee, Congressman Ellison asked if David Addington's account of his role in the drafting of the August 1, 2002, interrogation memorandum was accurate. You refused to answer, claiming the attorney client privilege.

      On further reflection, will you reconsider and answer the question? In particular, please describe Mr. Addington's role in the drafting of that memorandum, any sections or arguments in the memo that significantly reflect his influence or views, and any arguments or subjects that he requested be covered by the memo.

   b. If you persist in refusing to answer the question, please explain your basis for claiming that the attorney client privilege would be violated by a response.

   c. To the extent that you assert Mr. Addington either was or represented your client in this matter, please explain why his testimony on this subject did not waive any privilege.

   d. To the extent that you do not assert Mr. Addington either was or represented your client, please explain why his presence in these conversations did not waive any privilege.

   e. In responding to this question, please address why the Committee should accede to any claim of attorney client privilege, given the well settled principle that "[t]here is no law that forbids a congressional committee from exercising its discretion to reject claims of attorney-client privilege."[1]

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[1] *Additional Views of Porter Goss re The Intelligence Authorization Act of 2000*, May 7, 1999, *available at* http://www.fas.org/sgp/news/1999/02/gossnsa.html.

*Note: The Subcommittee had not received a response to these questions prior to the printing of this hearing.

QUESTIONS FOR THE RECORD FOR JOHN YOO FOLLOWING HEARING HELD ON JUNE 26, 2008

2. **Unanswered Questions on SERE information used to develop August 2002 memo**

   a. According to recent reports, in late July 2002, the office of Defense Department General Counsel Jim Haynes obtained information about military training techniques used to train our soldiers to resist torture. These are usually called "SERE" techniques. This information – including a list of harsh interrogation methods and a memo on their psychological effects – was sent from the trainers to Mr. Haynes' office on July 26, 2002, one week before OLC issued the August 1, 2002, interrogation memo.

   Did you receive information on so-called "SERE" techniques or their effects in July 2002?

   If so, from whom? Why?

   b. Did you ever discuss SERE techniques or their effects with Mr. Haynes or any member of his staff? With any member of the military?

   c. Did any of this information contribute to any of the interrogation memoranda that you authored?

   d. To the extent you claim that any of this information is covered by the attorney client privilege, as you did during your testimony, please articulate the basis for this claim, including addressing why any privilege was not waived by Mr. Haynes testimony before the Senate Armed Services Committee on June 17.

3. **Questions re drafting the August 1, 2002 Memo**

   a. While you were drafting the August 1, 2002, interrogation memorandum, who did you consult?

QUESTIONS FOR THE RECORD FOR JOHN YOO FOLLOWING HEARING HELD ON JUNE 26, 2008

b. Did you ever show any draft of this memo to Jim Haynes or discuss any draft of this memo with Mr. Haynes? When did that occur?

c. Did you consult or discuss this draft with anyone at the State Department? If so, who and when? If not, why not?

d. Did you receive comments from the CIA before you finalized the memo? Without divulging the contents of those comments, did the CIA request any changes to the draft? How many changes, roughly?

e. A Washington Post report states: "[Mr. Addington] pushed Justice's Office of Legal Counsel to prepare a 2002 memo authorizing harsh interrogation methods. When that memo was later withdrawn, Addington was furious."[2]

Did Mr. Addington push to have this memo drafted?

Was he "furious" when the 2004 Bybee memorandum was withdrawn? If so why; if not, how would you characterize his reaction?

f. In an interview in Esquire magazine, you described the back and forth with the White House regarding this memo. You said "There wasn't a lot of back and forth -- people would say this is wrong, you need to delete this."[3]

Who at the White House participated in this "back and forth"? When someone at the White House said "you need to delete this," did you ever say "no"?

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[2]Ignatius, *Cheney's Cheney*, Washington Post, January 6, 2006.

[3]Richardson, *"Torture Memo" Author John Yoo Responds to This Week's Revelations*, Esquire, April 3, 2008.

g. In your testimony, you say that your draft interrogation opinions could not be widely circulated because they were highly classified. But Daniel Levin wrote an opinion on exactly the subject that was widely circulated. He testified on June 18, 2006, before the Subcommittee that your work suffered from being too closely held for no good reason.

Why could his drafts be circulated but yours could not?

Do you agree or disagree with his testimony that there was no good reason to hold the draft memos that you prepared so closely?

h. Was the August 1, 2002, legal memo formally classified?

Was it proper to classify these abstract legal memos that do not discuss specific covert actions or methods of intelligence?

4. Questions on March 2003 Interrogation Memo

a. Why was the March 2003 memorandum necessary, given the breadth of the August 2002 memorandum? Why was the guidance in the 2002 memo not adequate to military needs?

5. Question on Legal Opinions Expressed in Interrogation Memos

a. The August 2002 OLC opinion concluded that self defense would excuse torture committed on behalf of the *nation's defense*, regardless of whether the threat derived from the person being tortured or whether the threat was imminent. Do you stand by that position?

Is that consistent with ordinary principles of criminal law?

b. In the March 2003 interrogation memo, you explain that whether conduct "shocks the conscience" for legal purposes turns on whether it is without any justification. You wrote that the conduct may have to be inspired by malice or sadism to be unlawful.

QUESTIONS FOR THE RECORD FOR JOHN YOO FOLLOWING HEARING HELD ON JUNE 26, 2008

If any interrogator believed that a suspect had critical information about an impending attack, is there any interrogation method you believe would "shock the conscience"? Please give some examples.

Do you believe Congress would have the power to prevent the President from authorizing such methods in that situation?

c. In discussing the March 2003 interrogation memorandum in the press, you described the language in the document as "near boilerplate."[4]

What did you mean by that?

Please identify the portions of that memorandum that you consider to be boilerplate.

Who originally developed the "boilerplate?" Where did this "boilerplate" previously appear?

d. In an interview with Esquire Magazine, you stated "The basic substance of the [March 2003] memo and the one released in 2004 [the Levin memo] is the same."[5]

The Levin memo does not discuss the reach of the fifth and eighth amendments, the overseas reach of federal criminal law, the "shocks the conscience" test, the President's power to override customary international law, and the issues of self defense or necessity, as the March 2003 memo does.

On what basis do you conclude that the "basic substance" of these two memos is the same?

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[4] Eggen and White, "*Memo: Laws Didn't Apply to Interrogators*," Wash. Post, April 2, 2008.

[5] Richardson, *"Torture Memo" Author John Yoo Responds to This Week's Revelations*, Esquire, April 3, 2008.

QUESTIONS FOR THE RECORD FOR JOHN YOO FOLLOWING HEARING HELD ON JUNE 26, 2008

6. Questions on the Fourth Amendment

a. What is your legal view on the applicability of the Fourth Amendment to U.S. military forces operating in the U.S.?

b. In your opinion, does the Fourth Amendment allow the President to order US special forces to enter the home of a US citizen without a warrant? Under what circumstances?

c. In the declassified March 2003 opinion, there is a footnote stating "our Office recently concluded that the Fourth Amendment had no application to domestic military operations," citing an October 23, 2001 memo.

What does it mean to say that the Fourth Amendment – quote "has no application" – to military operations inside the US?

7. Questions on 2004 OLC Opinion

a. Press reports indicate that, in defending your 2002 memo against the Daniel Levin memo that later superseded it, you stated, "I think the OLC's reversal was pure politics. The administration just lost the courage of its convictions."[6]

Daniel Levin strongly disagreed before this Subcommittee on June 18, 2006.

Can you explain what you meant by the statement that the OLC reversal was "pure politics?"

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[6] Palmer, "'*Professor Torture' Stands By His Famous Memo*," Montreal Gazette, March 17, 2007.

QUESTIONS FOR THE RECORD FOR JOHN YOO FOLLOWING HEARING HELD ON JUNE 26, 2008

8. Questions on Advice Provided to the CIA re Interrogation of Abu Zubaydah

a. Press reports suggest that you initially provided oral advice to the CIA at the White House regarding the interrogation of top al-Qaeda operative Abu Zubaydah in the early spring of 2002.[7]

The New York Times says that an interrogation plan was "drawn up on the basis of legal guidance from the Justice Department, but [was] not yet supported by a formal legal opinon."[8]

George Tenet has written that it took until August 2002 for CIA to get "clear guidance" from DOJ on interrogation, suggesting that some advice was given before the August memo.[9]

Did you provide such oral advice?

When did you do so, and who did you give it to?

Did you advance the same theories orally that you would later memorialize in the 2002 opinion, including the commander-in-chief override that effectively provided the president with blanket authority during the war on terror?

9. Questions on the number of opinions you authored

a. Press reports indicate that there are memos that you authored which still have yet to be publicly released (e.g., October 23, 2001, memo containing language about the Fourth Amendment's inapplicability to domestic military operations).

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[7]Gellman and Becker, "*Pushing the envelope on Presidential Power*," Wash. Post, June 25, 2007.

[8]Johnston, *At Secret Interrogation, Dispute Flared Over Tactics*, September 10, 2006.

[9] Tenet, *At the Center of the Storm*, at 241.

b. How many opinions did you write on national security issues and presidential authority that have not been publically released?

If you cannot quote a specific number, can you provide an approximation?

10. Questions re Principals Meetings Reported by ABC News

a. ABC News has described important high-level "Principals" meetings in the White House situation room at which interrogation plans were developed and authorized. The report states that the discussions were so detailed that sometimes specific interrogation techniques were demonstrated.[10]

Without divulging the contents of those meetings, were you aware that such meetings occurred?

Can you identify who attended such meetings.

Did you ever brief the participants at such a meeting?

Do you dispute any portion of the ABC Report?

[10]Grenburg, Rosenburg, and de Vogue, *Sources: Top Bush Advisors Approved 'Enhanced Interrogation,'* ABC News, April 9, 2008.

CORRESPONDENCE BETWEEN PILIPPE SANDS, PROFESSOR OF LAWS AND DIRECTOR, CENTRE FOR INTERNATIONAL COURTS AND TRIBUNALS, AND JOHN YOO, PROFESSOR, BOALT HALL SCHOOL OF LAW, UNIVERSITY OF CALIFORNIA AT BERKELEY

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28 June 2008

Dear Professor Yoo,

I am writing to you on a matter that I hope can be cleared up quickly and without difficulty.

I have been provided with a copy of an uncorrected transcript prepared by the Federal News Service of your testimony of 26 June 2008 before the Sub-Committee of the House Judiciary Committee. Pages 14 and 15 of the transcript include an exchange between you and Representative King, which includes the following:

> *MR. YOO: Sir, I haven't read the book. I did read Mr. Sands's testimony before this committee. And I noticed in the testimony he said that he had interviewed me for the book. And I can say that he did not interview me for the book. He asked me for an interview and I declined. So I didn't quite understand why he would tell the committee that he had actually interviewed me.*
>
> *REP. KING: And with that answer, Professor Yoo, then I'm going to interpret that to mean that at least with regard to that statement -- that he had interviewed you -- you find that to be a false statement, and that would perhaps reflect on the veracity of the balance of the book.*
>
> *MR. YOO: I can't tell what else is in the book, but I don't understand why he would say that he interviewed me for the book. I can tell the committee that he contacted me once. He wanted to interview me for the book. And I said, I don't want to talk to you. I wrote my own book. You can look at my own book. Everything I have to say is in my book. And then he told the committee that he had interviewed me.*

Your recollection accords with mine (although you may also recollect we also debated in conversation at the World Affairs Council, in the autumn of 2005). I have always been careful to be as accurate as I can, and I do not believe that I indicated to the Sub-Committee that I had interviewed you for the book. The uncorrected transcript of the hearing at which I appeared on 6 May 2008 (prepared by the Federal News Service, copy attached) includes the following from my introductory statement:

> *Over hundreds of hours I conversed or debated with many of those most deeply involved in that memo's life. They included, for example, the combatant commander and his lawyer at Guantanamo, Major General Dunlavey and Lieutenant Colonel Beaver, the commander of United States Southern Command in Miami, General Hill, the chairman of the Joint Chiefs of Staff, General Myers, the undersecretary of Defense, Mr. Feith, the general counsel of the Navy, Mr. Moorer, and the deputy assistant attorney general at DOJ, Mr. Yoo.*

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I believe that is an accurate statement. It does not indicate that I interviewed you for the book, and there is no other point in my testimony in which I so indicated. For the avoidance of doubt, in my book *Torture Team* (which I appreciate you have not read), I refer to our debate in conversation at pages 184-5.

I hope you will forgive me for having troubled you with this point. I would not have done so but for the fact that Representative King appears to have concluded that I made "a false statement" to the Committee , and your exchange with him has caused me to receive a number of enquiries by email, raising issues of integrity or veracity.

I am perfectly happy to proceed on the basis that any statement you made (and any error it might have contained) was in good faith, and would be grateful if you could perhaps so communicate to Representative King and the Chairmen of the Committee and the Sub-Committee, and thereby clear up the misperception.

With best wishes,

Philippe Sands

cc. Representative John Conyers, Chairman, Judiciary Committee
Representative Jerrold Nadler, Chairman, Constitution, Civil Rights and Civil Liberties Sub-Committee
Representative Steve King, Member, Chairman, Constitution, Civil Rights and Civil Liberties Sub-Committee

July 15, 2008

BY EMAIL AND AIR MAIL

Philippe Sands QC
Professor of Laws and Director,
Centre for International Courts and Tribunals
University College London
Bentham House
Endsleigh Gardens
London WC1H 0EG

Dear Professor Sands,

I write in response to your letter of June 28, 2008.

As your letter points out, a transcript of your appearance before the House Judiciary Subcommittee on May 3, 2008, is publicly available. As I stated in my own testimony before that Subcommittee on June 26, 2008, from reading that transcript I understood you to have said that you had interviewed me for your book, when in fact I had not agreed to be interviewed by you. I appreciate the fact that you have acknowledged in your letter that no such interview took place, and thank you for that courtesy.

With respect to the content of your testimony, I remain of the view that the relevant portion of your statement to the Subcommittee (which you quote only in part in your letter) would lead a reasonable reader to believe that I had been interviewed by you for your book. Were that not the case, it would not even have occurred to me to raise this issue to the Subcommittee. Your letter clarifies, however, that it was not your intention to convey that impression. I am pleased to learn that, and have no objection to having the record regarding the intended meaning of your testimony clarified as you describe in your letter. To this end I will copy the Subcommittee's counsel on this letter, and ask that it be included together with yours in the hearing record.

Very truly yours,

John Yoo

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cc: Sam Sokol, Esq., Oversight Counsel, House Judiciary Committee

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