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Burrelles Luce

The C.I.A. and the Tapes: Sensing Support Shifting Away From Its Methods

By SCOTT SHANE

WASHINGTON — For six years, Central Intelligence Agency officers have worried that someday the tide of post-Sept. 11 opinion would turn, and their harsh treatment of Al Qaeda prisoners would be subjected to hostile scrutiny and possible criminal prosecution.

Now that day may have arrived, after years of shifting legal advice, searing criticism from rights groups — and no new terrorist attacks on American soil.

The Justice Department, which in 2002 gave the C.I.A. legal approval for waterboarding and other tough interrogation methods, is reviewing whether agency officials broke the law by destroying videotapes of those very methods.

The Congressional intelligence committees, whose leaders in 2002 gave at least tacit approval for the tough tactics, have voted in conference to ban all coercive techniques, and they have announced investigations of the destruction of the videotapes and the methods they documented.

"Exactly what they feared is what's happening," Jack Goldsmith, the former head of the Office of Legal Counsel at the Justice Department, said of the C.I.A. officials he advised in that job. "The winds change, and the recriminations begin."

The legal siege against the Bush administration's counterterrorism programs goes far beyond the C.I.A., including lawsuits brought on behalf of hundreds of detainees held at Guantánamo Bay, Cuba, and more than 40 challenges in court to the National Security Agency's warrantless surveillance program. For some at the C.I.A., the second-guessing began in 2004 with a decision by Mr. Goldsmith, now at Harvard Law School, to withdraw the 2002 opinion on interrogation, whose sweeping constitutional claims and narrow definition of torture he found fatally flawed. But he said he regretted the way the agency has been whipsawed — accused of "risk aversion" immediately after the Sept. 11 attacks, and now blamed for traducing American values by engaging in torture.

"Things that seemed to them five years ago to have airtight legal and political support are now under investigation," he said, comparing this cycle to the Senate hearings into C.I.A. abuses in the 1970s and the criminal prosecution of C.I.A. officials in the Iran-contra affair of the 1980s.

Even a C.I.A. officer involved in capturing and questioning leaders of Al Qaeda expresses a striking ambivalence about the policies they carried out.

John C. Kiriakou, who helped lead the team that caught the Qaeda operative Abu Zubaydah in Pakistan in March 2002, went public on ABC News this week with such a message. He said he saw intelligence reports saying that waterboarding, a technique that induces a sense of suffocation, had caused Mr. Zubaydah to start talking after 35 seconds.

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But Mr. Kiriakou, a 43-year-old father of four who left the agency in 2004, also said in an interview that he believed the waterboarding was torture and should never be used again, because "we Americans are better than that." He added: "I think the second-guessing of 2002 decisions is unfair. What I think is fair is having a national debate over whether we should be waterboarding."

Legal hazards were on the minds of Bush administration officials from the beginning of the response to 9/11. The 2002 Justice Department interrogation opinion laid out some defenses interrogators might use against criminal accusations of torture.

"The administration's success in preventing attacks has become its enemy," said John Yoo, the former Justice official who wrote most of the 2002 opinion. Since then, he added, "The political environment has changed because people feel the threat is less than it used to be."

Mr. Yoo's legal opinions, though criticized as seriously flawed by some scholars, may nonetheless provide impenetrable armor for C.I.A. officers. From the beginning, wary agency officials insisted on what they called "top cover" — written Justice Department approval for what they did.

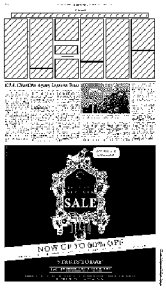
Most legal scholars say that even under a future administration, the Justice Department would not seek charges against C.I.A. officers for actions the department itself had approved.

Another obstacle to such prosecutions would be the laws passed by Congress in 2005 and 2006 granting extensive legal protection for authorized conduct. But the videotape destruction may not have such protection; the episode recalls the old adage of Washington scandals — that it's not the crime, it's the cover-up that leads to trouble.

The deaths of several prisoners who had been questioned by C.I.A. officers or contractors in Iraq and Afghanistan — but outside the detention program for high-level Qaeda prisoners — have been referred to the Justice Department. Only one C.I.A. contractor, David A. Passaro, has been prosecuted, receiving an eight-year sentence for beating an Afghan man who later died.

Still, investigations can impose a high price no matter how they end. "It's not just the fear of going to jail," Mr. Goldsmith said. "It's the enormous expense of hiring lawyers. It's seeing your reputation destroyed. It's losing your career."

Overseas, C.I.A. officers implicated in rendition cases have been sought on criminal charges in Italy and Germany, though none has been arrested. And since the international pursuit of the late Chilean dictator Augusto Pinochet, human rights advocates have often sought criminal charges against former officials on the principle of "universal ju-



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risdiction" for certain grave offenses, including torture.

The Center for Constitutional Rights in New York, which unsuccessfully sought charges against former Defense Secretary Donald H. Rumsfeld during a recent visit to France, has pledged to pursue criminal torture charges against former Bush administration officials when they travel abroad.

"The only way to restore the moral authority of our country," said Michael Ratner, the group's president, "is accountability."