JUSTICE DEPARTMENT'S OFFICE OF LEGAL COUNSEL

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HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

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FEBRUARY 14, 2008

APPENDIX

JUSTICE DEPARTMENT'S
OFFICE OF LEGAL COUNSEL

THURSDAY, FEBRUARY 14, 2008

House of Representatives,
Subcommittee on the Constitution,
Civil Rights, and Civil Liberties,
Committee on the Judiciary,
Washington, DC.

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

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

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

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

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

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

Today we consider a matter that goes to the heart of who we are as a Nation. No one will argue that we live in a dangerous

world, that there are people who are organizing to attack our Nation, or that our Government must gather reliable intelligence to defend us. All that is obvious. What is at issue is the lengths to which some people acting on our behalf have gone, and what the Office of Legal Counsel has advised our Government what it may and may not legally do.

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

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

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

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

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

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

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

Senator McCain, who is something of an expert on the subject, has been unsparing in his criticism of these

practices. I have held several hearings where experts in interrogation have testified not only to the cruelty, but to the ineffectiveness of this practice.

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

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

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

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

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

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

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

Mr. Franks. Well, thank you, Mr. Chairman.

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

Severe interrogations are unpleasant, to be very sure, but, Mr. Chairman, they are sometimes necessary to prevent severe consequences that potentially involve the violent deaths of thousands of innocent American citizens. Severe interrogations

are very infrequent. CIA Director Michael Hayden has confirmed that despite the incessant hysteria, the waterboarding technique has only been used on three high-level captured terrorists, the very worst of the worst of our terrorist enemies.

Director Hayden suspended the practice of waterboarding by CIA agents in 2006. Before the suspension, Director Hayden confirmed that his agency waterboarded Khalid Sheikh Mohammed, Abu Zubayda, and Abd al-Rahim Nashiri, each for approximately 1 minute. The results were of immeasurable benefit to the American people. CIA Director Hayden has said that Mohammed and Zubayda provided approximately 25 percent of the information the CIA had on al-Qaeda from human sources. That's 25 percent of the total information in human intelligence that we have received on al-Qaeda, derived from 3 minutes' worth of rarely used interrogation tactics.

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

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

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

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

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

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

As the Wall Street Journal pointed out in the recent

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

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

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

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

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

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

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

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

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

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

[Witness sworn.]

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

Mr. Bradbury, you are recognized for your statement.

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

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

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

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

interrogation of high-value terrorists.

As this Committee knows, the Office of Legal Counsel exercises the authority of the Attorney General to render legal opinions for the executive branch. I've been privileged to serve as the Principal Deputy in OLC since April 2004, and I can assure the Committee that every opinion I sign for the Office represents my best objective judgment as to what the law requires, without regard for the political currents that often swirl around the questions presented to us.

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

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

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

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

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

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

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

The CIA program is now operated in accordance with the President's executive order of July 20, 2007, which was issued

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

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

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

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

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

Thank you Mr. Chairman.

Mr. Nadler. I thank you, Mr. Bradbury.

[The prepared statement of Mr. Bradbury follows:]

Prepared Statement of Steven G. Bradbury

[GRAPHIC(S) NOT AVAILABLE IN TIFF FORMAT]

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

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

So let's put that aside and cut to the chase. The

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

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

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

Mr. Bradbury. Well, Mr. Chairman, as General Hayden has disclosed, our office has advised----

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

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

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

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

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

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

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

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

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

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

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

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

the Attorney General simply repeated that he was unable to share them with us.

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

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

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

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

Mr. Bradbury. Well, let me say that we do intend and we strive to respond to----

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

Mr. Bradbury. We will--we are giving that serious consideration, Mr. Chairman. We are giving that serious consideration.

Mr. Nadler. Is there any legal basis for saying ``no'' to a committee of jurisdiction which falls squarely within our jurisdiction and where we all have clearance--security clearance?

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

Mr. Nadler. And the Judiciary Committee.

Mr. Bradbury. And the classified details of the program are very close hold----

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

Mr. Bradbury. Well, Mr. Chairman, as you and I have discussed these--this very question before, the interest is--the interest that the President and the executive branch have in protecting the potential public disclosure of----

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

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

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

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

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

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

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

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

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

Mr. Bradbury. Yes.

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

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

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

Mr. Bradbury. I don't----

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

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

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

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

Mr. Nadler. Thank you very much.

Mr. Bradbury. We recognize those interests.

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

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

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

Mr. Bradbury. Okay.

Mr. Nadler. Thank you.

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

Mr. Franks. Well, thank you, Mr. Chairman.

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

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

way the courts look at the same situation.

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

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

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

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

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

Mr. Bradbury. Well, Mr. Franks, as General Hayden did say, the CIA's use of the waterboarding procedure was adapted from the SERE training program used by the Navy and other departments of the military, in which many, many members of the military have been trained using that procedure.

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

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

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

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

of torture.

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

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

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

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

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

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

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

Mr. Franks. Thank you.

Mr. Bradbury. The last thing on the torture statute I'd

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

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

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

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

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

Mr. Franks. That's my point.

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

In addition to which, I would point out that at least with respect to the mental element, infliction of severe mental distress, when they are tortured they know they are not going to die. When someone is being drowned, the mental aspect is he doesn't know you're going to stop. If someone is being trained, he knows you're not going to actually drown him. May be severe physical, but it is certainly not a severe mental aspect. When we are torturing somebody else or someone else is torturing one of our soldiers, they don't know that they are going to be treated kindly.

Mr. Franks. But if it is indeed, Mr. Chairman--if it is indeed torture shouldn't we be

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

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

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

Mr. Franks. Thank you.

Mr. Nadler. Mr. Franks has exceeded his time.

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

I now recognize the gentleman from Alabama for 5 minutes.

Mr. Davis. Thank you, Mr. Chairman.

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

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

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

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

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

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

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

Mr. Bradbury. I think so, yes.

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

Mr. Bradbury. I think so.

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

Mr. Bradbury. I suppose so.

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

Mr. Bradbury. Yes, sir.

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

Mr. Bradbury. Yes, sir.

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

Mr. Bradbury. Yes, it was.

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

Mr. Bradbury. I believe he had bones broken and he----

Mr. Davis. If you could answer my question.

Mr. Bradbury. Yes. Yes, it was.

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

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

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

for a moment.
Page 3 of your written statement, you state that these alternative interrogation methods have been used with fewer than one-third of the terrorists who have been detained in this program. Approximately how many people is that, Mr. Bradbury, about 30 or so?
Mr. Bradbury. I don't think the exact number has been publicly----
Mr. Davis. Just give me a ball park, if you would. This was your word choice.
Mr. Bradbury. I actually am not authorized to be more precise.
Mr. Davis. Well, but this is your word choice. They have been used with fewer than one-third of the terrorists who have been detained. Approximately how many have been detained?
Mr. Bradbury. Fewer than 100.
Mr. Davis. All right. Fewer than 100, a third of those. Have any of those individuals, to your knowledge, lied in response to the interrogation techniques?
Mr. Bradbury. I don't know.
Mr. Davis. Is it conceivable that some of them might have lied?
Mr. Bradbury. I don't know.
Mr. Davis. My point again. Mr. Bradbury, you're right, you don't know, you can't know.
How many prosecutions have been brought based on what those 30 or so individuals have said?
Mr. Bradbury. Mr. Davis----
Mr. Davis. That's a simple question. How many prosecutions have been brought? Have there been any?
Mr. Bradbury. No.
Mr. Davis. No prosecutions have been brought. You don't know if any of them have given untrue or false information. You know, I am an SCC guy, so I like football. That sounds to me like a completion rate that could be pretty low for all we know.
Mr. Bradbury. May I--may I respond?
Mr. Davis. Yes.
Mr. Bradbury. The purpose of this program is not to obtain evidence to use in criminal prosecutions. The purpose of the program is to obtain intelligence that may be used to----
Mr. Davis. No, Mr. Bradbury. We have to test whether or not you are doing that. We have to test--if I could finish my sentence, sir, we have to test whether or not the program is reliable. I assume you don't mean to fashion a program that's unreliable.
Mr. Bradbury. I----
Mr. Davis. I assume you don't mean to fashion a program that doesn't yield results.
Mr. Bradbury. I don't fashion the program. We don't fashion----
Mr. Davis. You don't mean to condone or sanction a program that doesn't yield results, do you?
Mr. Bradbury. I just give my legal opinion----
Mr. Davis. Let me make my point, Mr. Bradbury, since you're not addressing my point. It is a very simple one. We can't measure the accuracy of this program by saying we've gone out and brought hard-and-fast cases based on it. You cannot tell me whether any of these individuals, or all of these individuals, have lied. You've conceded to me that someone facing extreme

anxiety and pressure could yield false information.

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

And I yield back the balance of my time.

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

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

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

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

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

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

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

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

Mr. King. Thank you, Mr. Chairman.

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

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

Mr. King. Reclaiming my time.

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

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

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

reluctantly was less than 100.

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

Mr. Bradbury. No I'm not.

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

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

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

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

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

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

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

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

And if that is a threat of imminent death, then you need to ask: Is it the kind that would be expected to cause prolonged mental harm; that is an ongoing, persistent mental disorder as

a result of that? That's what the cases have focused on with respect to the Torture Victims Protection Act and that would be--the analysis would turn on that.

Mr. King. Thank you, just a short----

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

Mr. Nadler. It----

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

Mr. King. That language sounds vague.

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

Mr. Bradbury. I am not.

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

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

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

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

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

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

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

Isn't that a recipe for unchecked executive power?

Mr. Bradbury. Well, Congressman, no. I don't--I don't believe it is. And it may not be accepted at this point by this

Committee, but I believe that the opinions we are talking about are reasonable and were appropriately relied on by the agency.

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

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

Mr. Bradbury. That's my understanding.

Mr. Ellison. What is your understanding based on?

Mr. Bradbury. Based on my interactions.

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

Mr. Bradbury. No, sir.

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

Mr. Bradbury. No.

Mr. Ellison. Now, you said earlier that----

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

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

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

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

Mr. Bradbury. No, Mr. Ellison, I'm really not----

Mr. Ellison. Have you seen video tape?

Mr. Bradbury. That--no, I've not.

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

Mr. Bradbury. I have reason to believe.

Mr. Ellison. Which is what?

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

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

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

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

Mr. Bradbury. I believe that----

Mr. Ellison. Because somebody told you, right?

Mr. Bradbury. I believe that that's----

Mr. Ellison. Because somebody said so, right?

Mr. Bradbury. I don't have--I believe that that is the case.

Mr. Ellison. Okay, so----

Mr. Bradbury. May I make----

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

Mr. Bradbury. I would like to respond to----

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

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

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

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

Mr. Bradbury. May I?

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

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

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

Mr. Bradbury. May I? May I respond?

Mr. Ellison. If you're responsive.

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

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

Mr. Bradbury. If you would like.

Mr. Ellison. I would like.

Mr. Bradbury. I'm happy to.

Mr. Ellison. You mean at some later point?

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

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

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

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

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

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

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

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

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

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

Mr. Scott. Thank you, Mr. Chairman. Mr. Bradbury, in your statement you said that the CIA program is very narrow in scope and is reserved for a small number of most hardened terrorists believed to possess uniquely valuable intelligence, intelligence that could directly save lives. Later on you say

fewer than 100 terrorists have been detained by the CIA as part of this program. It's been one of the most valuable sources of intelligence.

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

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

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

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

Mr. Scott. The 2005 memo.

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

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

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

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

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

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

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

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

Mr. Scott. You do not know----

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

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

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

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

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

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

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

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

Mr. Bradbury. Well, I believe communications between the Department and--I know Chairman Reyes on the Intel Committee

had been handled by the deputy, the acting deputy attorney general, and so I would refer you to his office.

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

Mr. Bradbury. That's correct.

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

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

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

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

Mr. Scott. Did that part of the----

Mr. Bradbury. That doesn't--I'm sorry?

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

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

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

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

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

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

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

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

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

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

Mr. Watt. Thank you, Mr. Chairman. Mr. Bradbury, on page 2

of your written testimony you say that fewer than 100 terrorists have been detained by the CIA as part of the program since its inception in 2002. Those are the people who were at Guantanamo?

Mr. Bradbury. I believe the 14, maybe 15 high value detainees at Guantanamo who were transferred there from CIA custody are among those who have ever been detained by the CIA. But the CIA has held others. So that's not the sum total of the terrorists who have ever been detained in this program by the CIA. Those were the ones who were--I believe, as the President said in September of 2006, when the 14 HVDs were moved to Gitmo at that time, that that emptied the overseas facilities of the CIA. At that time there were no----

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

Mr. Bradbury. Over time or today?

Mr. Watt. Over time and today.

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

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

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

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

Mr. Bradbury. I believe so.

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

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

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

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

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

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

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

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

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

Mr. Bradbury. Correct.

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

Mr. Bradbury. I don't believe the President would ever----

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

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

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

Mr. Bradbury. I don't believe he would disregard----

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

Mr. Bradbury. Well, he----

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

Mr. Bradbury. He would not.

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

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

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

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

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

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

Mr. Bradbury. Well, the President is sworn to----

Mr. Watt. I understand----

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

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

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

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

Mr. Bradbury. Yes, there are.

Mr. Nadler. Answer that question briefly.

Mr. Bradbury. General Hayden has very clearly said, and this is a practical limit that matters under our system of Government, he will not order his people and his people will

not do anything that the Attorney General has determined is inconsistent with a statute that applies.

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

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

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

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

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

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

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

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

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

A P P E N D I X

Material Submitted for the Hearing Record

[GRAPHIC(S) NOT AVAILABLE IN TIFF FORMAT]