STATEMENT OF JOHN ASHCROFT

Hearing before the House Judiciary Committee
From the DOJ to Guantanamo Bay: Administration Lawyers and Administration Interrogation Rules

July 17, 2008

Mr. Chairman, thank you for the opportunity to testify about "United States policies regarding interrogation of persons in the custody of the nation's intelligence services and armed forces." This Committee's prior hearings on this topic have focused principally on three legal opinions authored by the Office of Legal Counsel in August 2002, March 2003, and December 2004. I served as Attorney General when each of these memos was written. Before delving into the specifics of those memos, I would like to make a few preliminary points.

First, during the weeks and months following September 11—and particularly in the summer of 2002, as the first anniversary of that tragic day approached—the Nation greeted each new day with justified awareness that al Qaeda was determined to strike us again. The daily report of national security threats prepared for the President by the intelligence agencies served as a chilling reminder of the danger we faced, and every morning brought new and pressing challenges. As I stated to the 9/11 Commission: "My day beg[an] with a review of the threats to Americans and to American interests that were received in the previous twenty-four hours. If ever there were proof of the existence of evil in the world, it is in the pages of these reports."

After seven years without an attack, it is perhaps easy to forget just how perilous that time was; easy to forget the daily headlines of foiled plots and new threats; easy to forget the color-coded threat levels and the nervous apprehension that hung in the air; easy to forget how strange it seemed to take our shoes off in airport security lines. But at the time—the summer of 2002—reminders of the peril we faced were all about us. During that summer both Zacarias Moussaoui, a confessed co-conspirator in 9/11, and John Walker Lindh, the American turned Taliban fighter, were being prosecuted by the Justice Department. It was also during that summer that the Department announced the disruption of Jose Padilla's plot to explode a dirty bomb, and the indictment of five leaders of the Islamic terrorist organization Abu Sayyaf. And in August of 2002 the first payments from the September 11 Victim Compensation Fund went out to the families of some of our murdered countrymen.

In short, we in the Justice Department were confronted with daily reminders that the lives of countless Americans depended on the effectiveness of our efforts to prevent another terrorist attack and that even the slightest mistake could result in tragedy. After 9/11, the Administration's overriding goal, which I fully embraced, was to do everything within its power and within the limits of the law—I repeat, within its power *and* within the limits of the law—to keep this country and the American people safe from terrorist attacks. If we had missed some piece of intelligence, or had failed to pursue vigorously every lead—if we had returned to a pre-9/11 way of doing business, with counterproductive firewalls and outdated laws and procedures—I might still be testifying here today, but the topic might be far different. As this Congress and the nation now turn to reevaluate that work with the altered perception of seven

years of safety, we would all do well to remember the danger we faced (and still face) and the potentially catastrophic consequences of error.

Second, the process we will discuss here today—the examination of difficult legal questions by OLC, and OLC's reassessment of its opinions when warranted by new concerns, conditions, or information—is a distinct virtue, and reflects this Administration's commitment to the rule of law. There is no room in the Justice Department for an assumption that its work is perfect, nor for an attitude of resistance to reconsideration. The Administration's continual—indeed, almost obsessive—quest for legal guidance and specific authorization for measures necessitated by the War on Terror is evidence of a government striving to keep within the limits of law, not one seeking to ignore or evade those limits. I make no claim that the Department's analyses of the difficult legal questions that arose during my tenure as Attorney General—questions often at the edges of our law—were always flawless, nor that our conclusions were always free from doubt. No Administration can lay claim to such a feat; nor can the oft-divided Supreme Court, which reverses itself, from time to time, on issues of the greatest national importance. I can and do claim, however, that as Attorney General I sought to ensure that the legal advice provided by the Department adhered to the highest professional standards of quality and integrity.

In rendering legal advice to the President and Executive Branch agencies, OLC is bound to respect and faithfully adhere to the holdings of relevant Supreme Court precedents. So, too, are the lower federal courts bound by Supreme Court precedents in deciding the issues that come before them. That is why, I submit, the Justice Department's legal positions in the major War on Terror cases—*Rasul*, *Hamdi*, *Hamdan*, and *Boumediene*—uniformly prevailed in the courts of appeals, courts in which Supreme Court precedent is binding. Indeed, the Department lost the vote of only one of the twelve court of appeals judges that heard these cases. The Department's positions, to be sure, did not fare as well when these cases reached the Supreme Court, but the Justices were closely divided in each of them. Unlike the courts of appeals and OLC, however, the Supreme Court is free to depart from its own precedents, and that is what it did, I submit, in these cases. But whether you agree with the 27 federal judges who ruled against the Department in these cases, or the 24 federal judges who agreed with the Department, it simply cannot be denied that each of these cases presented close and difficult issues on which reasonable people acting in good faith could disagree.

Which brings me to a related point about the work of the Justice Department, and of the OLC in particular. The Justice Department is located in the Executive Branch and serves both the institution of the presidency and the incumbent, democratically elected President, in whom the Constitution vests the executive power. OLC therefore differs from a court in that its responsibilities include facilitating the objectives of the offices and persons it serves, especially the President, consistent with the requirements of the law. And while OLC is bound to respect and adhere to Supreme Court precedent, that precedent is often genuinely open to more than one interpretation and thus contemplates an Executive Branch interpretive role. It follows, I believe, that when OLC is presented with a close and difficult legal question, one on which it cannot conclude that an Administration policy or course of action is legally foreclosed, OLC is obliged to so inform the President and to offer any advice it may have on steps that might be taken to reduce any legal uncertainty. It is difficult to imagine an area in which the imperative to afford

the President the benefit of genuine doubt is greater than with respect to his judgments as Commander-in-Chief on how best to protect the lives and liberty of the American people in the War on Terror.

To relate these points to actual legal issues addressed by OLC, let me return to the Supreme Court's decisions in *Rasul*, *Hamdi*, *Hamdan*, and *Boumediene*. Again, although the Supreme Court ultimately ruled against certain features of Administration policy in each of these cases, the Justices themselves were closely divided and the courts of appeals had uniformly upheld the Administration's positions. In one of those cases, we find the Court issuing six separate opinions. On questions plagued by significant uncertainty, on which the sharpest legal minds embrace differing legal analysis, it would have been inappropriate for OLC to constrain as unlawful the President's defense prerogatives.

The fourth point to keep in mind when examining the interrogation memos is that the Office of Legal Counsel provides just what its name implies: legal counsel. It is not a policymaking body, and it does not offer policy recommendations. It renders legal advice based upon its best reading of the existing law. To my recollection, nothing in the three interrogation memos advocates any particular policy or practice; the memos represented attempts to answer specific fact-bound legal questions posed to the Department regarding the reach of laws that might be implicated by interrogation practices. Legal analysis marks the beginning of policy analysis, not the end. The decision to pursue a policy within the legal boundaries recognized in an OLC memo was left to the relevant agencies.

The final preliminary point I would like to make is this: Before these hearings commenced, I had but a limited recollection of many of the events pertinent to your inquiry. In attempting to prepare for this hearing, I have reviewed testimony from prior hearings and have read portions of publications recounting some of the timely events. I must admit that it has become difficult for me to distinguish between what I in fact recall as a matter of my own experience and what I remember from the accounts of others. As a result, while I hope what I can say will be of value to the Committee, reliance on my statements and observations ought to be tempered by this awareness.

With these points in mind, let me turn now to some specifics about the OLC memos in question.

In March 2002, the United States and Pakistan captured Abu Zubaydah, al Qaeda's third-in-command, and the highest value capture up to that point. This was an event of overwhelming significance for the intelligence community. Former CIA Director George Tenet explained in his book, *At the Center of the Storm*, "Zubaydah and a small number of other extremely highly placed terrorists potentially had information that might save thousands of lives." Zubaydah was the chief military planner for al Qaeda, and he knew the identities and plans of many of its operatives. He was, however, highly resistant to standard interrogation techniques. In this setting, the Administration turned to OLC for general guidance as to the standard for interrogation of al Qaeda detainees outside the United States under 18 U.S.C. §§ 2340-2340A, commonly known as the anti-torture statute, and the Convention Against Torture and other Cruel, Inhuman, and Degrading Treatment or Punishment ("CAT"). OLC issued its opinion on

August 1, 2002, under the signature of Assistant Attorney General Jay Bybee. Press accounts have related that another still-classified memorandum gave more focused guidance on the legality of certain individual interrogation techniques.

In 2003, the Department of Defense requested that OLC provide an opinion on the scope of federal and international law standards governing military interrogation of *al Qaeda detainees* held outside of the United States, including at Guantanamo Bay, Cuba. The resulting opinion, issued on March 14, 2003, under the signature of Deputy Assistant Attorney General John Yoo, also addressed the anti-torture statute and the CAT, and its analysis of these provisions largely tracked the August 2002 opinion.

Mr. Yoo has testified to this Committee that OLC followed its normal process in preparing both of these highly classified legal opinions, including consultation with other components of the Justice Department and Executive Branch agencies. And he provided a fairly detailed account of the process that attended the preparation and issuance of the August 2002 opinion. My own memory is not nearly so detailed, but I do generally recall that I was made aware that a legal opinion relating to interrogation of al Qaeda detainees was being prepared by OLC, that a draft (or drafts) were provided to my office, that I was briefed on the general contours of the opinion's substantive analysis and on its conclusions, and that I approved of its issuance.

Thus, as best I can recall, the August 2002 interrogation opinion followed the normal review process in my office for such matters. In this regard, it is important to bear in mind that each week during my tenure as Attorney General—and especially following 9/11—scores of critically important matters came to my desk. During the time period in question—2002 and 2003—myriad opinions issued from OLC, many on urgent matters of national security; hundreds of criminal prosecutions were brought; hundreds of civil enforcement suits were filed by the Department's litigating divisions and U.S. Attorneys; scores of judicial candidates were considered and many nominations were made; dozens of corporate mergers were analyzed and decided; major legislative proposals were formulated and analyzed; the Solicitor General filed hundreds of briefs in the Supreme Court on issues of paramount importance, and on, and on, and on. In other words, while the focused nature of this congressional hearing might lead some to the impression that interrogation issues constituted the bulk of the Department's business from 2002 through 2004, the reality is that the entire Department of Justice marched on during this time, and it was my responsibility to oversee all of it. Necessarily then, I did what every Attorney General and Cabinet official must: I daily relied on the expert counsel and painstaking work of the experienced and skilled professionals who staff the Department.

With respect specifically to the March 2003 opinion, while I have no recollection of the process that attended its preparation by OLC or the review it received by my office, I have no reason to doubt the testimony of Mr. Yoo on this matter. Given that the relevant analysis in the March 2003 memo largely mirrored that of the earlier August 2002 memo, the fact that its review process is not particularly memorable to me is unsurprising.

Thus, the bottom line is that I treated the interrogation memos like I treated other critical matters percolating at the time: I relied on the professional staff in the Department to research,

formulate, and properly vet the analysis, to brief me on its general contours and bottom line, and to answer any questions I had. But it was no more feasible for me to read these memos line by line, and to pull the sources cited therein to double check their applicability, than it would have been for me to line edit and source-check the more than 300 briefs filed by the Solicitor General before the Supreme Court in 2002 and 2003.

It is now well known that Assistant Attorney General Jack Goldsmith withdrew the August 2002 and March 2003 memos during his tenure as head of the OLC. He did so with my knowledge and approval. The question will thus be asked: why did my office approve these memos in the first place and then approve their withdrawal? The answer is simply that, upon review of the memos, concerns were raised about the appropriateness of some of the analysis and that the memos addressed certain issues beyond those necessary to answer the narrow questions presented to the Department. I believe this process worked as it should have: when concerns were raised about the Department's work on any important matter, I directed the experts at the Department to reexamine its work and make any warranted adjustments.

The December 2004 memo that ultimately replaced the August 2002 memo advanced a narrower interpretation of the standard defined by the anti-torture statute. It also deleted unnecessary discussions of the scope of presidential power and potential defenses to prosecutions under the anti-torture statute. The memo did not, however, call into question any of the actual interrogation practices that the OLC had previously approved as legal. As the memo itself stated: "we have reviewed the Office's prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would have been different under the standards set forth in this memorandum." And as Attorney General Mukasey explained to the Senate just last week: "[I]t's fair to say that the conclusions—the ultimate bottom-line conclusions of those opinions were unchanged. That is that practices that were permitted under the laws that then existed were in fact permissible, although not for the reasons outlined in those opinions." One way to think about this is with an analogy. Imagine that a highway had a posted speed limit of 85 miles per hour, but the cars traveling upon it never moved faster than 65 miles per hour. Taking down the 85 miles-per-hour signs and putting up 65 miles-per-hour signs would not require a change in driving conduct: It would merely redefine the outer boundaries of what the drivers legally could do. That is precisely what happened with the interrogation advice rendered by the Department in 2002 and 2003: when I was informed about concerns regarding overly broad advice, the limits of which were never tested, I directed the OLC to correct it.

To the extent my memory will allow, and to the extent I am permitted under the guidance I have received from the Department of Justice[1], I will attempt to answer your questions.

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[1] Specifically, the guidance from the Department of Justice states:

> The Department of Justice does not object to former Attorney General Ashcroft's appearance before the House Judiciary Committee to testify on the general subjects identified in the letter to him of April 11, 2008 from Chairman Conyers, subject to limitations set forth herein. Specifically, the Department authorizes General Ashcroft to respond to questions in the following manner: He may discuss the conclusions reached and the reasoning supporting those conclusions

in particular unclassified or declassified legal opinions that have been publicly disclosed by the Department (such as the unclassified August 1, 2002 opinion addressing the anti-torture statute, the published December 30, 2004 opinion addressing the anti-torture statute, and the declassified March 14, 2003 opinion to the Department of Defense addressing interrogation standards). As a special accommodation of Congress's interest in this particular area, he may discuss in general terms which offices of the Executive Branch participated in the process that led to a particular opinion or policy decision, to the extent those opinions or policy decisions are now matters of public record. He is not authorized, however, to discuss specific deliberative communications, including the substance of comments on opinions or policy questions, or the confidential predecisional advice, recommendations, or other positions taken by individuals or entities of the Executive Branch.