

**Senate Judiciary Committee Testimony on
Bush Administration Torture, Detention and Interrogation Policies**

**What Went Wrong: Torture and the Office of Legal Counsel in the Bush Administration
Subcommittee on Administrative Oversight and the Courts
May 13, 2009**

Philip Zelikow

Former Counselor to Secretary of State Condoleezza Rice and Executive Director of the 9/11 Commission

“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.”

[\[Page 12\]](#)

“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.” [\[Page 13-14\]](#)

“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 us 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.” [\[Page 14\]](#)

“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.” [\[Page 14\]](#)

Ali Soufan

Former FBI Supervisory Special Agent

“From my experience - and I speak as someone who has personally interrogated many terrorists and elicited important actionable intelligence- I strongly believe that it is a mistake to use what has become known as the ‘enhanced interrogation techniques,’ a position shared by many professional operatives, including the CIA officers who were present at the initial phases of the Abu Zubaydah interrogation.” [\[Page 1\]](#)

“These techniques, from an operational perspective, are ineffective, slow and unreliable, and as a result harmful to our efforts to defeat al Qaeda. (This is aside from the important additional considerations that they are un-American and harmful to our reputation and cause.)” [\[Page 1\]](#)

“I wish to do my part to ensure that we never again use these harmful, slow, ineffective, and unreliable techniques instead of the tried, tested, and successful ones - the ones that are also in sync with our values and moral character. Only by doing this will we defeat the terrorists as effectively and quickly as possible.” [\[Page 1\]](#)

“Through our interrogation, which was done completely by the book (including advising him of his rights), we obtained a treasure trove of highly significant actionable intelligence. For example, Abu Jandal gave us extensive information on Osama Bin Laden's terror network, structure, leadership, membership, security details, facilities, family, communication methods, travels, training, ammunitions, and weaponry, including a breakdown of what machine guns, rifles, rocket launchers, and anti-tank missiles they used. He also provided explicit details of the 9/11 plot operatives, and identified many terrorists who we later successfully apprehended.” [\[Page 2\]](#)

“The Army Field Manual is not about being nice or soft. It is a knowledge-based approach. It is about outwitting the detainee by using a combination of interpersonal, cognitive, and emotional strategies to get the information needed. If done correctly it's an approach that works quickly and effectively because it outwits the detainee using a method that he is not trained, or able, to resist.” [\[Page 3\]](#)

“The CIA specializes in collecting, analyzing, and interpreting intelligence. The FBI, on the other hand, has a trained investigative branch. Until that point, we were complimenting each other's expertise, until the imposition of the ‘enhanced methods.’ As a result people ended doing what they were not trained to do.” [\[Page 5\]](#)

“It is also important to realize that those behind this technique are outside contractors with no expertise in intelligence operations, investigations, terrorism, or al Qaeda. Nor did the contractors have any experience in the art of interview and interrogation.” [\[Page 5\]](#)

“In summary, the Informed Interrogation Approach outlined in the Army Field Manual is the most effective, reliable, and speedy approach we have for interrogating terrorists. It is legal and has worked time and again.” [\[Page 7\]](#)

“It was a mistake to abandon it in favor of harsh interrogation methods that are harmful, shameful, slower, unreliable, ineffective, and play directly into the enemy's handbook. It was a mistake to abandon an approach that was working and naively replace it with an untested method. It was a mistake to abandon an approach that is based on the cumulative wisdom and successful tradition of our military, intelligence, and law enforcement community, in favor of techniques advocated by contractors with no relevant experience.” [\[Page 7\]](#)

“The mistake was so costly precisely because the situation was, and remains, too risky to allow someone to experiment with amateurish, Hollywood style interrogation methods- that in reality

taints sources, risks outcomes, ignores the end game, and diminishes our moral high ground in a battle that is impossible to win without first capturing the hearts and minds around the world. It was one of the worst and most harmful decisions made in our efforts against al Qaeda.” [\[Page 7\]](#)

Robert Turner

Former national security adviser to Senator Robert P. Griffin, Special Assistant to the Under Secretary of Defense for Policy, Counsel to the President’s Intelligence Advisory Board, and Acting Assistant Secretary of State for Legislative and Intergovernmental Affairs

“I think the decision to authorize waterboarding in the current conflict was a tremendous blunder that was clearly contrary to our treaty obligations and has contributed to seriously undermining the coalition against al Qaeda and its allies.” [\[Page 5\]](#)

“Let me make it clear – I believe that waterboarding crosses the line and is ‘torture’ by any reasonable interpretation.” [\[Page 10\]](#)

“I personally am very fond of the Army’s “Golden Rule” for interrogation: If you would be offended to learn our enemies were treating our POWs in this manner, don’t do it to them.” [\[Page 10\]](#)

“I think [waterboarding] was wrong, and the resulting publicity has done very serious harm to our national security by costing us public support both within the United States and among people of good will around the world.” [\[Page 11-12\]](#)

“We didn’t have to resort to torturing POWs during World War II, and I don’t sense the al Qaeda threat to be even close to that level of threat.” [\[Page 12\]](#)

“Among other considerations, it is imperative for a democracy to maintain the moral high ground if it wishes to maintain the support of its people. Foreign governments we traditionally consider among our strongest allies have reportedly instructed their intelligence services not to cooperate with U.S. intelligence agencies in several key areas because of outrage over waterboarding and allegations of misconduct. America’s ability to pressure Iran and North Korea to comply with their legal obligations has also suffered with perceptions that we have violated our own obligations. And it is likely that American POWs in future armed conflicts will pay an extra price as our enemies rely upon our own behavior and public statements about the scope of the Geneva Conventions.” [\[Page 13\]](#)

David Luban

Professor of Law, Georgetown University Law Center

“Based on the publicly-available sources I’ve studied, I believe that the memos are an ethical train wreck.” [\[Page 1\]](#)

“Twenty-six years ago, President Reagan’s Justice Department prosecuted law enforcement officers for waterboarding prisoners to make them confess. The case is called United States v.

Lee. Four men were convicted and drew hefty sentences that the Court of Appeals upheld.

“The Court of Appeals repeatedly referred to the technique as ‘torture.’ This is perhaps the single most relevant case in American law to the legality of waterboarding. Any lawyer can find the Lee case in a few seconds on a computer just by typing the words ‘water torture’ into a database. But the authors of the torture memos never mentioned it. They had no trouble finding cases where courts didn’t call harsh interrogation techniques ‘torture.’ It’s hard to avoid the conclusion that Mr. Yoo, Judge Bybee, and Mr. Bradbury chose not to mention the Lee case because it casts doubt on their conclusion that waterboarding is legal.” [\[Page 3\]](#)

“The first Bybee memo advances a startlingly broad theory of executive power, according to which the President as commander-in-chief can override criminal laws such as the torture statute. This was a theory that Jack Goldsmith, who headed the OLC after Judge Bybee’s departure, described as an ‘extreme conclusion,’ reached through ‘cursory and one-sided legal arguments’ -- a conclusion that ‘has no foundation in prior OLC opinions, or in judicial decisions, or in any other source of law.’ It comes very close to President Nixon’s notorious statement that ‘when the President does it, that means it is not illegal’ -- except that Mr. Nixon was speaking off the cuff in a high pressure interview, not a written opinion by the Office of Legal Counsel.” [\[Page 4\]](#)

“I believe Professor Goldsmith’s view that no source of law supports the Bybee Memo’s proposition that the commander-in-chief power can override the criminal law on torture is correct; surely Professor Goldsmith, a Bush appointee, a conservative, and an intellectual ally of Professor Yoo, cannot have lightly decided to withdraw the memos.” [\[Page 4\]](#)

“This morning I have called the torture memos an ethical train wreck. I believe it’s impossible that lawyers of such great talent and intelligence could have written these memos in the good faith belief that they accurately state the law.” [\[Page 7\]](#)

“I would like to emphasize to this Committee that when OLC lawyers write opinions, especially secret opinions, the stakes are high. Their advice governs the executive branch, and officials must be told frankly when they are on legal thin ice. They and the American people deserve the highest level of professionalism and independent judgment, and I am sorry to say that they did not get it here.” [\[Page 7\]](#)

Getting to the Truth Through a Nonpartisan Commission of Inquiry
Full Committee
March 4, 2009

Thomas Pickering
Former U.S. Ambassador and Under Secretary of State for Political Affairs

“It is not enough to say that America is discontinuing the policies and practices of the recent past. We must, as a country, take stock of where we might have been and determine what was not acceptable, what should not have been done, and what we will never do again.” [\[Page 2\]](#)

“To the extent that the Guantanamo detention camp, Abu Ghraib, secret detention sites, and torture and abuse enhance the efforts of our adversaries to recruit others to join their ranks and to make a case against us, we cannot simply turn the page. We must engage in a genuine effort to take stock of these policies and actions. We must acknowledge any mistakes that were made and commit not to repeat them. It is a crucial step in neutralizing our adversaries' narrative about U.S. abuse of detainees. Only in so doing can we say to ourselves and to the world that we have not just turned the page on the past, but we have confronted it, learned from it, and strengthened our resolve to remain true to our principles in the future. Only great countries, confident in themselves, are prepared to look at their most serious mistakes, learn from them and lead on forward. The United States has been and still is today, I believe, the kind of country.” [\[Page 2\]](#)

Retired Vice Admiral Lee Gunn
Former U.S. Navy and Inspector General of the Department of the Navy

“I have been an active member of a coalition of retired generals and admirals who speak out against torture. Our group, now numbering 49 members, joined together in 2004 with the assistance of Human Rights First to urge the United States government to put a stop to abusive interrogation practices. Though we are members of both major parties and independents, and we represent a wide variety of military backgrounds, I can safely say that we are unanimous in our view that the Bush Administration's decisions to sanction the use of torture and other cruel techniques came at an enormous cost to our nation--to our values, our laws, and our security.” [\[Page 1\]](#)

“Preparing to protect our service members demands a thorough, comprehensive and sober examination of the policies and practices that led us astray in the first place. Such an examination would help inoculate our country against committing future abuses; the examination also would go a long way toward enabling us to demonstrate to the world that the United States is committed again to the humane treatment of prisoners in its care.” [\[Page 2\]](#)

“The Bush Administration's misguided embrace of torture, secret prisons and renditions to torture came at an enormous cost to our American values, our laws, and our counterterrorism efforts. Repairing our reputation as a nation committed to human rights and building a more sustainable framework for national security policy going forward requires a comprehensive examination of the policies and practices that sanctioned torture and abuse.” [\[Page 4-5\]](#)

“In the balance hangs the ability of the United States to maintain the integrity of our counterterrorism policy; improve intelligence cooperation with allies; support the human intelligence community in employing proven, effective methods for gathering actionable information; and re-establish the moral authority necessary to restore the United States as a world leader in upholding human rights.” [\[Page 5\]](#)

John Farmer
Former New Jersey Attorney General and Senior Counsel of the 9/11 Commission

“We have now reached a point where the tactics we have adopted in the struggle against terrorism have compromised our ability to respond to the 9/11 conspiracy itself. In my view, that

fact calls into question exactly what we have done, to whom, why, when, and on what basis.”
[\[Page 2\]](#)

Frederick Schwarz

Former Chief Counsel to the Church Committee and Chief Counsel at the Brennan Center for Justice

“All of us would agree that some of the government’s actions in response to 9-11 were necessary and productive. But there is evidence that some of the counter-terrorism policies and practices that were implemented after 9-11 departed from the rule of law and from our nation’s shared values.” [\[Page 3\]](#)

“I have argued that some of our counter-terrorism policies, such as detaining suspects for years without charge and employing harsh interrogation techniques, have made our country less safe. Regardless of whether they have produced useful intelligence in specific cases, they have harmed us, on balance, by giving the Bin Ladens of the world powerful recruiting messages; alienating our allies and making their intelligence services less willing to cooperate with us; and placing our own troops at increased risk of mistreatment if they are captured abroad.” [\[Page 4\]](#)

“Serious allegations of unlawful government policies are not a common occurrence. Where there is any reason to believe the government has strayed from the rule of law, the only non-partisan response is to pursue meaningful action in order to learn the full truth.” [\[Page 9\]](#)

Restoring the Rule of Law
Subcommittee on the Constitution
September 16, 2008

Frederick Schwarz

Former Chief Counsel to the Church Committee and Chief Counsel at the Brennan Center for Justice

“American law clearly prohibits all torture and all lesser forms of coercive interrogation, commonly known as cruel, inhuman, and degrading treatment. But, since 9/11, the current Administration has secured from the Justice Department legal opinions that seed ambiguity about these unequivocal legal limits and devise ways to evade what should be clear and impenetrable barriers.” [\[Page 29\]](#)

“Even though federal law and international law—clearly, and without reservation or caveat—prohibit all forms of torture and cruel, inhuman, and degrading treatment, the Administration has found ways to sanction interrogation tactics—including waterboarding and prolonged sleep deprivation—which clearly constitute torture.” [\[Page 29\]](#)

Walter Dellinger

Former Assistant Attorney General, Office Of Legal Counsel and Former Acting Solicitor General

“When the secret Torture Memo of August 1, 2002 became public, it provided a vivid - indeed, a shocking - example of the harm that could be done by the invocation of indefensibly sweeping constitutional claims of presidential authority to defy the law and by the perverse twisting of statutory language. A federal law makes it a crime for anyone acting under the color of law to engage in torture outside the United States. OLC nevertheless concluded that this federal law, which implements our treaty obligations under the Convention against Torture, could not operate to prohibit the President from ordering the use of torture in interrogating enemy combatants.” [\[Page 3\]](#)

“The Administration's interpretation of the constitutional distribution of war powers has no support in judicial precedent. Former OLC head Jack Goldsmith observed that the Torture Memo, and other memoranda authored to support the Administration's counterterrorism activities, ‘were deeply flawed: sloppily reasoned, overbroad, and incautious in asserting extraordinary constitutional authorities on behalf of the President. I was astonished, and immensely worried, to discover that some of our most important counterterrorism policies rested on severely damaged legal foundations.’” [\[Page 4\]](#)

“Not only is the theory of presidential power found in the Torture Memo unjustified, but OLC also betrayed its proper role in arriving at its conclusions. Instead of enforcing valid legal constraints within the Executive Branch, OLC seems to have allowed its interpretation of applicable laws to be infected by its outsized view of the President's power to disregard limitations on his authority to do whatever he thought necessary. As a result, the memorandum reads more like a one-sided justification for conferring legal immunity than as a sober assessment of the actual state of the law.” [\[Page 4\]](#)

Elisa Massimino
Chief Executive Officer, Human Rights First

“U.S. detention and interrogation policy over the past seven years has been marked by ongoing violations of fundamental humane treatment standards rationalized by a series of secret legal opinions that have stretch the law beyond recognition. Such violations range from abusive interrogations sanctioned by Department of Justice memoranda to renditions of individuals to torture and the maintenance of a secret detention system shielded even from the confidential visits of the International Committee of the Red Cross (ICRC).” [\[Page 3\]](#)

“Abusive detention policies have inhibited intelligence cooperation with close allies and interfered with the ability of allied governments to coordinate detention operations with our military.” [\[Page 4\]](#)

John Podesta
Former President and CEO, Center for American Progress

“The rule of law can thrive only in an open society in which the laws are known and understood; government actions are taken, insofar as possible, in full view of the public and subject to scrutiny and debate; and government officials are held accountable for the arbitrary or unscrupulous exercise of power. The rule of law requires that Congress, the courts, the public

and the press have access to the information they need to serve as effective checks on the executive branch. Without such information, there can be no checks and balances. Unless the people know what their government is doing, there can be no rule of law.” [\[Page 3\]](#)

**How the Administration's Failed Detainee Policies Have Hurt the Fight Against Terrorism:
Putting the Fight Against Terrorism on Sound Legal Foundations**

Full Committee
July 16, 2008

Retired Colonel Will Gunn
Former Chief Defense Counsel in the Department of Defense Office of Military Commissions

“While there has been a great deal of debate regarding what constitutes torture, there is no doubt that at least some detainees were exposed to interrogation methods that the U.S. has publicly decried when carried out by other nations.” [\[Page 2\]](#)

“As an Air Force Academy cadet in the 1970s, my classmates and I received instruction on what was then described as the inhumane practice of water boarding. This is a practice the Chinese employed against captured American soldiers during the Korean Conflict to coerce false confessions and a practice which the U.S. government has heretofore considered unacceptable. Remarkably, the U.S. government has used this technique in at least some cases in the aftermath of 9/11.” [\[Pages 2-3\]](#)

Kate Martin
Director, Center for National Security Studies

“The administration ignored both the law of war and constitutional requirements and established a new detention regime, largely in order to conduct illegal and abusive interrogations. The results have been disastrous.” [\[Page 12\]](#)

Hearing Suspended Because Of Objection On Senate Floor -- Coercive Interrogation Techniques: Do They Work, Are They Reliable, and What Did the FBI Know About

Them?
Full Committee
June 10, 2008

Glenn Fine
Former Inspector General, Department of Justice

“Constitutional and evidentiary considerations were not the only rationales for the FBI's prohibition on the use of coercive interview techniques. On numerous occasions, the FBI has stated its belief that the most effective way to obtain accurate information for both evidentiary and intelligence purposes is to use rapport-building techniques in interviews.” [\[Page 2\]](#)

“FBI agents told us that the FBI's approach, coupled with a strong substantive knowledge of al Qaeda, had produced extensive useful information in both pre-September 11 terrorism investigations as well as in the post-September 11 context. Many FBI witnesses also stated that they believed that FBI agents had skills and expertise that would enable them to make a significant contribution to the government's overseas intelligence gathering mission.” [\[Page 3\]](#)

“The FBI deployed agents to military zones after the September 11 attacks in large part because of its expertise in conducting custodial interviews and in furtherance of its expanded counterterrorism mission. The FBI has had a long history of success in custodial interrogations using non-coercive, rapport-based interview techniques developed for the law enforcement context. Some FBI agents experienced disputes with the DOD, which used more aggressive interrogation techniques. These disputes placed FBI agents in difficult situations in the military zones.” [\[Page 8\]](#)

John Cloonan
Retired FBI Special Agent

“It is my belief, based on a 27 year career as a Special Agent and interviews with hundreds of subjects in custodial settings, including members of al Qaeda, that the use of coercive interrogation techniques is not effective. The alternative approach, sometimes referred to as ‘rapport building’ is more effective, efficient and reliable. Scientists, psychiatrists, psychologists, law enforcement and intelligence agents, all of whom have studied both approaches, have come to the same conclusion The CIA's own training manual advises its agents that heavy-handed techniques can impair a subject's ability to accurately recall information and, at worst, produce apathy and complete withdrawal.” [\[Page 1\]](#)

“I have personally used the rapport building approach successfully with al Qaeda members and other terrorists who were detained by US authorities. The information elicited led to numerous indictments, successful prosecutions and actionable intelligence which was then disseminated to the CIA and the NSA and others. This approach, which the FBI practices, is effective, lawful and consistent with the principles of due process - And in addition to its intelligence gathering potential, it can do nothing but improve our image in the eyes of the world community.” [\[Page 1\]](#)

“I accept the argument that coercion will obtain a certain kind of information. I do not, however, accept the argument that sleep deprivation, sensory deprivation, head slapping, isolation, temperature extremes, stress positions, water boarding and the like will produce accurate information.” [\[Page 1\]](#)

“The majority of jihadists detained post 9/11 were clueless when it came to al Qaeda's operational plans, and I don't believe many of the detainees posed a direct threat to the US or were confidants of Bin Laden or Ayman Zawahiri. A heavy-handed approach with these detainees was unlikely to generate any useful intelligence, and it served to validate Bin Laden's take on America and our intelligence gathering propensities.” [\[Page 2\]](#)

“Gaining the cooperation of an al Qaeda member is a formidable task, but it is not impossible. I've witnessed al Qaeda members, who pledged ‘bayat’ to Bin Laden, cross the threshold and

cooperate with the FBI because they were treated humanely, understood what due process was about and were literally seduced by our legal system, as strange as that might sound.” [\[Page 2\]](#)

“Torture degrades our image abroad and complicates our working relationships with foreign law enforcement and intelligence agencies.” [\[Page 2\]](#)

Philippe Sands
Professor of Laws, University College London

“The coercive interrogations were illegal, did not work, have undermined moral authority, have migrated, have served as a recruiting tool for those who seek to do harm to the US, and have made it more difficult for allies to transfer detainees and cooperate in other ways. They have resulted in the very opposite of what was intended, contributing to an extension of the conflict and endangering the national security they were meant to protect.” [\[Page 2\]](#)

“No country has done more to promote the international rule of law than the United States. Uncovering the truth is a first step in restoring this country's necessary leadership role; in undoing the damage caused; and in providing a secure, sustainable and effective basis for responding to what is a real threat of terrorism.” [\[Pages 2-3\]](#)

Philip Heymann
Former Deputy Attorney General

“Coercion is likely to elicit a statement, but frequently one that is false. Any accurate information furnished can therefore only be detected by time-consuming verification. It was this disadvantage of unreliability that first caused our Supreme Court to forbid the use of coerced confessions. The problem is most severe when dealing with a carefully planned operation; for the plan is likely to include a cover story that is hard to unravel in any short period of time. The information furnished is likely to be narrow as well as unreliable. A tortured suspect is unlikely to reveal matters about which we did not know to ask; nothing will be volunteered. In sum, as the new Army Field Manual of September, 2006, states, torture ‘is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the HUMINT collector wants to hear.’ (at 5-21)” [\[Page 3\]](#)

Preserving the Rule of Law in the Fight Against Terrorism
Full Committee
October 2, 2007

Jack Goldsmith
Former Acting Assistant Attorney General, Office of Legal Counsel and Former Special Counsel to the General Counsel to the Department of Defense

“The administration often eschewed genuine deliberation with Congress, both formal and informal, not just with members of the opposition, but with members of the President's own party

as well. It instead took a ‘go-it-alone’ approach that rested on the President's Article II powers, World War II and Civil War precedents, and imaginative interpretations of extant law.” [\[Page 5\]](#)

“The President's control over the military and intelligence agencies, his ability to act in secret, and his power to self-interpret legal limits on his authority create opportunities for abuse, and spark mistrust of his power, especially in war.” [\[Page 8\]](#)