

Statement of Philip Zelikow
United States Senate Committee on the Judiciary,
Subcommittee on Administrative Oversight and the Courts

May 13, 2009

Mr. Chairman, Senator Sessions, thank you for giving me the opportunity to appear before you today. The declassification of Justice Department legal opinions on the legality of an interrogation program operated by the CIA has reopened an important public debate. The debate is on how the United States should get intelligence from captives taken in the global armed conflict against the violent Islamist extremist organization, al Qaeda, its allies, and its affiliates, as these organizations wage war against our country, and our people.

The Committee has my c.v. so I won't detail my experience or scholarship. I will concentrate in this statement on my involvement in debates on the treatment of enemy captives in order to discuss the effectiveness of such methods and the legal reasoning employed to judge this and future intelligence programs.

At the outset, I will address a few frequently asked questions:

- I have no view on whether former officials should be prosecuted. We have institutions to make those judgments. The factual and legal story is complicated, more complicated than is generally recognized. We should let our institutions do their job.
- There should be a thorough inquiry, yielding a public report, to:
 - *comprehend* how the United States came to operate such an unprecedented program so that we can learn from that; and
 - *evaluate* whether the more constrained intelligence program we have been operating against al Qaeda in Iraq for at least four and a half years and against al Qaeda worldwide for at least three and a half years is adequate to protect the country. I think it is. But important people have challenged that view. Since the issue is so important, our

current approach should be validated, or it should be changed.

- I have no view on whether Justice Department lawyers acted unethically or improperly. I believed at least some of their legal opinions on this subject were unsound, even unreasonable. But I don't know how they did their work. Others should judge.

In 2003, while serving as executive director of the 9/11 Commission, some of my staff colleagues and I were concerned because the CIA was unwilling to disclose information about the conduct of the interrogations of key detainees and would not allow access to the detainees or the interrogators.¹ The Commission's concerns deepened as press reports in 2004 indicated that detainees might have been abused. Therefore, in its July 2004 report, the Commission formally recommended that the United States "engage its friends to develop a common coalition approach toward the detention and humane treatment of captured terrorists" drawing "upon Article 3 of the Geneva Conventions on the law of armed conflict," an article "specifically designed for those cases in which the usual laws of war did not apply."

This article, common to all four of the Geneva Conventions on armed conflict, was meant to provide a 'floor' to handle situations where usual POW status does not apply. It prohibits "cruel treatment" under any circumstances and bans "outrages upon personal dignity, in particular humiliating and degrading treatment." In its recommendation, the 9/11 Commission noted that these "minimum standards are generally accepted throughout the world as customary international law."

Although the Bush administration accepted most of the Commission's recommendations, this was one of the few it did not accept. That refusal plainly signaled that the administration was reserving the right to inflict treatment that might violate the so-called "CID" standard. "CID" stands

¹ After the 2007 disclosure that the CIA had destroyed videotapes of interrogations, the Commission's efforts to learn more about the circumstances surrounding interrogations were summarized in a report that I prepared with our former deputy general counsel, Steve Dunne. That unclassified report has been made public. A federal special prosecutor, John Durham, is currently investigating the destruction of the videotapes.

for “cruel, inhuman, or degrading” – a standard expressed, in slightly varying terms, in Common Article 3 of the Geneva Conventions that I just mentioned, in the Convention Against Torture, another signed and ratified treaty obligation, and is a standard also found in a Protocol to the Geneva Conventions that had been accepted by most countries and by the United States during the Reagan administration. The administration’s initial rejection of the 9/11 Commission recommendation on this point was therefore both revealing and troubling.

As 2004 turned to 2005, the controversy about the treatment of captives intensified. There were the revelations of detainee abuse in military facilities in Iraq, and reports of alleged murders. There were reports of past abuses at the Guantanamo facility. There were growing rumors and reports about other sites run by the CIA. I later learned that, in 2004, the CIA Inspector General, John Helgerson, had prepared a secret report that was plainly skeptical and worried about the Agency’s treatment of captives. I was acquainted with Helgerson and respected his judgment; I also later talked to CIA officials who worked on this study. An important critique, the IG report was also another reminder about the outstanding professionalism that can always be found in the Agency’s ranks.

In 2005, I became Counselor of the Department of State. This should not be confused with the duties of the State Department’s Legal Adviser. The “Counselor” is an old office at State, a place where the Secretary puts someone who serves as a kind of deputy on miscellaneous issues. Among my duties, I was to be the subcabinet “deputy” for the Department on issues of intelligence policy or counterterrorism.

By June 2005, President Bush wanted to reconsider the current approach. He asked his advisers to develop real options for the future of the Guantanamo facility, for the eventual disposition of detainees held by CIA, and to look at the standards governing the treatment of enemy captives.

Secretary of State Condoleezza Rice was in favor of change. Also supporting change was her Legal Adviser, John Bellinger, who had held the same job for her on the NSC staff. Bellinger was already deeply

concerned about detainee policies and carried scars from earlier bureaucratic battles on the topic.

Subcabinet deputies began meeting regularly in highly sensitive meetings to consider these issues. I represented the Department at these meetings, along with Mr. Bellinger. I was thus 'read in' to the details of this particular CIA program for the first time.

Why was such a program adopted? I do not yet adequately understand how and why this happened. But four points stand out:

First, the atmosphere after 9/11. The country had suffered the most devastating single attack in its history. Attitudes toward those behind this mass murder were understandably merciless. The feeling of being at war was real, at least in the White House. Almost every morning, President Bush himself received nerve-jangling briefings just on the latest threats. Almost every afternoon, usually at 5 p.m., George Tenet would review the latest engagements as a de facto Combatant Commander in a global war. Some of the threat reports were apocalyptic, some scares have never become public. I saw many such reports when serving on the President's Foreign Intelligence Advisory Board.

One result was that the tough, gritty world of 'the field' worked its way into the consciousness of the nation's leaders to a degree rarely seen before, or since. A large cultural divide shadowed these judgments, a divide between the world of secretive, bearded operators in the field coming from their 3 a.m. meetings at safe houses, and the world of Washington policymakers in their wood-paneled suites. As the policymakers sense this divide, they often and naturally become more deferential – especially in a time of seemingly endless alarms. What policymakers can sometimes miss, though, is that the world of the field has many countries and cultures of its own. Seasoned operators often disagree about what the government should do, and did in this case, but policymakers were rarely aware of these arguments.

Second, the CIA – an agency that had no significant institutional capability to question enemy captives – improvised an unprecedented, elaborate, systematic program of medically monitored physical torment

to break prisoners and make them talk. This program was apparently based on the SERE program familiar to civilian and military intelligence officials from their training. The program was reportedly reverse-engineered and then sold to policymakers as being no more than “what we do to our own trainees.” Much about this policy development process is still unclear, though press reports have already discussed some of the fallacies and omissions in the reverse-engineering approach.

There have also been conflicting accounts about the role of “supply” and “demand”: CIA policy entrepreneurs and officials in the White House or in the Office of the Vice President who were pushing for better intelligence. Nor is it clear just how the program evolved. It would be important to grasp how the program was understood and sold at each stage in this evolution. But the program would not have come into being unless an executive department or agency of the government was willing to develop it and defend it.

Third, the leaders of the CIA evidently believed, and told the government’s leaders, that their program would be uniquely effective in getting information from high-value captives. “Uniquely” is the key word. After all, other kinds of interrogation programs were well known to experts in law enforcement and the U.S. armed forces. The Director of the CIA, the de facto combatant commander in an ongoing fight, apparently emphasized that there were no good alternatives to adoption of this proposal.

Fourth, Attorney General John Ashcroft and his Department of Justice, along with the White House Counsel, Alberto Gonzales, assured the government’s leaders that the proposed program was lawful. Those assurances were renewed by Ashcroft’s successor, Mr. Gonzales, and by Gonzales’ successor as White House Counsel, Harriet Miers.

I will discuss the legal issues in more detail in a moment. For now, I wish to return to the issue of unique “effectiveness” and the supposed absence of alternatives.

There is quite a bit of empirical and historical information available about interrogation experience in this country, in its past wars, and in

the experiences of other democracies facing terrifying threats. I have done some work on the British, French, and Israeli experiences. These experiences and others are highly instructive. They show the damage that these programs can do to the counterterror effort, the process of trial and error as alternatives emerged, and the proven effectiveness of some of these alternatives. America has had extensive experience with interrogation of high-value detainees, especially in World War II when special facilities were created for this purpose. The national policy then was to treat the detainees humanely, even though thousands of lives were potentially at stake in the midst of a brutal, total war. It is not clear how much, if any, of this knowledge was canvassed and analyzed when the critical arguments over adoption of this unprecedented program were occurring in 2002 and 2003.

By the time I began engaging in these arguments, in the spring and summer of 2005, another important source of data had emerged. This was the American intelligence and interrogation effort against al Qaeda in Iraq. This was an interagency effort, including CIA and FBI experts, organized by the military's Joint Special Operations Command. By 2005, if not earlier, this program was complying with basic international standards in its interrogation of captives. The program was high-tempo and time-urgent. The officers running the interrogation program considered it effective and, at least by mid-2005, the government's leaders were aware of their positive assessment.

Nonetheless, the intelligence community's position in 2005, and later, was that a substantial program of intense physical coercion was uniquely necessary to protect the nation. The arguments that have appeared recently in the press are the same arguments, even using some of the same examples, used to defend the program against its internal critics four years ago.

Examples of success cite plots thwarted or terrorists captured. Some of these examples may not be accurate. Others may be exaggerated, or they may mask murky, internal arguments among operatives and analysts about whose source proved out, or which lead was key. Rival claims of credit often accompany successful cases. But getting into a debate about whether the CIA program produced useful intelligence misses the point.

The point is not whether the CIA program produced useful intelligence. Of course it did. Quite a lot. The CIA had exclusive custody of a number of the most important al Qaeda captives in the world, for years. Any good interrogation effort would produce an important flow of information from these captives.

Complicating the story, the CIA did not just rely on physical coercion. A long-term interrogation program was also being employed, mustering a number of experts using growing skill in patiently mining for more information and assimilating it. Indeed, one of the tragedies of this program is that the association with physical coercion detracts attention away from some of the very high quality work the CIA did do for the country, quality work that has continued in recent years even after this program was substantially dismantled.

So the issue is not whether the CIA program of extreme physical coercion produced useful intelligence; it is about its net value when compared to the alternatives.² And, even though the program may have some value against some prisoners, it has serious drawbacks just in the intelligence calculus, such as:

² While in government, I joined in encouraging the Intelligence Science Board, a federal advisory group, and its chairman, Robert Fein, to pursue a professional examination of the empirical data, science, and pseudo-science surrounding the topic of interrogation. The Board ultimately produced a valuable report with papers from a variety of experts.

A representative conclusion, from a veteran interrogator and former director of the Air Force Combat Interrogation Course, was that “the scientific community has never established that coercive interrogation methods are an effective means of obtaining reliable intelligence information.” The author added that, “Claims from some members of the operational community as to the alleged effectiveness of coercive methods in educing meaningful information from resistant sources are, at best, anecdotal in nature and would be, in the author’s view, unlikely to withstand the rigors of sound scientific inquiry.” Col. Steven Kleinman, “KUBARK Counter-Intelligence Interrogation Review: Observations of an Interrogator – Lessons Learned and Avenues for Further Research,” in Intelligence Science Board, *Educing Information – Interrogation: Science and Art – Foundations for the Future* (Washington, D.C.: National Defense Intelligence College Press, December 2006), p. 130 and note 91.

- constraints in getting the optimal team of interrogators, since law enforcement and military experts could not take part;
- whether the program actually produces much of the time-sensitive current intelligence that is one of its unique justifications;
- loss of intelligence from allies who fear becoming complicit in a program they abhor and a whole set of fresh problems with coalition cooperation on intelligence operations;
- poorer reliability of information obtained through torment;
- possible loss of opportunities to turn some captives into more effective and even cooperative informants; and
- problems in devising an end-game for the eventual trial or long-term disposition of the captives.

This skepticism about effectiveness links to wider concerns about how the United States should treat captured terrorists or terrorist suspects. By 2005, the raging controversy over “Abu Ghraib” or “Guantanamo” or “torture” was hurting the United States position in the world more than any other problem in our foreign policy.

As Secretary of State, Dr. Rice placed a high priority on changing the national approach to the treatment of detainees. Therefore, once the President indicated his readiness to hear alternatives, we first attempted to develop a ‘big bang’ approach, a presidential initiative that might take on the whole cluster of issues in a single announcement.

To show what such an initiative might look like and how it could be presented, and with help from Mr. Bellinger, I worked with the deputy secretary of defense, Gordon England, on a joint paper, a notional draft of the building blocks of such an initiative. Deputy Secretary England was aided by DOD’s Deputy Assistant Secretary for detainee affairs, Matt Waxman, and other staff. Our (unclassified) joint paper outlining the

elements of a presidential initiative was distributed in June 2005. (As an aid to the committee a copy of it is attached at Annex A.³)

However the Secretary of Defense, Donald Rumsfeld, indicated that this paper did not represent his Department's views. He designated a different official as his deputy for these issues. The NSC staff then felt it was more appropriate for the interagency process to address the specific issues incrementally, rather than take up discussion of this broad paper.

At State we then focused much of our effort on recommending a different legal framework for evaluating the treatment of enemy captives. We felt it was very important to focus on the "CID" – cruel, inhuman, and degrading -- standard.

The administration had always conceded the applicability of the federal anti-torture statute and had repeatedly held that the CIA program did not violate it. The Justice Department's view was authoritative for the executive branch and was immovable. The anti-torture language, as interpreted by Justice, also turned on medical assessments by CIA doctors, assessments we could not challenge. Taking these facts into account, plus the fact that "CID" was actually a stronger standard codified in three relevant treaties, we concentrated our advocacy on adoption of the "CID" guideline.

The "CID" standard was critical for two other reasons.

- It was the standard that had been proposed by Senator John McCain and his allies, including Senator Lindsey Graham, in the "McCain Amendment."
- The "CID" standard, as codified in Article 3 of the Geneva Conventions, is also the relevant standard in the federal war crimes law (18 U.S.C. section 2441) which then stated (it was later

³ A copy was provided to the press more than a year later, apparently by a Defense Department source. See Tim Golden, "Detainee Memo Created Divide in White House," *New York Times*, October 1, 2006. The paper was thereafter made available to other reporters.

amended) that any conduct constituting a violation of Article 3 was a war crime, a felony punishable by up to life imprisonment.

The administration position on all these “CID” arguments had been this: We do not have to measure our conduct against this standard because none of these treaties apply. If the standard did apply, the CIA program did not violate it. The outer defenses, a series of technical, jurisdictional arguments, had received the most attention. Samples can be seen in the OLC opinion of May 30, 2005.

Also, OLC’s view was that Geneva Common Article 3 did not apply because it was meant for civil conflict, not an international war (Article 3 was written that way because its drafters thought international wars would be covered by fuller Geneva protections; they thought civil war was the loophole they were closing with the minimum standard of Article 3.) And, although the federal war crimes statute’s reference to “conduct constituting” could be construed as stating a substantive compliance standard, the OLC did not share that view.

In 2005 State worked to persuade the rest of the government to join in developing an option that would abandon these technical defenses and accept the “CID” standard. An illustration of these arguments, as made at the time, is in an unclassified paper prepared with Mr. Bellinger’s help and circulated in July 2005. It is attached at Annex B.

Both deputies and principals battled over these topics on into the fall of 2005, including the issue of how the administration should deal with Senator McCain’s proposed amendment. New press reports, by Dana Priest in the Washington Post, fueled further controversy – especially in Europe.

By the end of 2005 these debates in both the executive and legislative branches did lead to real change. On December 5, as Secretary Rice left on a European trip, she formally announced on behalf of the President that the “CID” standard would govern U.S. conduct by any agency, anywhere in the world.⁴ On December 30 the McCain amendment (to a

⁴ Perhaps coincidentally, CIA officials destroyed existing videotapes of its coercive interrogations in this same time period, in November 2005.

defense appropriations bill) was signed into law as well, as the Detainee Treatment Act of 2005.

Thus by early 2006 there was no way for the administration to avoid the need to reevaluate the CIA program against a “CID” standard. The work of the NSC deputies intensified, working to develop a comprehensive set of proposals for presidential decision about the future of the CIA program and the future of Guantanamo.

The OLC had guarded against the contingency of a substantive “CID” review in its May 30, 2005 opinion. OLC had held that, even if the standard did apply, the full CIA program -- including waterboarding -- complied with it. This OLC view also meant, in effect, that the McCain amendment was a nullity; it would not prohibit the very program and procedures Senator McCain and his supporters thought they had targeted.

So, with the battle to apply the standard having been won, State then had to fight another battle over how to define its meaning. That meant coming to grips with OLC’s substantive analysis.

OLC contended that these subjective terms -- like “cruel” or “humane” -- should be interpreted in light of the well developed and analogous restrictions found in American constitutional law, specifically through the interaction of the 5th, 8th, and 14th amendments to the U.S. Constitution. As OLC observed in its May 30 opinion, the Congress had conditioned its ratification of one of the “CID”-type standards, the one found in the Convention Against Torture, on its being interpreted in just this way.

Therefore, to challenge OLC’s interpretation, it was necessary to challenge the Justice Department’s interpretation of U.S. constitutional law. This was not easy, since OLC is the authoritative interpreter of such law for the executive branch of the government. Many years earlier I had worked in this area of American constitutional law. The OLC interpretation of U.S. constitutional law in this area seemed strained and indefensible. It relied on a “shocks the conscience” standard in judging interrogations but did not seem to present a fair reading of the caselaw under that standard. The OLC analysis also

neglected another important line of caselaw, on conditions of confinement.

While OLC's interpretations of other areas of law were well known to be controversial, I did not believe my colleagues had heard arguments challenging the way OLC had analyzed these constitutional rights. With the issue of "CID" definition now raised so squarely, and so important to the options being developed for the President, it seemed necessary to put that legal challenge in front of my government colleagues, citing relevant caselaw.

Further, the OLC position had implications beyond the interpretation of international treaties. If the CIA program passed muster under an American constitutional compliance analysis, then – at least in principle -- a program of this kind would pass American constitutional muster even if employed anywhere in the United States, on American citizens. Reflect on that for a moment.

I distributed my memo analyzing these legal issues to other deputies at one of our meetings, probably in February 2006. I later heard the memo was not considered appropriate for further discussion and that copies of my memo should be collected and destroyed. That particular request, passed along informally, did not seem proper and I ignored it. This particular legal memo has evidently been located in State's files. It is currently being reviewed for possible declassification.

The broader arguments over the future of the CIA program went on for months, even though the old program had effectively been discontinued. There were continuing issues over whether or how to maintain a different kind of CIA program. Both principals and deputies examined proposals to bring the high-value detainees out of the 'black sites' and to Guantanamo where they could be brought to justice (and would give accounts of their treatment to lawyers and the Red Cross); seek legislation that would close Guantanamo; accept fully the application of Common Article 3; and find some way of maintaining a standby CIA program that would comply with legal standards. A new OLC opinion was also being developed in the spring of 2006 to deal with the different circumstances, including the McCain amendment. We at State were

concerned about this development, unless OLC had reconsidered how to interpret the “CID” standard.

We nonetheless believed these issues were moving in an encouraging direction, though the administration certainly remained divided. Options for action on all the major issues had been developed for possible presidential decision and had already been discussed repeatedly by the principal officers of the government.

Then, on June 29, the U.S. Supreme Court decided *Hamdan v. Rumsfeld*. That decision held that Geneva Common Article 3 applied to the U.S. government’s treatment of these captives as a matter of law. Immediately, the potential exposure to criminal liability in the federal war crimes act became real.

Internal debate continued into July, culminating in several decisions by President Bush. Accepting positions that Secretary Rice had urged again and again, the President set the goal of closing the Guantanamo facility, decided to bring all the high-value detainees out of the ‘black sites’ and move them toward trial, sought legislation from the Congress that would address these developments (which became the Military Commissions Act) and defended the need for some continuing CIA program that would comply with relevant law. President Bush announced these decisions on September 6.

I left the government at the end of 2006 and returned to the University of Virginia. Both Secretary Rice and Mr. Bellinger remained deeply involved in these issues for the following two years, working for constructive change. Mr. Bellinger, in particular, also deserves credit for exhausting, patient diplomacy to carry forward the idea of working with our key allies to build common, coalition approaches on these tough problems. He has conducted several international conferences that have successfully advanced this effort.

The U.S. government adopted an unprecedented program of coolly calculated dehumanizing abuse and physical torment to extract information. This was a mistake, perhaps a disastrous one. It was a collective failure, in which a number of officials and members of Congress (and staffers) of both parties played a part, endorsing a CIA

program of physical coercion even after the McCain amendment was passed and after the Hamdan decision . Precisely because this was a collective failure it is all the more important to comprehend it, and learn from it.

For several years our government has been fighting terrorism without using these extreme methods. We face some serious obstacles in defeating al Qaeda and its allies. We could be hit again, hit hard. But our decision to respect basic international standards does not appear to be a big hindrance in the fight. In fact, if the U.S. regains some higher ground in the wider struggle of ideas, our prospects in a long conflict will be better.

Others may disagree. They may believe that recent history, even since 2005, shows that America needs an elaborate program of indefinite secret detention and physical coercion in order to protect the nation. The government, and the country, needs to decide whether they are right. If they are right, our laws must change and our country must change. I think they are wrong.

Attachments:

Annex A: "Elements of Possible Initiative" (June 2005)

Annex B: "Detainees – The Need for a Stronger Legal Framework" (July 2005)

Annex C: Zelikow c.v.