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July 2, 2013

The Honorable Patrick J. Leahy  
Chairman  
Judiciary Committee  
United States Senate  
Washington D.C. 20510

The Honorable Chuck Grassley  
Ranking Member  
Judiciary Committee  
United States Senate  
Washington D.C. 20510

**Re: Confirmation Hearing for James B. Comey**

Dear Chairman Leahy and Ranking Member Grassley:

We are writing in regard to the confirmation hearing of James Comey, nominated to become the new director of the Federal Bureau of Investigation (FBI). The Constitution Project (TCP) takes no position on whether Mr. Comey, or any nominee, should be confirmed. But we do urge that, in considering the nomination, the committee explore his role in approving the CIA's use of what The Constitution Project's Task Force on Detainee Treatment concluded was the use of torture and other forms of abuse on detainees held by our country.

As Deputy Attorney General from December 2003 to August 2005, Mr. Comey played an important role in discussions and decisions about the legality of the CIA's treatment of detainees. Based on the publicly available evidence, Mr. Comey warned his superiors at the Department of Justice (DOJ) that the CIA program was "simply awful," and approving it "would come back to haunt" DOJ. But he also stated that he concurred with a May 2005 OLC memorandum by Steven Bradbury, which advised the CIA that brutalizing detainees by waterboarding them; locking them into coffin-sized "confinement boxes"; depriving them of sleep by shackling them in a standing position for up to 180 hours at a time; and a variety of other methods of mistreatment would not violate the torture statute.<sup>1</sup>

Mr. Comey's concurrence with that OLC memo contradicts the findings of TCP's bipartisan, independent Task Force on Detainee Treatment, co-chaired by former Congressmen Asa Hutchinson (R-AR) and James Jones (D-OK). On April 16, 2013, after two years of study and deliberation, the Task Force published its exhaustive report on the treatment of detainees taken into U.S. custody in connection with counterterrorism operations. The Task Force unanimously found that it was "indisputable" that the United States had engaged in torture after September 11. This finding applied, though it was not limited to, the CIA's use of several techniques discussed in the May 2005 OLC memo.

The CIA's detention and interrogation program has been ended by Executive Order, but if confirmed, Mr. Comey will serve as FBI Director for ten years, under multiple presidents. It is crucial for the committee to fully explore whether he approved torture and other detainee abuse, to determine his current views on the subject, and to get a firm commitment from him that he would never authorize detainee mistreatment as FBI director. Some suggested questions and a short background paper on Mr. Comey's role are attached.

Sincerely,

Virginia Sloan  
President

Katherine Hawkins  
Investigator, Task Force on Detainee Treatment

cc: Members of the Senate Judiciary Committee

<sup>1</sup> See Department of Justice Office of Professional Responsibility Report, Jul. 29, 2009; Memorandum from Steven Bradbury to John Rizzo Re: Individual Techniques, May 10, 2005; Emails from James Comey to Chuck Rosenberg, April & May 2005.

## SUGGESTED QUESTIONS FOR JAMES COMEY

- 1) While serving as Deputy Attorney General, were you involved in authorizing the “enhanced interrogation techniques” of any individuals? How many individuals? Please explain as many details as you can in an unclassified setting.
- 2) According to a document released under the Freedom of Information Act, on July 2, 2004, you met with CIA General Counsel Scott Muller regarding the interrogation of a detainee. A memorandum from Muller states that you authorized the use of all of the “techniques previously approved for use with Abu Zubaydah, with the exception of the waterboard.” Is that accurate?
- 3) A July 7, 2004 memo from Jack Goldsmith to Scott Muller states that you asked Goldsmith to emphasize to Muller that your authorization “presupposes that the techniques will adhere closely to the assumptions and limitations stated” in the August 1, 2002 Memorandum from Jay Bybee to Acting CIA General Counsel John Rizzo, (Bybee II). Why did you send that clarification?
- 4) Did you take any steps to verify whether the CIA did, in fact, adhere to the limits in the Bybee II memo in interrogating the detainee discussed in the July 2 meeting?
- 5) As of July 2004, were you aware of the means that the CIA used to prevent detainees from sleeping?
- 6) Aside from the detainee discussed during your July 2, 2004 meeting with Muller, did CIA or OLC attorneys inform or consult with you before authorizing the use of “enhanced interrogation” on any other detainee? If so, how frequently?
- 7) Is waterboarding torture? Is it a crime?
- 8) Is sleep deprivation for up to 180 hours torture? What if it is carried out by shackling naked, diapered detainees to the ceiling for hours/days at a time? Is it a crime?
- 9) Is locking detainees inside confinement boxes torture? Is it a crime?
- 10) If you believe that any of these practices constitute torture, why did you state that you “concurred” with the conclusion in a May 10, 2005 memo from then Principal Deputy Assistant Attorney General Steven Bradbury to John Rizzo, then Senior Deputy General Counsel at the CIA, which found that none of the techniques above were torture?
- 11) In a May 31, 2005 email from you to Chuck Rosenberg, you described telling Attorney General Alberto Gonzales that the CIA interrogation techniques were “simply awful,” that “there needed to be a detailed factual discussion” of how they were used before approving them, and that “it simply could not be that the Principles were willfully blind.”

Why did you believe that there was a danger that the NSC Principals were unaware of or “willfully blind” to the details of the CIA program?
- 12) Steven Bradbury’s May 2005 memos re-authorizing the interrogation program relied heavily on the CIA’s factual representations regarding:
  - (a) the degree of pain and suffering inflicted by the “enhanced interrogation techniques”
  - (b) the lack of any symptoms of “serious physical pain” or “prolonged mental harm” in detainees subjected to those techniques

- (c) the independence of the Office of Medical Services clinicians responsible for monitoring interrogations
- (d) the efficacy of the CIA techniques

Based on what you know now, were the CIA representations cited in the Bradbury memos accurate? (Please answer separately for each category). Based on what you knew at the time, was Bradbury's reliance on the CIA's representations justified?

13) What is your opinion now about your advising the CIA that it would be permissible to use all of the Bybee II techniques other than waterboarding on a detainee? About your approval of the first Bradbury memo? About any other actions or omissions regarding the CIA black site program?

14) In 2002, FBI agent Ali Soufan called his supervisors to protest the interrogation techniques that CIA contractors were using against Abu Zubaydah, including sleep deprivation, nudity, and placement in a "confinement box", which Soufan viewed as "borderline torture." What would you have done if you had been Ali Soufan's supervisor or the FBI director at that time? What would you have done if you were FBI director in 2004 or 2005, and a field agent called you with similar concerns about interrogation techniques whose legality OLC had approved? What would you do if confirmed as FBI director and you are faced with that situation in the future?

15) Please describe your role in Attorney General John Ashcroft's decision to refer criminal investigations of detainee abuse cases to the Eastern District of Virginia. Did Attorney General Ashcroft consult with you before he made that decision? Did you agree with it?

16) Were you informed of the reasons for subsequent declinations of prosecution? Did you concur in the prosecutors' judgment?

17) If a future President rescinded President Obama's executive order on interrogation and re-instated the CIA program, would you allow FBI agents to take part? Would you criminally investigate FBI agents' allegations that they witnessed torture or war crimes by other government agencies?

18) Do you support declassification and release of the Senate Intelligence Committee's 6,000 page study into the CIA program?

19) As United States Attorney for the Southern District of New York you supported, and later as Deputy Attorney General publicly defended, the military detention without charge or trial for several years of Jose Padilla, a U.S. citizen apprehended on U.S. soil on suspicion of involvement in terrorism plots. Is it your current belief that military detention without charge or trial for persons apprehended on U.S. soil is lawful? If so, for what category of people and under what authority? Specifically, is it permitted under the 2001 Authorization for Use of Military Force?

## BACKGROUND PAPER REGARDING JAMES COMEY'S POSITION ON "ENHANCED INTERROGATION"

- James Comey served as Deputy Attorney General from December 2003 until August 2005.
- In May/June 2004, with Comey's support, Office of Legal Counsel head Jack Goldsmith withdrew John Yoo and Jay Bybee's August 1, 2002 memo (the Bybee I memo) narrowly defining "torture" and arguing that the anti-torture statute could not be used to prosecute individuals following orders from the President.<sup>1</sup>
- Goldsmith did *not* withdraw a separate memo by Bybee and Yoo signed on the same date, authorizing the use of a series of specific abusive techniques to interrogate Abu Zubaydah (the Bybee II memo).<sup>2</sup> The Bybee II memo authorized waterboarding, sleep deprivation, "close confinement" for several hours in a coffin-sized wooden box and for longer periods in a slightly larger box, slamming detainees into a plywood wall, stress positions, and slaps to the face and body. On May 27, 2004, Goldsmith "strongly recommended" that the CIA suspend the use of waterboarding until OLC could examine its use more thoroughly, but did not recommend suspension of any of the other "enhanced techniques" in the Bybee memo.<sup>3</sup>
- On July 2, 2004, Comey met with CIA General Counsel Scott Muller to discuss "the use of interrogation techniques on a certain high-value detainee."<sup>4</sup> Public sources suggest that the detainee was most likely Hassan Ghul, but this has not been definitively confirmed. Comey approved the use of all the techniques discussed in the August 1, 2002 Bybee/Yoo memo other than waterboarding.
- On July 7, 2004, Goldsmith wrote to Muller to emphasize that Comey's approval "presupposes that the techniques will adhere closely to the assumptions and limitations" in the Bybee techniques memo.<sup>5</sup> (A May 2004 report by the CIA's Inspector General's Office had found that the CIA did not consistently follow those limits in the past.)<sup>6</sup>
- From July 2004 through September 2004, the Office of Legal Counsel wrote several letters to the CIA that provided individualized legal authorization to use abusive interrogation techniques—including waterboarding, nudity, and "water dousing," soaking detainees with cold water.<sup>7</sup> Comey's level of knowledge of and participation in those authorizations is not known.

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<sup>1</sup> Memorandum from Jay Bybee to Alberto R. Gonzales, Aug. 1, 2002 (Bybee I Memo), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.08.01.pdf>.

<sup>2</sup> Memorandum from Jay Bybee to John Rizzo, Aug. 1, 2002 (Bybee II Memo), available at [http://media.luxmedia.com/aclu/olc\\_08012002\\_bybee.pdf](http://media.luxmedia.com/aclu/olc_08012002_bybee.pdf).

<sup>3</sup> Letter from Jack Goldsmith to Scott Muller, May 27, 2004, available at <http://www.justice.gov/olc/docs/memo-muller2004.pdf>.

<sup>4</sup> Fax from Scott Muller to James Comey, July 2, 2004, available at <http://www.aclu.org/files/torturefoia/released/082409/olcremand/2004olc43.pdf>.

<sup>5</sup> Letter from Jack Goldsmith to Scott Muller, July 7, 2004, available at <http://www.justice.gov/olc/docs/memo-muller2004-2.pdf>.

<sup>6</sup> CIA Inspector General, *Special Review: Counterterrorism Detention and Interrogation Activities* (May 7, 2004), available at [http://media.washingtonpost.com/wp-srv/nation/documents/cia\\_oig\\_report.pdf](http://media.washingtonpost.com/wp-srv/nation/documents/cia_oig_report.pdf).

<sup>7</sup> Letter from Daniel Levin to John Rizzo, Aug. 6, 2004, available at <http://www.justice.gov/olc/docs/memo-rizzo2004.pdf>; Letter from Daniel Levin to John Rizzo, Aug. 26, 2004, available at

- In December 2004, OLC publicly issued a memo addressed to Comey from OLC Attorney Daniel Levin, which replaced the Bybee I memo's interpretation of the torture statute. A footnote to Levin's memo stated that despite "various disagreements with the August 2002 [Bybee I] Memorandum, we have reviewed this Office's prior opinions regarding issues involving treatment of detainees and do not believe any of their conclusions would be different under the standards set forth in this memorandum."<sup>8</sup>
- In May 2005, OLC issued three memoranda by Steven Bradbury re-authorizing the CIA's use of "enhanced interrogation" techniques:
  - A 46 page memo on whether the individual CIA techniques, including waterboarding, violated the torture statute (Bradbury I), issued on May 10, 2005.<sup>9</sup>
  - A 20 page memo on whether the combined use of the CIA techniques violated the torture statute. (Bradbury II), also issued on May 10, 2005.<sup>10</sup>
  - A 40 page memo on whether the CIA's treatment of detainees violated the prohibition on cruel, inhuman, or degrading treatment or punishment. (Bradbury III), issued on May 30, 2005.<sup>11</sup>
- According to an email from Comey to his deputy Chuck Rosenberg, published by the *New York Times* in 2009, Comey "concurred" with Bradbury I, but he strongly recommended against issuing Bradbury II.<sup>12</sup> Comey's emails do not discuss Bradbury III. According to a report by the Department of Justice's Office of Professional Responsibility (OPR), Comey told investigators that he was never informed of the third memo.<sup>13</sup>
- In an email dated April 27, 2005, Comey recounted telling Attorney General Alberto Gonzales that:

I was here to urge him not to allow the 'combined effects' memo to be finalized. I told him it would come back to haunt him and the Department. I told him the first

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<http://www.justice.gov/olc/docs/memo-rizzo2004-3.pdf>; Letter from Daniel Levin to John Rizzo, Sept. 6, 2004, available at <http://www.justice.gov/olc/docs/memo-rizzo2004-4.pdf>; Letter from Daniel Levin to John Rizzo, Sept. 20, 2004, available at <http://www.justice.gov/olc/docs/memo-rizzo2004-2.pdf>.

<sup>8</sup> Memorandum from Daniel Levin to James Comey, Dec. 30, 2004, note 8, available at

<http://f11.findlaw.com/news.findlaw.com/cnn/docs/terrorism/doj/torture123004mem.pdf>.

<sup>9</sup> Memorandum from Steven Bradbury to John Rizzo Re: Individual Techniques (Bradbury I Memo), May 10, 2005, available at [http://media.luxmedia.com/aclu/olc\\_05102005\\_bradbury46pg.pdf](http://media.luxmedia.com/aclu/olc_05102005_bradbury46pg.pdf).

<sup>10</sup> Memorandum from Steven Bradbury to John Rizzo Re: Combined Techniques (Bradbury II Memo), May 10, 2005, available at [http://media.luxmedia.com/aclu/olc\\_05102005\\_bradbury\\_20pg.pdf](http://media.luxmedia.com/aclu/olc_05102005_bradbury_20pg.pdf).

<sup>11</sup> Memorandum from Steven Bradbury to John Rizzo Re: Article 16 of the Torture Convention (Bradbury III Memo), May 30, 2005, available at [http://media.luxmedia.com/aclu/olc\\_05302005\\_bradbury.pdf](http://media.luxmedia.com/aclu/olc_05302005_bradbury.pdf).

<sup>12</sup> Email from James Comey to Chuck Rosenberg, Apr. 27, 2005, available at

<http://graphics8.nytimes.com/packages/images/nyint/doc/justice-department-communication-on-interrogation-opinions/original.pdf>. See also Department of Justice, Office of Professional Responsibility Report (Jul. 29, 2009) ("OPR Report") at 141-143, available at <http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf>.

<sup>13</sup> OPR Report at 150, available at <http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf>.

opinion was ready to go out and I concurred. I told him I did not concur with the second and asked him to stop it.<sup>14</sup>

- Comey's emails state that one reason for his concern about the Bradbury II memo was its "prospective nature."<sup>15</sup> OPR later wrote that Comey's "main concern was that the memorandum was theoretical and not tied to a request of specific techniques on an individual detainee. Comey believed it was irresponsible to give legal advice about the combined effects of techniques in the abstract."<sup>16</sup>
- Comey has never spoken publicly about why he concurred with the Bradbury I memo.
- The tactics that the Bradbury I memo concluded were not torture included: placing detainees in completely dark "confinement boxes" that restricted their movement; soaking them with cold water; physically assaulting detainees in various ways—allegedly with a level of force that was carefully controlled to prevent injury; stress positions; and providing only limited amounts of Ensure or other commercial nutrition supplement instead of normal food.<sup>17</sup>
- Bradbury wrote that his conclusion that the above techniques were not torture was "straightforward," but two others raised more "substantial questions": waterboarding and sleep deprivation. The Bradbury I memo described sleep deprivation, as implemented by the CIA, as follows:

The primary method of sleep deprivation involves the use of shackling to keep the detainee awake. In this method, the detainee is standing and is handcuffed, and the handcuffs are attached by a length of chain to the ceiling. The detainee's hands are shackled in front of his body, so that the detainee has approximately a two- to three-foot diameter of movement. The detainee's feet are shackled to a bolt in the floor....the detainee is not allowed to hang from or support his body weight with the shackles...should the detainee begin to fall asleep, he will lose his balance and awaken, either because of the sensation of losing his balance or because of the restraining tension of the shackles....

A detainee undergoing sleep deprivation is generally fed by hand by CIA personnel so that he need not be unshackled....Detainees subject to sleep deprivation...will at times be nude and wearing a diaper...

The maximum allowable duration for sleep deprivation authorized for the CIA is 180 hours.<sup>18</sup>

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<sup>14</sup> Email from James Comey to Chuck Rosenberg, Apr. 27, 2005, available at <http://graphics8.nytimes.com/packages/images/nytint/docs/justice-department-communication-on-interrogation-opinions/original.pdf>.

<sup>15</sup> Email from James Comey to Chuck Rosenberg, Apr. 28, 2005, available at <http://graphics8.nytimes.com/packages/images/nytint/docs/justice-department-communication-on-interrogation-opinions/original.pdf>.

<sup>16</sup> OPR Report at 141, available at <http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf>.

<sup>17</sup> Bradbury I Memo, available at [http://media.luxmedia.com/aclu/olc\\_05102005\\_bradbury46pg.pdf](http://media.luxmedia.com/aclu/olc_05102005_bradbury46pg.pdf).

<sup>18</sup> *Id.* at 11-12.

- The Bradbury I memo authorized sleep deprivation in part based on the CIA's representations that medical and psychological personnel from the Office of Medical Services constantly monitored detainees undergoing this procedure and would intervene if there was any danger to detainees; that the technique was not "significantly painful"; and that no detainee subject to sleep deprivation "has suffered any harm or injury."<sup>19</sup>
- The Bradbury I memo authorized waterboarding based on similar CIA assertions about careful medical monitoring, and lack of harm to detainees:

the waterboard has been used by the CIA on three high level Al Qaeda detainees, two of whom were subjected to the technique numerous times, and, according to OMS, none of these three individuals has shown any evidence of physical pain or suffering or mental harm in the more than 25 months since the technique was used on them.<sup>20</sup>

- The Bradbury I memo's reliance on representations regarding medical monitoring of interrogations is highly problematic. It is a grave violation of professional ethics for doctors to participate in torture or cruel treatment, including by monitoring interrogation sessions where torturous or cruel methods are used.<sup>21</sup> The Constitution Project's bipartisan Task Force on Detainee Treatment unanimously concluded that

The Department of Justice should formally prohibit the Office of Legal Counsel from approving interrogation techniques based on representations that health providers will monitor the techniques and regulate the degree of physical and mental harm that interrogators may inflict. Health professionals cannot ethically condone any deliberate infliction of pain and suffering on detainees, even if it falls short of torture or cruel treatment.<sup>22</sup>

- The Bradbury I memo's representations about lack of pain, suffering or harm to detainees resulting from the approved techniques contradict the detainees' detailed accounts to the International Committee for the Red Cross, and court findings regarding detainees subjected to similar treatment in CIA prisons in Afghanistan.<sup>23</sup> The Obama administration takes the position that former black site detainees' medical records are classified, as are the detainees' memories about their treatment in CIA custody. However, one former CIA detainee, Abd al Rahim al-Nashiri, was recently diagnosed with depression and posttraumatic stress disorder by a military commission "sanity board."<sup>24</sup> Another, Abu Zubaydah, is alleged by his counsel to suffer from severe pain, memory loss, and frequent seizures as a result of his treatment at CIA black sites.<sup>25</sup>

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<sup>19</sup> *Id.* at 11-12.

<sup>20</sup> *Id.* at 15.

<sup>21</sup> Report of the Constitution Project's Task Force on Detainee Treatment (Apr. 2013) 233-241, available at <http://detaineeetaskforce.org>.

<sup>22</sup> *Id.* at 19.

<sup>23</sup> *Id.* at 212-218, 367-369.

<sup>24</sup> R.M.C. 206 Sanity Board Evaluation of Abd Al Rahim Hussayn Muhammad Al Nashiri, ISN#10015, Mar. 28, 2013, available at <http://media.miamiherald.com/smedia/2013/06/11/09/50/1iVHtz.S0.56.pdf>.

<sup>25</sup> Report of the Constitution Project's Task Force on Detainee Treatment (Apr. 2013) 211, available at <http://detaineeetaskforce.org>.

- According to Comey's emails, on May 31, 2005 he met with Attorney General Gonzales before a National Security Council principals committee meeting on the CIA program. Comey said he described the CIA techniques to Gonzales in graphic detail:

to demonstrate that some of this stuff is simply awful. I told him it would all come out some day and be presented in the way I was presenting it. I mentioned that I had heard there was a video of any early session, which would come out eventually....I explained that even he and Bradbury believed that the legal question was extremely close; and the details of what we are talking about, there needed to be a detailed factual discussion, followed by a full policy discussion. It would land on the President eventually [and] it simply could not be that the Princip[als] would be willfully blind.<sup>26</sup>

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<sup>26</sup> Email from James Comey to Chuck Rosenberg, May 31, 2005, available at <http://graphics8.nytimes.com/packages/images/nytint/docs/justice-department-communication-on-interrogation-opinions/original.pdf>.