U.S. House of Representatives
Committee on the Judiciary

Testimony of Daniel Levin
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Mr. Chairman and members of the Committee:

Thank you for inviting me to testify today. Since leaving government in 2005, I have avoided making any public statements on these matters. But I do believe that a public discussion and debate of the legal issues involved—and of the process by which legal opinions were issued and relied upon—is important. And I will do my best to answer your questions within the limits of what the Justice Department has authorized me to talk about.

I will avoid any substantive discussion of the issues in these opening remarks, but I would like to briefly make a couple of general points.

First, the legal issues we are going to discuss—in addition to being very important—are, in my view, also extremely difficult. Issues involving core presidential powers and the interplay between the President and Congress are among the most difficult I have ever tried to analyze. Although there have been significant decisions by the Supreme Court in recent years—and days—at the time many of these issues were being addressed following the horrific events of September 11, 2001, there was very little case law to guide the analysis. Arguments from the Framers' writings or historical practice are frequently murky at best. The stakes are high: you are often told that lives, and perhaps many lives, are at stake. And classification concerns often limit whom you can consult—a topic I'll address a little more in a moment. In short, they are just plain hard questions. And I think the debate would benefit if people on both sides acknowledged that fact and also perhaps showed a little more humility in stating their opinions. Lawyers who say the answers to some of these questions are obviously yes or clearly no are either a lot smarter than me or are oversimplifying things. And let me start that process—I tried my very best to answer these questions correctly, but I will be the first to say I may have gotten it wrong. And I'll have a little more to say about the consequences of that at the end of these remarks.

Second, in discussing these legal issues we need to be very precise about what question is being asked. To take an obvious example, if the question is "Is a certain technique torture," you first need to define exactly what the technique is. I expect we'll get into this some, but many words that are used to describe techniques do not have precise definitions and may cover a wide range of conduct. For example, sleep deprivation can vary significantly in duration. It can also vary significantly in how a person is kept awake. Those differences may well affect the legal analysis. The same is true for "waterboarding"—it has been used to cover a very wide range of practices that may require differences in analysis.

And it is also important to be precise about what you mean by "torture." There is a definition under U.S. law, where Congress has defined the term, although using words that I believe are very hard to apply—something I assume we will get to during the questioning. There is a different definition, or more accurately definitions, under international law—the Convention Against Torture being perhaps the most prominent. The definitions under U.S. law and under the Convention differ in significant respects when it comes to non-physical forms of torture. There is also the colloquial use of the term, which I believe differs from all of these definitions. And there are the Geneva Conventions, which use different terms but which certainly prohibit torture and much more.

This emphasis on precision in the terms used and questions asked may sound overly lawyerly—and I suppose in some sense it is. But we are talking here about legal questions that were being analyzed by lawyers giving legal advice. And I think that raises one of the most important issues in this area.

I think it is critical to remember that the legal analysis should begin, not end, the discussion of whether to do something. If something is illegal, than obviously it is not an option. However, if it is legal than it is only that—an option—and there should be a policy discussion about whether it is a good idea. Philip Zelikow gave an interesting talk about this and I agree with him that in this area in particular too often the legal analysis replaced the policy analysis. The question tended to become simply is it legal and if so we'll do it. I think that may have been understandable in the immediate aftermath of 9/11. But as time went on it became increasingly clear that many of the steps we were taking—even if legal—had significant costs, costs which might well outweigh any benefits we were receiving. This is just my personal view, but I think we were too slow to recognize some of those costs and adjust some of our policies accordingly.

Focusing on the legal analysis, I think there is a valuable process lesson to be learned from our experience in this area. The opinions I worked on benefitted enormously from comments from other parts of the Justice Department and the government. In particular, the opinion I wrote at the end of 2004 benefitted from detailed comments from lawyers at the State Department and the Criminal Division in Justice, although it bears repeating that any mistakes in that opinion are entirely my responsibility. There is an incredible wealth of legal talent around the government and I believe it is a mistake not to take advantage of it. You won't always agree with what other lawyers may have to say, but you almost always benefit from hearing it. I do not know why, but my understanding is that some of the earlier opinions were very tightly held and were not circulated for comments. I do not think that was justified by any legitimate concerns about classification or leaks. Rather, I think that was a mistake and that the opinions would have benefited from broader review.

Let me make two final points.

First, there has been reporting about certain steps I may have taken in working on opinions in this area. And some people have said some very flattering things about me. I am not authorized to discuss that matter. But I can say that while it is always nice to have such things said about you they are completely undeserved. I don't say that out of any sense of false modesty—the simple fact is that I did nothing that thousands and thousands of members of our military have not done during training. I simply took the steps I felt I needed to take in order to do the work I was privileged to be assigned and I deserve no special credit for that.

Finally, many, many people both at OLC and elsewhere in the government contributed to the opinions I wrote. I will not name them because I don't want them dragged into the public discussion but they know who they are and I am eternally grateful to them. Anything useful in those opinions is almost certainly attributable to them. That said, I alone am responsible for any errors in any opinions issued while I was in charge of OLC. I did my best to answer questions correctly—and hope I succeeded—but to the extent there are any errors I am the person—and the only person—responsible for them. And in particular, if anyone in the government acted on the basis of any legal advice I gave, and that advice turns out to be mistaken, I am the one who should be held accountable, not some agent or officer or soldier acting in good faith reliance on that advice. When someone in the government does the right thing by seeking legal advice, they should not then be punished if the advice turns out to be mistaken. It is an incredible privilege to be asked to work on these issues as a lawyer for the U.S. Government. We who have been privileged to serve as government lawyers are responsible for the advice we give, and I unconditionally and absolutely accept that responsibility.

I would be happy to try to answer any questions you may have.