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BEFORE THE

HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

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Chairman Nadler, Ranking Member Franks, Chairman Conyers, and Members of the Subcommittee, I appreciate the opportunity to appear before you today to address the Department of Justice's legal review of the CIA program of detention and interrogation.

A few basic points are worth stressing up front:

First, the CIA program is—and always has been—very narrow in scope; it is reserved for a small number of the most hardened terrorists believed to possess uniquely valuable intelligence—intelligence that could directly save lives. The program is operated in a professional manner, and all the methods of interrogation authorized for the program are subject to strict limitations and safeguards.

Second, the Justice Department's legal advice continues to reflect the principles set forth in our public December 2004 opinion to the Deputy Attorney General in which the Office of Legal Counsel explained our current interpretation of the federal statute prohibiting torture, and which rejected all torture as abhorrent to American values. All advice we have given since then has been consistent with the December 2004 opinion. Of course, many of the legal standards involved (some of which have only recently

become applicable to the CIA program) are quite general in nature, and their application can raise difficult questions about which reasonable people may disagree.

Third, although I cannot discuss classified details about the CIA program here, it is appropriate to stress that the program has been the subject of oversight by the Intelligence Committees of both Houses of Congress, and the classified details have been briefed to Members of those Committees and other leaders in Congress.

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In response to the attacks of 9/11, the Central Intelligence Agency has operated a program of detention and interrogation of certain high value al Qaeda terrorists captured in the War on Terror. It is important to remember that the program was initiated at a time when our knowledge of al Qaeda was more limited and when the possibility of a follow-on attack was thought to be imminent.

Fewer than one hundred terrorists have been detained by the CIA as part of this program since its inception in 2002. The President and CIA Director General Hayden have stated that this program has been one of the most valuable sources of intelligence to help prevent further mass terrorist attacks on the U.S. homeland and U.S. interests worldwide.

As the President and General Hayden have also stated, this program has involved the limited use of alternative (also called "enhanced") 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 guides 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 five-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 this program, and certain of the methods have been used on far fewer still. As General Hayden has disclosed, one interrogation method that has received considerable public attention, waterboarding, was used on only three individuals, and was never used after March 2003.

From the very beginning, the CIA has sought the views of the Department of Justice to ensure that its interrogation program complied with the law. In 2002, when the CIA was establishing the program and first sought advice, the relevant federal law applicable to the CIA program was the federal anti-torture statute, 18 U.S.C. §§ 2340-2340A, which prohibits government conduct occurring outside the United States that is intended to inflict severe physical or mental pain or suffering, as defined in the statute. Since then, new legal requirements have become applicable: Congress has passed the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006, and the Supreme Court held for the first time in *Hamdan v. Rumsfeld* that Common Article 3 of the Geneva Conventions applies to a worldwide armed conflict with an international terrorist organization—specifically, our armed conflict with al Qaeda.

After enactment of the Detainee Treatment Act in December 2005, the CIA commenced a comprehensive policy and operational review of the program, which

eventually resulted in a narrower set of proposed interrogation methods. While that process was underway, the Supreme Court handed down its decision in *Hamdan* in June 2006, and, in response to *Hamdan*, Congress enacted the Military Commissions Act in the fall of 2006, in part to ensure that the CIA could continue to operate its program in an effective form. Among other things, the Military Commissions Act amended the War Crimes Act to spell out the specific War Crimes Act provisions that apply in Common Article 3 conflicts. In addition, the Military Commission Act helped to clarify how the United States would apply Common Article 3.

In conjunction with the CIA's policy and operational review, OLC evaluated the legality of the narrower program against the new legal framework, including not only the Detainee Treatment Act but also the Military Commissions Act and Common Article 3.

The CIA program is now operated in accordance with the President's executive order of July 20th, 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.

Number one, of course, 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 the federal prohibition on torture, the prohibition on cruel, inhuman, or degrading treatment contained in the Detainee Treatment Act, and the prohibitions on grave breaches of Common Article 3 of the Geneva Conventions, as defined in the amended War Crimes Act.

Number two, the executive order makes clear that the program must be very narrow in scope, to include only those high-value terrorist detainees believed to possess critical knowledge of potential attack planning or the whereabouts of senior al Qaeda leadership. All detainees in the program must be afforded the basic necessities of life, including 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 and degrading personal abuse that rise to the level of an outrage upon personal dignity. The Director of the CIA must have rules and procedures in place to ensure compliance with the executive order, and he must personally approve each individual plan of interrogation before it is implemented.

As noted, the specifics of the program authorized today are not the same as they were in the initial years. The set of interrogation methods authorized for current use is narrower than before, and it does not today include waterboarding. As the Attorney General has made clear, before any additional interrogation method could be authorized for use in the program, three things would have to happen:

First, the Director of the CIA, together with the Director of National Intelligence, would have to determine that the new method is necessary to obtain information on terrorist attack planning or the location of senior al Qaeda leadership; second, the Attorney General would have to conclude that the use of the method, subject to all conditions, limitations, and safeguards proposed for its use, would be lawful under current law (and that includes the requirements of the Detainee Treatment Act, the Military Commissions Act, and Common Article 3); and, three, even if the Attorney

General concludes that the method's use is lawful, the President would have to personally authorize its use. In addition, Congress would be appropriately notified—including, per the commitment from the Attorney General, specific notification to the Judiciary Committees if there were a plan to add waterboarding to the program.

Let me be clear, though: There has been no determination by the Justice Department that the use of waterboarding, under any circumstances, would be lawful under current law.

While there is much we cannot say publicly about the CIA program, the Administration has briefed the Intelligence Committees on the operational details relating to the program, including all of the interrogation practices that have been employed, or are currently authorized to be employed, and the authorities supporting those practices.

I realize, Mr. Chairman, that these matters are controversial. Although many of the legal questions raised by the CIA program are difficult ones, and ones over which reasonable minds may differ, we believe that Congress and the American people should have confidence that the dedicated professionals at the CIA are working with honor to protect the country effectively and in accordance with the law.

Thank you, Mr. Chairman, and I look forward to the Committee's questions.