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U.S. Lawyers Agreed on the Legality of Brutal Tactic

By [SCOTT SHANE](#) and DAVID JOHNSTON

WASHINGTON — When Justice Department lawyers engaged in a sharp internal debate in 2005 over brutal [interrogation techniques](#), even some who believed that using tough tactics was a serious mistake agreed on a basic point: the methods themselves were legal.

Previously undisclosed Justice Department e-mail messages, interviews and newly declassified documents show that some of the lawyers, including [James B. Comey](#), the deputy attorney general who argued repeatedly that the United States would regret using harsh methods, went along with a 2005 legal opinion asserting that the techniques used by the [Central Intelligence Agency](#) were lawful.

That opinion, giving the green light for the C.I.A. to use all 13 methods in interrogating terrorism suspects, including [waterboarding](#) and up to 180 hours of sleep deprivation, “was ready to go out and I concurred,” Mr. Comey wrote to a colleague in an April 27, 2005, e-mail message obtained by The New York Times.

While signing off on the techniques, Mr. Comey in his e-mail provided a firsthand account of how he tried unsuccessfully to discourage use of the practices. He made a last-ditch effort to derail the interrogation program, urging Attorney General [Alberto R. Gonzales](#) to argue at a White House meeting in May 2005 that it was “wrong.”

“In stark terms I explained to him what this would look like some day and what it would mean for the president and the government,” Mr. Comey wrote in a May 31, 2005, e-mail message to his chief of staff, Chuck Rosenberg. He feared that a case could be made “that some of this stuff was simply awful.”

The e-mail messages are now in the hands of investigators at the department’s Office of Professional Responsibility, which is preparing a report expected to be released this summer on the Bush administration lawyers who approved waterboarding and other harsh methods. The inquiry, under way for nearly five years, will be the Justice Department’s fullest public account of its role in the interrogation program, which [President Obama](#) has ended.

In years of bitter public debate, the department has sometimes seemed like a black-and-white moral battleground over torture. The main authors of memorandums authorizing the methods — [John C. Yoo](#), [Jay S. Bybee](#) and [Steven G. Bradbury](#) — have been widely pilloried as facilitators of torture.

Others, including Mr. Comey, [Jack Goldsmith](#) and Daniel Levin, have largely escaped criticism because they raised questions about interrogation and the law.

But a closer examination shows a more subtle picture. None of the Justice Department lawyers who reviewed

the interrogation question argued that the methods were clearly illegal.

For example:

¶Mr. Goldsmith, now a [Harvard](#) law professor, unnerved the C.I.A. in June 2004 by withdrawing a 2002 memorandum written by Mr. Yoo that said only pain equal to that produced by organ failure or death qualified as torture.

In addition, in a previously undisclosed letter to the agency, Mr. Goldsmith put a temporary halt to waterboarding. But he left intact a secret companion memorandum from 2002 that actually authorized the harsh methods, leaving the C.I.A. free to use all its methods except waterboarding, including wall-slammings, face-slapping, stress positions and more.

¶Mr. Levin, now in private practice, won public praise with a 2004 memorandum that opened by declaring “torture is abhorrent.” But he also wrote a letter to the C.I.A. that specifically approved waterboarding in August 2004, and he drafted much of Mr. Bradbury’s lengthy May 2005 opinion authorizing the 13 methods.

¶Mr. Comey, who had forced a 2004 showdown with White House officials over the [National Security Agency](#)’s surveillance program, concurred in that Bradbury opinion. His objections focused on a second legal opinion that authorized combinations of the methods. He expressed “grave reservations” and asked for a week to revise the memorandum, warning Mr. Gonzales that “it would come back to haunt him and the department,” Mr. Comey said in a 2005 e-mail message to Mr. Rosenberg.

Justice Department lawyers involved in the opinions felt torn between what was legal and what was advisable, Mr. Levin said. “Obviously you can only do that which is legal,” he said in a recent interview. “But that does not mean you should automatically do something simply because it is legal.”

The e-mail messages and documents provide new details about a critical year in the interrogation saga, beginning in mid-2004. The C.I.A. inspector general had questioned the legality and effectiveness of the harsh methods, prompting a review of the program. Under intense White House pressure, the Justice Department lawyers in May 2005 approved a series of opinions that reauthorized the harshest practices.

The lawyers had to interpret a 1994 antitorture law written largely with despotic foreign regimes in mind, but used starting in 2002, in effect, as a set of guidelines for American interrogators. The law defined torture as treatment “specifically intended to inflict severe physical or mental pain or suffering.” By that standard, a succession of Justice Department lawyers concluded that the C.I.A.’s methods did not constitute torture.

The only issues that provoked debate were waterboarding, which Mr. Goldsmith questioned, and some combinations of multiple techniques, which Mr. Comey resisted.

Some outside experts agree that the language of the 1994 law is strikingly narrow. “There’s no doubt whatsoever that a great deal of coercive treatment that most people would call torture is not prohibited by the federal antitorture statute,” said Benjamin Wittes, a [Brookings Institution](#) scholar who has studied interrogation policy.

But many believe that even under that law, the Justice Department should have recognized that

waterboarding, at least, was torture. To argue otherwise, said Brian Z. Tamanaha, a [St. John's University](#) law professor who has studied the interrogation memorandums, required "extraordinary contortions in language and legal analysis."

[Waterboarding](#), the near-drowning method that Mr. Obama has described as torture, was used on three operatives for [Al Qaeda](#) in 2002 and 2003. The C.I.A. never used the technique after it was reauthorized in 2005.

C.I.A. officials had been nervous about the legality of their proposed methods from the start in 2002. They had asked [Michael Chertoff](#), then head of the Justice Department's criminal division, to grant interrogators immunity in advance from prosecution for torture. Mr. Chertoff refused, but neither did he warn the agency against the methods it was proposing.

The agency's worst fears about the potential liability of its officers returned with a vengeance in 2004, after the sharp criticism from the agency's inspector general and Mr. Goldsmith's withdrawal of the first torture memorandum. C.I.A. officials demanded a comprehensive legal review.

But Mr. Goldsmith resigned in July 2004, and his successor as acting head of the Office of Legal Counsel, Mr. Levin, quickly set to work on the review, assisted by his top deputy, Mr. Bradbury.

On July 22, 2004, the Justice Department offered the C.I.A. interim assurance that it could use all methods except waterboarding, which Mr. Goldsmith had questioned. On Aug. 6, Mr. Levin issued another interim letter reauthorizing waterboarding, as long as rules were followed.

But in February 2005, when Mr. Levin moved to a job as legal adviser to the [National Security Council](#), the new interrogation opinions had not been approved by all necessary officials. The day before his departure, Mr. Levin stopped by and apologized to Mr. Bradbury for leaving it to him to sign the volatile documents.

By April 2005, the opinions were in final form, and Mr. Comey, who had set his own resignation for August, concurred in the 46-page opinion affirming the legality of the 13 techniques. But he told Mr. Gonzales that he strongly objected to Mr. Bradbury's second opinion, allowing multiple techniques to be used in a single interrogation session.

Mr. Gonzales told him that he was "under great pressure" from Vice President [Dick Cheney](#) to complete both memorandums and that President [George W. Bush](#) had asked about them, Mr. Comey recounted in one of the 2005 e-mail messages.

Later, after reading a revised draft of the second opinion, Mr. Comey added that "my concerns were not allayed, only heightened." He said he wanted more time to fix the memorandum, but Mr. Gonzales's chief of staff, Theodore Ullyot, told him the White House would not wait.

Mr. Comey wanted an analysis centered on actual interrogations in an effort to limit the type and combination of techniques that would be permissible, according to someone familiar with his thinking.

"I told him the people who were applying pressure now would not be there when the [expletive] hit the fan," Mr. Comey wrote in another e-mail message. "It would be Alberto Gonzales in the bull's-eye. I told him it was

my job to protect the department and the A.G. and that I could not agree to this because it was wrong. I told him it could be made right in a week, which was a blink of an eye, and that nobody would understand at a hearing three years from now why we didn't take that week."

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