

OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE
WASHINGTON, DC 20511

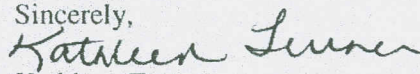
November 17, 2008

The Honorable Carl Levin
Chairman
Committee on Armed Services
United States Senate
Washington, DC 20510

The Honorable John McCain
Ranking Member
Committee on Armed Services
United States Senate
Washington, DC 20510

Dear Mr. Chairman and Ranking Member McCain:

Attached please find an unclassified paper prepared by Mr. Jonathan Fredman, at his own initiative, reflecting his views, regarding matters that may be relevant to your committee's inquiry into the treatment of detainees in U.S. custody. This information is not being provided as a notification from the Office of the Director of National Intelligence (ODNI). Mr. Fredman is currently assigned to the ODNI and he requested that we make this information available to your committee.

Sincerely,

Kathleen Turner
Director of Legislative Affairs

Enclosure

- At last summer's Senate Foreign Relations Committee hearing, notes from a meeting at Guantanamo Bay were read into the record. Those notes, which were misleadingly labeled by their author as "minutes," to the best of my knowledge were never circulated for comment, and contain several serious misstatements of fact. Those misstatements were then compounded by the false allegation at the hearing that the so-called minutes contained quotations from me; the first page of those so-called minutes themselves expressly states that "all questions and comments have been paraphrased" -- and, I might add, paraphrased sloppily and poorly.
- On September 11, 2001, I was the chief legal counsel for the CIA Counterterrorist Center, or CTC. I was at the time, and remain, a career Federal employee not beholden to any political party or particular Administration. Among my responsibilities were to provide legal advice to the Director of CTC about proposed and ongoing operations conducted pursuant to written Presidential direction to CIA provided following the attacks of 9/11. The set of questions provided were novel, to say the least, and not the sort of matters I had envisioned when deciding upon a legal career. Nor did I, or my colleagues, enthusiastically welcome the requirements to address issues such as detention or interrogation. However, it was our duty to examine those matters, and to provide legal advice so that the Counterterrorist Center could perform its functions to protect American lives effectively and, critically, within the law.
- Director Hayden has spoken about the need for CIA to remain within the bounds of the law, employing the metaphor of a team that must remain within the

boundaries of the playing field. He has observed that prior to 9/11, the Agency stayed well within those boundaries, ensuring a buffer zone between the area of its operations and the chalk lines delineating the borders of the playing field, but that after 9/11 we had no such luxury to stay far away from the chalk lines with the lives of thousands at stake. In light of the thousands murdered in the attacks, and the prospects of thousands additional Americans killed if we were to refrain from lawful activities that could avert the subsequent attacks, CIA would have to accept chalk marks on its shoes if necessary, while still remaining in bounds, to protect the lives of our people.

- The determination of necessity was one for the leadership to make, of course, and not for the attorneys. However, the serious nature of the issues and the consequences of error made it essential for the lawyers to determine just where the legal chalk lines lay. I found no pleasure in those tasks, and on more than one occasion I offered the respective General Counsels my voluntary departure from CTC if they so desired. But each time I was asked to remain, and so I stayed at my post in CTC until early April 2004.
- As the chief counsel for CTC, I managed a legal staff that grew from three people in the days immediately before 9/11 to approximately 10 people thereafter. I authored thousands of cables and e-mails on an extremely wide range of matters to CIA officers serving at home and abroad, and I coordinated -- that is, reviewed prior to release -- literally thousands of other communications written by others. One thing I continually emphasized to my legal staff, and to my non-legal colleagues elsewhere in CTC, was the need to ensure that any statement providing

a legal opinion expressly state the underlying rationale for the legal conclusion.

We live in a world of complexity and of valuable post facto review, and for both of those reasons I required that the materials addressing legal topics must be clear and comprehensive.

- Accordingly, I had many opportunities throughout my time in CTC to provide written guidance about the legal considerations applicable to the Presidential directions to CIA, the Agency's proposals for the implementation of those directions, and its ongoing operations. In particular, I provided explicit written guidance on the very same subjects that are addressed in the so-called minutes of that October 2002 meeting at Guantanamo Bay. I have asked that that guidance be provided to the Congress for its own review, along with my written report of that meeting. I specifically addressed the provisions of the Federal anti-torture statute and the penalties for its violation. I strongly emphasized that those penalties are severe, and I expressly warned that should a detainee die as a result of a violation, the responsible parties could be sentenced to capital punishment.
- I also emphasized that the requirements of the statute are not, and cannot be, a matter for individual perception. The question of whether specific conduct would be torture, for example, and therefore criminal under the anti-torture statute cannot depend upon whether any particular officer believes that the proposed conduct would or would not produce "severe pain or suffering" or, instead, would simply produce some lesser degree of discomfort. In light of the importance of the issue, CIA sought an authoritative statement of Federal law from the Department of Justice, whose Office of Legal Counsel provides the legal advice

which is binding upon all Federal departments, agencies, and employees. We did so specifically to *avoid* having the anti-torture statute misinterpreted as in any way subject to an individual's particular perception.

- In keeping with my insistence upon clear documentation, I also wrote that our officers not only must remain within the law and the scope of their authorizations in the *conduct* of their activities, but that they also must clearly and accurately *document* their activities. As an example, I noted that if a detainee dies in custody, there will and should be a full investigation of the facts and circumstances leading to the death. This is true regardless of the department or agency with custody, whether CIA, the FBI, the Los Angeles Police Department, or the U.S. military. The investigation may determine that the detainee was murdered by his captors; it may conclude that he died of a cerebral hemorrhage or heart attack wholly unrelated to his captivity. But either way the record will be critical.
- It was with this background, and this written record, that I traveled to the Naval Station at Guantanamo Bay in October 2002 as part of my responsibilities as chief CTC legal counsel. Although the activities at Guantanamo were conducted by the Department of Defense, CIA also had officers there and I wanted to speak with them directly about the legal requirements applicable to them and their activities. In the course of my visit with CIA personnel, I was asked to meet with the lead military lawyer as well. At the time, the President had not yet declassified the existence of the CIA detention program, and so I was not at liberty to discuss any details of that program with DoD personnel.

- I was authorized to review legal issues at a more general level. Nonetheless, I underscored to the military attorney that I was not a Defense Department lawyer and could not provide advice for any DoD personnel or for any DoD activities. We then engaged in a conversation about a number of subjects, which are described in the trip report which I have asked be shared with the Congress. Among other things, I noted that the Istanbul Protocol of 1999 provides that even "exposure to ambiguous situations or contradictory messages," the use of "solitary confinement," and the use of coercion to induce an individual "to betray someone placing them at risk of harm" all constitute torture. Under the Istanbul Protocol, therefore, it is not clear that even techniques described in the U.S. Army Field Manual on interrogation would be permitted.
- At the DoD attorney's request, I then participated in a group discussion which formed the basis for those so-called minutes. As I had with the DoD attorney, I emphasized that I could not speak for the Department of Defense or provide any guidance for the military, but that I could speak generally about the subjects based upon the civilian law. I again emphasized that all interrogation practices and legal guidance must not be based upon anyone's subjective perception; rather, they must be based upon definitive and binding legal analysis from the Department of Justice; that DoD must ensure that its treatment of detainees is fully lawful and authorized by the military chain of command, and that the legal analysis and specific authorizations be fully documented, just as the interrogations themselves must be; and that comprehensive investigations must be conducted should a detainee pass away.

- I also commented on the Istanbul conference. As another indication of the poor quality of his notes, the author of the so-called minutes of the conversation paraphrases my remarks as being to the effect that "in Turkey they say that interrogation at all, or anything you do to [sic] that results in the subject betraying his comrades is torture."
- Clearly, that is preposterous. I did not say the obscene things that were falsely attributed to me at the Senate hearing, nor did I make the absurd comment about Turkey that the author similarly misreported. The so-called minutes misstate the substance, content, and meaning of my remarks; I am pleased to address the actions that I did undertake, and the statements that I did make.