MEMORANDUM

To: Mr. John Helgerson,
Inspector General, Central Intelligence Agency

From: Jack Goldsmith III
Assistant Attorney General, Office of Legal Counsel

Date: June 18, 2004

Re: "Special Review: Counterterrorism Detention and Interrogation Activities"

As I mentioned in my letter of 25 May 2004, the Department of Justice has recently had its first opportunity to review your report concerning the CIA's program of enhanced interrogation techniques. As a result of our review, we have concerns with two areas of ambiguity or mistaken characterizations in the report. I am writing, therefore, to request that you make some modifications to the report to clarify ambiguities or correct what we believe to be mistaken characterizations.

The first area of concern relates to a meeting of select National Security Council Principals on July 29, 2003. The Report states that at this meeting the Attorney General approved of "expanded use" of enhanced interrogation techniques. The reference to "expanded use" of techniques is somewhat ambiguous. In context, it appears to mean simply the use of approved techniques on other detainees in addition to the particular detainee (Abu Zubaydah) expressly addressed in an OLC opinion to the Acting General Counsel, John Rizzo, on August 1, 2002. If that is the intended meaning, the statement in the Report is entirely correct. In the attached addendum, therefore, we suggest some minor revisions to clarify this point.

On the second issue, OLC disagrees with the CIA's Office of General Counsel (OGC). The disagreement revolves around the status of a document containing a set of bullet points outlining legal principles and entitled "Legal Principles Applicable to CIA Detention and Interrogation of Captured Al-Qa'ida Personnel." The bullet points were drafted by OGC in consultation with OLC attorneys in the Spring of 2003. There is no dispute that OLC attorneys reviewed and provided comments on several drafts of the bullet points. In OGC's view, OGC secured formal OLC concurrence in the bullet points and thus believed that the bullet points reflected a formal statement of OLC's views of the law. OLC's view, however, is that the bullet points – which, unlike OLC opinions, are not signed or dated – were not and are not an opinion from OLC or formal statement of views. OLC also believes that the status of the bullet points was made clear at a

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meeting on June 17, 2003 soon after the Deputy Assistant Attorney General with whom OGC had consulted on the bullet points had departed from the Department of Justice.

In any event, when OGC, pursuant to a recommendation from your Report, sought an opinion from OLC confirming the conclusions outlined in the bullet points, the disagreement concerning the status of the bullet points became clear. As a result, I am suggesting revised language for the Report that I believe would accurately reflect the misunderstanding that arose concerning the bullet points.

I understand that you have already forwarded the Report in final form to the DCI. Where, however, the actions of another Department are described in the Report; where no personnel from that Department were interviewed in the preparation of the Report; and where that Department had no opportunity to comment on the Report in draft form we believe that it would make sense for your office to consider making the proposed revisions.

ADDENDUM

- p. 5, ¶ 10 After referring to the frequency of use of the waterboard, this paragraph states that "[t]he Agency, on 29 July 2003, secured oral DoJ concurrence that certain deviations are not significant for purposes of DoJ's legal opinions." To make clear that the "certain deviations" referred to here are the frequency of use of the waterboard, we recommend the following change. Strike the last sentence of the paragraph and replace with the following two sentences:

  > "In July 2003, selected Principals of the National Security Council, including the Attorney General, were briefed concerning the number of times the waterboard had been administered to certain detainees. The Attorney General expressed the view that, while appropriate caution should be exercised in the number of times the waterboard was administered, the repetitions described did not contravene the principles underlying DOJ's August 2002 opinion."

- p. 7, ¶ 17 Insert after the phrase "has been subject to DoJ legal review" the following: ", as described elsewhere in this Report,".

- p. 20, ¶ 41 Insert the phrase, "the torture provisions of" between the word "violate" and the phrase "the Torture Convention." It is clear from the context of this letter, which never discusses any provisions of the Convention except those addressing torture, that it is meant to address only the torture provisions.

- pp. 22-23, ¶ 44 This paragraph addresses the bullet points and we recommend two revisions.

  1). Strike the sentence that reads, "According to OGC, this analysis was fully coordinated with and drafted in substantial part by OLC." Replace it with the following: "This analysis was drafted by OGC in consultation with attorneys from OLC."

  2). The last sentence of the paragraph contains two points of concern. First, touching upon the point of disagreement between OGC and OLC, it suggests that the bullet points constitute formal views of the Department of Justice. Second, it has the potentially sweeping and unqualified statement that the meaning of the bullet points is that the reasoning of the 1 August 2002 OLC opinion "extends beyond . . . the conditions that were specified in that opinion." We therefore recommend striking the last sentence of the paragraph and replacing it with the following:

[redacted]

"OGC has explained that it believed that the document reflected a formal statement of views from OLC on the topics addressed. OLC, however, has stated that it does not consider that document, which (unlike OLC opinions) is not dated or signed, either to be an OLC opinion or to reflect formal OLC advice. OLC has also stated that it has not fully analyzed or evaluated some of the legal positions set forth in the document."

- p. 24, ¶ 48 This paragraph contains the ambiguous statement that the Attorney General "approved of the expanded use of various EITs." To clarify what we believe to be the intended meaning here, we recommend the following revisions.

  1). Strike the phrase "to include the expanded use of EITs" from the end of the first sentence.

  2). Insert the following sentence after the first sentence: "Specifically, the Principals were briefed concerning the number of times the waterboard had been administered to certain detainees and concerning the fact that the program had been expanded to detainees other than the individual (Abu Zubaydah) who had been the subject of specific DOJ advice in August 2002."

  3). After the sentence beginning "According to a Memorandum for the Record prepared by the General Counsel," insert the following: "Specifically, the Attorney General expressed the view that the legal principles reflected in DOJ's specific original advice could appropriately be extended to allow use of the same approved techniques (under the same conditions and subject to the same safeguards) to other individuals besides the subject of DOJ's specific original advice. The Attorney General also expressed the view that, while appropriate caution should be exercised in the number of times the waterboard was administered, the repetitions described did not contravene the principles underlying DOJ's August 2002 opinion."

  In addition, this paragraph states that "the senior officials were again briefed regarding the CTC Program on 16 September 2003." That statement seems to suggest that the *same* officials who were present at the 29 July meeting were also present at the 16 September meeting. The Attorney General, however, was not present at the meeting on 16 September, nor was any official of the Department of Justice. We request that the sentence be modified to read: "senior officials, not including the Attorney General, were again briefed . . .".

- pp. 44-45, ¶ 99 For reasons already explained, we recommend the following change:

1). Delete the second to last sentence. Insert at the start of the last sentence "In July 2003." Finally, insert after the last sentence the following: "The Attorney General expressed the view that, while appropriate caution should be exercised in the number of times the waterboard was administered, the repetitions described did not contravene the principles underlying DOJ's August 2002 opinion."

- p. 95, ¶ 234 Insert the following before the last sentence: "The General Counsel's statement is consistent with the 2003 document drafted by OGC in consultation with OLC. In the General Counsel's view, he had understood, in good faith, that this document represented OLC's opinion on the subjects it addressed. OLC has stated that it does not consider that document, which (unlike an OLC opinion) is not dated or signed, either to be an OLC opinion or to reflect formal OLC advice. OLC has also stated that it has not fully analyzed or evaluated some of the legal positions set forth in the document."

- p. 101, ¶ 254

  1). Insert the following after the third sentence: "Specifically, the officials were briefed concerning the number of times the waterboard had been administered to certain detainees and concerning the fact that the program had been expanded to detainees other than the individual (Abu Zubaydah) who had been the subject of specific DOJ advice in August 2002."

  2). Replace the final sentence with the following: "At that time, the Attorney General expressed the view that the legal principles reflected in DOJ's specific original advice could appropriately be extended to allow use of the same approved techniques (under the same conditions and subject to the same safeguards) to other individuals besides the subject of DOJ's specific original advice. The Attorney General also expressed the view that, while appropriate caution should be exercised in the number of times the waterboard was administered, the repetitions described did not contravene the principles underlying DOJ's August 2002 opinion."

- p. 101, ¶ 255: replace the phrase "has been subject to DoJ legal review" to "has been subject to the DoJ legal review described elsewhere in this Report."

- Appendix B.

  - 2002 August: Change "would not violate US law" to "would not violate 18 U.S.C. §§ 2340 – 2340A or the prohibition on torture in the Convention Against Torture."