

WAR ON TERROR

Secret US Endorsement of Severe Interrogations

By Scott Shane, David Johnston and James Risen in Washington

Reports of unacceptable interrogation techniques led to a shake up in policy and staff at the Justice Department in 2004. After Alberto Gonzales' arrival, the public started hearing things had changed, but new reports claim that things remained the same -- or worsened.



DPA

If emerging reports are true, Alberto Gonzales' Justice Department issued interrogation instructions to the CIA quite different than the ones it publicly espoused.

When the Justice Department publicly declared torture "abhorrent" in a legal opinion in December 2004, the Bush administration appeared to have abandoned its assertion of nearly unlimited presidential authority to order brutal interrogations.

But soon after Alberto R. Gonzales's arrival as attorney general in February 2005, the Justice Department issued another opinion, this one in secret. It was a very different document, according to officials briefed on it, an expansive endorsement of the harshest interrogation techniques ever used by the Central Intelligence Agency.

The new opinion, the officials said, for the first time provided explicit authorization to barrage terror suspects with a combination of painful physical and psychological tactics, including head-slapping, simulated drowning and frigid temperatures.

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The New York Times

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Mr. Gonzales approved the legal memorandum on "combined effects" over the objections of James B. Comey, the deputy attorney general, who was leaving his job after bruising clashes with the White House. Disagreeing with what he viewed as the opinion's overreaching legal reasoning, Mr. Comey told colleagues at the department that they would all be "ashamed" when the world eventually learned of it.

Later that year, as Congress moved toward outlawing "cruel, inhuman and degrading" treatment, the Justice

Department issued another secret opinion, one most lawmakers did not know existed, current and former officials said. The Justice Department document declared that none of the C.I.A. interrogation methods violated that standard.

The classified opinions, never previously disclosed, are a hidden legacy of President Bush's second term and Mr. Gonzales's tenure at the Justice Department, where he moved quickly to align it with the White House after a 2004 rebellion by staff lawyers that had thrown policies on surveillance and detention into turmoil.

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Congress and the Supreme Court have intervened repeatedly in the last two years to impose limits on interrogations, and the administration has responded as a policy matter by dropping the most extreme techniques. But the 2005 Justice Department opinions remain in effect, and their legal conclusions have been confirmed by several more recent memorandums, officials said. They show how the White House has succeeded in preserving the broadest possible legal latitude for harsh tactics.

A White House spokesman, Tony Fratto, said Wednesday that he would not comment on any legal opinion related to interrogations. Mr. Fratto added, "We have gone to great lengths, including statutory efforts and the recent executive order, to make it clear that the intelligence community and our practices fall within U.S. law" and international agreements.

More than two dozen current and former officials involved in counterterrorism were interviewed over the past three months about the opinions and the deliberations on interrogation policy. Most officials would speak only on the condition of anonymity

because of the secrecy of the documents and the C.I.A. detention operations they govern.

When he stepped down as attorney general in September after widespread criticism of the firing of federal prosecutors and withering attacks on his credibility, Mr. Gonzales talked proudly in a farewell speech of how his department was "a place of inspiration" that had balanced the necessary flexibility to conduct the war on terrorism with the need to uphold the law.

Associates at the Justice Department said Mr. Gonzales seldom resisted pressure from Vice President Dick Cheney and David S. Addington, Mr. Cheney's counsel, to endorse policies that they saw as effective in safeguarding Americans, even though the practices brought the condemnation of other governments, human rights groups and Democrats in Congress. Critics say Mr. Gonzales turned his agency into an arm of the Bush White House, undermining the department's independence.

The interrogation opinions were signed by Steven G. Bradbury, who since 2005 has headed the elite Office of Legal Counsel at the Justice Department. He has become a frequent public defender of the National Security Agency's domestic surveillance program and detention policies at Congressional hearings and press briefings, a role that some legal scholars say is at odds with the office's tradition of avoiding political advocacy.

Mr. Bradbury defended the work of his office as the government's most authoritative interpreter of the law. "In my experience, the White House has not told me how an opinion should come out," he said in an interview. "The White House has accepted and respected our opinions, even when they didn't like the advice being given."

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The debate over how terrorism suspects should be held and questioned began shortly after the Sept. 11, 2001, attacks, when the Bush administration adopted secret detention and coercive interrogation, both practices the United States had previously denounced when used by other countries. It adopted the new measures without public debate or Congressional vote, choosing to rely instead on the confidential legal advice of a handful of appointees.

The policies set off bruising internal battles, pitting administration moderates against hard-liners, military lawyers against Pentagon chiefs and, most surprising, a handful of conservative lawyers at the Justice Department against the White House in the stunning mutiny of 2004. But under Mr. Gonzales and Mr. Bradbury, the Justice Department was wrenched back into line with the White House.

After the Supreme Court ruled in 2006 that the Geneva Conventions applied to prisoners who belonged to Al Qaeda, President Bush for the first time acknowledged the C.I.A.'s secret jails and ordered their inmates moved to Guantánamo Bay, Cuba.

The C.I.A. halted its use of waterboarding, or pouring water over a bound prisoner's cloth-covered face to induce fear of suffocation.

But in July, after a monthlong debate inside the administration, President Bush signed a new executive order authorizing the use of what the administration calls "enhanced" interrogation techniques -- the details remain secret -- and officials say the C.I.A. again is holding prisoners in "black sites" overseas. The executive order was reviewed and approved by Mr. Bradbury and the Office of Legal Counsel.

Douglas W. Kmiec, who headed that office under President Ronald Reagan and the first President George Bush and wrote a book about it, said he believed the intense pressures of the campaign against terrorism have warped the office's proper role.

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"The office was designed to insulate against any need to be an advocate," said Mr. Kmiec, now a conservative scholar at Pepperdine University law school. But at times in recent years, Mr. Kmiec said, the office, headed by William H. Rehnquist and Antonin Scalia before they served on the Supreme Court, "lost its ability to say no."

"The approach changed dramatically with opinions on the war on terror," Mr. Kmiec said. "The office became an advocate for the president's policies."

From the secret sites in Afghanistan, Thailand and Eastern Europe where C.I.A. teams held Qaeda terrorists, questions for the lawyers at C.I.A. headquarters arrived daily. Nervous interrogators wanted to know: Are we breaking the laws against torture?

The Bush administration had entered uncharted legal territory beginning in 2002, holding prisoners outside the scrutiny of the International Red Cross and subjecting them to harrowing pressure tactics. They included slaps to the head; hours held naked in a frigid cell; days and nights without sleep while battered by thundering rock music; long periods manacled in stress positions; or the ultimate, waterboarding.

Never in history had the United States authorized such tactics. While President Bush and C.I.A. officials would later insist that the harsh measures produced crucial intelligence, many veteran interrogators, psychologists and other experts say that less coercive methods are equally or more effective.

With virtually no experience in interrogations, the C.I.A. had constructed its program in a few harried months by consulting Egyptian and Saudi intelligence officials and copying Soviet interrogation methods long used in training American servicemen to withstand capture. The agency officers questioning prisoners constantly sought advice from lawyers thousands of miles away.

"We were getting asked about combinations -- 'Can we do this and this at the same time?'" recalled Paul C. Kelbaugh, a veteran intelligence lawyer who was deputy legal counsel at the C.I.A.'s Counterterrorist Center from 2001 to 2003.

Interrogators were worried that even approved techniques had such a painful, multiplying effect when combined that they might cross the legal line, Mr. Kelbaugh said. He recalled agency officers asking: "These approved techniques, say, withholding food, and 50-degree temperature -- can they be combined?" Or "Do I have to do the less extreme before the more extreme?"

The questions came more frequently, Mr. Kelbaugh said, as word spread about a C.I.A. inspector general inquiry unrelated to the war on terrorism. Some veteran C.I.A. officers came under scrutiny because they were advisers to

Peruvian officers who in early 2001 shot down a missionary flight they had mistaken for a drug-running aircraft. The Americans were not charged with crimes, but they endured three years of investigation, saw their careers derailed and ran up big legal bills.

That experience shook the Qaeda interrogation team, Mr. Kelbaugh said. "You think you're making a difference and maybe saving 3,000 American lives from the next attack. And someone tells you, 'Well, that guidance was a little vague, and the inspector general wants to talk to you,'" he recalled. "We couldn't tell them, 'Do the best you can,' because the people who did the best they could in Peru were looking at a grand jury."

Mr. Kelbaugh said the questions were sometimes close calls that required consultation with the Justice Department. But in August 2002, the department provided a sweeping legal justification for even the harshest tactics.

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That opinion, which would become infamous as "the torture memo" after it was leaked, was written largely by John Yoo, a young Berkeley law professor serving in the Office of Legal Counsel. His broad views of presidential power were shared by Mr. Addington, the vice president's adviser. Their close alliance provoked John Ashcroft, then the attorney general, to refer privately to Mr. Yoo as Dr. Yes for his seeming eagerness to give the White House whatever legal justifications it desired, a Justice Department official recalled.

Mr. Yoo's memorandum said no interrogation practices were illegal unless they produced pain equivalent to organ failure or "even death." A second memo produced at the same time spelled out the approved practices and how often or how long they could be used.

Despite that guidance, in March 2003, when the C.I.A. caught Khalid Sheikh Mohammed, the chief planner of the Sept. 11 attacks, interrogators were again haunted by uncertainty. Former intelligence officials, for the first time, disclosed that a variety of tough interrogation tactics were used about 100 times over two weeks on Mr. Mohammed. Agency officials then ordered a halt, fearing the combined assault might have amounted to illegal torture. A C.I.A. spokesman, George Little, declined to discuss the handling of Mr. Mohammed. Mr. Little said the program "has been conducted lawfully, with great care and close review" and "has helped our country disrupt terrorist plots and save innocent lives."

"The agency has always sought a clear legal framework, conducting the program in strict accord with U.S. law, and protecting the officers who go face-to-face with ruthless terrorists," Mr. Little added.

Some intelligence officers say that many of Mr. Mohammed's statements proved exaggerated or false. One problem, a former senior agency official said, was that the C.I.A.'s initial interrogators were not experts on Mr. Mohammed's background or Al Qaeda, and it took about a month to get such an expert to the secret prison. The former official said many C.I.A. professionals now believe patient, repeated questioning by well-informed experts is more effective than harsh physical pressure.

Other intelligence officers, including Mr. Kelbaugh, insist that the harsh treatment produced invaluable insights into Al Qaeda's structure and plans.

"We leaned in pretty hard on K.S.M.," Mr. Kelbaugh said, referring to Mr. Mohammed. "We were getting good information, and then they were told: 'Slow it down. It may not be correct. Wait for some legal clarification.'"

The doubts at the C.I.A. proved prophetic. In late 2003, after Mr. Yoo left the Justice Department, the new head of the Office of Legal Counsel, Jack Goldsmith, began reviewing his work, which he found deeply flawed. Mr. Goldsmith infuriated White House officials, first by rejecting part of the National Security Agency's surveillance program, prompting the threat of mass resignations by top Justice Department officials, including Mr. Ashcroft and Mr. Comey, and a showdown at the attorney general's hospital bedside.

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Then, in June 2004, Mr. Goldsmith formally withdrew the August 2002 Yoo memorandum on interrogation, which he found overreaching and poorly reasoned. Mr. Goldsmith left the Justice Department soon afterward. He first spoke at length about his dissenting views to The New York Times last month, and testified before the Senate Judiciary Committee on Tuesday.

Six months later, the Justice Department quietly posted on its Web site a new legal opinion that appeared to end any flirtation with torture, starting with its clarionlike opening: "Torture is abhorrent both to American law and values and to international norms."

A single footnote -- added to reassure the C.I.A. -- suggested that the Justice Department was not declaring the agency's previous actions illegal. But the opinion was unmistakably a retreat. Some White House officials had opposed publicizing the document, but acquiesced to Justice Department officials who argued that doing so would help clear the way for Mr. Gonzales's confirmation as attorney general.

If President Bush wanted to make sure the Justice Department did not rebel again, Mr. Gonzales was the ideal choice. As White House counsel, he had been a fierce protector of the president's prerogatives. Deeply loyal to Mr. Bush for championing his career from their days in Texas, Mr. Gonzales would sometimes tell colleagues that he had just one

regret about becoming attorney general: He did not see nearly as much of the president as he had in his previous post.

Among his first tasks at the Justice Department was to find a trusted chief for the Office of Legal Counsel. First he informed Daniel Levin, the acting head who had backed Mr. Goldsmith's dissents and signed the new opinion renouncing torture, that he would not get the job. He encouraged Mr. Levin to take a position at the National Security Council, in effect sidelining him.

Mr. Bradbury soon emerged as the presumed favorite. But White House officials, still smarting from Mr. Goldsmith's rebuffs, chose to delay his nomination. Harriet E. Miers, the new White House counsel, "decided to watch Bradbury for a month or two. He was sort of on trial," one Justice Department official recalled.

Mr. Bradbury's biography had a Horatio Alger element that appealed to a succession of bosses, including Justice Clarence Thomas of the Supreme Court and Mr. Gonzales, the son of poor immigrants. Mr. Bradbury's father had died when he was an infant, and his mother took in laundry to support her children. The first in his family to go to college, he attended Stanford and the University of Michigan Law School. He joined the law firm of Kirkland & Ellis, where he came under the tutelage of Kenneth W. Starr, the Whitewater independent prosecutor.

Mr. Bradbury belonged to the same circle as his predecessors: young, conservative lawyers with sterling credentials, often with clerkships for prominent conservative judges and ties to the Federalist Society, a powerhouse of the legal right. Mr. Yoo, in fact, had proposed his old friend Mr. Goldsmith for the Office of Legal Counsel job; Mr. Goldsmith had hired Mr. Bradbury as his top deputy.

"We all grew up together," said Viet D. Dinh, an assistant attorney general from 2001 to 2003 and very much a member of the club. "You start with a small universe of Supreme Court clerks, and you narrow it down from there."

But what might have been subtle differences in quieter times now cleaved them into warring camps.

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Justice Department colleagues say Mr. Gonzales was soon meeting frequently with Mr. Bradbury on national security issues, a White House priority. Admirers describe Mr. Bradbury as low-key but highly skilled, a conciliator who brought from 10 years of corporate practice a more pragmatic approach to the job than Mr. Yoo and Mr. Goldsmith, both from the academic world.

"As a practicing lawyer, you know how to address real problems," said Noel J. Francisco, who worked at the Justice Department from 2003 to 2005. "At O.L.C., you're not writing law review articles and you're not theorizing. You're giving a client practical advice on a real problem."

As he had at the White House, Mr. Gonzales usually said little in meetings with other officials, often deferring to the hard-driving Mr. Addington. Mr. Bradbury also often appeared in accord with the vice president's lawyer.

Mr. Bradbury appeared to be "fundamentally sympathetic to what the White House and the C.I.A. wanted to do," recalled Philip Zelikow, a former top State Department official. At interagency meetings on detention and interrogation, Mr. Addington was at times "vituperative," said Mr. Zelikow, but Mr. Bradbury, while taking similar positions, was "professional and collegial."

While waiting to learn whether he would be nominated to head the Office of Legal Counsel, Mr. Bradbury was in an awkward position, knowing that a decision contrary to White House wishes could kill his chances.

Charles J. Cooper, who headed the Office of Legal Counsel under President Reagan, said he was "very troubled" at the notion of a probationary period.

"If the purpose of the delay was a tryout, I think they should have avoided it," Mr. Cooper said. "You're implying that the acting official is molding his or her legal analysis to win the job."

Mr. Bradbury said he made no such concessions. "No one ever suggested to me that my nomination depended on how I ruled on any opinion," he said. "Every opinion I've signed at the Office of Legal Counsel represents my best judgment of what the law requires."

Scott Horton, an attorney affiliated with Human Rights First who has closely followed the interrogation debate, said any official offering legal advice on the campaign against terror was on treacherous ground.

"For government lawyers, the national security issues they were deciding were like working with nuclear waste -- extremely hazardous to their health," Mr. Horton said.

"If you give the administration what it wants, you'll lose credibility in the academic community," he said. "But if you hold back, you'll be vilified by conservatives and the administration."

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In any case, the White House grew comfortable with Mr. Bradbury's approach. He helped block the appointment of a liberal Ivy League law professor to a career post in the Office of Legal Counsel. And he signed the opinion approving combined interrogation techniques.

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Mr. Comey strongly objected and told associates that he advised Mr. Gonzales not to endorse the opinion. But the attorney general made clear that the White House was adamant about it, and that he would do nothing to resist.

Under Mr. Ashcroft, Mr. Comey's opposition might have killed the opinion. An imposing former prosecutor and self-described conservative who stands 6-foot-8, he was the rare administration official who was willing to confront Mr. Addington. At one testy 2004 White House meeting, when Mr. Comey stated that "no lawyer" would endorse Mr. Yoo's justification for the N.S.A. program, Mr. Addington demurred, saying he was a lawyer and found it convincing. Mr. Comey shot back: "No good lawyer," according to someone present.

But under Mr. Gonzales, and after the departure of Mr. Goldsmith and other allies, the deputy attorney general found himself isolated. His troublemaking on N.S.A. and on interrogation, and in appointing his friend Patrick J. Fitzgerald as special prosecutor in the C.I.A. leak case, which would lead to the perjury conviction of I. Lewis Libby, Mr. Cheney's chief of staff, had irreparably offended the White House.

"On national security matters generally, there was a sense that Comey was a wimp and that Comey was disloyal," said one Justice Department official who heard the White House talk, expressed with particular force by Mr. Addington.

Mr. Comey provided some hints of his thinking about interrogation and related issues in a speech that spring. Speaking at the N.S.A.'s Fort Meade campus on Law Day -- a noteworthy setting for the man who had helped lead the dissent a year earlier that forced some changes in the N.S.A. program - Mr. Comey spoke of the "agonizing collisions" of the law and the desire to protect Americans.

"We are likely to hear the words: 'If we don't do this, people will die,'" Mr. Comey said. But he argued that government lawyers must uphold the principles of their great institutions.

"It takes far more than a sharp legal mind to say 'no' when it matters most," he said. "It takes moral character. It takes an understanding that in the long run, intelligence under law is the only sustainable intelligence in this country."

Mr. Gonzales's aides were happy to see Mr. Comey depart in the summer of 2005. That June, President Bush nominated Mr. Bradbury to head the Office of Legal Counsel, which some colleagues viewed as a sign that he had passed a loyalty test.

Soon Mr. Bradbury applied his practical approach to a new challenge to the C.I.A.'s methods.

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The administration had always asserted that the C.I.A.'s pressure tactics did not amount to torture, which is banned by federal law and international treaty. But officials had privately decided the agency did not have to comply with another provision in the Convention Against Torture -- the prohibition on "cruel, inhuman, or degrading" treatment.

Now that loophole was about to be closed. First Senator Richard J. Durbin, Democrat of Illinois, and then Senator John McCain, the Arizona Republican who had been tortured as a prisoner in North Vietnam, proposed legislation to ban such treatment.

At the administration's request, Mr. Bradbury assessed whether the proposed legislation would outlaw any C.I.A. methods, a legal question that had never before been answered by the Justice Department.

At least a few administration officials argued that no reasonable interpretation of "cruel, inhuman or degrading" would permit the most extreme C.I.A. methods, like

waterboarding. Mr. Bradbury was placed in a tough spot, said Mr. Zelikow, the State Department counselor, who was working at the time to rein in interrogation policy.

"If Justice says some practices are in violation of the C.I.D. standard," Mr. Zelikow said, referring to cruel, inhuman or degrading, "then they are now saying that officials broke current law."

In the end, Mr. Bradbury's opinion delivered what the White House wanted: a statement that the standard imposed by Mr. McCain's Detainee Treatment Act would not force any change in the C.I.A.'s practices, according to officials familiar with the memo.

Relying on a Supreme Court finding that only conduct that "shocks the conscience" was unconstitutional, the opinion found that in some circumstances not even waterboarding was necessarily cruel, inhuman or degrading, if, for example, a suspect was believed to possess crucial intelligence about a planned terrorist attack, the officials familiar with the legal finding said.

In a frequent practice, Mr. Bush attached a statement to the new law when he signed it, declaring his authority to set aside the restrictions if they interfered with his constitutional powers. At the same time, though, the administration responded to pressure from Mr. McCain and other lawmakers by reviewing interrogation policy and giving up several C.I.A. techniques.

Since late 2005, Mr. Bradbury has become a linchpin of the administration's defense of counterterrorism programs, helping to negotiate the Military Commissions Act last year and frequently testifying about the N.S.A. surveillance

program. Once he answered questions about administration detention policies for an "Ask the White House" feature on a Web site.

Mr. Kmiec, the former Office of Legal Counsel head now at Pepperdine, called Mr. Bradbury's public activities a departure for an office that traditionally has shunned any advocacy role.

A senior administration official called Mr. Bradbury's active role in shaping legislation and speaking to Congress and the press "entirely appropriate" and consistent with past practice. The official, who spoke on the condition of anonymity, said Mr. Bradbury "has played a critical role in achieving greater transparency" on the legal basis for detention and surveillance programs.

Though President Bush repeatedly nominated Mr. Bradbury as the Office of Legal Counsel's assistant attorney general, Democratic senators have blocked the nomination. Senator Durbin said the Justice Department would not turn over copies of his opinions or other evidence of Mr. Bradbury's role in interrogation policy.

"There are fundamental questions about whether Mr. Bradbury approved interrogation methods that are clearly unacceptable," Mr. Durbin said.

John D. Hutson, who served as the Navy's top lawyer from 1997 to 2000, said he believed that the existence of legal opinions justifying abusive treatment is pernicious, potentially blurring the rules for Americans handling prisoners.

"I know from the military that if you tell someone they can do a little of this for the country's good, some people will do a lot of it for the country's better," Mr. Hutson said. Like other military lawyers, he also fears that official American acceptance of such treatment could endanger Americans in the future.

"The problem is, once you've got a legal opinion that says such a technique is O.K., what happens when one of our people is captured and they do it to him? How do we protest then?" he asked.

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