



July 1, 2013

Re: Confirmation Hearing for James B. Comey

The Honorable Patrick J. Leahy
Chairman
Judiciary Committee
United States Senate
Washington D.C. 20510

The Honorable Chuck Grassley
Ranking Member
Judiciary Committee
United States Senate
Washington D.C. 20510

Dear Chairman Leahy and Ranking Member Grassley:

The undersigned organizations concerned with human rights and civil liberties write regarding the upcoming confirmation hearing for James B. Comey to be Director of the Federal Bureau of Investigation (FBI). We are particularly concerned with two legal memoranda that approved the use of waterboarding and other forms of torture, the use of which Mr. Comey later wrote that he “concurred,” even as he objected to a third memorandum that approved the use of these tactics in combination.

We urge the Senate to determine the full extent of Mr. Comey’s role in the approval and use of torture and abuse before voting on whether to confirm him. Not only is the FBI the lead federal agency in interrogating criminal suspects, but it also is charged with conducting criminal investigations into allegations of torture and other ill treatment by government officials. The Senate cannot make an informed decision on whether to confirm Mr. Comey as FBI Director without having a

complete understanding of his actions at a time when torture and abuse were being used and top government officials were taking extraordinary steps to avoid criminal liability.

During the prior administration, several legal memoranda provided the basis for the use of various forms of torture and other abuse of detainees. One of the most egregious was an August 1, 2002 memo, known as “Bybee I,” which was signed by then Assistant Attorney General for the Office of Legal Counsel Jay Bybee. That memo asserted that in order for abuse of detainees to meet the definition of torture under the federal anti-torture statute, it must produce pain similar to that of organ failure or death. In a memo dated the same day known as “Bybee II,” the Justice Department approved the use of waterboarding and other torture or inhumane techniques against Abu Zubaydah, a suspect in US custody.

Mr. Comey was serving as Deputy Attorney General in 2004 when Bybee I was leaked to the press. He reportedly concurred in the decision by Bybee’s successor at the Office of Legal Counsel (OLC), Jack Goldsmith, to withdraw Bybee I. However, Bybee II was not withdrawn, and in early July 2004, Mr. Comey advised CIA General Counsel Scott Muller that the CIA could continue to use all of the Bybee II techniques other than waterboarding.

Later, OLC re-authorized waterboarding as well. In December 30, 2004, OLC released the replacement memo for Bybee I, which was addressed to Mr. Comey. Footnote eight in the legal memo addressed to Mr. Comey specifies that conclusions reached in prior opinions from the Office of Legal Counsel with respect to detainee treatment would not be any different under the new guidance: “While we have identified various disagreements with the August 2002 Memorandum, we have reviewed this Office’s prior opinions regarding issues involving treatment of detainees and do not believe any of their conclusions would be different under the standards set forth in this memorandum.” The following spring, Mr. Comey wrote in an email that he “concurred” with another new legal memo, signed by Stephen Bradbury of the Office of Legal Counsel on May 10, 2005, that authorized torture techniques designed to inflict pain or terror, such as cramped confinement, wall-standing, water dousing, extended sleep deprivation, and waterboarding.

Mr. Bradbury also wrote a separate memo discussing the use of interrogation techniques in combination. Mr. Comey’s emails from that time were published by the *New York Times* in 2009 and make clear that, although he viewed the techniques as “simply awful” and strongly recommended against issuing a second memo that permitted them to be used in combination, he “concurred” with the first Bradbury memo that evaluated and authorized the CIA’s use of the techniques.

The Bybee II and first Bradbury memos authorized waterboarding, 180 hours of sleep deprivation, and other techniques long recognized as torture or cruel, inhuman or degrading treatment in violation of both domestic and international law – contrary to the advice of experienced FBI interrogators, who believed that these

techniques were wrong. Mr. Comey's apparent view that these techniques were lawful is deeply troubling and raises important questions that need to be answered.

Beyond questions related to approval of legal memos authorizing waterboarding and other forms of torture, the Senate Judiciary Committee should examine related aspects of Mr. Comey's record in office. Specifically, the Committee should examine Mr. Comey's role in meetings and deliberations of the National Security Council on interrogations, any role he had as Deputy Attorney General in deciding whether, where, or how criminal investigations of the use of torture by civilians would proceed, and any role he had—either as Deputy Attorney General or as the US Attorney for the Southern District of New York—in decisions related to the indefinite military detention and abuse of Jose Padilla, an American citizen taken into custody in May 2002 and detained within the United States.

We are aware that Mr. Comey raised concerns about using the proposed CIA interrogation techniques, particularly in combination, and that he urged Attorney General Gonzales to argue against them on policy and other grounds to the Principals Committee. This does not, unfortunately, change the acknowledged fact that he concurred in OLC's legal judgment that waterboarding, lengthy sleep deprivation and other abusive techniques did not constitute torture and did not violate US law. It does reinforce our request that the Committee thoroughly examine these issues and have Mr. Comey clarify his views and actions.

The public does not know the full scope of Mr. Comey's role in the approval and use of torture and other abuse. We urge you to have him explain that role during his confirmation process. One key lesson from the post-9/11 abuses is that we need moral and legal clarity from top-level leadership positions. The director of the FBI must not only be committed to the administration's policies opposing torture and indefinite detention, but he or she also must be a candidate who in the many years to come will steadfastly adhere to the rule of law regardless of what crisis the nation may face.

Sincerely,

American Civil Liberties Union
Center for Victims of Torture
Human Rights First
Human Rights Watch
National Religious Campaign Against Torture
Open Society Policy Center
Physicians for Human Rights

cc: Members of the Senate Judiciary Committee