S. HRG. 109–633

CONFIRMATION HEARING ON THE NOMINATIONS OF WILLIAM JAMES HAYNES II TO BE CIRCUIT JUDGE FOR THE FOURTH CIRCUIT AND FRANCES MARIE TYDINGCO-GATEWOOD TO BE DISTRICT JUDGE FOR THE DISTRICT OF GUAM

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

JULY 11, 2006

Serial No. J–109–96

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TUESDAY, JULY 11, 2006

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 3:15 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Hatch, Sessions, Graham, Cornyn, Leahy, Kennedy, and Durbin.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Chairman SPECTER. Good afternoon.

Today we have counsel for the Department of Defense, William James Hayes, II, to be U.S. Circuit Judge for the Fourth Circuit, and Justice Frances Marie Tydingco-Gatewood to be U.S. District Judge for the District of Guam.

We had expected to start this hearing at 2:15, but the hearing we had on the Guantanamo Bay and *Hamdan* v. *Rumsfeld* lasted longer than we had anticipated. We had expected to begin at 3:00, judging from the number of Senators who were present at 2:30, but Senators came in, so we were delayed 15 minutes. I regret keeping you all here.

We are joined by distinguished Members of the Senate and Members of the House. I, first, recognize Senator John Warner, of the Class of 1978, to introduce Mr. Haynes.

PRESENTATION OF WILLIAM JAMES HAYNES II, NOMINEE TO BE CIRCUIT JUDGE FOR THE FOURTH CIRCUIT, BY HON. JOHN WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator WARNER. Thank you very much for the opportunity to appear here a second time on behalf of this nominee for the Fourth Circuit Court of Appeals. I welcome the opportunity to be here today with the Chairman, Senator Specter, Senator Hatch, Senator

Kennedy, Senator Sessions, Senator Cornyn, and my good friend from South Carolina.

I am going to go through basically the same statement as I gave here some years ago in introducing this wonderful man and his wonderful family.

At this point, I wonder if the Chair would entertain his introducing his wife, Meg, and two of his three children. Would you introduce your wife and two children?

Chairman SPECTER. That is a splendid idea. Mr. Haynes, if you would do that, we would appreciate it.

Mr. HAYNES. Thank you, Mr. Chairman. Mr. Chairman, this is my wife, Margaret Campbell Haynes, of 24 years. My older son, Will, and my younger son, Taylor. Our daughter, Sarah, is at home, sick.

Chairman SPECTER. Thank you very much, Mr. Haynes.

Senator WARNER. Thank you, Mr. Chairman.

The court to which Mr. Haynes has been nominated by President Bush, the Court of Appeals for the Fourth Circuit, is one that I have had almost a lifetime of association with. The court serves our State of Virginia, West Virginia, Maryland, North Carolina, and South Carolina.

Over the history of the Fourth Circuit, there have been a total of 43 judges who have served on that court. In my 28 years here in the Senate, I have had the opportunity of participating in the advice and consent procedure for 18 of these judges. In fact, of the 12 active judges today, only one, Judge Henry Widener, precedes my service here in the Senate.

I want to say a word about Judge Widener. He and I both graduated from Washington Lee University, he a bit ahead of me. But I have to say, and I want the record to reflect, in my judgment, I think he is one of the most distinguished jurists I have ever met in my entire life.

He served on this court for over 37 years, first as a District Judge and then as a Circuit Court Judge. He is just an extraordinary individual, and I am sure that Mr. Haynes is conscious of the fact that he would, if confirmed, take Judge Widener's seat on this court.

Judge Widener decided to remain on the bench, even though he indicated to the President some years ago his intention to retire, until such time as the Senate confirms a Presidential nominee.

Back to Mr. Haynes. He earned his Bachelor's degree from Davidson College in 1980, while receiving an Army ROTC scholarship. After graduating from college cum laude and Phi Beta Kappa, the nominee went to the Harvard Law School. Subsequent to his graduation from law school, he worked as a law clerk for Judge James McMillan on the U.S. District Court for the Western District of North Carolina.

After completing his clerkship, he worked for over 4 years on active duty as a captain in the Army, in the Office of General Counsel. After leaving active service and practicing law in the private sector, he was nominated by President Bush to serve as General Counsel of the Department of the Army. He was confirmed by the Senate in 1990 for this position.

In 1993, he reentered private practice and worked for a number of years. Then President George W. Bush nominated him to the current position as General Counsel of the Department of Defense. Again, he was confirmed by the Senate, this time by a voice vote.

As General Counsel of the Department of Defense, there is no doubt that Jim Haynes has had a tough job, with great responsibility.

I will put the balance of my statement in the record and just talk to the Committee in a personal sense. I was privileged to serve in the Department of Defense for 5 years during the war in Vietnam. That department is a real challenge, particularly in a time of war.

I had to make a number of decisions which were bitterly contested. I appeared before many committees of the U.S. Senate and the House time and time again, questioning the judgment of colleagues that I served with in that period of time as to the correctness of our decisions.

I mention that because anyone who accepts the challenge to serve in that department has got to be prepared to accept a very, very heavy burden—and I thought it was a privilege, not a burden—to appear before the Congress and answer the many questions that are asked of them.

I remember very clearly a number of instances where I had to make tough decisions with regard to prisoners of war, not unlike situations that are facing us today, and there was considerable disagreement with what the then-Secretary of Defense and I, and others, did.

I mention that because I have just come into possession today of two documents, one which is before the Committee already in the context of the earlier hearing today, and that is the memorandum issued to the Secretaries of military departments and many others, but it is the application in Common Article 3 of the Geneva Convention to the treatment of detainees by the Department of Defense.

The memo says—and I will just read one paragraph—"The Supreme Court has determined that Common Article 3 to the Geneva Convention of 1949 applies as a matter of law to the conflict with Al Qaeda. The court found that the military commissions, as constituted by the Department of Defense, are not consistent with Common Article 3."

Now, I talked with this nominee this morning, and he participated in drawing this memorandum up. It is a very constructive and correct management approach to this historic decision by the Supreme Court. I think it should be noted that this memorandum on that decision would be before the Senate here for some time.

The distinguished Chairman of the Committee and Members of this Committee had a hearing on this subject this morning; my Committee will have a hearing on Thursday morning on the same subject.

I just point that out as showing the constructive work that this lawyer has done for the Secretary of Defense, and indeed, others, in recognizing the importance of that decision.

The second letter that was handed to me was addressed to you, Mr. Chairman, and to the Ranking Member, Mr. Leahy. It is signed by about a dozen or so very distinguished former retired of-

ficers of the military services, among them, several Judge Advocate Generals.

I have just given a copy of this to the nominee. He looked it over and he said to me forthrightly, he welcomes the opportunity to appear before this Committee and address this letter. This is an important document, I say to the committee.

I have been privileged to be associated with the men and women of the U.S. military for the better part of my life, and I have the highest regard for them. I have a very high regard for those individuals who are able to work up through the competitive system of the military departments and become Judge Advocate Generals of the Army, Navy, Air Force, and Marine Corps.

Some of them are in this article, as well as other officers. So I hope the Committee views this letter and gives this nominee an opportunity to respond to the allegations that are raised in it, because it is a very important letter and it should not be dismissed lightly. Hopefully the nominee can provide for the Committee persuasive responses.

I say this because my urging of the Committee is to just give this nominee of the President of the United States for the Fourth Circuit Court of Appeals a fair, objective hearing and render the decision as you see in the best interests of our Nation.

I thank the Chair and the members of the committee.

Chairman SPECTER. Thank you very much, Senator Warner.

We turn now to Senator George Allen, former Governor and member of the Senate Class of 2000.

Senator Allen?

PRESENTATION OF WILLIAM JAMES HAYNES II, NOMINEE TO BE CIRCUIT JUDGE FOR THE FOURTH CIRCUIT, BY HON. GEORGE ALLEN, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator ALLEN. Thank you, Mr. Chairman, Senator Kennedy, Senators Hatch, Sessions, Graham, and Cornyn. Thank you for allowing me to come before you again on behalf of Jim Haynes.

I come here again with my colleague, Senator Warner, to show and indicate to all of you my strong support for the nomination of Mr. Haynes to be on the Fourth Circuit Court of Appeals.

Senator Warner went through Mr. Haynes' resume, education and professional career; you have that record and I will not reiterate it for you.

Judge Widener is the one who he will be replacing, we hope. I have worked for a Federal Judge named Glen Williams. Judge Williams is in the District Court for the Western District of Virginia, based in Abingdon. Right across the hallway was Judge Widener.

I have, over the years, from when I was just starting off in my career, admired Judge Widener as a very steady, principled, smart individual, and a character. That is important for southwest Virginia, that you have character, but that you are also a character, and he is an outstanding jurist. This country should be forever grateful for people of his capability to devote their lives on the bench.

One of the reasons why people want to do it, is because they love their country. They care about justice, the fair administration of

justice. As we look to the fair administration of justice, I would also hope that the Senate will show fair due process to nominations.

It was about 3 years ago, Senator Warner and I were first introducing Mr. Haynes to you all. The Fourth Circuit means a great deal. I know Senator Graham knows that, being from South Carolina, and it is an outstanding court.

Mr. Haynes, when you look at his record and capabilities, he will be one to contribute mightily and in an honorable way, bringing a unique perspective, but I think a helpful perspective, to the Fourth Circuit Court of Appeals.

The American Bar Association has twice rated Mr. Haynes as "well qualified," most recently just last year. He has worked as chief legal counsel for the Department of Defense. The Senate has unanimously, twice, confirmed him.

I do note the letter that my colleague, Senator Warner, brought up from retired military officers. I will also note, though, and hope you will take into consideration, that Mr. Haynes gets bipartisan support, including that of prominent Democrats, including former U.S. Senator Bill Hathaway, U.S. former Attorney General Griffin Bell, Floyd Abrams, Thurgood Marshall, Jr., Newt Minnow, Judge William Webster—not necessarily a Democrat—but nonetheless has good bipartisan support from people who have seen him work and have worked with him.

I am hopeful, Mr. Chairman and members of the committee, that you will accord him the opportunity to state his case. I know you will. I look forward to being able to vote on the confirmation of Jim Haynes on the floor of the Senate. I thank you all for the work that you all do on this committee. You have had a very heavy docket this year.

Mr. Chairman, you have been an inspiration with what you have had to go through personally to keep your attention and to keep your eye on the ball on a lot of contentious issues.

The judges are a very important aspect of our representative democracy, and I think it is vitally important that we have men and women who are nominated and can be confirmed to work in the District, Circuit, and Supreme Court of the United States who understand that their role is to apply the law, not invent the law, and show due deference to the representatives of the people in our Republic.

I am very confident that Jim Haynes will be a jurist in that mold who will be perfect for the Fourth Circuit, but also one that we can be proud of for all of America. I look forward to a confirmation vote on the floor as soon as practicable. Thank you for your indulgence and the attention of all the members of this committee.

Chairman SPECTER. Thank you very much, Senator Allen, especially for those kind personal words.

I know how busy Senators are, so we would expect Senator Warner and Senator Allen to move on to other duties.

We now turn to Hon. Madeleine Bordallo, a U.S. Representative from the District of Guam who is here today to introduce the nominee for the District Judge for the District of Guam.

Representative Bordallo, we are pleased to have you here and we look forward to your introduction.

PRESENTATION OF FRANCES MARIE TYDINGCO-GATEWOOD, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF GUAM, BY HON. MADELEINE Z. BORDALLO, A DELEGATE IN CONGRESS FROM THE TERRITORY OF GUAM

Delegate BORDALLO. Thank you very much, Mr. Chairman, Senator Kennedy, Senators Hatch, Sessions, Graham, and Cornyn.

I am, indeed, honored, Mr. Chairman, to join you today to introduce Hon. Frances Tydingco-Gatewood, who has been nominated by the President to serve as a U.S. District Court Judge for the District of Guam.

The book of Isaiah, chapter 17, verse 1 reads: "Learn to do right, seek justice, encourage the oppressed, defend the cause of the fatherless, plead the case of the widow." Justice Tydingco-Gatewood has lived a life faithful to these Biblical words.

She was born in Hawaii to a Chamorro family. She moved to Guam as a youngster and spent her childhood and early adult years growing up in a Chamorro community. It was in this principled environment that Justice Tydingco-Gatewood learned early on the importance of doing what is right. This ethic would prove ever present in her future life experiences.

Justice Tydingco-Gatewood graduated from George Washington High School in Mangilao, Guam in 1976. She earned a Bachelor of Arts degree from Marquette University in 1980, and earned her law degree from the University of Missouri, Kansas City, in 1983.

She had coupled her principled ethic with the hard work that leads to success as a student and as a young professional, and soon success did follow.

Having graduated from law school, Justice Tydingco-Gatewood began her career as a law clerk, and soon thereafter became a prosecutor, first in Missouri, then on Guam, a position in which she sought justice on behalf of her people.

As the first Chamorro woman prosecutor on Guam, she exhibited the professionalism and leadership skills that would earn her the respect of her peers, and later appointment as Guam's chief prosecutor.

In 1994, Governor Joseph Ada appointed her to a seat on the bench of Guam's Superior Court, and in 2001 she was appointed by Governor Carl Gutierrez to her current position as an Associate Justice on the Supreme Court of Guam.

Further, the words of the Biblical quote, "Defend the cause of the fatherless, plead the case of the widow," like the others in the verse, are part of the fabric of Justice Tydingco-Gatewood's distinguished career and her life. She embraced public service as the co-chair person of the Family Violence Task Force, has been a constant advocate of families, and has been an unwavering leader in addressing domestic violence.

It is Justice Tydingco-Gatewood's character, coupled with her formidable professional credentials, that leads me to confidently recommend her for the Federal bench. She is a leader, she is a role model for our young citizens, and she is a strong Chamorro woman who embodies the integrity and character of our people.

It is, thus, my honor to introduce to the Committee today the person I urge the Senate to confirm as the first woman Federal

District Court Judge for the District Court of Guam, Justice Frances Tydingco-Gatewood.

She is joined today by her husband of 25 years, Dr. Robert Gatewood, and a number of her family and friends, Mr. Chairman, are in the audience today seated right behind her.

They are the proud parents, she and her husband, of three fine young sons: Daniel, who is a recent graduate of the University of Hawaii at Manoa; Michael, a student at the University of Hawaii; and Stephen, a sophomore at Father Duenas Memorial High School on Guam.

We are proud of Justice Frances Tydingco-Gatewood and the honor bestowed by the President in nominating her. She has the bipartisan support of our community, the Governor of Guam, the Guam Bar Association, and she is enthusiastically supported by my predecessor, former Republican Congressman and Brigadier General Ben Blaz, who asked me to inform you, Mr. Chairman, of his endorsement of Justice Tydingco-Gatewood and his recommendation for her confirmation.

I urge your expeditious and favorable consideration of her nomination. Today, Mr. Chairman, is a great moment for the people of Guam as we present one of our island's finest to you: Hon. Justice Tydingco-Gatewood.

Thank you.

Chairman SPECTER. Thank you very much, Representative Bordallo.

Would Mr. Haynes and Justice Tydingco-Gatewood please step forward? While you are up, if you would raise your right hand, we will administer the oath.

[Whereupon, the nominees were duly sworn.]

Chairman SPECTER. You may be seated.

We met the family of Mr. Haynes. Justice Tydingco-Gatewood, would you oblige us by introducing your family and friends who are here?

STATEMENT OF FRANCES MARIE TYDINGCO-GATEWOOD, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF GUAM

Justice TYDINGCO-GATEWOOD. Yes, Chairman Specter. My husband, unfortunately, is at the hospital right now. He is quite ill, so he was not able to be here at the hearing. But I am joined, of course, by Congressman Bordallo and her staff. I consider them all family. They are seated behind me in the three or four rows directly behind me.

I just wanted to let you know, my husband, Dr. Robert Gatewood, is not here at this moment.

[The biographical information of Justice Tydingco-Gatewood follows.]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. **Full name (include any former names used.)**

   Frances Marie Tydingco-Gatewood
   Frances Gatewood, Frances Tydingco, Ching Tydingco.

2. **Address: List current place of residence and office address(es).**

   Residence: Yona, Guam

   Office: Supreme Court of Guam, Guam Judicial Center, 120 West O'Brien Drive, Hagatna, Guam 96910

3. **Date and place of birth.**

   01/21/58; Honolulu, Hawaii.

4. **Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).**

   Married to Dr. Robert Roy Gatewood, periodontist, self employed at Dr. Robert R. Gatewood, D.D.S., M.S. Clinic at 222 Chalan Santo Papa, Suite 303, Hagatna, Guam 96910

5. **Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.**

   University of Missouri-Kansas City School of Law, 8/80-5/83
   Juris Doctorate received 5/83

   Marquette University, Milwaukee Wisconsin, 08/76-05/80,
   Bachelor of Arts Degree, received 5/80

   Summer Classes for credit received at the following:
   Metro State College, 6/79-7/79, Denver, Colorado
   New Mexico State University, 6/78-7/78, Las Cruces, NM
   University of Guam, 7/77-8/77, Mangilao, Guam

6. **Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.**

2/02 to present	Supreme Court of Guam; Associate Justice
8/94 to 2/02	Superior Court of Guam; Superior Court Judge
5/90 to 8/94	Guam Attorney General's Office; Chief Prosecutor
2/89 to 5/90	Jackson County Missouri Prosecutor's Office; Assistant Prosecutor
7/84 to 10/88	Guam Attorney General's Office; Prosecutor
9/83 to 6/84	Jackson County (Missouri) Circuit Court; Law Clerk
7/82 to 2/83	Teasdale and Hartigan Law Offices; Law Clerk
6/81 to 6/82	Jackson County (Missouri) Public Defender's Office; law clerk
6/80 to 7/80	Excelsior Youth Center; youth worker
1990 to 2002	Dr. Robert R. Gatewood's Clinic
1996 to current	Guam Junior Golf Academy
1997 to 2004	Make-A-Wish Foundation of Guam

7. **Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.**

No.

8. **Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.**

Marquette University - Dean's List; Pi Sigma Alpha Political Honor Society

University of Missouri Kansas City School of Law -
Moot Court Board, Chief Justice
Appellate Advocacy III, Thomas Ellison Moot Court Team, Top Oralist
Appellate Advocacy II, Thomas Ellison Moot Court Team, Top Oralist
Appellate Advocacy I, Best Brief, Section CB

1999 - University of Guam Honorary Doctor of Laws degree

Numerous certificates and resolutions of appreciation.

9. **Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.**

Missouri Bar Association
Guam Bar Association
Pacific Judicial Council Education Committee, Co-Chairperson (2004 – present)

Guam Supreme Court Criminal Jury Instructions Committee, Chairperson (2002-current)
Guam Supreme Court Criminal Indigent Defense Committee, Chairperson (2002-present)
Guam Supreme Court Pro Se Litigation Committee, Chairperson (2002-current)
Guam Supreme Court Crime Victim and Witness Protection Committee, Chairperson (2004-current)
Guam Supreme Court Board of Law Examiners Drafting and Grading Sub-Committee Chairperson (2002-current)
Guam Supreme Court Alternative Dispute Resolution- Mediation Committee for contested child custody cases, Chairperson (2004-current)
Guam Supreme Court Judicial, Attorney, and Community Education Committee, Chairperson (2002-current)
Guam's (tri branch) Family Violence and Sexual Assault Task Force, Co-Chairperson (2002-current)
Governor's Family Violence Task Force, Member, 1993
Special Legislative Rape Crisis Center Task Force, Member (1992-1993)
Law and Procedure Subcommittee for the Legislative Select Committee to Review the Department of Corrections Chairperson (1987)
Governor's Child Sexual Abuse Task Force, Chairperson, (1987)
Guam Bar Association Ethics Committee, Member, (1985-1987)
Civil Service Commission, Equal Employment Opportunity, Member, (1984)

10. **Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.**

National Council of Juvenile and Family Court Judges
National Association of Women Judges

11. **Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.**

Missouri Supreme Court; admitted May 3, 1984. Inactive membership at this time because I am a Guam Supreme Court justice. I am up to date on paying my annual inactive fees.

Superior Court of Guam; admitted May 22, 1985.

United States Court of Appeals for the Ninth Circuit; admitted August 21, 1984.

United States District Court, District of Guam; admitted February 11, 1988

Supreme Court of the United States; admitted May 26, 1992.

12. **Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.**

Written Testimony by Judge Frances Tydingco-Gatewood in Support of H.R. 2370-The Guam Judicial Empowerment Act, dated October 24, 1997. Submitted to Chairman Don Young and the Committee on Resources.

Written Testimony by Justice Frances Tydingco-Gatewood in Support of H.R. 521, dated May 8, 2002. Submitted to Chairman James Hansen and the Committee on Resources.

Article written for Guahan Magazine, 2004. Title: "First Person"

Article written for the Pacific Daily News, dated October 2005. Title: "How can we improve community involvement in Preventing Family Violence?"

13. **Health: What is the present state of your health? List the date of your last physical examination.**

I am in an excellent state of health. The date of my last physical examination was January 31, 2006

14. **Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.**

Superior Court of Guam Judge, August 8, 1994 to February 8, 2002. Appointed by the Governor of Guam and confirmed unanimously by the Guam Legislature. This is a general jurisdiction Court.

Supreme Court of Guam Associate Justice, February 8, 2002-current.
Appointed by the Governor and confirmed unanimously by the Guam Legislature. This is an Appellate jurisdiction court.

15. **Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues,**

together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

(1) Significant opinions:

a. PR 0065-63; In the matter of the Estate of Juana Pangelinan Concepcion

b. The following 4 cases (SP114-95, CV 1383-95, CV1856-95 and SP24-96) were consolidated and one decision and order was issued:

Special Proceedings Case No. SP114-95
Ignacio T. Tainatongo, *Petitioner,* vs. Territorial Board of Education, *Respondent,* Lawrence Kasperbauer, Gloria Nelson, Ione Wolf, Mark Martinez, Judith Guthertz, Vicente Meno, Celestine Babauta, Mary Gutierrez and Jackie Madarang, *Real Parties In Interest.*

Calvin E. Holloway, Sr. Attorney General of Guam *Petitioner in Intervention* vs. Ignacio T. Tainatongo, Territorial Board of Education, Lawrence Kasperbauer, Gloria Nelson, Ione Wolf, Mark Martinez, Judith Guthertz, Vicente Meno, Celestine Babauta, Mary Gutierrez and Jackie Madarang, *Respondents In Intervention.*

CIVIL CASE NO. CV1383-95
Carl T.C. Gutierrez, Governor of Guam and Calvin E. Holloway, Sr., Attorney General of Guam, and The Government of Guam, *Plaintiffs,* vs. Territorial Board of Education, and Gloria Nelson, Mary Gutierrez, Judith Guthertz, Celestine Babauta, Lawrence Kasperbauer, Eric Merfalen, Mark Martinez, Vicente Meno, Ione Wolf, and Donald Schoneboom, individually and in their capacities as members of the Territorial Board of Education, and Mary Torres, in her capacity as a member of the Territorial Board of Education, *Defendants.*

CIVIL CASE NO. CV 1856-95
Carl T.C. Gutierrez, Governor of Guam and Calvin E. Holloway Sr., Attorney General of Guam, on behalf of the Government of Guam, *Plaintiffs* vs. Territorial Board of Education, Joseph L. DeTorres, in his capacity as Director of the Department of Education and Wilfred G. Aflague, in his capacity as Deputy Director of the Department of Education, *Defendants*

SPECIAL PROCEEDINGS CASE NO. SP 24-96
Territorial Board of Education and Gloria B. Nelson, Celestin C. Babauta, Mary A. Gutierrez, Judith P. Guthertz, Lawrence F. Kasperbauer, Eric J. Merfalen, Mark K. Martinez, Vicente C. Meno, and Ione M. Wolf, on behalf of and in their capacities as members of the Territorial Board of Education, *Petitioners* vs. Joseph E. Rivera, Acting Director, Bureau of Budget and Management, *Respondent*

c. JD 0057-96; In The Interest of E.S.

d. The following 2 cases, CV1497-93 and CV1885-93, were consolidated and one decision and order was issued:

> CV 1497-93 Antonio M. Iglesias et al., Plaintiffs, vs. Kawasho International (Guam) Inc., et al., Defendants
>
> CV 1885-93 The Association of Apartment Owners of Royal Palm Resort, a Guam Corporation et al., (Plaintiffs) vs. Mitsui Construction Co., Ltd. Defendants, a Japanese Corporation et al., Defendants,
> Kawasho International (Guam) Inc., vs. Insurance Company of North America, A Pennsylvania Corporation, et al., Defendants

e. CF 324-98, People of Guam v. Frank Ronald Castro

f. Original Action No. 02-002, Bank of Saipan, Petitioner, vs. The Superior Court of the Commonwealth of the Northern Mariana Islands, Respondent
Randall T. Fennell, Temporary Receiver for the Bank of Saipan, Secretary of Commerce, Fermin M. Atalig, in his official capacity as the CNMI Director of Banking pursuant to 4 CMC Subsection 6105(a) (Respondents-Real Parties in Interest)

g. JP 0306, In the Interest of R.A., B.A., R.A., and J. A.

h. 2003 GUAM 13, Vicente C. Pangelinan and Joseph C. Wesley, Plaintiffs-Appellants vs. Carl T.C. Gutierrez, Governor, John F. Tarantino, Attorney General, James H. Underwood, Director of the Department of Public Works; Edward G. Untalan, Administrator of the Guam Economic Development Authority; Carl J.C. Aguon, Director of the Department of Land Management; Y'asela A. Pereira, Treasurer of Guam; Government Of Guam, Defendants-Appellees, and Guam Resource Recovery Partners Intervening Defendants-Appellees

i. 2003 GUAM 21, People of Guam vs. Stephen Fritz Muritok

j. 2004 GUAM 2, People of Guam vs. Seung Kweon Chung aka Jeong Senung-Kwon

(2) decisions reversed:

a. 1995 WL604383
Archbishop of Guam, Apuron, OFM,CAP,DD vs. G.F.G. Corporation: GFG Corporation appealed my Superior Court determination that the Archbishop of Guam substantially complied with Government Code Section 16027 (Guam's Business Licensing Statute). The District Court of Guam (Appellate Division) reversed this decision.

b. 1998 Guam 22
People of the Territory of Guam vs. Vincent Rosario Manibusan: The issue before the Guam Supreme Court was under what circumstances is it within the authority of a trial judge to impose monetary sanctions on the Prosecution Division in a criminal trial. I sanctioned the Prosecution Division by ordering them to pay $3,270.00 for the jury fees expended in a criminal case. I issued this sanction because the Prosecutor waited until the morning of trial to request dismissal of the case and he could have made the request the day before the hundred potential jurors were called into court for voir dire and were sent home without serving. The Guam Supreme Court reversed my decision and held that "incurring juror's fees is a normal function of the court's business and such expenses are not attributable to the parties and thus no party should be made to indemnify the court for such expenses."

c. Not reported in F. Supp., 1997 WL 208994 (D.Guam)
People of the Territory of Guam v. Doris Quintanilla Cruz:
Doris Cruz was arrested for possession of narcotics and firearms found in the car after she was detained by law enforcement authorities who suspected her of being a drug courier. While I served as a trial judge in the Superior Court of Guam, I denied her motion to suppress this evidence finding that the stop and questioning was constitutional. She then entered a conditional guilty plea which allowed her to challenge the denial of the motion to suppress. The District Court of Guam, Appellate Division reversed her conviction concluding that the stop and questioning of Cruz was unconstitutional.

d. 1998 Guam 18
George Kenneth Hamlet v. Mark C. Charfauros and Does 1-5: Mark C. Charfauros, Senator of the Guam Legislature appealed my order restraining him from further broadcasting an audio tape. I found that the playing of the tape was an act outside the "sphere of legitimate legislative activity" and that the Speech or Debate Clause immunity did not protect him. The Guam Supreme Court disagreed and reversed my decision finding that "although the Senator's actions were disturbing and caused (them) concern", the playing of the tape was a legitimate legislative act protected by the Speech and Debate Clause; therefore the actions of the Senator were privileged.

e. 1999 Guam 17
PCI Communications, Inc., vs. GST PACWEST Telecom Hawaii, Inc.,: As a Superior Court trial judge, I granted GST PACWEST Telecom Hawaii Inc.'s Motion to Strike PCI Communications Inc.'s complaint for lack of signature by the attorney of record, lack of personal jurisdiction and forum non conveniens. The Guam Supreme Court heard this appeal and reversed my decision.

f. 2000 Guam 12
Ricardo C. Blas vs. Guam Civil Service Commission, Government of Guam, and Guam Customs and Quarantine Agency, Government of Guam, Real Party in Interest, (reversed in part and affirmed in part): Ricardo C. Blas filed two separate petitions for judicial

review of decisions made by the Guam Civil Service Commission. As a Superior Court trial judge, I held that a member of the classified service against whom management has taken the personnel action of suspension, demotion or dismissal was not entitled to appeal the action to the Civil Service Commission as an adverse action even if the action was not predicated upon some malfeasance or incompetence on the job by the employee. The Guam Supreme Court reversed this part of my ruling. I also held and the Guam Supreme Court agreed that the plain meaning and common usage of the term "original appointment" was designed for those individuals first entering government service.

g. 2003 Guam 4
Ursula U. Fleming vs. Mary Ann F. Quigley and James R. Quigley: Ursula Fleming filed an action against the Quigleys for fraud and breach of fiduciary duties. She also sought damages and rescission of a deed of gift to real property as well as attorneys fees and costs. I found in Fleming's favor on the claims of fraud, breach of fiduciary duties and ordered the rescission of the deed of gift and the transfer of the property back to Fleming. I also awarded attorneys fees to Fleming. The Quigleys appealed the ruling pertaining to the fees arguing that the award of attorney's fees was made in contravention of the American Rule governing attorney's fees. The Guam Supreme Court reversed the award of attorney's fees.

h. 2001 Guam 26
People of Guam vs. Superior Court of Guam vs. Oliver Lintag Laxamana: This matter came before the Guam Supreme Court upon the People's Emergency Petition for Peremptory Writ of Prohibition, Alternative Writ of Mandate and Stay filed July 12, 2001. Petitioner People of Guam (hereinafter "People") sought the Supreme Court review of: (1) the hearing of an *ex parte* motion by a judge that was not the assigned *ex parte* judge for that day (myself); (2) the request by me, the lower court judge that a specific attorney be present in the courtroom when the People argued its motion; (3) my Superior Court order that the People preserve investigative field notes taken by police officers; and (4) my Superior Court order that the People disclose the preserved field notes to defendant Laxamana. After reviewing the petition and response, and after hearing oral arguments, the Guam Supreme Court issued a peremptory writ of mandate directing me to vacate my order requiring the People to disclose the preserved field notes. However, the Guam Supreme Court declined to grant a peremptory writ of prohibition or alternative writ of mandate with respect to any other conduct by me.

(3) Significant Superior Court opinions on federal or state constitutional issues: When applicable, the citations to the appellate court rulings on such opinions are listed.

a. People of Guam vs. Raymond Hernandez Manibusan CF407-94

b. People of the Territory of Guam vs. Eugene Thomas Palomo CF 257-95
1997 WL 209048 citation to the District Court of Guam, Appellate Division, Affirmed.

c. People of the Territory of Guam vs. William C. Stovall CF 345-95

d. People of the Territory of Guam vs. Robert V. Taniedo CF 503-96

e. People of the Territory of Guam vs. Timmy Reyes Lane CF 499-96

f. People of the Territory of Guam vs. Kevin Nishimura
CF 482-96, CF 493-96 and CM 1060-96

g. People of the Territory of Guam vs. Claire H. Templo CF 247-96

h. People of the Territory of Guam vs. Donicio M. San Nicolas; CF 471-97, 2001 Guam 4

i. People of the Territory of Guam vs. Raymond Torres Tedtaotao CF 249-98

j. People of the Territory of Guam vs. Steven A. Zamsky CF 265-98

k. People of the Territory of Guam vs. Ronnie Quinata Sanchez CF 0048-97

l. People of the Territory of Guam vs. Jose Meno San Nicolas CF 264-98

The following are 19 Supreme Court citations to Opinions discussing federal or state constitutional issues written in my capacity as an authoring or co-authoring justice from 2002 to present. When applicable, the citations to the appellate court rulings on such opinions are listed.

a. Commonwealth of the Northern Mariana Islands vs. Felipe Q. Atalig 2002 MP 20

b. People of Guam vs. Jimmy Cedino Palisoc 2002 Guam 9

c. In the Interest of J.L.L.P, minor and David Perez, Respondent, Appellant 2002 Guam 21

d. Teresita Paulis vs. Superior Court of the Commonwealth of the Northern Mariana Islands, Respondent, Gregorio Ngirausui, Real Party in Interest; Original Action 02-003-0A

e. People of Guam vs. Anthony Duenas Santos ; 2003 Guam 1; CR 00-00006
9th Circuit Court of Appeals dismissed the appeal on January 3, 2006 holding it is without jurisdiction to decide the appeal.

f. Vicente C. Pangelinan and Joseph C. Wesley Plaintiffs-Appellants, vs. Carl T.C. Gutierrez, Governor, John F. Tarantino, Attorney General, James H. Underwood, Director of the Department of Public Works; Edward G. Untalan, Administrator of the Guam Economic Development Authority; Carl J.C. Aguon, Director of the Department of Land Management; Y'Asela A. Pereira, Treasurer of Guam; Government of Guam Defendants-Appellees and Guam Resource Recovery Partners Intervening Defendants-Appellees. 2003 Guam 13

g. National Union Fire Insurance Co. of Pittsburgh, PA vs. Guam Housing and Urban Renewal Authority 2003 Guam 19

h. People of Guam vs. Stephen Fritz Muritok 2003 Guam 21

i. People of Guam vs. Seung Kweon Chung aka Jeong Seung-Kwon 2004 Guam 2

j. People of Guam vs. Zachary Richard Ulloa Camacho 2004 Guam 6

k. In re: Request of Governor Felix P. Camacho relative to the interpretation and application of Sections 6 and 9 of the Organic Act of Guam 2004 Guam 10

l. People of Guam vs. Mark Bamba Angoco 2004 Guam 11

m. Rosie Villagomez-Palisson and Marianas Physicians Group vs. Superior Court; Carmen Arceo Laguana and Romy Peter Laguana, Real Party in Interest 2004 Guam 13

n. Vicente C. Pangelinan and Joseph C. Wesley Plaintiffs-Appellants, vs.Carl T.C. Gutierrez, Governor, John F. Tarantino, Attorney General, James H. Underwood, Director of the Department of Public Works; Edward G. Untalan, Administrator of the Guam Economic Development Authority; Carl J.C. Aguon, Director of the Department of Land Management; Y'Asela A. Pereira, Treasurer of Guam; Government of Guam, Defendants Appelees, and Guam Resource Recovery Partners, Intervening Defendant-Appellee 2004 Guam 16

o. A.B. Won Pat Guam International Airport Authority, by and through its Board of Directors vs. Douglas B. Moylan, Attorney General of Guam 2005 Guam 5

p. People of Guam vs. Jesse Q. Manila 2005 Guam 6

q. Pacific Rock Corporation vs. Lourdes M. Perez, in her official capacity as the Director of Administration, Government of Guam 2005 Guam 15

r. Frank May vs. People of Guam 2005 Guam 17

s. People of Guam vs. Carl T.C. Gutierrez, Clifford Guzman, Joseph Luis Cruz and Thelma Ann D. Aguon Perez 2005 Guam 19

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

None.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

I served as a law clerk to the Honorable Presiding Judge Forest W. Hanna, Jackson County Circuit Court, 16th Judicial Circuit, Division 13, Kansas City, Missouri, 09/83 to 06/84.

2. whether you practiced alone, and if so, the addresses and dates;

I have never practiced alone.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

Supreme Court of Guam, Justice — 2/02 to present
Guam Judicial Center
3rd floor, Guam Supreme Court
Hagatna, Guam 96910

Superior Court of Guam, Judge — 8/94 to 2/02
Guam Judicial Center
120 West O'Brien Drive
Hagatna, Guam 96910

Guam Attorney General's Office Prosecution Division, Prosecutor 287 West O'Brien Drive Hagatna, Guam 96910	5/90 to 8/94
Jackson County Missouri Prosecutor's Office, Prosecutor 415 East 12th Street Jackson County Court House, 11th floor Kansas City, Missouri 64106	02/89 to 05/90
Guam Attorney General's Office Prosecution Division, Prosecutor 287 West O'Brien Drive Hagatna, Guam 96910	7/84 to 10/88
Jackson County (Missouri) Circuit Court Law clerk to the Honorable Presiding Judge Forest W. Hanna 415 East 12th Street Kansas City, Missouri 64106	9/83 to 06/84

b. **1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?**

1983 to 1984: law clerk to Jackson County Circuit Court, Presiding Judge Forest W. Hanna; criminal, civil, domestic and special proceedings.

1984 to 1994: prosecuting attorney in Guam and Missouri; criminal

1994 to 2002: Superior Court of Guam judge; general jurisdiction-criminal, civil, domestic, probate, small claims, traffic, collections, writs, juvenile delinquents and juvenile special proceedings.

2002 to current: Supreme Court of Guam, Associate Justice: Appellate jurisdiction-criminal, civil, domestic, juvenile, writs, habeas corpus, juvenile.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

As a former prosecutor both on Guam and in Missouri, I represented the People of Guam and Missouri respectively. I specialized in criminal law.

c. **1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.**

I appeared in court on a daily basis as a prosecutor both on Guam and in Kansas City, Missouri from 1984 to 1994.

2. What percentage of these appearances was in:
(a) federal courts: 1%
(b) state courts of record: 99%
(c) other courts

3. What percentage of your litigation was:
(a) civil;
(b) criminal: 100%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

As a prosecutor from 1984 to 1994 both on Guam and in Kansas City, Missouri, I would estimate that I tried to verdict or judgment 35 trials. I was sole counsel in approximately 8 cases, chief counsel in about 20 cases and associate counsel in 7 cases.

5. What percentage of these trials was:
(a) jury: 98 %
(b) non-jury: 2%

18. **<u>Litigation</u>: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:**
(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. People of the Territory of Guam v. Alvin S.N. Cruz and John C. Ignacio
Superior Court of Guam case number CF-47F-86

District Court of Guam Appellate Division case number 86-00045A
Ninth Circuit Court of Appeals case number 871 F.2d 101 (1989)
United States Supreme Court case number 110 S.Ct.109 denying certiorari on October 2, 1989

I prosecuted Alvin S.N. Cruz and John C. Ignacio for robbery. Both defendants were found guilty by a Superior Court of Guam jury. Alvin S.N. Cruz was sentenced to fourteen years confinement. John C. Ignacio was sentenced to serve seven years confinement plus a three year special parole term.

Defendant-appellant Alvin S.N. Cruz appealed his conviction of first degree robbery to the United States District Court of Guam, Appellate Division on three grounds: (1) the giving of an erroneous jury instruction shifted the burden of proof away from the prosecution to Cruz; (2) a question asked during voir dire allegedly conflicted with the correct jury instruction; and (3) the weight of the evidence was insufficient to support a finding that Cruz had the specific intent to kill either or both of the robbery victims. The District Court of Guam, Appellate Division disagreed with the defendant and affirmed the conviction. Defendant Cruz then appealed unsuccessfully to the Ninth Circuit Court of Appeals. The 9th Circuit held that the typographical error in the single challenged instruction did not prejudice Cruz in light of the other instructions which were favorable to the defendant and imposed a very high degree of proof upon the prosecution in requiring it to prove a specific intent to kill. Alvin Cruz's conviction was affirmed by the 9th Circuit Court of Appeals as well.

I represented the People of the Territory of Guam. I was the chief counsel in this matter. I fully participated in the presentation of the case before the grand jury, met with the victims and all of the witnesses and handled all of the litigation.

The date of representation began from the date of the indictment which was March 13, 1986.

The Superior Court of Guam was the venue and the presiding judge was the Honorable Judge Janet Healy Weeks (retired).

Defendant Alvin S. N. Cruz was represented by Attorney Eric Miller and Defendant John C. Ignacio was represented by Attorney Pablo Aglubat. Eric Miller's address is unknown. Pablo Aglubat may be contacted at the Public Defender Services Corporation, 110 West O'Brien Drive, Hagatna, Guam 96910.

2. People of the Territory of Guam v. Irvin S. Ibanez
Superior Court of Guam case number CF-112-86
District Court of Guam, Appellate Division case number 1992 WL 97221
Ninth Circuit Court of Appeals, 993 F.2d 884 (1993) unpublished opinion
United States Supreme Court of Guam denied certiorari on December 13, 1993

Criminal defendant Irvin S. Ibanez was convicted of aggravated murder, kidnapping and possession and use of a deadly weapon in the commission of a felony. He appealed his convictions to the Appellate Division of the District Court of Guam and the 9th Circuit Court of Appeals. He was unsuccessful in both of these appeals. He argued unsuccessfully that his constitutional and statutory rights to a speedy trial were violated. He also argued that the trial court judge committed reversible error in admitting gruesome and bloody photographs of the victim's torso and partially decomposed skull. The courts found that the probative value outweighed any prejudicial effect. Ibanez also argued that the trial court committed reversible error when it instructed the jury that they could infer Ibanez's consciousness of guilt if it found that he had suppressed evidence when he shaved his pubic hairs. The appellate courts found the instruction to be proper and affirmed his convictions.

I represented the People of the Territory of Guam. I was the chief counsel in this matter. I believe then Assistant Attorney General, Raymond Johnson assisted me. His current mailing address is 234 N.E. Randolph Avenue, Peoria, Illinois, 61606. I believe he is suspended from the Guam Bar indefinitely. I fully participated in the presentation of the case before the grand jury, met with the victims and of the witnesses and handled most of the trial litigation. The 12 person jury convicted the defendant as described in the above paragraph. The defendant was sentenced to life imprisonment with no chance of parole. I also wrote the briefs to the District Court of Guam and the 9th Circuit Court of Appeals and argued the matters before both courts.

The date of representation began from the date of indictment which was April 25, 1986.

The Superior Court of Guam was the venue and the presiding judge was the Honorable Presiding Judge Alberto C. Lamorena.

Defense Counsel was Robert Hartsock, address is unknown.

3. People of the Territory of Guam v. Norbert Botelho
Superior Court of Guam case number CF-263-86
District Court of Guam, Appellate Division case number 1998 WL 242609

Criminal defendant Norbert Botelho was convicted of criminal sexual conduct, robbery, and possession and use of a deadly weapon in the commission of a felony by a Guam jury of twelve. The defendant insisted on representing himself, and was allowed to represent himself at the trial with a standby counsel sitting behind him during trial. The District Court of Guam, Appellate Division affirmed the conviction on several grounds but the 9th Circuit Court of Appeals reversed his convictions on the basis that the trial court judge gave an improper jury instruction on the definition of "reasonable doubt".

I represented the People of the Territory of Guam. I was the chief counsel in this matter. I had a second chair counsel working with me. I cannot recall the name of my co-counsel, assuming I had one. I fully participated in the presentation of the case before the grand jury, met with the victims and all of the witnesses and handled most of the litigation. The 12 person jury convicted the defendant as described in the above paragraph. The defendant was sentenced to life imprisonment. After his conviction was reversed by the 9th Circuit Court of Appeals, Botelho entered a deferred no contest plea to third degree criminal sexual conduct as a second degree felony and third degree robbery as a third degree felony and was sentenced to ten years imprisonment with credit for time served and the suspension of the execution of the remaining of the sentence.

The date of representation began from the date of indictment which was October 10, 1986.

The Superior Court of Guam was the venue and the presiding judge was the Honorable Paul J. Abbate (retired).

4. People of the Territory of Guam v. Irvin Ibanez
Superior Court of Guam case number CF-121-87

Criminal defendant Irvin Ibanez was acquitted of aggravated murder, murder, manslaughter and possession and use of a deadly weapon in the commission of a felony by a Guam jury of 12. He was accused of murdering a Department of Corrections guard, Douglas W. Mashburn. Mashburn was stabbed to death and his body was burned. Irvin Ibanez, James Leon Guerrero, Alexander Kitano, and Joe Baza were named as co-defendants in this murder. Ibanez went to trial and was acquitted. Leon Guerrero, Kitano and Baza pled guilty and testified against Ibanez. At the trial of Ibanez, co defendant and witness for the prosecution, Leon Guerrero changed his testimony during direct examination and became a star witness for the defense. Leon Guerrero was later allowed to have his plea withdrawn, was tried for the murder of Mashburn and convicted by a separate jury. I was not the prosecutor against Leon Guerrero.

I represented the People of the Territory of Guam. I was the associate counsel in this matter. Then Chief Prosecutor, Tom Lannen (now deceased) was the Chief Counsel in this matter. I fully participated in the presentation of the case before the grand jury, met with the victim's family and all of the witnesses and handled a substantial part of the litigation.

The defense counsel for Irvin Ibanez was Attorney Peter F. Perez. His address is 194 Hernan Cortes Avenue, Union Bank Plaza, 2nd Floor, Suite 216, Hagatna, Guam 96910.

The date of representation began from the date of the homicide which was June 24, 1987.

The Superior Court of Guam was the venue and the presiding judge was the Honorable Paul J. Abbate (retired).

5. People of the Territory of Guam v. Albert Blas Camacho
Superior Court of Guam case number CF-036-89
District Court of Guam, Appellate Division case number 91-00057A
Ninth Circuit Court of Appeals, 93-10246 not for publication
Defendant Albert Blas Camacho was found guilty by a jury of twelve of one count of first degree criminal sexual conduct and two counts of second degree criminal sexual conduct. He appealed his convictions contending that the Superior Court trial judge erred in admitting testimony by William Q. Perez that others told him that the defendant admitted to raping Mr. Perez's two daughters.

The Ninth Circuit found no reversible error and affirmed the judgment. The Ninth Circuit Court of Appeals held that under the invited error doctrine, the Prosecutors were entitled to pursue the effect that hearing of the defendant's confession had on Perez. In addition, the Ninth Circuit held that there was no confrontation clause violation and evidence of the defendant's guilt was overwhelming.

The District Court of Guam, Appellate Division and the 9th Circuit Court of Appeals affirmed the convictions.

I represented the People of the Territory of Guam. I was the chief counsel in this matter. I believe my co-counsel in this matter was then prosecuting assistant attorney general, Sharilyn Byerly, State Attorney's Office, 5th Circuit, 20 North Main Street, Brooksville, Florida,346012817 I fully participated in the presentation of the case before the grand jury, met with the victims and all of the witnesses and handled most of the litigation. The 12 person jury convicted the defendant of the crimes listed in the second paragraph above. The defendant was sentenced to life imprisonment without the possibility of work release or education release plus a 10 year concurrent sentence. I believe his sentence was later reduced by the trial judge at a later date.

The date of representation began from the date of indictment which was January 31, 1989.

The Superior Court of Guam was the venue and the presiding judge was the Honorable Peter C. Siguenza, Jr. (retired).

Defendant Albert C. Camacho was represented by Michael Phillips, 410 W.O'Brien Drive, Hagatna, Guam 96910

6. People of the Territory of Guam v. Richard Reyes Quichocho and Michael John Quichocho
Superior Court of Guam case number CF-147-89

District Court of Guam, Appellate Division case number 90-00083A
Ninth Circuit Court of Appeals, 91-10333

Criminal defendant Richard Quichocho threatened his girlfriend, Bobbie that if "...I can't have you, then nobody will." Soon after this threat, Richard Quichocho stalked the victim, Bobbie Quichocho. On May 20, 1989, Richard filed a single shot at a group of three young girls, one of whom he thought was Bobbie. Richard was armed with a police radio, 9 mm semi-automatic and dressed in a black trench coat, maroon ski mask and surgical gloves when he fired this shot. No one was injured. Five days later Richard Quichocho fired into a Merizo home in which Bobbie was staying. Richard Quichocho killed sixteen year old Melanie Cruz.

Richard was tried and convicted for the murder of Melanie Cruz and the attempted murders of the three girls and the four men and women, including Bobbie who were staying in the Merizo home the evening Melanie Cruz was killed.

Richard Quichocho was convicted of aggravated murder and under Guam law, the appellate courts held that the existence of "extreme mental and emotional disturbance" is not a defense to aggravated murder. The appellate courts also held that the defense counsel's comments concerning the non existence of character evidence invited the Prosecutor's closing argument which did not unfairly prejudice Quichocho. "The prosecutor's comments merely rebutted defense counsel's suggestion that the reason the government failed to introduce negative character evidence is that none existed." The court further held that Richard's convictions should not be reversed because of the California Jury instruction on the transferred intent doctrine which was given to the jurors did not materially differ from Guam's law on "transferred intent." The "transferred intent" instruction was limited to the aggravated murder count and did not apply to the seven attempted murder victims.

Michael John Quichocho, the co-defendant pled guilty and testified against Richard Quichocho.

The District Court of Guam, Appellate Division and the 9th Circuit Court of Appeals affirmed the convictions.

I represented the People of the Territory of Guam. I was the chief counsel in this matter. I fully participated in the presentation of the case before the grand jury, met with the victims and all of the witnesses and handled most of the litigation. The 12 person jury convicted the defendant as described in the above paragraph. The defendant was sentenced to life imprisonment with no chance of parole plus 85 years.

The date of representation began from the date of indictment which was June 1, 1989.

The Superior Court of Guam was the venue and the presiding judge was the Honorable Ramon V. Diaz (retired).

Richard Quichocho was represented by Jerry Hogan and Jeffrey A. Cook. The address for Jerry Hogan is unknown. The address for Attorney Jeffrey A. Cook is Office of Cunliffe and Cook, P.C., 210 Archbishop F.C. Flores Street, Suite 200, Hagatna, Guam 96910. Michael John Quichocho was represented by Attorney Lee Conover, 18315 Landon Road #C, Gulfport, MS 39503.

7. People of the Territory of Guam v. Edward R.C. Dela Pena
Superior Court of Guam case number CF-0045-92
District Court of Guam, Appellate Division case number 93- 00064A
Ninth Circuit Court of Appeals, 94-10504

Susume and Ritsuko Satake were murdered on February 21, 1992. The next evening Dela Pena was interviewed by the Guam Police Department. He waived his rights both orally and in writing and agreed to be questioned by the police. There was no dispute that he was not in custody at this interview.

Dela Pena was interviewed from 7:50 p.m. on February 22nd to 4:00 a.m. on February 23rd. Dela Pena consented to a search of his home. Officers found a knife and an unregistered gun. The defendant returned back to the police station at 6:35 a.m. on February 23rd and he was given time to rest. At 8:00 a.m. he said he wanted to leave. There was no dispute he was in custody at this time. At 10:35 a.m. on February 23rd the defendant orally waived his Miranda Warnings but did not waive them in writing. Dela Pena then confessed to the robbery and murders. His confession was admitted at trial. Dela Pena argued on appeal that the confession he made during his in-custody interrogation on February 23rd should have been suppressed because the Miranda Warnings he had been given the night before, when he was not in custody were not repeated once he was placed in custody.

The Ninth Circuit Court of Appeals, following the lead of the Eighth and Eleventh Circuits held that Dela Pena's statements made "...during custodial interrogation are not rendered inadmissible simply because the police fail to repeat Miranda Warnings previously given to the defendant when he was not in custody." The Ninth Circuit court also held that the fifteen hour interval between the Miranda Warnings and the subsequent questioning did not render Dela Pena's confession inadmissible.

The District Court of Guam, Appellate Division and the 9th Circuit Court of Appeals affirmed the convictions.

I represented the People of the Territory of Guam. I was the chief counsel in this matter. Then Assistant Attorney General, Amber Malarney was my associate counsel. I believe she is currently a judge in North Carolina. I don't have her address at this time. I fully

participated in the presentation of the case before the grand jury, met with the victims and all of the witnesses and handled most of the litigation. The 12 person jury convicted the defendant of four counts of aggravated murder as a first degree felony, two counts of robbery as a first degree felony and eight counts of possession and use of a deadly weapon in the commission of a felony.

The date of representation began from the date of the filing of the magistrates complaint, February 24, 1992.

The Superior Court of Guam was the venue and the presiding judge was the Honorable Peter C. Siguenza, Jr. (retired).

Defendant Dela Pena was represented by Robert Hartsock. His address is unknown.

8. State of Missouri v. Cecil L. Hill, Jr.
Circuit Court of Jackson County, Missouri, case number CR1989-4930
WD43312, matter was appealed in the 1993 May Session and conviction was upheld by the three appellate judges, the Honorable Turnage, P.J., Breckenridge and Hanna.

On August 18, 1989 at about 10:10 p.m. four employees were in the Osco Drug Store in Kansas City, Missouri when they were confronted by a black male, armed with a handgun. He took the employees to a back bathroom and forced them to remove all of their clothing. He then searched for the store manager at gunpoint and made the manager remove all the money from the safe. The defendant received $2,700.00 in United States currency. He then forced the manager to join the other employees in the back bathroom and told him to take off his clothes. The defendant then took Naimi Mathias one of the naked employees as a hostage. He took her to an office in the drug store, put a gun to her head and sexually assaulted her. The defendant was later identified and arrested.

Defendant Cecil Hill, Jr. was found guilty by a jury of twelve of sodomy, robbery, armed criminal action, and attempted rape. He was sentenced to life for robbery, 30 years as a persistent sexual offender for the sodomy charge consecutive to the robbery charge, 10 years concurrent on armed criminal action, 30 years as a persistent sexual offender for the attempted rape charge consecutive to the robbery charge and concurrent with sodomy.

I represented the people of the State of Missouri. I was co counsel in this matter. Lead counsel was then Assistant Prosecutor Marianne Hill. I fully participated in the presentation of the case, met with the victims and all of the witnesses and handled much of the litigation. I handled the main victim who was raped and sodomized by the defendant.

The date of representation began from the date of the State of Missouri Complaint, August 27, 1989.

Jackson County Circuit Court located in Kansas City, Missouri was the venue and the presiding judge was the Honorable Donald Mason.

Defendant Hill was represented by Assistant Public Defender, Leon M. Munday, 324 East 11th Street, 20th Floor, Kansas City, Missouri.

9. State of Missouri v. Quakenbush
Circuit Court of Jackson County, Missouri, case number CR1988-1299
Motion for New Trial was overruled by the Honorable Judge Moran, Division 16 on October 5, 1989

Criminal defendant Keith Quakenbush of Independence, Jackson County, Missouri entered the residence of Kathleen Quakenbush. He was armed with a .38 caliber handgun when he entered her home. He shot Mrs. Quakenbush twice. The Defendant gave a signed statement to Detective Rast of the Independence Police Department. A witness saw the defendant fire the shots which struck Mrs. Quakenbush. Mrs. Quakenbush told two officers prior to her death that she had been shot by the defendant. The defendant was found guilty of Murder, Burglary and two counts of armed criminal action. The defendant pled insanity.

I represented the State of Missouri. I was co-counsel in this matter. Lead Counsel in the case was Assistant Prosecutor Patrick B. Hall (now deceased). I fully participated in the presentation of the case, met with the victim's family and all of the witnesses and handled some of the trial litigation. The 12 person jury convicted the defendant as described in the above paragraph. The defendant was sentenced to Life without Parole for the Murder, Life for the Armed Criminal Actions, and 15 years for the Burglary, all to run concurrent.

The date of representation began in 1989.

The Circuit Court of Jackson County, Missouri, Division 17, Docket I (Independence) was the venue and the presiding judge was the Honorable Judge Julian M. Levitt.

Defense Counsel was Assistant Public Defender, Mary D. Curtis, address is unknown.

10. State of Missouri v. Joe Jr. McNeely, Michael McGowan, Christopher Spencer and Daryl L. Johnson.
Circuit Court of Jackson County, Missouri, case number CR1988-5178A, 5178B, 5178E and 5178F respectively.

On October 16, 1988, detectives of the Kansas City Police Department responded to a shooting involving multiple victims at an apartment building. This matter was classified as a drive by drug shooting involving the "Bloods" and the "Crypts." Several victims, including children were shot.

I represented the State of Missouri. I was co-counsel in this matter. My co-counsel in the case was then Assistant Prosecutor Jeffrey Bushur. Mr. Bushur is currently a judge at the Jackson Circuit Court. His address is Division 13, Independence Courthouse, 308 West Kansas, 1st Floor, Independence, Missouri 64050.

I fully participated in the presentation of the case, met with the victims, family and all of the witnesses and handled much of the trial litigation.

The date of representation began in 1989.

Joe McNeely Jr. was sentenced to 7 years for four counts of Assault 1st and 3 years for Assault 2nd which ran concurrently. He was sentenced on October 31, 1989.

Michael McGowan was sentenced by the Judge Wells of the Circuit Court of Jackson County. The defendant was found guilty by a jury of twelve of various counts of Assault and Armed Weapons. He was sentenced to 18 months in state prison and 3 years state prison concurrently with credit for time served.

Christopher Spencer was sentenced by Judge William Ely of the Circuit Court of Jackson County. The defendant entered a guilty plea to five counts of assault and armed weapon and was sentenced to 10 years state prison and 3 years state prison concurrently.

Daryl L. Johnson was sentenced by Judge William Ely of the Circuit Court of Jackson County to 1 year Jackson County jail, 2 years state prison, 5 years state prison consecutively.

I am unable to recall and retrieve the names of defense counsels.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

From 1984 to 1987, I served as an assistant general in the Guam Attorney General's Office. In that position, I was assigned over 400 cases per year including felony, misdemeanor, petty misdemeanor, violations and juvenile; prosecuted felony jury trials and bench trials; presented numerous cases to the Superior Court of Guam Territorial Grand Jury; wrote briefs and argued

before the District Court of Guam Appellate Division and the Ninth Circuit Court of Appeals; presented the government's case in hundreds of arraignments; prepared numerous search warrants and extradition papers; handled many of the most serious cases in the office. I developed procedural guidelines for all juvenile cases which made the handling of these cases more efficient. From 1987 to August 1988, I served as acting Chief Prosecutor, Acting Deputy Attorney General.

From 1988 to 1990, I served as an assistant prosecuting attorney in the Jackson County, Missouri Prosecutor's Office. While there I prosecuted serious felony cases, primarily drug, sex crimes, robberies, drive-by shootings, and homicides. I prosecuted felony jury trials, presented numerous cases to the Jackson County Circuit Court Grand Jury and to the various judges for preliminary hearings, prepared numerous post-conviction responses, and was assigned the position of Trial Team Leader for the Sex Crimes Unit.

From May 1990 to August 1994, I was appointed the Chief Prosecutor, Deputy Attorney General of the Office of the Attorney General. I supervised eighteen trial lawyers in the performance of their duties; trained new lawyers in the criminal law, trial strategy and rules of evidence, trial procedure, and negotiation; monitored and distributed caseloads according to trial schedules of individual attorneys; supervised initial trials with lawyers with minimal trial experience; approved major felony plea agreements. I also supervised the development of programs in connection with the computer system in order to monitor case flow. I acted as a liaison between the prosecutor's office and territorial and federal investigative agencies, assumed the responsibility of being the Deputy Chief Prosecutor available 24 hours a day by telephone or beeper to respond to inquiries from investigative agencies. I prosecuted major felony trials, presented cases to the Superior Court Territorial Grand Jury, wrote briefs and argued before the District Court of Guam, Appellate Division and Ninth Circuit Court of Appeals, prepared arrest and search warrants, and wrote briefs to the United States Supreme Court. I established a permanent White Collar Crime Unit; obtained a high conviction rate in felony jury trials during 1990-1991; eliminated a major backlog review of 5,000 criminal cases; established a strong Victim-Witness Ayuda Service Program; instituted the computerization of the entire Prosecution Division; established a strong Family Violence Protocol for the Prosecution Division.

From 1994 to 2002, I served as a trial judge in the Superior Court of Guam. I presided over pretrial hearings, including magistrates, arraignments, bail, and grand jury returns in both Superior Court and Federal District Court (when serving as a designated federal judge); I presided over massive jury selections and assisted in preparing a sophisticated questionnaire for 600 potential jurors in one case alone. I presided over bench and jury trials involving homicide, family violence, drugs, sexual conduct, robbery, burglary, thefts, aggravated assaults and other types of crime. I presided over hundreds of juvenile delinquent cases involving minors who committed crimes and minors who were abused and neglected. I presided over hundred of domestic cases involving issues of divorce, family violence temporary and permanent restraining orders, separation, reconciliation, adoptions, termination of parental rights, community property, separate property and contempt. I presided over several cases involving probate issues involving the appointments of administrators and executrix of estates, partition of

property, preliminary, and final distribution of property.

Since 2002, I have been serving as an associate justice with the Guam Supreme Court. I review all decisions of the Superior Court of Guam in which appeals have been filed; preside over civil and criminal appeals, writs of prohibition, habeas corpus, and mandates, attorney discipline, certified questions, pro hac vice applications and emergency motions.

In addition, as one of the associate justices working under the leadership of Chief Justice F. Philip Carbullido, the justices are responsible for overseeing the offices of the Ethics Prosecutor, Public Guardian and the Compiler of Laws.

I, along with the justices on the bench also exercise disciplinary jurisdiction over attorneys admitted to practice on Guam, administer the bar examination and inquire into the character and fitness of applicants for the practice of law on Guam.

I have been appointed to serve as a designated Associate Supreme Court Justice with the Guam Supreme Court and the Commonwealth of the Northern Marianas Supreme Court; I attend hearings and write decisions. I currently serve on the Commonwealth of the Northern Marianas Supreme Court as a Justice Pro Tem and have held this position for four years.

I currently serve as a designated federal district court judge. I was recently reappointed by Chief Judge of the 9th Circuit, the Honorable Mary Schroeder. I have held this designation for approximately ten years, from 1995 to present. I preside over many types of hearings including arraignments, bail hearings, grand jury returns, change of pleas, discovery motions, summary judgment motions, and probation revocation.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. **List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.**

   Currently, I am a member of Guam's government retirement system, known as the Government of Guam "Defined Benefit" Retirement Plan. If confirmed to the Federal District Court of Guam, I can either withdraw my contributions or leave it with the Government of Guam until age 60 and then collect my retirement benefits at that time. I became a member of this plan in 1984 and have been a continuous member since then.

2. **Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.**

   If confirmed, I will look to the Code of Conduct for United States Judges, the Ethics Reform Act of 1989, 28 U.S.C. Section 455, and any other relevant material.

   Currently, I look to our statutes, our case law, and staff attorney's recommendations when considering a request for disqualification. If it is unclear as to whether I should voluntarily recuse myself, I disclose to all of the parties at a status hearing any information I may have including the fact that my husband is a periodontist and may have a certain doctor/patient relationship or doctor/insurance company relationship with a party or an attorney before me. By providing this information early on in the case, the parties can then decide whether they wish to formally request my disqualification. I recuse myself from any cases in which I participated as a former judge of the Superior Court of Guam or a former prosecutor with the Office of the Attorney General.

3. **Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.**

   No.

4. **List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)**

   Please see the attached Financial Disclosure Report.

5. **Please complete the attached financial net worth statement in detail (Add schedules as called for).**

   Please see attached Net Worth Statement

6. **Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.**

   I have never held a position or played a role in a political campaign.

AO-10 (WP)
Rev. 1/2004

FINANCIAL DISCLOSURE REPORT
FOR CALENDAR YEAR 2004

Report Required by the Ethics in Government Act of 1978, (5 U.S.C. App. §§101-111)

1. Person Reporting *(Last name, first, middle initial)*	2. Court or Organization	3. Date of Report
Tydingco-Gatewood, Frances, M.	United States Federal District Court of Guam	April 25, 2006

4. Title *(Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)*	5. Report Type (check appropriate type)	6. Reporting Period
District Judge - Nominee	X Nomination, Date 4/25/06 Initial ___ Annual ___ Final	1-1-05 to 04-15-06

7. Chambers or Office Address	8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations.
Supreme Court of Guam 120 West O'Brien Drive, Suite 300 Hagatna, Guam 96910	Reviewing Officer _____ Date_____

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.

I. POSITIONS. *(Reporting individual only; see pp. 9-13 of Instructions.)*

	POSITION	NAME OF ORGANIZATION/ENTITY
[X]	NONE (No reportable positions.)	
1		

II. AGREEMENTS. *(Reporting individual only; see pp. 14-16 of Instructions.)*

	DATE	PARTIES AND TERMS
[ ]	NONE (No reportable agreements.)	
1	1984	My Government of Guam Defined Benefit Retirement Plan. I can either withdraw my contributions or leave it with the Government of Guam until age 60 and then collect my retirement benefits at that time.
2		

III. NON-INVESTMENT INCOME. *(Reporting individual and spouse; see pp. 17-24 of Instructions.)*

	DATE	SOURCE AND TYPE	GROSS INCOME
A.	**Filer's Non-Investment Income**		
[ ]	NONE (No reportable non-investment income.)		
1	2004	Supreme Court of Guam, salary	$ 126,000.00
2	2005	Supreme Court of Guam, salary	$ 126,000.00
3	2006	Supreme Court of Guam, salary	$ 39,000.00
B.	**Spouse's Non-Investment Income - If you were married during any portion of the reporting year, please complete this section. (dollar amount not required except for honoraria)**		
[ ]	NONE (No reportable non-investment income.)		
1	2004	Earnings as self employed periodontist	
2	2005	Earnings as self employed periodontist	

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting: Frances Marie Tydingco-Gatewood

Date of Report: 4/25/06

IV. REIMBURSEMENTS -- transportation, lodging, food, entertainment.
(Includes those to spouse and dependent children. See pp. 25-27 of Instructions.)

	SOURCE	DESCRIPTION
☐	NONE (No such reportable reimbursements.)	
1		EXEMPT
2		
3		
4		
5		
6		
7		

V. GIFTS. *(Includes those to spouse and dependent children. See pp. 28-31 of Instructions.)*

	SOURCE	DESCRIPTION	VALUE
☐	NONE (No such reportable gifts.)		
1		EXEMPT	$
2			$
3			$
4			$

VI. LIABILITIES. *(Includes those of spouse and dependent children See pp. 32-33 of Instructions.)*

	CREDITOR	DESCRIPTION	VALUE CODE*
☐	NONE (No reportable liabilities.)		
1	Sallie Mae	College expenses for our two sons	J
2			
3			
4			
5			

*Value Codes: J=$15,000 or less; K=$15,001-$50,000; L=$50,001-$100,000; M=$100,001-$250,000; N=$250,001-$500,000; O=$500,001-$1,000,000; P1=$1,000,001-$5,000,000; P2=$5,000,001-$25,000,000; P3=25,000,001-50,000,000; P4=50,000,001 or more

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Frances Marie Tydingco-Gatewood	4/25/06

VII. Page 1 INVESTMENTS and TRUSTS – income, value, transactions *(Includes those of spouse and dependent children. See pp. 34-57 of Instructions.)*

	A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure*	B. Income during reporting period (1) Amt. Code1 (A-H)	B. Income during reporting period (2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code2 (J-P)	C. Gross value at end of reporting period (2) Value Method Code3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	D. Transactions during reporting period – If not exempt from disclosure (2) Date: Month-Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
☐	NONE (No reportable income,									
1	Money Market Fund (IRA)	A	int.	J	T	Exempt				
2	General Electric (IRA)	A	div.	J	T					
3	FHLMC Series Mtn.(IRA)	A	int.	J	T					
4	AT&T (IRA)	A	int.	J	T					
5	Washington Mutual (IRA)	A	div.	J	T					
6	Intel (IRA)	A	div.	J	T					
7	Pfizer (IRA)	A	div.	J	T					
8	Tyson Food (IRA)	A	div.	J	T					
9	U.S. Bancorp (IRA)	A	div.	J	T					
10	Cisco Systems	A	div.	J	T					
11	Com cast Corp.	A	div.	J	T					
12	Dell Inc.	A	div.	J	T					
13	Lucent Tech	A	div.	J	T					
14										
15										
16										
17										

1	Income/Gain Codes: (See Col. B1, D4)	A=$1,000 or less F=$50,001- $100,000	B=$1,001-$2,500 G=$100,001-$1,000,000	C=$2,501-$5,000 H1=$1,000,001-$5,000,000	D=$5,001-$15,000 H2=More than $5,000,000	E=$15,001-$50,000
2	Value Codes: (See Col. C1, D3)	J=$15,000 or less N=$250,001-$500,000 P3=$25,000,001-$50,000,000	K=$15,001-$50,000 O=$500,001-$1,000,000	L=$50,001- $100,000 P1=$1,000,001-$5,000,000 P4=More than $50,000,000	M=$100,001-$250,000 P2=$5,000,001-$25,000,000	
3	Value Method Codes: (See Col. C2)	Q=Appraisal U=Book value	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash/Market	

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting: Frances Marie Tydingco-Gatewood	Date of Report: 4/25/06

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS (Indicate part of Report.)

IX. CERTIFICATION.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app., § 501 et. seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

Signature Frances Marie Tydingco-Gatewood Date 4/25/06

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. App., § 104.)

FILING INSTRUCTIONS:

Mail signed original and 3 additional copies to:

Committee on Financial Disclosure
Administrative Office of the
United States Courts
Suite 2-301
One Columbus Circle, N.E.
Washington, D.C. 20544

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS				LIABILITIES			
Cash on hand and in banks		36	419	Notes payable to banks-secured		8	300
U.S. Government securities-add schedule				Notes payable to banks-unsecured			
Listed securities-add schedule				Notes payable to relatives			
Unlisted securities--add schedule				Notes payable to others			
Accounts and notes receivable:				Accounts and bills due		22	000
Due from relatives and friends				Unpaid income tax			
Due from others				Other unpaid income and interest			
Doubtful				Real estate mortgages payable-add schedule			
Real estate owned-personal residence		242	000	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		45	000				
Cash value-life insurance		29	000				
Other assets itemize:							
Government of Guam retirement		217	255				
Spouse retirement IRA		171	000				
Spouse business assets		298	623	Total liabilities		30	300
				Net Worth	1	008	997
Total Assets	1	039	297	Total liabilities and net worth	1	039	297
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged? (Add schedule)	NO		
On leases or contracts				Are you defendant in any suits or legal actions?	YES*		
Legal Claims				Have you ever taken bankruptcy?	NO		
Provision for Federal Income Tax							
Other special debt							

*I have been named as a Defendant only in my official capacity as a trial judge

III. GENERAL (PUBLIC)

1. **An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.**

   Since I graduated from law school in 1983, my entire legal career has been devoted to working in the government sector as a law clerk, prosecutor, and judge and currently as a justice. Because of this, I have been prohibited from representing private clients. As both a judge and a justice, I have worked closely with the Guam Bar Association in trying to develop rules for those who are disadvantaged. I am the Chairperson for the Indigent Defense Counsel Committee. We developed rules which eventually were promulgated by the Guam Supreme Court. I am also serving as a co-chairperson for the Pro Se Committee and we are currently in the process of developing the necessary rules.

2. **The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?**

   I have never held membership in any such organization.

3. **Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).**

   In June of 2005, The Governor of Guam, the Honorable Felix P. Camacho asked me if I would be interested in being considered for the position of United States Federal District Court Judge here on Guam. After consultation with my family, I spoke to the Governor personally and responded that I would be honored to be considered for the position. He explained that he was asked to submit three names to the White House for consideration. On October 7, 2005 I participated in a telephone interview with staff from the White House Counsel's Office and from the Department of Justice. Following this interview, I completed the necessary nomination paperwork and underwent a background investigation.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.

No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped-many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

The five characteristics of "judicial activism" noted in the question are characteristics I have discussed and debated with my colleagues in my capacity as a former prosecutor and a jurist on the bench during my twenty-two year legal career.

Clearly, many judges and justices including myself have been tempted to embark on the path of "judicial activism" rather than remain on the straight path of "judicial restraint." However, there is no doubt that justices and judges should disavow the practice of "judicial activism." The role of a judge is limited and the judge must confine herself to such role. Judges cannot and should not be legislators. We do not have the people's mandate. Judges should not be administrators. Our job is not to micro manage the governmental agencies.

For judges to travel down the road of "judicial activism" is to clearly risk undermining the faith of our citizenry in the efficacy of our co-equal but independent executive, legislative and judicial branches of government. Like the umpire in a ball game, a judge must not be intimidated by the teams or the parties in a controversy whether they include those from the executive or legislative branches of government, but rather the judge must remain true to her role in impartially interpreting the law as applied to the facts of a case. It is this umpire role that I employed as a judge at the trial court level and now as a justice at the appellate level.

Respecting the authority of cases decided in the past has also been critical in my decision making as both a trial judge and an appellate justice. This is important so that arbitrary decisions are not made in our courts. All judges concerned with stability, consistency and predictability should respect stare decisis.

In addition to honoring the doctrine of stare decisis, a judge must also ensure that the jurisdictional requirements of standing and ripeness are properly analyzed. Proper determinations of these requirements will also ensure stability of our legal system. In the past 12 years as a former trial judge and appellate justice, I have come to value these important jurisdictional limitations and have endeavored not to loosen such requirements.

Finally, our Constitution was designed based on the principles of separation of powers. Our Framers established three coequal but separate branches of government. Each of the branches has the ability to exercise checks and balances on the two others. To preserve this separation each branch must not be controlled or influenced by either of the others. It is crucial that a judge respect this important principle when presented with cases.

In sum, judges should employ the umpire role, respect stare decisis, properly analyze the court's jurisdictional requirements, and maintain a deep respect for the separation of powers doctrine. By doing all of these things, criticism targeted against federal judges will decline.

AFFIDAVIT

I, Frances Marie Tydingco-Gatewood, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

4/19/06 Frances Marie Tydingco Gatewood
(DATE) (NAME)

(NOTARY)

CYNTHIA C. SABLAN
Notary Public
In and for Guam, U.S.A.
My Commission Expires May 3, 2006
Po Box 3824 Hag[illegible]

Chairman SPECTER. Thank you very much.

Your resume and background has been covered on your introduction. We are going to begin with you, Justice Tydingco-Gatewood, because your hearing will be relatively brief, as is our custom when there is bipartisan support in a situation like yours.

Let me begin by asking if you think your experience as a prosecutor will be of special assistance to you on the bench.

Justice TYDINGCO-GATEWOOD. I do, Chairman Specter. As you see in the investigative report that you have before you, I was a prosecutor for 10 years, both on Guam and in Missouri. If confirmed by the Senate, I will be handling many criminal cases at the Federal District Court.

So I think that all of the experiences I have had, having presented many hundreds, if not thousands, of cases before the grand jury, conducted preliminary hearings in Missouri, appearing before juries on criminal cases, I think that would be very instrumental. I have had the opportunity to work on Motions to Suppress and Motions in limine, and I think those will be helpful.

Chairman SPECTER. Well, that covers the criminal. What would you say would be the background of your experience which would give you the qualifications to handle civil matters?

Justice TYDINGCO-GATEWOOD. Civil? Did you say civil, sir?

Chairman SPECTER. Civil.

Justice TYDINGCO-GATEWOOD. Civil. Yes. In my experience on the civil matters, as a former prosecutor, I did not cover any civil matters. But as a former Superior Court Judge, I handled many civil matters.

Chairman SPECTER. And how many years were you on the Supreme Court?

Justice TYDINGCO-GATEWOOD. I am currently on the Supreme Court. I have been on the Supreme Court for four and a half years. Prior to that, I was a Superior Court Judge for seven and a half years, a trial judge, so I had criminal and civil dockets.

Chairman SPECTER. Did you have any legal practice in the civil field?

Justice TYDINGCO-GATEWOOD. Before I became an attorney, no, I have not.

Chairman SPECTER. You once quoted Socrates as saying, "Four things belong to a judge: to hear courteously, to answer wisely, to consider soberly, and to decide impartially."

That is reminiscent of some advice that I heard from Senator Thurmond shortly after I joined the Senate when he was Chairman of this committee, and he asked a judicial nominee, "Do you promise to be cuhrteous?" Translated into English, that is, "Do you promise to be courteous?"

[Laughter.]

I say that in the presence of Senator Sessions and Senator Graham, who do not need a translation.

[Laughter.]

Senator GRAHAM. Socrates told him personally, so I know.

[Laughter.]

Chairman SPECTER. And the nominee responded, "Yes." I said to myself, well, what would you expect a nominee to say except yes? Then Senator Thurmond said, "The more power a person has, the

more cuhrteous a person should be," translated, "The more power a person has, the more courteous a person should be."

I have since come to regard that as the most profound statement I have heard from this dais in the time that I have been on the Judiciary Committee. I think it is something which should be remembered. Nominees confirmed have said to me decades later about that, and how important they thought it was.

You wrote in your first year as a Judge that you did not want to contract what you called "robeitis." What did you mean by "robeitis," and why not?

Justice TYDINGCO-GATEWOOD. Right. When I was a prosecuting attorney for many years, I had appeared before many judges, both on Guam and in Missouri. Of course, most of the judges I appeared before were very courteous, very respectful, very open-minded. One, in particular, however, was not.

You just said, "the more powerful you are, the more courteous you should be, and the more respectful," and I felt that he was not during a big rape trial that I had in Missouri.

So I feel that sometimes when people become powerful, when they put on the black robe, they forget their values of respect, the forget their character, and I did not want to become like that.

Having been a lawyer for many years, I have always endeavored to be prepared before a judge and I had always hoped that a judge would be respectful towards me, and that is what I meant by that, Chairman Specter.

Chairman SPECTER. Justice Tydingco-Gatewood, a standard question is, if confirmed, do you promise to interpret the law and not make law?

Justice TYDINGCO-GATEWOOD. Yes, I do, sir.

Chairman SPECTER. Senator Kennedy?

Senator KENNEDY. No questions. Just, congratulations on the nomination.

Justice TYDINGCO-GATEWOOD. Thank you, Senator Kennedy.

Chairman SPECTER. Senator Kennedy's congratulations is second best to no questions, Justice Tydingco-Gatewood.

Justice TYDINGCO-GATEWOOD. Yes, I read the transcripts of some of the prior hearings, so I appreciate that.

[Laughter.]

Senator KENNEDY. I am sure you meant that as a compliment.

[Laughter.]

Justice TYDINGCO-GATEWOOD. Yes, sir, I did.

Senator KENNEDY. Thank you.

Chairman SPECTER. Thank you very much for being with us, Justice. You may be excused at this point.

Justice TYDINGCO-GATEWOOD. Thank you.

Chairman SPECTER. We turn, now, to the nomination of the General Counsel for the Department of Defense. I met with Mr. Haynes extensively yesterday to lay the groundwork for what I thought was going to be a contentious hearing, just to be very candid about it.

Mr. Haynes come to us in the context of being General Counsel to the Department of Defense at a time when there has been a great deal of criticism and controversy about many practices of the Department of Defense. In that capacity as General Counsel, he is

likely to be held responsible for many of the things which happened.

In discussing the confirmation hearing with Mr. Haynes yesterday, I referred to the memorandum by Assistant Attorney General Jay Bybee dated August 1, 2002, which outlined very strong tactics on interrogation.

Even realizing that we are a Nation at war and the memorandum was written less than a year after 9/11, and one of the comments from the introductory paragraph of this memorandum, Assistant Attorney General Bybee wrote, "We further conclude that certain acts may be cruel, inhuman or degrading, but still not produce pain and suffering of the requisite intensity to fall within Section 234(a)'s proscription against torture."

The memo then goes on to describe in some detail what is an appropriate line of interrogation, but in that context it is a very strong, strong standard.

Senator Warner has referred to a letter dated July 7 that was sent to the committee. It sets the parameter of the hearing. I think it advisable to put it on the table so we can deal with it as directly as possible. I appreciate your understanding of that, Mr. Haynes. Let the record show, he nodded in agreement.

The second paragraph says, from these 20 officials, "What compels us to take the unusual step in writing is our profound concern about the role Mr. Haynes played in establishing, over the objections of uniformed military lawyers, to tension and interrogation policies in Iraq, Afghanistan, and Guantanamo which led not only to the abuse of detainees in U.S. custody, but to a dangerous abrogation of the military's longstanding commitment to the rule of law."

Now, I had suggested to you that you take as much time as you need in your opening statement. Ordinarily, we try to be relatively brief, but you and I spent about three and a half hours yesterday going over the complexities of the role you had, and it was a difficult role, admittedly, in the context of 9/11 and in the context of trying to structure a response on interrogation to get information from an enemy and to protect the United States, to deal with detainees, to construct a system which would accord them basic fairness, to undertake interrogation tactics which were within the realm of reason, and I asked you to do that at some length.

I also asked you, in your opening statement, to deal with the question of where we go next in light of the decision of the Supreme Court in *Hamdan* v. *Rumsfeld* as to what kind of a law we are going to structure, because your views on that were very germane as to your qualifications to be a Federal Judge, as to how you handle the interrogation issue, on the values that you saw and what you tried to accomplish and what you thought was right, and on the construction of the military tribunals and your evaluation as to those tribunals in light of the Supreme Court decision, and where your judgment is as to where we should go next, all very salient and very germane to the role of a Federal judge.

This Committee is committed to giving you a full and fair hearing to explore your qualifications, your resume, and your work—you have outstanding academic qualifications, outstanding profes-

sional qualifications—then to deal with the issues which I have just raised.

Senator Kennedy?

STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. Thank you, Mr. Chairman. Two years ago, when our Committee met to consider Mr. Haynes for the Fourth Circuit, I opposed his nomination. Since then, we have learned far more about him, despite his consistent refusal to provide additional information or even to appear before this Committee or any of the other committees in his capacity as General Counsel of the Department of Defense. Every new piece of information has strengthened the case against him.

Time and again, on some of the most fundamental questions of law and diplomacy that have come before the Department of Defense, Mr. Haynes has displayed a shocking failure of legal and moral leadership.

It is astounding that the administration would continue to press the nomination, even though the subordinates who have followed the policies that he authorized have gone to prison.

At the Pentagon, Mr. Haynes works closely with David Addington, John Yoo, and others to develop and implement policies on prisoner detention, executive power, and torture that made a mockery of the rule of law. Based on incompetent legal reasoning, these actions represented such an appallingly bad policy that most of them have been categorically repudiated by the Congress, the Supreme Court, and even the President himself.

On torture, Mr. Haynes was personally responsible for the adoption of the Bybee torture memo as official Defense Department policy. First pursuing a harsh interrogation policy without consulting career military lawyers, he subsequently yielded to significant internal pressure and convened a working group to study the use of harsh interrogation techniques at Guantanamo, but later, he secretly forwarded a sham version of the working group's final report to Secretary Rumsfeld that closely followed the Bybee torture memo, without even informing dissenting administration and career military lawyers who were supposedly members of the working group.

Yale Law School Dean Harold Koh, testifying before this committee, has called the Bybee torture memo "perhaps the most clearly legally erroneous opinion I have ever heard," and "a stain on our law", and has been repudiated by the administration and the Attorney General.

Mr. Haynes also failed to provide people captured on the battlefield with an immediate determination of their POW status. He ignored these hearing requirements in spite of the unequivocal warnings of scores of high-ranking military officials, including the senior Judge Advocates General of all the services and the legal advisor to the Chairman of the Joint Chiefs of Staff.

We are now paying the price for that failure, trying to recreate those tribunals three or more years after capturing these combatants, when we should be prosecuting and convicting many of these individuals as terrorists.

In addition, Mr. Haynes played a key role in establishing the fatally flawed military commissions process. Instead of following the established procedures for trying war criminals, Mr. Haynes and the Department ignored Congress and pursued a unilateral, unworkable commissions system.

According to the Justice Department, 261 terrorists have been convicted in the civilian criminal justice system since 9/11, while not a single conviction has been obtained under the defective military commissions. Last week, the commissions process was invalidated by the Supreme Court, which held it unconstitutional.

Mr. Haynes and his colleagues in the administration claimed that no American court could review the designation of an American citizen as an enemy combatant. Mr. Haynes is accountable for this policy, since it was executed by the military, not the Justice Department.

In the *Padilla* case, the administration claimed in court documents that their "determinations on this score are the first and final word", notwithstanding the Constitution. The Fourth Circuit rejected that position as absurd.

Mr. Haynes also interfered with Congress's ability to perform oversight over the detainee issue. Despite a standing invitation, he has never appeared before the Armed Services Committee, in direct contravention of his own statements in pre-confirmation questions indicating he would appear before the Committee when called.

In addition, Mr. Haynes has ignored laws requiring protecting whistle blowers be protected from retaliation. Mr. Greenhouse, the highest ranking civilian in the Army Corps of Engineers, was demoted in retaliation for blowing the whistle on Halliburton's no-bid contracts.

In ways like these, Mr. Haynes's actions as General Counsel of the Department of Defense have caused irreparable harm to our military, our foreign policy, and our reputation in the world.

On torture, General Thomas Romig, the head of the Army Judge Advocate General Corps, wrote that "implementation of questionable techniques will very likely establish a new baseline for acceptable practice in this area, putting our service personnel at far greater risk and vitiating many of the POW/detainee safeguards that the U.S. has worked hard to establish over the past five decades."

The Guantanamo issue has continued to fester, becoming a blight on our international image, led to rebukes by the International Red Cross and the U.N. Human Rights Commission. The invalidated commissions process for handling Guantanamo has never produced, as I mentioned, a single conviction or even a charge against a high-ranking Al Qaeda figure in 5 years.

The nomination of Mr. Haynes to the Fourth Circuit is as embarrassing as any that has ever come before this committee. His record clearly shows a deplorable lack of commitment to the fundamental rights and the principle of separation of powers that we all expect from the Federal courts.

Former Chief Judge Advocate General of the Navy, Rear Admiral John Hutson, has said that "[i]f civilian leadership of the military means anything at all, it must mean there is accountability for failures such as his." If we are not going to hold Mr. Haynes account-

able, let us at least deny him a promotion to a lifetime seat on the Federal bench. I will urge my colleagues to reject the nomination.

Chairman SPECTER. There will be order in this room. If anybody speaks—will you please have the lady removed? Have the lady removed. Have her removed.

Mr. Haynes, the floor is yours. We are very interested in your testimony. You may proceed.

STATEMENT OF WILLIAM JAMES HAYNES II, NOMINEE TO BE CIRCUIT JUDGE FOR THE FOURTH CIRCUIT

Mr. HAYNES. Thank you, Mr. Chairman, Senator Hatch, Senator Kennedy, Senator Sessions, Senator Cornyn.

I appreciate the opportunity to appear before you again. It has been a little over 2 years since I was here last. Senator Leahy, thank you for coming as well.

I must not let pass the kind words Chairman Warner and Senator Allen said a moment ago, introducing me and my family. Both of them have been so gracious in welcoming me to the Commonwealth of Virginia some three years ago.

Like so many other people who have served in the Armed Forces around the world, when we chose to settle in Virginia we were welcomed as family.

I thank my family, my wife Meg, of 24 years, who has been my rock, my children, Will, Sarah, and Taylor, who have grown quite a bit in these last 5 years that I have been so selfish as to work in the Department of Defense.

Sarah and Taylor are moving up in school. Taylor will be a freshman at Yorktown High School, and Sarah, a first-year student at Davidson College. Will is already at Davidson. After trying to enlist twice in 2001 as a 14-year-old, he was determined to fight the terrorists who tried to kill his dad at the Pentagon.

Will finally joined the Army. He is an ROTC scholarship student at Davidson, following in his father's footsteps, and his grandfather's before, who served 26 years as an Air Force officer after graduating ROTC at the University of South Carolina.

I thank the President for his continued confidence in me, and for his nomination of me to be a judge.

If confirmed, I pledge that I will be true to the Constitution and laws of the United States and that I will discharge my responsibilities without partisanship and without favoritism.

I have served as the General Counsel of the Department of Defense for more than 5 years. If not already, within weeks I will have served longer than anyone else in this job, and it has been during war.

My duties are much like those of a general counsel of a large corporation. The Department has many hundreds of thousands of employees and is responsible for the expenditure of more than $400 billion annually, and has presence worldwide ranging from industrial operations to environmental stewardship, from advanced research, to air, land, and rail transportation systems. My client, the Department of Defense, also must fight, and win, the Nation's wars.

The soldiers, sailors, airmen, and marines around the world are performing magnificently, and it is my deep privilege to serve with

them. We should all be thankful that they are out there every day, protecting us from our enemies.

The attacks of September 11, 2001 demonstrated the kind of enemies that they, our soldiers, sailors, airmen, and Marines, and we face. These enemies are unique. They do not have uniformed armies or capitals to capture. They do not follow any rules, other than to exploit the rules of civilized society.

This is a war that has presented many difficult questions for people like me, a lawyer working for the country and for our soldiers, sailors, airmen, and marines.

I have, along with others, endeavored, along with my client, to develop appropriate guidelines for treatment and questioning of terrorists. Information is, after all, critical to protecting this Nation in this conflict.

That approach has, from time to time, been adjusted. But from the beginning, and at all times, the rule has been clear: even the terrorists must be treated humanely and we must operate within the law as best we see it.

This issue, getting information, in particular, has generated passionate debate that has been healthy and worthwhile, but there has been much misinformation about these debates.

One episode in particular has been much in the news, the interrogation of the 20th highjacker, a man named Muhammad al Katani, at Guantanamo Bay, Cuba. Remember who he is. He is the man identified by the 9/11 Commission who flew into the Orlando, Florida airport in August of 2001 to be met by the lead highjacker, Muhammad Atta, and one other highjacker.

Katani is said to have been likely the operative that would have rounded out the team on United Airlines Flight 93 which crashed into an empty field in Shanksville, Pennsylvania.

Thankfully, an alert Customs official turned Katani away. He returned to Afghanistan and was captured after 9/11. Katani was brought to Guantanamo, but our soldiers did not learn who he was until the late summer of 2002, shortly before the first anniversary of 9/11.

Now, what was happening then? As the anniversary approached, intelligence and threat warnings spiked, indicating that attacks might be imminent. Additionally, over the spring and summer there were deadly attacks in Tunisia and Pakistan.

In October of 2002, Al Qaeda leader Ayman al-Zawahiri released a tape recording stating, "God willing, we will continue targeting the keys of the American economy." In September and October, the FBI broke up the Lackawanna Six cell in New York. October 12, 2002, Al Qaeda affiliate Jama Islamia bombed the nightclub in Bali, killing more than 200 people and injuring about 300.

Meanwhile, the interrogators of Katani were frustrated. Katani showed considerable skill in resisting established techniques developed for questioning prisoners of war, lawful combatants. He maintained his story that he went to purchase falcons.

So, the commanding general of Guantanamo, an aggressive Major General, whose civilian job was to serve as a State court trial judge, sought permission from his superiors to employ more aggressive techniques than were traditionally employed by the U.S. Armed Forces over the decades for interrogating prisoners of war.

His request came with a concurring legal opinion of his Judge Advocate and was forwarded to the commander of Southern Command, a four-star general named Hill, who in turn forwarded that request to the Joint Chiefs of Staff at the Pentagon, and on to the Secretary.

In the succeeding weeks as the request passed up the line, many people struggled over that question. I struggled over that question. Like many questions I have had to deal with, these are difficult decisions, how to deal with this kind of enemy and this kind of war, and the balances that need to be struck in light of what the President has directed and what the laws and the Constitution demand of us in government.

Ultimately, I joined the Chairman of the Joint Chiefs of Staff, the Deputy Secretary of Defense, and the Under Secretary for Policy in recommending—and I signed the memorandum—that some of the requested techniques be approved, the more extreme ones to be rejected, noting that while all of the techniques might be legal, as the opinion suggested, and as Chairman Specter pointed out, as the Justice Department might have determined, those techniques should not be approved in their entirety because, as I said in the memorandum, the Armed Forces operate with a tradition of restraint.

Deep concerns regarding the interrogations at Guantanamo continued. The Secretary approved this approach in early December of 2002. Over the next few weeks, from time to time I would hear from others in the legal community that they were concerned about what might be going on hundreds of miles away in Guantanamo.

In each case, I would alert the Secretary and the senior leadership of the concerns and I would go to the joint staff and seek assurances that the interrogations were being properly conducted. Nevertheless, the anxiety and concern continued. This is true of myself, as well. These are heavy responsibilities. I take responsibility for my part in them, and that is just part of the job.

Eventually, in early January I went back to the Secretary again, asked him to rescind the approach approved for Mr. Katani, and give me some time to pull together all the interested stakeholders in the Department of Defense and give this approach further analysis.

Now, I must point out that this is not something the Defense Department has had to deal with for quite some time. The decision of the Secretary and his subordinate commanders in how to question terrorists at a strategic interrogation facility such as that of Guantanamo Bay, Cuba, is something that the Department had not confronted, to my knowledge. I certainly found no documentation to suggest that it had ever been addressed before. What the Department had prepared for was interrogating prisoners of war in a traditional armed conflict between nation states.

The Secretary approved my request and directed me to convene a working group, which I chartered on the 15th of January. I called together representatives, as I said, of all the stakeholders, representatives of the combatant commanders, the Chairman of the Joint Chiefs of Staff, all of the Judge Advocates General of the military services, the General Counsels of the military departments, the Director of the Defense Intelligence Agency, various law

enforcement officials within the Department, and invited them to bring anybody else that they wanted to this deliberation. I asked the General Counsel of the Air Force to chair this group.

Contemporaneous with that, I asked the Department of Justice for an opinion. This was new ground. The President had determined a year earlier that certain aspects of the Geneva Conventions did not apply, as a matter of law, to the Al Qaeda foes that we faced, based in part on a legal opinion by the Attorney General of the United States and the advice of his senior Cabinet officials. We were in new territory.

There were still, however, rules that we had to consider. The Justice Department, charged by the executive with determining with finality what is the legal position of the executive branch, was the appropriate place to go for a definitive opinion.

But that is not where it stopped, because just because the law might allow something does not mean that one must do what the law might allow. So the working group was requested to evaluate every consideration conceivable: from a policy perspective, from a legal perspective, from an effectiveness perspective, from a public affairs perspective, should any of it become known, from an international perspective, a diplomatic perspective: everything was on the table. The Secretary gave me two weeks to produce that.

Two weeks came. The Justice Department had provided a draft legal opinion. A number of senior military offices, the four Judge Advocates General, expressed their strong reservations about the possible implications of that.

I believe those opinions are already public. I know that Senator Graham held a hearing last summer in which he had a number of the people who participated in that process testify about their memorandum and he released those to the public.

I note that they had been provided a year earlier in their classified form to the Armed Services Committee, but Senator Graham, in conducting his hearing, asked that they be declassified, and the Department did declassify those opinions.

I went back to the Secretary and said to him, the Department is not ready to come to resolution on this issue. We took another almost 2 months, during which, of course, a number of things continued.

I noted earlier, as General Counsel of the Department of Defense, how much my job is like a corporate counsel, and I had a number of other things to attend to. But this was very important and remained on my mind. From time to time, I would check in with the working group. We had a number of spirited discussions, mostly with the lawyers, which I think was a very good thing.

In the end, on the 16th of April, after the working group had collected and written up three major components of their analysis: the legal analysis, which to be sure, was the Justice Department analysis, which, as a matter of tradition, practice, and regulation is the binding legal opinion within the executive branch, and which we, as part of the executive branch were bound to observe; a policy portion, which discussed all of those things that I highlighted a moment ago, and probably some more that I have forgotten, and a substantial appendix that described 35 separate techniques meas-

ured against each one of those criteria that I laid out just a moment ago as the working group found it appropriate to evaluate.

In the course of assessing those 35 separate techniques, the group, with my full agreement, chose not even to evaluate certain techniques that had been collected from various quarters. Among them, the infamous water board technique that we have heard so much about in the press, was not even evaluated or considered, and certainly not recommended or approved.

When the report had been fleshed out, there continued to be, as I understood it—again, the General Counsel of the Air Force chairing the working group—there continued to be give and take, mostly about the chart showing all the techniques and what safeguards ought to be employed, what approval levels, if approved, should be given.

At that point, I went to the Secretary, and with his blessing, suggested that these proposed techniques, the 35 techniques, be evaluated by the other senior leaders of the Department.

By that, I am referring to principally the chiefs of staff of the services and the secretaries of the military departments, in addition, of course, to the Secretary's other direct reports, and the Deputy Secretary of Defense.

For three or four weeks in late March and early April of 2003, those proposals were evaluated at those levels, first by the three-star deputy chiefs of staff of the services, then the vice chiefs, then the chiefs, then the secretaries of the military departments.

In the course of that, I conferred with the Chairman of the Joint Chiefs, General Dick Myers, and urged that we recommend, again, a substantial subset of what had been evaluated.

So of those 35 techniques that were evaluated in that thorough way, the Chairman ended up recommending with my strong endorsement, and contrary, I might add, to some others in the Department who urged that all of them be approved, and the Secretary approved 24 of those 35 techniques.

Of those 24, 17 are the 17 approaches in the field manual, then and now still in effect, drafted for interrogating prisoners of war in Geneva Convention-governed conflicts.

The additional seven were highly regulated, two of which, arguably, were restatements of one or two of the 17 basic techniques. The Secretary approved them in April of 2003 only for unlawful combatants at Guantanamo Bay, Cuba.

So again, the fact that the law was advised by the Justice Department in a definitive way for the executive branch, including my client, the Department of Defense, I recommended a subset and recommended rejecting a number of others.

Now, all of this discussion is historical in nature. It is an example of the kinds of things your Defense Department has had to confront in 5 years of war. It is historical, more importantly, because, as Senator Kennedy has pointed out earlier, the legal opinion of the Department of Justice has been withdrawn, notwithstanding the fact that all of those 24 techniques approved by the Secretary were subsequently reviewed thoroughly by the Department of Justice and found to be lawful.

Last year, when you, the members of the Senate and House of Representatives, and the President, when he signed the bill, passed

the Detainee Treatment Act, requiring that interrogations within the Department of Defense be conducted only using techniques authorized and listed in the Army field manual may be used, the Department issued an order within hours of the President signing the bill directing that.

Therefore, as we speak, within the Defense Department, only those techniques authorized and listed in the field manual, the 1992 version of the field manual for interrogations, are authorized.

Now, I have been speaking as the General Counsel of the Department of Defense. This is one episode in my tenure in the executive branch. But I am, as you know, Mr. Chairman and Senators, a nominee to be a judge and I think it is appropriate for me to say something about that.

My first job out of law school was as a law clerk for a judge, who remains one of my heroes. Judge James B. McMillan in the Western District of North Carolina was a great teacher. I learned a lot from him, of course, and carry many of those maxims with me today as I serve in the executive branch.

He was a wonderful man. He is no longer with us. I remember a few of his sayings. Every day, I find some occasion to use one: "never attribute to malice that which can be attributed to stupidity." It is a very useful thing to remember when you have contentious discussions with people of good faith.

Another that he told me quite often was, "your job as a law clerk is to keep me from making unintended error." Finally, he said quite frequently, "Remember, Jim, government has no rights, only responsibilities."

Now, I did not always agree with Judge McMillan, but I have not forgotten that the awesome powers that the government has are checked by the Constitution. And while I do not think that, as a legal principle—particularly as somebody who has to represent or advise a client who appears in court often—I do not think it is quite accurate to say that government has no rights, only responsibilities, but it is an awfully good maxim for a government official to follow.

That is what guides me, and what has guided me for 5 years, and guides, I think, fairly stated, the men and women of the armed forces whose responsibility it is to protect all of us from a vicious enemy.

If I am confirmed as a judge, I will remember that. I will have a different role. I will not be an advocate for a client, I will not be representing a point of view. I will be applying the law and the Constitution fairly, without partisanship, and with good faith.

I thank you for the opportunity, Mr. Chairman, to make such a long statement, and look forward to your questions.

[The updated biographical information of Mr. Haynes follows. The original biographical information can be found in Senate Hearing Number 108–135, Pt. 5, hearing date: November 19, 2003. A prepared statement of Mr. Haynes appears as a submission for the record.]

5320 37th Street North
Arlington, Virginia 22207-1313

February 17, 2005

The Honorable Arlen Specter
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: nomination of William James Haynes II to be a judge on the United States Court of Appeals for the Fourth Circuit

Dear Chairman Specter,

The attached enclosure updates my previously provided questionnaire for nominees referred to the U.S. Senate Committee on the Judiciary pursuant to my nomination to be a judge on the United States Court of Appeals for the Fourth Circuit. As the previously provided answers were submitted with an affidavit, so also I declare that the enclosure is true and correct. Please note that some of the updated answers are to questions in the Confidential portion of the questionnaire.

I am honored by the President's nomination and appreciate your Committee's consideration.

Sincerely,

William J. Haynes II

Enclosure: a/s

Cc: The Honorable Patrick J. Leahy
Ranking Democratic Member

Amendments to Previously Provided Questionnaire

I. BIOGRAPHICAL INFORMATION (PUBLIC)
William J. Haynes II

Page 1:

2. Address:

Residence: Arlington, Virginia (since November 2003)

Page 6:

12. Published Writings:

White House Press Briefing, June 22, 2004, available at
http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html

Page 14:

18. Litigation: (cont.)

3. Coalition of Clergy, v. Bush, 189 F. Supp 2d 1036 (C.D. Cal. 2002) (Judge Matz); Coalition of Clergy, v. Bush, 310 F.3d 1153 (9th Cir. 2002) (Circuit Judges Noonan, Wardlaw, and Berzon); cert. denied, Coalition of Clergy, v. Bush, 538 U.S. 1031 (2003).

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18. Litigation: (cont.)

4. Acree v. Snow, 2003 WL 21754983 (D.D.C. July 30, 2003) (Judge Roberts); aff'd, Acree v. Snow, 2003 WL 22335011 (D.C. Cir. Oct 07, 2003). Related case: Acree v. Republic of Iraq, 2003 WL 21872372 (D.D.C. July 7, 2003) (Judge Roberts).

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II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)
William J. Haynes II

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5. Financial Net Worth Statement

ASSETS (Approximate, February 1, 2005)

Type	Account	Amount
Cash on Hand		**294700.00**
US Government Securities		
US Savings Bonds (WJH, and children)		**3000.00**
Listed Securities		**420900.00**
Tier common (MCH)		160000.00
Tier common (options) (MCH)		10000.00
America Movil S A common		11000.00
Owens Corning common		17000.00
Owens Ill. Common		23000.00
RF Micro Devices Common		1100.00
Tel. de Mexico common		7900.00
Wind River Systems common		1900.00
Bank of Coweta common		3000.00
Third Avenue Small Cap Value Fund		12000.00
Third Avenue Value Fund		3000.00
USAA S&P 500 Index Fund		11000.00
Clipper Fund		160000.00
Unlisted Securities – None		0
Accounts and notes receivable		
Due from relatives and friends, or others		0
Doubtful		0
Real estate owned		**900500.00**
	Home	900000.00
	Undev. Land - NC	500.00
Real estate mortgages receivable	Newnan, GA	**25000.00**
Autos and other property		**40000.00**

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC) (cont.)
William J. Haynes II

Cash value - life ins.	**10000.00**
Other assets:	**1112300.00**
TRowe Price 529 plan FBO minor child	129000.00
TRowe Price 529 plan FBO minor child	124000.00
TRowe Price 529 plan FBO minor child	124000.00
401K (Jenner & Block) (WJH)	56000.00
General Dynamics Defined benefit (payable to WJH CY 2023)	0
General Dynamics Defined contribution plan (WJH)	1900.00
Fed. Employee Retirement System - TSP (WJH)	70000.00
USAA Money Market Mutual Fund (IRA) (WJH)	52000.00
USAA S&P 500 Index Fund (IRA) (WJH)	4300.00
Torray Fund (IRA) (WJH)	250000.00
First Union Money Market Mutual (IRA) (MCH)	1500.00
401K (Tier Technology) (MCH)	55000.00
401K (American Bar Association) (MCH)	241000.00
USAA Certificate of Deposit (IRA) (MCH)	3600.00
Total assets:	**2806400.00**

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CONTINGENT LIABILITIES

Type	Account	Amount
As endorser, comaker or guarantor		0
On leases or contracts		0
Legal claims		0
Provision for Federal Income Tax (potential cap. gains tax on sale of securities)		100000.00
Other special debt		0

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC) (cont.)
William J. Haynes II

LIABILITIES

Type	Account	Amount
Notes payable to banks - secured		0
Notes payable to banks - unsecured		0
Notes payable to relatives		0
Notes payable to others		0
Accounts and bills due		2500.00
Unpaid income tax		0
Other unpaid income and interest		0
Real estate mortgages payable		
	Wells Fargo (residence)	500000.00
	Wells Fargo Home Equity Line (residence)	500.00
Chattel mortgages and other liens payable		
Other debts:		0
Total liabilities		**603000.00**
Net Worth		**2203400.00**
Total liabilities and net worth		**2806400.00**

GENERAL INFORMATION

Are any assets pledged?
NO
Are you a defendant in any suits or legal actions?
NO
Have you ever taken bankruptcy?
NO

AO-10 Rev. 1/2004	**FINANCIAL DISCLOSURE REPORT** Calendar Year 2004	**Report Required by the Ethics in Government Act of 1978 (5 U.S.C. app. §§ 101-111)**

1. Person Reporting (Last name, First name, Middle initial)	2. Court or Organization	3. Date of Report
Haynes II, William J	Fourth Circuit	2/17/2005
4. Title (Article III Judges indicate active or senior status; magistrate judges indicate full- or part-time) Circuit Judge Nominee	5. ReportType (check appropriate type) (•) Nomination, Date 2/14/2005 ( ) Initial ( ) Annual ( ) Final	6. Reporting Period 1/1/2004 to 1/31/2005
7. Chambers or Office Address U.S. Department of Defense 1600 Defense Pentagon Washington, D.C. 20301-1600	8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations. Reviewing Officer_____ Date_____	

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.

I. POSITIONS. (Reporting individual only; see pp. 9-13 of filing instructions)

☐ NONE - (No reportable positions.)

	POSITION	NAME OF ORGANIZATION/ENTITY
1.	Member	Maryville College National Advisory Council

II. AGREEMENTS. (Reporting individual only; see pp. 14-16 of filing instructions)

☐ NONE - (No reportable agreements.)

	DATE	PARTIES AND TERMS
1.	1999	General Dynamics Corporation Defined Bepefit Plan (approximately $464 per month beginning March 2023)

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	Haynes II, William J	2/17/2005

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 17-24 of filing instructions)

A. Filer's Non-Investment Income

☐ NONE - (No reportable non-investment income.)

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1.	2004	United States Department of Defense (Salary)	Exempt
2.	2003	United States Department of Defense (Salary)	Exempt

B. Spouse's Non-Investment Income (If you were married during any portion of the reporting year, please complete this section. (dollar amount not required except for honoraria)

☐ NONE - (No reportable non-investment income.)

	DATE	SOURCE AND TYPE
1.	2003-04	Tier Technology (Salary)

IV. REIMBURSEMENTS -- transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children. See pp. 25-27 of instructions.)

☐ NONE - (No such reportable reimbursements.)

	SOURCE	DESCRIPTION
1.		EXEMPT

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V. GIFTS. (Includes those to spouse and dependent children. See pp. 28-31 of instructions.)

☐ **NONE** - (No such reportable gifts.)

	SOURCE	DESCRIPTION	VALUE
1.		EXEMPT	

VI. LIABILITIES. (Includes those of spouse and dependent children. See pp. 32-34 of instructions.)

☐ **NONE** - (No reportable liabilities.)

	CREDITOR	DESCRIPTION	VALUE CODE
1.	Private School	Tuition #1	K
2.	Private School	Tuition #2	K
3.			

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Name of Person Reporting	Date of Report
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VII. INVESTMENTS and TRUSTS -- income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A -H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
] NONE (No reportable income, assets, or transactions)									
USAA FSB Joint Checking	A	Interest	M	T					EXEMPT
USAA FSB Joint Savings	A	Interest	J	T					
USAA Brokerage Account #1	A	Interest	K	T					
USAA Brokerage Account #2	A	Interest	J	T					
USAA S&P 500 Index Fund (IRA)	A	Dividend	J	T					
USAA S&P 500 Index Fund (IRA)	B	Dividend	J	T					
USAA Money Market Fund (IRA)	A	Interest	L	T					
PFCU Account	A	Interest	J	T					
Citibank Account	A	Interest	J	T					
U.S. Government Securities Savings Bonds	A	Interest	J	T					
Tier Technologies Common		None	M	T					
Tier Technologies Common (Options)		None	J	T					
America Movil, SA Common		None	J	T					
Bank of Coweta Common		None	J	T					
Owens Corning Common		None	K	T					
Owens-Illinois, Inc. Common		None	K	T					
RF Micro Devices Common		None	J	T					
Telefonos de Mexico Common		None	J	T					

Income/Gain Codes: (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000
	F = $50,001-$100,000	G = $100,001-$1,000,000	H1 = $1,000,001-$5,000,000	H2 = More than $5,000,000	
Value Codes: (See Columns C1 and D3)	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000	
	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000	
	P3 = $25,000,001-$50,000,000		P4 = $More than $50,000,000		
Value Method Codes (See Column C2)	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market	
	U = Book Value	V = Other	W = Estimated		

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Name of Person Reporting	Date of Report
Haynes II, William J	2/17/2005

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9. Wind River Systems, Inc. Common		None	J	T					EXEMPT
0. Clipper Fund	A	Dividend	M	T					
1. Fidelity Advisor Diversified International Fund (401K)	A	Dividend	J	T					
2. Fidelity Advisor Equity Growth Fund (401K)	A	Dividend	J	T					
3. Fidelity Advisor Growth and Income Fund (401K)	A	Dividend	J	T					
4. Fidelity Advisor Growth Opportunity Fund (401K)	A	Dividend	J	T					
5. Fidelity Advisor Small Cap Fund (401K)	A	Dividend	J	T					
6. Fidelity Blue Chip Fund (401K)	A	Dividend	K	T					
7. Fidelity U.S. Bond Index Fund (401K)	A	Interest	J	T					
8. Fidelity Growth Fund (401K)	A	Dividend	J	T					
9. SSgA Secure Income Fund (401K)	A	Interest	K	T					
0. SSgA S&P 500 Index Fund (401K)	A	Dividend	M	T					
1. Third Avenue Value Fund	A	Dividend	J	T					
2. Third Avenue Small Cap Value Fund	A	Dividend	J	T					
3. Torray Fund (IRA)	A	Dividend	M	T					
4. Undeveloped Land near Pamlico, North Carolina		None	J	W					
5. Bullsboro Ventures (land in Newnan, Georgia)		None							
6. Mass. Mutual Whole Life Insurance Policy (Oppen. Fund)		None	J	T					

1. Income/Gain Codes: (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000
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3. Value Method Codes (See Column C2)	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market	
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7. Mass. Mutual Variable Life Insurance Policy (Oppen. Fund)		None	J	T					EXEMPT
8. T. Rowe Price College Savings Plan #1		None	M	T					
9. T. Rowe Price College Savings Plan #2		None	M	T					
0. T. Rowe Price College Savings Plan #3		None	M	T					
1. General Dynamics Defined Benefit Plan		None	J	T					will pay $464 per month 2023
2. GenDyn Unqualified Defined Cont. Plan (S&P Index Fund)	A	Dividend	J	T					
3. First Union Certificate of Deposit (IRA)	A	Interest	J	T					
4. Federal Employee Retirement System (TSP)	A	Dividend	L	T					
5. USAA Certificate of Deposit (IRA)	A	Interest	J	T					
6. First Union Money Market Mutual Fund	A	Interest	J	T					

Income/Gain Codes: (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000
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Value Method Codes (See Column C2)	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market	
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FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Haynes II, William J	2/17/2005

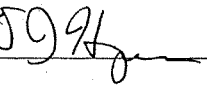
VIII. ADDITIONAL INFORMATION OR EXPLANATIONS (Indicate part of Report.)

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Haynes II, William J	2/17/2005

IX. CERTIFICATION.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. § 501 et. seq., 5 U.S.C. § 7353, and Judicial Conference regulations.

Signature  Date FEB 17 2005

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

Committee on Financial Disclosure
Administrative Office of the United States Courts
Suite 2-301
One Columbus Circle, N.E.
Washington, D.C. 20544

Chairman SPECTER. Mr. Haynes, did you rely upon the memorandum prepared by Assistant Attorney General Jay Bybee in formulating the standards for interrogation?

Mr. HAYNES. I relied on a different, but substantially similar, opinion from the Office of Legal Counsel that was issued later. The one that you are referring to I believe is dated August of 2002, which I did not have at the time. I believe that one was addressed to the counsel to the President.

Chairman SPECTER. Did you agree that there could be acts which could be "cruel, inhuman, or degrading," as specified in the Bybee memorandum and still not constitute prohibited torture?

Mr. HAYNES. Well, sir, I was the recipient of an opinion from the Justice Department. And forgive me, sir. I am going to answer your question, but I want to just lay the groundwork. I received an opinion, which was the expressed view binding on the executive branch.

Your direct question, did I agree that there is conduct that does not amount to torture that is what is described as "cruel, inhuman, and degrading," I certainly agreed with that because it was a statement, at least insofar as you have described it—I think, anyway, if I heard you correctly—about what the law of the United States requires embodied in the—

Chairman SPECTER. Did you recommend any interrogation techniques which would be classified as "cruel, inhuman or degrading"?

Mr. HAYNES. I do not believe so, certainly not at the time. The phrase "cruel, inhuman and degrading," Senator, as you know—I should say, Chairman—is one that has vexed the Congress of the United States for some years. It is a term that comes from initially the convention against torture that was negotiated in the 1980's and ratified by the U.S. Senate in the 1990's.

Chairman SPECTER. Aside from the history, Mr. Haynes, do you think that any of the techniques you had recommended would fall into those categories of "cruel, inhuman or degrading"?'

Mr. HAYNES. I do not believe so, but I hasten to add, Senator, you all have defined that phrase in the interim to mean what is prohibited by the Fifth, Eighth, and Fourteenth Amendment to the U.S. Constitution.

Chairman SPECTER. Mr. Haynes, have you seen this letter dated July 7 from General Joseph Bore and 19 others that was referred to by Senator Warner?

Mr. HAYNES. Yes, sir. Senator Warner handed that to me just a few minutes ago.

Chairman SPECTER. Have you had an opportunity to read it?

Mr. HAYNES. I read it just a few minutes ago, but I believe that it addresses some of the episodes I have just described.

Chairman SPECTER. Well, when you have had an opportunity to review it, you are welcome to file a detailed response with this committee. For the time being, I would like your response to the allegations which are set forth in the second paragraph, that you "established policies over the objections of uniformed military lawyers." Is that true?

Mr. HAYNES. I am sure that in the course of five years serving as chief legal officer of the Department of Defense I have made decisions that some uniformed lawyers have not been happy with, some of them I know about, some of them I do not. I also would

point out that there are thousands of Judge Advocates serving in the armed forces, many of whom are in my office.

Chairman SPECTER. Let me move on to another point, because I have very little time left.

Mr. HAYNES. Sorry.

Chairman SPECTER. The allegation is that those practices led not only to the abuse of detainees in U.S. custody, but to a dangerous abrogation of the military's longstanding commitment to the rule of law. There is too little time left to ask you to answer that, but these are very serious allegations—really, accusations—from a very prominent group of individuals.

The Committee would like your response, and we would like included in your response the contacts you have had with these individuals, as to what basis they had for making these statements.

Mr. HAYNES. May I answer quickly?

Chairman SPECTER. Before my red light goes on, I am going to ask my deputy to hand you a coded classification which you and I discussed at length yesterday, and will be made a part of the record. Explain what it means.

Mr. HAYNES. Thank you, Mr. Chairman. I would like to answer, very briefly, directly to that question about, did policies lead to abuses.

Chairman SPECTER. Once my red light is on, I will not ask any questions, but you are free to respond.

Mr. HAYNES. All right, sir. I would like to say that, again, without having scrutinized that letter or knowing most of the members that signed that letter, having worked only with two that I can recall, one of whom was at least 15 years ago, I do not know exactly what they might be referring to.

But I can say that the Defense Department has investigated allegations of abuse every time that it was alleged; that one of the things that the Defense Department is very good at is responding and self-correcting.

The principal investigations of the most notorious abuse case, Abu Ghraib, found that those abuses were not a result of policies within the Defense Department. Indeed, they were in direct violation of all polices. Indeed, the abuses at Abu Ghraib were done not by interrogators at all.

Only one of the individuals shown in those horrible photographs was even somebody of intelligence interest, according to the investigations. Their conclusions, which have been provided to the Armed Services Committee, and I think in large part to the public, concluded that that statement is not true.

Thank you, sir.

Chairman SPECTER. You have the color-coded charts, which I think ought to be made a part of the record, with your explanation.

Mr. HAYNES. Well, sir, the color-coded charts that you have just handed me and entered into the record are the third part of the working group report that I described a while ago, that, as you can see, is sometimes referred to as a stop-light chart because there are green, yellow and red circles that assess techniques that go down the left column by a number of different measures, only one or two of which are legal measures.

They reflect the significant policy measures of the techniques that are included within the assessment done by this working group, including a number of safeguards recommended, and approval levels proposed. That is what this describes.

Chairman SPECTER. Senator Leahy?

Senator LEAHY. Mr. Chairman, because of the extraordinary—actually, unprecedented—length of the nominee's opening statement, and knowing we started late and his family has put up with a lot in being here, I will put my opening statement in the record.

I was disappointed you could not testify this morning at the other hearing, but I appreciate your recitation here.

Now I would like to ask you to supply copies of the documents relative to the matters you discussed, and their chronology, if you would do that, please.

Mr. HAYNES. Yes, sir.

Senator LEAHY. I think that would probably be helpful to us, and it would be helpful to the Armed Services Committee.

Now, Alberto Mora, who is a former General Counsel of the U.S. Navy, this year received a Profile on Courage Award from the John F. Kennedy Library Foundation. That was for his efforts to resist the Bush administration's adoption of policies permitting and condoning cruel, inhuman, degrading interrogation techniques.

Mr. Mora protested these policies, even though many higher-level Department of Defense and administration officials supported them. He told others in the administration that these were alien to our values as a Nation, and actually dangerous to our troops.

Now, did you, like Mr. Mora, stand up against these policies, which many now in our military say endanger our troops and threaten our longstanding values?

Mr. HAYNES. Senator Leahy, thank you for that question. I think what you are referring to is exactly what I have been talking about, the process that led to—

Senator LEAHY. I want to hear your answer specifically. I have heard a long opening statement. You and I spent nearly an hour—

Mr. HAYNES. Over an hour. Yes, sir.

Senator LEAHY. Over an hour discussing this, at the request of Secretary Coleman and Generals Pace and Jones, and I appreciate. But on this specific question, go ahead.

Mr. HAYNES. There were a number of techniques that I recommended not be approved, and they were not approved in both significant instances that I described a moment ago. These were proposals, and I recommended against them.

Senator LEAHY. Why were you told that you were going to be promoted to one of the highest courts in our land? Why did they tell you you were? You have not had a significant practice in courts, you have certainly not argued before the court that you are being nominated to. What did they tell you when they nominated you? Why?

Mr. HAYNES. Well, I do not recall a specific conversation like that, Senator Leahy. That puts me in an awkward position, because it might demand that I toot my own horn, which I do not like to do.

Senator LEAHY. You have taken 24 minutes here to do that already, so it should not bother you.

[Laughter.]

I said that was an unprecedented and extraordinary length of an opening statement. So, go ahead. Why were you told that you were being nominated?

Mr. HAYNES. I do not recall being told a specific reason, except that I think that the President thought that I would be a good judge, a fair judge, one that would apply the law, not make law.

Senator LEAHY. Did he tell you that?

Mr. HAYNES. No, sir. The President did not tell me that.

Senator LEAHY. Who did?

Mr. HAYNES. But he said some nice things in the nomination.

Senator LEAHY. I understand that. I remember that. But did somebody approach you in the administration and say, hey, we want you on this court?

Mr. HAYNES. I do not remember.

Senator LEAHY. Or did you approach them?

Mr. HAYNES. I do not remember precisely how discussions began. There is a process where I guess the White House considers a number of different candidates. Having worked with some of the senior people in the administration, I think I must have come to their attention.

I would point out, as somebody has already pointed out, that notwithstanding the fact that I have not gotten some of the same characteristics that some other nominees have, I have been rated by the American Bar Association twice as "well qualified," in 2002 and then 2005.

Senator LEAHY. We do not seem to be getting to the point. I think, on something as significant as this, I think one would remember exactly how they got approached, than not. But I will accept your answer that you do not remember.

Mr. HAYNES. No, sir. I do not remember the first time.

Senator LEAHY. You are the first nominee in 32 years that I have ever asked that question of that did not remember, but I accept your answer.

Now, I spoke of the 2006 Profile on Courage Award. Mr. Mora said of the administration's policies authorizing certain interrogation techniques, "for as long as these policies were in effect, our government had adopted what can only be labeled as a policy of cruelty."

He said, "Cruelty disfigures our National character, is incompatible with our constitutional order, with our laws, with our most prized values. Cruelty can be effective as torture in destroying human dignity, and there is no moral distinction between one and the other."

Do you agree with Mr. Mora's assessment of the administration's policies?

Mr. HAYNES. No, sir, I do not, if that is an accurate reflection of his statement. I would point out that there was a memorandum that I understand Mr. Mora wrote.

I believe that in the same memorandum that that must have been drawn from, he concluded that the techniques approved by the Secretary in April of 2003 were well within the bounds of the law, or something like that, as I recall.

Senator LEAHY. Well, my time is up. I will have further questions later. As I said, Mr. Chairman, I will put my full statement in the record.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Chairman SPECTER. Thank you, Senator Leahy. Your full statement will be made a part of the record, without objection.

We follow the early bird rule on the committee, going to Senators in the order of their arrival. Among the Republicans, I have Senator Hatch, Senator Sessions, Senator Cornyn, and Senator Graham, if that is accurate. I yield, first, to Senator Hatch.

Senator HATCH. Well, thank you, Mr. Chairman.

Mr. Haynes, just so we all know what a "well qualified" rating means, and you have had it twice now from the American Bar Association, let me remind my colleagues what that rating means.

A rating of "well qualified" means, "the nomination meets the committee's very high standards with respect to integrity, professional competence, and judicial temperament, and that the Committee believes that the nominee will be able to perform satisfactorily all of the duties and responsibilities required by the high office of the Federal judge." Integrity, professional competence, judicial temperament: you have them all.

Do you know retired Army Major General Michael Marchand?

Mr. HAYNES. Yes, sir, I do. I worked with him for more than 4 years.

Senator HATCH. In a letter to the Chairman of this committee, this is what he had to say about your relationship with the JAG Corps: "In my experience, Mr. Haynes has been more inclusive of the Judge Advocates General and the senior service lawyers of the armed services than any General Counsel of the Department of Defense." I ask, Mr. Chairman, that a copy of that letter be placed in the record.

Chairman SPECTER. Without objection, it will be made a part of the record.

Senator HATCH. December 6, 2002, several JAG lawyers sent a letter to the Wall Street Journal, where they confirmed that they "worked over the past months on many complex legal questions surrounding the war on terrorism and other issues. The interaction has been frequent and productive."

Now, to be fair, these opinions are not universal, but it is worth noting the rationale behind some of the objections raised. We need to note that in a letter from 20 retired distinguished military officers, questions were raised about your judgment in recommending certain interrogation policies.

This is what they had to say: "Many of the legal positions put forward by Mr. Haynes in the course of formulating interrogation policy and many of the techniques he recommended to be authorized for use against prisoners in U.S. custody has since been repudiated and revoked." But that is precisely the point.

When you recommended these policies, or the policies that you recommended, they were based on the judgment of the Department of Justice at the time as to what the law really is in this area. Is that right?

Mr. HAYNES. That is part of it, yes, sir. The legal component is one of many, but the legal component is certainly determinative. If something violates the law, it cannot be done.

Senator HATCH. Well, that is right. Let me just put it this way. Your job was to inform the Pentagon what the law required. As those who wrote this letter noted, "these policies may have since been repudiated and revoked." But was it your job to repudiate and revoke them?

Mr. HAYNES. No, sir. There is an important distinction that I think your question raises that I think is worth elaborating on, if I may. A lawyer's job is, in the first instance, to say what the law is. That is where he is expert.

Senator HATCH. And here you were told what the law is.

Mr. HAYNES. And here I was told what the law is by the entity historically charged with making that definitive determination within the executive branch. Now, that is not the end of an inquiry. There can, beyond that, be policy choices made about what to do with that law. That decision is properly made by the lawyer's client, in my case the Department of Defense, as personified by the Secretary and the other senior leaders.

Senator HATCH. So, after you brought all these people together and asked all of them to participate that you described in your opening remarks.

Mr. HAYNES. Yes, sir.

Senator HATCH. And I can see why, with some of the criticisms that have been thrown your way, it took you a little bit of time to explain it. I think you certainly deserve that time without being criticized for it.

But let me just say this. When confronted with a law you do not like, the answer is not to ignore the law or rewrite the law. Yet, even so, you brought everybody together and you did, in essence, say only parts of that opinion could be applied. Is that right?

Mr. HAYNES. That was our recommendation. My recommendation, I should say.

Senator HATCH. And this is in a situation where we have a war on terrorism that we had never really fought before, with people who do not represent a country, do not wear uniforms, do not have any restraints, and do not abide by the Geneva Convention themselves, and do not abide by any common rules of decency.

Mr. HAYNES. You are absolutely right.

Senator HATCH. My time is up, Mr. Chairman. I wish I had more time.

Chairman SPECTER. Well, thank you. Thank you very much, Senator Hatch.

Senator Kennedy?

Senator KENNEDY. Thank you.

Just on this point here about the working group and the timing that you went through, talking about the working group, there was significant opposition to the Yoo memorandum. When Senator Leahy asked you to provide the memorandum, I assume that had been referred to in your earlier comments, that will include the Yoo memorandum?

Mr. HAYNES. Senator Kennedy, I am sorry. If that is what he requested, I can't provide it. Sir, let me, if I may, respond. Untold

numbers of documents have been provided to the Armed Services Committee in the past year, and I am happy to provide all of that to the Committee because it is already public.

I have, to the extent that there have been requests for other documents over which I have no control, I cannot, and am not, permitted to commit to that. I will have to take that question back to somebody who has the authority to do that.

Senator KENNEDY. That is the same answer you gave me 2 years ago, that you would take it back and look at it. This is the Yoo memorandum, which is the draft memorandum that was drawn down from the Bybee memorandum, which is the guiding document. That is the one you referred to in your earlier comments and exchanges with the Chairman.

I assume, when Senator Leahy said, will you provide the documents that you referred to, that is extremely important, that is the Bybee memorandum for the Department of Defense. Is there any reason? We have the Bybee memorandum. You say this is a direct draft from that. Is there any reason we should not have that document?

Mr. HAYNES. Well, sir, again, I have to defer to somebody else who has got the authority to do that.

Senator KENNEDY. Moving on, then. We know there was significant opposition. The reason it is important, is because you talked about bringing all the JAGs together, working out a working group, all about this memorandum which we are not allowed to see, but is drawn basically from the Bybee memorandum, which effectively permits torture unless the purpose of the torture is going to be to cause harm or injury to the individual rather than gaining information.

Now, the Yoo memorandum from the Judge Advocates General on the working group, when I asked Admiral Church, he was the investigator for the Armed Services Committee, who had overruled the well-reasoned objection in the working committee, he told me, "I believe the answer was the Office of General Counsel." I asked, "Is that Mr. Haynes?" He replied, "Yes, it was."

Now, that is in the Church report that has been made available to the Armed Services Committee I was asking for before the Yoo memorandum. But in that report he goes into some detail about exactly what these Judge Advocates General concerns were, and about you overruling.

Let me come back. Did you ever, after you were General Counsel, after 9/11, talk to anyone in the Office of Legal Counsel about the preparation of what we call the torture memorandum?

Mr. HAYNES. I am going to respond, first, Senator, to what you said just a moment ago. I am the General Counsel. I did advise, as I am required to do, the other legal officials within the Department of Defense that, as tradition and regulation requires, that a Justice Department opinion is binding, that that was in no way an establishment of policy, it merely laid out what the law is and what the boundaries of conduct would be for the policymakers to decide.

Senator KENNEDY. Now can I get back to my other question?

Mr. HAYNES. Yes, sir.

Senator KENNEDY. As General Counsel, when OLC was developing what we call the Bybee memorandum, did you ever have reason to call the OLC and to speak to anyone over there?

Mr. HAYNES. I have had, over the last 5 years, a number of conversations with the Office of Legal Counsel and other members of the Justice Department, and many members within the national security establishments, State Department, White House.

Senator KENNEDY. So is it safe to assume that in the fashioning and shaping of the Bybee memorandum, that you talked to members of the OLC about how that was being fashioned and being shaped?

Mr. HAYNES. As I said earlier, Senator Kennedy, the memorandum that is the basis of the working group report was addressed to me. If you are referring to the Bybee memo of August of 2002, I did not have a copy of that. I do not know how long it took them to draft that memorandum, but I certainly have talked with the members of the Office of Legal Counsel from the beginning of the war, because we needed to.

Senator KENNEDY. My time is going to run out. We will have to spend some time here.

Let me ask you today, have you ever repudiated the legal justification of the Bybee memorandum?

Mr. HAYNES. What I have done, sir, is declare, within the Department, that the working group report, which was based on that, is null and void and of no operative effect, as indeed it was of no operative effect except to advise the Secretary for just Guantanamo Bay, Cuba, unlawful combatants.

Senator KENNEDY. I am just at my time. But in reading the Bybee memorandum, as a legal document, it is one that was repudiated effectively by the Attorney General. Have you ever effectively repudiated the legal reasoning of the Bybee memorandum?

Mr. HAYNES. Well, if you would like me to express an opinion now, I will.

Senator KENNEDY. I am just asking if you have ever done that in the past. My time is up. So I gather that you have not in the past, but you will express an opinion now. Is that about where we are?

Mr. HAYNES. Well, I am sure I have talked about that memorandum in a number of different contexts. I have not made a broad statement to the public, but I will now. I would say, sir, that it is no longer operative. It was withdrawn by the Attorney General. I accept that. I think it was the right thing to do.

In retrospective, I think having requested an opinion, addressing such a difficult question hypothetically was not the best thing to do.

Senator KENNEDY. My time is just up. But just in ending this thought. The Yoo memorandum, which you acknowledged was really based upon the thinking, the reasoning, and the rationale of the Bybee memorandum, which was the operative document that you used as the legal justification, we have asked for that document that, virtually, you have indicated in your own kinds of expression, very, very similar to the Bybee memorandum. You indicated in earlier responses to that.

But that is something that we requested from you the last time you appeared here, and you said you would go back to the Department and come back to us with an answer, which we never received.

I do think that that is the one document which is key, because that is obviously the operative document that was drafted. As you effectively now, today, repudiated the Bybee memorandum, we would like to know what your view on that is. Have you repudiated the Yoo memorandum? My time is up.

Mr. HAYNES. I would like to respond, Senator. With all due respect, I have not been asked by this Committee for that document. I do not believe that this Committee knew that that document existed the last time I was here. So if I have failed to respond to a request from you, I did not know I had one, and I apologize. But I have responded to it today.

Chairman SPECTER. Senator Kennedy's time is up. Senator Leahy asked you if you would provide all of the documents which you had referred to, and you said that you would. Does that include the memorandum that you got from the Department of Justice, Office of Legal Counsel?

Mr. HAYNES. I do not think I have the authority to agree to produce that document.

Chairman SPECTER. Well, will you make a request to your Department to produce it?

Mr. HAYNES. Yes, sir, I will.

Chairman SPECTER. We would like to see it.

Mr. HAYNES. I will take that back.

Chairman SPECTER. So pass the request on to the Department that we would like to see it.

Mr. HAYNES. Yes, sir.

Chairman SPECTER. Senator Sessions?

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you, Mr. Chairman.

Mr. Haynes, it is great to have you with us. Before I get started, I just want to thank you for your service to your country. I am proud that your son is also serving the country in the Army now.

You are an honors graduate, Phi Beta Kappa at Davidson; your son is at Davidson, a great school. You went to Harvard Law School. You were rated "well qualified" by the ABA for this position, the highest rating that they give.

You were a partner at Jenner & Block, one of the world's great law firms, twice. It would be interesting to know how much money that has cost you, the public service that you have given to your Nation, to the Department of Defense, to our soldiers in the field by giving up a partnership in that great law firm. So I want to say thank you for your work.

I am sorry you had to receive the criticism you received in an opening statement by Senator Kennedy. There is a litany of charges, exaggerations, inaccurate statements, and matters taken out context for which you have absolutely no opportunity to fully explain. And now we have a group of people dropping in a letter right here the day of the hearing, where you hardly have a chance

to read it, that is critical. I just think that is not a healthy way for us to proceed.

You have served your country with distinction, with fidelity. You have done your best to do the right thing in very, very difficult circumstances, and I, for one, want to say thank you.

I noticed, first of all, that with regard to your position, you are counsel to the Secretary of Defense, a member of the President's Cabinet. Is that correct?

Mr. HAYNES. Yes, sir.

Senator SESSIONS. And the President has the Attorney General as his top law officer in the country, and this Congress has created a position of Office of Legal Counsel.

The person who fills that position is confirmed by the Senate, and that person is empowered to state the administration's legal position relevant to important issues involving any Cabinet department of the United States. Is that not correct?

Mr. HAYNES. That is correct.

Senator SESSIONS. And whenever anyone in that office is given a responsibility, they understand what their responsibilities are. They understand they are making what may be a very momentous legal call, a legal opinion, do they not?

Mr. HAYNES. It is my experience, in dealing with virtually everyone in government, that they take their job very seriously and recognize the enormous obligations and responsibility inherent in the office.

Senator SESSIONS. And they understand it is their responsibility. You asked them, when there were questions about how detainees should be treated and interrogated. And you did the proper thing, did you not, as a counsel in the Department of Defense—you asked the authoritative agency of the Department of Justice for the official opinion. Is that not correct?

Mr. HAYNES. That is what I did. Yes, sir.

Senator SESSIONS. And they gave you that. There is nothing wrong if you called them several times to discuss it. There is nothing wrong with that. The person who issued that opinion, Mr. Bybee, knew it was his opinion. His name is on it, on behalf of the Attorney General of the United States. Is that not correct?

Mr. HAYNES. Yes, sir.

Senator SESSIONS. So I just do not see how you can be blamed for that. As a matter of fact, you cannot be. It is wrong to do so. I know a lot of lawyers that come through here, and the wonderful nominee we just had in the hearing. She was a prosecutor who prosecuted cases, kind of like I did, doing your duty. Some have been in law firms, some have served as State judges and they just go right through.

But here you are, a person giving up the opportunities at a great law firm to serve your country in the Department of Defense, having to make tough calls, and I do not think that ought to be held against you. I think that you have done a good job in serving your country. I noticed here there is a letter, signed by Larry Thompson, former Deputy Attorney General of the United States, and James B. Comey. I believe he was former Criminal Division.

Mr. HAYNES. He was the U.S. Attorney in the Southern District of New York, then later the Deputy Attorney General of the United States.

Senator SESSIONS. Deputy Attorney General. And two others, Jack Goldsmith and Patrick Philbin. They were very, very strongly in support of your nomination. They note that when aggressive techniques were first requested by the joint task force at Guantanamo, you "actually recommended that the Secretary of Defense restrict authorized techniques to a more limited set."

Then they note that you reasoned, "Our armed forces are trained to a standard of interrogation that reflects a tradition of restraint." Then they note that the opinions of the Office of Legal Counsel are binding on all executive agencies in the government, and I would offer this for the record.

Mr. Chairman, I note that my time is out.

Chairman SPECTER. Without objection, that letter will be made a part of the record.

Senator Durbin?

Senator DURBIN. Thank you, Mr. Chairman.

Mr. Haynes, we have been here before. I asked you questions the last time your nomination was up and you did not answer them, and that is why I opposed you. I am going to give you another chance.

Our State Department issues a report card on human rights each year. The State Department has characterized the use of dogs as an interrogation aid as "torture, and cruel, inhuman, and degrading treatment." We have publicly condemned the countries of Libya and Burma for using dogs in interrogation.

In November of 2002, you recommended that Secretary Rumsfeld approve the use of dogs to intimidate detainees at Guantanamo. The Department of Defense's own investigation concluded this technique migrated from Guantanamo to Iraq and Abu Ghraib.

At least two members of the Armed Forces have now been convicted, under the Uniform Code of Military Justice, for using dogs to frighten detainees. It is striking that while these soldiers were prosecuted, you were being promoted.

What message are we sending our troops, and what message are we sending the world in light of your role in promulgating abusive interrogation techniques like the use of dogs, stress positions, and forced nudity? What message are we sending if we promote you to the second-highest court in the land?

Mr. HAYNES. Senator Durbin, thank you for your question. I want to make one very important point at the outset about Abu Ghraib, which is what you are alluding to in your statement about the use of dogs.

What the photographs at Abu Ghraib showed was not interrogation, was not authorized, was not the result of any policy, was not at all sanctioned by anyone. It was not an accurate depiction even of what was authorized at Guantanamo, as I understand it. I deplore it and I regret that it happened.

To the extent that some, as you have just said, attribute that to me, I say, I do not think that is the case and I deplore it.

Now, your question is, what message would you send?

Senator DURBIN. Yes. And I might add, incidentally, I am going to share with you this record from an investigation of Abu Ghraib. It was your interrogation technique that they believe migrated into the very conduct of our soldiers.

It is the same message that is included in this letter, not a letter from some random individuals, but people who have served our country in uniform and asked us not to approve your nomination, believing that it is unfair to hold these soldiers accountable for using the very technique you approved, then promote you to the Federal court.

What message do we send to our soldiers if we ignore the obvious? Every time something like this happens you think, well, they are going to dispatch a few privates, a few corporals, a sergeant, maybe get to a lieutenant, but it will never get upstairs. That is the message of this letter. Apparently, upstairs there is a promotion party; downstairs, people are being sent to prison.

Mr. HAYNES. Well, Senator, I appreciate your concern. It is an important concern. Again, I saw this letter this morning for the first time, but I did read it so I know what it says.

To my knowledge, none of the people who signed that letter has worked in the Defense Department during the period of time at issue, so they are expressing an opinion, so far as I know, based on news reports, many of which are inaccurate.

The investigations of the conduct at Abu Ghraib consistently found that what happened there was not authorized, it was not condoned, it was not a result of policy, it was not even interrogation, and it certainly was not a result of something that the Secretary of Defense approved a year earlier, half a world away, for unlawful combatants in the war on terror.

Senator DURBIN. Mr. Haynes, at Abu Ghraib, those images, which members of the Senate went up to watch in gruesome detail, hundreds and thousands of images, included the use of dogs, included forced standing, included nudity, the things which you approved in the memo you sent to the Secretary of Defense.

Now you are arguing that there was no connection between this official policy and what happened later, that it is just happenstance that the same thing occurred, to the embarrassment of the United States of America?

Mr. HAYNES. What I am saying, Senator, is what the investigations concluded, that it was neither condoned, nor even an interrogation. None of the individuals in those photographs, except one, as I am told, was even of interest, from an intelligence standpoint or from an information standpoint.

What occurred at Abu Ghraib, as the Schlesinger report said, was the work of the night shift, without any authority whatsoever, for sport. The use of dogs in those photographs was horrible.

Senator DURBIN. I read from the Schlesinger report, "It is important to note that techniques"—

Chairman SPECTER. Senator Durbin, how much more time would you like?

Senator DURBIN. Could I have one minute?

Chairman SPECTER. Sure.

Senator DURBIN. Thank you.

"It is important to note that techniques effective under carefully controlled conditions at Guantanamo became far more problematic when they migrated and were not adequately safeguarded." So to argue there is no connection—let me just close.

Yesterday, I was at Guantanamo. I sat down with our lead interrogator and I asked him point-blank, "If you were told tomorrow that you have to follow the Geneva Conventions and the Uniform Code of Military Justice, what would you change here?"

He said, "Nothing." We can interrogate these prisoners effectively without throwing away a lifetime of values this country has stood for.

You had your chance. You had your moment. You made a decision, which history will not judge kindly. When you made that judgment, you really used all of your professional ability and training, which has been referred to. Now you are asking for a lifetime appointment to the second-highest court of the land. I am sorry, it does not follow.

Chairman SPECTER. Thank you, Senator Durbin.

Senator Cornyn?

STATEMENT OF HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator CORNYN. Thank you.

Mr. Haynes, thank you for being here today, particularly to your family for being here. I know it is not easy for you, or them, to sit here and listen to some pretty nasty things being said about you, being attributed to you.

I want to just tell you straight up, if I believed half of the allegations that have been made against you today and that have been repeated elsewhere, I would not support your nomination.

But it is because I do not believe them, that I do believe you have a distinguished record of public service, I do believe you are an honorable person who has tried to do the right thing in a very difficult job, that I am proud to support your nomination.

What I do not really get, and maybe you can explain it to us, is the first detainees made their way to Guantanamo Bay on January 11, 2002. January 11, 2002. But it was not until April 16, 2003 that the various working groups that you have already testified to ultimately promulgated the approved interrogation techniques, the 24 techniques that went into effect on April 16, 2003.

For the life of me, I cannot understand. If you were intent on violating the law, if you were intent on torturing detainees without regard to international conventions or basic human decency, why in the world did you spend from January 11, 2002 until April 16, 2003 studying the law, having these meetings, trying to develop a policy? Why in the world would you do that?

Mr. HAYNES. To clarify, Senator, there is one intermediate step. That is the one that Senator Durbin was referring to, which was in late November of 2002, which is when the urgent need for guidance on how to interrogate the twentieth highjacker came up. It was from the period right after that until April 16, 2003 that all the analysis was conducted.

But your point is absolutely right, which is that, notwithstanding the urgent need expressed by some quarters of the defense estab-

lishment for information necessary to protect American lives and soldiers' lives, perhaps, overseas, the Department went to great lengths to look hard at this question—perhaps too long, but they did take that amount of time.

Senator CORNYN. And is the reason that you took as long as you did and that you convened as many meetings as you did among lawyers and other policy advisors because you were trying to figure out how to strike the right balance?

Mr. HAYNES. Absolutely right. But I should say, I was not the decision maker. I was trying to be very clear about my role, as the lawyer: what is the law, then what is the policy?

Senator CORNYN. Point well taken. You were not the ultimate decision maker, but you were trying to provide your best professional advice to Secretary Rumsfeld.

Mr. HAYNES. Yes, sir.

Senator CORNYN. And, in turn, to the President of the United States. Is that not right?

Mr. HAYNES. Certainly to Secretary Rumsfeld. I did not advise the President.

Senator CORNYN. I want to make sure that we all understand what the context is. I mean, it is easy for us to sit here today, 5 years after our country was attacked and 3,000 people died at the hand of a new and different kind of enemy unlike any that our country has ever dealt with before, but I would just like to tell us what was in your head as you were trying to develop these interrogation techniques about both the value of the intelligence that you would be able to get, or that our interrogators would be able to get, from terrorists that might prevent future 9/11s, or injury or death to our troops on the battlefield, and whether that was a factor weighing on your mind in trying to figure out, number one, how to do the right thing, but number two, to do it in expeditious a way as possible so we could get information that might, indeed, save American lives.

Mr. HAYNES. There is a phrase that comes to mind that was coined by somebody a lot smarter than I am, and I do not use it regularly but it seems appropriate now, and that is "cognitive dissonance." These are hard questions.

As many of us experienced on 9/11, I knew some people killed. Working in the Defense Department, I worked all the time with people who put their lives at risk. The value of information about what Al Qaeda might be planning to do to our soldiers or to our citizens in this country is hard to overstate.

On the other hand, there are other important concerns that all of us share. We are all Americans and we stand for things. How one strikes that balance is difficult. Who makes that decision is sometimes extraordinarily important.

The lawyer, such as I, is an important player in that and must say what the law is, and what it is not. The client needs to make the decision about what to do with the discretion available to him.

So these are hard calls. I am not complaining about that, either. It is an honor to be serving in the Defense Department and the people that I work with are, without exception, extraordinary people. But that is what we face.

Chairman SPECTER. Thank you, Senator Cornyn.

Senator Graham?

Senator GRAHAM. Thank you, Mr. Chairman.

Mr. Haynes, my analysis of how to dispose of your nomination is not going to be based on holding you responsible for every mistake or every bad thing that happened; that is not fair.

I do not believe anyone has actually gone to jail for following a policy you instituted. I think people have gone to jail because of personal misconduct. I think it is fair to say that our troops have been confused for quite a while, and some people have lost their jobs because the bad things that happened on their watch, they were held responsible for. I am all for civilian control of our military; I am also for civilian accountability when required.

Did you, at any time, meet with Mr. Yoo or Mr. Bybee to discuss what went into the memo?

Mr. HAYNES. Absolutely. I certainly did.

Senator GRAHAM. Would it be fair to say that you were part of the architecture team that came up with the Bybee/Yoo memo?

Mr. HAYNES. Well, I do not know what an "architecture team" is, Senator.

Senator GRAHAM. Maybe that is a bad way to say it. Basically what I am saying is, did they do this in the darkness, without your input, or did you have input in creating the final product?

Mr. HAYNES. When the memorandum that was addressed to me was being drafted, not only did I talk with the author, but every member of that working group had an opportunity to talk with that author. In fact, many of them did talk with the author.

Senator GRAHAM. Wait a minute, Mr. Haynes. I am talking about, the Department of Defense received a legal memo from the Office of Legal Counsel. During the drafting of that memo, were you involved in its content, its legal reasoning?

Mr. HAYNES. Well, as I was trying to explain, sir—I hope I am not missing your point—if your question is, did I talk with the author of the memorandum as it was being drafted, the answer is yes. I had to start the question. I had to ask for it.

But what I was trying to say, sir, as part of this process where I wanted everyone to have an opportunity to express their views, I asked those people at the Office of Legal Counsel to come over and meet with the members of the working group as many times as anybody wanted to meet with them.

Senator GRAHAM. If we could, in sake of fairness to Mr. Mora, when the contents of the Yoo memo were known to Mr. Mora and the Judge Advocate individuals long before the working group, the working group comes up later after many, many complaints, is it a fair characterization that when the military legal officers and Mr. Mora saw what you were proposing, Mr. Yoo was proposing, they went ballistic because you were going to get our own troops in trouble if they followed this legal road map, that if you go down the legal road map Mr. Yoo and Mr. Bybee came up with, you are going to violate the UCMJ and get our own guys in trouble. Was that not their initial reaction?

Mr. HAYNES. Well, sir, I think you may not quite have the sequence. Let me try to restate it. In November of 2002 is when I recommended that the Secretary approve that subset of techniques, and December 2, 2002 is when the Secretary approved it. Now,

that was after it had come up through the hierarchy of the Defense Department.

Senator GRAHAM. My question, Mr. Haynes, is when the JAGs, whatever moment in time they saw the proposal, did they not push back strongly?

Mr. HAYNES. They did, but it was in February of 2003. That is why it is important for me to make clear to you, sir, the sequence of events, because their staffs had seen no opinion from the Justice Department.

Senator GRAHAM. Did Mr. Mora meet with you in January of 2003, long before February? I would like to introduce his memo of July 7, 2004 into the record, in complete.

Chairman SPECTER. Without objection, it will be made a part of the record.

Senator GRAHAM. January 9, he says he meets with you. "Mr. Haynes said little during our meeting. Frustrated by not having made much apparent headway, I told him that the interrogation policies could threaten Secretary Rumsfeld's tenure and could even damage the presidency. 'Protect your client,' I urged Mr. Haynes." That was January 9, 2003. So apparently long before February, these people were very concerned about the road you were going down. Is that not true?

Mr. HAYNES. Well, I have already testified to that, Senator Graham, that there was substantial anxiety within the Defense Department after the Secretary approved the techniques on the twentieth highjacker in early December, until he stopped them on the 12th of January.

Senator GRAHAM. Did you share those concerns?

Mr. HAYNES. Absolutely.

Senator GRAHAM. Did you have any legal writings back with the Office of Legal Counsel that your proposal is way off base, it is going to get people in trouble?

Mr. HAYNES. The Office of Legal Counsel had not expressed a view to me at that time. I asked for the opinion from the Office of Legal Counsel.

Senator GRAHAM. My time is up. You have told the story, Mr. Haynes, as if the JAGs were fully and completely consulted. The working group was a sham, according to them—and I have talked to them—and that the final product coming out of the working group went back to where you started. All of their concerns, none of them made it into the final product. Is that not true?

Mr. HAYNES. I do not want to answer a question quite like that. But what I will say, is what, for example, General Romig said in your hearing last June or July, where he said, as I recall, "our concerns were listened to and many of them were accepted." Because what they expressed, and I think what you are referring to, Senator, is a series of memorandum they wrote in February.

Senator GRAHAM. Why did they need to write the memorandum? What compelled them to put on paper their strong objections? Why did they feel the need to write the memo?

Mr. HAYNES. I believe the reason they felt the need to write the memos that they wrote at the time, is that the two-week period that the Secretary had given us to come back with recommendations was expiring, and there was a draft legal opinion that they

had been provided from Department of Justice that they did not like the consequences of.

Now, as each one of their letters reflects, they were concerned about the policy implications of accepting such a legal memorandum and employing the breadth of authority that that might allow.

So what they suggested were, as you point out, and quite appropriately, concerns about, among other things, the impact on our soldiers. Those were reflected in the policy component of the working group report, and ultimately led me to recommend that the Secretary not approve them all.

Senator GRAHAM. But did the JAGs ever receive the final product of the working group for their review or input?

Mr. HAYNES. The final working group report was limited to one copy.

Senator GRAHAM. Did they ever see it?

Mr. HAYNES. I believe that they did.

Senator GRAHAM. Did Mr. Mora ever threaten that, if you do not change these policies, I am going to go public?

Mr. HAYNES. I do not know. I do not remember that.

Senator GRAHAM. Thank you. No further questions.

Chairman SPECTER. Thank you, Senator Graham.

Mr. Haynes, you testified earlier in your presentation that the request was made for more direct techniques against al Katani. Were they successful in eliciting any additional information from al Katani?

Mr. HAYNES. It is my understanding that he did provide significant additional information, including about Mr. Reid, the shoe bomber, and about some other events that I do not recall.

Chairman SPECTER. Do you know whether the additional information he provided was the result of the new techniques, the additional techniques, of interrogation?

Mr. HAYNES. I believe that during the period that he was interrogated, he did provide some additional information. Of course, he is still at Guantanamo.

Chairman SPECTER. Mr. Haynes, yesterday in our meeting you told me about requests for three different categories for al Katani, and that you had recommended to the Secretary that they not use certain facets of Category 3. Would you state for the record now what occurred in that respect?

Mr. HAYNES. The Secretary accepted that recommendation.

Chairman SPECTER. Well, what were the three categories? Provide just a little background.

Mr. HAYNES. I do not have the list in front of me, but there were three. When General Dunlavey asked for additional authority to interrogate, he proposed three categories of technique in ascending order of aggressiveness. There were not equal numbers in each category.

Chairman SPECTER. Had he asked for specific techniques to be approved?

Mr. HAYNES. Yes, sir. And as I said, his request came with a legal opinion and then was recommended up the line.

Chairman SPECTER. With the legal opinion from whom?

Mr. HAYNES. From his Judge Advocate assigned to him at Guantanamo.

Chairman SPECTER. The Judge Advocate asked that those techniques be endorsed, permitted?

Mr. HAYNES. The Judge Advocate provided an opinion that those techniques would be allowable, in accordance with the applicable law, as that person saw it.

Chairman SPECTER. So that opinion was submitted to you for your ratification, for your approval?

Mr. HAYNES. The way a proposal like that works in the Pentagon, in the Defense Department, is that if the Secretary's approval is sought from somebody in the field, as in this case, there is a proposal put together by the commander.

Chairman SPECTER. All right. That is enough history.

Mr. HAYNES. Sorry.

Chairman SPECTER. Tell me what the techniques were. Time is always limited here.

Mr. HAYNES. All right. I am sorry.

Chairman SPECTER. So we will go right to the point of interest.

Mr. HAYNES. I cannot remember precisely which ones are in each category, but Category 1 were the least.

Chairman SPECTER. What did you recommend not be approved?

Mr. HAYNES. Not be approved. I got it. All right. There were, in Category 3, which was the most aggressive, the one that is most memorable in the press is something that I believe is called water boarding. I think it was called something else.

Chairman SPECTER. What did you recommend with respect to water boarding?

Mr. HAYNES. I recommended that it not be approved.

Chairman SPECTER. And was it approved?

Mr. HAYNES. It was not approved.

Chairman SPECTER. And was it done?

Mr. HAYNES. To my knowledge, it has never been done in DoD.

Chairman SPECTER. Were there any other techniques that you recommended not be approved?

Mr. HAYNES. There were a few other techniques in Category 3, and I should say, to my knowledge, those were not employed by the Defense Department.

Chairman SPECTER. Do you recollect what they were? Would you provide them to the committee, please?

Mr. HAYNES. I will provide them to the committee. Yes, sir. I am sorry I do not have them on me.

Chairman SPECTER. That is all right. Just let us have them so we know what they are, for the record.

Mr. HAYNES. Yes, sir.

Chairman SPECTER. We talked, yesterday, extensively about the decision in *Hamdan* v. *Rumsfeld*, and where we go from here. Have you had a chance to review the proposed legislation which I introduced?

Mr. HAYNES. I have looked at it again, after our meeting. It is such a substantial piece that I would still like to study it more closely, because it has a lot in it. But there are a number of significant and important components that would, I believe—and again, I cannot speak for the executive branch, I am here as a nominee.

Chairman SPECTER. All I am looking for is your judgment.

Mr. HAYNES. Well, I think, in my personal judgment, that your proposal has a number of very important proposals that would address the Supreme Court's opinion.

Chairman SPECTER. All right. My red light is on.

Senator Kennedy?

Senator KENNEDY. Thank you. Thank you, Mr. Chairman.

You did list water boarding on your list, did you not?

Mr. HAYNES. I did not have a list, sir. But the proposal that came up from Guantanamo did include something described as "use of a wet cloth on a face," and I think that is what—

Senator KENNEDY. A misperception of suffocating. With the misperception of suffocation. I am just reading what I had understood were the interrogations recommended as lawful by you here. "The following techniques were recommended by Haynes in the memo to Secretary of Defense Rumsfeld." I guess we have got that here.

Mr. HAYNES. Sir, I think that is incorrect. I did not recommend that.

Senator KENNEDY. All right.

Mr. HAYNES. I think I recommended against it.

Senator KENNEDY. Well, I will not take the time. I will give it to you so you can look at it later on and let me know. All right?

Mr. HAYNES. Yes, sir.

Senator KENNEDY. Thanks.

Mr. HAYNES. I can tell you with certainty, I recommended against that.

Senator KENNEDY. All right. But this was, at least, on the list.

Let me get back to where we are after 9/11, when we have the Bybee memorandum drafted, because the people that were working at OLC and the drafting of the Bybee memorandum were involved and instrumental in the drafting of the Yoo memorandum. That is according to Church, the Armed Services Committee.

I want to keep moving. The Bybee memorandum was released in 2002, so we have got that background. The Bybee memorandum has been out there and it has been effectively understood as the law, the legal policy. Then we have your other statements about the recommendations in November of 2002, the working group in 2003. But in 2002, this is the document that is out there.

Now, let me ask you this. The Bybee memorandum, we can see how, late in 2002, the JAG in Guantanamo says that he thinks it is legal to do all of these bad things. Well, sure he is, because the Bybee memorandum is out there.

That is the guiding document which everything is going to be all right, legal, effectively. So when we keep hearing about what is legal and what is not, the Bybee memorandum was effectively in place, and finally repudiated by General Gonzales in December of 2004.

Now, this is my question to you. Just on the legal reasoning, the torture memorandum says that "any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the commander in chief authority in the President."

It concludes that the statute banning torture "does not apply to the President's detention and interrogation of enemy combatants, pursuant to his commander in chief authority." That is the Bybee memorandum.

Do you believe that American officials could torture prisoners with impunity, in violation of the anti-torture statutes?

Mr. HAYNES. Not only do I not believe that, the President made very clear that the United States will not, and as a matter of policy does not, do that. I would like to say, sir, you made a statement earlier that I think is incorrect.

That is that the August 2002 memorandum signed by Assistant Attorney General Bybee, to my knowledge, was not available to the officer at Guantanamo Bay who wrote that.

Senator KENNEDY. It would not have been. That is what Mr. Gonzales, as the legal counsel, as I understand, asked for. That is what was turned over as the recommendation of OLC.

Mr. HAYNES. You are right about that. It was addressed to General Gonzales.

Senator KENNEDY. And I think Mr. Gonzales, when he testified, said that that was made available to the Defense Department, was it not?

Mr. HAYNES. I do not recall him saying that at all.

Senator KENNEDY. All right.

Mr. HAYNES. In fact, I think it was made public in 2004, I believe. That is when it was withdrawn.

Senator KENNEDY. It was in effect for over two years.

I want to get back, and we can come to that. But you are not doubting that it was in effect for over two years, effectively, the rule?

Mr. HAYNES. I do not doubt that, just looking at the dates.

Senator KENNEDY. Well, you must have known about it. It was in effect for two and a half years. You are the legal counsel. You did not know that it was in effect?

Mr. HAYNES. Well, sir, that opinion, if I am recalling correctly—

Senator KENNEDY. The Bybee memorandum.

Mr. HAYNES. [Continuing]. It was addressed to Judge Gonzales. It was not addressed to me. I asked for an opinion, and received an opinion, in 2003 that is similar to that memorandum.

Senator KENNEDY. All right. That was in effect, right? That was repudiated as well when Gonzales repudiated the Bybee memorandum. Did he repealed yours as well?

Mr. HAYNES. Yes, sir. Those were withdrawn and have no operative effect.

Senator KENNEDY. All right. Well, in effect, as I understand—and that is why it would be worthwhile getting the information so we know it on the Yoo memorandum, is that it is virtually similar to the Bybee memorandum. I am interested in your legal understanding.

In the Bybee memorandum it argues that "an individual who willfully tortures a prisoner, in violation of the anti-torture statute, may avoid prosecution through the defense of necessity. The defense apparently applies to torture, since any harm that might occur during an interrogation would pale to insignificance compared to the harm avoided by preventing an attack."

Do you really believe that flimsy justification would excuse the torture of prisoners?

Mr. HAYNES. Senator Kennedy, one of the problems with that memorandum that I acknowledge, that General Gonzales and others have acknowledged, is that it was so hypothetical, not tied to a particular request, to my knowledge, certainly not in our case.

What was asked for—and this is something I regret—was an opinion on the extent of the authority available to the President, if necessary. It is something I regret, as I said. It addressed hypothetical situations. In order to apply legal reasoning of that nature, one needs to have some facts to apply it against.

Now, the facts are that when we received that memorandum, we said, all right, that is fine. That tells us that there is a lot of latitude available to the Department of Defense at Guantanamo for use with unlawful combatants, if the Nation's security required it.

What we then did, was apply a series of policy assessments, brought in by everybody involved, that led to the Secretary approving a subset of possible techniques, well short of what the Justice Department said might be legal under certain circumstances.

Senator KENNEDY. Well, the fact is that this was in effect for two and a half years, the Bybee memorandum. The Yoo memorandum is very similar to it. I understand that this is the first time. This is the rationale. You can say, we do not know really what was going to go on. Everybody knew what was going on. You have got the Red Cross talking about what was happening to these prisoners and prisoners of war.

We have had it repeated in the Armed Services Committee. I do not want to get away from what exactly, because I want to find out about your thinking when you read this Bybee memorandum. There are people that are absolutely appalled by it. Appalled by it.

Ronald Reagan was the signer on the convention on torture. This is not a Democrat or Republican issue, or left/right issue. It is an issue because we are interested in protecting Americans.

Mr. HAYNES. You are absolutely right, Senator.

Senator KENNEDY. That is why all of this has gone on. This is the further reasoning.

Chairman SPECTER. Senator Kennedy, how much more time would you like?

Senator KENNEDY. If I may get two minutes.

Chairman SPECTER. Go ahead. We are going to take it out of your next round, Senator.

Senator KENNEDY. All right. That will be fine. Let me just get on to this part here. The memo continues, "There can be little doubt that the Nation's right to self-defense has been triggered under our law due to 9/11, and that if a government defendant were to harm an enemy combatant during an interrogation, in violation of the torture statute, he could argue his actions were justified by the executive branch's constitutional authority to protect the Nation from attack."

Therefore, school is virtually out. Anyone can do anything in terms of torture if the purpose is to get information, as long as you do not have a specific intent to do injury to that individual, because you are going to get pardoned effectively because of the President's power.

Do you really believe that, as we have listened to Mr. Koh at Yale Law School, who said that is the most cockamamie legal reasoning that he has ever read in his entire life? I am just interested, as you, as an attorney. Were you persuaded by that kind of reasoning in terms of your own thinking?

Chairman SPECTER. You may answer that question, then we are going to move on.

Mr. HAYNES. Yes, sir.

A number of points. The President has made clear, we do not torture, and the policy is not to torture. What you are describing is a discussion of a hypothetical situation, not applied to facts. If your question is, do I—I am not sure what the question is. But I have already told you that—

Senator KENNEDY. It is the memorandum. It is the official guidance to the President of the United States. We will look back in the record, but I believe Mr. Gonzales said that it was made available to the Defense Department.

Chairman SPECTER. Mr. Haynes, the question is whether you agree with that memo.

Mr. HAYNES. I think that that memo should not have been requested, and I am the one who requested a version of that memo, for the reasons that I have already said: that it was unnecessary and invited speculation about hypotheticals that need not have been requested.

It certainly did not reflect policy, Senator Kennedy. It was in answer to a legal question addressed to a lawyer, who is not a decision maker, about what interrogation to employ. Certainly I would take issue with your understanding of it in that respect.

Chairman SPECTER. Thank you.

Senator Cornyn?

Senator CORNYN. Mr. Haynes, you have been asked about whether certain Judge Advocate General officers within the military had a different conclusion than that that you ultimately reached in your recommendations with regard to interrogation policy. Do you remember the questions that Senator Graham asked you about that?

Mr. HAYNES. I was a little confused by Senator Graham because I think I was not clear to him in my presentation about the sequence of events.

Senator CORNYN. Let me ask these questions maybe to help clarify it. Was there any source of information, pro, con or neutral, with regard to what the interrogation policy of the government ought to be that you refused to consider?

Mr. HAYNES. No, sir. As I have tried to say, I wanted everything on the table.

Senator CORNYN. And there were eventually, you would concede, some people whose arguments you did not agree with.

Mr. HAYNES. That is true.

Senator CORNYN. Is that unusual in your experience as a lawyer to have a divergence of views among lawyers involved in a legal question?

Mr. HAYNES. It is not unusual to have two lawyers disagree, much less thousands.

Senator CORNYN. He asked you about Mr. Mora. Who is Mr. Mora?

Mr. HAYNES. Mr. Mora is the previous general counsel of the Department of the Navy.

Senator CORNYN. Do you believe Mr. Mora was ultimately satisfied with the interrogation policies, the conclusions of the working group that were ultimately approved in April of 2003, notwithstanding some earlier concerns he might have expressed?

Mr. HAYNES. Here is what I think. I certainly cannot speak for Mr. Mora. I know that he was concerned in the period between early December of 2002 and the middle of January, 2003 when the interrogation of the twentieth highjacker was being conducted. I know that he had strong views about what the ultimate policy ought to be. I do not know what he thinks for sure. I know he expressed his views publicly in recent times.

I believe that the memorandum that Senator Graham introduced into the record has a number of statements, but I think that memorandum includes a statement, if it is the one I have seen in recent months, to the effect that the techniques ultimately approved by the Secretary of Defense in April of 2003 were well within the bounds of the law.

Senator CORNYN. The quote I have in front of me from Mr. Mora's memo is, "To my knowledge, all interrogation techniques authorized for use in Guantanamo after January 15, 2003 fell well within the boundaries authorized by law." Does that refresh your memory?

Mr. HAYNES. That sounds familiar. Yes, sir.

Senator CORNYN. What I really find so repugnant about all of the discussion about torture, which we all condemn, is the suggestion that somehow, notwithstanding the statements by the President, your statements, statement by Secretary Rumsfeld, and other prominent government officials, that people still want to believe and want to allege, without any factual basis whatsoever, that our government engages in torture of detainees and others engaged in this global war on terror.

But you have been at the Department of Defense now 5 years. As a member of the Armed Services Committee, along with Senators Sessions, Senator Graham, Senator Kennedy and others, it is my recollection that there have been 12 major investigations conducted by the Department of Defense or independent entities into these allegations, whether they arise out of Guantanamo Bay or they arise out of Abu Ghraib. Is that correct?

Mr. HAYNES. That is correct. There have been a number of less significant, but thorough, investigations.

Senator CORNYN. Well, in the suggestion that we heard from Senator Durbin, that somehow the big guys get off scott free, but the little folks are the ones who get nailed, I know there have been 500 criminal investigations, roughly 100 disciplinary actions or other criminal actions.

I seem to recall that the highest-level officer that was disciplined as a result of Abu Ghraib was a Brigadier General, if I am not mistaken. Is that not correct?

Mr. HAYNES. I think that is right.

Senator CORNYN. Do you know of any basis whatsoever for the allegation that some were treated differently from others? In your view, were there repetitive comprehensive investigations undertaken in an effort to get to the bottom of these charges?

Mr. HAYNES. Certainly the latter statement that you made, I would think it is so. I think it is important to reemphasize something I said earlier, and that is one of many things about the Defense Department that should make the country proud, is that it is a self-correcting mechanism.

In other words, everybody is trained to raise their hand and report improprieties. When those things are reported, they are investigated. Then if the facts warrant it, then corrective actions, ranging from criminal prosecutions, to policy changes, to determinations that the allegation was unsubstantiated, happen. That is what continues to be the case within the Defense Department.

Senator CORNYN. Mr. Chairman, if I can ask one last quick question.

Mr. Haynes, is it not a fact that the interrogation techniques approved on April 16, 2003 are the same interrogation techniques currently in effect today?

Mr. HAYNES. No, sir, that is not true. They did prevail until the end of last year, when the Congress passed, and the President signed, the Detainee Treatment Act, which had, among other things, a requirement that only techniques listed and authorized in the Army field manual may be used. So as soon as the President signed that bill, an order went out from the Pentagon putting that into effect.

Senator CORNYN. I thank you for that correction. That is exactly right. Congress passed that legislation and now all of the interrogation techniques are published in the Army field manual. Is that correct?

Mr. HAYNES. Yes, sir. The 1992 version is the one that is in effect.

Senator CORNYN. Thank you.

Chairman SPECTER. Senator Sessions?

Senator SESSIONS. Mr. Haynes, thank you for your service to your country, and your patriotism and your many, many hours of hard work for your Nation.

I want to get a couple of things straight, just so everybody knows what has occurred. There was an open discussion within the Department of Defense about these interrogation techniques, were there not?

Mr. HAYNES. Yes, sir. It was no holds barred.

Senator SESSIONS. And JAG officers were free to speak up, and did speak up. You had the Chief Judge Advocates for all of the services discussing all of these things. Is that correct?

Mr. HAYNES. Yes, sir.

Senator SESSIONS. And you did not just impose some personal opinion on these techniques. You also asked the Office of Legal Counsel of the U.S. Department of Justice for an official opinion of the Attorney General, which is the authoritative agency, before you approved any techniques.

Mr. HAYNES. That is correct, with this clarification. I did not approve any techniques.

Senator SESSIONS. Well, that is correct.

Mr. HAYNES. Before I made any recommendations, I asked for all of those things that you have just described. Yes, sir.

Senator SESSIONS. And that office is the one that is sworn and has the official responsibility to evaluate legal matters, and the Secretary of Defense is the one that is authorized and required to set the policy ultimately. Is that not correct?

Mr. HAYNES. Yes, sir. The Secretary runs the Department.

Senator SESSIONS. And you make advice to him.

Mr. HAYNES. Yes, sir.

Senator SESSIONS. First of all, the Bybee memo that came out, you did not recommend to the Secretary of Defense that our military use every technique that the Bybee memo authorized, did you?

Mr. HAYNES. You are correct about that. But let me also make clear that what you are calling the Bybee memo was actually not signed by Bybee, but somebody else in that office, and did not recommend any techniques at all.

It was an exposition of what law applied at Guantanamo for unlawful combatants in the global war on terror, in their opinion. So they did not propose any techniques, nor evaluate any techniques at that time or in that memorandum.

Senator SESSIONS. And you considered techniques that would have been acceptable under that memo, presumably, and rejected those techniques. Is that correct? Or the team that you put together did.

Mr. HAYNES. Well, there were a number of people who expressed views. My personal view was that a number of techniques should not even be considered at all. Then yet another substantial number of techniques that had been evaluated under the criteria that the working group came up with also should not be considered or recommended, and I, in fact, recommended that those be rejected.

Senator SESSIONS. Well, I think this is all important. You did not ask the Office of Legal Counsel to tell you everything you could do, then do everything they said you could do, and more. You did not even do all the things they said you could do, number one.

Mr. HAYNES. That is correct.

Senator SESSIONS. I think that is important. Did you want to respond further?

Mr. HAYNES. No, sir. I think I agree with your statement.

Senator SESSIONS. You prepared these color-coded charts. I remember when we had the complaint about, I believe General Sanchez in Iraq, and there were all kinds of approval practices.

Even if you approved the technique, you did not give that power, or the DOJ opinion did not give that power, unreviewable, to an interrogation officer. The more significant techniques had to be approved higher up in the chain of command. Is that not correct?

Mr. HAYNES. That is correct. But there is an important point I need to make here. That is that what these charts reflect are for unlawful combatants at Guantanamo Bay, Cuba in the global war on terrorism only. It had nothing to do with anything in Iraq.

Senator SESSIONS. That is very important. I am glad you mentioned that, because the President said we would let the Geneva Conventions apply with regard to Iraq, even though they do not, because those soldiers do not really meet the standards, in my

view, and do not come close. Those terrorists do not come close to meeting those standards. But he said we will do it in Iraq.

But with regard to the Al Qaeda types that were captured and held at Guantanamo, these are the techniques and they required review up the chain if somebody were using an enhanced technique. Is that correct?

Mr. HAYNES. That is correct.

Senator SESSIONS. Well, I think, Mr. Chairman, this counsel is not operating as a rogue person. The Department of Defense is not operating as an independent agency, trying to violate people's rights.

From the very, very beginning, they have had the best legal advice they could get. They have worked at it, they have had full debate among JAG officers. Some had a different policy view about how these things ought to be handled. They thought they just ought to stick with the Uniform Code of Military Justice.

But this was a different kind of war, and the President basically did not agree with that, so they went forward. But they strictly controlled what they were doing. It is reviewable. The policies are made available to the Congress and key leaders.

So I think, Mr. Haynes, you have done your best and have served your country well under difficult circumstances and you have reflected credit on you and your fine family.

Mr. HAYNES. Thank you.

Chairman SPECTER. Thank you very much, Senator Sessions.

Mr. Haynes, just a few more questions about looking forward and where we go from here.

With respect to trial procedures to meet the requirements of the Supreme Court of the United States in *Hamdan* v. *Rumsfeld*, do you believe that evidence should be used in the trials which are the result of coerced confessions or involuntary statements by the detainees?

Mr. HAYNES. Senator, if you will bear with me just one second, I feel schizophrenic. I am here, I am a government official. I am here as a nominee. You are asking my view about what the Congress should do. Is that correct, what the Congress should propose?

Chairman SPECTER. Mr. Haynes, you are here today as a nominee for a Federal Judgeship.

Mr. HAYNES. Yes, sir.

Chairman SPECTER. This Committee is interested in your judgment. The issue as to how you treat detainees and what you have on trial practice falls squarely within the ambit of judgment. We are not asking you for the views of the administration; that has already been made clear. You have already expressly stated that.

Now do you think, as a matter of policy, in your judgment as an individual, that we should use coerced confessions in a trial?

Mr. HAYNES. I do not like the idea of coercing anybody as a general matter. In our conversations yesterday, one of the things that we talked about was—

Chairman SPECTER. Let me ask you to respond in writing, after you have had a chance to think about it, so that we can move to another question.

Mr. HAYNES. Yes.

Chairman SPECTER. In the same context, do you believe that a defendant in one of these trials ought to be entitled to exculpatory evidence? That is, evidence which would tend to be probative on his innocence.

Mr. HAYNES. My view is that if somebody is being tried, all relevant information, especially of that nature, ought to be available to the decision maker, especially exculpatory—

Chairman SPECTER. So it should be made available to defense counsel?

Mr. HAYNES. My personal view is that exculpatory information absolutely must be.

Chairman SPECTER. Do you think that defense counsel ought to be entitled to have access to classified information which may be relevant to the trial, even though that would not be necessarily shown to the defendant, but made available to counsel?

Mr. HAYNES. I would observe, on the question of making classified information available to somebody, the reason that information is classified—

Chairman SPECTER. Would the counsel or JAG be cleared to handle classified information?

Mr. HAYNES. Let me try answering it this way, sir.

Chairman SPECTER. No. Answer it in writing. I want to move on.

Mr. HAYNES. All right. I will.

Chairman SPECTER. With respect to the treatment of enemy combatants and detainees who are held for the duration of the war against terror, which has no ending boundary in sight, if you have a prisoner of war they are held until the war is over, then they are released. Where you have detainees, enemy combatants, in the legislation which I have proposed, there will be periodic reviews.

What is the kind of information which would be requisite to holding them as enemy combatants and detainees, the standard being essentially whether they are a threat, that if they are released they will go back to the battlefield and kill Americans?

Mr. HAYNES. That has been the traditional standard. That would be something that would make sense to me.

Chairman SPECTER. Well, what kind of information? You cannot have, necessarily, competent evidence that would be admitted in a proceeding in a criminal trial in a Federal court in the United States.

But what kind of information would be appropriate to be received to protect the interests of the United States, the administration, the President in protecting Americans, contrasted with sufficient reason for continued attention?

Mr. HAYNES. Well, from the country's perspective, the interest would be to make sure that somebody who is trying to kill citizens should be detained. So, any information—

Chairman SPECTER. What kind of data and information would be appropriate to establish that? That is my last question. My red light is about to go on.

Mr. HAYNES. I will take that for the record. If I may take that for the record, I will give you writing on that as well.

Chairman SPECTER. That would be fine.

Senator Kennedy, you have minus one minute for your last round.

Senator KENNEDY. Thank you, Mr. Chairman.

Let me ask you—

Chairman SPECTER. No, he took six minutes of overtime, so he would have less than one minute to go. But we have another round, so start him at five, not at four.

Senator KENNEDY. That is awfully kind. I will not take all that time.

Chairman SPECTER. You say you will not take all that time?

Senator KENNEDY. No.

Let me ask you, did you ever request a judgment by Mr. Bybee on specific techniques from the Office of Legal Counsel?

Mr. HAYNES. No, sir. I never asked Mr. Bybee for judgment on specific techniques. I did ask his successor at the Office of Legal Counsel to review the techniques approved by the Secretary of Defense in April of 2003.

Senator KENNEDY. All right. And did you receive that?

Mr. HAYNES. I received the judgment—

Senator KENNEDY. Is that known, sort of, as the Bybee two memorandum?

Mr. HAYNES. I do not know.

Senator KENNEDY. All right. Well, let us just stick with that. Can you make that available to us?

Mr. HAYNES. Bybee two?

Senator KENNEDY. Well, the memorandum that you just mentioned that you received about the techniques.

Mr. HAYNES. I do not recall if I did, but if I did receive a memorandum to that effect, it may be that I can do that, because, as I said earlier, there has been an enormous disgorgement of data related to Guantanamo to the Armed Services Committee already. If that is available, if there is such a thing—and I think there is—then I will do everything I can to make it available.

Senator KENNEDY. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Kennedy.

Senator Sessions, would you like another round?

Senator SESSIONS. Well, I would just say that, with regard to some of the specific questions you asked, like coerced confessions, what we define as "coerced" in America is a very low threshold.

For example, if a police officer stands in front of somebody and asks them, were they involved in a crime, that can be considered coercion if they feel like the person may have been threatened. We do not want to exclude confessions or admissions made to soldiers who make inquiry of people they apprehend on the battlefield.

With regard to torture, we have a statute that, if I am not mistaken, senior members of this Committee all voted for that defined "torture" as an intention to inflict severe physical or mental pain, and defined "severe mental pain or suffering" as "prolonged mental harm resulting from severe physical pain."

You are a lawyer. You are required to follow the laws that Congress passes. That is what we passed as the definition of torture some years ago in the U.S. Congress. I think President Clinton signed it.

But I just hope that as we go forward with the overall process of dealing with detainees, that we will be realistic and understand

the exigencies of the threat this Nation faces and the difficulties and challenges our soldiers on the battlefield face.

How do you feel about those soldiers out there, trying to serve their country, trying to find out information that could preserve Iraqi lives or American soldiers' lives, or Americans in the homeland's lives? Would you share any thoughts with us about how you feel about them and your responsibility to them?

Mr. HAYNES. I feel grateful for what they are doing. I feel humbled by what they are putting at stake. I feel concerned at what they risk. I feel a fiduciary responsibility, both as a government official and as a citizen, because they are out there for us. That is just the beginning.

Senator SESSIONS. Let me ask you about Abu Ghraib. You are blamed for it, but in fact the Army found out about that and brought it forward and, I presume with your advice, the Secretary of Defense said go full force and investigate and prosecute whoever was wrong.

Mr. HAYNES. Absolutely. That is the standard response when any allegation comes in, and I believe it was Specialist Darby is the one who brought that to light and presented that to his chain of command. The first thing General Sanchez did, was call in the Criminal Investigative Division of the Army to investigate it.

Chairman SPECTER. Senator Sessions, I have just been advised that there is an unidentified bag in the anteroom. If we are going to be concluding promptly, fine. If not, the Capitol Police would like us to vacate the room.

Senator SESSIONS. We will wrap right up, I am sure.

Were you involved at some point, aware of, and supportive of the full-fledged investigation and prosecution?

Mr. HAYNES. I supported it fully.

Senator SESSIONS. That is all, Mr. Chairman.

Chairman SPECTER. That concludes the hearing. Thank you very much, Mr. Haynes.

[Whereupon, at 6:00 p.m. the hearing was concluded.]

[Questions and answers and submissions for the record follow.]

[Additional material is being retained in the Committee files.]

QUESTIONS AND ANSWERS

Responses of William J. Haynes II
Nominee to the U.S. Court of Appeals for the Fourth Circuit
to the Written Questions of Chairman Arlen Specter

Thank you for giving me the opportunity to clarify and expand my testimony in these questions for the record. At the outset, I would like to draw your attention to two considerations. First, it is important for me to note that I am appearing before you as a nominee for the federal judiciary and answer in that capacity. Yet, I am also a sitting government official. I recognize that Congress has important roles in both providing oversight of the Executive branch and advice and consent on judicial nominees. I am before you in the latter capacity; however, where your questions concerned the former, I have attempted to be responsive as possible, consistent with my continuing responsibility as a government official, and consistent with my memory.

1. During the hearing on July 11, 2006, I asked you to provide this Committee with your response to the allegations set forth in the letter dated July 7, 2006 from General Joseph Hoar and 19 others to myself and Senator Leahy. The letter includes six questions appended to this letter. Please provide a detailed response to each allegation set forth in the letter, as well answers to the six specific questions included at the conclusion of the letter.

Response:

Please see attached.

2. During the hearing, you were asked to request the Department of Defense provide this Committee with all copies of documents you referred to when formulating your legal opinion concerning military interrogation techniques (such as the so-called "Bybee memorandum"), and any other document you or others within the Defense Department relied upon when formulating legal opinions about the use of interrogation techniques including documents from other executive branch components.

Response:

The following documents are available on the Department of Defense's website at:
http://www.defenselink.mil/cgi-bin/dlprint.cgi?http://www.defenselink.mil/releases/2004/nr20040622-0930.html

- October 11, 2002 request from the military Commander at Guantanamo Bay, Cuba for additional interrogation techniques, accompanied by a legal opinion by a JAG officer. (Document 3)
- October 25, 2002 request from the Commander of Southern Command forwarding the Guantanamo Bay request for additional interrogation techniques. (Document 4)
- December 2, 2002 approval by the Secretary of Defense of November 27, 2002 memorandum from the Department of Defense General Counsel, referencing the views of the Deputy Secretary of Defense, the Undersecretary of Policy, and the Chairman of the

Joint Chiefs of Staff, General Richard Myers, recommending that the Secretary reject the most aggressive interrogation techniques. (Document 5)

- January 15, 2003 memorandum from the Secretary of Defense rescinding approval of interrogation techniques dated December 2, 2002. (Document 6)
- January 15, 2003 memorandum from the Secretary of Defense directing the formation of a working group to consider interrogation policy. (Document 7)
- April 4, 2003 now-withdrawn Working Group Report. (Document 8)
- April 16, 2003 memorandum from the Secretary of Defense to the Commander of U.S. Southern Command rejecting 11 of the 35 interrogation techniques recommended by the Working Group Report. (Document 9)

Three additional documents are attached:

- August 1, 2002 memorandum from the Office of Legal Counsel, Department of Justice to Alberto R. Gonzales, Counsel to the President regarding Standards of Conduct for Interrogation under 18 U.S.C. secs. 2340 – 2340A.
- September 23, 2002 letter from General Counsel of the Department of Defense to President, American Bar Association, forwarded to the Armed Services' General Counsels, the Armed Services' Judge Advocates General, and the Legal Counsel for the Chairman, Joint Chiefs of Staff providing comments to the Preliminary Report of the ABA Task Force on Treatment of Enemy Combatants.
- January 17, 2003 memorandum from the General Counsel of the Department of Defense to the General Counsel of the Department of the Air Force designating the General Counsel as the Chair of an interdepartmental working group to study detainee interrogation methods.

I am not authorized to provide any documents that have not already been made publicly available. Specifically, with respect to the now-withdrawn March 13, 2003, Department of Justice memorandum, I have forwarded your request to the appropriate decision makers. All other referenced documents have been provided.

3. During your hearing, Senator Graham asked you what type of input you had in the formation of the memoranda referred to in the previous question. Specifically, he asked if you were part of the "architecture team" that came up with the legal reasoning represented by these memoranda. What was your substantive input into these documents? Did you indicate your agreement with the thrust of the documents while they were still in draft form? Did you ever communicate reservations about the reach of these documents with the Office of Legal Counsel while they were still in draft form? Were any substantive changes made to the draft documents before they were finalized?

Response:

The August 1, 2002 Memorandum was addressed to then-White House Counsel Alberto Gonzales. I did not have a copy of it and I did not shape its legal analysis. Several months after the issuance of that memorandum, I sought from the Department of Justice's Office of Legal

Counsel an opinion regarding 18 U.S.C. § 2340-2340A and other laws potentially applicable to interrogations of enemy combatants held at Guantanamo by U.S. Armed Forces. I likewise did not shape its analysis.

With respect to the concerns of the Judge Advocates General and others regarding the March 14, 2003 Memorandum, I encouraged them to meet with the representatives of the Department of Justice's Office of Legal Counsel and it is my understanding that several such meetings took place. It is also my understanding that there were a number of such consultations during which the views of participating judge advocates and others were expressed to the Department of Justice attorneys. I do not recall whether there were any substantive changes made to the March 14, 2003 Memorandum between the draft provided to the Working Group and the final version.

4. During your testimony there appeared to be considerable disagreement between you and some of your questioners with regard to the sequence of events in developing interrogation policies. Please provide the Committee with a detailed timeline reflecting your understanding of the relevant sequence of events, including when relevant requests were made by combatant commanders, when you requested or authored key memoranda, when the Office of Legal Counsel circulated drafts or issued final opinions, and key dates in the development and the formation the "working group" that reported to you, its report, and any other recommendations that came out of that body.

Response:

Detainee Interrogation Policy:
Chronology

February 7, 2002: A Presidential memorandum regarding "Humane Treatment of al Qaeda and Taliban Detainees," requiring the U.S. Armed Forces to treat detainees humanely is issued.

Spring/Summer 2002: Deadly attacks occur in Tunisia and Pakistan.

August 1, 2002: Memorandum from then-Assistant Attorney General Bybee, head of the Office of Legal Counsel (OLC), to then-White House Counsel Alberto Gonzales regulating standards of conduct for interrogation under 18 U.S.C. §§ 2340-2340A.

September 13, 2002: DOJ breaks up the Lackawana Six.

October 8, 2002: Al Qaeda leader Ayman Zawahiri releases a tape recording stating that "God willing, we will continue targeting the keys of the American economy."

October 11, 2002: Major General Michael E. Dunlavey, Commander, Joint Task Force 170 (Guantanamo Bay), makes a request to General James T. Hill, Commander USSOUTHCOM, for approval of 19 additional counter-resistance techniques that were not specifically listed in Field Manual 34-52 (techniques were broken down into categories I, II, III) to aid in the interrogation

of detainees at Guantanamo Bay. General Dunlavey's request asserted that the requested techniques "do not violate U.S. or international laws." The request came with a concurring legal opinion of his Staff Judge Advocate.

October 12, 2002: Al Qaeda affiliate Jemaah Islamiya bombs a nightclub in Bali, Indonesia killing more than 200 and injuring approximately 300.

October 16, 2002: Congress passes the Authorization for Use of Military Force Joint Resolution of 2002.

October 25, 2002: Commander USSOUTHCOM forwarded Major General Dunlavey's request for approval of additional counter-resistance techniques to the Chairman of the Joint Chiefs of Staff, General Richard B. Myers.

October 30, 2002: The Director of the Joint Staff for Strategic Plans and Policy (J-5) circulated Major General Dunlavey's proposed techniques to Joint Staff Office of Legal Counsel, Intelligence (J-2), Operations (J-3) and the service planner for comment.

October/November 2002: Various and recurring information about possible terrorist threats and attacks.

November 27, 2002: Mr. Haynes sent an Action Memo to the Secretary of Defense recommending the authorization of Categories I and II techniques, but only one of the category III techniques, namely, mild, non-injurious physical contact, including light poking in the chest. He advised that, as a matter of policy, the remaining techniques should not be used because "[o]ur armed forces are trained to a standard interrogation that reflects a tradition of restraint." Prior to doing so Mr. Haynes consulted with the Deputy Secretary of Defense, the Undersecretary of Defense for Policy, and the Chairman of the Joint Chiefs of Staff.

December 2, 2002: Secretary Rumsfeld authorizes the use of some of the interrogation techniques requested by the Guantanamo Commander, while rejecting the most extreme ones.

December 2002/January 2003: On several occasions, Mr. Haynes alerts Secretary Rumsfeld and other senior leaders to concerns regarding interrogation practices at Guantanamo Bay. Mr. Haynes also seeks assurances from the Joint Staff that the interrogations are being properly conducted.

January 12, 2003: Mr. Haynes meets with Secretary Rumsfeld and reiterates concerns regarding interrogations at Guantanamo Bay, urges him to withdraw his approval, and seeks permission to commission a working group to evaluate the matter. Secretary Rumsfeld calls General Hill and rescinds his approval of Category II and Category III counter-resistance techniques.

January 15, 2003: Secretary Rumsfeld confirms his January 12, 2003 rescission in writing. Secretary Rumsfeld formally approves convening a working group to address legal considerations raised by detainee interrogations in Guantanamo.

January 17, 2003: Mr. Haynes asks Air Force General Counsel Mary Walker to convene a working group composed of Office of the Under Secretary of Defense for Policy (USDP), Defense Intelligence Agency, the General Counsels of the Air Force, Army, and Navy, Counsel to the Commandant of the Marine Corps, the Judge Advocates General of the Air Force, Army, Navy and Marines, and the Joint Staff Legal Counsel and the Director of the Joint Staff for Strategic Plans and Policy (J-5). Contemporaneous with the establishment of the working group, Mr. Haynes requested a legal opinion from the Department of Justice, Office of Legal Counsel, regarding the interrogation of detainees.

February 5, 2003: Memo to Mary Walker from Air Force Deputy Judge Advocate Jack Rives regarding the Final Report and Recommendations of Working Group

February 6, 2003: Memo to Mary Walker from Navy Judge Advocate Rear Admiral Michael Lohr regarding the Working Group recommendations on interrogation of detainees.

February 6, 2003: Memo to Mary Walker from Air Force Deputy Judge Advocate Major General Jack Rives regarding Comments on Draft Report and Recommendations of Working Group

February 6, 2003: Memo to Mary Walker from Staff Judge Advocate to the Commandant of the Marine Corps, Brigadier General Kevin Sandkuhler regarding Working Group Recommendations on Detainee Interrogations.

Early February 2003: Mr. Haynes requests additional time for further study of the issues. The Secretary of Defense grants the extension. He later grants a second extension.

March 3, 2003: Memo to Mary Walker from the Army Judge Advocate General, Major General Thomas Romig.

March 13, 2003: Memo to Mary Walker from Navy Judge Advocate Rear Admiral Michael Lohr regarding comments on the March 6 draft of the working group report.

March 14, 2003: OLC issues a memorandum entitled "Military Interrogation of Alien Unlawful Combatants Held Outside the United States."

March 18, 2003: Mr. Haynes met with Rear Admiral Lohr and two Navy judge advocates to discuss concerns about the Working Group Report.

March 2003: Mr. Haynes suggests to Secretary Rumsfeld that the 35 proposed interrogation techniques being considered by the Working Group also be evaluated separately by other senior leaders of the Department.

March 2003: Secretary Rumsfeld meets with The Judge Advocates General.

Late March/Early April 2003: 35 evaluated techniques briefed to the Joint Chiefs of Staff and Secretaries of the Military Departments

April 4, 2003: The Working Group Chairperson signs the Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations. The Report evaluates 35 interrogation techniques.

April 16, 2003: Following the recommendation of General Richard Myers, Chairman of the Joint Chiefs and Mr. Haynes (and over the objections of some others, who desired approval of all techniques), Secretary Rumsfeld approves 24 of the 35 techniques recommended in the Working Group Report. Of those 24, 17 are the 17 approaches in the Army field manual, drafted for interrogating prisoners of war in Geneva Convention-governed conflicts. The additional seven were highly regulated, two of which, arguably, were restatements of one or two of the 17 basic techniques.

April 2003: General Hill and General Miller are briefed on the 24 techniques that the Secretary authorized along with the safeguards that his authorization required for the use of those techniques. General Hill and General Miller were briefed only generally regarding the Working Group Report and were not provided a copy of that report at that briefing.

December 2003: The Department of Justice alerts Mr. Haynes orally that the March 14, 2003, OLC memo on interrogation of enemy combatants is under review and should not be relied upon, but that the techniques approved in April 2003 were legal.

June 2004: The Department of Justice withdraws the August 1, 2002, OLC memo.

July 14, 2004: Patrick Philbin, Associate Deputy Attorney General, testifying before the House Select Committee on Intelligence, states that "the proper use of each of these 24 techniques [approved for Guantanamo on April 16, 2003], in accordance with the General Safeguards, is lawful under any relevant standard."

December 30, 2004: The Department of Justice issues a memo replacing the August 1, 2002, memo.

March 2005: The Department of Defense, through a memorandum signed by Mr. Haynes, declares the 2003 Working Group Report a "non-operational, 'historic document.'"

December 30, 2005: President Bush signs the Detainee Treatment Act, requiring that interrogations within the Department of Defense be conducted only using techniques authorized and listed in the Army Field Manual on Intelligence Interrogations. The Department issues an order within hours of the President signing the bill consistent with this requirement. Accordingly, only those techniques authorized and listed in the Army Field Manual for Intelligence Interrogations are currently authorized.

5. Do you personally believe – as a matter of policy – that evidence obtained by a coerced confession or otherwise involuntary statements from a detainee should be used as evidence in a military trial or commission?

Response:

If confirmed to serve on the U.S. Court of Appeals, questions concerning the propriety of the use of such evidence may come before me. For that reason, I do not think it would be appropriate for me to offer an opinion on this subject. If confirmed, I pledge to apply faithfully the law with respect to the inadmissibility of coerced confessions in civilian courts. In addition, I note that the military commission rules currently provide that evidence determined to have been obtained through torture is inadmissible.

6. Do you personally believe – as a matter of policy – that a defendant in a military tribunal or commission should be entitled to receive and review exculpatory evidence in his or her defense?

Response:

If confirmed to serve on the U.S. Court of Appeals, questions concerning the provision of exculpatory evidence may come before me. For that reason, I do not think it would be appropriate for me to offer an opinion regarding access to exculpatory evidence. If confirmed, I pledge to apply faithfully the law with respect to a defendant's access to exculpatory evidence in civilian courts. I note that the military commission rules currently provide for a defendant to have access to exculpatory evidence.

7. Do you personally believe – as a matter of policy – that defense counsel in a military trial or commission should be entitled to receive access to classified information relevant to the trial? For purposes of your response, assume the defendant will not have access to the classified information, only defense counsel will have such access.

Response:

If confirmed to serve on the U.S. Court of Appeals, questions concerning access to classified evidence may come before me. For that reason, I do not think it would be appropriate for me to offer an opinion regarding such access. If confirmed, I pledge to apply faithfully the law with respect to a defendant's access to classified information in civilian courts. I note that the military commission rules currently provide for a defendant to have access to classified evidence for counsel with appropriate security clearances, which come at no cost to the defendant.

8. "Enemy combatants" may be detained for the duration of the "war on terror" – a war with a potentially limitless duration. Prisoners of war, however, are held until the duration of the conflict, then released. What standard is required to justify the continued detention of enemy combatants? Please describe specific examples of the type of information, data, or evidence that would exemplify continued detention.

Response:

There should be periodic review of the need for continued detention of enemy combatants. Review of enemy combatant status has been ongoing in Afghanistan and at Guantanamo Bay, Cuba since 2002. In addition to the reviews that were already being done, the Department of Defense established, in the summer of 2004, the Combatant Status Review Tribunal (CSRT). The CSRT provides a formal review of all available information related to a detainee to determine whether each person meets the criteria to be designated as an enemy combatant. In addition, the Administrative Review Board (ARB) process is an annual review to determine the need to continue the detention of an enemy combatant on the basis of whether the detainee continues to pose a threat to the United States or its allies, and other factors, such as intelligence value. The ARB recommends whether the detainee should be released, transferred, or continue to be detained.

9. Do you believe any of the techniques you recommended be implemented by the Department of Defense would be considered "cruel, inhuman, or degrading"? Please provide any analysis supporting your position.

Response:

I would not have recommended interrogation techniques if I thought they constituted prohibited cruel, inhuman, or degrading treatment. The request for the use of additional techniques originated from a commanding general in the field, was forwarded for consideration by the Commander of U.S. Southern Command, and was accompanied by a legal review by the Staff Judge Advocate at Guantanamo. The use of any technique was required to be in accordance with the President's order that the U.S. Armed Forces were to treat the detainees humanely. Nothing in the Secretary's authorization of the additional techniques provided otherwise.

10. When the Department of Justice withdrew the Bybee memorandum as controlling authority, what affirmative steps did you take as General Counsel to provide legal advice to the Department of Defense?

Response:

By the time that the Department of Justice rescinded the August 1, 2002 Memorandum, the Department was no longer relying on the March 14, 2003 Memorandum. As of at least December of 2003, we had no longer been relying on the March 14, 2003 Memorandum. After I was notified by the Department of Justice's Office of Legal Counsel that I was not to rely on the March 14, 2003 Memorandum, I sought advice from the Office of Legal Counsel on the legality of the techniques authorized by the Secretary of Defense on April 16, 2003. I obtained oral advice that the Office of Legal Counsel remained of the view that the 24 techniques that had been authorized by the Secretary on April 16, 2003 were in fact legally permissible. As you may know, Patrick F. Philbin, then-Associate Deputy Attorney General, testified as to the views of the Justice Department regarding these 24 techniques before the House Permanent Select Committee on Intelligence on July 14, 2004. In his testimony he stated that it was the view of

the Justice Department that "each of those [24] techniques is plainly lawful" and that "[t]he proper use of these 24 techniques, in accordance with the General Safeguards [which the Secretary required as part of his authorization], is lawful under any relevant legal standard."

With respect to the Working Group Report, the signed report was not disseminated because it had served its purpose as a constructive vehicle—a crucible—for collecting and evaluating myriad perspectives and measuring proposed techniques against those perspectives for a unique setting. Moreover, it was also not disseminated because it contained broad legal analysis that was not necessary for the specific techniques ultimately approved for use on unlawful combatants held at Guantanamo, and it evaluated the use of many techniques that were not approved for such use. It fact, its expansive legal analysis had not been necessary for the approval of the 24 techniques that the Secretary had approved for use at Guantanamo. Nonetheless, in an abundance of caution, however, I rescinded the Working Group Report on detainee interrogation on March 17, 2005.

11. Is it your understanding that Secretary Rumsfeld relied on the views of the working group and its report when formulating his decision in 2003 to approve the 24 interrogation techniques for use at Guantanamo? Were the views of Navy General Counsel Alberto Mora considered when the final decision was made? Did you discuss with Secretary Rumsfeld Mr. Mora's specific concerns?

Response:

Many of the concerns of the Judge Advocates General were reflected in the Working Group Report. In particular, the Working Group Report addressed various ways in which the use of more aggressive interrogation techniques might impact the U.S. service members. Those concerns were important to me and were part of the reason that I recommended that the Secretary reject 11 of the 35 techniques proposed by the Working Group Report, and approve only 24 techniques, 17 of which were already allowed by the Field Manual. Moreover, I shared the concerns of Mr. Mora and others with the Secretary of Defense. The Secretary was aware of the concerns of the Judge Advocates General. Indeed, at my request, he met with them (the General Counsels of the Military Departments and the Judge Advocates General) in March 2003. After a thorough vetting of the evaluated techniques by the senior military and civilian leaders of the Department, I joined Chairman of the Joint Chiefs of Staff Myers in recommending approval of only 24 of the 35 techniques evaluated by the Working Group.

12. Were the views of uniformed military JAG officers considered when the final decision was made? Did you discuss the opinions of JAG officers with Secretary Rumsfeld? Please detail the contacts and consultations you had with JAG officers, including Maj. Gen. Jack L. Rives, during the formation of Department policy on interrogation techniques.

Response:

Yes, the views of the Judge Advocates General were considered. The Secretary was aware of their concerns. Indeed, at my request, he met with them in March 2003. Moreover, their concerns were reflected in the Working Group Report. In particular, the concern for the effect that authorizing more aggressive techniques might have on service members was deliberated and discussed by the Working Group. That very concern is ultimately reflected in the Working Group Report. For example, the Working Group Report states:

- "Participation by U.S. military personnel in interrogations which use techniques that are more aggressive than those appropriate for POWs would constitute a significant departure from traditional U.S. military norms and could have an adverse impact on the cultural self-image of U.S. military forces. Those techniques considered in this review that raise this concern are relatively few in number . . ." [p. 69 & n.76]

- "General use of exceptional techniques (generally having substantially greater risk than those currently, routinely used by U.S. Armed Forces interrogators), even though lawful, may create uncertainty among interrogators regarding the appropriate limits of interrogations. They should therefore be employed with careful procedures and only when fully justified." [p. 69]

- "Some nations may assert that the U.S. use of techniques more aggressive than those appropriate for POWs justifies similar treatment for captured U.S. personnel." [p. 69]

- "Other nations, including major partner nations, may consider use of techniques more aggressive than those appropriate for POWs violative of international law or their own domestic law, potentially making U.S. personnel involved in the use of such techniques subject to prosecution for perceived human rights violations in other nations or to be surrendered to international fora, such as the ICC; this has the potential to impact future operations and overseas travel of such personnel." [pp. 68-69]

Those concerns were important to me and were part of the reason that I recommended that the Secretary reject 11 of the 35 techniques evaluated by the Working Group Report, and approve only 24 techniques, 17 of which were already allowed by the Field Manual. Additionally, because of the concerns expressed regarding the Department of Justice Office of Legal Counsel opinion, I encouraged the members of the Working Group to confer with the Department of Justice attorneys preparing the legal opinion. It is my understanding that there were a number of such consultations in which the views of the participating judge advocates and others were expressed to the Department of Justice attorneys. I also personally extended an invitation to those in the Working Group, including the Judge Advocates General, to have their staff meet with me separately or otherwise to express any concerns. Admiral Lohr and two Navy judge advocates accepted that invitation. I further suggested that if they were not comfortable raising those concerns to me that they raise them with their respective Military Department Secretaries.

13. In *Hamdan v. Rumsfeld,* the Supreme Court decision struck down the use of military commissions, at least as they have been constituted, to try accused terrorists of war crimes. It is has been reported that you played a role in the establishment of these commissions – with other executive branch components. Without divulging

the specific legal advice or counsel you provided, can you identify what role you played in the establishment of the commissions? Who were the parties within the Executive Branch germane to the establishments of the commissions? Did you confer with other experienced lawyers within the Defense Department? Who within the Defense Department did you consult about the establishment of these Commissions?

Response:

As you recognize, I cannot discuss specific legal advice or counsel that I provided on military commissions. On November 13, 2001, President George W. Bush directed Secretary of Defense Rumsfeld to establish military commissions for the war crimes trial of individuals for whom there is reason to believe those individuals are members of al Qaeda or have engaged or participated in terrorist activities aimed at or harmful to the United States. I first established a working group composed of representatives of the Judge Advocates General of the Armed Forces and of relevant civilian legal offices within the Department of Defense to develop the procedures to be used in the military commissions and the elements of crimes that could be charged. Moreover, I sought the advice of a number of distinguished attorneys in developing proposals. Among those most active were: Lloyd Cutler, Newton Minow, Gerhard Casper, Griffin Bell, William Barr, William Webster, William T. Coleman, Jr., Bernard Meltzer, and Ruth Wedgwood. Further, substantial interagency participation—including the Departments of State and Justice—sharpened the effort. After consultation and discussion that ran over the course of several months, the Secretary of Defense approved draft Military Commission Order No. 1, issued on March 21, 2002, setting out the procedures for the commissions, and Military Commission Instruction No. 2, issued on April 30, 2003, establishing the crimes and elements for military commission trials. A number of senior military and civilian lawyers within the Department of Defense participated in the deliberations.

14. It has been reported that you defended the military's policy of indefinitely holding detainees obtained from the battlefields – including U.S. citizens – as "enemy combatants." You argued protections under the Geneva Conventions do not apply to these detainees. Can you explain the legal distinction between the "enemy combatant" designation and a "prisoner of war" that would be afforded protections under Geneva? Is it safe to assume all detainees at Guantanamo are affiliated with al Qai-da, and thus not afforded protections under Geneva?

Response:

I appreciate the opportunity to clarify the distinction identified in the question. As an initial matter, it is important to keep in mind that al Qaeda is not a signatory to the Geneva Conventions and thus its members are not entitled to prisoner of war protections. As a general matter, the term "enemy combatant" broadly captures all types of combatants, including both "unlawful" enemy combatants (sometimes called "unprivileged belligerents") as well as those lawful combatants entitled to protection as prisoners of war. "Unlawful enemy combatants"

have also been referred to as simply "enemy combatants." The U.S. Supreme Court explained the distinction between lawful and unlawful combatants in *Ex Parte Quirin*:

> By universal agreement and practice the law of war draws a distinction between the armed forces of a nation and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are not entitled to the states of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.

317 U.S. 1, 30-31 (1942).

To qualify for prisoner of war status under the Geneva Conventions, *all four* conditions of lawful combatancy must be satisfied: (1) being commanded by a person responsible for his subordinates; (2) having a fixed distinctive sign recognizable at a distance; (3) carrying arms openly; and (4) conducting their operations in accordance with the laws and customs of war. Al Qaeda members are unlawful enemy combatants because (1), as noted above, al Qaeda was never a signatory of the Geneva Conventions, and (2) al Qaeda fails to meet all four conditions. Similarly, the Taliban has not met all four conditions of lawful combat. This distinction between lawful and unlawful enemy combatants has existed for over a century. *See Ex Parte Quirin,* 317 U.S. at 30-31 (citing sources dating back to 1896). In thinking about these distinctions it is important to keep in mind that prisoner of war treatment is the gold standard of treatment of enemy combatants, rather than some very basic minimum standard of treatment. As you may know, the Supreme Court's recent decision in *Hamdan v. Rumsfeld* does not touch upon prisoner of war status. Instead, the Supreme Court held only that members of al Qaeda are as a matter of law covered by Common Article 3.

Those detained at Guantanamo are either affiliated with al Qaeda or the Taliban. The United States has followed an extensive multi-step process for determining who is detained as an enemy combatant and which enemy combatants should be transferred to Guantanamo. Prior to arriving at Guantanamo, these detainees have been determined in the field as an unlawful enemy combatant. Each detainee held at Guantanamo is assessed by a Combatant Status Review Tribunal (CSRT) to determine if he is an "enemy combatant." "Enemy combatant," for purposes of a CSRT, is defined as "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." As the Supreme Court recognized in *Hamdi*

v. Rumsfeld, an enemy combatant, whether lawful or unlawful, can be detained until the cessation of hostilities.

15. What role did you play, if any, in the continued justification to detain Jose Padilla after the Supreme Court decision in *Hamdi*? Did you participate in any effort to transfer Padilla to civilian custody?

Response:

As General Counsel of the Department of Defense, I advised Department leaders. In these matters and worked with the Department of Justice in implementing the Department of Justice's decision to bring criminal charges. The Department of Justice represented the United States in court, and advises the Department of Defense.

Responses of William J. Haynes II
Nominee to the U.S. Court of Appeals for the Fourth Circuit
to the Written Questions of Senator Patrick J. Leahy

Thank you for giving me the opportunity to clarify and expand my testimony in these questions for the record. At the outset, I would like to draw your attention to two considerations. First, it is important for me to note that I am appearing before you as a nominee for the federal judiciary and answer in that capacity. Yet, I am also a sitting government official. I recognize that Congress has important roles in both providing oversight of the Executive branch and advice and consent on judicial nominees. I am before you in the latter capacity; however, where your questions concerned the former, I have attempted to be responsive as possible, consistent with my continuing responsibility as a government official, and consistent with my memory.

1) **You began your testimony last week by speaking for 26 minutes "as General Counsel of the Department of Defense" about your role in the development of the Bush Administration's policies on the treatment of enemy combatants, the interrogation of detainees, and the creation of military commissions." Yet, the morning of your confirmation hearing, the Judiciary Committee held a hearing on the Supreme Court's recent decision in *Hamdan v. Rumsfeld*, in which the Court held that military tribunals as constituted by this administration were unconstitutional. Why did your deputy, Daniel Dell'Orto, testify at that hearing instead of you? Why have you declined invitations to appear to testify before the Senate Armed Services Committee about the same subject matter you discussed in your lengthy opening statement?**

Response:

I understand that Mr. Dell'Orto testified at the *Hamdan* hearing because he was the person invited. I do not recall declining any invitation to testify before the Senate Armed Services Committee.

2) **In *Hamdan*, the Supreme Court rejected the policies you helped to develop on military tribunals and the legal theory of almost unfettered executive power underpinning it. The morning of the Judiciary Committee's hearing, we learned from news reports that just days before, the Department of Defense issued a memorandum stating that military detainees being held in U.S. military custody around the world do deserve some protections under the Geneva Conventions. This eleventh hour reversal of the policy you helped develop on the eve of your confirmation hearing raised many questions, especially in light of the fact that neither of the Administration's witnesses at the *Hamdan* hearing, Acting AAG Steve Bradbury of the Office of Legal Counsel or your deputy, Daniel Dell'Orto, made reference to this memo in their written testimony or opening statements.**

a) Mr. Bradbury testified that, prior to the *Hamdan* decision, the Geneva Conventions did not apply based on Presidential interpretation of a treaty. Do you agree with Mr. Bradbury? Didn't the Supreme Court in *Hamdan* conclude that Common Article 3 of the Geneva Conventions did apply?

Response:

While I am not familiar with the specifics of Mr. Bradbury's testimony, I agree that prior to the *Hamdan* decision the Geneva Conventions did not apply to the conflict with Al Qaeda based on Presidential interpretation of those conventions. The Department of Justice's Office of Legal Counsel had issued an opinion in January of 2002, in which it concluded that Common Article 3 did not apply to the conflict with al Qaeda because Common Article 3 applied "only to internal conflicts between a state party and an insurgent group, rather than to all forms of armed conflict not covered by Common Article 2." It reached this conclusion by relying upon "the text [of Common Article 3] and the context in which it was ratified by the United States." This view was binding on the Executive Branch, including the Department of Defense. The binding nature of that opinion is so as a matter of regulation, and practice. In fact, this has been the practice of both Democratic and Republican administrations. The President agreed with the legal views expressed by the Office of Legal Counsel and announced on February 7, 2002, that the conflict with al Qaeda was not covered by Common Article 3.

The Supreme Court has now spoken as to the interpretation of Common Article 3 of the Geneva Conventions. In the *Hamdan* decision, in interpreting section 821 of the Uniform Code of Military Justice, which recognizes the authority to establish military commissions, the Supreme Court concluded that the law of war includes the Geneva Conventions and that Common Article 3 applies to the conflict with al Qaeda. The memorandum to which your question refers, which was issued by the Deputy Secretary of Defense, did advise the Department that pursuant to the Supreme Court's decision that Common Article 3 applied to the conflict with al Qaeda.

The application of the standards in Common Article 3 does not involve a reversal in policy in terms of the treatment of detainees. The President directed on February 7, 2002, that the Armed Forces were to treat detainees humanely. To that end, the U.S. Armed Forces provide detainees held at Guantanamo with three culturally appropriate meals a day; adequate shelter and clothing; the opportunity to worship, including a copy of the Koran and prayer beads; the means to send and receive mail; reading materials; and exceptional medical care. The individuals held at Guantanamo are treated in a manner that exceeds the requirements of Common Article 3.

Finally, it bears noting that the Court did not opine on the remainder of the President's determinations with respect to the conflict with Afghanistan, namely that because al Qaeda is not a party to the Convention its members are not prisoners of war and that the Taliban's failure to meet all four factors of lawful combatancy recited in the

Geneva Convention Relative to the Treatment of Prisoners of War means that its fighters are not prisoners of war.

b) Do you believe the President has the authority to ignore a treaty ratified by the United States Senate?

Response:

Article II Section 2 of the U.S. Constitution provides that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur." Technically, the Senate does not ratify treaties, but instead advises the President and consents or withholds consent on whether treaties should be ratified.

It would be inappropriate for the President to ignore a treaty in force and ratified by the United States. According to Article II Section 3 of the U.S. Constitution, the President "shall take care that the laws be faithfully executed."

c) When you appeared before this Committee in 2003, you asserted that when it came to the conflict in Afghanistan and the war on terror, there was "no way" that the Geneva Conventions could apply, and that as a matter of law, they did not. Do you now accept that you were mistaken in your legal and policy determinations on the issue of military tribunals?

Response:

The Supreme Court in *Hamdan* did reject the President's determination that Common Article 3 did not apply to the conflict with al Qaeda. I am bound by that decision, just as I would be should I be confirmed to serve on the Court of Appeals. At the time that the decisions regarding the applicability of the Geneva Conventions were made, there was no recent guidance from the Supreme Court. Moreover, prior to the Supreme Court's decision, the U.S. Court of Appeals for the District of Columbia Circuit in *Hamdan v. Rumsfeld* had agreed with the President's determination.

It is important to keep in mind that the Supreme Court did not, however, conclude that military commissions are illegal. Instead, the Court concluded only that some procedures were not consistent with the Uniform Code of Military Justice and Common Article 3. It did not address the President's authority as Commander in Chief. The Court did not call into question the authority of the United States to detain enemy combatants in the War on Terror, and the Court's decision does not require the United States to close the detention facilities at Guantanamo Bay or release any terrorist held by the United States. The Court implicitly recognized several Government positions. Specifically, it confirmed the view the attacks committed by al Qaeda on September 11 triggered this

country's right to use military force in self-defense and that the United States is involved in an armed conflict with al Qaeda to which the laws of war apply.

d) According to press accounts, there was a meeting in 2005 between civilian heads of the armed services branches, military lawyers, and top DoD official to consider a proposal that would make it official Pentagon policy to treat detainees in accordance with Common Article 3 if the Geneva Conventions. There was nearly unanimous consensus that the Geneva Conventions do apply. In fact, you were reportedly one of only two people opposed to what is apparently now, after five years, Pentagon policy. Why? Did you make a mistake in ignoring the advice of so many military lawyers?

Response:

There have been many news reports about me that are inaccurate. My view at the time was that, while adhering to the standards of Common Article 3 was a legal obligation in many circumstances, it was not a legal obligation in the context of the U.S. conflict with al Qaeda. The President determined in his memorandum of February 7, 2002, that "common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to 'armed conflict not of an international character.'" Moreover, the U.S. Court of Appeals for the District of Columbia Circuit in *Hamdan v. Rumsfeld* had agreed with the President's determination.

The Supreme Court has now spoken in *Hamdan v. Rumsfeld* and concluded that the current conflict in which we are engaged with al Qaeda is one covered by Common Article 3. The Supreme Court has thus resolved the question of its applicability to the conflict with al Qaeda. As General Counsel of the Department of Defense, I am bound, just as I would be should I be confirmed to serve on the U.S. Court of Appeals, to follow the law as interpreted by the Supreme Court.

The President also directed on February 7, 2002 that the Armed Forces were to treat detainees humanely. To that end, the U.S. Armed Forces provide the detainees held at Guantanamo with: three culturally appropriate meals a day; adequate shelter and clothing; the opportunity to worship, including a copy of the Koran and prayer beads; the means to send and receive mail; reading materials; and exceptional medical care. The individuals held at Guantanamo are treated in a manner that exceeds the requirements of Common Article 3.

In discussing the views of judge advocates, I try to be careful not to ascribe a single point of view to the thousands of uniformed attorneys within the Department of Defense. (Indeed, please note that I became a judge advocate–a member of the U.S. Army's Judge Advocate General's Corps–after I left active duty for reserve status.) Over the years, for example, there have been a number of judge advocates—both active and

retired—who have served in the Office of the General Counsel. Each has been a valued contributor to the work of the office and the Department, and each brought his or her own perspective.

e) **Do you also now accept that you were wrong in the policies and legal positions you advocated on the issue of interrogation of detainees – specifically that the President could authorize cruel, inhumane, and degrading treatment, and that several cruel techniques were advisable as a matter of policy?**

Response:

I did not advocate that cruel techniques were advisable as a matter of policy, nor that the President should authorize cruel, inhumane, and degrading treatment. I do regret, as I said in my hearing in July 11, 2006, that the opinion I asked for from the Department of Justice's Office of Legal Counsel was "so hypothetical, not tied to a particular request, to my knowledge, and certainly not in our case."

I have always believed that the standard for treatment of all detainees should be humane treatment.

3) **I am enclosing two articles written by Jane Mayer published in the New Yorker within the last six months. These articles detail the development and implementation of the legal theories underpinning the Administration's policies on detainees, interrogation and military tribunals. Did these articles accurately describe your role? If not, please explain where they are incorrect.**

Response:

No. I set forth a more accurate description of my role in my opening statement at the hearing.

On February 27, 2006, the Assistant Secretary of Defense for Public Affairs wrote to the Editor of the New Yorker. The Editor of the New Yorker refused to print the letter from the Assistant Secretary of Defense for Public Affairs. (letter attached).

4) **Alberto Mora, former General Counsel of the United States Navy, this year received a Profile in Courage Award from the John F. Kennedy Library Foundation for his efforts to resist The Bush Administration's adoption of policies permitting and condoning cruel, inhumane, and degrading interrogation techniques. Mr. Mora protested these policies even though many higher level Department of Defense and administration officials**

supported them. He told others in the administration that these policies were alien to our national values and dangerous to our troops.

a) When he accepted the 2006 Profile in Courage Award, Mr. Mora said about the administration's policies authorizing certain interrogation techniques, "for as long as these policies were in effect, our government had adopted what only can be labeled as a policy of cruelty." He said, "Cruelty disfigures our national character. It is incompatible with our constitutional order, with our laws, and with our most prized values. Cruelty can be as effective as torture in destroying human dignity, and there is no moral distinction between one and the other." Do you agree with his assessment of the administration's policies?

Response:

I respectfully disagree with this assessment. Of the 24 interrogation techniques authorized by the Secretary on April 16, 2003, 17 of them were already authorized by the Army Field Manual on Intelligence Interrogations. It is my understanding that Mr. Mora has expressed the view in writing that interrogation techniques approved by the Secretary of Defense on April 16, 2003, were well within the bounds of the law. Moreover, to the extent to which Mr. Mora is referring to the Working Group Report or the March 14, 2003 Memorandum, those documents did not reflect Department of Defense policy. The former was a constructive vehicle—a crucible—for collecting and evaluating myriad perspectives and measuring proposed techniques against those perspectives for a unique setting. The latter was merely a legal analysis, not policy analysis, and never represented Department of Defense policy.

b) According to press accounts and Department of Defense documents, you defended the administration's authorization of cruel interrogation tactics and personally recommended that Secretary Rumsfeld approve specific harsh interrogation techniques. How do you square these actions with the concerns raised by Mr. Mora and others?

Response:

I would not have recommended interrogation techniques if I thought they constituted prohibited cruel, inhumane or degrading treatment. Moreover, the President issued a clear order in February 2002 that the U.S. Armed Forces were to treat all al Qaeda and Taliban detainees humanely. In fact, in December 2002, I recommended, in consultation with the Deputy Secretary, the Under Secretary of Defense for Policy, and the Chairman of the Joint Chiefs of Staff, that the Secretary reject the most aggressive interrogation techniques. At my urging that further study of the issues surrounding interrogations was necessary, the Secretary directed me in January 2003 to establish a working group to study those issues. In April 2003, I joined the Chairman of the Joint Chiefs of Staff in once again recommending that the Secretary reject the most aggressive interrogation techniques. In fact, based upon our recommendation he approved only 24

of the 35 interrogation techniques evaluated by the Working Group, 17 of which were already allowed by the Army Field Manual on Intelligence Interrogations.

5) **The Department of Justice in late 2003 withdrew the August 1, 2002, Office of Legal Counsel memo to Alberto Gonzalez, signed by Jay Bybee, about interrogation policy, known now as the Bybee memo. The Defense Department in 2005 declared its working group report reaching similar conclusions a non-operational historical document. Do you consider these withdrawals to be a repudiation of policies you had championed?**

Response:

No. The Office of Legal Counsel opinion was written by the Justice Department and the decision to withdraw it came from the Justice Department. The Working Group Report was declared a non-operational historical document because portions of its legal analysis were based upon an analysis that was withdrawn by the Department of Justice. The policies that I recommended, and that the Secretary approved, were much more restrictive than what arguably may have been permissible under the Office of Legal Counsel opinion. Although the Office of Legal Counsel's legal opinions are binding on the Executive Branch as a matter of regulation and practice, there was no need to rely upon the opinion's broad legal analysis. Moreover, although the legal analysis was binding, it was neither a policy opinion nor an imperative for action, and I remained, as did anyone else in the Department, free to recommend a much more limited course as a matter of policy. I chose to recommend a much more limited approach than permitted by the opinion.

I have consistently advocated restraint in the face of requests for more aggressive techniques. As I said in the November 27, 2002 memorandum sent to Secretary, after consulting with the Deputy Secretary of Defense, the Under Secretary of Defense, and the Chairman of the Joint Chiefs of Staff, "Our Armed Forces are trained to a standard of interrogation that reflects a tradition of restraint."

6) **John Yoo of the Office of Legal Counsel wrote a memorandum in early 2003 reaching similar conclusions to the 2002 Bybee memo. In fact, you testified that you solicited this memo from OLC, that it was "substantially identical" to the Bybee memo, and that you consulted with John Yoo as he was preparing the memo.**

a) Why did you solicit this memo from John Yoo?

Response:

This was obviously a very important question and one that was an issue of first impression, which might yield multiple legal interpretations. I thought it was important that the Executive Branch speak with one voice on such a sensitive issue. I sought an

opinion from the Office of Legal Counsel because of their expertise in handling complex, novel, constitutional issues and because their opinion is definitive. By regulation and tradition, it is binding upon all Executive Branch agencies. This is consistent with the law and longstanding practice. As Randolph Moss, then-Assistant Attorney General for the Office of Legal Counsel under President Clinton, wrote in 2000: "When the views of the Office of Legal Counsel are sought on the question of the legality of a proposed executive branch action, those views are typically treated as conclusive and binding within the executive branch. The legal advice of the Office, often embodied in formal, written opinions, constitutes the legal position of the executive branch, unless overruled by the President or the Attorney General." Randolph D. Moss, "Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel," 52 Admin. L. Rev. 1303, 1305 (Fall 2000). This policy dates back for at least 88 years. On May 31, 1918, President Wilson's Executive Order 2877 stated: "any opinion or ruling by the Attorney General upon any question of law arising in any Department . . . *shall be treated as binding* upon all departments . . . therewith concerned."

b) Please detail the communication you had with John Yoo and others at OLC regarding the content and legal reasoning of the memo you requested before it was issued by OLC, including the timing of your communications.

Response:

As part of my role as General Counsel of the Department of Defense, I speak very often with my colleagues at the Justice Department on a number of different issues. For that reason, I do not recall with precision the contacts I had with the attorneys at the Office of Legal Counsel during the relevant time period. The Office of Legal Counsel is an office that is independent of the Department of Defense General Counsel's Office. I have no oversight or command authority over them.

c) Did you agree with the Yoo memo's conclusions?

Response:

The conclusions reached in the March 14, 2003 memoranda were unnecessary. Nothing I recommended to the Secretary depended on those conclusions. I believe that Congress has authority to regulate the discipline of the Armed Forces, including its conduct of interrogations, and I believe that no one is above the law.

The opinion that I received (and the August 1, 2002 Memorandum addressed to the Counsel to the President) have been rescinded and replaced by the Office of Legal Counsel with a superseding opinion. I understand that new opinion, issued in December 2004, to be the binding opinion for the Executive Branch and the opinion to which the Department of Defense adheres. As Randolph Moss, then-Assistant Attorney General for the Office of Legal Counsel under President Clinton, wrote in 2000: "When the views of

the Office of Legal Counsel are sought on the question of the legality of a proposed executive branch action, those views are typically treated as conclusive and binding within the executive branch. The legal advice of the Office, often embodied in formal, written opinions, constitutes the legal position of the executive branch, unless overruled by the President or the Attorney General." Randolph D. Moss, "Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel," 52 Admin. L. Rev. 1303, 1305 (Fall 2000). This policy dates back for at least 88 years. On May 31, 1918, President Wilson's Executive Order 2877 stated: "any opinion or ruling by the Attorney General upon any question of law arising in any Department . . . *shall be treated as binding* upon all departments . . . therewith concerned."

d) Did you request or consult with OLC about any other memoranda or opinions relating to the treatment of enemy combatants, interrogation of detainees, trial of detainees, and creation of military commissions?

Response:

Yes, I have frequently consulted the Office of Legal Counsel regarding many issues, including many issues relating to the war on terror.

e) **Did you suggest that the Defense Department's Working Group rely upon the Yoo memo in drafting its report?**

Response:

Yes. In formulating advice to the Secretary, all Department of Defense lawyers were guided by (and bound by) legal advice from the Department of Justice. This is consistent with the law and longstanding practice. Although the legal analysis was binding, it was not a policy opinion, nor an imperative for action, and I remained, as did anyone else in the Department, free to recommend a much more limited course as a matter of policy. I chose to recommend a much more limited approach than permitted by the opinion.

The March 14, 2003 Memorandum, as an opinion for the Office of Legal Counsel, was binding on the Executive Branch, including the Department of Defense.

f) Was the Yoo memo withdrawn, as the Bybee memo eventually was?

Response:

Yes, the March 14, 2003 Memorandum was withdrawn.

7) **At your hearing, you were asked about a letter Chairman Specter and I received from twenty retired senior military officials, many of them generals**

and admirals. They expressed strong concern that you did not give proper regard to the views of uniformed and experienced military attorneys. They wrote:

> **Mr. Haynes was arguably in the strongest position of any other senior government official to sound the alarm about the likely consequences for military personnel of the views being put forward by the Justice Department, because he had the benefit of the clear and unanimous concerns voiced by the uniformed Judge Advocate General of each of the military services. Yet Mr. Haynes seems to have muted these concerns, rather than amplify them.**

How did you respond to the concerns that uniformed JAG attorneys unanimously put forward? Why did you conclude that it was appropriate for the administration to disregard these concerns? Whose expertise did you ultimately conclude trumped that of the top career military attorneys as far as what was in the best interest of the military and national security?

Response:

I know only three of the individuals who authored the letter to which the question refers. None of these individuals was even working in the Pentagon at the time of the development of interrogation policy. These retired officers appear to be basing their opinion, at least in part, upon media reports suggesting that the Department of Justice's Office of Legal Counsel opinion represented the Administration's policy. That was never the case. The Office of Legal Counsel legal opinion was a legal opinion. It did not set Administration policy.

The concerns of the Judge Advocates General were expressed both orally and in writing as they actively participated in the Working Group. In fact, the Working Group Report includes their concerns. For example, the Working Group Report states:

- "Participation by U.S. military personnel in interrogations which use techniques that are more aggressive than those appropriate for POWs would constitute a significant departure from traditional U.S. military norms and could have an adverse impact on the cultural self-image of U.S. military forces. Those techniques considered in this review that raise this concern are relatively few in number . . ." [p. 69 & n.76]

- "General use of exceptional techniques (generally having substantially greater risk than those currently, routinely used by U.S. Armed Forces interrogators), even though lawful, may create uncertainty among interrogators regarding the appropriate limits of interrogations. They should therefore be employed with careful procedures and only when fully justified." [p. 69]

- "Some nations may assert that the U.S. use of techniques more aggressive than those appropriate for POWs justifies similar treatment for captured U.S. personnel." [p. 69]

- "Other nations, including major partner nations, may consider use of techniques more aggressive than those appropriate for POWs violative of international law or their own domestic law, potentially making U.S. personnel involved in the use of such techniques subject to prosecution for perceived human rights violations in other nations or to be surrendered to international fora, such as the ICC; this has the potential to impact future operations and overseas travel of such personnel." [pp. 68-69]

Those considerations were important to me and were part of the reason that I recommended that the Secretary approve only 24 of the 35 techniques that the Working Group evaluated. Of those 24 techniques that I recommended, 17 of them were already allowed by the Army Field Manual. Finally, as the Church Report observed, "the Office of the Secretary of Defense received meaningful input from military service lawyers."

8) **You testified that members of your Department of Defense working group, including JAG officers, were given the opportunity to consult with John Yoo and OLC as the Yoo memo was being prepared. However, as that memo was being prepared, and before it was completed in March 2003, documents show that JAG officers expressed deep reservations about Mr. Yoo's claim that the President had authority, as commander-in-chief, to circumvent laws banning torture and cruel, inhuman and degrading treatment.**

a) Did you share the concerns of the JAG officers about arguments regarding the President's authority to violate laws banning torture and cruel, inhuman and degrading treatment?

Response:

I took into account the concerns of the JAG officers, as well as my own judgment, in making my recommendation to the Secretary of Defense to approve only 24 of the 35 interrogation techniques evaluated by the Working Group, 17 of which were already allowed by the Army Field Manual on Intelligence Interrogations.

b) Were those concerns addressed in the Yoo memo?

Response:

No, however, they were reflected in the Working Group evaluation of possible interrogation techniques.

c) Were those concerns addressed in the Department of Defense working group report?

Response:

Yes.

9) **You testified that Army Judge Advocate General, Maj. Gen. Thomas Romig, has said the concerns of the working group were heard. However, in the letter we received from 20 retired military officers, it quotes Gen. Romig as raising concerns as the policies were being developed that they would "open us to international criticism that the 'U.S. is a law unto itself,'" and that they would lower international standards, "putting our service personnel at far greater risk and vitiating many of the POW/detainee safeguards the U.S. has worked hard to establish over the past five decades." General Romig testified last week before the Senate Armed Services Committee, in fact, that the final Department of Defense working group report reflected none of the officers' ideas. How is that consistent with your testimony that Gen. Romig and members of the Working Group were satisfied that they had been consulted? Did you heed his warnings? If not, why not?**

Response:

The Department of Defense often uses working groups on a variety of issues. Major General Romig participated in a number of different working groups. With all due respect, I believe that the testimony by Major General Romig to which you are referring concerned the promulgation of the President's Order on Military Commissions, not the interrogation working group report. With respect to the interrogation Working Group Report, Major General Romig testified before the Personnel Subcommittee of Senate Armed Services Committee on July 14, 2005, and stated: "We did express opposition to certain things that were being proposed. Other things we did not. And I believe that our opposition was accepted in some cases, and maybe not in all cases. But it did modify the proposed list of [interrogation] techniques and procedures. So I have to say that we did have an impact. It was listened to."

The concerns of the Judge Advocates General were expressed both orally and in writing as they actively participated in the Working Group. In fact, the Working Group Report includes their concerns. For example, the Working Group Report states:

- "When assessing whether to use exceptional interrogations [sic] techniques, consideration should be given to the possible adverse effects on U.S. Armed Forces culture and self-image, which at times in the past may have suffered due to perceived law of war violations. DOD policy, reflected in the DOD Law of War Program implemented in 1979 and in subsequent directives, greatly restored the culture and self-image of U.S. Armed Forces by establishing high benchmarks of compliance with the principles and spirit of the law of war, and thereby humane

treatment of all persons in U.S. Armed Forces' custody. In addition, consideration should be given to whether implementation of such exceptional techniques is likely to result in adverse effects on DOD personnel who become POWs, including possible perceptions by other nations that the United States is lowering standards related to the treatment of prisoners, generally." [p. 55]

- "The method of obtaining these statements and its effect on voluntariness may also affect the usability of these statements against other accused in any criminal forum. Statements produced where the will of the detainee has been overborne will in all likelihood be viewed as inherently suspect and of questionable value. Consideration must be given to the public's reaction to methods of interrogation that may affect the military commission process. The more coercive the method, the greater the likelihood that the method will be met with significant domestic and international resistance. This in turn may lower international and domestic acceptance of the military commission process as a whole." [p.57]

- "Other nations, including major partner nations, may consider use of techniques more aggressive than those appropriate for POWs violative of international law or their own domestic law, potentially making U.S. personnel involved in the use of such techniques subject to prosecution for perceived human rights violations in other nations or to be surrendered to international fora, such as the ICC; this has the potential to impact future operations and overseas travel of such personnel." [pp. 68-69]

- "Some nations may assert that the U.S. use of techniques more aggressive than those appropriate for POWs justifies similar treatment for captured U.S. personnel." [p. 69]

- "Should information regarding the use of more aggressive interrogation techniques than have been used traditionally by U.S. forces become public, it is likely to be exaggerated or distorted in the U.S. and international media accounts, and may produce an adverse effect on support for the war on terrorism." [p. 69]

- "The more aggressive the interrogation technique used, the greater the likelihood that it will affect adversely the admissibility of any acquired statements or confessions in prosecutions against the person interrogated, including in military commissions (to a lesser extent than in other U.S. courts)." [p. 69]

- "General use of exceptional techniques (generally having substantially greater risk than those currently, routinely used by U.S. Armed Forces interrogators), even though lawful, may create uncertainty among interrogators regarding the appropriate limits of interrogations. They should therefore be employed with careful procedures and only when fully justified." [p. 69]

- "Participation by U.S. military personnel in interrogations which use techniques that are more aggressive than those appropriate for POWs would constitute a

significant departure from traditional U.S. military norms and could have an adverse impact on the cultural self-image of U.S. military forces. Those techniques considered in this review that raise this concern are relatively few in number . . ." [p. 69 & n.76]

Those considerations were important to me and were part of the reason that I recommended that the Secretary approve only 24 of the 35 techniques that the Working Group evaluated. Of those 24 techniques that I recommended, 17 of them were already allowed by the Army Field Manual.

Finally, it bears noting that I only know three of the individuals who authored the letter to which the question refers. None of these individuals was even working in the Pentagon at the time of the events referred to in the question occurred. These retired officers appear to be basing their opinion, at least in part, upon media reports suggesting that the Department of Justice's Office of Legal Counsel's legal opinion represented the Administration's policy. That was never the case. The Office of Legal Counsel opinion was a legal opinion. It did not set Administration policy.

10) **Maj. Gen. Jack L. Rives last week before the Senate Armed Services Committee that he did not see the April 2003 Department of Defense working group report until, "about 14 months after it was issued" and that, to his knowledge, "one in the Air Force JAG had seen it before then." In a July 15, 2006, letter to Chairman Specter, you concede that Gen. Rives had not seen the final report, but state that Gen. Rives had seen earlier versions of the report. How is that consistent with your testimony that members of the Working Group had been consulted? Why did you send the final working group report to Secretary Rumsfeld on April 4, 2003 without sharing it with all members of the working group?**

Response:

Thank your for the opportunity to clarify my testimony. It is important to bear in mind that I was not the author of the Working Group Report. Nonetheless, it is my understanding that the Working Group Report was open to all participants for editorial comments and proposed changes during the drafting process and, as evidenced by the JAG memoranda, participants actively submitted comments to the draft. I understand that the senior lawyers had reviewed and commented frequently on the text of the report or had the opportunity to do so, over the period of many weeks before the General Counsel of the Department of the Air Force signed the report in early April 2003. I believe that the members of the Working Group examined earlier versions of the report. The signed report was not disseminated because it had served its purpose as a constructive vehicle—a crucible—for collecting and evaluating myriad perspectives and measuring proposed techniques against those perspectives for a unique setting. Moreover, it was also not disseminated because it contained broad legal analysis that was not necessary for the specific techniques ultimately approved for use on unlawful

combatants held at Guantanamo, and it evaluated the use of many techniques that were not approved for such use.

Please consider this important point: the advice from the Department of Justice made very clear that the Secretary had very wide latitude with regard to legal restrictions concerning interrogations of unlawful enemy combatants at Guantanamo Bay, Cuba. Accordingly, while the wording of the legal discussion in the Working Group remained important, most of the discussion within the Working Group (and later when evaluating techniques with the Department's civilian and military leadership) concerned the policy considerations, the range of techniques, the safeguards, and the approval levels. Indeed, the so-called "stop light" chart at the end of the Report—a chart that listed 35 techniques evaluated against all these measures—was the principal subject of discussion in the Department in the weeks preceding the Secretary's April 16, 2003 approval. And it was the techniques that the Secretary received a recommendation on—not the report itself.

After reading in the news about the testimony to which you referred in your question, I wrote Chairman Specter a letter, which I sent to you as well. Please see attached.

11) **The twenty retired senior military officers wrote that the authorization of cruel interrogation techniques has had and will have a devastating effect on national security and on the military. They wrote, "Today, it is clear that these policies, which rejected long-standing military law grounded in decades of operational expertise, have fostered animosity toward the United States, undermined rather than enhanced our intelligence gathering efforts, and added significantly to the risks facing our troops serving around the world." Do you agree with their assessment? If not, what is your basis for reaching a different conclusion?**

Response:

I only know three of the individuals who authored the letter to which the question refers. None of these individuals was even working in the Pentagon at the time of the events referred to in the question occurred. These retired officers appear to be basing their opinion, at least in part, upon media reports suggesting that the Department of Justice's Office of Legal Counsel's legal opinion represented the Administration's policy. That was never the case. The Office of Legal Counsel opinion was a legal opinion. It did not set Administration policy. In fact, the interrogation policy approved by the Secretary of Defense, after recommendations from senior Department of Defense officials, including myself, was much narrower than what would have been allowed under the Office of Legal Counsel opinion. In fact, 17 of the 24 techniques approved by the Secretary were already allowed by the Army Field Manual.

12) **According to these 20 retired military officers, the uniformed JAGs also predicted that our own troops would be put in legal jeopardy by the policies**

you recommended to Secretary Rumsfeld and the President. The retired military leaders wrote, "For example, in a memorandum to the Secretary of Defense dated November 27, 2002, Mr. Haynes recommended authorizing the use of dogs to exploit phobias of detainees. This practice, which clearly violated the Army Field Manual on Intelligence Interrogations, was subsequently authorized for use against detainees at Guantanamo. And now two servicemembers have been convicted of crimes under the Uniform Code of Military Justice for using dogs to frighten detainees at Abu Ghraib." Why do you think you deserve a promotion for recommending the very practices that put our servicemen and women in prison?

Response:

It is my understanding that during that brief period during which this technique was authorized, the animals were to be merely present, walking security, with muzzles. The authorization was rescinded several weeks later and not reauthorized. The Working Group did not even consider this technique. The unauthorized use of dogs a year later in Iraq for the purpose of abusing detainees was shocking and caused me to support strongly an absolute prohibition on the use of dogs for any purpose related to interrogations, as stated in paragraph 3.4.4.4. of Department of Defense Directive 3115.09.

It is important to keep in mind that in 2003, at the outset of the conflict with Iraq, the direction to U.S. Armed Forces was unequivocal that the Geneva Conventions applied to that conflict. General Abizaid and Lieutenant General Sanchez testified as to the clarity of this direction during their testimony before the Senate Committee on the Armed Services.

All members of the U.S. Armed Forces are required to be trained on the Geneva Conventions and on their obligations to comply with their provisions and the law of armed conflict generally. As a matter of course the Department's military personnel are educated and trained regarding those obligations. The Department has a formal law of war program through which it monitors this training. The Department actively seeks to prevent law of war violations in any conflict through regular and repeated training, and educating its personnel on obligations applicable to the Unites States. Moreover, those forces serving in the field are advised by judge advocates, who in today's combat environments are found at many levels of command, with advice on compliance with those obligations.

Numerous investigations have confirmed that the abuses at Abu Ghraib prison in November 2003 were not authorized, violated the Uniform Code of Military Justice, were not part of any interrogation, and were directed at individuals who were not even believed to possess actionable information. The Geneva Conventions of 1949 applied to that conflict with Iraq and the obligations of U.S. Armed Forces with respect to the treatment of enemy prisoners of war, retained personnel, and civilian internees. The Secretary's authorization of counter-resistance techniques for use by the Commander of U.S. Southern Command with only unlawful combatants detained in Guantanamo did *not*

authorize actions in the area of responsibility of a different combatant commander in a different theater of operations for individuals with different status.

Vice Admiral Church, in his review of Department of Defense detention operations and interrogation techniques, did not find anything that sanctioned the practices that were shown in the Abu Ghraib photos. Vice Admiral Church, in his conclusions, stated:

> "We found, without exception, that the DoD officials and senior military commanders responsible for the formulation of interrogation policy evidenced the intent to treat detainees humanely, which is fundamentally inconsistent with the notion that such officials or commanders ever accepted that detainee abuse would be permissible. Even in the absence of a precise definition of 'humane' treatment, it is clear that none of the pictured abuses at Abu Ghraib bear any resemblance to approved policies at any level, in any theater. We note, therefore, that our conclusion is consistent with the findings of the Independent Panel, which in its August 2004 report determined that '[n]o approved procedures called for or allowed the kinds of abuse that in fact occurred. There is no evidence of a policy of abuse promulgated by senior officials or military authorities.'"

The investigation by Generals Fay and Jones likewise found that the Commander of CJTF-7 made clear that detainees were to be treated in accordance with the Geneva Conventions.

The duties and responsibilities of general counsel of the Department of Defense involve providing legal advice on the many questions and policies that arise in the operations of one of the largest organizations in the world. The Department of Defense has a budget larger than that of any corporation and of most countries. The lawyers in my office provide advice on issues that involve the day-to-day operations of that organization, including personnel, health, environment, property, contracting, and a great many other matters in addition to questions involving the law of war. I am proud of the work that the lawyers in my office have provided to our client during one of the most stressful periods in recent American history, a time when the building in which we work was attacked by terrorists and the country has been at war.

I also am also proud of the way that the Department of Defense has defended the country. There have been some cases where individuals have violated the rules. I am proud of the way that the Department of Defense swiftly investigated those incidents and all matters related to them and took corrective action, which continues. Policies have been changed to reduce the chances of abuses happening in the future. But throughout, the vast majority of U.S. Armed Forces personnel have conducted themselves honorably and have complied with all applicable laws and regulations. They have abided by the direction and the imperative to treat detainees humanely and have conducted U.S. military operations in accordance with the law of war.

Finally, please understand that I consider serving the United States to be a privilege, not an entitlement. If confirmed, I would serve proudly, honestly, and humbly.

13) **You testified that it was a mistake to have solicited the Yoo memo because it was too hypothetical. Yet, you did not dispute its conclusions. You testified that the Yoo memo was "substantially identical" to the Bybee memo, which sought to redefine torture and asserted that the President enjoys "complete authority over the conduct of war." It even asserted that application of the criminal law passed by Congress prohibiting torture "in a manner that interferes with the President's direction of such core war matters as the detention and interrogation of enemy combatants would be unconstitutional." It seemed to say that the President could immunize people from prosecution for violations of United States criminal laws that prohibit torture. Do you still agree with the memo's conclusion that the President can override the law and immunize people for torture?**

Response:

No. I have always believed that everyone, including the President, is subject to the law. Moreover, Congress has authority to regulate the interrogation of unlawful combatants. I note that Congress in the Detainee Treatment Act has imposed standards for interrogations, and that the Department of Defense immediately issued an order implementing the Detainee Treatment Act.

14) **You testified that the Yoo memo was too hypothetical and that neither it nor the Bybee memo addressed the legality of specific interrogation techniques. Was it your role to determine the legality of specific interrogation techniques? If so, please describe what standard and process you applied. If not, who made those determinations?**

Response:

As an initial matter once the Working Group was created, it was the responsibility of the Working Group to evaluate specific interrogation techniques for unlawful combatants. For example, it was their responsibility to assess the legality of the various techniques under the Uniform Code of Military Justice. They were also to, as set forth in the Secretary's January 15, 2003, memorandum to me, consider "[p]olicy considerations with respect to the choice of interrogation techniques, including: . . . effect on treatment of captured US military personnel, . . . historical role of US armed forces in conducting interrogations." It is important to understand that the purpose that the Working Group Report served was that of a constructive vehicle—a crucible—for collecting and evaluating myriad perspectives and measuring proposed techniques against those perspectives for a unique setting.

Based upon their assessment and the concerns raised to me by the JAGs and others, I and other senior advisers recommended that the Secretary not adopt the most aggressive interrogation techniques evaluated by the Working Group and approve only 24 of the 35 techniques, which included 17 techniques already allowed by the Army Field Manual on Intelligence Interrogations.

15) **When you were previously before the Judiciary Committee, you would not promise either to me personally or to the Committee that you would recuse yourself from cases involving the administration's detainee policies. Since that time, we've learned more about the key role you played in developing policies on detainee issues including the designation of and legal process due "enemy combatants," the rules governing military tribunals, and the acceptable means of interrogation of detainees. Also since that time, important cases on several of these issues have moved through the federal courts and the Fourth Circuit in particular.**

a) **Would you reconsider your earlier position and agree that, if confirmed, you will recuse yourself from all cases involving the Administration's detainee policies, and any other policies on which you worked?**

Response:

If confirmed, it would be necessary to analyze the specific facts of the case before me, but I would very likely recuse myself from all cases involving Administration policies on which I worked.

In analyzing the matter, I would determine whether to recuse myself based on applicable law and the Code of Conduct for United States Judges. As stated in my earlier answer, if confirmed, I would adhere strictly to all applicable statutes, court decisions, policies, and ethical rules, including 28 U.S.C. § 455, and the Code of Conduct for United States Judges. That Code of Conduct demands, among other things, that a judge should uphold the integrity of the Judiciary, that a judge should avoid the appearance of impropriety, and that a judge should perform the duties of the office impartially. As the Commentary to Canon 1 observes, deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. For the same reason, judges must avoid the appearance of impropriety, the objective test of which is "whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired."

In assessing the propriety of disqualification, a judge applying the Code should employ an analysis similar to that required by 28 U.S.C. § 455. For example, if confirmed, I would be obligated to (and of course would) disqualify myself from any proceeding in which I had "personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." Similarly, I would

be obligated to (and of course would) disqualify myself from any proceeding in which I had "served as lawyer in the matter in controversy, or a lawyer with whom [I] served during such association as a lawyer concerning the matter," or "participated as counsel, adviser, or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy." Applying this guidance requires close attention to the particular facts of each case. I would take care to disqualify myself in any proceeding in which my impartiality might reasonably be questioned. I believe fervently not only that the judiciary must make decisions with integrity, but also that the public must be able to have confidence in the integrity of the judiciary and its decisions.

b) **Chief Justice Roberts recused himself from the case of *Hamdan v. Rumsfeld* because he had heard the case in a lower court. In your view, did he make the right decision? How is the recusal decision he faced distinguishable from the one you would face if a case concerning a policy you helped to develop were to come before you as a judge?**

Response:

As a nominee to the U.S. Court of Appeals, it would not be appropriate for me to comment on the recusal decisions of the Chief Justice of the United States.

If confirmed and faced with such a decision myself, in analyzing the matter, I would determine whether to recuse myself based on applicable law and the Code of Conduct for United States Judges. As stated in my earlier answer, if confirmed, I would adhere strictly to all applicable statutes, court decisions, policies, and ethical rules, including 28 U.S.C. § 455, and the Code of Conduct for United States Judges. That Code of Conduct demands, among other things, that a judge should uphold the integrity of the Judiciary, that a judge should avoid the appearance of impropriety, and that a judge should perform the duties of the office impartially. As the Commentary to Canon 1 observes, deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. For the same reason, judges must avoid the appearance of impropriety, the objective test of which is "whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired."

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during such association as a lawyer concerning the matter," or "participated as counsel, adviser, or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy." Applying this guidance requires close attention to the particular facts of each case. I would take care to disqualify myself in any proceeding in which my impartiality might reasonably be questioned. I believe fervently not only that the judiciary must make decisions with integrity, but also that the public must be able to have confidence in the integrity of the judiciary and its decisions.

16) **You sent me a letter on June 25, 2003, in which you wrote that the United States "does not permit, tolerate or condone" torture "under any circumstances." You also wrote that the United States would not engage in "cruel, inhuman, or degrading treatment," at least to the extent that such treatment is prohibited by the United States Constitution. We now know, though, that in March 2003, the Department of Defense adopted a report by a working group that you supervised, providing a legal justification for potentially cruel interrogation techniques. Press reports also indicate that you approved the use of specific interrogation methods that many would call "cruel, inhuman, or degrading," and that other military attorneys strongly advised against using.**

   a) **When you wrote your letter to me in June 2003, were you presenting a public version of the Defense Department's detainee interrogation policy which you knew to be different than the secret policy the Department was in fact pursuing at the time? How can you reconcile your letter to me with the working group report and other secret documents on interrogation from that time?**

Response:

The answer to your first question is no. The now-defunct Working Group Report was a pre-decisional document that did not constitute final Department of Defense policy. In fact, it evaluated 11 interrogation techniques that were, upon my recommendation, not adopted by the Secretary of Defense. Significantly, however, the policy approved by the Department of Defense was much narrower than what the Department of Justice Office of Legal Counsel legal opinion might have permitted as well as much narrower than what the Working Group Report's legal discussion of what constituted the outermost permissible limits. When I wrote the June 2003 letter to you, the Secretary's April 16, 2003 memorandum authorizing certain techniques for use with unlawful combatants at Guantanamo Bay, Cuba, reflected Department policy. The Secretary approved 24 interrogation techniques for use only at Guantanamo Bay, Cuba (17 of which were already allowed by Army Field Manual on Intelligence Interrogations) that I believe did not constitute cruel, inhuman or degrading treatment. Instead, those easily comported with the policy articulated in the letter.

Moreover, with respect to the interrogation techniques approved by the Secretary on December 2, 2002 (and rescinded shortly thereafter), I did not believe that those techniques constituted such treatment. The use of those techniques had to be consistent with Department of Defense regulations and directives, U.S. law, and the President's direction to the U.S. Armed Forces that they treat detainees humanely. Nothing in the Secretary's memorandum provided otherwise. Additionally, it is important to note that authorization to employ those techniques was rescinded more than five months before my letter to you.

b) **An article in *The New Yorker* indicated that late last year, you opposed a proposal that would have made it official Department of Defense policy that detainees be treated in accordance with Common Article Three of the Geneva conventions, barring cruel, inhumane, and degrading treatment. Are these accounts accurate? If so, how do you reconcile your opposition to the proposed policy with the renunciation of "cruel, inhuman, or degrading treatment" in you June 25, 2003 letter to me?**

Response:

There have been many news reports about me that are inaccurate. Please note at the outset that the pertinent portion of Common Article 3 prohibits "outrages upon personal dignity, particularly humiliating and degrading treatment," which appears to be a different standard than "cruel, inhumane, and degrading treatment" prohibited by the Convention Against Torture. Indeed, the former has never been defined in U.S. law. The latter phrase was given context by a Senate reservation to its consent to ratification of the Convention Against Torture, and more recently by the Detainee Treatment Act. My view at the time was that, while adhering to the standards of Common Article 3 was a legal obligation in many circumstances, it was not a legal obligation in the context of the U.S. conflict with al Qaeda. The President determined in his memorandum of February 7, 2002, that "common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to 'armed conflict not of an international character.'" Moreover, the U.S. Court of Appeals for the District of Columbia Circuit in *Hamdan v. Rumsfeld* had agreed with the President's determination.

The Supreme Court has now spoken in *Hamdan v. Rumsfeld* and concluded that the current conflict in which we are engaged with al Qaeda is one covered by Common Article 3. The Supreme Court has thus resolved the question of its applicability to the conflict with al Qaeda. As General Counsel of the Department of Defense, I am bound, just as I would be should I be confirmed to serve on the U.S. Court of Appeals, to follow the law as interpreted by the Supreme Court. As you may know, the Deputy Secretary of Defense, after consultation with me and others within the Defense Department, issued guidance on July 7, 2006, requiring that all Department of Defense personnel adhere to these standards in light of the Supreme Court's *Hamdan* decision.

The President directed on February 7, 2002, that the Armed Forces were to treat detainees humanely. To that end, U.S. Armed Forces provide detainees held at Guantananmo with: three culturally appropriate meals a day; adequate shelter and clothing; the opportunity to worship, including a copy of the Koran and prayer beads; the means to send and receive mail; reading materials; and exceptional medical care. The individuals held at Guantanamo are treated in a manner that exceeds the requirements of Common Article 3. I have always agreed that the standard for treatment of all detainees should be humane treatment. My position on this issue is consistent with my 2003 letter to you.

17) **The twenty retired senior military officers wrote in their letter of the interrogation policies on which you worked, "We have an enormous task ahead now repairing the damage those policies have done to military morale and discipline," and they lamented our departure from the "moral principles on which this country was founded." Perhaps in light of the moral ambiguity created and the morale problems asserted, it should not come as a surprise that the Southern Poverty Law Center recently released a study indicating a rise in the number of white supremacists joining the armed forces. The study further found that pressure on recruiters is so great due to the unpopularity of the war in Iraq that recruiters are knowingly letting these people in. Perhaps even more disturbingly, a Defense Department investigator asserted that even when he provided evidence of the presence of extremists, commanders would not remove them.**

a) **Do you agree that detainee abuse issues, and policies tolerating cruel treatment have contributed to morale problems within the military, and to an atmosphere of moral ambiguity?**

Response:

I respectfully disagree with the statement concerning Department of Defense policies. In his February 7, 2002 determination, the President directed the U.S. Armed Forces to treat humanely those detained in the conflict with al Qaeda and the Taliban. To that end, the Armed Forces have provided those detained at Guantanamo with: three culturally appropriate meals; adequate shelter and clothing; the opportunity to worship, including a copy of the Koran and prayer beads; the means to send and receive mail; reading materials; and exceptional medical care.

With respect to the conflict with Iraq, in 2003, at the conflict's outset, the direction to U.S. Armed Forces was unequivocal that the Geneva Conventions applied to that conflict. General Abizaid and Lieutenant General Sanchez testified as to the clarity of this direction during their testimony before the Senate Committee on the Armed Services.

All members of the U.S. Armed Forces are required to be trained on the Geneva

Conventions and on their obligations to comply with their provisions and the law of armed conflict generally. As a matter of course the Department's military personnel are educated and trained regarding those obligations. The Department has a formal law of war program through which it monitors this training. The Department actively seeks to prevent law of war violations in any conflict through regular and repeated training, and educating its personnel on obligations applicable to the Unites States. Moreover, those forces serving in the field are advised by judge advocates, who in today's combat environments are found at many levels of command, with advice on compliance with those obligations.

Vice Admiral Church, in his review of Department of Defense detention operations and interrogation techniques, did not find anything that sanctioned the practices that were shown in the Abu Ghraib photos. Vice Admiral Church, in his conclusions, stated:

> "We found, without exception, that the DoD officials and senior military commanders responsible for the formulation of interrogation policy evidenced the intent to treat detainees humanely, which is fundamentally inconsistent with the notion that such officials or commanders ever accepted that detainee abuse would be permissible. Even in the absence of a precise definition of 'humane' treatment, it is clear that none of the pictured abuses at Abu Ghraib bear any resemblance to approved policies at any level, in any theater. We note, therefore, that our conclusion is consistent with the findings of the Independent Panel, which in its August 2004 report determined that '[n]o approved procedures called for or allowed the kinds of abuse that in fact occurred. There is no evidence of a policy of abuse promulgated by senior officials or military authorities.'"

The investigation by Generals Fay and Jones likewise found that the Commander of CJTF-7 made clear that detainees were to be treated in accordance with the Geneva Conventions.

The abuses that have occurred are regrettable. I have supported and continue to support appropriate administrative and disciplinary action for those found to have engaged in such abuses.

Morale of uniformed service members is always important, and especially during wartime. I have tried to advocate the moral high ground as we sought to address the very difficult question of what the rules are in this new paradigm of war. That is why I repeatedly have advocated not adopting aggressive interrogation techniques. As General Counsel, however, I do not have sufficient exposure to assess the morale of the force. Other elements of the Department of Defense, such as the Military Departments, Combatant Commands, and the Office of the Under Secretary of Defense for Personnel and Readiness, are in a better position to make this evaluation.

b) **Do you believe that detainee abuse issues have contributed to a rise in extremists within the military, and made it more difficult for the military to remove them?**

Response:

As General Counsel, I do not have responsibility for military recruitment and retention. Those issues are handled by the Military Departments, and other offices within the Department of Defense, such as the Office of the Under Secretary of Defense for Personnel and Readiness. I understand that Office is actively engaged in assessing whether the recent reports of extremists in the military are accurate.

c) **What is the Department of Defense doing to prevent extremists from entering the military in the first place, and why are they not being removed when they are discovered?**

Response:

As General Counsel, I do not have responsibility for military recruitment and retention. Those issues are handled by other offices within the Department of Defense, such as the Military Departments, and the Office of the Under Secretary of Defense for Personnel and Readiness. I understand that Office is actively engaged in assessing whether the recent reports of extremists in the military are accurate.

18) **This month, the *Washington Post* reported that, for the last six months, sensitive personal records for every Navy and Marine Corps aviator and air crew member who has logged flight hours during the past 20 years have been posted on the Navy's Safety Center website – a website that is available to the general public. According to press reports, the sensitive personal information posted on this website included the full names of Navy personnel and more than 100,000 social security numbers. Earlier this month, we also learned that in a separate incident, the personal information of at least 28,000 U.S. sailors and their family members was posted on another public website. Of course, both of these unfortunate disclosures come on the heels of the theft of the personal data of 26.5 million of our veterans and active duty personal at the Veterans Administration. These breaches involving military personnel raise serious concerns about identity theft and about the possible compromise of our national security.**

a) **First, given the troubling pattern of data security breaches at the Department of Defense, what assurances can you give to the American people that the sensitive personal data of our service members will not be compromised and that the privacy of service members and their families will be protected by their Government?**

Response:

As General Counsel, I do not have responsibility for the security of information systems. Those issues are handled by the Military Departments and other offices within the Department of Defense, such as the Offices of the Under Secretary of Defense for Intelligence, the Under Secretary of Defense for Personnel and Readiness, the Assistant Secretary of Defense for Network and Information Integration, and the Director of Administration and Management. I agree that protecting the sensitive personal data of service members and their families is extremely important.

b) **According to press reports, the sensitive data posted on the Internet included information about activity duty Navy personnel. Has the Department of Defense assessed the impact of these breaches on our national security and if so, what are the results of that assessment?**

Response:

As General Counsel, I do not have responsibility for the security of information systems discussed in your question. Those issues are handled by the Department of the Navy and other offices within the Department of Defense, such as the Offices of the Under Secretary of Defense for Intelligence, the Under Secretary of Defense for Personnel and Readiness, the Assistant Secretary of Defense for Network and Information Integration, and the Director of Administration and Management. I agree that protecting the sensitive personal data of service members and their families is extremely important.

c) **What is the Department of Defense doing to prevent these data breaches from occurring again in the future and to protect Department of Defense personnel and their families from identity theft?**

Response:

As General Counsel, I do not have responsibility for the security of information systems and military personnel policy. Those issues are handled by the Military Departments and other organizations within the Department of Defense, such as the Offices of the Under Secretary of Defense for Intelligence, the Under Secretary of Defense for Personnel and Readiness, the Assistant Secretary of Defense for Network and Information Integration, and the Director of Administration and Management. I agree that protecting the sensitive personal data of service members and their families is extremely important.

19) **In 2003, then-EPA Administrator Whitman testified that she had been working "been working very closely with the Department of Defense, and [she didn't] believe that there [was] a training mission anywhere in the county that [was] being held up or not taking place because of environmental protection regulation." Additionally, Ben Cohen, deputy General Counsel for Environment and Installations, Department of Defense testified before**

the House Subcommittees on Energy and Air Quality and on Environment and Hazardous Materials on April 21, 2004 and he agreed that "there have not been any instances in which RCRA or CERCLA have impacted readiness, and specifically no State has ever (sic) used its RCRA or Superfund authority in a matter which has affected readiness."

Yet, under your tenure as General Counsel, the Department of Defense has continued, for five consecutive years, to request sweeping exemptions from critical environmental laws including the Clean Air Act, Resource Conservation and Recovery Act, the Comprehensive Environmental Response Compensation and Liability Act, the Endangered Species Act and the Marine Mammal Protection Act on the ground that these exemptions are necessary to sustain "military readiness" and to protect our young men and women serving in the military.

As General Counsel you are responsible for formulating the Department's legislative program. Each year you requested expanded exemptions from compliance with environmental laws that protect service men and women and their families from hazardous waste and contaminated drinking water that can cause terrible health problems, birth defects, and fatal illnesses.

What was the nature and extent of your involvement in formulating the requests for exemption? Did you and do you support the requests that were made for exemptions?

Response:

Although these legislative proposals were developed by others within the Administration, I was aware of the nature of the legislative proposals, which the Administration referred to as the "Readiness and Range Preservation Initiative." As a member of the Executive Branch, I supported the Administration's legislative proposals. A clean and safe environment is important to me as a citizen, and as a public official. Of course, I also support the rigorous application of the environmental laws.

Written Responses of William J. Haynes II
Nominee to the U.S. Court of Appeals for the Fourth Circuit
to Hearing Questions on July 11, 2006

Question 1. Chairman Specter: You are welcome to file a detailed response to the July 7, 2006 letter from twenty retired JAG officers. You should indicate the relationship and contacts you have had, if any, with all the individuals who signed the letter.

Response:

I know only three of the twenty signatories to the letter. Major General (ret.) Batiste served as the military assistant to Dr. Wolfowitz during his tenure as Deputy Secretary of the Department of Defense. It is only in that capacity that I have had any contact with Major General (ret.) Batiste. I understand Major General Batiste was not at the Pentagon at the time that interrogation policy was being developed, but serving in Germany and then Iraq. Rear Admiral (ret.) Guter served as the Judge Advocate General of the Navy, but retired in 2002. I have had only intermittent contact with him since his retirement. During his time as the Judge Advocate General, I would have had contact with him because I was in regular contact with the Judge Advocates General. I know Major General (ret.) Fugh from my time with the Army many years ago. I have not worked with him since January 1993.

Assertions Made in the Letter:

> A. **"Mr. Haynes was arguably in the strongest position of any other senior government official to sound the alarm about the likely consequences for military personnel of the views being put forward by the Justice Department, because he had the benefit of the clear and unanimous concerns voiced by the uniformed Judge Advocates General of each of the military services. Yet Mr. Haynes seems to have muted these concerns, rather than amplify them."**

The concerns of the Judge Advocates General were expressed both orally and in writing as they actively participated in the Working Group. In fact, the Working Group Report includes their concerns. For example, the Working Group Report states:

- "Participation by U.S. military personnel in interrogations which use techniques that are more aggressive than those appropriate for POWs would constitute a significant departure from traditional U.S. military norms and could have an adverse impact on the cultural self-image of U.S. military forces. Those techniques considered in this review that raise this concern are relatively few in number . . ." [p. 69 & n.76]

- "General use of exceptional techniques (generally having substantially greater risk than those currently, routinely used by U.S. Armed Forces interrogators), even though lawful, may create uncertainty among interrogators regarding the appropriate limits of

interrogations. They should therefore be employed with careful procedures and only when fully justified." [p. 69]

- "Some nations may assert that the U.S. use of techniques more aggressive than those appropriate for POWs justifies similar treatment for captured U.S. personnel." [p. 69]

- "Other nations, including major partner nations, may consider use of techniques more aggressive than those appropriate for POWs violative of international law or their own domestic law, potentially making U.S. personnel involved in the use of such techniques subject to prosecution for perceived human rights violations in other nations or to be surrendered to international fora, such as the ICC; this has the potential to impact future operations and overseas travel of such personnel." [pp. 68-69]

Those considerations were important to me and were part of the reason that I recommended that the Secretary approve only 24 of the 35 techniques that the Working Group Report evaluated. Of those 24 techniques that I recommended, 17 of them were already allowed by the Army Field Manual.

B. "For example, in a memorandum to the Secretary of Defense dated November 27, 2002, Mr. Haynes recommended authorizing the use of dogs to exploit phobias of detainees. This practice, which clearly violated the Army Field Manual on Intelligence Interrogations, was subsequently authorized for use against detainees at Guantanamo. And now two servicemembers have been convicted of crimes under the Uniform Code of Military Justice for using dogs to frighten detainees at Abu Ghraib. This was precisely what the uniformed JAGs predicted would happen once such departures from the rules of humane treatment of prisoners were authorized. We owed our troops better guidance. Indeed, in his review of Defense Department detention operations concluded in 2004, former Secretary of Defense James R. Schlesinger's panel concluded that these changes in [illegible] led to confusion and confusion in the field, contributing to the abuses of detainees at Abu Ghraib and elsewhere, and undermining the mission and morale of our troops."

In 2003, at the outset of the conflict with Iraq, the direction to U.S. Armed Forces was unequivocal that the Geneva Conventions applied to that conflict. General Abizaid and Lieutenant General Sanchez testified as to the clarity of this direction during their testimony before the Senate Committee on Armed Services.

All members of the U.S. Armed Forces are required to be trained on the Geneva Conventions and on their obligations to comply with their provisions and the law of armed conflict generally. As a matter of course the Department's military personnel are educated and trained regarding those obligations. The Department has a formal law of war program through which it monitors this training. The Department actively seeks to prevent law of war violations in any conflict through regular and repeated training, and educating its personnel on obligations

applicable to the United States. Moreover, those forces serving in the field are advised by judge advocates, who in today's combat environments are found at many levels of command, with advice on compliance with those obligations.

Admiral Church, in his review of Department of Defense detention operations and interrogation techniques, did not find anything that sanctioned the practices that were shown in the Abu Ghraib photos. Admiral Church, in his conclusions, stated:

> "We found, without exception, that the DoD officials and senior military commanders responsible for the formulation of interrogation policy evidenced the intent to treat detainees humanely, which is fundamentally inconsistent with the notion that such officials or commanders ever accepted that detainee abuse would be permissible. Even in the absence of a precise definition of 'humane' treatment, it is clear that none of the pictured abuses at Abu Ghraib bear any resemblance to approved policies at any level, in any theater. We note, therefore, that our conclusion is consistent with the findings of the Independent Panel, which in its August 2004 report determined that '[n]o approved procedures called for or allowed the kinds of abuse that in fact occurred. There is no evidence of a policy of abuse promulgated by senior officials or military authorities.'"

The investigation by Generals Fay and Jones likewise found that the Commander of CJTF-7 made clear that detainees were to be treated in accordance with the Geneva Conventions.

C. "The Army Judge Advocate General, Maj. Gen. Thomas Romig, warned that this disdainful approach toward the Geneva Conventions and binding international law "will open us to international criticism that the 'U.S. is a law unto itself,'" and that the adoption of questionable techniques will lower international standards, "putting our service personnel at far greater risk and vitiating many of the POW/detainee safeguards the U.S. has worked hard to establish over the past five decades." These prescient warnings were echoed by the [illegible] Judge Advocates General of the Navy, Air Force and Marine Corps, but Mr. Haynes failed to heed them."

The statement of Major General Romig referenced in the paragraph above is found in a memorandum he wrote in February 2003 regarding the draft of the Working Group Report as it stood at that time. His concerns as well as the concerns of the other Judge Advocates General were reflected in the Working Group Report. For example, the Working Group Report states:

- "Should information regarding the use of more aggressive interrogation techniques than have been used traditionally by U.S. forces become public, it is likely to be exaggerated or distorted in the U.S. and international media accounts, and may produce an adverse effect on support for the war on terrorism." [p. 69]

- "Some nations may assert that the U.S. use of techniques more aggressive than those appropriate for POWs justifies similar treatment for captured U.S. personnel." [p. 69]

- "Participation by U.S. military personnel in interrogations which use techniques that are more aggressive than those appropriate for POWs would constitute a significant departure from traditional U.S. military norms and could have an adverse impact on the cultural self-image of U.S. military forces. Those techniques are considered in this review that raise this concern are relatively few in number . . ." [p. 69 & n.76]

- "General use of exceptional techniques (generally having substantially greater risk than those currently, routinely used by U.S. Armed Forces interrogators), even though lawful, may create uncertainty among interrogators regarding the appropriate limits of interrogations. They should therefore be employed with careful procedures and only when fully justified." [p. 69]

- "Other nations, including major partner nations, may consider use of techniques more aggressive than those appropriate for POWs violative of international law or their own domestic law, potentially making U.S. personnel involved in the use of such techniques subject to prosecution for perceived human rights violations in other nations or to be surrendered to international fora, such as the ICC; this has the potential to impact future operations and overseas travel of such personnel." [pp. 68-69]

Those considerations were important to me and were part of the reason that I recommended that the Secretary approve only 24 of the 35 techniques that the Working Group evaluated for use only at Guantanamo. Of those 24 techniques that I recommended, 17 of them were already allowed by the Army Field Manual.

Questions submitted in the letter:

1. Before you recommended that the Secretary of Defense authorize the use of dogs to exploit phobias of detainees at GTMO, did you consider the possibility that use of this technique might constitute a criminal act under the Uniform Code of Military Justice?

It is my understanding that during that brief period during which this technique was authorized, the animals were to be merely present, walking security, with muzzles. The authorization was rescinded several weeks later and not reauthorized. The unauthorized use of dogs a year later in Iraq for the purpose of abusing detainees was shocking and caused me to support strongly an absolute prohibition.

As for my own view whether the presence of muzzled animals at Guantanamo was a lawful interrogation technique for unlawful combatants such as the 20th hijacker, including whether it was lawful under the Uniform Code of Military Justice, I believed that it was, as it would have been pursuant to a lawful order and was to be implemented in a manner consistent with the President's direction that detainees be treated humanely and not otherwise in violation of then-applicable law.

Are you aware that two servicemembers were recently convicted under the UCMJ for using dogs to frighten detainees at Abu Ghraib? What responsibility should senior leaders in the Defense Department assume for authorizing an act for which young soldiers are now being prosecuted?

The Geneva Conventions of 1949 apply to the conflict with Iraq and the obligations of U.S. Armed Forces with respect to the treatment of enemy prisoners of war, retained personnel, and civilian internees. The Secretary's authorization of counter-resistance techniques for use by the Commander of U.S. Southern Command only with unlawful combatants detained in Guantanamo did *not* authorize actions in the area of responsibility of a different combatant commander in a different theater of operations for individuals with different status.

The acts for which service members are being prosecuted were not authorized. Nor were those acts like what was authorized for use at Guantanamo. Service members are being prosecuted for violating the law and/or failing to comply with lawful orders. There have been multiple substantive reports resulting from investigations into alleged detainee abuse in Department of Defense facilities in Afghanistan, Iraq, and at Guantanamo Bay, Cuba. None of those investigations found that there was a governmental policy directing, encouraging, or condoning abuse.

2. Now that U.S. law contains a clear prohibition on the use of cruel, inhuman or degrading treatment of detainees anywhere in the world, could you reach the same conclusions, and make the same recommendations, that you did in your November 27, 2002 memorandum to Secretary Rumsfeld, in which you opined that waterboarding and threatening a detainee's family with death "may be legally available"? Did you at the time believe that these techniques were lawful, including under the UCMJ? Do you believe so now?

To be clear, I did not reach a determination that the techniques specifically referenced in the question were legally available.

I stated in my memo that:

"[w]hile all Category III techniques may be legally available, we believe that, as a matter of policy, a blanket approval of Category III techniques is not warranted at this time. Our Armed Forces are trained to a standard of interrogation that reflects a tradition of restraint."

The language quoted above reflected the fact that the Commander of JTF-170 concluded that all of the techniques that he requested "do not violate U.S. or international laws."

I did not reach a determination that the techniques identified in question were legally available because I did not need to reach a determination on the legal question. Based on my own views and those of the Deputy Secretary of Defense, the Under Secretary of Defense for Policy, and the Chairman of the Joint Chiefs of Staff, I recommended as a matter of policy

against the approval of all Category III techniques, except "the use of mild non-injurious contact."

Pursuant to the Detainee Treatment Act of 2005, no person in the custody or under the effective control of the Department of Defense, or detained in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation. Accordingly, only techniques listed in the field manual are legal for use with any person in the custody or under the effective control of the Department of Defense, or detained in a Department of Defense facility.

Do you believe such techniques could ever lawfully be used by a foreign country on captured American personnel?

U.S. Armed Forces conduct their operations in accordance with the law of war. Captured U.S. forces would be entitled to, and should be provided, prisoner of war protections, including protection against application of such techniques.

It should be noted in addressing this question in the context of a U.S. service member captured by the Taliban or al Qaeda that their forces have repeatedly demonstrated their absolute disregard for the law of war and any obligation to provide humane care and treatment to persons they capture.

3. In a June 25, 2003 letter to Senator Leahy, you stated that the military's policy did not permit the use of "cruel, inhuman and degrading treatment," which is prohibited by the Convention Against Torture. But in your November 27, 2002 memorandum to Secretary Rumsfeld, you recommended that he authorize a set of techniques including "stress positions," forced nudity, and the use of dogs "to induce stress." Do you believe that these techniques constitute cruel, inhuman and degrading treatment? Did you believe so when you assured Senator Leahy that military policy prohibits such treatment?

No. I did not believe that those techniques constituted such treatment. As the question notes, my June 25, 2003, letter to Senator Leahy stated that "United States policy is to treat all detainees and conduct all interrogations, wherever they may occur, in a manner consistent with" the U.S. commitment to "undertake . . . to prevent other acts of cruel, inhuman, or degrading treatment or punishment." The use of the techniques identified in the question had to be consistent with DoD regulations and directives, U.S. law, and the President's direction to the U.S. Armed Forces that they treat detainees humanely. Nothing in the Secretary's memorandum provided otherwise.

It is important to note that authorization to employ the techniques identified in the question was rescinded more than five months earlier than my letter to Senator Leahy. At the time of that letter, the Secretary had authorized a more modest array of techniques at

Guantanamo, 17 of which were already allowed by the Army Field Manual, for use with unlawful combatants that easily comported with the policy articulated in the letter to Senator Leahy.

4. The Working Group Report on Detainee Interrogations in the Global War on Terrorism, which you delivered to Secretary Rumsfeld on April 4, 2003, asserted that the statutory prohibition against torture does not apply to the President's detention and interrogation of enemy combatants. Did you agree with this contention at the time you delivered the Report to Secretary Rumsfeld? Do you now believe that the President can lawfully authorize U.S. personnel to engage in torture?

The Working Group Report was not disseminated. It was not a statement of policy or authorization. It has been withdrawn. The discussion to which the question refers was unnecessary at the time, and I did not rely upon that discussion in my recommendation to the Secretary that he reject 11 of the 35 interrogation techniques evaluated by the Working Group. I recommended that the Secretary adopt only 24 techniques for use only at Guantanamo. Of those 24 techniques, 17 were already allowed by the Army Field Manual. I continue to view the discussion concerning the President's authority as Commander in Chief as having been unnecessary.

Fortunately, I have not had to confront the question of whether the President can lawfully authorize such activity. In addition to his specific directive that the U.S. Armed Forces treat all detainees humanely, the President has repeatedly stated that torture is unacceptable. For example in his statement on June 26, 2003, on the United Nations International Day in Support of Victims of Torture, the President said, "The United States is committed to the world-wide elimination of torture and we are leading this fight by example." The question presented here is a general, hypothetical legal question devoid of context and specific facts against which to apply the law. For the same reason that, at my hearing, I expressed regret for the asking for the Department of Justice Office of Legal Counsel Opinion, I believe it would be unwise to express my own views on such a question devoid of any facts. I note that the law of war, relevant international law, U.S. law, and applicable directives including the Detainee Treatment Act, the United Nations Convention against Torture, 18 USC § 2340, and the Constitution, govern this issues.

5. In his February 2, 2003 memorandum commenting on the draft Working Group Report, which recommended a number of interrogation techniques that violated established military doctrine and argued that the Geneva Conventions could be set aside, the Judge Advocate General of the Navy, Rear Admiral Michael F. Lohr, wrote: "[W]ill the American people find we have missed the forest for the trees by condoning practices that, while technically legal, are inconsistent with our most fundamental values? ... I recommend that we consider asking decision-makers directly: is this the "right thing" for U.S.A. military personnel?" Did you heed this recommendation? Did you forward to Secretary Rumsfeld the concerns

expressed by the Judge Advocates General about the draft Working Group Report?

The Secretary was aware of the concerns of the Judge Advocates General. Indeed, at my request, he met with them in March 2003. I agree wholeheartedly that the decision-makers needed to be presented with the question: is this the right thing to do? After a thorough vetting of the evaluated techniques by the senior military and civilian leaders of the Department, I joined Chairman of the Joint Chiefs of Staff Myers in recommending approval of only 24 of the 35 techniques evaluated by the Working Group.

6. What responsibility do you believe should attach to senior military leaders under whose command U.S. personnel abused prisoners? In order to maintain good order and discipline, as well as adherence to the rule of law, do you believe it is important to hold commanders accountable for failing to provide appropriate guidance or leadership when this failure resulted in the application of interrogation techniques that could fairly be classified as torture? Do you support the establishment of a special investigative commission, with subpoena power, to determine why the abuse of prisoners by U.S. personnel became so widespread in Afghanistan and Iraq and who bears responsibility for such practices?

Senior military leaders should assume responsibility for those acts which they authorized.

Should individuals apply techniques that constitute torture because commanders failed to provide leadership or appropriate guidance, it would be important to hold those commanders accountable.

With respect to the establishment of a special investigative commission, I would note that there have been multiple substantive reports resulting from investigations into alleged detainee abuse in Department of Defense facilities in Afghanistan, Iraq, and at Guantanamo Bay, Cuba. None of those reports found that there was a government policy directing, encouraging, or condoning abuse.

For example, Admiral Church, in his review of Department of Defense detention operations and interrogation techniques, did not find anything that sanctioned the practices that were shown in the Abu Ghraib photos. Admiral Church, in his conclusions, stated:

> "We found, without exception, that the DoD officials and senior military commanders responsible for the formulation of interrogation policy evidenced the intent to treat detainees humanely, which is fundamentally inconsistent with the notion that such officials or commanders ever accepted that detainee abuse would be permissible. Even in the absence of a precise definition of 'humane' treatment, it is clear that none of the pictured abuses at Abu Ghraib bear any resemblance to approved policies at any level, in any theater. We note, therefore, that our conclusion is consistent with the findings of the Independent Panel, which in its August 2004 report determined that '[n]o approved procedures called for or

> allowed the kinds of abuse that in fact occurred. There is no evidence of a policy of abuse promulgated by senior officials or military authorities.'"

The investigation by Generals Fay and Jones likewise found that the Commander of CJTF-7 made clear that detainees were to be treated in accordance with the Geneva Conventions.

Question 2. Senator Leahy: Please submit copies of all documents referenced in your opening statement and a chronology.

Response:

A chronology is enclosed.

The following documents are available on the Department of Defense's website at:
http://www.defenselink.mil/releases/2004/nr20040622-0930.html

- October 11, 2002 request from the military Commander at Guantanamo Bay, Cuba for additional interrogation techniques, accompanied by a legal opinion by a JAG officer. (Document 3)
- October 25, 2002 request from the Commander of Southern Command forwarding the Guantanamo Bay request for additional interrogation techniques. (Document 4)
- December 2, 2002 approval by the Secretary of Defense of November 27, 2002 memorandum from the Department of Defense General Counsel, referencing the views of the Deputy Secretary of Defense, the Undersecretary of Policy, and the Chairman of the Joint Chiefs of Staff, General Richard Myers, recommending that the Secretary reject the most aggressive interrogation techniques. (Document 5)
- January 15, 2003 memorandum from the Secretary of Defense rescinding approval of interrogation techniques dated December 2, 2002. (Document 6)
- January 15, 2003 memorandum from the Secretary of Defense directing the formation of a working group to consider interrogation policy. (Document 7)
- April 4, 2003 now-withdrawn Working Group Report. (Document 8)
- April 16, 2003 memorandum from the Secretary of Defense to the Commander of Southern Command rejecting 11 of the 35 interrogation techniques recommended by the Working Group Report. (Document 9)

Three additional documents are attached:

- August 1, 2002 memorandum from the Office of Legal Counsel, Department of Justice to Alberto R. Gonzales, Counsel to the President regarding Standards of Conduct for Interrogation under 18 U.S.C. secs. 2340 – 2340A.
- September 23, 2002 letter from General Counsel of the Department of Defense to President, American Bar Association, forwarded to the Armed Services' General Counsels, the Armed Services' Judge Advocates General, and the Legal Counsel for the Chairman, Joint Chiefs of Staff providing comments to the Preliminary Report of the ABA Task Force on Treatment of Enemy Combatants.
- January 17, 2003 memorandum from the General Counsel of the Department of Defense to the General Counsel of the Department of the Air Force designating the General Counsel as the Chair of an interdepartmental working group to study detainee interrogation methods.

I am not authorized to provide any documents that have not already been made publicly available. Specifically, with respect to the now-withdrawn March 13, 2003, Department of Justice memorandum, I have forwarded your request to the appropriate decision makers. All other referenced documents have been provided.

Detainee Interrogation Policy:
Chronology

February 7, 2002: A Presidential memorandum regarding "Humane Treatment of al Qaeda and Taliban Detainees," requiring the U.S. Armed Forces to treat detainees humanely is issued.

Spring/Summer 2002: Deadly attacks occur in Tunisia and Pakistan.

August 1, 2002: Memorandum from then-Assistant Attorney General Bybee, head of the Office of Legal Counsel (OLC), to then-White House Counsel Alberto Gonzales regulating standards of conduct for interrogation under 18 U.S.C. §§ 2340-2340A.

September 13, 2002: DOJ breaks up the Lackawana Six.

October 8, 2002: Al Qaeda leader Ayman Zawahiri releases a tape recording stating that "God willing, we will continue targeting the keys of the American economy."

October 11, 2002: Major General Michael E. Dunlavey, Commander, Joint Task Force 170 (Guantanamo Bay), makes a request to General James T. Hill, Commander USSOUTHCOM, for approval of 19 additional counter-resistance techniques that were not specifically listed in Field Manual 34-52 (techniques were broken down into categories I, II, III) to aid in the interrogation of detainees at Guantanamo Bay. General Dunlavey's request asserted that the requested techniques "do not violate U.S. or international laws." The request came with a concurring legal opinion of his Staff Judge Advocate.

October 12, 2002: Al Qaeda affiliate Jemaah Islamiya bombs a nightclub in Bali, Indonesia killing more than 200 and injuring approximately 300.

October 16, 2002: Congress passes the Authorization for Use of Military Force Joint Resolution of 2002.

October 25, 2002: Commander USSOUTHCOM forwarded Major General Dunlavey's request for approval of additional counter-resistance techniques to the Chairman of the Joint Chiefs of Staff, General Richard B. Myers.

October 30, 2002: The Director of the Joint Staff for Strategic Plans and Policy (J-5) circulated Major General Dunlavey's proposed techniques to Joint Staff Office of Legal Counsel, Intelligence (J-2), Operations (J-3) and the service planner for comment.

October/November 2002: Various and recurring information about possible terrorist threats and attacks.

November 27, 2002: Mr. Haynes sent an Action Memo to the Secretary of Defense recommending the authorization of Categories I and II techniques, but only one of the category III techniques, namely, mild, non-injurious physical contact, including light poking in the chest. He advised that, as a matter of policy, the remaining techniques should not be used because "[o]ur armed forces are trained to a standard interrogation that reflects a tradition of restraint." Prior to doing so Mr. Haynes consulted with the Deputy Secretary of Defense, the Undersecretary of Defense for Policy, and the Chairman of the Joint Chiefs of Staff.

December 2, 2002: Secretary Rumsfeld authorizes the use of some of the interrogation techniques requested by the Guantanamo Commander, while rejecting the most extreme ones.

December 2002/January 2003: On several occasions, Mr. Haynes alerts Secretary Rumsfeld and other senior leaders to concerns regarding interrogation practices at Guantanamo Bay. Mr. Haynes also seeks assurances from the Joint Staff that the interrogations are being properly conducted.

January 12, 2003: Mr. Haynes meets with Secretary Rumsfeld and reiterates concerns regarding interrogations at Guantanamo Bay, urges him to withdraw his approval, and seeks permission to commission a working group to evaluate the matter. Secretary Rumsfeld calls General Hill and rescinds his approval of Category II and Category III counter-resistance techniques.

January 15, 2003: Secretary Rumsfeld confirms his January 12, 2003 rescission in writing. Secretary Rumsfeld formally approves convening a working group to address legal considerations raised by detainee interrogations in Guantanamo.

January 17, 2003: Mr. Haynes asks Air Force General Counsel Mary Walker to convene a working group composed of Office of the Under Secretary of Defense for Policy (USDP), Defense Intelligence Agency, the General Counsels of the Air Force, Army, and Navy, Counsel to the Commandant of the Marine Corps, the Judge Advocates General of the Air Force, Army, Navy and Marines, and the Joint Staff Legal Counsel and the Director of the Joint Staff for Strategic Plans and Policy (J-5). Contemporaneous with the establishment of the working group, Mr. Haynes requested a legal opinion from the Department of Justice, Office of Legal Counsel, regarding the interrogation of detainees.

February 5, 2003: Memo to Mary Walker from Air Force Deputy Judge Advocate Jack Rives regarding the Final Report and Recommendations of Working Group

February 6, 2003: Memo to Mary Walker from Navy Judge Advocate Rear Admiral Michael Lohr regarding the Working Group recommendations on interrogation of detainees.

February 6, 2003: Memo to Mary Walker from Air Force Deputy Judge Advocate Major General Jack Rives regarding Comments on Draft Report and Recommendations of Working Group

February 6, 2003: Memo to Mary Walker from Staff Judge Advocate to the Commandant of the Marine Corps, Brigadier General Kevin Sandkuhler regarding Working Group Recommendations on Detainee Interrogations.

Early February 2003: Mr. Haynes requests additional time for further study of the issues. The Secretary of Defense grants the extension. He later grants a second extension.

March 3, 2003: Memo to Mary Walker from The Army Judge Advocate General, Major General Thomas Romig.

March 13, 2003: Memo to Mary Walker from Navy Judge Advocate Rear Admiral Michael Lohr regarding comments on the March 6 draft of the working group report.

March 14, 2003: OLC issues a memorandum entitled "Military Interrogation of Alien Unlawful Combatants Held Outside the United States."

March 18, 2003: Mr. Haynes met with Rear Admiral Lohr and two Navy judge advocates to discuss concerns about the Working Group Report.

March 2003: Mr. Haynes suggests to Secretary Rumsfeld that the 35 proposed interrogation techniques being considered by the Working Group also be evaluated separately by other senior leaders of the Department.

March 2003: Secretary Rumsfeld meets with The Judge Advocates General.

Late March/Early April 2003: 35 evaluated techniques briefed to the Joint Chiefs of Staff and Secretaries of the Military Departments

April 4, 2003: The Working Group Chairperson signs the Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations. The Report evaluates 35 interrogation techniques.

April 16, 2003: Following the recommendation of General Richard Myers, Chairman of the Joint Chiefs and Mr. Haynes (and over the objections of some others, who desired approval of all techniques), Secretary Rumsfeld approves 24 of the 35 techniques recommended in the Working Group Report. Of those 24, 17 are the 17 approaches in the Army field manual, drafted for interrogating prisoners of war in Geneva Convention-governed conflicts. The additional seven were highly regulated, two of which, arguably, were restatements of one or two of the 17 basic techniques.

April 2003: General Hill and General Miller are briefed on the 24 techniques that the Secretary authorized along with the safeguards that his authorization required for the use of those techniques. General Hill and General Miller were briefed only generally regarding the Working Group Report and were not provided a copy of that report at that briefing.

December 2003: The Department of Justice alerts Mr. Haynes orally that the March 14, 2003, OLC memo on interrogation of enemy combatants is under review and should not be relied upon, but that the techniques approved in April 2003 were legal.

June 2004: The Department of Justice withdraws the August 1, 2002, OLC memo.

July 14, 2004: Patrick Philbin, Associate Deputy Attorney General, testifying before the House Select Committee on Intelligence, states that "the proper use of each of these 24 techniques [approved for Guantanamo on April 16, 2003], in accordance with the General Safeguards, is lawful under any relevant standard."

December 30, 2004: The Department of Justice issues a memo replacing the August 1, 2002, memo.

March 2005: The Department of Defense, through a memorandum signed by Mr. Haynes, declares the 2003 Working Group Report a "non-operational, 'historic document.'"

December 30, 2005: President Bush signs the Detainee Treatment Act, requiring that interrogations within the Department of Defense be conducted only using techniques authorized and listed in the Army Field Manual on Intelligence Interrogations. The Department issues an order within hours of the President signing the bill consistent with this requirement. Accordingly, only those techniques authorized and listed in the Army Field Manual for Intelligence Interrogations are currently authorized.

Question 3. Chairman Specter: Which interrogation techniques did you recommend that the Secretary of Defense reject.

Response:

On November 27, 2002, I recommended that the following interrogation techniques be rejected:

1. "the use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family,"
2. "exposure to cold weather or water (with appropriate medical monitoring)," and
3. "use of a wet towel and dripping water to induce the misperception of suffocation."

In April 2003, I concurred with the recommendation to the Secretary of Defense by the Chairman of the Joint Chiefs of Staff to approve 24 interrogation techniques and disapprove the 11 remaining techniques evaluated by the Working Group:

1. Hooding
2. Mild Physical Contact
3. Threaten to Transfer to a 3rd Country
4. Use of Prolonged Interrogations
5. Forced Grooming
6. Prolonged Standing
7. Sleep Deprivation
8. Physical Training
9. Face or Stomach Slap
10. Removal of Clothing
11. Increasing Anxiety

Question 4. Senator Kennedy: Requested the March 13, 2003 Memorandum, which was the legal basis for the Working Group report.

Response:

I am not authorized to provide any documents that have not already been made publicly available. Specifically, with respect to the now-withdrawn March 13, 2003, Department of Justice memorandum, I have forwarded your request to the appropriate decision makers. I believe all other referenced documents have been provided.

Question 5. Senator Kennedy: Requested that Mr. Haynes determine whether he had recommended "waterboarding" as a counter-resistance measure.

Response:

In my November 27, 2002, memorandum for the Secretary, I recommended *against* the approval of "the use of a wet towel and dripping water to induce the misperception of suffocation." The Secretary of Defense did not approve waterboarding. I did not recommend its use.

Moreover, I recommended that the Working Group not even *evaluate* waterboarding. Accordingly, the Secretary did not consider its use.

Question 6. Chairman Specter: Do you believe evidence from coerced confessions should be used in trials as a matter of policy?

Response:

If confirmed to serve on the U.S. Court of Appeals, questions concerning the propriety of the use of such evidence may come before me. For that reason, I do not think it would be appropriate for me to offer an opinion on this subject. If confirmed, I pledge to apply faithfully the law with respect to the inadmissibility of coerced confessions in civilian courts. In addition, I note that the military commission rules currently provide that evidence determined to have been obtained through torture is inadmissible.

Question 7. Chairman Specter: Do you believe a defendant should be entitled to exculpatory evidence? Do you believe defense counsel should have access to classified information if the counsel has the proper clearances?

Response:

If confirmed to serve on the U.S. Court of Appeals, questions concerning the provision of exculpatory evidence may come before me. For that reason, I do not think it would be appropriate for me to offer an opinion regarding access to exculpatory evidence. If confirmed, I pledge to apply faithfully the law with respect to a defendant's access to exculpatory evidence in civilian courts. I note that the military commission rules currently provide for a defendant to have access to exculpatory evidence.

If confirmed to serve on the U.S. Court of Appeals, questions concerning access to classified evidence may come before me. For that reason, I do not think it would be appropriate for me to offer an opinion regarding such access. If confirmed, I pledge to apply faithfully the law with respect to a defendant's access to classified information in civilian courts. I note that the military commission rules currently provide for a defendant to have access to classified evidence for counsel with appropriate security clearances, which come at no cost to the defendant.

Question 8. Chairman Specter: What kind of information do you believe would be appropriate to establish necessity for continued detention and should there be periodic reviews of enemy combatants?

Response:

There should be periodic review of the need for continued detention of enemy combatants. Review of enemy combatant status has been ongoing in Afghanistan and at Guantanamo Bay, Cuba since 2002. In addition to the reviews that were already being done, the Department of Defense established, in the summer of 2004, the Combatant Status Review Tribunal (CSRT). The CSRT provides a formal review of all available information related to a detainee to determine whether each person meets the criteria to be designated as an enemy combatant. In addition, the Administrative Review Board (ARB) process is an annual review to determine the need to continue the detention of an enemy combatant on the basis of whether the detainee continues to pose a threat to the United States or its allies, and other factors, such as intelligence value. The ARB recommends whether the detainee should be released, transferred, or continue to be detained.

Question 9. Senator Kennedy: Please submit the Department of Justice memorandum regarding the Secretary of Defense's approval of interrogation techniques.

Response:

Please see attached transcript for the July 14, 2004 testimony of Patrick F. Philbin, then-Associate Deputy Attorney General, before the House Permanent Select Committee on Intelligence. He stated, "the proper use of each of these 24 techniques [approved on April 16, 2003], in accordance with the General Safeguards, is lawful under any relevant standard."

Responses of William J. Haynes II
Nominee to the U.S. Court of Appeals for the Fourth Circuit
to the Written Questions of Senator Richard Durbin

Thank you for giving me the opportunity to clarify and expand my testimony in these questions for the record. At the outset, I would like to draw your attention to two considerations. First, it is important for me to note that I am appearing before you as a nominee for the federal judiciary and answer in that capacity. Yet, I am also a sitting government official. I recognize that Congress has important roles in both providing oversight of the Executive branch and advice and consent on judicial nominees. I am before you in the latter capacity; however, where your questions concerned the former, I have attempted to be responsive as possible, consistent with my continuing responsibility as a government official, and consistent with my memory.

1. **Please describe your and your office's involvement in the creation and legal review of the Combatant Status Review Tribunals for Guantanamo Bay detainees.**

Response:

Following the Supreme Court's *Rasul* decision in late June 2004, I advised senior Department of Defense officials regarding the impact and meaning of that opinion.

At this time, the Secretary of the Navy had already been appointed as the designated civilian official responsible for the Administrative Review Board (ARB) process. On July 7, 2004, the Deputy Secretary of Defense issued an order establishing the Combatant Status Review Tribunals (CSRT) as a forum for Guantanamo detainees to contest their designation as enemy combatants. (http://www.defenselink.mil/news/Jul2004/d20040707review.pdf). The Secretary of the Navy was appointed to implement and oversee this process.

Because of the Secretary of the Navy's role in the CSRT process, the Department of the Navy was responsible for drafting the initial order and the implementing directive that was issued on July 30, 2004. (http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf) Along with individuals from other components of the Department of Defense, personnel in my office were involved in providing advice and input on both of those documents. My staff also coordinated with other U. S. government agencies, as appropriate, on various aspects of the documents. Members of my staff consulted with me regarding the development of these documents.

2. **Please describe your and your office's involvement in the creation and legal review of the Administrative Review Procedures for Guantanamo Bay detainees.**

Response:

In the summer and fall of 2002, my office began developing a proposal for a more formalized review regarding the need for continued detention of the enemy combatants detained at Guantanamo. In late 2002, the Deputy Secretary of Defense issued guidance requiring regular, additional review of the status of detainees at Guantanamo. Further refinement of that process took many months and ultimately became the Administrative Review Board (ARB)

process. Draft procedures were publicly released in the spring of 2004. My office was involved in advising on this matter throughout this period.

On June 23, 2004, the Deputy Secretary of Defense appointed the Secretary of the Navy as the designated civilian official responsible for the ARB process. (http://www.defenselink.mil/releases/2004/nr20040623-0932.html) Using the draft procedures created by my office as a starting point, the Department of the Navy drafted the implementing directive that was ultimately issued on September 15, 2004. (http://www.defenselink.mil/releases/2004/nr20040915-1253.html). Along with individuals from other organizations within the Department of Defense and other U.S. government agencies, personnel in my office were involved in providing advice and input on this document. Members of my staff consulted with me regarding the development of this document.

3. To your knowledge, was the establishment of the Administrative Review Procedures an attempt to influence the outcome of *Rasul v. Bush*, which was pending in the Supreme Court at the time that the draft procedures were made public?

Response:

No. Establishment of the Administrative Review Boards was the end result of a number of initiatives within the Department to address detention requirements in the context of the unusual characteristics of the War on Terrorism.

4. The Administrative Review Board (ARB) makes an annual recommendation regarding each detainee to the Designated Civilian Official (DCO), who makes the final decision whether to release, transfer or continue to detain the individual. Please provide a statistical breakdown of ARB recommendations and final DCO decisions since the establishment of the Administrative Review Procedures, including how many detainees the ARB has recommended releasing, transferring, and continuing to detain; how many detainees the DCO has decided to release, transfer and continue to detain; and, for each category (release, transfer or continue to detain), the number of instances the DCO has accepted or rejected the ARB's recommendation.

Response:

While I am appearing in my personal capacity as a nominee to be a judge on the U.S. Court of Appeals for the Fourth Circuit, and not as a government official, I am advised of the following information responsive to your question.

The decisions made by the DCO in the first round of ARBs have been posted on the Department of Defense's website. (http://www.defenselink.mil/news/Jan2006/d20060130arb.pdf). Round 2 is still ongoing and the decisions made by the DCO in those ARBs are periodically updated on the website. (http://www.defenselink.mil/news/arb2.pdf).

5. Please describe your and your office's involvement in the drafting and legal review of Military Commission Instruction #10.

Response:

MCI No. 10 was drafted by the Office of Military Commissions (OMC). My office worked with OMC and other attorneys within the Executive Branch to ensure that the wording of the Instruction was legally accurate and sufficiently comprehensive.

6. To your knowledge, was the decision to issue Military Commission Instruction #10 an attempt to influence the outcome of *Hamdan v. Rumsfeld*, which was pending in the Supreme Court at the time that the Instruction was issued?

Response:

No.

7. On February 7, 2002, President Bush issued a memorandum stating, "As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely, and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva." In your personal opinion, what is the definition of humane treatment?

Response:

As was stated in the February 7, 2002, White House Fact Sheet, those detained at Guantanamo were provided and were to be continued to be provided the following: three meals a day that meet Muslim dietary laws; water; medical care; clothing and shoes; shelter; showers; soap and toilet articles; foam sleeping pads and blankets; towels and washcloths; the opportunity to worship; correspondence materials, the means to send mail, and the ability to receive packages of food and clothing, subject to security screening. The opportunity to worship includes a copy of the Koran and prayer beads. The U.S. Armed Forces have also provided those detained at Guantanamo with other reading materials. In addition, the medical care that has been supplied those persons has been exceptional.

The President also articulated in the Military Order on Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, November 13, 2001, that detainees will be treated humanely, including the following:

- To be treated without any adverse distinction based on race, color, religion, gender, birth, wealth, sex, or any similar criteria;
- Sufficient food, drinking water, shelter, clothing, and medical treatment;
- Free exercise of religion, consistent with the requirements of detention.

8. Timothy Flanigan, then-nominee for Deputy Attorney General, told me that he did "not believe that the term 'inhumane' treatment is susceptible to a succinct definition." Do you agree?

Response:

The standards established by the President clearly define a level of treatment which is humane. As was stated in the February 7, 2002, White House Fact Sheet, those detained at Guantanamo were provided and were to be continued to be provided the following: three meals a day that meet Muslim dietary laws; water; medical care; clothing and shoes; shelter; showers; soap and toilet articles; foam sleeping pads and blankets; towels and washcloths; the opportunity to worship; correspondence materials, the means to send mail, and the ability to receive packages of food and clothing, subject to security screening. The opportunity to worship includes a copy of the Koran and prayer beads. The U.S. Armed Forces have also provided those detained at Guantanamo with other reading materials. In addition, the medical care that has been supplied those persons has been exceptional.

9. Mr. Flanigan also told me that "To say that the term 'inhumane' treatment is not susceptible to a succinct definition is not to say ... that the Department of Defense cannot provide service men and women with appropriate guidance in the context of specific facts and circumstances." To your knowledge, has the Department of Defense provided any guidance on the meaning of humane or inhumane treatment?

Response:

The President articulated in the Military Order on Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, November 13, 2001, that detainees will be treated humanely, including the following:

- To be treated without any adverse distinction based on race, color, religion, gender, birth, wealth, sex, or any similar criteria;
- Sufficient food, drinking water, shelter, clothing, and medical treatment;
- Free exercise of religion, consistent with the requirements of detention.

As was stated in the February 7, 2002, White House Fact Sheet, those detained at Guantanamo were provided and were to be continued to be provided the following: three meals a day that meet Muslim dietary laws; water; medical care; clothing and shoes; shelter; showers; soap and toilet articles; foam sleeping pads and blankets; towels and washcloths; the opportunity to worship; correspondence materials, the means to send mail, and the ability to receive packages of food and clothing, subject to security screening. The opportunity to worship includes a copy of the Koran and prayer beads. The U.S. Armed Forces have also provided those detained at Guantanamo with other reading materials. In addition, the medical care that has been supplied those persons has been exceptional.

Additionally, the Ronald Reagan National Defense Authorization Act (NDAA) of Fiscal Year 2005 requires that Department of Defense personnel and contract personnel handling or

interrogating detainees must receive annual law of war training, including on the Geneva Conventions. The Department provided reports regarding compliance with these provisions to the House Armed Services Committee and the Senate Armed Services Committee in June and September 2005. All combatant commands have taken steps to ensure that all military personnel, contractor employees, and federal employees who come into contact with individuals under Department of Defense control receive law of armed conflict training. Finally, the Department has implemented the requirements of section 1092 of the NDAA in the Department of Defense Federal Acquisition Regulation Supplement (DFARS), which provides that each contract in which contractor personnel may interact with individuals detained by the Department of Defense must include a requirement that such contractor personnel receive the requisite training and acknowledge receipt of the training. The DFARS coverage also states that the combatant commander responsible for the area where the detention or interrogation facility is located will provide the training.

10. The Schmidt-Furlow Report on the Investigation into FBI Allegations of Detainee Abuses at Guantanamo Bay concluded that an interrogation "resulted in degrading and abusive treatment but did not rise to the level of being inhumane treatment." Do you agree that the treatment of a detainee could be degrading and abusive, but not inhumane?

Response:

I did not perform an independent evaluation of the circumstances and therefore could not offer a personal opinion. General Craddock, Commander, U.S. Southern Command, however, testified before the Senate Armed Services Committee on March 16, 2006. He responded in a question for the record as follows: "The Schmidt-Furlow investigation determined that the creative, aggressive, and persistent interrogation of Qahtani 'resulted in the cumulative effect being degrading and abusive treatment.' However, the investigation did not identify at what point the cumulative effect became degrading or abusive, or point to any violation of U.S. law or policy from the purported 'degrading and abusive' treatment."

General Craddock also informed the Committee that "the Detainee Treatment Act mandates that detainees must not be 'subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.' The Detainee Treatment Act also restates the U.S. Government's prohibition on cruel, inhuman, or degrading treatment as defined through U.S. reservations to the U.N. Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. The Department of Defense is doing a top to bottom review of interrogation and detention operations. This has resulted in changes to and clarification of Department of Defense policy. Last fall, the Department of Defense published Department of Defense Directive 3115.09, Department of Defense Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning. I anticipate that Department of Defense Directive 2310.1E, the Department of Defense Detainee Program, and Field Manual 2-22.3, Human Intelligence Collector Operations, will be published shortly. The Field Manual especially will provide interrogators on the ground better clarity on proper versus improper interrogation techniques."

11. During your hearing, you stated that you recommended and Secretary Rumsfeld approved interrogation techniques for use on Mohammed al Qahtani, the alleged 20th hijacker. For example, you told Senator Graham, "there was substantial anxiety within the Defense Department after the Secretary approved the techniques on the 20th highjacker in early December, until he stopped them on the 12th of January." To clarify, your recommendation and Secretary Rumsfeld's approval of these techniques for use on Guantanamo detainees were not limited to al Qahtani, were they?

Response:

The need to interrogate Qahtani was the catalyst for the request, and Qahtani was the detainee upon whom JFT-GTMO began using the approved techniques. While the approval document was not limited to Qahtani, that document was limited to use for Guantanamo detainees and it is my understanding that Qahtani was the first upon whom the techniques were used. The Commander at Guantanamo required highly regulated application of the techniques approved by the Secretary. As investigations have established, that approval was rescinded weeks after it was issued. Only a few of the reduced number of techniques approved by the Secretary were actually employed with the 20th hijacker, Qahtani.

12. During your hearing, Senator Sessions asked you, "When there were questions about how detainees should be treated and interrogated, you did the proper thing, did you not, as a counsel to the Department of Defense, and you asked the authoritative agency of the Department of Justice for the official opinion. Is that not correct?" You responded, "That is what I did. Yes, sir." Did you ask the Justice Department for a legal opinion before you sent Secretary Rumsfeld a memorandum on November 27, 2002, recommending the approval of certain interrogation techniques for use on Guantanamo Bay detainees? If so, please provide this legal opinion.

Response:

No, I did not seek a written opinion from the Department of Justice with respect to my November 27, 2002, memorandum. I sought an opinion from the Department of Justice's Office of Legal Counsel after urging the Secretary to rescind his approval and permit more time for study of the important and difficult issues surrounding interrogations.

13. Did you consult with any JAGs before you sent Secretary Rumsfeld a memorandum on November 27, 2002, recommending the approval of certain interrogation techniques for use on Guantanamo Bay detainees? If so, please provide the names of those with whom you consulted, describe the nature of these consultations, and provide any written opinions authored by the JAGs.

Response:

As my memorandum of November 27, 2002, reflects, I consulted with the Chairman of the Joint Chiefs of Staff, the Deputy Secretary of Defense, and the Under Secretary of Defense for Policy, but I did not consult specifically or individually with the Judge Advocates General of the Army, Navy, and Air Force, or the staff judge advocate to the Commander of the Marine

Corps. I am not aware of any written opinions by these particular officials on this topic prior to November 27, 2002.

14. Chairman Specter asked you whether any of the interrogation techniques you recommended "would be classified as cruel, inhuman, or degrading." You said, "I do not believe so, but I hasten to add, Senator, you all have defined that phrase in the interim to mean what is prohibited by the Fifth, Eighth and Fourteenth Amendment to the U.S. Constitution." Were you referring to the Detainee Treatment Act? In fact, is it not true that Congress defined cruel, inhuman or degrading treatment to mean what is prohibited by the Fifth, Eighth and Fourteenth Amendments to the U.S. Constitution in 1990 when we filed the following reservation to Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: "That the United States considers itself bound by the obligation under Article 16 to prevent 'cruel, inhuman or degrading treatment or punishment,' only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States"?

Response:

I appreciate the opportunity to clarify my testimony. You are correct that the reservations to the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment define cruel, inhuman, or degrading treatment or punishment to mean the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the U.S. Constitution. The Detainee Treatment Act also prohibited cruel, inhuman, and degrading treatment and defined that conduct in a way similar to that detailed in the Senate reservation.

15. On November 27, 2002, you recommended that Defense Secretary Rumsfeld authorize the use of stress positions on Guantanamo detainees. What was the basis for your determination that the use of stress positions on Guantanamo detainees was legal?

Response:

The request for the use of additional techniques originated from a commanding general in the field and was forwarded for consideration by the Commander of U.S. Southern Command and was accompanied by a legal review by the Staff Judge Advocate at Guantanamo. I reviewed that request. The use of the particular technique referenced in your question was exemplified by standing no more than four hours. Moreover, it was required to be in accordance with the President's order that the U.S. Armed Forces were to treat the detainees humanely. Nothing in the Secretary's authorization of the additional techniques provided otherwise. Based on all of this, I concluded that its use was legal under the circumstances.

16. What was the basis for your recommendation "as a matter of policy" that the Secretary of Defense authorize the use of stress positions on Guantanamo detainees?

Response:

The request for the use of additional techniques originated from a commanding general in the field and was forwarded for consideration by the Commander of U.S. Southern Command and was accompanied by a legal review by the Staff Judge Advocate at Guantanamo. The Commander of U.S. Southern Command in forwarding that request stated: "some detainees have tenaciously resisted our current interrogation methods." I consulted with the Deputy Secretary, the Under Secretary of Policy, and the Chairman of the Joint Chiefs of Staff in recommending that the Secretary authorize the techniques set forth in the November 27, 2002, memorandum. The use of the particular technique referenced in your question was required to be in accordance with the President's order that the U.S. Armed Forces were to treat the detainees humanely. Nothing in the Secretary's authorization of the additional techniques provided otherwise.

17. In your personal opinion, does the use of stress positions on detainees constitute torture or cruel, inhuman or degrading treatment?

Response:

Please see the answer to Question 15.

18. In your personal opinion, is the use of stress positions on detainees humane?

Please see the answer to Question 15.

19. In your personal opinion, is the use of stress positions on detainees consistent with Common Article 3 of the Geneva Conventions?

Response:

In reviewing the use of the technique referenced in your question, it was unnecessary to determine whether Common Article 3 of the Geneva Conventions barred its use because the legal determination had previously been reached that Common Article 3 did not apply to members of al Qaeda or the Taliban. The technique was not authorized except for a brief period from December 2, 2002, through January 12, 2003, for the interrogation of unlawful combatants held at Guatanamo. More important, because its use is not specifically authorized in the Army Field Manual on Intelligence Interrogations, the Detainee Treatment Act of 2005 would not permit its use. For those reasons, reaching this determination regarding the scope of Common Article 3 would be unnecessary in my current position.

20. In your personal opinion, is the use of stress positions on detainees consistent with the U.S. Army Field Manual on Intelligence Interrogation (FM 34-52)?

Response:

It is not specifically authorized by the U.S. Army Field Manual on Intelligence Interrogations. Because the Detainee Treatment Act of 2005 prohibits the Department of Defense from employing any interrogation techniques not specifically listed and authorized in the Army Field Manual, such actions, accordingly, are not consistent with that manual. I should note that the Department of Defense is currently working on a new version of that Field Manual. To my knowledge, much like the current field manual, the new manual does not specifically authorize the use of that technique. Accordingly, such a technique would not be permissible.

21. The Army Field Manual provides that, in attempting to determine whether an interrogation technique is legal, an interrogator should consider, "If your contemplated actions were perpetrated by the enemy against US PWs [Prisoners of War], you would believe such actions violate international or US law." In your personal opinion, would it violate international or U.S. law for enemy forces to use stress positions on U.S. Prisoners of War?

Response:

U.S. Armed Forces conduct their operations in accordance with the law of war. Captured U.S. forces would be entitled to, and should be provided, prisoner of war protections, including protection against application of the technique to which the question refers.

It should be noted in addressing this question in the context of a U.S. service member captured by the Taliban or al Qaeda that their forces have repeatedly demonstrated their absolute disregard for the law of war and any obligation to provide humane care and treatment to persons they capture.

22. The Army Field Manual on Intelligence Interrogation states "forcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time" is "physical torture." Do you agree?

Response:

The U.N. Convention Against Torture defines torture as: "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions." In addition 18 U.S.C. § 2340 defines torture as "any act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering." Depending on the precise facts and circumstances the conduct described could constitute physical torture.

23. On November 27, 2002, you recommended that Secretary Rumsfeld approve using detainee individual phobias (such as fear of dogs) to induce stress on Guantanamo detainees. What was the basis for your determination that this technique was legal?

Response:

The request for the use of additional techniques originated from a commanding general in the field and was forwarded for consideration by the Commander of U.S. Southern Command and was accompanied by a legal review by the Staff Judge Advocate at Guantanamo. It was my understanding that the animals were to be merely present, walking security, with muzzles. I reviewed the request. I viewed the presence of muzzled animals at Guantanamo to be lawful because it was pursuant to a lawful order, implemented in a manner consistent with the President's direction that detainees be treated humanely, and not otherwise in violation of then-applicable law.

The authorization was rescinded several weeks later and was not reauthorized.

24. What was the basis for your recommendation "as a matter of policy" that the Secretary of Defense authorize the use of dogs to induce stress on detainees?

Response:

The request for the use of additional techniques originated from a commanding general in the field and was forwarded for consideration by the Commander of U.S. Southern Command and was accompanied by a legal review by the Staff Judge Advocate at Guantanamo. The Commander of U.S. Southern Command in forwarding that request stated: "some detainees have tenaciously resisted our current interrogation methods." I consulted with the Deputy Secretary, the Under Secretary of Policy, and the Chairman of the Joint Chiefs of Staff in recommending that the Secretary authorize the techniques set forth in the November 27, 2002, memorandum. The use of the particular technique referenced in your question was required to be in accordance with the President's order that the U.S. Armed Forces were to treat the detainees humanely. Nothing in the Secretary's authorization of the additional techniques provided otherwise.

I note that I supported the directive that the Department of Defense adopted, which expressly prohibits the use of dogs in interrogations. Department of Defense Directive 3115.09, "Department of Defense Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning," sets out Departmental policies and guidance, including the requirement for humane treatment during all interrogations. It provides, among other things, that

> "3.1. All captured or detained personnel shall be treated humanely, and all intelligence interrogations, debriefings, or tactical questioning to gain intelligence from captured or detained personnel shall be conducted humanely, in accordance with applicable law and policy. Applicable law and policy may include the law of war, relevant international law, U.S. law, and applicable directives, including Department of Defense Directive 2310.01, "Department of Defense Detainee Program," (draft), upon publication (reference (d)), instructions or other issuances. Acts of physical or mental torture are prohibited."

and

> "3.4.4.4. Military working dogs, contracted dogs, or any other dog in use by a government agency shall not be used as part of an interrogation approach nor to harass, intimidate, threaten, or coerce a detainee for interrogation purposes."

The directive was the product of extensive review and consultation within and among numerous components of the Department, including consultation with my office and with me.

It is my understanding that during that brief period during which this technique was authorized for use at Guantanamo, the animals were to be merely present, walking security, with muzzles. The authorization was rescinded several weeks later and not reauthorized. The unauthorized use of dogs a year later in Iraq for the purpose of abusing detainees was shocking and caused me to support strongly an absolute prohibition on the use of dogs for any purpose related to interrogating as stated in paragraph 3.4.4.4 of Department of Defense Directive 3115.09.

25. In your personal opinion, does the use of dogs to induce stress on detainees constitute torture or cruel, inhuman or degrading treatment?

Response:

Please see the answer to Question 23.

26. In your personal opinion, is the use of dogs to induce stress on detainees humane?

Response:

Please see the answer to Question 23.

27. In your personal opinion, is the use of dogs to induce stress on detainees consistent with Common Article 3 of the Geneva Conventions?

Response:

In reviewing the use of the technique referenced in your question, it was unnecessary to determine whether Common Article 3 of the Geneva Conventions barred its use because the legal determination had previously been reached that Common Article 3 did not apply to members of al Qaeda or the Taliban. Its use has not been authorized except for a brief period from December 2, 2002, through January 12, 2003, for interrogations of unlawful combatants at Guantanamo. More important, because its use is not specifically authorized in the U.S. Army Field Manual on Intelligence Interrogations, the Detainee Treatment Act of 2005 would not permit its use. For those reasons, reaching this determination regarding the scope of Common Article 3 would be unnecessary in my current position.

28. In your personal opinion, is the use of dogs to induce stress on detainees consistent with the U.S. Army Field Manual on Intelligence Interrogation (FM 34-52)?

Response:

It is not specifically authorized by the U.S. Army Field Manual on Intelligence Interrogations. Because the Detainee Treatment Act of 2005 prohibits the Department of Defense from employing any interrogation techniques not specifically listed and authorized in the Army Field Manual, such actions, accordingly, are not consistent with that manual. I should note that the Department of Defense is currently working on a new version of that Field Manual. To my knowledge, much like the current field manual, the new manual does not specifically authorize the use of that technique. Accordingly, such a technique would not be permissible.

29. In your personal opinion, would it violate international or U.S. law for enemy forces to use dogs to induce stress on U.S. Prisoners of War?

Response:

U.S. Armed Forces conduct their operations in accordance with the law of war. Captured U.S. forces would be entitled to, and should be provided, prisoner of war protections, including protection against application of the technique to which the question refers.

It should be noted in addressing this question in the context of a U.S. service member captured by the Taliban or al Qaeda that their forces have repeatedly demonstrated their absolute disregard for the law of war and any obligation to provide humane care and treatment to persons they capture.

30. On November 27, 2002, you recommended that Secretary Rumsfeld approve removal of clothing as an interrogation technique on Guantanamo detainees. What was the basis for your determination that this technique was legal?

Response:

The request for the use of additional techniques originated from a commanding general in the field and was forwarded for consideration by the Commander of U.S. Southern Command and was accompanied by a legal review by the Staff Judge Advocate at Guantanamo. I reviewed that request. The use of the particular technique referenced in your question was required to be in accordance with the President's order that the U.S. Armed Forces were to treat the detainees humanely. Nothing in the Secretary's authorization of the additional techniques provided otherwise. Based on all of this, I concluded that its use was legal.

31. What was the basis for your recommendation "as a matter of policy" that the Secretary of Defense authorize removal of clothing as an interrogation technique?

Response:

The request for the use of additional techniques originated from a commanding general in the field and was forwarded for consideration by the Commander of U.S. Southern Command. The Commander of U.S. Southern Command, in forwarding that request stated: "some detainees have tenaciously resisted our current interrogation methods." I consulted with the Deputy Secretary, the Under Secretary of Policy, and the Chairman of the Joint Chiefs of Staff in recommending that the Secretary authorize the techniques set forth in the November 27, 2002, memorandum. The use of the particular technique referenced in your question was required to be in accordance with the President's order that the U.S. Armed Forces were to treat the detainees humanely. Nothing in the Secretary's authorization of the additional techniques provided otherwise.

32. In your personal opinion, does the use of removal of clothing as an interrogation technique constitute torture or cruel, inhuman or degrading treatment?

Response:

Please see the answer to Question 30.

33. In your personal opinion, is the use of removal of clothing as an interrogation technique humane?

Response:

Please see the answer to Question 30.

34. In your personal opinion, is the use of removal of clothing as an interrogation technique consistent with Common Article 3 of the Geneva Conventions?

Response:

In reviewing the use of the technique referenced in your question, it was unnecessary to determine whether Common Article 3 of the Geneva Conventions barred its use because the legal determination had previously been reached that Common Article 3 did not apply to members of al Qaeda or the Taliban. In fact, its use has not been authorized except for a brief period from December 2, 2002, through January 12, 2003. Moreover, because its use is not specifically authorized in the Army Field Manual on Intelligence Interrogations, the Detainee Treatment Act of 2005 would not permit its use. For those reasons, reaching this determination regarding the scope of Common Article 3 would be unnecessary in my current position.

35. In your personal opinion, is the use of removal of clothing as an interrogation technique consistent with the U.S. Army Field Manual on Intelligence Interrogation (FM 34-52)?

Response:

It is not specifically authorized by the U.S. Army Field Manual on Intelligence Interrogations. Because the Detainee Treatment Act of 2005 prohibits the Department of Defense from employing any interrogation techniques not specifically listed and authorized in the Army Field Manual, such actions, accordingly, are not consistent with that manual. I should note that the Department of Defense is currently working on a new version of that Field Manual. To my knowledge, much like the current field manual, the new manual does not specifically authorize the use of that technique. Accordingly, such a technique would not be permissible.

36. In your personal opinion, would it violate international or U.S. law for enemy forces to use removal of clothing as an interrogation technique on U.S. Prisoners of War?

Response:

U.S. Armed Forces conduct their operations in accordance with the law of war. Captured U.S. forces would be entitled to, and should be provided, prisoner of war protections, including protection against application of the technique to which the question refers.

It should be noted in addressing this question in the context of a U.S. service member captured by the Taliban or al Qaeda that their forces have repeatedly demonstrated their absolute disregard for the law of war and any obligation to provide humane care and treatment to persons they capture.

37. On November 27, 2002, in a memo to Secretary Rumsfeld, you stated that the use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family (i.e. mock execution) "may be legally available" as an interrogation technique on Guantanamo detainees. What was the basis for your determination that this technique might be legally available?

Response:

I stated in my memo that

> "[w]hile all Category III techniques may be legally available, we believe that, as a matter of policy, a blanket approval of Category III techniques is not warranted at this time. Our Armed Forces are trained to a standard of interrogation that reflects a tradition of restraint."

The language quoted above reflected the fact that the Commander of JTF-170 concluded that all of the techniques that he requested "do not violate U.S. or international laws."

I did not reach a determination that the technique identified in question was legally available, because I did not need to reach a determination on the legal question. Based on my own views and those of the Deputy Secretary of Defense, the Under Secretary of Defense for Policy, and the Chairman of the Joint Chiefs of Staff, I recommended as a matter of policy against its use.

38. In your personal opinion, does mock execution constitute torture or cruel, inhuman or degrading treatment?

Response:

Without attempting to come to a legal conclusion, I would answer emphatically that this should be unacceptable for the Department of Defense. Because I did not need to reach a determination regarding the use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family, I have not analyzed the legality of this technique. As you know, I recommended against the approval of this technique because, as I stated in the November 27, 2002, memorandum, "Our Armed Forces are trained to a standard of interrogation that reflects a tradition of restraint." The Secretary rejected its use on December 2, 2002. In fact, I have not recommended its use and the Secretary of Defense has not approved its use on detainees. Moreover, because its use is not specifically authorized in the Army Field Manual on Intelligence Interrogations, the Detainee Treatment Act of 2005 would not permit its use. For those reasons, reaching this determination regarding the scope of the meaning of torture or cruel, inhuman, or degrading treatment would be unnecessary in my current position.

39. In your personal opinion, is mock execution humane?

Response:

Please see the answer to Question 38.

40. In your personal opinion, is mock execution consistent with Common Article 3 of the Geneva Conventions?

Response:

Without attempting to come to a legal conclusion, I would answer emphatically that this should be unacceptable for the Department of Defense. As you know, I recommended against the approval of this technique because, as I stated in the November 27, 2002, memorandum, "Our Armed Forces are trained to a standard of interrogation that reflects a tradition of restraint." The Secretary rejected its use on December 2, 2002. In fact, I have not recommended its use and the Secretary of Defense has not approved its use on detainees. Moreover, because its use is not specifically authorized in the Army Field Manual on Intelligence Interrogations, the Detainee Treatment Act of 2005 would not permit its use. For those reasons, reaching this determination regarding the scope of Common Article 3 would be unnecessary in my current position.

41. In your personal opinion, is mock execution consistent with the U.S. Army Field Manual on Intelligence Interrogation (FM 34-52)?

Response:

It is not specifically authorized by the U.S. Army Field Manual on Intelligence Interrogations. Because the Detainee Treatment Act of 2005 prohibits the Department of Defense from employing any interrogation techniques not specifically listed and authorized in the Army Field Manual, such actions, accordingly, are not consistent with that manual. I should note that the Department of Defense is currently working on a new version of that Field Manual. To my knowledge, much like the current field manual, the new manual does not specifically authorize the use of that technique. Accordingly, such a technique would not be permissible.

42. In your personal opinion, would it violate international or U.S. law for enemy forces to subject U.S. Prisoners of War to mock execution?

Response:

U.S. Armed Forces conduct their operations in accordance with the law of war. Captured U.S. forces would be entitled to, and should be provided, prisoner of war protections, including protection against application of the technique to which the question refers.

It should be noted in addressing this question in the context of a U.S. service member captured by the Taliban or al Qaeda that their forces have repeatedly demonstrated their absolute disregard for the law of war and any obligation to provide humane care and treatment to persons they capture.

43. On November 27, 2002, in a memo to Secretary Rumsfeld, you stated that use of a wet towel and dripping water to induce the misperception of drowning (i.e. waterboarding) as an interrogation technique "may be legally available" as an interrogation technique on Guantanamo detainees. What was the basis for your determination that this technique might be legally available?

Response:

I stated in my memo that

> "[w]hile all Category III techniques may be legally available, we believe that, as a matter of policy, a blanket approval of Category III techniques is not warranted at this time. Our Armed Forces are trained to a standard of interrogation that reflects a tradition of restraint."

The language quoted above reflected the fact that the Commander of JTF-170 concluded that all of the techniques that he requested "do not violate U.S. or international laws."

I did not reach a determination that the technique identified in question was legally available, because I did not need to reach a determination on the legal question. Based on my own views and those of the Deputy Secretary of Defense, the Under Secretary of Defense for Policy, and the Chairman of the Joint Chiefs of Staff, I recommended as a matter of policy against its use.

44. In your personal opinion, does waterboarding constitute torture or cruel, inhuman or degrading treatment?

Response:

Without attempting to come to a legal conclusion, I would answer emphatically that this should be unacceptable for the Department of Defense. Because I did not need to reach a determination regarding the use of a wet towel and dripping water to induce the misperception of drowning, I have not analyzed the legality of this technique. As you know, I recommended against the approval of this technique because, as I stated in the November 27, 2002, memorandum, "Our Armed Forces are trained to a standard of interrogation that reflects a tradition of restraint." The Secretary rejected its use on December 2, 2002. In fact, I have not recommended its use and the Secretary of Defense has not approved its use on detainees. Moreover, because its use is not specifically authorized in the U.S. Army Field Manual on Intelligence Interrogations, the Detainee Treatment Act of 2005 would not permit its use. For those reasons, reaching this determination regarding the scope of the meaning of torture or cruel, inhuman, or degrading treatment would be unnecessary in my current position.

45. In your personal opinion, is waterboarding humane?

Response:

Please see the answer to Question 44.

46. In your personal opinion, is waterboarding consistent with Common Article 3 of the Geneva Conventions?

Response:

Without attempting to come to a legal conclusion, I would answer emphatically that this should be unacceptable for the Department of Defense. As you know, I recommended against the approval of this technique because, as I stated in the November 27, 2002, memorandum, "Our Armed Forces are trained to a standard of interrogation that reflects a tradition of restraint." The Secretary rejected its use on December 2, 2002. In fact, I have not recommended its use and the Secretary of Defense has not approved its use on detainees. Moreover, because its use is not specifically authorized in the Army Field Manual on Intelligence Interrogations, the Detainee Treatment Act of 2005 would not permit its use. For those reasons, reaching this determination regarding the scope of Common Article 3 would be unnecessary in my current position.

47. In your personal opinion, is waterboarding consistent with the U.S. Army Field Manual on Intelligence Interrogation (FM 34-52)?

Response:

It is not specifically authorized by the U.S. Army Field Manual on Intelligence Interrogations. Because the Detainee Treatment Act of 2005 prohibits the Department of

Defense from employing any interrogation techniques not specifically listed and authorized in the Army Field Manual, such actions, accordingly, are not consistent with that manual. I should note that the Department of Defense is currently working on a new version of that Field Manual. To my knowledge, much like the current field manual, the new manual does not specifically authorize the use of that technique. Accordingly, such a technique would not be permissible.

48. In your personal opinion, would it violate international or U.S. law for enemy forces to subject U.S. Prisoners of War to waterboarding?

Response:

U.S. Armed Forces conduct their operations in accordance with the law of war. Captured U.S. forces would be entitled to, and should be provided, prisoner of war protections, including protection against application of the technique to which the question refers.

It should be noted in addressing this question in the context of a U.S. service member captured by the Taliban or al Qaeda that their forces have repeatedly demonstrated their absolute disregard for the law of war and any obligation to provide humane care and treatment to persons they capture.

49. On January 15, 2003, Secretary Rumsfeld issued a memorandum to the Commander of USSOUTHCOM withdrawing his December 2, 2002, approval of all Category II and III interrogation techniques, but stating, "Should you determine that particular techniques in either of these categories are warranted in an individual case, you should forward that request to me." Have there been subsequent requests to use any of these techniques? If so, has the Defense Secretary approved such requests?

Response:

On April 16, 2003, the Secretary issued a new order to the Commander of U.S. Southern Command governing interrogation of unlawful combatants at Guantanamo Bay, Cuba. I do not recall any request pursuant to the January 15, 2003, memorandum.

50. The Working Group Report on Detainee Interrogations in the Global War on Terrorism states, "Any effort by Congress to regulate the interrogation of unlawful combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President." Do you agree? In your personal opinion, does Congress have any authority to regulate the interrogation of unlawful combatants?

Response:

Congress does have authority to regulate the interrogation of unlawful combatants. I note that Congress in the Detainee Treatment Act has imposed standards for interrogations, and that the Department of Defense immediately issued an order implementing the Detainee Treatment Act.

The statement from the Working Group Report and quoted in the question was

unnecessary. Nothing I recommended to the Secretary depended on that statement. I recommended that the Secretary not adopt 11 of the techniques evaluated by the Working Group and approve only 24 techniques for use only at Guantanamo. Of those 24 techniques, 17 of them were already allowed by the Field Manual.

I note that in formulating advice to the Secretary, all Department of Defense lawyers were guided by (and bound by) legal advice from the Department of Justice. This is consistent with the law and longstanding practice. As Randolph Moss, then-Assistant Attorney General for the Office of Legal Counsel under President Clinton, wrote in 2000: "When the views of the Office of Legal Counsel are sought on the question of the legality of a proposed executive branch action, those views are typically treated as conclusive and binding within the executive branch. The legal advice of the Office, often embodied in formal, written opinions, constitutes the legal position of the executive branch, unless overruled by the President or the Attorney General." Randolph D. Moss, "Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel," 52 Admin. L. Rev. 1303, 1305 (Fall 2000). This policy dates back for at least 88 years. On May 31, 1918, President Wilson's Executive Order 2877 stated: "any opinion or ruling by the Attorney General upon any question of law arising in any Department . . . *shall be treated as binding* upon all departments . . . therewith concerned."

The opinion that I received, as well as the August 1, 2002, Memorandum addressed to Judge Gonzales, have been rescinded. I understand that new opinion of the Office of Legal Counsel, issued in December 2004, to be the binding opinion for the Executive Branch and the opinion to which the Department of Defense adheres.

51. The Working Group Report states, "In order to respect the President's inherent constitutional authority to manage a military campaign, 18 U.S.C. §2340A (the prohibition against torture) as well as any other potentially applicable statute must be construed as inapplicable to interrogations undertaken pursuant to his Commander-in-Chief authority." Do you agree? In your personal opinion, is 18 U.S.C. §2340A unconstitutional when applied to interrogations pursuant to the President's Commander-in-Chief authority?

Response:

As I stated above, Congress does have authority to regulate the interrogation of unlawful combatants. I note that Congress in the Detainee Treatment Act has imposed standards for interrogations, and that the Department of Defense immediately issued an order implementing the Detainee Treatment Act.

The statement from the Working Group Report and quoted in the question was unnecessary. Nothing I recommended to the Secretary depended on that statement. I recommended that the Secretary not adopt 11 of the techniques evaluated by the Working Group and approve only 24 techniques for use only at Guantanamo. Of those 24 techniques, 17 of them were already allowed by the Field Manual.

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52. The Working Group Report states, "As this [Commander-in-Chief] authority is inherent in the President, it would be appropriate within the context of the war on terrorism for this authority to be stated expressly in a Presidential directive or other writing." To your knowledge, has such a Presidential directive or other writing been issued?

Response:

This portion of the Working Group Report turned out to be unnecessary and hypothetical. The interrogation techniques approved by the Secretary of Defense for use at Guantanamo Bay, Cuba for unlawful combatants were not of the type referenced by the quote from the Working Group Report. Accordingly, there was no need for such a directive.

53. The Working Group Report states that its analysis "was informed by a Department of Justice opinion." During your hearing, you testified that you requested this opinion from the Justice Department's Office of Legal Counsel (OLC) and that you considered the opinion binding. You said you were "told what the law is by the entity historically charged with making that definitive determination within the executive branch." A number of senior Administration officials, including then-Secretary of State Powell and his legal advisor, have stated their objections to the OLC's opinions on detainee-related issues, and sought to move those opinions in a different direction. Did you at any point challenge the analysis or conclusions of OLC?

Response:

In the course of the deliberations of the Working Group, I asked the Working Group participants to challenge the representations of the Department of Justice as they thought necessary. In the end, I acknowledged, consistent with the law and longstanding practice, all Department of Defense lawyers were guided by (and bound by) legal advice from the Department of Justice. As Randolph Moss, then-Assistant Attorney General for the Office of Legal Counsel under President Clinton, wrote in 2000: "When the views of the Office of Legal

Counsel are sought on the question of the legality of a proposed executive branch action, those views are typically treated as conclusive and binding within the executive branch. The legal advice of the Office, often embodied in formal, written opinions, constitutes the legal position of the executive branch, unless overruled by the President or the Attorney General." Randolph D. Moss, "Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel," 52 Admin. L. Rev. 1303, 1305 (Fall 2000). This policy dates back for at least 88 years. On May 31, 1918, President Wilson's Executive Order 2877 stated: "any opinion or ruling by the Attorney General upon any question of law arising in any Department . . . *shall be treated as binding* upon all departments . . . therewith concerned."

54. As you testified at your hearing, "A number of senior military officers, the four Judge Advocates General, expressed their strong reservations about the possible implications" of the OLC opinion. As Brigadier General Kevin Sandkuhler, then Staff Judge Advocate to the Commandant of the Marine Corps, wrote: "The common thread among [the JAG] recommendations is concern for servicemembers. OLC does not represent the services; thus, understandably, concern for servicemembers is not reflected in their opinion. Notably, their opinion is silent on the UCMJ." Did you agree with Brigadier General Sandkuhler's statement? What was your reaction to the JAG memos? Did you relay the JAGs' concerns to OLC?

Response:

The Department of Justice's Office of Legal Counsel (OLC) expressly deferred to the Department of Defense to analyze the Uniform Code of Military Justice (UCMJ), which is why it was not addressed in the OLC opinion that I received. The analysis of the UCMJ, which is part of the Working Group Report, reflects the analysis of attorneys at the Department of Defense, including military attorneys.

With respect to the interests of U.S. military personnel, the OLC opinion was a legal opinion, not a policy opinion, so it did not address those matters. Moreover, those within the Department of Defense, including the military attorneys, were far better situated to understand and assess policy and operational considerations. The concern for the effect that authorizing more aggressive techniques might have on service members was deliberated and discussed by the Working Group. That very concern is ultimately reflected in the Working Group Report. For example, the Working Group Report states:

- "Participation by U.S. military personnel in interrogations which use techniques that are more aggressive than those appropriate for POWs would constitute a significant departure from traditional U.S. military norms and could have an adverse impact on the cultural self-image of U.S. military forces. Those techniques considered in this review that raise this concern are relatively few in number . . ." [p. 69 & n.76]

- "General use of exceptional techniques (generally having substantially greater risk than those currently, routinely used by U.S. Armed Forces interrogators), even though lawful, may create uncertainty among interrogators regarding the appropriate limits of interrogations. They should therefore be employed with careful procedures and only when fully justified." [p. 69]

- "Some nations may assert that the U.S. use of techniques more aggressive than those appropriate for POWs justifies similar treatment for captured U.S. personnel." [p. 69]

- "Other nations, including major partner nations, may consider use of techniques more aggressive than those appropriate for POWs violative of international law or their own domestic law, potentially making U.S. personnel involved in the use of such techniques subject to prosecution for perceived human rights violations in other nations or to be surrendered to international fora, such as the ICC; this has the potential to impact future operations and overseas travel of such personnel." [pp. 68-69]

Those considerations were important to me and were part of the reason that I recommended that the Secretary approve only 24 of the 35 techniques that the Working Group evaluated. Of those 24 techniques that I recommended, 17 of them were already allowed by the Army Field Manual.

55. On November 3, 2005, I sent the attached letter to Secretary Rumsfeld expressing my concern about the Federal Bureau of Investigation's objections to the Defense Department's interrogation policies at Guantanamo Bay. On November 16, 2005, I received a response from Secretary Rumsfeld stating, "I have asked Jim Haynes, Department of Defense General Counsel, to be in touch with you on this. He will get back to you as soon as possible." However, I never received a response from you. Rather, on February 6, 2006, I received a response to my letter from Stephen Cambone, Undersecretary of Defense for Intelligence. Why did Undersecretary Cambone respond to my letter instead of you? Was your failure to respond related in anyway to your pending nomination?

Response:

To the best of my knowledge, I did not receive the letter in your question, nor was I assigned to respond to this letter. To the best of my recollection, this is the first I have heard of this matter.

I note that the Under Secretary for Intelligence is an appropriate official in the Department to answer questions concerning interrogations. As the proponent of the newly published DoD Directive 3115.09, DoD Intelligence Interrogations, Detainee Debriefings and Tactical Questioning, dated November 3, 2005, the Undersecretary of Defense for Intelligence exercises "primary staff responsibility for intelligence interrogations, detainee debriefings and tactical questioning" on behalf of the Secretary of Defense. He also serves as "primary liaison to the Intelligence Community" for these matters.

The fact that you received a response from the Under Secretary and not from me was not a decision I made related to my pending nomination.

56. My letter to Secretary Rumsfeld asked the following questions:

1. **Has the Defense Department reviewed and addressed the legal and policy concerns raised by the FBI?**
2. **Have Defense Department interrogation policies at Guantanamo Bay changed in response to FBI concerns? If so, how have the policies changed?**
3. **Are the interrogation techniques that you approved for use at Guantanamo Bay on April 16, 2003, still operational?**

Undersecretary Cambone's letter of February 6, 2006, did not respond to my first two questions. Please respond to these questions.

Response:

The Department of Defense has renewed and revised its detainee operations on multiple occasions over many years. Interrogation techniques within the Department, including at Guantanamo Bay, Cuba, are limited to those listed and authorized in the Army Field Manual.

57. Undersecretary Cambone's letter of February 6, 2006, states that the interrogation techniques Secretary Rumsfeld approved for use at Guantanamo Bay on April 16, 2003, are "still authorized for use when approved and appropriate." However, at your hearing, you said when the President signed the Detainee Treatment Act into law the Defense Department issued an order "within hours" providing that the all interrogations by Defense Department personnel be conducted only using techniques authorized and listed in the Army Field Manual on Interrogations. You stated, "Therefore, as we speak, within the Defense Department, only those techniques authorized and listed in the Field Manual, the 1992 version of the Field Manual for interrogations, are authorized." How do you reconcile Undersecretary Cambone's statement with your statement? Please provide a copy of the order issued by the Defense Department limiting interrogation techniques to those authorized and listed in the Army Field Manual.

Response:

My statement concerning the Department's order in response to passage of the Detainee Treatment Act was correct. It remains the Department's policy. After the passage of the Detainee Treatment Act, no techniques other than those authorized and listed in the Army Field Manual on Interrogations were authorized for use at Guantanamo or any other location by Department of Defense interrogators. Please see the attached order.

58. In my letter of November 3, 2005, I referenced, "Legal Analysis of Interrogation Techniques," an FBI memo which concludes that interrogation techniques authorized by Secretary Rumsfeld "are not permitted by the U.S. Constitution." In response, Undersecretary Cambone wrote that the FBI memo "does not reflect techniques approved by the Secretary of Defense." However, you recommended and Secretary Rumsfeld approved a number of interrogation techniques that the FBI memo concludes are unconstitutional, including, among others, the use of stress positions, the use of 20-hour interrogations, removal of clothing, and using individual phobias (such as fear of dogs) to induce stress. Isn't Undersecretary Cambone's statement inaccurate? Do you agree with the conclusions of the FBI memo?

Response:

I have not reviewed and analyzed the FBI memo referenced in your question.

The Department of Defense has renewed and revised its detainee operations on multiple occasions over many years. Interrogation techniques within the Department, including at Guantanamo Bay, Cuba, are limited to those listed and authorized in the Army Field Manual.

59. Undersecretary Cambone did not address two other FBI documents that I referenced in my letter. One states that the FBI and the Defense Department have "differing assessments of the efficacy of harsh interrogation techniques" and "differing views on the propriety of the harsher techniques." In the other document, a May 10, 2004 e-mail, an FBI official states that the Defense Department's interrogation techniques were "not effective or producing Intel that was reliable. ... We all agreed DoD tactics were going to be an issue in the military commission cases." The e-mail also states, "I know Mr. [Bruce] Swartz brought this to the attention of DoD OGC." When did you become aware of the FBI's concerns? What did you do, if anything, in response to these concerns? Please describe any communications between you and Mr. Swartz and any other Justice Department or FBI officials about this issue.

Response:

I do not recall specific FBI complaints at the time of the November 27, 2002, memorandum to Secretary Rumsfeld, nor do I recall ever speaking with Mr. Swartz about this issue. I do, however, know that there were concerns about the appropriate means of questioning the detainees at Guantanamo at that time. It was because of those continuing concerns, including my own, in late 2002 and early 2003 that, in January 2003, I recommended to the Secretary that he rescind his order of December 2002, concerning the interrogation of the 20th hijacker, Qahtani, and allow me to convene a Working Group to evaluate the Department's options further.

As Principal Deputy General Counsel Dell'Orto expressed in his response to the Senate Armed Services Committee:

> "Differences in approaches toward interrogation between the military intelligence community and the law enforcement community were reported beginning relatively early in the evolution of DoD detention operations at Guantanamo. For example, the law enforcement community raised issues regarding the requirement to provide *Miranda* warnings to detainees. The military intelligence community was not obligated to provide such warnings. It also was reported on several occasions that the law enforcement community believed the most effective way to obtain information from a detainee was to build rapport with the detainee. I understood that the military intelligence community desired to pursue a course of interrogation that drew heavily on the techniques described in Army Field Manual 34-52. From time to time reports of these differences in approaches to interrogation came to our office from various sources. Some reports came from the military intelligence community at Guantanamo, and some came from Department of Justice attorneys who met with Department of Defense attorneys from time to time. Whenever Mr. Haynes learned of such reports, he directed inquiry through

the Joint Staff to the chain of command to determine whether the differences between the communities reflected the historically different roles of the two communities or whether there were specific complaints about the interrogation of particular detainees and the specific techniques employed."

60. On July 7, 2006, Deputy Secretary of Defense Gordon England issued a memorandum entitled, "Application of Common Article 3 of the Geneva Conventions to the Treatment of Detainees in the Department of Defense." Please describe your and your office's role in the drafting and legal review of this memorandum.

Response:

I, along with my office, reviewed the *Hamdan* decision and advised senior members of the Department as to its holding with respect to Common Article 3. My office and I also reviewed the memorandum issued by the Deputy Secretary.

61. The England memo states, "The Supreme Court has determined that Common Article 3 to the Geneva Conventions of 1949 applies as a matter of law to the conflict with Al Qaeda." Do you agree with this statement?

Response:

Yes. As you know, the President had determined in his memorandum of February 7, 2002, that "common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to 'armed conflict not of an international character.'" The Supreme Court has now spoken in *Hamdan v. Rumsfeld* and concluded that the current conflict in which we are engaged with al Qaeda is one covered by Common Article 3. The Supreme Court has thus resolved the question of its applicability to the conflict with al Qaeda. As General Counsel of the Department of Defense, I am bound, just as I would be should I be confirmed to serve on the U.S. Court of Appeals, to follow the law as interpreted by the Supreme Court.

62. In light of *Hamdan v. Rumsfeld*, in your personal opinion are all U.S. personnel now required to abide by Common Article 3 in the treatment of detainees?

Response:

Yes, the Supreme Court has determined that Common Article 3 to the Geneva Conventions of 1949 applies as a matter of law to the conflict with al Qaeda. As you know, on February 7, 2002, the President directed the Armed Forces to treat detainees humanely. To that end, they are provided with three culturally appropriate meals a day; adequate shelter and clothing; the opportunity to worship, including a copy of the Koran and prayer beads; the means to send and receive mail; reading materials; and exceptional medical care. The individuals held at Guantanamo are treated in a manner that exceeds the requirements of Common Article 3.

Responses of William J. Haynes II
Nominee to the U.S. Court of Appeals for the Fourth Circuit
to the Written Questions of Senator Russell D. Feingold

Thank you for giving me the opportunity to clarify and expand my testimony in these questions for the record. At the outset, I would like to draw your attention to two considerations. First, it is important for me to note that I am appearing before you as a nominee for the federal judiciary and answer in that capacity. Yet, I am also a sitting government official. I recognize that Congress has important roles in both providing oversight of the Executive branch and advice and consent on judicial nominees. I am before you in the latter capacity; however, where your questions concerned the former, I have attempted to be responsive as possible, consistent with my continuing responsibility as a government official, and consistent with my memory.

1. **After your first nominations hearing in 2003, I submitted two rounds of written questions asking whether you would recuse yourself from a case challenging the President's creation of military commissions pursuant to his November 2001 Executive Order, or a case involving an individual tried in such a military commission. You responded, "[t]he facts of each case must be weighted and considered individually." You stated further, "[i]f confirmed, I would determine whether to recuse myself based on applicable law." While you reiterated provisions within the Code of Judicial Conduct, you declined in response to both sets of questions to address any specific hypothetical, and said it would be "imprudent" to do so "because that would be pre-judging an issue that cannot be analyzed until the actual facts and legal issues are determined." Your refusal to respond to these recusal questions is of great concern to me, so I would like to give you another opportunity to answer.**

   a. **If you were presented with a case involving an individual challenging his designation as an enemy combatant and he was so designated by the President and held indefinitely after you left the Department of Defense (DOD), would you recuse yourself from hearing this case because you had a role in developing the process for designating individuals as enemy combatants? Please explain.**

Response:

If confirmed, it would be necessary to analyze the specific facts of the case before me; however, I would likely recuse myself from hearing the case.

In analyzing the matter, I would determine whether to recuse myself based on applicable law and the Code of Conduct for United States Judges. As stated in my earlier answer, if confirmed, I would adhere strictly to all applicable statutes, court decisions, policies, and ethical rules, including 28 U.S.C. § 455, and the Code of Conduct for

United States Judges. That Code of Conduct demands, among other things, that a judge should uphold the integrity of the Judiciary, that a judge should avoid the appearance of impropriety, and that a judge should perform the duties of the office impartially. As the Commentary to Canon 1 observes, deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. For the same reason, judges must avoid the appearance of impropriety, the objective test of which is "whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired."

In assessing the propriety of disqualification, a judge applying the Code should employ an analysis similar to that required by 28 U.S.C. § 455. For example, if confirmed, I would be obligated to (and of course would) disqualify myself from any proceeding in which I had "personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." Similarly, I would be obligated to (and of course would) disqualify myself from any proceeding in which I had "served as lawyer in the matter in controversy, or a lawyer with whom [I] served during such association as a lawyer concerning the matter," or "participated as counsel, adviser, or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy." Applying this guidance requires close attention to the particular facts of each case. I would take care to disqualify myself in any proceeding in which my impartiality might reasonably be questioned. I believe fervently not only that the judiciary must make decisions with integrity, but also that the public must be able to have confidence in the integrity of the judiciary and its decisions.

b. If you were presented with a case involving a challenge to any issue related to the use of military commissions to try individuals held at Guantanamo Bay, would you recuse yourself from hearing this case because you had a role in developing the President's November 2001 Executive Order authorizing military commissions and in evaluating their legality?

Response:

If confirmed, it would be necessary to analyze the specific facts of the case before me; however, I would likely recuse myself from hearing the case.

In analyzing the matter, I would determine whether to recuse myself based on applicable law and the Code of Conduct for United States Judges and I would follow the same procedures outlined in the response immediately preceding (response to question 1(a)).

c. As part of your response to the written questions I submitted to you in 2003, you stated you "would take care to disqualify [yourself] in any proceeding in which [your] impartiality might be reasonably be questioned." If a case were to come before you involving an individual tried in a military commission, would this constitute a "proceeding in which [your] impartiality might reasonably be questioned"? Please explain.

Response:

If I were confirmed, and a case were to come before me involving an individual tried in a military commission concerning some aspect of that individual's detention or trial, I would need to analyze the specific facts of the case before me; however, I could imagine the proceeding could be one in which my impartiality might reasonably be questioned. In analyzing this situation, I would consider, among many things, the Code of Conduct for United States Judges.

The Code of Conduct demands, among other things, that a judge should uphold the integrity of the Judiciary, that a judge should avoid the appearance of impropriety, and that a judge should perform the duties of the office impartially. As the Commentary to Canon 1 observes, deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. For the same reason, judges must avoid the appearance of impropriety, the objective test of which is "whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired."

Without knowledge of the facts and circumstances of a particular case, it is impossible to state with absolute certainty whether my impartiality might reasonably be questioned in such a case. Indeed, it would be imprudent for a nominee to say definitively how he or she would apply the recusal rules in a future case, because that would be pre-judging an issue that cannot be analyzed until the actual facts and legal issues are determined.

I have, however, committed to adhering to all applicable statutes, court decisions, policies, and ethical rules, including 28 U.S.C. § 455, which requires, among other things, recusal when a judge's "impartiality might reasonably be questioned." If confirmed, I would be most rigorous in ensuring that I disqualify myself in any proceeding in which my impartiality might reasonably be questioned. I believe fervently not only that the judiciary must make decisions with integrity, but also that the public must be able to have confidence in the integrity of the judiciary and its decisions.

2. As you know, the President has admitted that in 2001 he authorized the National Security Agency (NSA) to conduct wiretaps within the United States

without obtaining the court orders required by the Foreign Intelligence Surveillance Act (FISA). The NSA is part of the Defense Department, where you have served as General Counsel since May 31, 2001.

a. When were you first made aware of the existence of the President's authorization of the NSA to conduct electronic surveillance without obtaining the court orders required by FISA?

Response:

I believe I became aware of the existence of the NSA program referenced in your question at the same time as the rest of the public, namely, when the New York Times elected to publish an article concerning the program. I had been aware that the United States had a highly classified program to which I was not privy but which was covered by competent counsel. After the New York Times published its article, I learned that this was the same program. I do not know the details of this program and am not cleared for access.

b. As DOD General Counsel, have you provided any input at any time to anyone within the Administration about the legality of the President's authorization of the NSA to conduct electronic surveillance without obtaining the court orders required by the Foreign Intelligence Surveillance Act? If so, when did you provide that input, and what was the substance of your legal views on the program? Please provide copies of any legal analysis of the program that you drafted or supervised.

Response:

No, I have not provided any input about the legality of the NSA program.

c. Do you agree with the legal analysis laid out in a January 19, 2006, Justice Department memo on the program entitled "Legal Authorities Supporting the Activities of the National Security Agency Described by the President"?

Response:

I have not had an opportunity to study that analysis and so I have no opinion regarding that memorandum.

d. Do you believe that the Supreme Court's decision in *Hamdan* has undermined the Administration's legal justifications for the NSA program? If not, why not?

Response:

Because I have not been involved in the provision of legal advice regarding the NSA program and have not studied the analysis the Department of Justice has offered, I cannot offer an opinion regarding the impact of the *Hamdan* decision on the NSA program's legal justifications.

3. **A number of major events during your tenure at the Defense Department have been controversial. You were centrally involved in decisions about interrogation techniques that have had serious repercussions for American foreign policy and our moral authority in the world. Policies relating to "enemy combatants" held at Guantanamo Bay have similarly fueled the fire of anti-American sentiment overseas. The President's authorization of trial by military commission, which you were instrumental in designing, was held unlawful by the Supreme Court. Many believe the policies in which you have been heavily involved have been significant failures, both in terms of their failure to stand up to legal challenges and their effect on the national interest. You seem to have consistently demonstrated poor legal and policy judgment in attempts to justify proposals that have since been repudiated. What can you point to in your record to reassure us that you would not bring this same approach to your work as a federal judge?**

Response:

The duties and responsibilities of General Counsel of the Department of Defense involve providing legal advice on the many questions and policies that arise in the operations of one of the largest organizations in the world. The Department of Defense has a budget larger than that of any corporation and of most countries. The lawyers in my office provide advice on issues that involve the day-to-day operations of that organization, including personnel, health, environment, property, contracting, and a great many other matters in addition to questions involving the deployment and activities of the U.S. Armed Forces around the world, including in fighting the war on terrorism. I am proud of the work that the lawyers in my office have provided to our client during one of the most challenging and important periods in recent American history, a time when the building in which we work was attacked by terrorists and the country has been at war.

I also am also proud of the way that the Department of Defense has defended the country. There have been some cases where individuals have violated the rules. I am proud of the way that the Department of Defense swiftly investigated those incidents and all matters related to them and took corrective action, which continues. Policies have been changed to reduce the chances of such abuses happening in the future. But throughout, the vast majority of U.S. Armed Forces personnel have conducted themselves honorably and have complied with all applicable laws and regulations. They have abided by the direction and the imperative to treat detainees humanely and have conducted U.S. military operations in accordance with the law of war.

I believe that much of what the courts have considered that relates to actions the President has taken in the war on terrorism has been upheld by the courts. One of the most important decisions is *Hamdi v. Rumsfeld*. In that case, the Supreme Court upheld the military's authority to detain enemy combatants without criminal charge. The Court upheld a fundamental conclusion of the executive branch, which is that the terrorist attacks of September 11, 2001 began a war. In the recent *Hamdan* case, the Court found that the current military commission rules did not conform to Congress's intent in passing the Uniform Code of Military Justice in 1950. It did not, however, hold that military commissions were unconstitutional. In fact, several members of the majority observed that if Congress were to authorize military commissions more explicitly, they could be used. It should be observed that at the time the President issued his military order to the Defense Department in November 2001, several Supreme Court cases, including *Ex Parte Quirin*, *Ex Parte Yamashita*, and *Johnson v. Eisentrager*, had upheld the use of military commissions to try enemy aliens for war crimes. The military commission rules and crimes and elements, developed after careful study and consultation throughout the Department of Defense, including the Military Departments, provided much more clarity and procedural protections than the World War II military commissions that had been upheld by the Supreme Court at that time. The Supreme Court now has further elaborated on its case law in the area, and I would expect the Defense Department to operate in accordance with the case law.

If confirmed as a judge, I would always seek faithfully to apply the Constitution, the laws and treaties of the United States, and applicable precedent.

4. **At the hearing, you talked about "the balances that need to be struck in light of what the President has directed and what the laws and the Constitution demand of us in government." What were you referring to when you said "what the President has directed"?**

Response:

I appreciate the opportunity to clarify my statement at the hearing. I was referring generally to the fact that, at times, the President or Cabinet Officers may make policy decisions that are not only within the bounds of legal and constitutional requirements (as they must be), but also are even more constrained than what the law would require. For example, on February 7, 2002, the President determined that al Qaeda and the Taliban were not entitled to prisoner of war status. He reached that determination based on the following: The Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention) applies to the conflict with the Taliban, but not to the conflict with al Qaeda; al Qaeda is not a state party to the Geneva Convention; it is a foreign terrorist group. As such, its members are not entitled to prisoner of war status. Although the United States never recognized the Taliban as the legitimate Afghan government, Afghanistan is a party to the Geneva Convention, and the President determined that the provisions of the Geneva Convention apply to the conflict with the Taliban. Under the

terms of the Geneva Convention, however, the Taliban detainees do not qualify as prisoners of war.

Nonetheless, in addition to the above determinations based on legal conclusions, the President also directed that, as a matter of policy, the U.S. Armed Forces "shall treat all of the individuals detained at Guantanamo humanely, and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva." I also recognize that the Supreme Court has since held that the provisions of Common Article 3 of the Geneva Conventions apply to the armed conflict with al Qaeda.

5. **You testified during your first nominations hearing in November 2003 that the Geneva Conventions did not apply to the conflicts with the Taliban and with al Qaeda. According to an article published on February 27, 2006, in *The New Yorker* magazine, during a meeting of high-ranking civilian and military officials at the Pentagon in 2005, the participants considered a proposal to make it official Pentagon policy to treat detainees in accordance with Common Article 3 of the Geneva Conventions. The story reports that you were one of only two individuals at that meeting to oppose the proposal.**
   a. **Is the press account of this meeting accurate? If not, please explain what was discussed at the meeting with regard to the Geneva Conventions and what position(s) you advocated.**
   b. **In light of the Supreme Court's decision in *Hamdan v. Rumsfeld*, do you now believe that your earlier conclusions about the Geneva Conventions were incorrect?**
   c. **What steps do you believe should be taken in order to comply with the Court's ruling?**
   d. **Given the Court's decision, how do you think that detainees held at Guantanamo Bay should be tried?**

Response:

There have been many news reports about me that are inaccurate. My view had been that, while adhering to the standards of Common Article 3 was a legal obligation in many circumstances, it was not a legal obligation in the context of the U.S. conflict with al Qaeda.

The President determined in his memorandum of February 7, 2002, that "common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to 'armed conflict not of an international character.'" Moreover, the U.S. Court of Appeals for the District of Columbia Circuit in *Hamdan v. Rumsfeld* had agreed with the President's determination.

The Supreme Court has now spoken in *Hamdan v. Rumsfeld* and concluded that the current conflict in which we are engaged with al Qaeda is one covered by Common Article 3. The Supreme Court has thus resolved the question of its applicability to the

conflict with al Qaeda. As General Counsel of the Department of Defense, I am bound, just as I would be should I be confirmed to serve on the U.S. Court of Appeals, to follow the law as interpreted by the Supreme Court.

I have always agreed that the standard for treatment of all detainees should be humane treatment.

It is important to bear in mind what the Supreme Court did not address. The Supreme Court did not address the President's determinations that members of al Qaeda are not entitled to prisoner of war treatment because al Qaeda is not a party to the Geneva Conventions or the President's determination that the Taliban do not qualify as prisoners of war under Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War.

The Department is already taking steps to comply with the *Hamdan* decision. I, along with my office, reviewed the *Hamdan* decision and advised senior members of the Department as to its holding with respect to Common Article 3. As you may know, Deputy Secretary England issued a memorandum on July 7, 2006, stating that "the Supreme Court has determined that Common Article 3 to the Geneva Conventions of 1949 applies as a matter of law to the conflict with Al Qaeda." He further requested that recipients of that memorandum "promptly review all relevant directives, regulations, policies, practices, and procedures under [their] purview to ensure that they comply with the standards of Common Article 3." My office and I reviewed the memorandum issued by the Deputy Secretary.

After the Hamdan decision, the assistance of Congress is necessary if the current military commissions are to be an available option for trying the Al Qaeda detainees. The Administration is preparing a legislative proposal to present to Congress and hopes to work with Congress to develop a way forward.

6. **As a matter of either law or policy, do you believe that a prohibition on evidence obtained through coercion should be a part of any new military commission procedures that Congress may establish?**

Response:

If confirmed to serve on the U.S. Court of Appeals, questions concerning the propriety of the use of "evidence obtained through coercion" may come before me. For that reason, I do not think it would be appropriate for me to offer an opinion on this question. If confirmed, I pledge to apply faithfully the law with respect to this issue.

7. **As you should be aware, agents of the FBI have at various times expressed serious concerns over the tactics being used by military interrogators at Guantanamo Bay. Some of the e-mails they wrote expressing these concerns have become public. One e-mail from May 2004 makes clear that FBI agents**

were instructed not to participate in DOD interrogations using harsher tactics than the FBI thought it appropriate to apply, and that the FBI believed DOD techniques were ineffective. That email also makes clear that representatives from the Criminal Division of the Justice Department "brought this to the attention of DoD OGC" – your office, the Office of General Counsel.

a. **When were you first made aware of FBI concerns about the interrogation techniques used by DOD personnel at Guantanamo Bay?**
b. **Who raised these concerns with you, and when?**
c. **What steps did you take in response?**
d. **Your memo to Secretary Rumsfeld regarding the authorization of interrogation techniques was dated November 27, 2002. Were you aware, when you wrote that memo, of FBI complaints regarding the treatment of detainees at Guantanamo?**

Response:

I do not recall specific FBI complaints at the time of the November 27, 2002, memorandum to Secretary Rumsfeld, nor do I recall ever speaking with Mr. Swartz about this issue. I do, however, know that there were concerns about the appropriate means of questioning the detainees at Guantanamo at that time. It was because of those continuing concerns, including my own, in late 2002 and early 2003 that, in January 2003, I recommended to the Secretary that he rescind his order of December 2002, concerning the interrogation of the 20th hijacker, Qahtani, and allow me to convene a Working Group to evaluate the Department's options further.

As Principal Deputy General Counsel Dell'Orto expressed in his response to the Senate Armed Services Committee:

> "Differences in approaches toward interrogation between the military intelligence community and the law enforcement community were reported beginning relatively early in the evolution of DoD detention operations at Guantanamo. For example, the law enforcement community raised issues regarding the requirement to provide *Miranda* warnings to detainees. The military intelligence community was not obligated to provide such warnings. It also was reported on several occasions that the law enforcement community believed the most effective way to obtain information from a detainee was to build rapport with the detainee. I understood that the military intelligence community desired to pursue a course of interrogation that drew heavily on the techniques described in Army Field Manual 34-52. From time to time reports of these differences in approaches to interrogation came to our office from various sources. Some reports came from the military intelligence community at Guantanamo, and some came from Department of Justice attorneys who met with Department of Defense attorneys from time to time. Whenever Mr. Haynes learned of such reports, he directed inquiry through the Joint Staff to the chain of command to determine whether the

differences between the communities reflected the historically different roles of the two communities or whether there were specific complaints about the interrogation of particular detainees and the specific techniques employed."

8. **Secretary Rumsfeld in January 2003 ordered you to convene a working group to make recommendations on interrogation techniques, and to report your recommendations back to him. At your nomination hearing, in speaking about the formation and charge of the DOD Working Group, you stated, "the working group was requested to evaluate every consideration conceivable: from a policy perspective, from a legal perspective, from an effectiveness perspective, from a public affairs perspective, such any of it become known, from an international perspective, a diplomatic perspective, everything was on the table."**

    a. **Please explain your role and level of involvement in the creation of the three major components of the Working Group report: the legal analysis, the policy portion, and the appendix, which described 35 separate interrogation techniques.**

    b. **The DOD Working Group report, dated April 4, 2003, incorporated much of the reasoning of the August 1, 2002, Office of Legal Counsel (OLC) "Bybee" memorandum, which was addressed to you and Alberto Gonzales. Virtually all of the arguments made in the Bybee memo were incorporated into the Working Group Report, including the idea that the exercise of inherent presidential power could excuse acts of torture. Yet a number of senior military lawyers had expressed concern about the OLC approach. At any point in the process, did you represent to the Justice Department the view of the JAGs that the Bybee memo and other OLC views failed to take into account the interests of American service personnel? If not, why not?**

Response:

At the outset, please note that the August 1, 2002 Office of Legal Counsel memorandum was not addressed to me. My role in the development of the Working Group Report was as follows. At my urging, the Secretary of Defense directed me to establish a working group to consider the difficult and complex issues surrounding the interrogation of those detained at Guantanamo. I asked the General Counsel of the Air Force to chair the Working Group. At my request, the Judge Advocates of the military departments were to be included along with individuals from the following offices: the Under Secretary of Defense for Policy; the Acting Assistant Secretary of Defense for Special Operations and Low Intensity Conflict; the General Counsel of the Department of the Army; the General Counsel of the Department of the Navy; the Director of the Joint Staff; the Director, Defense Intelligence Agency; the Legal Counsel to the Chairman of the Joint Chiefs of Staff; the Counsel for the Commandant of the Marine Corps; and the

Staff Judge Advocate for the Commandant of the Marine Corps. I was not involved in the early deliberations of the Working Group.

I also sought an opinion from the Department of Justice's Office of Legal Counsel on some of the legal questions under consideration by the Working Group. I encouraged those with disagreements with the Office of Legal Counsel analysis to meet with Department of Justice attorneys preparing the opinion. It is my understanding that there were several such meetings between the Office of Legal Counsel and some of the members of the Working Group during which the views of the participating judge advocates and others were expressed to the Department of Justice attorneys. The Office of Legal Counsel expressly deferred to the Department Defense to analyze the Uniform Code of Military Justice, which is why it was not addressed in the Office of Legal Counsel opinion that I received. The analysis of the Uniform Code of Military Justice, which is a key part of the Working Group Report, reflects the analysis of attorneys at the Department of Defense, including judge advocates.

Although the Working Group was bound by the Office of Legal Counsel opinion in its general legal analysis, it also remained the Working Group's responsibility to apply that analysis to the techniques under consideration, as well as to analyze the Uniform Code of Military Justice and the permissibility of those techniques under the Uniform Code of Military Justice. The application of the legal analysis contained within the body of the report is reflected in the chart, to which your question refers. I did sit in on and participated in some of the discussions of that chart, which occurred much later in the Working Group process.

In terms of the policy considerations contained within the Report, it was important to me that all of the policy considerations be included in that Report. The particular interests of U.S. military personnel were among those policy considerations to be addressed. Specifically, in his January 15, 2003, memorandum to me, the Secretary directed the working group to consider "[p]olicy considerations with respect to the choice of interrogation techniques, including: . . . effect on treatment of captured US military personnel, . . . historical role of US armed forces in conducting interrogations."

With respect to the interests of U.S. military personnel, the Office of Legal Counsel opinion was a legal opinion, not a policy opinion, so it did not address those matters. Moreover, those within the Department of Defense, including judge advocates, were far better situated to understand and assess policy and operational considerations. The concern for the effect that authorizing more aggressive techniques might have on service members was deliberated and discussed by the Working Group. That very concern is ultimately reflected in the Working Group Report. For example, the Working Group report states:

- "Participation by U.S. military personnel in interrogations which use techniques that are more aggressive than those appropriate for POWs would constitute a significant departure from traditional U.S. military norms and could have an adverse impact on the cultural self-image of U.S. military forces. Those

techniques considered in this review that raise this concern are relatively few in number . . ." [p. 69 & n.76]

- "General use of exceptional techniques (generally having substantially greater risk than those currently, routinely used by U.S. Armed Forces interrogators), even though lawful, may create uncertainty among interrogators regarding the appropriate limits of interrogations. They should therefore be employed with careful procedures and only when fully justified." [p. 69]

- "Some nations may assert that the U.S. use of techniques more aggressive than those appropriate for POWs justifies similar treatment for captured U.S. personnel." [p. 69]

- "Other nations, including major partner nations, may consider use of techniques more aggressive than those appropriate for POWs violative of international law or their own domestic law, potentially making U.S. personnel involved in the use of such techniques subject to prosecution for perceived human rights violations in other nations or to be surrendered to international fora, such as the ICC; this has the potential to impact future operations and overseas travel of such personnel." [pp. 68-69]

9. **Twenty retired military officers sent Senators Specter and Leahy a letter on July 7, 2006, expressing their concern about your nomination, and "the role [you] played in establishing – over the objections of uniformed military lawyers – detention and interrogation policies in Iraq, Afghanistan, and Guantanamo which led not only to the abuse of detainees in U.S. custody but to a dangerous abrogation of the military's long-standing commitment to the rule of law." What is your response to their claim that you promoted policies that "compromised military values, ignored federal and international law, and damaged America's reputation and world leadership"?**

Response:

I respectfully disagree. As the General Counsel of the Department of Defense, just as I would if I were confirmed to serve on the U.S. Court of Appeals, I have sought to determine what the law required and I have worked tirelessly to uphold the rule of law. I have also sought to honor military values. Respect for those values has been an important part of the basis for many of my policy recommendations. Moreover, it bears noting that I only know three of the individuals who signed the letter to which the question refers. None of the letter's signers was involved in any of deliberations or discussions concerning interrogation policy. In fact, to my knowledge, none of them was serving in the Pentagon at the time of those discussions. They appear to be basing their opinions, at least in part, upon inaccurate media reports.

Responses of William J. Haynes II
Nominee to the U.S. Court of Appeals for the Fourth Circuit
to the Written Questions of Senator Dianne Feinstein

Thank you for giving me the opportunity to clarify and expand my testimony in these questions for the record. At the outset, I would like to draw your attention to two considerations. First, it is important for me to note that I am appearing before you as a nominee for the federal judiciary and answer in that capacity. Yet, I am also a sitting government official. I recognize that Congress has important roles in both providing oversight of the Executive branch and advice and consent on judicial nominees. I am before you in the latter capacity; however, where your questions concerned the former, I have attempted to be responsive as possible, consistent with my continuing responsibility as a government official, and consistent with my memory.

Background: Water boarding, an interrogation technique in which a prisoner is subjected to a form of simulated drowning, has been condemned and prosecuted by the United States as torture for over 100 years. Yet there have been reports that this technique has been used on prisoners held by the CIA. On March 17, 2005, former Director Porter Goss stated to the Senate Armed Services Committee that water boarding fell into "an area of what I will call professional interrogation techniques."

Your November 27, 2002 memo to Secretary Rumsfeld listed "use of a wet towel and dripping water to induce the misperception of suffocation," a form of "water boarding" as an interrogation technique that "may be legally available."

- **Do you agree with Mr. Goss's statement that water boarding may be acceptable?**

Response:

I would like to clarify that I have not studied "water boarding" and do not know whether that the question's reference to the use of a wet towel is in fact a form of "water boarding." I do not think, however, it would be appropriate for our military to use such a tactic. In my November 27, 2002 memorandum, I recommended against the proposed use of a wet towel as described above.

- **Does it remain your opinion that "use of a wet towel and dripping water to induce the misperception of suffocation" as an interrogation technique "may be legally available"? Why?**

Response:

I stated in my memo that:

> "[w]hile all Category III techniques may be legally available, we believe that, as a matter of policy, a blanket approval of Category III techniques is not warranted at this time. Our Armed Forces are trained to a standard of interrogation that reflects a tradition of restraint."

The language quoted above reflected the fact that the Commander of JTF-170 concluded that all of the techniques that he requested "do not violate U.S. or international laws."

I did not reach a determination that the technique identified in question was legally available, because I did not need to reach a determination on the legal question. Based on my own views and those of the Deputy Secretary of Defense, the Under Secretary of Defense for Policy, and the Chairman of the Joint Chiefs of Staff, I recommended as a matter of policy against its use.

Pursuant to the Detainee Treatment Act of 2005, no person in the custody or under the effective control of the Department of Defense, or detained in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation. The technique recited in the question is not listed in the field manual and consequently would not be legal for use with any person in the custody or under the effective control of the Department of Defense, or detained in a Department of Defense facility.

Background: In the November 27 memo to Secretary Rumsfeld you also listed "use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family" as an interrogation technique that "may be legally available."

- **Does it remain your opinion that "use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family" as an interrogation technique "may be legally available"? Why?**

Response:

I stated in my memo that

> "[w]hile all Category III techniques may be legally available, we believe that, as a matter of policy, a blanket approval of Category III techniques is not warranted at this time. Our Armed Forces are trained to a standard of interrogation that reflects a tradition of restraint."

The language quoted above reflected the fact that the Commander of JTF-170 concluded that all of the techniques that he requested "do not violate U.S. or international laws."

I did not reach a determination that the technique identified in question was legally available, because I did not need to reach a determination on the legal question. Based on my own views and those of the Deputy Secretary of Defense, the Under Secretary of Defense for Policy, and the Chairman of the Joint Chiefs of Staff, I recommended as a matter of policy against its use.

Pursuant to the Detainee Treatment Act of 2005, no person in the custody or under the effective control of the Department of Defense, or detained in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation. The technique recited in the question is not listed in the field manual and consequently would not be legal for use with any person in the custody or under the effective control of the Department of Defense, or detained in a Department of Defense facility.

- **Do you believe such techniques could ever lawfully be used by a foreign country on captured American personnel?**

Response:

U.S. Armed Forces conduct their operations in accordance with the law of war. Captured U.S. forces would be entitled to, and should be provided, prisoner of war protections, including protection against application of such techniques.

It should be noted in addressing this question in the context of a U.S. service member captured by the Taliban or al Qaeda that their forces have demonstrated repeatedly their absolute disregard for the law of war and any obligation to provide humane care and treatment to persons they capture.

Background: In a June 25, 2003 letter to Senator Leahy, you stated that the military's policy did not permit the use of "cruel, inhuman and degrading treatment," which is prohibited by the Convention Against Torture.

In your November 27, 2002 memorandum to Secretary Rumsfeld, you recommended that he authorize a set of techniques including "stress positions," forced nudity, and the use of dogs "to induce stress."

- **Do you believe that these techniques constitute cruel, inhuman and degrading treatment?**

Response:

I appreciate the opportunity to clarify my November 2002 recommendation to Secretary Rumsfeld. I do not believe that the techniques authorized by the Secretary, properly administered, constituted prohibited cruel, inhuman, and degrading treatment.

The use of the techniques identified in the question had to be used consistent with Department of Defense regulations and directives, U.S. law, and the President's direction to the U.S. Armed Forces that they treat detainees humanely. Nothing in the Secretary's memorandum provided otherwise.

Moreover, it is important to note that authorization to employ the techniques identified in your question was rescinded more than five months before my letter to Senator Leahy. At the time of that letter, the Secretary had authorized a more limited array of 24 techniques for possible use with unlawful enemy combatants at Guantanamo, 17 of which were already allowed by the Army Field Manual.

I obtained oral advice that the Office of Legal Counsel remained of the view that the 24 techniques that had been authorized by the Secretary on April 16, 2003, were in fact legally permissible. This advice is reflected in the testimony of Patrick F. Philbin, then-Associate Deputy Attorney General. On July 14, 2004, Mr. Philbin testified before the House Permanent Select Committee on Intelligence that it was the view of the Justice Department that "each of those [24] techniques is plainly lawful" and that "[t]he proper use of these 24 techniques, in accordance with the General Safeguards [, which the Secretary required as part of his authorization] is lawful under any relevant legal standard."

- **Did you believe so when you assured Senator Leahy that military policy prohibits such treatment?**

Response:

No, I did not believe that those techniques as authorized by the Secretary constituted such treatment. Please see the answer to the immediately preceding question for further explanation.

Background: The Working Group Report on Detainee Interrogations in the Global War on Terrorism, which you delivered to Secretary Rumsfeld on April 4, 2003, asserted that the statutory prohibition against torture does not apply to the President's detention and interrogation of enemy combatants.

- **Did you agree with this contention at the time you delivered the Report to Secretary Rumsfeld?**

Response:

Please note that the Working Group Report discussion of the statutory prohibition proved to be wholly irrelevant to the needs of the Department and was not relied upon. Moreover, the Working Group Report was not disseminated. It was not a statement of policy or authorization. It has been withdrawn. The discussion to which the question refers was unnecessary at the time, and I did not need to nor did I rely upon that

discussion in my recommendation to the Secretary that he not adopt 11 of the 35 interrogation techniques evaluated by the Working Group. I recommended that the Secretary approve only 24 techniques. Of those 24 techniques, 17 were already allowed by the Army Field Manual.

I note that in formulating advice to the Secretary, all Department of Defense lawyers were guided by (and bound by) legal advice from the Department of Justice. This is consistent with the law and longstanding practice. As Randolph Moss, then-Assistant Attorney General for the Office of Legal Counsel under President Clinton, wrote in 2000: "When the views of the Office of Legal Counsel are sought on the question of the legality of a proposed executive branch action, those views are typically treated as conclusive and binding within the executive branch. The legal advice of the Office, often embodied in formal, written opinions, constitutes the legal position of the executive branch, unless overruled by the President or the Attorney General." Randolph D. Moss, "Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel," 52 Admin. L. Rev. 1303, 1305 (Fall 2000). This policy dates back for at least 88 years. On May 31, 1918, President Wilson's Executive Order 2877 stated: "any opinion or ruling by the Attorney General upon any question of law arising in any Department . . . *shall be treated as binding* upon all departments . . . therewith concerned."

- **Do you now believe that the President can lawfully authorize U.S. personnel to engage in torture?**

Response:

Fortunately, I have not had to confront this question. In addition to his specific directive that the U.S. Armed Forces treat all detainees humanely, the President has repeatedly stated that torture is unacceptable. For example in his statement on June 26, 2003, on the United Nations International Day in Support of Victims of torture, the President said, "The United States is committed to the world-wide elimination of torture and we are leading this fight by example."

This is a general, hypothetical legal question devoid of context and specific facts against which to apply the law. For the same reason that, at my hearing, I expressed regret for the asking for the Department of Justice Office of Legal Counsel Opinion, I believe it would be unwise to express my own views on such a question devoid of any facts.

I note that the law of war, relevant international law, U.S. law, and applicable directives including the Detainee Treatment Act, the United Nations Convention against Torture, 18 USC § 2340, and the Constitution, govern this issue.

Background: In February 2003, you received several memoranda from senior military lawyers criticizing the draft Working Group Report, which

recommended a number of interrogation techniques that violated established military doctrine

- **Did you heed these recommendations?**

Response:

Yes. As I recall, those memoranda contained two general categories of concern: the permissibility of techniques under the Uniform Code of Military Justice (UCMJ), and concerns about the possible impact of authorization of those techniques on American service members. The concerns expressed in the memoranda were reflected in the Working Group Report. The Department of Justice's Office of Legal Counsel (OLC) expressly deferred to the Department Defense to analyze the UCMJ, which is why it was not addressed in the OLC opinion that I received. The analysis of the UCMJ, which is part of the Working Group Report, reflects the analysis of attorneys at the Department of Defense, including judge advocates.

With respect to the interests of U.S. military personnel, the OLC opinion was a legal opinion, not a policy opinion, so it did not address those matters. Moreover, those within the Department of Defense, including judge advocates, were far better situated to understand and assess the policy and operational considerations. The concern for the effect that authorizing more aggressive techniques might have on service members was deliberated and discussed by the Working Group. That very concern is ultimately reflected in the Working Group Report. For example, the Working Group report states:

- "Participation by U.S. military personnel in interrogations which use techniques that are more aggressive than those appropriate for POWs would constitute a significant departure from traditional U.S. military norms and could have an adverse impact on the cultural self-image of U.S. military forces. Those techniques considered in this review that raise this concern are relatively few in number . . ." [p. 69 & n.76]

- "General use of exceptional techniques (generally having substantially greater risk than those currently, routinely used by U.S. Armed Forces interrogators), even though lawful, may create uncertainty among interrogators regarding the appropriate limits of interrogations. They should therefore be employed with careful procedures and only when fully justified." [p. 69]

- "Some nations may assert that the U.S. use of techniques more aggressive than those appropriate for POWs justifies similar treatment for captured U.S. personnel." [p. 69]

- "Other nations, including major partner nations, may consider use of techniques more aggressive than those appropriate for POWs violative of international law or their own domestic law, potentially making U.S. personnel involved in the use of such techniques subject to prosecution for perceived human rights violations in

other nations or to be surrendered to international fora, such as the ICC; this has the potential to impact future operations and overseas travel of such personnel." [pp. 68-69]

Those considerations were important to me and were part of my rationale in recommending that the Secretary approve only 24 of the 35 techniques that the Working Group evaluated. Of those 24 techniques I recommended, 17 of them were already allowed by the Army Field Manual.

- **Did you forward to Secretary Rumsfeld the concerns expressed by these military lawyers about the draft Working Group Report?**

Response:

The Secretary was aware of the concerns of the Judge Advocates General. Indeed, at my request, he met with them in March 2003. After a thorough vetting of the evaluated techniques by the senior military and civilian leaders of the Department, I joined Chairman of the Joint Chiefs of Staff Myers in recommending approval of only 24 of the 35 techniques evaluated by the Working Group.

Background: In December 2003, the Office of Legal Counsel of the Department of Justice withdrew the legal opinion, authored by John Yoo, upon which the Working Group Report was based, because it was deemed to provide overly broad Executive powers.

However, the Department of Defense did not declare the report based on the Yoo opinion to be a "non-operational 'historical' document" until March 2005, nearly a year after the Abu Ghraib torture scandal.

- **Why didn't you withdraw the Working Group Report after the document it was based on was withdrawn?**

Response:

Because the Working Group Report had not been disseminated, nor had its expansive legal analysis been necessary for the approval of the 24 techniques that had been approved for use only at Guantanamo, there had been no need to rescind it. However, in an abundance of caution, I rescinded the Working Group Report on detainee interrogation on March 17, 2005.

- **Why did you withdraw the Working Group Report over a year later?**

Response:

Please see the answer to the immediately preceding Question.

- **Do you continue to believe that the legal opinion set out in the Yoo memo and Working Group Report are correct?**

Response:

No. The Department of Justice has withdrawn the opinion on which the Working Group Report legal analysis relies, and I do not believe that the opinion controls. Similarly, the Working Group Report has been formally withdrawn.

To be clear, the analysis contained within both the March 14, 2003 Memorandum and the Working Group Report was unnecessary to the recommendation that I reached. That recommendation was informed by many of the policy concerns expressed by members of the Working Group, including the Judge Advocates General. Because of those concerns I recommended that the Secretary approve only 24 of the techniques evaluated by the Working Group and not adopt 11 of those evaluated techniques. Of those 24 techniques, 17 of them were already allowed by the Army Field Manual.

Moreover, I note that Congress in the Detainee Treatment Act has imposed standards for interrogations, and that the Department of Defense immediately issued an order implementing the Detainee Treatment Act.

Background: At your previous hearing before this committee you would not unequivocally agree to recuse yourself from all cases involving the detainment of individuals captured in the War on Terror.

- **Will you agree to recuse yourself from all cases relating to the detainment and interrogation of individuals captured in the War on Terror?**

Response:

If confronted with a case relating to the detainment and interrogation of individuals captured in the war on terrorism, I would likely recuse myself from hearing the case because I have worked on Administration policies on detainment and interrogation of individuals captured in the war on terrorism.

Without knowledge of the facts and circumstances of a particular case, it would be imprudent for a nominee to say definitively how he or she would apply the recusal rules in a future case, because that would be pre-judging an issue that cannot be analyzed until the actual facts and legal issues are determined.

In analyzing the matter, I would determine whether to recuse myself based on applicable law and the Code of Conduct for United States Judges. If confirmed, I would adhere strictly to all applicable statutes, court decisions, policies, and ethical rules, including 28 U.S.C. § 455, and the Code of Conduct for United States Judges. That Code of Conduct demands, among other things, that a judge should uphold the integrity of the

Judiciary, that a judge should avoid the appearance of impropriety, and that a judge should perform the duties of the office impartially. As the Commentary to Canon 1 observes, deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. For the same reason, judges must avoid the appearance of impropriety, the objective test of which is "whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired."

In assessing the propriety of disqualification, a judge applying the Code should employ an analysis similar to that required by 28 U.S.C. § 455. For example, if confirmed, I would be obligated to (and of course would) disqualify myself from any proceeding in which I had "personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." Similarly, I would be obligated to (and of course would) disqualify myself from any proceeding in which I had "served as lawyer in the matter in controversy, or a lawyer with whom [I] served during such association as a lawyer concerning the matter," or "participated as counsel, adviser, or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy." Applying this guidance requires close attention to the particular facts of each case. I would take care to disqualify myself in any proceeding in which my impartiality might reasonably be questioned. I believe fervently not only that the judiciary must make decisions with integrity, but also that the public must be able to have confidence in the integrity of the judiciary and its decisions.

Background: A July 7, 2006 memo from Deputy Defense Secretary Gordon England to senior Department of Defense officials and military officers on Friday, states that the Supreme Court has determined that Common Article 3 of the Geneva Conventions – which prohibits inhumane treatment of prisoners and requires certain basic legal rights at trial – applies to the conflict with Al Qaeda, and therefore must be applied to all detainees held in U.S. military custody.

In your November 27, 2002 memo to Secretary Rumsfeld on "Counter-Resistance Techniques" included a legal analysis that stated "FACTS: The detainees currently held at Guantanamo Bay, Cuba, are not protected by the Geneva Conventions."

In this morning's *Hamdan* hearing, in response to a question about this letter, Principal Deputy General Counsel for the Department of Defense Dell'Orto said that this statement "does not represent a change in policy."

- **When did the Department of Defense change its position that detainees in Guantanamo were not covered by the Common Article 3 of the Geneva Conventions?**

Response:

The Department of Defense changed its position concerning the applicability of Common Article 3 as a matter of law as a result of the Supreme Court's decision in *Hamdan v. Rumsfeld*. As you know, the Supreme Court held in *Hamdan* that Common Article 3 applies as a matter of law to the conflict with al Qaeda. The Court did not address the President's determinations that members of al Qaeda are not entitled to prisoner of war status because al Qaeda is not a party to the Geneva Conventions or the President's determination that the Taliban failed to meet the requirements to be entitled to prisoner of war status under the Geneva Convention Relative to the Treatment of Prisoners of War. As Mr. Dell'Orto stated, the memorandum sent by the Deputy Secretary does not represent a change in policy. The President directed on February 7, 2002, that the U.S. Armed Forces treat detainees humanely. To that end, they are provided with three culturally appropriate meals a day; adequate shelter and clothing; the opportunity to worship, including a copy of the Koran and prayer beads; the means to send and receive mail; reading materials; and exceptional medical care. The individuals held at Guantanamo are treated in a manner that exceeds the requirements of Common Article 3.

- **What role, if any, did you play in the decision to apply Common Article 3 of the Geneva Conventions to detainees in Guantanamo?**

Response:

I, along with my office, reviewed the *Hamdan* decision and informed senior members of the Department as to its holding with respect to Common Article 3. My office and I reviewed the memorandum issued by the Deputy Secretary on July 7, 2006.

- **Does it remain your legal opinion, as it was in November of 2002, that the Department of Defense is not required to apply Common Article 3? When did your legal opinion change?**

Response:

No, that does not remain my legal opinion. The Supreme Court held in *Hamdan v. Rumsfeld* that Common Article 3 applies as a matter of law to the conflict with al Qaeda. As General Counsel of the Department of Defense, I am bound, just as I would be should I be confirmed to a seat on the U.S. Court of Appeals, to follow the decisions of the Supreme Court.

Background: In response to a question from Senator Durbin about the prosecution of two service members for the use of dogs on detainees at Abu Ghraib, you stated that "the abuses at Abu Ghraib were done not by interrogators." However, you did not indicate whether or not the same use of dogs would have been legal if it had been used in an interrogation.

- **Do you continue to believe, as you did at the time of your November 27, 2002 memo and April 2, 2002 Working Group Report, that the use of dogs would have been legal and acceptable if it had been part of an interrogation?**

Response:

I do not believe that the use of dogs is an appropriate form of interrogation. I supported the directive that the Department of Defense adopted, which expressly prohibits the use of dogs in interrogations. DoD Directive 3115.09, "DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning," November 3, 2005, sets out Departmental policies and guidance, including the requirement for humane treatment during all interrogations. It provides, among other things, that

> "3.1. All captured or detained personnel shall be treated humanely, and all intelligence interrogations, debriefings, or tactical questioning to gain intelligence from captured or detained personnel shall be conducted humanely, in accordance with applicable law and policy. Applicable law and policy may include the law of war, relevant international law, U.S. law, and applicable directives, including DoD Directive 2310.01, "DoD Detainee Program," (draft), upon publication (reference (d)), instructions or other issuances. Acts of physical or mental torture are prohibited."

and

> "3.4.4.4. Military working dogs, contracted dogs, or any other dog in use by a government agency shall not be used as part of an interrogation approach nor to harass, intimidate, threaten, or coerce a detainee for interrogation purposes."

The directive was the product of extensive review and consultation within and among numerous components of the Department, including consultation with my office and with me.

It is my understanding that during that brief period during which this technique was authorized for use at Guantanamo, the animals were to be merely present, walking security, with muzzles. The authorization was rescinded several weeks later and not reauthorized.

It is important to note that the use of dogs was not proposed in the April 4, 2003 Working Group Report. Please note there was no April 2, 2002 Working Group Report. The unauthorized use of dogs a year later in Iraq for the purpose of abusing detainees was shocking and caused me to support strongly an absolute prohibition on the use of dogs for any purpose related to interrogations, as stated in paragraph 3.4.4.4. of DoD Directive 3115.09.

- **What responsibility do you believe should attach to senior military leaders under whose command U.S. personnel abused prisoners?**

Response:

Senior military leaders should assume responsibility for those acts which they authorized. The acts for which service members are being prosecuted were not authorized, were violations of the Uniform Code of Military Justice, were not part of any interrogation, and were directed at individuals who were not even believed to possess actionable intelligence. Service members are being prosecuted for violating the law and/or failing to comply with lawful orders. There have been multiple substantive reports resulting from investigations into alleged detainee abuse in Department of Defense facilities in Afghanistan, Iraq, and at Guantanamo Bay, Cuba. None of those reports found that there was a government policy directing, encouraging, or condoning abuse.

Admiral Church, in his review of Department of Defense detention operations and interrogation techniques, did not find anything that sanctioned the practices that were shown in the Abu Ghraib photos. Admiral Church, in his conclusions, stated:

> "We found, without exception, that the DoD officials and senior military commanders responsible for the formulation of interrogation policy evidenced the intent to treat detainees humanely, which is fundamentally inconsistent with the notion that such officials or commanders ever accepted that detainee abuse would be permissible. Even in the absence of a precise definition of 'humane' treatment, it is clear that none of the pictured abuses at Abu Ghraib bear any resemblance to approved policies at any level, in any theater. We note, therefore, that our conclusion is consistent with the findings of the Independent Panel, which in its August 2004 report determined that '[n]o approved procedures called for or allowed the kinds of abuse that in fact occurred. There is no evidence of a policy of abuse promulgated by senior officials or military authorities.'"

The investigation by Generals Fay and Jones likewise found that the Commander of CJTF-7 made clear that detainees were to be treated in accordance with the Geneva Conventions.

- **In order to maintain good order and discipline, as well as adherence to the rule of law, do you believe it is important to hold commanders accountable for failing to provide appropriate guidance or leadership when this failure resulted in the application of interrogation techniques that could fairly be classified as torture?**

Response:

When individuals apply techniques that constitute torture because commanders failed to provide leadership or appropriate guidance, it is important to hold those commanders accountable.

- **Do you support the establishment of a special investigative commission, with subpoena power, to determine why the abuse of prisoners by U.S. personnel became so widespread in Afghanistan and Iraq and who bears responsibility for such practices?**

Response:

I note that there have been multiple substantive reports resulting from investigations into alleged detainee abuse in Department of Defense facilities in Afghanistan, Iraq, and at Guantanamo Bay, Cuba. None of those reports found that there was a government policy directing, encouraging, or condoning abuse.

For example, Admiral Church, in his review of Department of Defense detention operations and interrogation techniques, did not find anything that sanctioned the practices that were shown in the Abu Ghraib photos. Admiral Church, in his conclusions, stated:

> "We found, without exception, that the DoD officials and senior military commanders responsible for the formulation of interrogation policy evidenced the intent to treat detainees humanely, which is fundamentally inconsistent with the notion that such officials or commanders ever accepted that detainee abuse would be permissible. Even in the absence of a precise definition of 'humane' treatment, it is clear that none of the pictured abuses at Abu Ghraib bear any resemblance to approved policies at any level, in any theater. We note, therefore, that our conclusion is consistent with the findings of the Independent Panel, which in its August 2004 report determined that '[n]o approved procedures called for or allowed the kinds of abuse that in fact occurred. There is no evidence of a policy of abuse promulgated by senior officials or military authorities.'"

The investigation by Generals Fay and Jones likewise found that the Commander of CJTF-7 made clear that detainees were to be treated in accordance with the Geneva Conventions.

Background: In response to a question from Senator Kennedy asking whether or not you agreed with the opinion of the Office of Legal Counsel that a defense of necessity would apply to an interrogator's torture at Guantanamo, you replied that the question posed to the Office of Legal Counsel was hypothetical and should not have been asked, however you did not say whether or not you believed that a defense of necessity would apply to an interrogator's use of torture.

- **Do you agree with the Office of Legal Counsel's legal opinion that a defense of necessity would apply to an interrogator who used torture at Guantanamo?**

Response:

The conclusions in the opinion regarding the defense of necessity were unnecessary. Nothing I recommended to the Secretary depended on the conclusions in the opinion regarding the defense of necessity. For the same reason that, at my hearing, I expressed regret for the opinion, I believe it would be unwise to express my own views on such a question devoid of any facts.

The opinion that I received has been rescinded and replaced by the Office of Legal Counsel with a superseding opinion. I understand that new opinion, issued in December of 2004, to be the binding opinion for the Executive Branch and the opinion to which the Department of Defense adheres.

Background: In 2003, then-EPA Administrator Whitman testified that she had been working "been working very closely with the Department of Defense, and [she didn't] believe that there [was] a training mission anywhere in the county that [was] being held up or not taking place because of environmental protection regulation." Additionally, Ben Cohen, deputy General Counsel for Environment and Installations, Department of Defense testified before the House Subcommittees on Energy and Air Quality and on Environment and Hazardous Materials on April 21, 2004 and he agreed that "there have not been any instances in which RCRA or CERCLA have impacted readiness, and specifically no State has ever (sic) used its RCRA or Superfund authority in a matter which has affected readiness."

Nevertheless, under your tenure as General Counsel, the Department of Defense has for five consecutive years, requested sweeping exemptions from environmental laws such as the Clean Air Act, Resource Conservation and Recovery Act, the Comprehensive Environmental Response Compensation and Liability Act, the Endangered Species Act and the Marine Mammal Protection.

- **What was the nature and extent of your involvement in formulating the requests for exemption? Did you and do you support the requests made?**

Response:

Although these legislative proposals were developed by others within the Administration, I was aware of the nature of the Administration's proposal, which the Administration referred to as the "Readiness and Range Preservation Initiative." As a member of the Executive Branch, I supported the Administration's legislative proposals. Of course, I also support the rigorous application of the environmental laws.

- **Wouldn't you agree that military families deserve the same environmentally safe environment as other citizens?**

Response:

I agree entirely that military families deserve the same environmentally safe environment as other citizens.

Responses of William J. Haynes II
Nominee to the U.S. Court of Appeals for the Fourth Circuit
to the Written Questions of Senator Edward M. Kennedy

Thank you for giving me the opportunity to clarify and expand my testimony in these questions for the record. At the outset, I would like to draw your attention to two considerations. First, it is important for me to note that I am appearing before you as a nominee for the federal judiciary and answer in that capacity. Yet, I am also a sitting government official. I recognize that Congress has important roles in both providing oversight of the Executive branch and advice and consent on judicial nominees. I am before you in the latter capacity; however, where your questions concerned the former, I have attempted to be responsive as possible, consistent with my continuing responsibility as a government official, and consistent with my memory.

1. In your opening statement, you said that in October 2002, you received a request to approve additional interrogation techniques from the commander at Guantanamo, and indicated the request had come up through the ranks. You stated that you ultimately approved that request with the concurrence of the Chairman of the Joint Chiefs of Staff, the Deputy Secretary of Defense, and the Undersecretary of Defense for Policy.

QUESTIONS:

1. Did the Chairman's legal advisor provide you with an opinion on that request? If so, will you provide it to us?

Response:

I do not recall an opinion on this matter from the Legal Counsel for the Chairman of the Joint Chiefs of Staff. I would clarify that I did not "approve" the request from the commander at Guantanamo as stated in the introduction to the question. Instead, I, along with the Chairman of the Joint Chiefs of Staff, the Deputy Secretary of Defense and the Under Secretary of Defense for Policy, recommended the approval of a subset of the requested techniques, and the rejection of the most aggressive techniques requested.

2. Did you consult with any of the military JAGs about the October 2002 request? Were they provided a copy of that request?

Response:

It is important to understand the normal operating procedures concerning the routing of operational requests, like the request that came from Major General Dunlavey, and was forwarded to the Chairman of the Joint Chiefs of Staff by the Commander of U.S. Southern Command in October 2002. The President exercises authority and control of the Armed Forces through two distinct branches of the chain of command. One branch of the chain of command runs from the President, through the Secretary of Defense, to

the commanders of the combatant commands to their subordinate organizations. This branch is responsible for the operational direction to forces assigned to those combatant commanders. Combatant commanders exercise combatant command authority over forces assigned to them and are directly responsible to the President and Secretary of Defense for the performance of assigned missions. The other branch of the chain of command runs from the President through the Secretary of Defense to the Secretaries of the Military Departments. The Secretaries of the Military Departments exercise authority through their respective Service Chiefs over their forces not assigned to the combatant commands. The Service Chiefs, except in circumstances otherwise prescribed by law, perform their duties under the authority, direction, and control of the Secretaries and are directly responsible to their Service Secretaries. The Service Judge Advocate Generals (TJAGs) fall under this second branch of the chain of command. This second branch is responsible for matters outside of operational direction of forces assigned to combatant commanders. The October 2002 request from the commander at Guantanamo came through U.S. Southern Command and the Chairman of the Joint Chiefs of Staff, and concerned operational issues—interrogation of combatants during a time of war. It was an operational request from a combatant commander seeking guidance for direction of forces assigned to him. To my knowledge, that request because of its operational nature followed the normal procedures for such a request. It went from the combatant commander to Commander of U.S. Southern Command to the Chairman of the Joint Chiefs of Staff. Thus, like any other operational request, it would not have been staffed to the TJAGs for their review. Because of the operational nature of the request and the division of labor within the Pentagon, it would have been highly unusual to consult with the TJAGs concerning such a request. Accordingly, I did not believe that it was necessary to coordinate with the TJAGs. While I have since learned that many in the Department, including some in the offices of the service judge advocates general were considering this proposal from Guantanamo, I do not recall seeing any product of any such consideration at that time. Moreover, as I described in my testimony, there was significant concern at the time this request was received at the Pentagon that another attack was imminent. It was believed that al Qatani, who the 9-11 Commission identified as the 20th hijacker and was (and is) detained at Guantanamo, had critical information that might prevent such an attack and loss of American life and thus, time was of the essence in responding to the October 2002 request.

3. Major General Dunleavy, the commanding General at Guantanamo, forwarded the recommendation to you with an opinion from his JAG. Was that opinion shared with the Army Judge Advocate General, General Romig? If not, why not?

Response:

Please see the response to Question 1.2.

4. Please provide a copy of all correspondence between the service JAGs and the SOUTHCOM legal advisor and your office concerning the October 2002 request from General Dunleavy for additional interrogation techniques.

Response:

I am not authorized to provide any documents that have not already been made publicly available. Moreover, in an abundance of caution, I previously recused myself from determinations concerning the release of documents that touch upon areas of concern to the Judiciary Committee in considering my nomination.

Nevertheless, I am unaware of any such correspondence.

2. In your opening statement, you said that following the approval of the October 2002 request for additional interrogation techniques, "from time to time" you would hear of others in the legal community about what might be going on "hundreds of miles away" at Guantanamo. You said that "in each case" you would alert the Secretary and senior leadership of the concerns.

QUESTIONS:

1. Please provide a record of your correspondence with the Secretary and senior leadership regarding each member of the legal community that raised concerns with you, including but not limited to the FBI, the Naval Criminal Investigative Service, and the International Committee of the Red Cross.

Response:

My statement about alerting the Secretary and senior leadership to concerns that were expressed to me referred to conversations I had with the Secretary and senior leadership, rather than any concerns conveyed in writing. I do not recall written correspondence with the Secretary and senior leadership on these matters.

2. Do you recall any discussions with T.J. Harrington, the head of the counterterrorism division at the FBI, who was concerned about harsh interrogation techniques? Did you ever discuss Mr. Harrington's concerns with Mr. Dell'Orto? Please provide as much information about these discussions as is available.

Response:

No, I do not recall having any discussions with Mr. Harrington. I do not know Mr. Harrington. I do not recall discussing Mr. Harrington or any concerns that he may have had with Mr. Dell'Orto.

3. You mention in your opening statement that in late summer 2002, interrogators at Guantanamo realized that they had Mohammad Khatani in custody, and

subsequently, they sought additional interrogation techniques and approval of a specific interrogation plan for Mr. Khatani.

QUESTIONS:

A. Did you consult with the Chairman's legal advisor or the Service JAGs about the appropriateness of that interrogation plan? If so, please provide a summary of that consultation.

Response:

Please see answer to Question 1.2 above. Also, to my knowledge, no such specific interrogation plan was under consideration by the Office of the Secretary of Defense for approval or disapproval. Because I do not recall of any such consideration of a specific plan, I also do not recall consulting with the Legal Counsel to the Chairman of the Joint Chiefs of Staff or the Judge Advocates General concerning any such plan. To clarify, I did not mention the approval of a specific interrogation plan for any detainee in my testimony.

B. Please provide all written documents related to the approval of Mr. Khatani's interrogation plan.

Response:

I am not authorized to provide any documents that have not already been made publicly available. Moreover, in an abundance of caution, I previously recused myself from determinations concerning the release of documents that touch upon areas of concern to the Judiciary Committee in considering my nomination.

See also answer to Question 3.A above.

4. In your action memo to the Secretary on November 27th, 2002, you recommend the legal availability of Category III techniques, which according to the October 11th Dunleavy Memo include "the use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family", "exposure to cold weather or water (with appropriate medical monitoring)", "use of a wet towel and dripping water to induce the misperception of suffocation", and the "use of mild, non-injurious physical contact such as grabbing, poking in the chest with the finger, and light pushing". You claimed in the hearing that to your knowledge, the Category III interrogation techniques were never authorized.

QUESTIONS:

A. Did you ever recommend their use on a specific detainee?

Response:

To be clear, I did not, as stated in the introductory paragraph to the question, recommend the legal availability of all Category III techniques. I stated in the November 27, 2002 Memo that:

> "[w]hile all Category III techniques may be legally available, we believe that, as a matter of policy, a blanket approval of Category III techniques is not warranted at this time. Our Armed Forces are trained to a standard of interrogation that reflects a tradition of restraint."

My statement in that memo regarding the legal availability of Category III techniques did not refer to the use of mild, non-injurious physical contact. I did conclude that the use of such mild non-injurious contact administered in keeping with the President's directive to the Armed Forces to treat detainees humanely was lawful.

I did not, however, reach a determination that those remaining techniques were legally available because I did not need to reach a determination on the legal question. Instead, based on my own views and those of the Deputy Secretary of Defense, the Under Secretary of Defense for Policy, and the Chairman of the Joint Chiefs of Staff, I recommended against the approval of all Category III techniques except the use of mild non-injurious physical contact as a matter of policy. The Secretary authorized the use of this Category III technique and no others. To my knowledge, those techniques contained within Category III that were not authorized on December 2, 2002, were never authorized for use by the Department.

Other than on November 27, 2002, I have never recommended the authorization of the use of any techniques, let alone the remaining techniques in Category III that were to my knowledge never authorized for use in the Department of Defense, for use on a specific detainee. I do not develop interrogation plans; interrogation is a responsibility of forces in the field.

B. Did you ever recommend to the Secretary that he delegate the authority to use the Category III interrogation techniques to someone other than himself? If so, to whom?

Response:

The commander at Guantanamo requested authorization for those within his command to use additional interrogation techniques. This request was an operational request for direction to the forces within the command. The Secretary's authorization for the use of additional techniques, like any other request for guidance for forces in the field, gave the requested guidance. Once such guidance is given, as a matter of ordinary course, such operational guidance is executed by forces in the field. Accordingly, in the November 27, 2002 memorandum, I recommended to the Secretary that he "authorize the Commander of USSOUTHCOM to employ, in his discretion, only Categories I and II and the fourth technique listed in Category III ('Use of mild non-injurious physical contact such as grabbing, poking in the chest with the finger, and light pushing.')."

5. In your opening statement, you said that the Department of Defense had not dealt with the interrogation of terrorists "for quite some time." Specifically, you claim that "[t]he decision of the Secretary and his subordinate commanders on how to question terrorists at a strategic interrogation facility such as that of Guantanamo Bay, Cuba, is something that the department had not confronted, to my knowledge."

QUESTIONS:

1. Did you consult with the service JAGs to see if they had any legal guidance based on past practice of interrogations? Please provide any available record of such consultations.

Response:

To the extent the question pertains to the operational guidance request made by the commander at Guantanamo, and forwarded to the Chairman of the Joint Chiefs of Staff by the Commander of U.S. Southern Command, please see the response to Question 1.2. To the extent the question pertains to the development of interrogation policy leading to the approval of a policy in April of 2003, please see the following. At my urging, the Secretary directed me to create a working group on interrogation matters. I specifically requested the inclusion of the Judge Advocates General in that working group and their assistance in addressing the myriad difficult issues, which included their views of the limitations imposed by the Uniform Code of Military Justice. The Working Group Report analyzed those limitations and that analysis reflects the work of attorneys within the Department of Defense, including judge advocates.

2. Did you ask the service JAGs if military personnel had ever previously interrogated persons with sensitive intelligence information, and how that was handled? Please provide any record of such consultations.

Response:

To the extent the question pertains to the operational guidance request made by the commander at Guantanamo, and forwarded to the Chairman of the Joint Chiefs of Staff by the Commander of U.S. Southern Command, please see the response to Question 1.2. To the extent the question pertains to the development of interrogation policy leading to the approval of a policy in April of 2003, as stated both above and in my testimony, it was at my urging that the Secretary directed me to create a working group on interrogation matters. I specifically requested the inclusion of the Judge Advocates General in that working group and their assistance in addressing the "historical role of US armed forces in conducting interrogations," as directed by the Secretary. The historical role was addressed in the Working Group Report. For example, the Report stated:

- "Historically, the intelligence staff officer (G2/S2) was the primary Army staff officer responsible for all intelligence functions within the command structure. This responsibility included interrogation of enemy prisoners of war (EPW), civilian internees, and other captured or detained persons. In conducting interrogations, the intelligence staff officer was responsible for insuring [sic] that these activities were execute [sic] in accordance with international and domestic U.S. law, United States Government policy, and the applicable regulations and field manuals regarding the treatment and handling of EPWs, civilian internees, and other captured or detained persons. In the maintenance of interrogations collection, the intelligence staff officer was required to provide guidance and training to interrogators, assign collection requirements, promulgate regulations, directives, and field manuals regarding intelligence interrogations, and insure that interrogators were trained in international and domestic U.S. law and the applicable Army publications." [p. 51-52]

- "[Field Manual 30-15] stated that intelligence interrogations are an art involving questions and examination of a source in order to obtain the maximum amount of usable information. Interrogations are of many types, such as the interview, the debriefing, and an elicitation." [p. 52]

3. Did you consult with the CIA to determine how they handled interrogations of intelligence targets? Please provide any record of such consultations.

Response:

While, as General Counsel of the Department of Defense I may not disclose the content of any discussions, I note that I have participated in interagency meetings concerning the detention and treatment of detainees in the Global War on Terror between and among various entities including the Departments of State, Defense, Justice, the Office of the Director of National Intelligence, and the Central Intelligence Agency.

I am not authorized to provide any documents that have not already been made publicly available. Moreover, in an abundance of caution, I previously recused myself from determinations concerning the release of documents that touch upon areas of concern to the Judiciary Committee in considering my nomination.

6. Throughout your testimony, you repeatedly stated that opinions of the Office of Legal Counsel are binding on the rest of the government. However, those opinions are not issued in a vacuum. Other agencies often present their opinions to OLC. You have cited a number of OLC opinions that were very controversial: the determination that the Geneva Conventions did not apply at Guantanamo, and the development of the legal framework for interrogation guidelines in the so-called

Torture Memo. Other government agencies expressed their opposition to those memos, either to OLC, or directly to the President.

QUESTIONS:

1. Your most senior military lawyers repeatedly expressed deep reservations and concerns about the OLC memos. Did you ever report their concerns in writing to the President, OLC, or the Secretary?

Response:

On February 7, 2002, the President determined that "none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva," that "the provisions of Geneva will apply to our present conflict with the Taliban," and that "the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva." I supported the President's determination. In fact, the U.S. Court of Appeals for the District of Columbia Circuit in *Hamdan v. Rumsfeld* had agreed with the President's determination. That decision, of course, was overturned by the Supreme Court. It is important to keep in mind that the determination of the President was not, as the question suggests, a determination that the Geneva Conventions did not apply at Guantanamo. It was a determination with respect to the specific groups against which the United States was engaged in an armed conflict.

With respect to interrogations, it was at my urging that more study of the difficult issues surrounding interrogations was necessary that the Secretary of Defense directed me to set up a working group to consider those issues. I asked the General Counsel of the Air Force to chair the Working Group. Most important, I specifically requested that the Judge Advocates General participate in the Working Group, as indicated in the January 17, 2003 Memorandum that I sent to the General Counsel of the Air Force. That memorandum was previously made available to the public and has been provided to this Committee.

I made the Secretary aware of the concerns of the Judge Advocates General, though I do not recall providing to him in writing their concerns. Indeed, at my request, he met with them in March 2003. After a thorough vetting of the evaluated techniques by the senior military and civilian leaders of the Department, I joined Chairman of the Joint Chiefs of Staff Myers in recommending approval of only 24 of the 35 techniques evaluated by the Working Group, 17 of which were already allowed by the Army Field Manual on Interrogations.

In addition to making the Secretary aware of the concerns of the Judge Advocates General, I encouraged the members of the Working Group to confer with the Department of Justice attorneys preparing a legal opinion concerning these issues. It is my understanding that there were a number of such consultations during which the views of participating judge advocates and others were expressed to the Department of Justice attorneys. Additionally, as you know, in February of 2003, the Judge Advocates General

wrote several memoranda expressing concerns. As I recall, those memoranda contained various concerns, including the permissibility of techniques under the Uniform Code of Military Justice and concerns for the impact of authorization of those techniques on American service members. The Department of Justice's Office of Legal Counsel (OLC) expressly deferred to the Department of Defense to analyze the Uniform Code of Military Justice, which is why it was not addressed in the OLC opinion that I received. The analysis of the Uniform Code of Military Justice, which is a key part of the Working Group Report, reflects the analysis of attorneys at the Department of Defense, including judge advocates.

With respect to the interests of U.S. military personnel, the concerns of the Judge Advocates General were reflected in the Working Group Report itself. It is important to bear in mind that the OLC opinion was a legal opinion, not a policy opinion, so it did not address policy matters, such as the impact on American service members. Indeed, those within the Department of Defense, including the judge advocates, were far better situated to understand and assess the policy and operational considerations than were the Department of Justice attorneys. The Secretary had specifically tasked the Working Group with considering "[p]olicy considerations with respect to the choice of interrogation techniques, including: . . . effect on treatment of captured US military personnel, . . . historical role of US armed forces in conducting interrogations." The concern for the effect that authorizing more aggressive techniques might have on service members was deliberated and discussed by the Working Group. That very concern is reflected in the Working Group Report. For example, the Working Group Report states:

- "When assessing whether to use exceptional interrogations [sic] techniques, consideration should be given to the possible adverse effects on U.S. Armed Forces culture and self-image, which at times in the past may have suffered due to perceived law of war violations. DOD policy, reflected in the DOD Law of War Program implemented in 1979 and in subsequent directives, greatly restored the culture and self-image of U.S. Armed Forces by establishing high benchmarks of compliance with the principles and spirit of the law of war, and thereby humane treatment of all persons in U.S. Armed Forces' custody. In addition, consideration should be given to whether implementation of such exceptional techniques is likely to result in adverse effects on DOD personnel who become POWs, including possible perceptions by other nations that the United States is lowering standards related to the treatment of prisoners, generally." [p. 55]

- "Participation by U.S. military personnel in interrogations which use techniques that are more aggressive than those appropriate for POWs would constitute a significant departure from traditional U.S. military norms and could have an adverse impact on the cultural self-image of U.S. military forces. Those techniques considered in this review that raise this concern are relatively few in number . . ." [p. 69 & n.76]

- "General use of exceptional techniques (generally having substantially greater risk than those currently, routinely used by U.S. Armed Forces interrogators), even though lawful, may create uncertainty among interrogators regarding the appropriate limits of interrogations. They should therefore be employed with careful procedures and only when fully justified." [p. 69]

- "Some nations may assert that the U.S. use of techniques more aggressive than those appropriate for POWs justifies similar treatment for captured U.S. personnel." [p. 69]

- "Other nations, including major partner nations, may consider use of techniques more aggressive than those appropriate for POWs violative of international law or their own domestic law, potentially making U.S. personnel involved in the use of such techniques subject to prosecution for perceived human rights violations in other nations or to be surrendered to international fora, such as the ICC; this has the potential to impact future operations and overseas travel of such personnel." [pp. 68-69]

Those considerations were important to me and were part of the reason that I recommended that the Secretary approve only 24 of the 35 techniques that the Working Group evaluated for use only at Guantanamo. Of those 24 techniques that I recommended, 17 of them were already allowed by the Army Field Manual on Intelligence Interrogations.

2. Please provide copies of any writings submitted to the President, OLC, or the Secretary outlining the concerns of senior military lawyers throughout the development of Department interrogation policy.

Response:

I do not recall any such writings.

7. Nineteen days prior to the President's determination that the Geneva Conventions did not apply to Al Qaeda and detainees at Guantanamo, Secretary Rumsfeld issued an order to all combatant commanders and Task Force 160 indicating that "The United States has determined that Al Qaeda and Taliban individuals under the control of the Department of Defense are not entitled to Prisoner of War Status for purposes of the Geneva Conventions of 1949."

QUESTIONS:

1. Did you advise Secretary Rumsfeld to issue this determination before the President had made his own determination?

Response:

The Secretary provided this guidance to Commanders because guidance on this matter was needed by those engaged in combat. It was my understanding that the President had already made the determination as stated.

2. Whose authority was Secretary Rumsfeld invoking when he indicated what "[t]he United States ha[d] determined"? Did you draft the order for Secretary Rumsfeld?

Response:

The Secretary acted pursuant to the President's determination. I do not specifically recall if I drafted the order.

3. Did you consult with the attorneys at OLC before Secretary Rumsfeld issued the order?

Response:

I do not specifically recall consulting with the Office of Legal Counsel attorneys. It is possible that I did so because I frequently did so with respect to a variety of issues, including matters pertaining to the conflict with al Qaeda and the Taliban.

4. Why didn't you wait--or advise the Secretary to wait-- for the President to make his own determination before you issued this order?

Response:

Please note that I did not issue an order. As stated above, it was the Department's understanding that the President had already made the determination.

8. It has been stated legal policy under the Department of Defense during your tenure that the Geneva Conventions do not apply to members of Al Qaeda, and in particular that even the basic protections of Common Article 3 do not apply to members of Al Qaeda.

QUESTION:

A. Who determines whether someone is a member of Al Qaeda? Please provide any available documentation describing the process by which a detained individual is classified to be a member of Al Qaeda and thus is not subject to the protections of the Geneva Conventions.

Response:

On February 7, 2002, the President determined that "none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva," that "the provisions of Geneva will apply to our present conflict with the Taliban," and that "the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva." The President determined that Common Article 3 as a matter of law did not apply to the conflict with al Qaeda and the Taliban. These determinations were determinations as a matter of law, not legal policy. Although the President made those legal determinations, the President directed as a matter of policy the U.S. Armed Forces "to treat all of the individuals detained at Guantanamo humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Third Geneva Convention of 1949."

The United States has followed an extensive multi-step process for determining who is detained as an enemy combatant and which enemy combatants should be transferred to Guantanamo. The Secretary of Defense has issued guidance to Commander, U.S. Central Command (USCENTCOM) for determining the status of persons detained by U.S. forces in Afghanistan. The Secretary's guidance provides:

> Unless otherwise directed by the Secretary of Defense, within 90 days of a detainee being brought under DoD control, the detaining combatant commander, or his designee, shall review the initial determination that the detainee is an enemy combatant (EC). Such review shall be made based upon all available and relevant information available on the date of the review and may be subject to further review based upon newly discovered evidence or information.
>
> The detaining combatant commander or his designee shall produce a written assessment regarding the detainee's EC status based upon his review of all available and relevant information concerning the detainee. The review shall be administrative in nature and shall not be deemed to create any right, benefit, or privilege, substantive or procedural, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person. The detaining combatant commander shall be guided by the following:
>
> (a) The detaining combatant commander shall consider all relevant and reasonably available information, including new information that has been identified since the initial status determination.
>
> (b) If necessary to make a proper review, the detaining combatant commander may interview witnesses, provided they are reasonably available and such interviews would not affect combat, intelligence gathering, law enforcement, or support operations.

(c) The detaining combatant commander may, at his discretion, convene a panel of commissioned officers to review the available evidence and reach a recommended determination.

After the initial 90-day status review, the detaining combatant commander shall, on an annual basis, reassess the status of each detainee.

If, as a result of a periodic EC review (90-day or annual), a detaining combatant commander concludes that a detainee may no longer meet the definition of an EC, the detaining combatant commander shall identify the detainee for possible release or transfer as appropriate.

In addition to this process, following the Supreme Court's *Rasul* decision in late June 2004, the Department implemented the Combatant Status Review Tribunal (CSRT) process.

At the time of the *Rasul* decision, the Secretary of the Navy had already been appointed as the designated civilian official responsible for the Administrative Review Board process. On July 7, 2004, the Deputy Secretary of Defense issued an order establishing the CSRTs as a forum for Guantanamo detainees to contest their designation as enemy combatants (http://www.defenselink.mil/news/Jul2004/d20040707review.pdf). The Secretary of the Navy was appointed to implement and oversee this process.

Because of the Secretary of the Navy's role in the CSRT process, the Department of the Navy was responsible for drafting the initial order and the implementing directive that was issued on July 30, 2004 (http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf).

In the *Hamdi* decision, a plurality of the Supreme Court specifically cited the procedures contained in Army Regulation 190-8 as sufficient for U.S. citizen-detainees entitled to due process under the U.S. Constitution. (The procedures found in Army Regulation 190-8 go beyond the general requirements found in Article 5 of the Geneva Prisoner of War Convention.) The CSRTs created by the Department of Defense follow many of the procedures found in that regulation. For example:

- Tribunals are composed of three neutral commissioned officers, plus a non-voting officer who serves as a recorder;
- Decisions are by a preponderance of the evidence by a majority of the voting members who are sworn to execute their duties impartially;
- The detainee has the right to (a) call reasonably available witnesses, (b) question witnesses called by the tribunal, (c) testify or otherwise address the tribunal, (d) not be compelled to testify, and (e) attend the open portions of the proceedings;
- An interpreter is provided to the detainee, if necessary; and
- The Tribunal creates a written report of its decision that the Staff Judge Advocate reviews for legal sufficiency.

Unlike an Article 5 tribunal, the CSRT provides the detainee *additional* benefits, such as a personal representative to assist in reviewing information and preparing the detainee's case, presenting information, and questioning witnesses at the CSRT. The rules require the detainee to receive an unclassified summary of the evidence in advance of the hearing in the detainee's native language, and to introduce relevant documentary evidence. In addition, the rules require the Recorder to search government files for, and provide to the Tribunal, any "evidence to suggest that the detainee should not be designated as an enemy combatant." The detainee's Personal Representative also has access to the government files and can search for and provide relevant evidence that would support the detainee's position. These benefits go above and beyond that which would be provided in an Article 5 tribunal.

Between July 12-14, 2004, the United States notified all detainees then at Guantanamo of their opportunity to contest their enemy combatant status under this process, and that a federal court has jurisdiction to entertain a petition for habeas corpus brought on their behalf. The Government also provided them with information on how to file habeas corpus petitions in the U.S. court system (http://www.defenselink.mil/news/Dec2004/d20041209ARB.pdf). When the Government has added new detainees, it has also informed them of this information.

Please see http://www.defenselink.mil/news/Combatant_Tribunals.html for further documentation and information.

9. The Supreme Court ruled in *Hamdan* that the military commissions could not go forward, yet as late as 10 days after the decision was issued, the presiding officer was still issuing orders in the military commission cases.

QUESTIONS:

1. Please provide the details of any and all orders issued in the military commission cases subsequent to the Court's decision in *Hamdan*.

Response:

I do not recall any such orders. I will refer your request to the Assistant Secretary of Defense for Legislative Affairs. I am not authorized to provide any documents that have not already been made publicly available. Moreover, in an abundance of caution, I previously recused myself from determinations concerning the release of documents that touch upon areas of concern to the Judiciary Committee in considering my nomination.

2. Did you advise the Secretary to send out an order to the military commission after the Supreme Court ruling came down?

Response:

No.

3. Why wasn't such an order sent?

Response:

It would have been unnecessary.

10. In your testimony, you stated that after Congress passed the Detainee Treatment Act, limiting interrogation techniques to the Army Field Manual, you sent out an order within hours of the bill signing. However, at the bill signing, the President issued a signing statement suggesting that he would ignore the statute under certain circumstances to "assist in achieving the shared objective of the Congress and the President ... of protecting the American people from further terrorist attacks".

QUESTIONS:

1. Why did you need to issue such a wide order within hours of bill signing, if you were already complying with these guidelines?

Response:

Please note that I did not issue an order. The primary reason for providing immediate guidance regarding the Detainee Treatment Act (DTA) was to ensure compliance with its requirement that no interrogation approach or technique be used that is "not authorized by and listed in the United States Army Field Manual on Intelligence Interrogations." With regard to treatment of detainees, I agree that the Department was already complying with the DTA's provisions. Thus, the Deputy Secretary's December 30, 2005 memorandum stated:

> "Consistent with the President's guidance, DoD shall continue to ensure that no person in the custody or under the control of the Department of Defense, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment."

2. Congress retains the absolute right under Article I, Section 8 of the U.S. Constitution to "make rules concerning captures on land and water". Please provide any existing documentation that helps to clarify those circumstances under which the President believes he can ignore the duly enacted mandates of the Detainee Treatment Act.

Response:

I am not aware of such circumstances. The Department of Defense policy is to comply with the requirements of the law, including the requirements of the Detainee Treatment Act.

3. Did the Secretary ever issue an order on use of interrogation techniques prior to December 2005? If so, please provide those orders to the committee?

Response:

The Secretary approved interrogation guidance for Guantanamo dated December 2, 2002, which he partially rescinded on January 12, 2003. He also provided interrogation guidance on April 16, 2003. These documents have been made available and may be found at the Department of Defense website (http://www.defenselink.mil/releases/2004/nr20040622-0930.html). I also note that on November 3, 2005, the Deputy Secretary of Defense issued DoD Directive 3115.09, "DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning." And, on December 30, 2005, the Deputy Secretary issued a memorandum as discussed in Question 1 above. I do not recall any other guidance on interrogations issued by the Secretary.

I am not authorized to provide any documents that have not already been made publicly available. Moreover, in an abundance of caution, I previously recused myself from determinations concerning the release of documents that touch upon areas of concern to the Judiciary Committee in considering my nomination.

11. Throughout your testimony, you stated that you were glad that the Bybee Torture Memo of August 2, 2002, was withdrawn because it was too hypothetical. You also mentioned that there are opinions from OLC that addressed specific interrogation techniques. These opinions have also been acknowledged in DOJ correspondence with Chairman Specter.

QUESTIONS:

1. Did you solicit or read a memo or memos from OLC on the legality of specific interrogation techniques?

Response:

Please note that the August 1, 2002 memorandum was addressed to the Counsel to the President. In January 2003, I requested a memorandum which I received on March 14, 2003, but that memorandum did not address specific interrogation techniques. I received oral advice from the Office of Legal Counsel in December 2003 confirming that the techniques approved at Guantanamo on April 16, 2003 were legal.

2. How many memos did you read? Please provide these memos to the Committee, as you told me that you would at the hearing.

Response:

In the past five plus years, I have read an enormous amount of material on any number of subjects from many sources. I do not know how many memos I may have read.

When I was notified by the Department of Justice's Office of Legal Counsel (OLC) that the Department of Defense was not to rely on the March 14, 2003 memorandum from the Office of Legal Counsel, I sought confirming advice from the Office of Legal Counsel on the legality of the specific techniques authorized by the Secretary of Defense on April 16, 2003. I obtained oral advice that the Office of Legal Counsel remained of the view that the 24 techniques that had been authorized by the Secretary on April 16, 2003 were in fact legally permissible. As you may know, Patrick F. Philbin, then-Associate Deputy Attorney General, testified as to the views of the Justice Department regarding these 24 techniques before the House Permanent Select Committee on Intelligence on July 14, 2004. In his testimony he stated that it was the view of the Justice Department that "each of those [24] techniques is plainly lawful" and that "[t]he proper use of these 24 techniques, in accordance with the General Safeguards [, which the Secretary required as part of his authorization], is lawful under any relevant legal standard."

The August 1, 2002 Office of Legal Counsel memorandum and the Philbin testimony, which I provide herewith, is also public. Please note that the August 1, 2002 memorandum was not addressed to me.

As you know, at my urging, the Secretary directed me to establish a working group to study the difficult issues surrounding interrogations. I sought an opinion from the Office of Legal Counsel concerning the interrogation of unlawful combatants held at Guantanamo. I received and read the March 14, 2003 Memorandum from the Office of Legal Counsel. The August 1, 2002 Memorandum (released by the White House in June 2004) is attached.

As I stated during my hearing on July 11, 2006, before the Senate Judiciary Committee, I am not authorized to provide any documents that have not already been made publicly available. Moreover, in an abundance of caution, I previously recused myself from determinations concerning the release of documents that touch upon areas of concern to the Judiciary Committee in considering my nomination. I have referred your request to the appropriate decision-makers.

3. In the OLC Levin memo to Comey, footnote 8 says that the Levin memo only retracts the August 2002 Bybee memo, but that all other OLC opinions remain in effect. Based on this footnote, do you consider any memos that address specific interrogation techniques to be legally valid, or were they repudiated at the same time as the Bybee memo?

Response:

I consider the Department of Justice Office of Legal Counsel opinion on specific interrogation techniques authorized for use at Guantanamo to be of historic value only, given the passage of the Detainee Treatment Act.

4. Have the memos remained in effect after the retraction of the Bybee Torture Memo been subsequently superseded by the Detainee Treatment Act? Will you provide us with a copy of your analysis on this subject?

Response:

Please see the response to Question 11.3 above.

12. At your hearing, Senator Leahy asked you if you would "supply copies of the documents relating to the matters you discussed and their chronology." You replied, "Yes, sir," to this request. However, less than a half-hour later, when I asked you to provide the Yoo memorandum, which you referenced extensively in your testimony, you demurred. You claimed that you did not have the authority to release the memorandum.

QUESTIONS:

A. Who does have the authority to release this memorandum?

Response:

I am not authorized to provide any documents that have not already been made publicly available. Additionally, in an abundance of caution, I previously recused myself from determinations concerning the release of documents that touch upon areas of concern to the Judiciary Committee in considering my nomination. .

13. Senator Levin and I asked your deputy, Mr. Dell'Orto, for a copy of the Yoo memorandum over a year ago in the Senate Armed Services Committee. At that time, he indicated that the decision on whether or not to release that document was under review.

QUESTIONS

1. Why has it taken so long to review that request?

Response:

I previously recused myself from determinations concerning the release of documents that touch upon areas of concern to the Judiciary Committee in considering my nomination. Because I am recused from those decisions, I do not know the reasons for the length of time it took to consider the request for March 14, 2003 Memorandum.

2. **Why haven't you released the memorandum?**

Response:

Please see the answer to Question 13.1.

3. **Who has the authority to release the document?**

Response:

Please see the answer to Questions 13.1 and 12.A.

4. **Why didn't you allow the members of the working group to make copies of the Yoo memorandum?**

Response:

The March 14, 2003 Memorandum contained confidential legal advice concerning a classified subject—the interrogation of unlawful combatants at Guantanamo. For those reasons alone it was important that it not be widely disseminated. Members of the working group were allowed to read it. It is not uncommon and, indeed, it is appropriate to place restrictions in the manner in which sensitive documents containing classified information may be further disseminated. The provision of copies of such a document under these circumstances would have been inappropriate.

5. **Why wouldn't you provide a copy of that memo to Admiral Church?**

Response:

Vice Admiral Church was provided the opportunity to read the March 14, 2003 Memorandum. Please see also the answer to Question 13.4 above.

6. **During your confirmation to be DOD General Counsel, you assured the committee that you would provide testimony and other documents required by the committee. Do you believe you have honored that commitment?**

Response:

I believe I have honored my commitments. In my capacity as General Counsel of the Department of Defense, I have endeavored to provide the testimony and other documents requested by Congress. In an abundance of caution, I previously recused myself from determinations concerning the release of documents that touch upon areas of concern to the Judiciary Committee in considering my nomination.

14. During your confirmation hearing, Senator Graham asked if you were part of the architecture team for the Yoo memo. You replied that you had asked for the memo and had ongoing consultations with the authors of that memo.

QUESTION:

A. Please provide a chronology of all contacts with the Office of Legal Counsel's office from October 2002 through April of 2004, relating to the development of a legal framework for interrogations.

Response:

As part of my role as General Counsel of the Department of Defense, I speak very often with my colleagues at the Justice Department on a wide array of issues. I do not recall with any precision the various times I may have spoken with individuals at the Office of Legal Counsel or the topics that were discussed over that time period, which began almost four years ago and ended over two years ago. In January of 2003, I sought a formal opinion from the Office of Legal Counsel regarding interrogations of unlawful enemy combatants held at Guantanamo. I was provided with a draft, which the members of the Working Group saw. I had conversations with Office of Legal Counsel attorneys about the status of the memorandum and some initial thoughts on it. It is important to understand that at no time, did I direct, guide, or shape the legal analysis or the content of the Office of Legal Counsel memorandum. During the time in early 2003 when the Working Group was conducting its review, I encouraged the members of the Working Group to confer with the Department of Justice attorneys preparing a legal opinion regarding their concerns. It is my understanding that there were a number of such consultations during which the views of participating judge advocates and others were expressed to the Department of Justice attorneys. I was provided with the Office of Legal Counsel's opinion on March 14, 2003.

In December of 2003, I was informed by the Justice Department that the Department of Defense was not to rely on the March 14, 2003 Memorandum. At that time, I sought advice from the Office of Legal Counsel confirming the legality of the techniques authorized by the Secretary of Defense on April 16, 2003. I obtained oral advice that the Office of Legal Counsel remained of the view that the 24 techniques that had been authorized by the Secretary on April 16, 2003, were legally permissible. This

advice is reflected in the testimony of Patrick F. Philbin, then-Associate Deputy Attorney General. On July 14, 2004, Mr. Philbin testified before the House Permanent Select Committee on Intelligence that it was the view of the Justice Department that "each of those [24] techniques is plainly lawful" and that "[t]he proper use of these 24 techniques, in accordance with the General Safeguards [which the Secretary required as part of his authorization] is lawful under any relevant legal standard."

15. In response to my questions at the hearing, you claimed that you didn't have a copy of the August 2002 Bybee Torture Memo.

QUESTIONS:

1. Were you aware of that memorandum prior to the Yoo memo?

Response:

In the fall of 2003, I did not have a copy of the August 1, 2002 Memorandum regarding Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A. I was aware that the Office of Legal Counsel had given some thought to issues arising from the interrogation of unlawful combatants in the current war on terror.

2. Did you have a summary of the conclusions of the Bybee memorandum?

Response:

See Answer to Question 1.

3. What legal guidance from the OLC did you follow in approving General Dunleavy's request for additional interrogation techniques?

Response:

I did not approve General Dunlavey's request.

4. Why did you request the Yoo memorandum, if it was substantially similar to the Bybee memorandum? Why not just rely on the Bybee memo?

Response:

I did not have a copy of the August 1, 2002 Memorandum. I was aware that the Department of Justice's Office of Legal Counsel had given some thought to issues arising from the interrogation of unlawful combatants in the current war on terror. This was obviously a very important question, which might yield multiple legal interpretations. I thought it was important that the Executive Branch speak with one voice on such a

sensitive issue. I sought an opinion from the Office of Legal Counsel because of their expertise in handling complex, novel, constitutional issues and because their opinion is definitive. By regulation and tradition, it is binding upon all Executive Branch agencies. This is consistent with the law and longstanding practice. As Randolph Moss, then-Assistant Attorney General for the Office of Legal Counsel under President Clinton, wrote in 2000: "When the views of the Office of Legal Counsel are sought on the question of the legality of a proposed executive branch action, those views are typically treated as conclusive and binding within the executive branch. The legal advice of the Office, often embodied in formal, written opinions, constitutes the legal position of the executive branch, unless overruled by the President or the Attorney General." Randolph D. Moss, "Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel," 52 Admin. L. Rev. 1303, 1305 (Fall 2000). This policy dates back for at least 88 years. On May 31, 1918, President Wilson's Executive Order 2877 stated: "any opinion or ruling by the Attorney General upon any question of law arising in any Department . . . *shall be treated as binding* upon all departments . . . therewith concerned."

16. Throughout your testimony, you were repeatedly asked your opinion of the August 2002 Bybee memorandum, and whether you agreed with it.

QUESTIONS:

1. **Do you believe that the legal analysis in the Bybee memorandum is correct?**
2. **Do you personally agree with the memo's repeated assertions that Congress cannot limit the President's Commander-in-Chief authority by statute?**
3. **Do you believe that statutes that regulate the President's ability to gather intelligence are unconstitutional, as the memo suggests?**
4. **Do you believe that a nation's right to self-defense can be used as a defense by an individual who commits an act in violation of a statute?**

Response:

Congress has authority to regulate the interrogation of unlawful combatants. I have never believed that anyone is above the law. The statements in the Memorandum to which your questions refer were unnecessary. Nothing I recommended to the Secretary depended on such statements. I recommended that the Secretary reject 11 of the techniques evaluated by the Working Group and approve only 24 techniques for use only at Guantanamo. Of those 24 techniques, 17 of them were already allowed by the Army Field Manual on Intelligence Interrogations.

I note that in formulating advice to the Secretary, all Department of Defense lawyers were guided by (and bound by) legal advice from the Department of Justice. This is consistent with the law and longstanding practice. As Randolph Moss, then-Assistant Attorney General for the Office of Legal Counsel under President Clinton, wrote in 2000: "When the views of the Office of Legal Counsel are sought on the question of the legality of a proposed executive branch action, those views are typically

treated as conclusive and binding within the executive branch. The legal advice of the Office, often embodied in formal, written opinions, constitutes the legal position of the executive branch, unless overruled by the President or the Attorney General." Randolph D. Moss, "Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel," 52 Admin. L. Rev. 1303, 1305 (Fall 2000). This policy dates back for at least 88 years. On May 31, 1918, President Wilson's Executive Order 2877 stated: "any opinion or ruling by the Attorney General upon any question of law arising in any Department . . . *shall be treated as binding* upon all departments . . . therewith concerned."

The opinion that I received as well as the August 1, 2002 Memorandum have been rescinded and replaced by the Office of Legal Counsel with a superseding opinion. I understand that new opinion, issued in December of 2004, to be the binding opinion for the Executive Branch and the opinion to which the Department of Defense adheres.

17. At the Armed Services committee hearing, I asked the heads of the military's Judge Advocate General Corps about the development of Military Commission Order Number One (MCO1). You had said that you frequently consulted with the military JAGs to ask them their opinion on military law. However, as reported by Tim Golden of the New York Times, while you had met with a group of military lawyers on the development of that order, you gave the head of that team only 30 minutes to review the Draft Presidential Order. That weekend, the group worked diligently to move the proposed commissions closer to the existing system of military justice, yet you did not make a single change in response to the expertise of these military lawyers. I asked General Romig to confirm the New York Times account, and he indicated that it was accurate.

QUESTIONS:

1. The Military Commission Order was a significant development in military law. Why didn't you allow the JAGs more than 30 minutes to review the order?

Response:

The Service Judge Advocates General and General Counsels had input into the draft Military Commission Order No. 1 ("MCO") during the five months it took to draft it. In the period immediately prior to issuance of the President's Military Order establishing military commissions, I sought the advice of the senior uniformed lawyer of the senior Service, Major General Romig. He assigned a team of Army JAGs to help draft the implementing MCO. A senior Army JAG was in charge of developing the first draft of the MCO. I then started from the Army JAG draft of the MCO and sought out the views of the other Service TJAGs and General Counsels. Hon. Mary Walker, General Counsel of the Air Force, and Major General Romig led a working group of Service JAG and General Counsel personnel who provided extensive comments on the

draft MCO, in addition to others in the Pentagon and senior lawyers in private life. Moreover, a senior Marine JAG who was assigned to my office was responsible for drafting the final version of the MCO and incorporating comments we received from others.

To the extent to which your question concerns the President's Military Order of November 13, 2001, the White House was in control of the process and timing of the issuance of the President's November 13, 2001 Military Order.

2. Why didn't you consider their written comments on the topic? Why weren't their objections incorporated into the final order? Did you ever provide written notice of their comments to anyone else within the Department? If so, please provide any and all documentation related to such notice.

Response:

As best I can recall about these events more than four years ago, I fully considered the Service Judge Advocates' General comments on the MCO. I have great respect for the views of uniformed military lawyers, and I accord—and accorded—their views significant weight.

As I noted above, to the extent to which your question concerns the President's Military Order, rather than Military Commission Order No. 1, the White House was in control of the process and timing of the issuance of the President's November 13, 2001 Military Order.

3. Please provide copies of the JAG working group comments on Military Commission Order Number 1.

Response:

I have forwarded your request to the appropriate decisionmakers. As stated above, I am not authorized to provide any documents that have not already been made publicly available. Additionally, in an abundance of caution, I previously recused myself from determinations concerning the release of documents that touch upon areas of concern to the Judiciary Committee in considering my nomination.

18. At your confirmation hearing, you repeatedly suggested that you were simply the recipient of the OLC memos. This suggests that you were not an architect of this Administration's response to the attacks of September 11, 2001, including the decision to deny Geneva protections to the detainees, the creation of the military commissions, and the original legal framework for harsh interrogation techniques. However, over and over again, you have responded for the Administration on these issues. On April 2, 2003, you responded to Human Rights Watch for the President on allegations of abuse at Baghram Air Force Base.

QUESTION:

A. In the summer of 2003, you responded to Senator Leahy on behalf of then-National Security Advisor Condoleezza Rice, about allegations of harsh interrogation techniques in Afghanistan and other places. Who directed you to respond for non-DOD agencies?

Response:

Then-White House Counsel Alberto Gonzales and National Security Council Legal Advisor John Bellinger asked me to respond to Senator Leahy on behalf of the Executive Branch.

19. In May 2004, I sent you a letter with some follow-up questions after your first hearing. I've yet to get an adequate reply from you, so I renew my request here. Attached, please find a copy of my original letter including 21 questions related to your role at the Department of Defense in formulating and monitoring the implementation of detainee policy.

Response:

Answers are provided.

May 7, 2004

The Honorable William J. Haynes II
General Counsel
Department of Defense
1600 Defense Pentagon
Room 3E980
Washington, DC 20301-1600

Dear Mr. Haynes:

In light of the extremely disturbing reports about prisoner abuse in Iraq and Afghanistan, I'm writing to ask that you answer additional questions on your role as General Counsel in formulating and monitoring implementation of the Defense Department's interrogation and detention policies.

As General Counsel, you are the chief legal officer of the Department of Defense. According to the Office of General Counsel's web site, your responsibilities include providing advice to the Secretary and Deputy Secretary of Defense regarding all legal matters and services performed within or involving the Department; providing advice on standards of conduct involving Department personnel; and establishing Department policy on general legal issues, determining the Department's position on specific legal problems, and resolving legal disagreements within the Department.

It is clear that you have had a significant role in the establishment and oversight of legal standards of conduct in U.S. military prisons and detention facilities. You have also assumed responsibility for responding to inquiries by members of Congress and human rights organization on the treatment of detainees by the U.S. military.

For example, on December 26, 2002, Human Rights Watch sent a letter to President Bush expressing its deep concern about a detailed *Washington Post* report on torture and other mistreatment of detainees at the Bagram air base in Afghanistan. On April 2, 2003, you responded on behalf of the President. Your letter failed to address any of the specific allegations set forth in the *Washington Post* report or the Human Rights Watch letter. Instead, you simply that "United States policy condemns and prohibits torture," and that "U.S. personnel are required to follow this policy and applicable laws prohibiting torture."

On June 2,2003, Senator Patrick Leahy sent a letter to National Security Adviser Condoleezza Rice. Senator Leahy wrote:

> Over the past several months, unnamed Administration officials have suggested in several press accounts that detainees held by the United States in the war on terrorism have been subjected to "stress and duress" interrogation techniques, including beatings, lengthy sleep and food deprivation, and being shackled in painful positions for extended periods of time. Our understanding is that these statements pertain in particular to interrogations conducted by the Central Intelligence Agency in Afghanistan and other locations outside the United States. Officials have also stated that detainees have been transferred for interrogation to governments that routinely torture prisoners.

Senator Leahy noted that these allegations "could undermine the credibility of American efforts to combat torture k d promote the rule of law, particularly in the Islamic world." He commended President Bush for stating that the United States does not, as a matter of policy, practice torture, but wrote that "the Administration's response thus far, including in a recent letter to Human Rights Watch from Department of Defense General Counsel William Haynes, while helpful, leaves important questions unanswered." Senator Leahy concluded by asking Dr. Rice six specific questions about the Administration's policy on torture.

Again, you assumed responsibility for responding to Senator Leahy's letter. You provided responses to Senator Leahy's questions about general legal policy, including the extent to which the Administration considers itself bound by the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment, and its policy on the rendering of detainees to countries that are known to engage in torture. However, you refused to say whether U.S. officials have used the "stress and duress" interrogation techniques that press reports have alleged and which our own State Department has condemned when used in countries such as Egypt, Iran, Eritrea, Libya, Jordan, and Burma. You wrote that "it would not be appropriate to catalogue the interrogation techniques used by U.S. personnel in fighting international terrorism." You further wrote that the Department's investigation into the deaths by blunt force injury of two detainees at the Bagram air base was "still in progress," but declined to say whether the Department or the Central Intelligence Agency had investigated any other allegations of torture or mistreatment of detainees.

As these letters show, you have held yourself out as an authority on not only the extent of the government's duty to comply with international treaties and other legal authorities on wartime interrogation and detention, but also the conduct of investigations into alleged acts of torture and other abuse by military and intelligence officials abroad. Given the intense public and Congressional interest in the recently reported allegations of abuse at Abu Ghraib prison, and the larger legal issues that these allegations raise, I respectfully request that you provide the following information and answer the following questions:

1. Gen. George W. Casey Jr. has said that the military has conducted a total of 25 criminal investigations into deaths and 10 into allegations of misconduct involving detainees in Iraq and Afghanistan. Please describe the full extent of your involvement and that of your office in and supervision of the investigations into alleged abuse or mistreatment of detainees at (a) the Bagram air base in Afghanistan, (b) the Abu Ghraib prison in Baghdad, (c) the internment facility at Camp Bucca, Iraq, (d) other detention facilities run by military or intelligence officials in Afghanistan or Iraq, and (e) the naval base at Guantanamo Bay.

Response:

The Office of the General Counsel does not conduct or supervise criminal investigations, and did not do so in the case of the criminal investigations involving detainee abuse allegations cited in the question.

2. When did you first become aware any allegation of abuse or mistreatment at the Abu Ghraib prison? What actions did you take at that time?

Response:

To the best of my recollection, I first learned of the allegations of abuse at Abu Ghraib in mid-January 2004. At that time, I assured myself that allegations were being investigated by Army Criminal Investigations Division, that the chain of command was properly notified, and that the command notified the public. It is important to keep in mind that the Office of the General Counsel does not conduct or supervise investigations generally, and did not in this case.

3. Have you read Major General Anthony M. Taguba's report on the alleged abuse of prisoners at Abu Ghraib prison? When did you become aware of this investigation? When did you first (a) know about this report, (b) have access to it, and (c) read it? What action did you take at each of these points?

Response:

As best I recall, I read General Taguba's report in late spring of 2004 when it became public. I assured myself that it was being evaluated by the chain of command and that the Department of Defense was addressing its findings.

4. On May 5th, the *New York Times* reported that the Defense Department had prepared nearly three weeks earlier a detailed 11-page plan "to address the fallout that officials expected once the photographs of Iraqi prisoners began circulating." Were you involved in the preparation; approval, or implementation of this plan? If so, please provide details. If not, when did it first come to your attention? Do you believe it was appropriate for the Department to withhold from Congress for nearly three weeks information about prisoner abuses that it knew would be controversial at home and abroad?

Response:

I do not recall being involved in any such preparation, if there was indeed such a plan. I do not believe that the Department withheld such information from Congress.

5. What steps have you or the Office of General Counsel taken in response to the findings and recommendations in General Taguba's report?

Response:

The Office of the General Counsel and I have been supportive of the Department's response to the recommendations of the Taguba report and other investigations. The Detainee Senior Leadership Oversight Council, chaired by the Vice Director of the Joint Staff and the Deputy Assistant Secretary of Defense for Detainee Affairs, reviewed every recommendation and finding in Major General Taguba's report. To my knowledge, there are no outstanding issues regarding Major General Taguba's report with the exception of decisions regarding the updating of detainee databases.

6. Were you or your office involved in the decision not to inform Congress about General Taguba's report or any of its findings or recommendations, prior to the disclosure of the report by the *New Yorker* Magazine and CBS News? Were you or your office involved in the decision and negotiations to delay the CBS News broadcast of its story on the subject? If so, please provide details.

Response:

I do not recall such a decision, and I was not involved in any such negotiations.

7. It has been reported that private security contractors have had a substantial role in interrogations and security at Abu Ghraib prison and other U.S. military detention facilities. These reports also indicate that civilian contractors may have been directly or indirectly responsible for the abuses at Abu Ghraib. According to the *New Yorker,* General Taguba had urged that one of these civilians

> **be fired from his Army job, reprimanded, and denied his security clearances for lying to the investigation team and allowing or ordering military policemen "who were not trained in interrogation techniques to facilitate interrogations by 'setting conditions' which were neither authorized" nor in accordance with Army regulations.**

In your letter to Senator Leahy of June 25, 2003, you wrote that the United States "does not permit, tolerate, or condone such torture *by its employees* under any circumstances," and that "credible allegations of illegal conduct *by U.S. personnel* will be investigated" (emphasis added). Do the prohibitions in U.S. domestic law or international law on torture and cruel, inhuman, or degrading treatment apply to private contractors in Iraq who are not U.S. government employees? Do you believe their actions in handling and interrogating Iraqi prisoners are within the scope of their employment by the U.S. government? Are they considered U.S. government personnel for the purposes of these laws? If not, what is their legal status? To what

extent were private contractors responsible for overseeing the actions of U.S. military personnel? Did you approve the command relationship between the private contractors and U.S. military personnel? What specific steps have you taken to hold these private contractors accountable for their alleged abuse and misconduct, and what specific steps have you taken to ensure that other private contractors are subject to legal restraints on prohibited conduct? What is the applicability of the Military Extraterritorial Jurisdiction Act to them? Have you or your office provided any interpretation or guidance on that Act to Department personnel or any private contractors? If so, please provide details.

Response:

It is my understanding that the Department of Justice reviewed allegations of abuse concerning contractors employed by the Department of Defense. To the best of my recollection, no Department of Defense contractors have been indicted for allegations of detainee abuse related to Abu Ghraib. I am advised that a CIA contractor was recently convicted for four counts of assault that led to the death of a detainee in Afghanistan, but that his actions were unrelated to Department of Defense actions.

The United States may rely upon the Military Extraterritorial Jurisdiction Act (MEJA), 18 U.S.C. § 3261 *et. seq.*, which took effect on November 22, 2000, to exercise jurisdiction over certain contractor personnel. Specifically MEJA jurisdiction extends to those persons who are employed by or accompanying the U.S. Armed Forces outside the United States, defined as Department civilian employees, Department of Defense contractors (and subcontractors at any tier) and their employees, and their dependents who reside with them outside the United States. This law was recently amended to add civilian employees and contractors of other agencies, to the extent such employment relates to supporting the mission of the Department of Defense overseas.

Detailed guidance on MEJA, as amended, is contained in Department of Defense Instruction 5525.11, "Criminal Jurisdiction Over Civilians Employed By or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members," and in the final rule promulgated in 32 Code of Federal Regulations Part 153 (published in the Federal Register on February 22, 2006). Both regulations became effective on March 3, 2005. Finally, the Department of Defense Federal Acquisition Regulation Supplement (DFARS) includes a clause that advises contractors that their employees may be subject to MEJA if they engage in conduct outside the United States that would constitute an offense punishable by imprisonment for more than one year had the conduct occurred in the territorial jurisdiction of the United States.

Additionally, the Ronald Reagan National Defense Authorization Act (NDAA) of Fiscal Year 2005 requires that Department of Defense personnel and contract personnel handling or interrogating detainees must receive annual law of war training, including on the Geneva Conventions. The Department provided reports regarding compliance with these provisions to the House Armed Services Committee and the Senate Armed Services Committee in June and September 2005. All combatant commands have taken steps to ensure that all military personnel, contractor employees, and federal employees who

come into contact with individuals under Department of Defense control receive law of armed conflict training. Finally, the Department has implemented the requirements of section 1092 of the NDAA in the Department of Defense Federal Acquisition Regulation Supplement (DFARS), which provides that each contract in which contractor personnel may interact with individuals detained by the Department of Defense must include a requirement that such contractor personnel receive the requisite training and acknowledge receipt of the training. The DFARS coverage also states that the combatant commander responsible for the area where the detention or interrogation facility is located will provide the training.

8. Last summer, the US.-led Coalition Provisional Authority issued an order providing that private contractors in Iraq are not subject to Iraqi law. Did you approve or otherwise have a role in the drafting or implementation of this order? If so, please describe your role.

Response:

The Coalition Provisional Authority (CPA) orders were issued by Ambassador Bremer, the Administrator of the CPA. The CPA staff often sought the views of my office and others when drafting proposed orders. I had no role in implementing any CPA orders.

9. On May 3, 2004, the New York Times reported that two months after General Taguba's report implicated two private contractors in the abuse of Iraqi prisoners at Abu Ghraib prison, the companies that employ them - CACI International Inc. and Titan Corp. - said that they had not heard anything from the Defense Department about these charges. These companies have not removed any employees from Iraq. Why has the Defense Department failed to act on General Taguba's recommendations on these private contractors? Did you or your office provide any guidance on these matters? If so, please provide details.

Response:

It is important to keep in mind that the Office of the General Counsel does not conduct or supervise investigations generally, and did not in this case. To the best of my knowledge, neither I nor my office has provided any guidance on these matters. It is my understanding that the Department of Justice has reviewed allegations of abuse concerning contractors employed by the Department of Defense. To the best of my recollection, no Department of Defense contractors have been indicted for allegations of detainee abuse related to Abu Ghraib. It is my understanding that the two contractors listed in the Taguba Report were referred to the Department of Justice for further investigation. To the best of my knowledge, both contractor employees were released by their respective contractors.

10. According to the New Yorker, General Taguba found that the abuses at Abu Ghraib prison occurred in part because Army intelligence officers, C.I.A. agents, and private contractors "actively requested that MP guards set physical and mental conditions for favorable interrogation of witnesses." In the opinion of General Taguba, the setting of "conditions for favorable interrogation" is not authorized or consistent with Army regulations. "Such actions generally run counter to the smooth operation of a detention facility, attempting to maintain its population in a compliant and docile state." Do you agree or disagree with these statements by General Taguba? Please explain.

Response:

I agree that the abuses at Abu Ghraib were not authorized or consistent with applicable regulations.

11. Despite General Taguba's report, issued in February 2004, the New York Times has reported that according to Defense Department officials, "[it was not until April 24 that the Army began to investigate possible involvement by military intelligence units and contractors working with them in Iraq in any abuse, including the 205th Military Intelligence Brigade; employees of CACI, a private contractor; and the Iraqi Survey Group, a unit of the Defense Intelligence Agency." Why has it taken so long for the Department to commence an investigation into the intelligence personnel who General Taguba concluded were responsible for setting "physical and mental conditions for favorable interrogation of witnesses"? What involvement did you or your office have in the decision whether and when to investigate?

Response:

As I understood the sequence of events, the vast majority of the investigations conducted in Iraq were begun by the commanders in Iraq when allegations of misconduct surfaced. It is important to keep in mind that the Office of the General Counsel does not conduct or supervise investigations generally. Additionally, the oversight of these criminal investigations was within the purview of the criminal investigative agencies of the Department of Defense.

12. General Taguba's report was not the first review of U.S. military detention operations in Iraq. From August 31 to September 9, 2003, Major General Geoffrey D. Miller, the commander at JTF-GTMO at Guantanamo Bay, Cuba, reviewed detention operations at Abu Ghraib prison using operations at Guantanamo as a "baseline." Do you believe that it was appropriate to use this baseline, given the different categories of prisoners held at Abu Ghraib?

Response:

It is my understanding, based on the testimony of General Abizaid and others, that the command responsible for operating the Abu Ghraib prison at the time of the abuses and General Miller both knew well that the detainees held at Abu Ghraib were of a different category than those held at Guantanamo, and that different treatment was

appropriate. It is also my understanding that General Miller was advising the command about how to bring more order to the prison and improve the conditions for detainees and others at Abu Ghraib.

13. Has any office of the Defense Department initiated any investigation into the possible involvement of C.I.A. or other civilian intelligence officials in the alleged abuses at Abu Ghraib prison?

Response:

There have been multiple investigations of the misconduct at Abu Ghraib. I am not aware of the results of any investigations by other agencies into allegations of detainee abuse that may have been referred to them.

14. Some of the U.S. military personnel currently under investigation for mistreatment of Iraqi prisoners at Abu Ghraib prison say that they received little or no guidance on the proper treatment of detainees. The New Yorker reported that General Taguba found that soldiers in the 800th MP Brigade were "poorly prepared and untrained... prior to deployment, at the mobilization site, upon arrival in theater, and throughout the mission." What steps has your office taken to ensure that standards of conduct, including the protections afforded to detainees in the Geneva Convention Relative to the Treatment of Prisoners of War and the Convention Against Torture, were understood and followed by U.S. military personnel, U. S. intelligence personnel engaged in interrogating detainees, and private contractors involved in U.S. detention or interrogation activities? Given the fact that the Army has conducted or is in the process of conducting 35 criminal investigations into allegations of abuse or other misconduct involving detainees in Iraq and Afghanistan, do you believe your efforts to date have succeeded or failed?

Response:

All members of the U.S. Armed Forces are required to be trained on the Geneva Conventions and on their obligations to comply with their provisions and the law of armed conflict generally. As a matter of course, the Department's military personnel are educated and trained regarding those obligations. The Department has a formal law of war program through which it monitors this training. The Department actively seeks to prevent law of war violations in any conflict through regular and repeated training, and educating its personnel on obligations applicable to the United States. Moreover, those forces serving in the field are advised by judge advocates, who in today's combat environments are found at many levels of command and who advise on compliance with those obligations.

In 2003, at the outset of the conflict with Iraq, the direction to U.S. Armed Forces was unequivocal that the Geneva Conventions applied to that conflict. General Abizaid and Lieutenant General Sanchez testified as to the clarity of this direction during their testimony before the Senate Committee on Armed Services.

The training of soldiers in the 800th MP Brigade was the responsibility of the commanders of the Brigade and others. My office has assisted the Department in reviewing and improving the Department of Defense's efforts to ensure U.S. Forces are trained, equipped, and ready to serve our country. I note, however, that it is the responsibility of the Armed Services to train, maintain, and equip the Armed Forces. The Office of the General Counsel has a broad oversight role in ensuring training regarding the law of war is accomplished effectively and in accordance with Department policy. It is the Armed Services, however, that have the primary responsibility for executing the training.

Additionally, the Ronald Reagan National Defense Authorization Act (NDAA) of Fiscal Year 2005 requires that Department of Defense personnel and contract personnel handling or interrogating detainees must receive annual law of war training, including on the Geneva Conventions. The Department provided reports regarding compliance with these provisions to the House Armed Services Committee and the Senate Armed Services Committee in June and September 2005. All combatant commands have taken steps to ensure that all military personnel, contractor employees, and federal employees who come into contact with individuals under Department of Defense control receive law of armed conflict training. Finally, the Department has implemented the requirements of section 1092 of the NDAA in the Department of Defense Federal Acquisition Regulation Supplement (DFARS), which provides that each contract in which contractor personnel may interact with individuals detained by the Department of Defense must include a requirement that such contractor personnel receive the requisite training and acknowledge receipt of the training. The DFARS coverage also states that the combatant commander responsible for the area where the detention or interrogation facility is located will provide the training.

It is important to keep in mind that the vast majority of the men and women serving in our Armed Forces serve with honor and in compliance with the law. Improvements can always be made to any program and the law of war training program is no different. But the actions of the relatively few should not be permitted to overshadow the hundreds of thousands who have served so honorably in active combat.

15. In March 2004, Human Rights Watch, a respected international human rights organization, published a report on abuses by U.S. forces in Afghanistan. It reported multiple instances of mistreatment of detainees at the Bagram airbase detention facility, including the deaths of two Afghans in custody in December 2002. Both deaths were ruled homicides by U.S. military doctors who performed autopsies; according to these military pathologists, the men died from "blunt force injuries" to their bodies. Military officials at Bagram said in March 2003 that the military had launched an investigation into these deaths. As of today, no results have been announced. Are you aware of the investigation into these deaths? What is its status? Have any other steps been taken to hold officials at Bagram accountable for these deaths, and to prevent such deaths from occurring again?

Response:

I am advised that the Army Criminal Investigations Division conducted the investigation and twenty-two soldiers were charged with various offenses related to these detainee deaths. The courts-martial were conducted at Fort Bliss, Texas. According to the Army, these cases have been concluded. The courts-martial have resulted in five soldiers pleading guilty to various counts including assault, battery, dereliction, and false official statement. Three soldiers were acquitted of all charges including maltreatment, assault, false official statement, and dereliction. One soldier was found guilty of aggravated assault, maltreatment, and false official statement. One soldier was found guilty of aggravated assault, maltreatment, maiming, and false official statement, and acquitted on other charges.

By the end of May 2006, within the Department of Defense, there had been more than 700 investigations into allegations of mistreatment of detainees. At that time, approximately 150 of these investigations remained open. Many of the completed investigations found no misconduct and were unsubstantiated. There have been at least 270 actions taken against more than 250 service members with a full range of corrective action taken. As of the end of May 2006, as the U.S. reported in the Second Periodic Report of the United States to the United Nations Committee Against Torture (with updates), there had been 103 courts-martial (General, Special, and Summary) of which 89 service members were convicted, an 86% conviction rate. Of the 89 convictions, 19 have received punishments of confinement of one year or more (21%). There have been approximately 100 service members who have received nonjudicial punishment; more than 60 reprimands; and 28 administrative separations from the service (http://www.state.gov/g/drl/rls/).

16. An April 26, 2002 report in the *Wall Street Journal* stated that the Army Judge Advocate General's Corps "keeps a lawyer on hand during interrogations, for quick decisions on the degree of physical or mental pressure allowed." Has this policy continued to the present day? Have JAG lawyers been present during all interrogations conducted by military or intelligence personnel in Iraq, Afghanistan, and Guantanamo? If so, please describe what guidance you or your office has provided these lawyers on the Geneva Conventions and other rules that govern the interrogation of detainees. If not, please explain why JAG lawyers are no longer required to be present during interrogations, when and by whom this change in policy was made, whether you or your office was involved in the decision, and whether you believe the absence of JAG lawyers may have contributed to any of the reported abuses in Iraq or Afghanistan.

Response:

Judge Advocates are not present during every interrogation and were not required to be present at every interrogation in Iraq, Afghanistan, and at Guantanamo Bay, Cuba. There is no such requirement under Department guidance or policy such as FM 34-52, Intelligence Interrogations. Judge Advocates (all of whom receive training in the Geneva Conventions) are available to provide advice to commanders and those who handle or interrogate detainees. DoD Directive 3115.09 DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning, issued by the Deputy Secretary of Defense on

November 3, 2005, does not require a Judge Advocate to be present at every interrogation. The Directive does require the following:

> "All captured or detained personnel shall be treated humanely, and all intelligence interrogations, debriefings, or tactical questioning to gain intelligence from captured or detained personnel shall be conducted humanely, in accordance with applicable law and policy. Applicable law and policy may include the law of war, relevant international law, U.S. law, and applicable directives, including DoD Directive 2310.1, (under revision), instructions or issuances."

17. In your letter to Senator Leahy of June 25, 2003, you refused to say whether U.S. officials have used "stress and duress" interrogation techniques. However, you aid state that the United States is bound by the prohibition against "cruel, inhuman, or degrading treatment or punishment" in the Convention Against Torture insofar as it means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. On May 4th, Major General Geoffrey Miller, who is now in charge of military jails in Iraq, defended practices such as depriving prisoners of sleep and forcing them into "stress positions" as legitimate means of interrogation. As General Counsel, have you approved these practices for use in military interrogations? Do you believe that these practices are consistent with the protections afforded prisoners and detainees in the United States under the Fifth, Eighth, and Fourteenth Amendments?

Response:

In 2003, at the outset of the conflict with Iraq, the direction to U.S. Armed Forces was unequivocal that the Geneva Conventions applied to that conflict. General Abizaid and Lieutenant General Sanchez testified as to the clarity of this direction during their testimony before the Senate Committee on Armed Services. The conduct described in the question is inconsistent with protections afforded to Prisoners of War by the Geneva Convention Relative to the Treatment of Prisoners of War.

On December 2, 2002, the Secretary authorized a number of additional techniques for use at Guantamano Bay on unlawful combatants held there. Among those techniques that he authorized was the use of stress positions, which as I understood was exemplified by the use of standing for no more than four hours. The technique did not involve the use of force. The use of that technique had to be enforced consistent with DoD regulations and directives, U.S. law, and the President's direction to the U.S. Armed Forces that they treat detainees humanely. Nothing in the Secretary's memorandum provided otherwise. Indeed, it was my understanding that the commanding general chose not to use stress positions because those employing this technique might be unable to enforce the technique.

As General Counsel, I do not approve interrogation practices or techniques, as the question suggests, because I am not the decision-maker in such matters. I do, however, offer recommendations on occasion. I would not have recommended interrogation

techniques if I thought they constituted prohibited cruel, inhumane or degrading treatment. Moreover, the President issued a clear order in February 2002 that the Armed Forces were to treat all al Qaeda and Taliban detainees humanely. In fact, in December 2002, I recommended, in consultation with the Deputy Secretary, the Under Secretary of Defense for Policy, and the Chairman of the Joint Chiefs of Staff, that the Secretary reject the most aggressive interrogation techniques. At my urging that further study of the issues surrounding interrogations was necessary, the Secretary directed me in January 2003 to establish a working group to study those issues. In April 2003, I joined the Chairman of the Joint Chiefs of Staff in once again recommending that the Secretary reject aggressive interrogation techniques. In fact, based upon our recommendation the Secretary approved only 24 of the 35 interrogation techniques evaluated by the Working Group, 17 of which were already allowed by the Army Field Manual on Intelligence Interrogations.

18. On May 4th, National Public Radio interviewed a 60-year-old man who had been detained by the U.S. military at Abu Ghraib prison. He said that he had been forced to do "knee bends until he collapsed with exhaustion." In your opinion, would such forced knee bends qualify as an acceptable "stress position" for use in interrogation?

Response:

With respect to the conflict with Iraq, the conduct described in the question is inconsistent with protections afforded to Prisoners of War by the Geneva Conventions Relative to the Treatment of Prisoners of War. Moreover, the conduct the question describes appears to be forced exercise, something that I recommended that the Secretary *not adopt* in April 2003 for use at Guantanamo Bay, Cuba. The Working Group had evaluated this technique among 34 others. I recommended that the Secretary not adopt this and 10 other techniques evaluated by the Working Group.

19. On May 4th, Secretary Rumsfeld stated, "My impression is that what has been charged thus far is abuse, which I believe technically is different from torture.... And therefore I'm not going to address the 'torture' word." According to the *New Yorker*, General Taguba reported that the abuses that occurred at Abu Ghraib prison included the following conduct: "Breaking chemical lights and pouring the phosphoric liquid on detainees; pouring cold water on naked detainees; beating detainees with a broom handle and a chair; threatening male detainees with rape; allowing a military police guard to stitch the wound of a detainee who was injured after being slammed against the wall in his cell; sodomizing a detainee with a chemical light and perhaps a broom stick; and using military working dogs to frighten and intimidate detainees with threats of attack, and in one instance actually biting a detainee." Do you believe that this alleged conduct does or does not qualify as torture? If not, please explain the basis for your belief.

Response:

Congress has defined torture in 18 U.S.C. § 2340 as:

> "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;

In the same section, Congress has defined "severe mental pain or suffering" to mean

> "the prolonged mental harm caused by or resulting from--
> **(A)** the intentional infliction or threatened infliction of severe physical pain or suffering;
> **(B)** the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
> **(C)** the threat of imminent death; or
> **(D)** the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality;

In December 2004, the Department of Justice's Office of Legal Counsel issued a memorandum providing guidance on the proper interpretation of 18 U.S.C. §§ 2340-2340A. (http://www.usdoj.gov/olc/18usc23402340a2.htm). Among other things, the Office of Legal Counsel noted that (i) the United Nations Convention Against Torture "treats torture as an 'extreme form' of cruel, inhuman, or degrading treatment" and that (ii) "under some circumstances 'severe physical suffering' may constitute torture even if it does not involve 'severe physical pain.'"

None of the criminal investigations conducted by the Combatant Commands or Military Departments resulted in prosecutions of U.S. service members for the offense of torture.

20. A *Washington Post* editorial dated May 5th stated that a "pattern of arrogant disregard for the protections of the Geneva Conventions or any other legal procedure has been set from the top, by Mr. Rumsfeld and senior U.S. commanders.... Senior officers and administration officials responsible for creating the lawless system of detention and interrogation employed in Afghanistan, Iraq and elsewhere since 2001 should be held accountable. And the system itself must, at last, be changed to conform with the Geneva Conventions and other international norms of human rights." Do you believe that the Defense Department's failure to follow the plain language of the Geneva Conventions - in particular, its categorical refusal to treat any of the 650 detainees at Guantanamo as prisoners of war, or even to convene Article 5 tribunals to decide this question - has set a bad example for soldiers charged with protecting detainees in Iraq and Afghanistan? Do you believe the Department's position on the Geneva Conventions has lowered the bar for treatment of American soldiers serving abroad or American citizens traveling in other countries? What role did you or your office have in the establishment, approval, or implementation of these policies?

Response:

The President determined in his memorandum of February 7, 2002, that "common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to 'armed conflict not of an international character.'" Moreover, the U.S. Court of Appeals for the District of Columbia Circuit in *Hamdan v. Rumsfeld* had agreed with the President's determination.

The Supreme Court has now spoken in *Hamdan v. Rumsfeld* and concluded that the current conflict in which we are engaged with al Qaeda is one covered by Common Article 3. The Supreme Court has thus resolved the question of the applicability of Common Article 3 to the conflict with al Qaeda. As General Counsel of the Department of Defense, I am bound, just as I would be should I be confirmed to serve on the U.S. Court of Appeals, to follow the law as interpreted by the Supreme Court.

The President also determined that "the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva" and that "because Geneva does not apply to our conflict with al Qaeda, al Qaeda detainees do not qualify as prisoners of war." The Supreme Court's recent decision in *Hamdan v. Rumsfeld* leaves these presidential determinations undisturbed.

Although he concluded that the members of al Qaeda and the Taliban are not entitled to treatment as prisoners of war, the President further determined that "our values as a Nation, values that we share with many nations in the world call for us to treat detainees humanely, including those who are not legally entitled to such treatment." For that reason, the President directed on February 7, 2002 the Armed Forces to continue to treat Taliban and al Qaeda detainees humanely. To that end, the Armed Forces provide the detainees held at Guantanamo with: three culturally appropriate meals a day; adequate shelter and clothing; the opportunity to worship, including a copy of the Koran and prayer beads; the means to send and receive mail; reading materials; and exceptional medical care. The individuals held at Guantanamo are treated in a manner that exceeds the requirements of Common Article 3 and, in fact, they have been and continue to be afforded many of the privileges afforded to prisoners of war.

Additionally, the processes that have been provided to the detainees have in many respects exceeded that which would have been provided had the members of the Taliban and al Qaeda been entitled to prisoner of war status. The Secretary of Defense has issued guidance to Commander, U.S. Central Command (USCENTCOM) for determining the status of persons detained by U.S. forces in Afghanistan. The Secretary's guidance provides:

> Unless otherwise directed by the Secretary of Defense, within 90 days of a detainee being brought under DoD control, the detaining combatant commander, or his designee, shall review the initial determination that the detainee is an enemy combatant (EC). Such review shall be made based upon all available and relevant information available

on the date of the review and may be subject to further review based upon newly discovered evidence or information.

The detaining combatant commander or his designee shall produce a written assessment regarding the detainee's EC status based upon his review of all available and relevant information concerning the detainee. The review shall be administrative in nature and shall not be deemed to create any right, benefit, or privilege, substantive or procedural, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person. The detaining combatant commander shall be guided by the following:

(a) The detaining combatant commander shall consider all relevant and reasonably available information, including new information that has been identified since the initial status determination.

(b) If necessary to make a proper review, the detaining combatant commander may interview witnesses, provided they are reasonably available and such interviews would not affect combat, intelligence gathering, law enforcement, or support operations.

(c) The detaining combatant commander may, at his discretion, convene a panel of commissioned officers to review the available evidence and reach a recommended determination.

After the initial 90-day status review, the detaining combatant commander shall, on an annual basis, reassess the status of each detainee.

If, as a result of a periodic EC review (90-day or annual), a detaining combatant commander concludes that a detainee may no longer meet the definition of an EC, the detaining combatant commander shall identify the detainee for possible release or transfer as appropriate.

In addition, following the Supreme Court's *Rasul* decision in late June 2004, the Department implemented the Combatant Status Review Tribunal (CSRT) process. At the time of the *Rasul* decision, the Secretary of the Navy had already been appointed as the designated civilian official responsible for the Administrative Review Board process. On July 7, 2004, the Deputy Secretary of Defense issued an order establishing the Combatant Status Review Tribunals as a forum for Guantanamo detainees to contest their designation as enemy combatants (http://www.defenselink.mil/news/Jul2004/d20040707review.pdf). The Secretary of the Navy was appointed to implement and oversee this process.

Because of the Secretary of the Navy's role in the CSRT process, the Department of the Navy was responsible for drafting the initial order and the implementing directive that was issued on July 30, 2004 (http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf).

In the *Hamdi* decision, a plurality of the Supreme Court specifically cited the procedures contained in Army Regulation 190-8 as sufficient for U.S. citizen-detainees entitled to due process under the U.S. Constitution. (The procedures found in Army Regulation 190-8 go beyond the general requirements found in Article 5 of the Geneva Prisoner of War Convention.) The CSRTs created by the Department of Defense follow many of the procedures found in that regulation. For example:

- Tribunals are composed of three neutral commissioned officers, plus a non-voting officer who serves as a recorder;
- Decisions are by a preponderance of the evidence by a majority of the voting members who are sworn to execute their duties impartially;
- The detainee has the right to (a) call reasonably available witnesses, (b) question witnesses called by the tribunal, (c) testify or otherwise address the tribunal, (d) not be compelled to testify, and (e) attend the open portions of the proceedings;
- An interpreter is provided to the detainee, if necessary; and
- The Tribunal creates a written report of its decision that the Staff Judge Advocate reviews for legal sufficiency.

Unlike an Article 5 tribunal, the CSRT provides the detainee *additional* benefits, such as a personal representative to assist in reviewing information and preparing the detainee's case, presenting information, and questioning witnesses at the CSRT. The rules require the detainee to receive an unclassified summary of the evidence in advance of the hearing in the detainee's native language, and to introduce relevant documentary evidence. In addition, the rules require the Recorder to search government files for, and provide to the Tribunal, any "evidence to suggest that the detainee should not be designated as an enemy combatant." The detainee's Personal Representative also has access to the government files and can search for and provide relevant evidence that would support the detainee's position. These benefits go above and beyond that which would be provided in an Article 5 tribunal.

Between July 12-14, 2004, the United States notified all detainees then at Guantanamo of their opportunity to contest their enemy combatant status under this process, and that a federal court has jurisdiction to entertain a petition for habeas corpus brought on their behalf. The Government also provided them with information on how to file habeas corpus petitions in the U.S. court system (http://www.defenselink.mil/news/Dec2004/d20041209ARB.pdf). When the Government has added new detainees, it has also informed them of this information.

With respect to the events in Iraq, in 2003, at the outset of the conflict with Iraq, the direction to U.S. Armed Forces was unequivocal that the Geneva Conventions applied to that conflict. General Abizaid and Lieutenant General Sanchez testified as to the clarity of this direction during their testimony before the Senate Committee on Armed Services. My office was involved in advising various decisionmakers in implementing these various policies of the United States.

21. In responding to each question above, please (a) provide all available written or electronic records documenting your answer, and (b) whenever an

answer contains classified information, separate that information out and provide classified and unclassified versions of the answer.

Response:

I am not authorized to provide any documents that have not already been made publicly available. Additionally, in an abundance of caution, I previously recused myself from determinations concerning the release of documents that touch upon areas of concern to the Judiciary Committee in considering my nomination. The Military Departments may have released relevant documents through the Freedom of Information Act or provided reports of investigation to Congress of which my office may not have knowledge.

September 27, 2006

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Specter:

Enclosed are my responses to the written follow-up questions of Senator Durbin and Senator Feingold.

Sincerely,

William J. Haynes II

cc: The Honorable Patrick J. Leahy

Responses of William J. Haynes II
Nominee to the U.S. Court of Appeals for the Fourth Circuit
to the Follow-up Questions of Senator Russell D. Feingold

Thank you for your testimony in connection with your nomination. I have follow-up questions to a number of the questions I sent you. In addition, recent events have raised additional questions to which I would appreciate your response. Please respond to these follow-up questions:

Thank you for giving me another opportunity to clarify and expand my testimony in these questions for the record. At the outset, I would like to reiterate the following: It is important for me to note that I am appearing before you as a nominee for the federal judiciary and answer in that capacity. Yet, I am also a sitting government official. I recognize that Congress has important roles in both providing oversight of the Executive branch and advice and consent on judicial nominees. I am before you in the latter capacity; however, where your questions concerned the former, I have attempted to be responsive as possible, consistent with my continuing responsibility as a government official, and consistent with my memory.

Military Commissions Legislation

1. **What has been your role in the drafting of the Administration's proposed Military Commissions Act of 2006?**

Response: I have not been involved in drafting the Administration's proposed Military Commissions Act.

2. **If you had a role in the drafting of this proposed legislation, would you recuse yourself from cases challenging the procedures used in military commissions if any were to come before you as a judge?**

Response: I have not been involved in drafting this proposed legislation.

If confirmed, it would be necessary to analyze the specific facts of the case before me. In analyzing the matter, I would determine whether to recuse myself based on applicable law and the Code of Conduct for United States Judges. As stated in my earlier answer, if confirmed, I would adhere strictly to all applicable statutes, court decisions, policies, and ethical rules, including 28 U.S.C. § 455, and the Code of Conduct for United States Judges. That Code of Conduct demands, among other things, that a judge should uphold the integrity of the judiciary, that a judge should avoid the appearance of impropriety, and that a judge should perform the duties of the office impartially. As the Commentary to Canon 1 observes, deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. For the same reason, judges must avoid the appearance of impropriety, the objective test of which is "whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a

reasonable inquiry would disclose, a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired."

In assessing the propriety of disqualification, a judge applying the Code should employ an analysis similar to that required by 28 U.S.C. § 455. For example, if confirmed, I would be obligated to (and of course would) disqualify myself from any proceeding in which I had "personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." Similarly, I would be obligated to (and of course would) disqualify myself from any proceeding in which I had "served as lawyer in the matter in controversy, or a lawyer with whom [I] served during such association as a lawyer concerning the matter," or "participated as counsel, adviser, or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy." Applying this guidance requires close attention to the particular facts of each case. I would take care to disqualify myself in any proceeding in which my impartiality might reasonably be questioned. I believe fervently not only that the judiciary must make decisions with integrity, but also that the public must be able to have confidence in the integrity of the judiciary and its decisions.

3. **As you know, a controversial aspect of the Administration's proposed Military Commissions Act of 2006 would permit individuals to be convicted, and even sentenced to death, without access to all of the evidence against them. Do you believe that the rules for access to classified material should be different for defendants in military commissions than defendants in courts-martial? If so, how?**

Response: Given the proposals pending before Congress on military commissions, the fact that I am a sitting administration official, and that I am a judicial nominee, it would not be appropriate for me to provide my specific views on pending legislation.

4. **The Administration's proposed Military Commissions Act of 2006 would deny the current detainees at Guantanamo Bay, as well as anyone else detained by the U.S. as an unlawful enemy combatant, the opportunity to challenge their detention in court. Do you support this aspect of the Administration proposal? If so, why do you believe it is necessary to prevent detainees, who may never be charged with a crime, from challenging their detention in a habeas corpus action?**

Response: Given the proposals pending before Congress on military commissions, the fact that I am a sitting administration official, and that I am a judicial nominee, it would not be appropriate for me to provide my specific views on pending legislation.

5. **The Administration's proposed Military Commissions Act of 2006 would stipulate that individuals who provide "material support" to terrorism and those**

involved in conspiracies would be eligible to be tried by military commission. Experts indicate that neither material support nor conspiracy have traditionally been considered war crimes, and a plurality of the Supreme Court held that conspiracy is not a war crime that can be tried by military commission. Do you agree with the Administration proposal that these crimes should be tried in military commissions?

Response: Given the proposals pending before Congress on military commissions, the fact that I am a sitting administration official, and that I am a judicial nominee, it would not be appropriate for me to provide my specific views on pending legislation.

6. **On September 14, 2006, Major General Scott Black, Judge Advocate General, United States Army; Major General Charles J. Dunlap, Jr., Deputy Judge Advocate General, United States Air Force; Rear Admiral Bruce MacDonald, Judge Advocate General, United States Navy; Brigadier General James C. Walker, Staff Judge to the United States Marine Corps; and Colonel Robert M. Reed, Legal Counsel to the Chairman of the Joint Chiefs of Staff, sent a letter to the House Armed Services Committee stating that they did "not object" to Sections 6 and 7 of the Administration's proposed Military Commissions Act of 2006.**
   a. **What role did you play in the drafting of this letter?**
   b. **Did you at any time encourage the individuals who signed this letter to do so, or to otherwise support the Administration's bill?**

Response: As General Counsel of the Department of Defense, I regularly discuss legal matters with senior lawyers in the Department. Every Wednesday, I host a meeting with the Judge Advocates General and General Counsels of the Military Departments. These meetings regularly include open and candid conversations about myriad legal issues. I greatly value the experience and intellect of the Judge Advocates General and the General Counsels of the Military Departments.

On Wednesday, September 13, 2006, I drafted and discussed with the Judge Advocates General a proposed letter. They discussed and changed the proposed letter. The letter they signed is attached.

Follow-up Questions to September 7 Answers

7. **In response to my questions about the National Security Agency's wiretapping program (Question #2), you stated that "I had been aware that the United States had a highly classified program to which I was not privy, but which was covered by competent counsel." Given that the National Security Agency is part of the Department of Defense, is it unusual that that you were not briefed on the program?**

Response: I am not in a position to comment on whether it was unusual for me not to be briefed on any particular program among the highly classified intelligence activities of the National Security Agency. According to the public record, the President himself decided who was to be granted access to information about the program for non-operational purposes, and the number of such individuals was strictly limited to protect the secrecy and security of the program.

8. **In Question #3, I asked you to point to aspects of your record that would reassure Senators considering your nomination that you would bring a different approach to your work as a federal judge than you have to your position as General Counsel to the Defense Department.**
   a. **In your response, you stated that investigations have been conducted when individuals within the Department of Defense "have violated the rules." To what investigations are you referring? How far up the chain of command did these investigations go?**
   b. **You also stated that "[p]olicies have been changed to reduce the chances of such abuses happening in the future." To what policies were you referring, and how have they changed? Please identify each policy with respect to which you were involved in the initial development, that later had to be changed.**
   c. **You also pointed to the Supreme Court's decision in *Hamdi v. Rumsfeld* as an example of the Court upholding an Administration anti-terrorism policy. Do you read *Hamdi* to reject any Administration policies?**

Response: The Department of Defense has conducted numerous investigations regarding alleged and actual violations of law and policy such as at Abu Ghraib. The results of some of those investigations have been publicly released at http://www.defenselink.mil/news/detainee_investigations.html.

Investigations have scrutinized the entire department. For example, the Church Report "found without exception that the DoD officials and senior military commanders responsible for the formulation of interrogation policy evidenced the intent to treat detainees humanely." The Independent Panel chaired by Dr. Schlesinger found that "there is no evidence of a policy of abuse promulgated by senior officials or military authorities."

Although investigations into abuses in the treatment of detainees have found that abuses were unauthorized and were not the product of policies, after abuses came to light, policies have been created and changed in order to minimize the chances of such abuses occurring again.

An example of such a policy is the recent Department of Defense Directive 2310.01E. The directive was the product of extensive review and consultation within and among numerous components of the Department, including consultation with my office and with me. The directive reflects and incorporates a variety of factors such as: (1) lessons

learned in the Global War on Terrorism and operations in Iraq, (2) recommendations made in investigations conducted by the Department of Defense after the events of Abu Ghraib, and (3) changes in the law such as Detainee Treatment Act of 2005.

This directive, among other things: (1) prescribes a minimum standard for the care and treatment of detainees (2) lists specifically prohibited acts, (3) requires training of all persons conducting or supporting detention operations, and (4) requires reporting violations of law or detainee polices. The publicly released directive is attached.

The Supreme Court in *Hamdi* did not agree in all respects with the Administration's legal positions.

9. **In Question #5, I asked you about the February 27, 2006 article in *The New Yorker* magazine concerning a meeting of high-ranking civilian and military officials at the Pentagon in 2005. In your answer, you stated that "[t]here have been many news reports about me that are inaccurate."**
   a. **What specifically in this article was inaccurate?**
   b. **Was the article inaccurate in its account of the 2005 meeting about whether the Pentagon's policy should be to treat detainees in accordance with Common Article 3?**

Response: The Assistant Secretary of Defense for Public Affairs submitted a letter to the editor of *The New Yorker* outlining some of the inaccuracies. I have attached that letter.

The article was inaccurate in its account of the 2005 meeting about whether the Pentagon's policy should be to treat detainees in accordance with Common Article 3. It would be inappropriate for me to disclose details of nonpublic internal deliberations of the Department of Defense.

10. **In your recent response to my Questions for the Record, you refused to answer Question #6 with respect to whether you support a proposed ban on the admission of coerced evidence in military commissions conducting trials of unlawful enemy combatants. The Administration's proposed Military Commissions Act of 2006 would prohibit the admission of statements "obtained by the use of torture" but would in some circumstances permit the admission of a "statement allegedly obtained by coercion." If you were involved in the drafting of this proposal, you should be able to explain your view of a potential ban on the admission of coerced evidence in military commissions, so please now respond to my question: As a matter of either law or policy, do you believe that a prohibition on evidence obtained through coercion should be part of any new military commission procedures that Congress may establish?**

Response: I was not involved in the drafting of this proposal.

11. In your answer to Question #7 about the Federal Bureau of Investigation's objections to the interrogation methods used by the Department of Defense, you quoted Principal Deputy General Counsel Dell'Orto, who said that you directed inquiries through the chain of command when there were reports of "differences in approaches" to interrogation techniques.

a. Do you agree with the quote from Principal Deputy General Counsel Dell'Orto that you used to respond to Question #7?

b. What were the outcomes of the inquiries to which he referred?

Response: As stated in my previous response, Principal Deputy General Counsel Dell'Orto testified to the Senate Armed Services Committee in part as follows:

> "Differences in approaches toward interrogation between the military intelligence community and the law enforcement community were reported beginning relatively early in the evolution of DoD detention operations at Guantanamo. For example, the law enforcement community raised issues regarding the requirement to provide *Miranda* warnings to detainees. The military intelligence community was not obligated to provide such warnings. It also was reported on several occasions that the law enforcement community believed the most effective way to obtain information from a detainee was to build rapport with the detainee. I understood that the military intelligence community desired to pursue a course of interrogation that drew heavily on the techniques described in Army Field Manual 34-52. From time to time reports of these differences in approaches to interrogation came to our office from various sources. Some reports came from the military intelligence community at Guantanamo, and some came from Department of Justice attorneys who met with Department of Defense attorneys from time to time. Whenever Mr. Haynes learned of such reports, he directed inquiry through the Joint Staff to the chain of command to determine whether the differences between the communities reflected the historically different roles of the two communities or whether there were specific complaints about the interrogation of particular detainees and the specific techniques employed."

I agree with this statement.

The Department of Defense conducted numerous inquiries into allegations of detainee abuse. The results of some of those investigations have been released at http://www.defenselink.mil/news/detainee_investigations.html.

Responses of William J. Haynes II
Nominee to the U.S. Court of Appeals for the Fourth Circuit
to the Follow-up Questions of Senator Richard Durbin

Thank you for giving me another opportunity to clarify and expand my testimony in these questions for the record. At the outset, I would like to reiterate the following: It is important for me to note that I am appearing before you as a nominee for the federal judiciary and answer in that capacity. Yet, I am also a sitting government official. I recognize that Congress has important roles in both providing oversight of the Executive branch and advice and consent on judicial nominees. I am before you in the latter capacity; however, where your questions concerned the former, I have attempted to be responsive as possible, consistent with my continuing responsibility as a government official, and consistent with my memory.

1.

a. **Did you personally prepare your responses to my questions?**
b. **Please describe the role played by the Office of Legal Policy or anyone else in preparing your responses.**

Response: These are my personal responses. As noted above, while I am a nominee for the federal judiciary, I am also a sitting government official. Accordingly, I have had assistance principally in gathering facts, developing responsive answers, administrative support, and fact checking where necessary. The Department of Justice's Office of Legal Policy reviewed the responses and transmitted them to the Committee.

2. **In question #7, I asked you, "In your personal opinion, what is the definition of humane treatment?" In response, you cited a February 7, 2002, White House Fact Sheet and the President's November 13, 2001, Military Order on Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism. These documents outline requirements for conditions of confinement like diet, medical care, and shelter, but they do not establish standards for interrogation techniques. In particular, they do not indicate whether torture and cruel, inhuman or degrading treatment are prohibited. In your personal opinion, what constitutes humane treatment with respect to interrogation techniques? Can a humane interrogation ever include cruel, inhuman, or degrading treatment?**

Response: As provided by the Detainee Treatment Act, Department of Defense interrogation techniques are limited to those authorized by and listed in the U.S. Army Field Manual on Intelligence Interrogations, currently FM 2-22.3, dated September 6, 2006. The Department has concluded that proper use of techniques listed in FM 2-22.3 constitutes humane treatment with respect to interrogation techniques.

3. **In question #9, I asked you, "To your knowledge, has the Department of Defense provided any guidance on the meaning of humane or inhumane treatment?" In response, you cited the February 7, 2002, White House Fact Sheet, the**

President's Military Order on Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, November 13, 2001, and the Ronald Reagan National Defense Authorization Act of Fiscal Year 2005. These are not guidance issued by the Department of Defense. Please respond to my question.

Response: The Department of Defense has provided guidance to components in the form of operations orders, memoranda, and Department of Defense directives to ensure implementation of applicable requirements, including the President's direction of February 7, 2002, the Ronald Reagan National Defense Authorization Act for Fiscal Year 2005, the Detainee Treatment Act, and the holding in the *Hamdan* case that Common Article 3 applies to the conflict with al Qaeda.

In this regard, I have attached the publicly available Department of Defense Directive 2310.01E, the Department of Defense Detainee Program, September 5, 2006, Secretary of Defense memorandum of April 11, 2005 (NDAA 2005), Deputy Secretary of Defense memorandum of December 30, 2005 (Detainee Treatment Act), and Deputy Secretary of Defense memorandum of July 7, 2006 (*Hamdan*).

To the extent you seek other information from the Department of Defense, I will refer your question to the Assistant Secretary of Defense for Legislative Affairs.

4. **Question #10 pertained to the conclusion of the Schmidt-Furlow Report on the Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay that an interrogation "resulted in degrading and abusive treatment but did not rise to the level of being inhumane treatment." I asked you, "Do you agree that the treatment of a detainee could be degrading and abusive, but not inhumane?" You responded, "I did not perform an independent evaluation of the circumstances and therefore could not offer a personal opinion." An independent evaluation of the circumstances is not necessary to answer this question, which relates to your personal opinion regarding the meaning of inhumane treatment. Please respond to my question.**

Response: The Schmidt-Furlow Report resulted from an investigation under Army Regulation 15-6 and was based on the investigating officers' evaluation of specific factual circumstances.

Pursuant to the Detainee Treatment Act of 2005, "no individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment." Moreover, pursuant to the Supreme Court's decision in *Hamdan*, Common Article 3 of the Geneva Convention of 1949 applies to the conflict with al Qaeda. Common Article 3 provides, in relevant parts, that persons covered under the Article "shall in all circumstances be treated humanely" and that certain conduct is prohibited including, "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;" and "outrages upon personal dignity, in particular humiliating and

degrading treatment." As a consequence of the Supreme Court's decision in *Hamdan*, Congress is currently considering various proposals, including the Administration's proposal, addressing the meaning of Common Article 3.

5. **In response to Question #15, you said you determined that the use of stress positions on detainees is legal in part because, "it was required to be in accordance with the President's order that the U.S. Armed Forces were to treat the detainees humanely." However, the fact that the President had ordered detainees to be treated humanely does not mean that the use of a particular technique on detainees is necessarily humane or legal.**

   a. **In your personal opinion, is the use of this technique on detainees humane?**
   b. **Was any guidance issued and/or were any limits placed on this technique to ensure that its use would be humane?**
   c. **In your response, you did not cite any legal authority for your conclusion that the use of this technique was legal. What legal authority did you rely on in reaching this conclusion?**
   d. **Do you still believe that the use of this technique on detainees is legal?**

Response: The question presented to the Department in the fall of 2002 was what interrogation techniques could be employed with al Qahtani, the 20th hijacker for the September 11, 2001 attacks that killed almost 3,000 Americans and citizens of 80 countries. This 20th hijacker was believed to possess information relevant to additional possible attacks on Americans. Yet, this 20th hijacker had successfully resisted attempts to question him by experts from the U.S. government. Accordingly, the Commander in the field at Guantanamo requested authorization to employ additional techniques, after first concluding that such techniques as proposed to be employed were not in violation of applicable law.

The use of the particular technique referenced in your question was exemplified by standing no more than four hours. Moreover, it was required to be used in accordance with the President's order that the U.S. Armed Forces were to treat detainees humanely. The President's order in the context of interrogations would require that the application of a particular technique would need to be legal and humane.

In *Hamdan*, the Supreme Court determined that Common Article 3 applied to the conflict with al Qaeda. Common Article 3 provides, in relevant parts, that persons covered under the Article "shall in all circumstances be treated humanely" and that certain conduct is prohibited including, "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;" and "outrages upon personal dignity, in particular humiliating and degrading treatment." As a consequence of the Supreme Court's decision in *Hamdan*, Congress is currently considering various proposals, including the Administration's proposal, addressing the meaning of Common Article 3.

The Detainee Treatment Act of 2005 requires that interrogation techniques be specifically authorized by and listed in the U.S. Army Field Manual on Intelligence Interrogations, which is now FM 2-22.3, dated September 6, 2006. This technique is not specifically authorized by and listed in FM 2-22.3. Therefore, its use by the Department of Defense is not authorized.

6. **In response to Questions #15, 23, and 30, you stated that among your bases for concluding that stress positions, use of dogs to induce stress, and removal of clothing are legal interrogation techniques is that, "The request for the use of additional techniques originated from a commanding general in the field and was forwarded for consideration by the Commander of U.S. Southern Command and was accompanied by a legal review by the Staff Judge Advocate at Guantanamo."**

    a. **Was the legal review by the Staff Judge Advocate at Guantanamo binding on you?**
    b. **Did you conduct your own independent legal analysis of these techniques?**
    c. **Did you consult with any legal experts other than the Staff Judge Advocate regarding the legality of these techniques?**
    d. **The legal review by the Staff Judge Advocate stated, "Since the law requires examination of all facts under a totality of circumstances test, I further recommend that all proposed interrogations involving category II and III methods must undergo a legal, medical, behavioral science, and intelligence review prior to their commencement." You subsequently recommended the approval of category II methods; the Defense Secretary accepted your recommendation; and these methods were used on detainees at Guantanamo Bay. Prior to use of these methods, did you, in your capacity as the Defense Department's top lawyer, ensure that the legal, medical, behavioral science, and intelligence reviews recommended by the Staff Judge Advocate took place?**

Response: The question presented to the Department in the fall of 2002 was what interrogation techniques could be employed with al Qahtani, the 20th hijacker for the September 11, 2001 attacks that killed almost 3,000 Americans and citizens of 80 countries. This 20th hijacker was believed to possess information relevant to additional possible attacks on Americans. Yet, this 20th hijacker had successfully resisted attempts to question him by experts from the U.S. government. Accordingly, the Commander in the field at Guantanamo requested authorization to employ additional techniques, after first concluding that such techniques as proposed to be employed were not in violation of applicable law. The legal conclusion by the Commander at Guantanamo and the legal review by the Staff Judge Advocate at Guantanamo were not binding on the Department of Defense General Counsel. I recommended as a matter of policy that the Secretary not adopt any of the Category III techniques except the use of "mild, non-injurious physical contact." With respect to the subset of requested techniques that I recommended the

Secretary approve, I, the Deputy Secretary of Defense, the Chairman of the Joint Chiefs of Staff, and the Under Secretary of Defense for Policy, concluded that their authorization was legal under the circumstances. The Commander of U.S. Southern Command was given the authority by the Secretary of Defense to authorize the use of the approved techniques during interrogations of the 20th hijacker at Guantanamo. The Commander of U.S. Southern Command did not request that interrogation plans using Category I, Category II, and the fourth technique listed in Category III be reviewed by the Joint Staff or Office of the Secretary of Defense, including the General Counsel of the Department of Defense. The specific reviews for the 20th hijacker were to be done within U.S. Southern Command.

7. **In response to Question #17, you said, "Please see the answer to Question 15." However, your answer to Question #15 is not responsive to Question #17, which asked, "In your personal opinion, does the use of stress positions on detainees constitute torture or cruel, inhuman or degrading treatment?" Please respond to Question #17.**

Response: The use of the particular technique referenced in your question was exemplified by standing no more than four hours. Moreover, it was required to be used in accordance with the President's order that the U.S. Armed Forces were to treat detainees humanely. The President's order in the context of interrogations would require that the application of a particular technique would need to be legal and humane.

8. **In Question #19, I asked, "In your personal opinion, is the use of stress positions on detainees consistent with Common Article 3 of the Geneva Conventions?" In response, you said, "reaching this determination regarding the scope of Common Article 3 would be unnecessary in my current position." As you note in response to other questions, you are appearing before the Judiciary Committee in your personal capacity. I am asking for your personal opinion, not whether you have rendered an opinion on this question in your official capacity. Please respond to Question #19.**

Response: At the time of its authorization by Secretary Rumsfeld on December 2, 2002, the use of the particular technique referenced in your question was not governed by Common Article 3, because the President had reached the legal determination that Common Article 3 did not apply to the conflict with al Qaeda and the Taliban. This determination was subsequently endorsed in the U.S. Court of Appeals for the D.C. Circuit as a proper application of the Geneva Convention, but was reversed by the Supreme Court. As a consequence of the Supreme Court's decision in *Hamdan*, Congress is currently considering various proposals, including the Administration's proposal, addressing the meaning of Common Article 3. Given the pending proposals, the fact that I am a sitting administration official, and that I am a judicial nominee, it would not be appropriate for me to provide my views as to the scope of Common Article 3.

I note that Common Article 3 provides, in relevant parts, that persons covered under the Article "shall in all circumstances be treated humanely" and that certain conduct is prohibited including, "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;" and "outrages upon personal dignity, in particular humiliating and degrading treatment."

9. **In response to Questions #20, 28, and 35, you acknowledged that stress positions, use of dogs to induce stress, and removal of clothing are interrogation techniques that are not authorized by the U.S. Army Field Manual on Intelligence Interrogation (FM 34-52). When you recommended that the Secretary of Defense approve these interrogation techniques were you aware that they are not authorized by the Army Field Manual? Why did you not mention this in your memo to the Secretary of Defense?**

Response: The question presented to the Department in the fall of 2002 was what interrogation techniques could be employed with al Qahtani, the 20th hijacker for the September 11, 2001 attacks that killed almost 3,000 Americans and citizens of 80 countries. This 20th hijacker was believed to possess information relevant to additional possible attacks on Americans. Yet, this 20th hijacker had successfully resisted attempts to question him by experts from the U.S. government. Accordingly, the Commander in the field at Guantanamo requested authorization to employ additional techniques, after first concluding that such techniques as proposed to be employed were not in violation of applicable law.

As the Commander in the field noted in his request, "I am fully aware of the techniques currently employed ... Although these techniques have resulted in significant exploitable intelligence, the same methods have become less effective over time. I believe the methods and techniques delineated in the accompanying J-2 memorandum will enhance our efforts to extract additional information."

The techniques referred to in your question were requested by the Commander in the field for authorization, in part, because they were not explicitly listed in the then-current Army Field Manual, FM 34-52. At the time, FM 34-52 was an Army doctrinal publication; there was no requirement at that time to limit techniques to those listed in FM 34-52.

Under the Detainee Treatment Act of 2005, interrogation techniques are limited to those authorized by and listed in the U.S. Army Field Manual on Intelligence Interrogations, currently FM 2-22.3, dated September 6, 2006. The events in question took place in 2002 and early 2003. Prior to the enactment of the Detainee Treatment Act of 2005, the Army Field Manual's list of interrogation techniques was not an exclusive, comprehensive listing of all possibly acceptable techniques.

10. In response to Question #23, you said you determined that the use of dogs to induce stress on detainees is legal in part because, "it was required to be in accordance with the President's order that the U.S. Armed Forces were to treat the detainees humanely." However, the fact that the President had ordered detainees to be treated humanely does not mean that the use of a particular technique on detainees is necessarily humane or legal.

- **a. In your personal opinion, is the use of this technique on detainees humane?**
- **b. Was any guidance issued and/or were any limits placed on this technique to ensure that its use would be humane?**
- **c. In your response, you did not cite any legal authority for your conclusion that the use of this technique was legal. What legal authority did you rely on in reaching this conclusion?**
- **d. Do you still believe that the use of this technique on detainees is legal?**

Response: The question presented to the Department in the fall of 2002 was what interrogation techniques could be employed with al Qahtani, the 20th hijacker for the September 11, 2001 attacks that killed almost 3,000 Americans and citizens of 80 countries. This 20th hijacker was believed to possess information relevant to additional possible attacks on Americans. Yet, this 20th hijacker had successfully resisted attempts to question him by experts from the U.S. government. Accordingly, the Commander in the field at Guantanamo requested authorization to employ additional techniques, after first concluding that such techniques as proposed to be employed were not in violation of applicable law.

With respect to the use of the particular technique referenced in your question as authorized by Secretary Rumsfeld on December 2, 2002 for use only at Guantanamo, it was my understanding that the animals were to be merely present, being used on security rounds, and with muzzles. Moreover, it was required to be used in accordance with the President's order that the U.S. Armed Forces were to treat detainees humanely. The President's order in the context of interrogations would require that the application of a particular technique would need to be legal and humane.

The Detainee Treatment Act of 2005 requires that interrogation techniques be specifically authorized by and listed in the U.S. Army Field Manual on Intelligence Interrogations, which is now FM 2-22.3, dated September 6, 2006. This technique is not specifically authorized by and listed in FM 2-22.3. Therefore, its use by the Department of Defense is not authorized. Moreover, FM 2-22.3 specifically prohibits the use of military working dogs if used in conjunction with intelligence interrogations.

11. In response to Question #23, you said, "It was my understanding that the animals were to be merely present, walking security, with muzzles."

- **a. From whom or from where did you gain this understanding?**

b. **Was any guidance issued limiting the use of dogs in this way? Please provide a copy of any such guidance.**
c. **How do you reconcile your understanding that the animals were to be "merely present, walking security, with muzzles" with the description of the technique as, "Using detainees individual phobias (such as fear of dogs) to induce stress" in the October 11, 2002, memorandum from the Commander of Joint Task Force 170, which you attached to your memorandum to the Defense Secretary recommending approval of this technique?**

Response: As these events occurred almost four years ago, I do not recall specifically and with certainty when and how I formed the understanding. I will refer your request for documents to the Assistant Secretary of Defense for Legislative Affairs, to the extent such documents may exist. My understanding and the description are not in conflict.

12. In response to Question #25, you said, "Please see the answer to Question 23." However, your answer to Question #23 is not responsive to Question #25, which asked, "In your personal opinion, does the use of dogs to induce stress on detainees constitute torture or cruel, inhuman or degrading treatment?" Please respond to Question #23.

Response: I assume that the question means to ask me to respond again to Question 25, which asks, "In your personal opinion, does the use of dogs to induce stress on detainees constitute torture or cruel, inhuman or degrading treatment?" The Detainee Treatment Act of 2005 requires that interrogation techniques be specifically authorized by and listed in the U.S. Army Field Manual on Intelligence Interrogations, which is now FM 2-22.3, dated September 6, 2006. This technique is not specifically authorized by and listed in FM 2-22.3. Therefore, its use by the Department of Defense is not authorized. Moreover, FM 2-22.3 specifically prohibits the use of military working dogs if used in conjunction with intelligence interrogations.

13. In Question #27, I asked, "In your personal opinion, is the use of dogs to induce stress on detainees consistent with Common Article 3 of the Geneva Conventions?" In response, you said, "reaching this determination regarding the scope of Common Article 3 would be unnecessary in my current position." I am asking for your personal opinion, not whether you have rendered an opinion on this question in your official capacity. Please respond to Question #27.

Response: At the time of its authorization by Secretary Rumsfeld on December 2, 2002, the use of the particular technique referenced in your question was not governed by Common Article 3, because the President had reached the legal determination that Common Article 3 did not apply to the conflict with al Qaeda and the Taliban. This determination was subsequently endorsed in the U.S. Court of Appeals for the D.C. Circuit as a proper application of the Geneva Convention, but was reversed by the

Supreme Court. As a consequence of the Supreme Court's decision in *Hamdan*, Congress is currently considering various proposals, including the Administration's proposal, addressing the meaning of Common Article 3. Given the pending proposals, the fact that I am a sitting administration official, and that I am a judicial nominee, it would not be appropriate for me to provide my views as to the scope of Common Article 3.

I note that Common Article 3 provides, in relevant parts, that persons covered under the Article "shall in all circumstances be treated humanely" and that certain conduct is prohibited including, "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;" and "outrages upon personal dignity, in particular humiliating and degrading treatment."

I would add, however, that the use of dogs in interrogations of detainees by the Department of Defense is currently prohibited. The Detainee Treatment Act of 2005 requires that interrogation techniques be specifically authorized by and listed in the U.S. Army Field Manual on Intelligence Interrogations, which is now FM 2-22.3, dated September 6, 2006. This technique is not specifically authorized by and listed in FM 2-22.3. Therefore, its use by the Department of Defense is not authorized. Moreover, FM 2-22.3 specifically prohibits the use of military working dogs if used in conjunction with intelligence interrogations.

14. In response to Question #30, you said you determined that removal of clothing as an interrogation technique is legal in part because, "it was required to be in accordance with the President's order that the U.S. Armed Forces were to treat the detainees humanely." However, the fact that the President had ordered detainees to be treated humanely does not mean that the use of a particular technique on detainees is necessarily humane or legal.

- **a. In your personal opinion, is the use of this technique on detainees humane?**
- **b. Was any guidance issued and/or were any limits placed on this technique to ensure that its use would be humane?**
- **c. In your response, you did not cite any legal authority for your conclusion that the use of this technique was legal. What legal authority did you rely on in reaching this conclusion?**
- **d. Do you still believe that the use of this technique on detainees is legal?**

Response: The question presented to the Department in the fall of 2002 was what interrogation techniques could be employed with al Qahtani, the 20th hijacker for the September 11, 2001 attacks that killed almost 3,000 Americans and citizens of 80 countries. This 20th hijacker was believed to possess information relevant to additional possible attacks on Americans. Yet, this 20th hijacker had successfully resisted attempts to question him by experts from the U.S. government. Accordingly, the Commander in the field at Guantanamo requested authorization to employ additional techniques, after

first concluding that such techniques as proposed to be employed were not in violation of applicable law.

The particular technique authorized by Secretary Rumsfeld on December 2, 2002 was required to be used in accordance with the President's order that the U.S. Armed Forces were to treat detainees humanely. The President's order in the context of interrogations would require that the application of a particular technique would need to be legal and humane.

The Detainee Treatment Act of 2005 requires that interrogation techniques be specifically authorized by and listed in the U.S. Army Field Manual on Intelligence Interrogations, which is now FM 2-22.3, dated September 6, 2006. This technique is not specifically authorized by and listed in FM 2-22.3. Therefore, its use by the Department of Defense is not authorized. Moreover, FM 2-22.3 specifically prohibits forcing the detainee to be naked in conjunction with intelligence interrogations.

15. In response to Question #32, you said, "Please see the answer to Question 30." However, your answer to Question #30 is not responsive to Question #32, which asked, "In your personal opinion, is the use of removal of clothing as an interrogation technique constitute torture or cruel, inhuman or degrading treatment?" Please respond to Question #32.

Response: Torture and "cruel, inhuman or degrading treatment" are prohibited by law. The Detainee Treatment Act of 2005 prohibits "cruel, inhuman or degrading treatment" as do regulations and directives applicable to the Executive Branch. Pursuant to the Detainee Treatment Act of 2005, "no individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment."

The Detainee Treatment Act defines "cruel, inhuman, or degrading" treatment to mean that treatment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the U.S. Constitution.

The use of the particular technique referenced in your question as authorized by Secretary Rumsfeld on December 2, 2002, was required to be used in accordance with the President's order that the U.S. Armed Forces were to treat detainees humanely. The President's order in the context of interrogations would require that the application of a particular technique would need to be legal and humane.

16. In Question #34, I asked, "In your personal opinion, is the use of removal of clothing as an interrogation technique consistent with Common Article 3 of the Geneva Conventions?" In response, you said, "reaching this determination regarding the scope of Common Article 3 would be unnecessary in my current position." I am asking for your personal opinion, not whether you have

rendered an opinion on this in your official capacity. Please respond to Question #34.

Response: At the time of its authorization by Secretary Rumsfeld on December 2, 2002, the use of the particular technique referenced in your question was not governed by Common Article 3, because the President had reached the legal determination that Common Article 3 did not apply to the conflict with al Qaeda and the Taliban. This determination was subsequently endorsed in the U.S. Court of Appeals for the D.C. Circuit as a proper application of the Geneva Convention, but was reversed by the Supreme Court. As a consequence of the Supreme Court's decision in *Hamdan*, Congress is currently considering various proposals, including the Administration's proposal, addressing the meaning of Common Article 3. Given the pending proposals, the fact that I am a sitting administration official, and that I am a judicial nominee, it would not be appropriate for me to provide my views as to the scope of Common Article 3.

I note that Common Article 3 provides, in relevant parts, that persons covered under the Article "shall in all circumstances be treated humanely" and that certain conduct is prohibited including, "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;" and "outrages upon personal dignity, in particular humiliating and degrading treatment."

17. In Question #38, I asked, "In your personal opinion, does mock execution constitute torture or cruel, inhuman or degrading treatment?" You responded, "reaching this determination regarding the scope of the meaning of torture or cruel, inhuman, or degrading treatment would be unnecessary in my current position." I am asking for your personal opinion, not whether you have rendered an opinion on this in your official capacity. Please respond to Question #38.

Response: Torture and "cruel, inhuman or degrading treatment" are prohibited by law. The Detainee Treatment Act of 2005 prohibits "cruel, inhuman or degrading treatment" as do regulations and directives applicable to the Executive Branch. Pursuant to the Detainee Treatment Act of 2005, "no individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment."

I did not analyze the legality of this technique. I recommended against the approval of the requested Category III technique, "the use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family," as a matter of policy. As I stated in the November 27, 2002, memorandum, "Our Armed Forces are trained to a standard of interrogation that reflects a tradition of restraint." The Secretary rejected the use of this Category III interrogation technique on December 2, 2002.

The Detainee Treatment Act of 2005 requires that interrogation techniques be authorized by and listed in the U.S. Army Field Manual on Intelligence Interrogations, which is currently FM 2-22.3, dated September 6, 2006. FM 2-22.3 specifically prohibits conducting mock executions if used in conjunction with intelligence interrogations.

18. In response to Question #39, you said, "Please see the answer to Question 38." This is non-responsive. Please respond to Question #39.

Response: Question 39 asked: "In your personal opinion, is mock execution humane?"

I did not analyze the legality of this technique. Indeed, I recommended against the approval of the requested Category III technique, "the use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family," as a matter of policy. As I stated in the November 27, 2002, memorandum, "Our Armed Forces are trained to a standard of interrogation that reflects a tradition of restraint." The Secretary rejected the use of this Category III interrogation technique on December 2, 2002.

The Detainee Treatment Act of 2005 requires that interrogation techniques be authorized by and listed in the U.S. Army Field Manual on Intelligence Interrogations, which is currently FM 2-22.3, dated September 6, 2006. FM 2-22.3 specifically prohibits conducting mock executions if used in conjunction with intelligence interrogations.

19. In Question #40, I asked, "In your personal opinion, is mock execution consistent with Common Article 3 of the Geneva Conventions?" In response, you said, "reaching this determination regarding the scope of Common Article 3 would be unnecessary in my current position." I am asking for your personal opinion, not whether you have rendered an opinion on this in your official capacity. Please respond to Question #40.

Response: At the time of Secretary Rumsfeld's authorization of certain techniques on December 2, 2002, interrogation techniques against al Qaeda detainees were not governed by Common Article 3, because the President had reached the legal determination that Common Article 3 did not apply to the conflict with al Qaeda and the Taliban. This determination was subsequently endorsed in the U.S. Court of Appeals for the D.C. Circuit as a proper application of the Geneva Convention, but was reversed by the Supreme Court. As a consequence of the Supreme Court's decision in *Hamdan*, Congress is currently considering various proposals, including the Administration's proposal, addressing the meaning of Common Article 3. Given the pending proposals, the fact that I am a sitting administration official, and that I am a judicial nominee, it would not be appropriate for me to provide my views as to the scope of Common Article 3.

I note that Common Article 3 provides, in relevant parts, that persons covered under the Article "shall in all circumstances be treated humanely" and that certain conduct is prohibited including, "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;" and "outrages upon personal dignity, in particular humiliating and degrading treatment."

The Detainee Treatment Act of 2005 requires that interrogation techniques be authorized by and listed in the U.S. Army Field Manual on Intelligence Interrogations, which is currently FM 2-22.3, dated September 6, 2006. FM 2-22.3 specifically prohibits conducting mock executions if used in conjunction with intelligence interrogations.

20. In Question #44, I asked, "In your personal opinion, does waterboarding constitute torture or cruel, inhuman or degrading treatment?" You responded, "reaching this determination regarding the scope of the meaning of torture or cruel, inhuman, or degrading treatment would be unnecessary in my current position." I am asking for your personal opinion, not whether you have rendered an opinion on this in your official capacity. Please respond to Question #44.

Response: I did not analyze the legality of this technique because I recommended against the approval of the requested Category III technique, "use of a wet towel and dripping water to induce the misperception of suffocation," as a matter of policy. As I stated in the November 27, 2002, memorandum, "Our Armed Forces are trained to a standard of interrogation that reflects a tradition of restraint." The Secretary rejected the use of this Category III interrogation technique on December 2, 2002.

The Detainee Treatment Act of 2005 requires that interrogation techniques be authorized by and listed in the U.S. Army Field Manual on Intelligence Interrogations, which is now FM 2-22.3, dated September 6, 2006. This technique is not specifically authorized by and listed in FM 2-22.3. Moreover, FM 2-22.3 specifically prohibits the use of "waterboarding" if used in conjunction with intelligence interrogations. Therefore, its use by the Department of Defense is not authorized.

21. In response to Question #45, you said, "Please see the answer to Question 44." This is non-responsive. Please respond to Question #45.

Response: Question 45 asked: "In your personal opinion, is waterboarding humane?"

I did not analyze the legality of this technique. I recommended against the approval of the requested Category III technique, "use of a wet towel and dripping water to induce the misperception of suffocation," as a matter of policy. As I stated in the November 27, 2002, memorandum, "Our Armed Forces are trained to a standard of interrogation that reflects a tradition of restraint." The Secretary rejected the use of this Category III interrogation technique on December 2, 2002.

The Detainee Treatment Act of 2005 requires that interrogation techniques be authorized by and listed in the U.S. Army Field Manual on Intelligence Interrogations, which is now FM 2-22.3, dated September 6, 2006. This technique is not specifically authorized by and listed in FM 2-22.3. Moreover, FM 2-22.3 specifically prohibits the use of "waterboarding" if used in conjunction with intelligence interrogations. Therefore, its use by the Department of Defense is not authorized.

22. In Question #46, I asked, "In your personal opinion, is waterboarding consistent with Common Article 3 of the Geneva Conventions?" In response, you said, "reaching this determination regarding the scope of Common Article 3 would be unnecessary in my current position." I am asking for your personal opinion, not whether you have rendered an opinion on this in your official capacity. Please respond to Question #40.

Response: I did not analyze the legality of this technique. I recommended against the approval of the requested Category III technique, "use of a wet towel and dripping water to induce the misperception of suffocation," as a matter of policy. As I stated in the November 27, 2002, memorandum, "Our Armed Forces are trained to a standard of interrogation that reflects a tradition of restraint." The Secretary rejected the use of this Category III interrogation technique on December 2, 2002.

At the time of Secretary Rumsfeld's authorization of certain techniques on December 2, 2002, interrogation techniques against al Qaeda detainees were not governed by Common Article 3, because the President had reached the legal determination that Common Article 3 did not apply to the conflict with al Qaeda and the Taliban. This determination was subsequently endorsed in the U.S. Court of Appeals for the D.C. Circuit as a proper application of the Geneva Convention, but was reversed by the Supreme Court. As a consequence of the Supreme Court's decision in *Hamdan*, Congress is currently considering various proposals, including the Administration's proposal, addressing the meaning of Common Article 3. Given the pending proposals, the fact that I am a sitting administration official, and that I am a judicial nominee, it would not be appropriate for me to provide my views as to the scope of Common Article 3.

I note that Common Article 3 provides, in relevant parts, that persons covered under the Article "shall in all circumstances be treated humanely" and that certain conduct is prohibited including, "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;" and "outrages upon personal dignity, in particular humiliating and degrading treatment."

23. Your answer to Question #56 was non-responsive. Please respond.

Response: Question 56 stated:

"My letter to Secretary Rumsfeld asked the following questions:

1. **Has the Defense Department reviewed and addressed the legal and policy concerns raised by the FBI?**
2. **Have Defense Department interrogation policies at Guantanamo Bay changed in response to FBI concerns? If so, how have the policies changed?**
3. **Are the interrogation techniques that you approved for use at Guantanamo Bay on April 16, 2003, still operational?**

Undersecretary Cambone's letter of February 6, 2006, did not respond to my first two questions. Please respond to these questions."

Department of Defense detention and interrogation procedures have undergone extensive review to make them more effective and clear for Department of Defense personnel and to capture as many lessons learned as possible. The techniques approved by the Secretary of Defense on April 16, 2003 are no longer in effect. Interrogation techniques that may be used by Department of Defense personnel, including at Guantanamo Bay, Cuba, are limited to those authorized by and listed in the Army Field Manual on Intelligence Interrogations, which is FM 2-22.3, dated September 6, 2006.

24. In Question #58, I asked whether you agreed with the conclusions of "Legal Analysis of Interrogation Techniques," an FBI memorandum which finds that interrogation techniques authorized by Secretary Rumsfeld "are not permitted by the U.S. Constitution." I attached the FBI memorandum to my questions. In response, you stated, "I have not reviewed and analyzed the FBI memo referenced in your question." This is not responsive. Please review the FBI memorandum, which I have again attached, and respond to my question.

Response: The question presented to the Department in the fall of 2002 was what interrogation techniques could be employed with al Qahtani, the 20th hijacker for the September 11, 2001 attacks that killed almost 3,000 Americans and citizens of 80 countries. This 20th hijacker was believed to possess information relevant to additional possible attacks on Americans. Yet, this 20th hijacker had successfully resisted attempts to question him by experts from the U.S. government. Accordingly, the Commander in the field at Guantanamo requested authorization to employ additional techniques, after first concluding that such techniques as proposed to be employed were not in violation of applicable law. I believe that the techniques I recommended that Secretary Rumsfeld authorize, if properly applied, would comply with all then-applicable law, including the U.S. Constitution, and were consistent with the President's order of February 7, 2002.

The Department recently issued FM 2-22.3; the interrogation techniques authorized by and listed in FM 2-22.3 comply with U.S. law and policy, including the Detainee Treatment Act of 2005.

25. Question #59 related to FBI concerns about Department of Defense interrogation techniques. I asked you, "When did you become aware of the FBI's concerns? What did you do, if anything, in response to these concerns? Please describe any communications between you and Mr. Swartz and any other Justice Department or FBI officials about this issue." You responded, "I do not recall specific FBI complaints at the time of the November 27, 2002, memorandum to Secretary Rumsfeld, nor do I ever recall speaking with Mr. Swartz about this issue." Do you recall specific FBI complaints at a time other than November 27, 2002? What did you do, if anything, in response to the FBI's concerns? Please describe any communications between you and any Justice Department or FBI officials other than Mr. Swartz about this issue.

Response: Principal Deputy General Counsel Dell'Orto addressed this issue in his response to the Senate Armed Services Committee:

> "Differences in approaches toward interrogation between the military intelligence community and the law enforcement community were reported beginning relatively early in the evolution of DoD detention operations at Guantanamo. For example, the law enforcement community raised issues regarding the requirement to provide *Miranda* warnings to detainees. The military intelligence community was not obligated to provide such warnings. It also was reported on several occasions that the law enforcement community believed the most effective way to obtain information from a detainee was to build rapport with the detainee. I understood that the military intelligence community desired to pursue a course of interrogation that drew heavily on the techniques described in Army Field Manual 34-52. From time to time reports of these differences in approaches to interrogation came to our office from various sources. Some reports came from the military intelligence community at Guantanamo, and some came from Department of Justice attorneys who met with Department of Defense attorneys from time to time. Whenever Mr. Haynes learned of such reports, he directed inquiry through the Joint Staff to the chain of command to determine whether the differences between the communities reflected the historically different roles of the two communities or whether there were specific complaints about the interrogation of particular detainees and the specific techniques employed."

26. In response to Question #62, you stated that "individuals held at Guantanamo are treated in a manner that exceeds the requirements of Common Article 3" of the Geneva Conventions. In response to Questions #19, 27, and 34, you state that you have not reached a determination regarding whether certain interrogation techniques used at Guantanamo Bay (stress positions, use of dogs to induce stress, and removal of clothing) violate Common Article 3. How can you conclude that Guantanamo detainees are treated in a manner that exceeds the requirements of Common Article 3 when you have not analyzed whether

interrogation techniques used on these detainees comply with Common Article 3?

Response: The President had determined in his memorandum of February 7, 2002, that "common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to 'armed conflict not of an international character.'" The Supreme Court has now spoken in *Hamdan v. Rumsfeld* and concluded that the current conflict in which we are engaged with al Qaeda is one covered by Common Article 3. The Supreme Court has thus resolved the question of its applicability to the conflict with al Qaeda.

The techniques referenced in the question were only briefly authorized, years before the Supreme Court's *Hamdan* decision that Common Article 3 applied to the conflict with al Qaeda. Those techniques were rescinded within weeks of authorization and never re-authorized. By the time the Court held that Common Article 3 governed the conflict with al Qaeda, those techniques had long since been rescinded and were no longer in use.

I hasten to add that, by all accounts of those knowledgeable about the operations at Guantanamo, the treatment of detainees at Guantanamo by our troops is exemplary and rivals or exceeds that of any high security detention facility.

27. At a July 15, 2006, hearing of the Senate Armed Services Committee, Senator Graham asked Major General Jack Rives, Judge Advocate General of the U.S. Air Force, "Would you agree that some of the techniques we have authorized clearly violate Common Article 3?" Major General Rives responded, "Some of the techniques that have been authorized and used in the past have violated Common Article 3." Do you agree with Major General Rives?

Response: In 2002, the President determined that Common Article 3 of the Geneva Conventions did not apply to the conflict with al Qaeda. This determination was subsequently endorsed in the U.S. Court of Appeals for the D.C. Circuit as a proper application of the Geneva Convention, but was reversed by the Supreme Court. As a consequence of the Supreme Court's decision in *Hamdan*, Congress is currently considering various proposals, including the Administration's proposal, addressing the meaning of Common Article 3. Given the pending proposals, the fact that I am a sitting administration official, and that I am a judicial nominee, it would not be appropriate for me to provide my views as to the scope of Common Article 3.

I note that Common Article 3 provides, in relevant parts, that persons covered under the Article "shall in all circumstances be treated humanely" and that certain conduct is prohibited including, "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;" and "outrages upon personal dignity, in particular humiliating and degrading treatment."

28. Please describe your involvement in drafting the Administration's proposed "Military Commissions Act of 2006."

Response: I have not been involved in drafting the Administration's proposed Military Commissions Act.

29. Please describe your role in producing the September 13, 2006, letter to Senator John Warner, Chairman of the Senate Armed Services Committee, from Major General Scott Black, U.S. Army Judge Advocate General; Major General Charles J. Dunlap, Jr., U.S. Air Force Deputy Judge Advocate General; Rear Admiral Bruce MacDonald, U.S. Navy Judge Advocate General; James C. Walker, U.S. Marine Corps Staff Judge Advocate; and Colonel Ronald M. Reed, U.S. Air Force, Legal Counsel to the Joint Chiefs of Staff. Did you draft the letter or earlier versions of the letter? Did you place any pressure on the signatories to sign the letter or earlier versions of the letter?

Response: As General Counsel of the Department of Defense, I regularly discuss legal matters with senior lawyers in the Department. Every Wednesday, I host a meeting with the Judge Advocates General and General Counsels of the Military Departments. These meetings regularly include open and candid conversations about myriad legal issues. I greatly value the experience and intellect of the Judge Advocates General and the General Counsels of the Military Departments.

On Wednesday, September 13, 2006, I drafted and discussed with the Judge Advocates General a proposed letter. They discussed and changed the proposed letter. The letter they signed is attached.

In a New York Times article published September 16, 2006, Major General Charles J. Dunlap Jr., Deputy Judge Advocate General of the Air Force said, "I didn't have any problem signing what I signed." In response to the suggestion that the letter was a product of coercion, General Dunlap replied, "Do you really think that an officer with 30 years' service could be coerced by the Pentagon bureaucracy to sign something he didn't want to sign?"

30. Have you consulted with an attorney regarding your potential legal liability for any actions you have taken since September 11, 2001, in your official capacity as General Counsel of the Defense Department?

Response: No.

SUBMISSIONS FOR THE RECORD

DEPARTMENT OF DEFENSE

SEP 1 3 2006

The Honorable John Warner
Chairman, Senate Armed Services Committee
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

We understand that the Congress is considering legislation proposed by the Administration in response to the recent Supreme Court decision in *Hamdan*.

We would like to clarify our views on two specific sections of the proposed legislation. We do not object to section 6 of the Administration proposal, which would clarify the obligations of the United States under common Article 3 of the Geneva Conventions, and section 7 of the Administration proposal, which would address crimes under the War Crimes Act. Indeed, we think these provisions would be helpful to our fighting men and women at war on behalf of our Country.

Sincerely,

Scott Black
Major General, U.S. Army
The Judge Advocate General

Charles J. Dunlap, Jr.
Major General, U.S. Air Force
The Deputy Judge Advocate General

Bruce MacDonald
Rear Admiral, U.S. Navy
The Judge Advocate General

James C. Walker
Brigadier General, U.S. Marine Corps
Staff Judge Advocate to the U.S. Marine Corps

Ronald M. Reed
Colonel, U.S. Air Force
Legal Counsel to the Chairman
of the Joint Chiefs of Staff

cc:
The Honorable Carl Levin
Ranking Member, Senate Armed Services Committee

DEPARTMENT OF DEFENSE

SEP 13 2006

The Honorable Duncan Hunter
Chairman, House Armed Services Committee
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

We understand that the Congress is considering legislation proposed by the Administration in response to the recent Supreme Court decision in *Hamdan*.

We would like to clarify our views on two specific sections of the proposed legislation. We do not object to section 6 of the Administration proposal, which would clarify the obligations of the United States under common Article 3 of the Geneva Conventions, and section 7 of the Administration proposal, which would address crimes under the War Crimes Act. Indeed, we think these provisions would be helpful to our fighting men and women at war on behalf of our Country.

Sincerely,

Scott Black
Major General, U.S. Army
The Judge Advocate General

Charles J. Dunlap, Jr.
Major General, U.S. Air Force
The Deputy Judge Advocate General

Bruce MacDonald
Rear Admiral, U.S. Navy
The Judge Advocate General

James C. Walker
Brigadier General, U.S. Marine Corps
Staff Judge Advocate to the U.S. Marine Corps

Ronald M. Reed
Colonel, U.S. Air Force
Legal Counsel to the Chairman
of the Joint Chiefs of Staff

cc:
The Honorable Ike Skelton
Ranking Member, House Armed Services Committee

DEPUTY SECRETARY OF DEFENSE
1010 DEFENSE PENTAGON
WASHINGTON, DC 20301-1010

DEC 30 2005

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
COMMANDERS OF THE COMBATANT COMMANDS
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Interrogation and Treatment of Detainees by the Department of Defense

The following provision appears in the Defense Appropriations Act, 2006 (§ 1402):

> No person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.

Pursuant to the above, effective immediately, and until further notice, no person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or interrogation approach or technique that is not authorized by and listed in United States Army Field Manual 34-52, "Intelligence Interrogation," September 28, 1992. Department of Defense Directive 3115.09, "DoD Intelligence Interrogations, Detainee Debriefings and Tactical Questioning," November 3, 2005, remains in effect.

This guidance does not apply to any person in the custody or under the effective control of the Department of Defense pursuant to a criminal law or immigration law of the United States.

The President's February 7, 2002 direction that all persons detained by the U.S. Armed Forces in the War on Terrorism shall be treated humanely remains in effect. Consistent with the President's guidance, DoD shall continue to ensure that no person in the custody or under the control of the Department of Defense, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.

Gordon England
ACTING

OSD 75003-06

Department of Defense

DIRECTIVE

NUMBER 2310.01E
September 5, 2006

USD(P)

SUBJECT: The Department of Defense Detainee Program

References: (a) DoD Directive 2310.01, "DoD Program for Enemy Prisoners of War (EPOW) and Other Detainees," August 18, 1994 (hereby canceled)
(b) DoD Directive 5101.1, "DoD Executive Agent," September 3, 2002
(c) Secretary of Defense Memorandum, "Office of Detainee Affairs," July 16, 2004 (hereby superseded)
(d) DoD Directive 2311.01E, "DoD Law of War Program," May 9, 2006
(e) through (k), see Enclosure 1

1. REISSUANCE AND PURPOSE

This Directive:

1.1. Reissues Reference (a) to revise policy and responsibilities within the Department of Defense (DoD) for a Detainee Program to ensure compliance with the laws of the United States, the law of war, including the Geneva Conventions of 1949, and all applicable policies, directives, or other issuances, consistent with References (d) through (k).

1.2. Re-designates, according to Reference (b), the Secretary of the Army as the DoD Executive Agent for the Administration of Department of Defense Detainee Operations Policy.

1.3. Supersedes Reference (c) and establishes the responsibilities of the Under Secretary of Defense for Policy (USD(P)) as the lead proponent in developing, coordinating, and implementing policies and guidance pertaining to detainee operations.

2. APPLICABILITY

2.1. This Directive applies to:

2.1.1. The Office of the Secretary of Defense (OSD), the Military Departments, the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all

other organizational entities in the Department of Defense (hereafter collectively referred to as the "DoD Components").

2.1.2. DoD contractors assigned to or supporting the DoD Components engaged in, conducting, participating in, or supporting detainee operations.

2.1.3. Non-DoD personnel as a condition of permitting access to internment facilities or to detainees under DoD control.

2.1.4. All detainee operations conducted by DoD personnel (military and civilian), contractor employees under DoD cognizance, and DoD contractors supporting detainee operations.

2.2. This Directive applies during all armed conflicts, however such conflicts are characterized, and in all other military operations.

3. DEFINITIONS

Terms used in this Directive are defined, and are to be interpreted, in accordance with U.S. law and the law of war. Specific terms found in this directive are provided in Enclosure 2.

4. POLICY

It is DoD policy that:

4.1. All detainees shall be treated humanely and in accordance with U.S. law, the law of war, and applicable U.S. policy.

4.2. All persons subject to this Directive shall observe the requirements of the law of war, and shall apply, without regard to a detainee's legal status, at a minimum the standards articulated in Common Article 3 to the Geneva Conventions of 1949 (References (g) through (j), full text of which is found in Enclosure 3), as construed and applied by U.S. law, and those found in Enclosure 4, in the treatment of all detainees, until their final release, transfer out of DoD control, or repatriation. Note that certain categories of detainees, such as enemy prisoners of war, enjoy protections under the law of war in addition to the minimum standards prescribed in Common Article 3 to References (g) through (j).

4.3. Captured or detained persons will be removed as soon as practicable from the point of capture and transported to detainee collection points, holding areas, or other detention locations operated by the DoD Components.

4.4. Detainees and their property shall be accounted for and records maintained according to applicable law, regulation, policy, or other issuances.

4.4.1. Detainees shall be assigned an Internment Serial Number (ISN) as soon as possible after coming under DoD control, normally within 14 days of capture. DoD Components shall maintain full accountability for all detainees under DoD control.

4.4.2. Detainee records and reports shall be maintained, safeguarded, and provided to USD(P) and other DoD Components as appropriate.

4.5. No person subject to this Directive shall accept the transfer of a detainee from another U.S. Government Department or Agency, coalition forces, allied personnel, or other personnel not affiliated with the Department of Defense or the U.S. Government, except in accordance with applicable law, regulation, policy, and other issuances.

4.6. No detainee shall be released or transferred from the care, custody, or control of a DoD Component except in accordance with applicable law, regulation, policy, and other issuances.

4.7. Where doubt exists as to the status of a detainee, the detainee's status shall be determined by a competent authority.

4.8. Detainees under DoD control who do not enjoy prisoner of war protections under the law of war shall have the basis for their detention reviewed periodically by a competent authority.

4.9. All persons subject to this Directive shall:

4.9.1. Receive instruction and complete training, commensurate with their duties, in the laws, regulations, policies, and other issuances applicable to detainee operations, prevention of violations of same, and the requirement to report alleged or suspected violations thereof that arise in the context of detainee operations.

4.9.2. Receive instruction and complete training in advance of conducting, participating in, or supporting detainee operations, and annually thereafter. Training requirements and certifications of completion shall be documented according to applicable law and policy.

4.10. All persons subject to this Directive shall report possible, suspected, or alleged violations of the law of war, and/or detention operations laws, regulations, or policy, for which there is credible information, or conduct, during military operations other than war, that would constitute a violation of law or policy if it occurred during an armed conflict, in accordance with References (d) and (k).

4.11. The International Committee of the Red Cross (ICRC) shall be allowed to offer its services during an armed conflict, however characterized, to which the United States is a party.

5. RESPONSIBILITIES

5.1. The Under Secretary of Defense for Policy (USD(P)) shall:

5.1.1. Review, ensure coordination of, and approve all implementing policies or guidance to the DoD Detainee Program, including all detainee matters involving interaction between the Department of Defense and other U.S. Government Departments or Agencies.

5.1.2. Review, ensure coordination of, and approve all implementing policy or guidance developed pursuant to this Directive by DoD Components. DoD Components will forward copies of such documents to USD(P) for review prior to issuance.

5.1.3. Serve as the principal DoD interlocutor with the ICRC and develop policy and procedures to ensure the proper and timely reporting of ICRC communications to appropriate DoD and U.S. Government officials.

5.2. The Under Secretary of Defense for Personnel and Readiness (USD(P&R)) shall:

5.2.1. Develop and oversee policy to ensure education and training programs satisfy DoD Component requirements in the areas of language, culture, customs, and related matters and to assure that persons subject to this directive have been provided requisite training, knowledge, and skills, necessary to perform detainee operations duties.

5.2.2. Ensure the Assistant Secretary of Defense for Health Affairs develops policies, procedures, and standards for medical program activities and issues DoD instructions consistent with this Directive for medical program activities required by the DoD Detainee Program.

5.2.3. Ensure the Assistant Secretary of Defense for Reserve Affairs develops policies, procedures, and standards for Reserve Components and issues DoD Instructions consistent with this Directive for National Guard and Reserve activities required for the DoD Detainee Program.

5.3. The Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)) shall:

5.3.1. Establish policies and procedures, in coordination with USD(P), the General Counsel, and the appropriate DoD Components, to ensure all DoD contracts pursuant to which contractor employees interact with detainees include a requirement that such contractor employees receive training regarding the international obligations and laws of the United States applicable to detention operations.

5.3.2. Ensure contractor employees accompanying DoD Components in conducting, participating in, or supporting detainee operations complete training and receive information on the law, regulations, and policies applicable to detention operations, and the requirements to report possible, suspected, or alleged violations that arise in the context of detention operations, in accordance with References (d) and (k).

5.4. The Under Secretary of Defense for Intelligence (USD(I)) shall:

5.4.1. Exercise primary responsibility for developing policy pertaining to DoD intelligence interrogations, detainee debriefings, and tactical questioning according to Reference (k).

5.4.2. Act as primary liaison between the Department of Defense and other agencies of the Intelligence Community on intelligence matters pertaining to detainees.

5.5. The General Counsel of the Department of Defense shall coordinate with the Department of Justice and other agencies regarding detainee-related litigation matters and on matters pertaining to detainees who may be U.S. citizens, dual-nationals with U.S. citizenship, or U.S. resident aliens, as appropriate.

5.6. The Heads of the DoD Components shall ensure that all personnel are properly trained and certified in detainee operations commensurate with their duties, maintaining records of such training and certification.

5.7. The Secretary of the Army is hereby designated as the Executive Agent for the Administration of Department of Defense Detainee Operations Policy and in that role shall:

5.7.1. Ensure all Executive Agent responsibilities and functions for the administration of DoD detainee operations policy are assigned and executed according to Reference (b) and this Directive.

5.7.2. Develop and promulgate guidance, regulations, and instructions necessary for the DoD-wide implementation of detainee operations policy in coordination with USD(P).

5.7.3. Communicate directly with the Heads of the DoD Components as necessary to carry out assigned functions. The Chairman of the Joint Chiefs of Staff shall be informed of communications to the Commanders of the Combatant Commands.

5.7.4. Designate a single point of contact within the Department of the Army for detainee operations policy, who shall also provide advice and assistance to USD(P).

5.7.5. Plan for and operate a national-level detainee reporting center and its elements (e.g., theater and lower levels) to account for detainees. Coordinate with USD(P) to provide reports on detainee operations to the Secretary of Defense and others as appropriate.

5.7.6. Recommend DoD-wide detainee operations-related planning and programming guidance to the USD(P), USD(AT&L), USD(I), USD(P&R), the Under Secretary of Defense (Comptroller), the Assistant Secretary of Defense for Networks and Information Integration, the Director of Program Analysis and Evaluation, and the Chairman of the Joint Chiefs of Staff. Provide information copies of such guidance to the Secretaries of the Military Departments.

5.7.7. Establish detainee operations training and certification standards, in coordination with the Secretaries of the Military Departments and the Joint Staff.

5.7.8. Develop programs to ensure all DoD detainee operations policy; doctrine; tactics, techniques, and procedures; and regulations or other issuances are subject to periodic review, evaluation, and inspection for effectiveness and compliance with this Directive.

5.8. The Chairman of the Joint Chiefs of Staff shall:

5.8.1. Provide appropriate oversight to the Commanders of the Combatant Commands to ensure their detainee operations policies and procedures are consistent with this Directive.

5.8.2. Designate a single point of contact within the Joint Staff for matters pertaining to the implementation of this Directive.

5.8.3. Ensure that operational exercises routinely test the capabilities of the DoD Components to conduct, participate in, and support detainee operations, consistent with this Directive.

5.9. The Commanders of the Combatant Commands shall:

5.9.1. Plan, execute, and oversee Combatant Command detainee operations in accordance with this Directive and implementing issuances.

5.9.2. Develop programs and issue appropriate guidance and orders implementing this Directive. All such programs and guidance shall be subjected to periodic review and evaluation for compliance and efficacy.

5.9.3. When detainee internment facilities, holding areas, collection points, or interrogation facilities are in their area of responsibility:

5.9.3.1. Ensure procedures are established for the treatment of detainees consistent with this Directive.

5.9.3.2. Ensure detainees are provided with information, in their own language, concerning the rights, duties, and obligations of their detention, which may include applicable provisions of the Geneva Conventions.

5.9.3.3. Ensure periodic unannounced and announced inspections of internment facilities, including temporary holding areas and collection points, are conducted to provide continued oversight of detainee operations.

6. EFFECTIVE DATE

This Directive is effective immediately.

Gordon England
Deputy Secretary of Defense

Enclosures – 4
E1. References, continued
E2. Definitions
E3. Article 3 Common to the Geneva Conventions of 1949
E4. Detainee Treatment Policy

E1. ENCLOSURE 1

REFERENCES, continued

(e) Sections 2340 & 2340A of Title 18, U.S. Code
(f) The Detainee Treatment Act of 2005, Pub. L. No. 109-163 (119 STAT. 3474-3480), Section 1401-1406, Title XIV
(g) Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949
(h) Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949
(i) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949
(j) Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949
(k) DoD Directive 3115.09, "DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning," November 3, 2005

E2. ENCLOSURE 2

DEFINITIONS

E2.1. Detainee. Any person captured, detained, held, or otherwise under the control of DoD personnel (military, civilian, or contractor employee). It does not include persons being held primarily for law enforcement purposes, except where the United States is the occupying power. A detainee may also include the following categories:

E2.1.1. Enemy Combatant. In general, a person engaged in hostilities against the United States or its coalition partners during an armed conflict. The term "enemy combatant" includes both "lawful enemy combatants" and "unlawful enemy combatants."

E2.1.1.1. Lawful Enemy Combatant. Lawful enemy combatants, who are entitled to protections under the Geneva Conventions, include members of the regular armed forces of a State party to the conflict; militia, volunteer corps, and organized resistance movements belonging to a State party to the conflict, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the laws of war; and members of regular armed forces who profess allegiance to a government or an authority not recognized by the detaining power.

E2.1.1.2. Unlawful Enemy Combatant. Unlawful enemy combatants are persons not entitled to combatant immunity, who engage in acts against the United States or its coalition partners in violation of the laws and customs of war during an armed conflict. For purposes of the war on terrorism, the term Unlawful Enemy Combatant is defined to include, but is not limited to, an individual who is or was part of or supporting Taliban or al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners.

E2.1.2. Enemy Prisoner of War. Individuals under the custody and/or control of the Department of Defense according to Reference (g), Articles 4 and 5.

E2.1.3. Retained Person. Individuals under the custody and/or control of the Department of Defense according to Reference (g), Article 33.

E2.1.4. Civilian Internee. Individuals under the custody and/or control of the Department of Defense according to Reference (h), Article 4.

E2.2. Law of War. That part of international law that regulates the conduct of armed hostilities and occupation. It is often called the "law of armed conflict" and encompasses all international law applicable to the conduct of hostilities that is binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party (e.g., the Geneva Conventions of 1949), and applicable customary international law.

E3. ENCLOSURE 3

ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS OF 1949

E3.1. The text of Common Article 3 to the Geneva Conventions of 1949 is as follows:

"In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

"(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

"To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

"(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

"(b) taking of hostages;

"(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

"(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

"(2) The wounded and sick shall be collected and cared for.

"An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

"The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

"The application of the preceding provisions shall not affect the legal status of the Parties to the conflict."

E4. ENCLOSURE 4

DETAINEE TREATMENT POLICY

E4.1. In addition to the requirements in paragraph 4.2 and Enclosure 3, DoD policy relative to the minimum standards of treatment for all detainees in the control of DoD personnel (military, civilian, or contractor employee) is as follows:

E4.1.1. All persons captured, detained, interned, or otherwise in the control of DoD personnel during the course of military operations will be given humane care and treatment from the moment they fall into the hands of DoD personnel until release, transfer out of DoD control, or repatriation, including:

E4.1.1.1. Adequate food, drinking water, shelter, clothing, and medical treatment;

E4.1.1.2. Free exercise of religion, consistent with the requirements of detention;

E4.1.1.3. All detainees will be respected as human beings. They will be protected against threats or acts of violence including rape, forced prostitution, assault and theft, public curiosity, bodily injury, and reprisals. They will not be subjected to medical or scientific experiments. They will not be subjected to sensory deprivation. This list is not exclusive.

E4.1.2. All persons taken into the control of DoD personnel will be provided with the protections of Reference (g) until some other legal status is determined by competent authority.

E4.1.3. The punishment of detainees known to have, or suspected of having, committed serious offenses will be administered in accordance with due process of law and under legally constituted authority.

E4.1.4. The inhumane treatment of detainees is prohibited and is not justified by the stress of combat or deep provocation.

OFFICE OF THE SECRETARY OF DEFENSE
WASHINGTON, DC 20301

JUL 7 2006

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
COMMANDERS OF THE COMBATANT COMMANDS
ASSISTANT SECRETARIES OF DEFENSE
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
DIRECTOR, OPERATIONAL TEST AND EVALUATION
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, ADMINISTRATION AND MANAGEMENT
DIRECTOR, PROGRAM ANALYSIS AND EVALUATION
DIRECTOR, NET ASSESSMENT
DIRECTOR, FORCE TRANSFORMATION
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Application of Common Article 3 of the Geneva Conventions to the Treatment of Detainees in the Department of Defense

The Supreme Court has determined that Common Article 3 to the Geneva Conventions of 1949 applies as a matter of law to the conflict with Al Qaeda. The Court found that the military commissions as constituted by the Department of Defense are not consistent with Common Article 3.

It is my understanding that, aside from the military commission procedures, existing DoD orders, policies, directives, execute orders, and doctrine comply with the standards of Common Article 3 and, therefore, actions by DoD personnel that comply with such issuances would comply with the standards of Common Article 3. For example, the following are consistent with the standards of Common Article 3: U.S. Army Field Manual 34-52, "Intelligence Interrogation," September 28, 1992; DoD Directive 3115.09, "DoD Intelligence Interrogation, Detainee Debriefings and Tactical Questioning," November 3, 2005; DoD Directive 2311.01E, "DoD Law of War Program," May 9, 2006; and DoD Instruction 2310.08E, "Medical Program Support for Detainee Operations," June 6, 2006. In addition, you will recall the President's prior directive that "the United States Armed Forces shall continue to treat detainees humanely," humane treatment being the overarching requirement of Common Article 3.

You will ensure that all DoD personnel adhere to these standards. In this regard, I request that you promptly review all relevant directives, regulations, policies, practices, and procedures under your purview to ensure that they comply with the standards of Common Article 3.

Your reply confirming completion of this review should be submitted by a Component Head, General/Flag Officer, or SES member, including a reply of "reviewed and no effect" where applicable, to the Deputy Assistant Secretary of Defense (DASD) for Detainee Affairs, Office of the Under Secretary of Defense for Policy, no later than three weeks from the date of this memorandum. The DASD for Detainee Affairs may be reached at (703) 697-4602.

The text of Common Article 3 follows:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> (b) taking of hostages;
> (c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
> (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
>
> (2) The wounded and sick shall be collected and cared for.
>
> An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
>
> The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
>
> The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 6, 2006

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed please find the corrected transcript of the testimony of Mr. William Haynes, II, for the hearing held before your Committee on July 11, 2006, concerning his nomination to the Fourth Circuit Court of Appeals.

If we may be of further assistance, please feel free to contact this office.

Sincerely,

William E. Moschella
Assistant Attorney General

Enclosure

Thank you Chairman Warner and Senator Allen for introducing me and my family. Both of you have been so gracious in welcoming me to the Commonwealth of Virginia some three years ago. Like so many other people who have served in the armed forces around the world and who chose to settle in Virginia, we have been welcomed as family.

I thank the Committee for the opportunity to appear before you again. In particular, I thank Chairman Specter and Senators Leahy, Sessions, and Cornyn for speaking with me recently.

I thank my family: my wife Meg, who has been my rock; my children Will, Sarah, and Taylor – who have all grown up during these last five years. Sarah and Taylor are moving up in school: Taylor will be a freshman at Yorktown High School, and Sarah a first year student at Davidson College. Will is already at Davidson. After trying to enlist twice in 2001 as a 14 year old, determined to fight the terrorists that tried to kill his Dad in the Pentagon, Will has finally joined the Army as an ROTC cadet, following his Dad's footsteps, and his grandfather's, who spent 26 years in the Air Force after graduating ROTC at the University of South Carolina.

I thank the President for his continued confidence in me and for this nomination to be a judge.

If confirmed, I pledge that I will be true to the Constitution and laws of the United States; that I will discharge my responsibilities without partisanship and without favoritism.

I have served as General Counsel of the Department of Defense for more than five years. If not already, within weeks I will have served longer than anyone else. My duties are much like those of a general counsel for a large corporation. The Department has many hundreds of thousands of employees, is responsible for the expenditure of more than 400 billion dollars annually, has presence worldwide ranging from industrial operations to environmental stewardship, from advanced research to air, land and rail transportation systems.

But my client – the DoD - also must fight and win the Country's wars.

The soldiers, sailors, airmen and marines around the world are performing magnificently, and it is my deep privilege to serve with them. We should all be thankful that they are out there every day, protecting us from our enemies.

The attacks of September 11, 2001, demonstrated the kind of enemies they, and we, face. These enemies are unique. They don't have uniformed armies or capitals to capture. They don't follow any rules, other than to exploit the rules of civilized society.

This is a war that has presented difficult questions for people like me: lawyers working for the Country and for our soldiers, sailors, airmen and marines.

I have, along with others, endeavored along with my client to develop appropriate guidelines for treatment and questioning of terrorists. Information is, after all, critical to protecting this Nation in this conflict. That approach has from time to time been adjusted But from the beginning and at all times the rule has been clear: even the terrorists must be treated humanely.

This issue, in particular, has generated passionate debated that has been healthy and worthwhile. But there has been much misinformation about these debates.

One episode, in particular, has been much in the news: the interrogation of the 20th hijacker, al Qatani, at Guantanamo.

Remember who he is: he is the man identified by the 9-11 Commission who flew into the Orlando Florida airport in August 2001, to be met by the lead hijacker Mohammed Atta, and one other hijacker. Qatani is said to have likely been the operative to round out the team that hijacked United Airlines Flight 93, which crashed into an empty field in Shanksville, PA.

Thankfully, an alert customs official turned Qatani away. He returned to Afghanistan, and was captured after 9-11. Qatani was brought to Guantanamo, but our soldiers did not learn who he was until late summer 2002, shortly before the first anniversary of 9-11.

What was happening then?

As the anniversary approached, the intelligence and threat warnings spiked, indicating attacks might be imminent. Additionally:

- Over the spring and summer, there were deadly attacks in Tunisia and Pakistan.
- In October 2002, al Qaeda leader Ayman Zawahiri released a tape recording stating that "God willing, we will continue targeting the keys of the American economy."
- In September and October, the FBI broke up the Lackawana Six cell in New York.
- On October 12, 2002, al Qaeda affiliate Jemaah Islamiya bombed the nightclub in Bali, Indonesia killing more than 200 and injuring about 300.

Meanwhile, the interrogators of Qatani were frustrated. Qatani showed considerable skill in resisting established techniques developed for questioning prisoners of war, and maintained his story that he had traveled to Afghanistan to purchase falcons.

So, the commanding general at Guantanamo, a reserve Major General whose civilian job was to serve as a state court trial judge, sought permission to employ more aggressive techniques. His request came with the concurring legal opinion of his judge advocate.

The Commander of SOUTHCOM forwarded that request to the Joint Chiefs of Staff at the Pentagon.

As the request passed up the line, many struggled over the question.. I struggled too.

Ultimately, I joined the Chairman of the Joint Chiefs of Staff, and the Deputy Secretary of Defense in recommending that some of the requested techniques be rejected, but that a subset should be approved, noting that, while all might be legal under these circumstances, "the armed forces operate with a tradition of restraint."

But deep concerns regarding the interrogations at Guantanamo were expressed to me. I was responsive to those concerns. I tried to find out whether there was some basis to the allegations that were raised to me, but could not determine what was or was not occurring at Guantanamo. Nevertheless, I shared with the Secretary the concerns expressed to me. I subsequently went to him on January 12, and recommended that he rescind his approval and permit more study of the issues. The Secretary promptly picked up the phone, called General Hill, and suspended the approval for the use of the most aggressive of the techniques, and three days later he followed up with a written memo rescinding the approval for the most aggressive techniques.

At my urging for more study of the issue, the Secretary directed me to establish a working group to study the issue and provide a report in two weeks. That working group would involve every relevant stakeholder in the Department of Defense, from judge advocates to intelligence officers to warfighters, to chiefs of staff and service secretaries

I sought the opinion of the Justice Department's Office of Legal Counsel because their *legal* advice is definitive and binding upon all Executive Branch agencies, including the Department of Defense. Although DoD was bound by OLC's *legal* advice, it was free to adopt a narrower course of action on the basis of *policy*. OLC made no policy recommendation.

I highly value the opinions of the JAGs. I am a JAG officer in the individual ready reserves. I have made an integral part of my routine as General Counsel to seek their advice as well as the advice of the General Counsel of the military departments. I meet with military legal advisor serving the Joint Chiefs of Staff everyday. I meet with General Counsels of the military departments and the TJAGs every Wednesday evening. So I directed that the JAGs and General Counsels of all of the military services be included in the Working Group.

Because of continuing differences of opinion within the Working Group, I personally invited each of the JAGs to meet with me regarding any concerns or suggestions. RADM Lohr and two Navy judge advocates took me up on my invitation and met with me regarding their concerns.

I again advised the Secretary to exercise restraint. My recommendation reflects my belief that the Secretary should not approve any techniques that were even close to the outer

legal boundary set by OLC. The Working Group evaluated 35 techniques. I recommended, as a matter policy, that he reject 11 of the most aggressive techniques in the Working Group Report. Of the techniques for which I recommended approval, 17 were already allowed by the Army Field Manual. The Chairman of the Joint Chiefs of Staff agreed. Ultimately, the Secretary approved the use of only 24 of the 35 techniques recommended by the Working Group, and only for use at Guantanamo. Again, of those 24, 17 were already allowed by the Army Field Manual.

There were some advisers who recommended that a greater number of these proposed techniques be adopted, but the Secretary ultimately chose to take the path of restraint. Neither serious physical injury, nor organ failure, nor impairment of bodily functions, nor waterboarding were proposed by that report, let alone approved.

All of this discussion is historical in nature. The OLC opinion and the Working Group Report have been withdrawn. And the Secretary's approval of 24 techniques is no longer in effect because of the enactment of the Detainee Treatment Act.

I have been speaking about one episode in my tenure in the Executive branch. But I appear before you today as a nominee to be a judge.

My first job out of law school was as a clerk to a judge: James B. McMillan, in the Western District of North Carolina. I learned a lot from my judge, including: "never attribute malice that which can be attributed to stupidity;" and, "your job as my clerk is to keep me from making unintended error;" and, "the government has no rights, only responsibilities."

While I didn't always agree with the judge, I haven't forgotten that the awesome powers of the government are checked by our Constitution, and for good reason.

That the government has no rights, only responsibilities may be an overstatement in a strictly legal sense, the underlying concept is a good one for a government official to remember.

But, consistent with that, I have also remembered that the powers employed by the President in this war is not so much an exercise of lawful executive power or governmental rights. It is an appropriate discharge of governmental responsibility. The Constitution imposes on the President an awesome responsibility to ensure that the American people are safe and secure, and that they can enjoy their liberty. To fail to meet this responsibility would be to fail to discharge one of these most basic of all governmental responsibilities.

If confirmed, I hope to take a different role, in a different branch of our Constitutional structure. I ask your support.

Thank you very much.

Statement of
The Honorable Patrick Leahy
United States Senator
Vermont

July 11, 2006

PRINTABLE VERSION

Statement of Senator Patrick Leahy,

Ranking Member, Judiciary Committee

On the Nomination of William J. Haynes II

To the Fourth Circuit Court of Appeals

July 11, 2006

William J. Haynes II has been renominated to the Fourth Circuit Court of Appeals. I have met with Mr. Haynes twice and shared with him my questions and concerns about this nomination. Mr. Haynes has been General Counsel of the Department of Defense since 2001, and in that role has been a key player in some of the more controversial and questionable policies this Administration has issued relating to the treatment and detention of military detainees.

The first time around, Mr. Haynes's nomination was rushed through the Committee in March 2004 before members of the Committee had answers to our questions. It was shortly thereafter that we learned of the scandalous treatment of prisoners at Abu Ghraib prison, which raised additional questions about treatment and interrogation of detainees. In the intervening years, we have learned a bit more about policies and legal positions apparently advocated by Mr. Haynes, and the devastating effects those policies have had on our military and our security. My questions and concerns about this nomination have continued to grow as more information has become available.

Press reports and Mr. Haynes's own statements in the Judiciary Committee questionnaire and elsewhere indicate that he played a key role in developing United States policy toward detainees in Guantanamo Bay and elsewhere. Specifically, he made legal findings and set policies for military tribunals for detainees, the designation of individuals as enemy combatants, and the limits on

cruel, inhumane, or degrading interrogation techniques.

Many of these policies have since been discredited. The Supreme Court, in the case of Hamdan v. Rumsfeld, recently ruled that military tribunals as constituted by this Administration were "illegal," and that the theory of almost unlimited presidential power that underpinned many of this Administration's policies is invalid. On the issue of detainee interrogation policy, the Department of Justice in late 2003 withdrew the controversial 2002 "Bybee memo" asserting that the President could authorize and immunize torture, and the Defense Department in 2005 declared its working group report, which had reached similar conclusions, a non-operational historical document.

The question for Mr. Haynes is where he stood in the development and analysis of these crucial, discredited policies and legal analysis. I look, by way of comparison, at Alberto Mora, former General Counsel of the United States Navy. Mr. Mora this year won a Profile in Courage Award from the John F. Kennedy Library Foundation for standing up to policies that he recognized as alien to our morals and values and dangerous to our troops. Mr. Mora wrote a July 7, 2004, memorandum to the Navy's Inspector General, setting out his tireless efforts to reverse what he saw as an intolerable direction in United States policy and legal analysis.

Mr. Mora said in accepting the Profile in Courage Award that "for as long as these policies were in effect our government had adopted what only can be labeled as a policy of cruelty." He said, "Cruelty disfigures our national character. It is incompatible with our constitutional order, with our laws, and with our most prized values. Cruelty can be as effective as torture in destroying human dignity, and there is no moral distinction between one and the other."

I want to hear from Mr. Haynes what his role was in the debates over the interrogation and punishment of detainees, whether he shared Mr. Mora's horror at policies authorizing cruelty, and whether he stood up to others to try to put a stop to these policies. Public accounts suggest otherwise. They suggest that Mr. Haynes defended the Administration's authorization of cruel interrogation tactics, that he discounted the concerns of Mr. Mora and others, and that he personally recommended that Secretary Rumsfeld approve specific cruel interrogation techniques. His actions may have earned him a nomination from this President', but they have only heightened my concerns about this nomination.

Yesterday I received a letter from 20 retired senior military officials, many of them generals and admirals expressing "deep concern" about this nomination. They are particularly concerned that Mr. Haynes may not have given proper regard to the views of uniformed and experienced military attorneys. They wrote:

Mr. Haynes was arguably in the strongest position of any other senior government official to sound the alarm about the likely consequences for military personnel of the views being put forward by the Justice Department, because he had the benefit of the clear and unanimous concerns voiced by the uniformed Judge Advocate General of each of the military services. Yet Mr. Haynes seems to have muted these concerns, rather than amplify them.

Press reports suggest that career military lawyers were also shut out of the process of determining procedures for military tribunals and that Mr. Haynes played a key role in this process, including opposing any civilian review of the tribunals. If Mr. Haynes had listened to career uniformed attorneys, perhaps the Supreme Court's decision in the Hamdan case checking the encroachment of Executive power would not have been necessary.

Documents and press accounts suggest that Mr. Haynes similarly disregarded the concerns of law enforcement officials who argued that the Defense Department's interrogation policies were ineffective and potentially harmful.

The 20 retired senior military officers wrote that the authorization of cruel interrogation techniques has had and will have a devastating effect on our country and on our military. They wrote, "Today, it is clear that these policies, which rejected long-standing military law grounded in decades of operational expertise, have fostered animosity toward the United States, undermined rather than enhanced our intelligence gathering efforts, and added significantly to the risks facing our troops serving around the world."

This distinguished group of retired officers concluded that the Administration's detainee policies have put our troops in harm's way and undermined our security. We know that these policies resulted in abuses at Abu Ghraib and elsewhere, for which young soldiers have been prosecuted and punished. If Mr. Haynes was in fact instrumental in formulating and defending these policies, it is difficult to understand how he earned a promotion while others who implemented these policies were severely punished.

We learn this morning, during the course of a hearing that Mr. Haynes did not attend but to which he sent his deputy, that days ago, the Defense Department issued a memorandum stating that military detainees being held do deserve some protections under the Geneva Conventions. It was not mentioned in the Administration's written testimony, some of which was not distributed until near midnight last night did not mention this relevant memorandum from last week. Nor did Mr. Haynes' deputy mention it in his initial remarks. Instead, we learned about it through press accounts and had to ask about the press accounts to determine its existence. We now would like to know what role Mr. Haynes played in its formulation and whether it reflects an admission of error and change of heart and legal analysis on his part.

I also have significant concerns whether Mr. Haynes would recuse himself if issues and policies on which he worked at the Department of Defense were to come before him as a judge. He has refused to make that commitment to me in our private conversations or at an earlier hearing. My suspicion is that a motivation of the President for making this nomination is to have another sure vote on the Fourth Circuit to uphold his actions. The Fourth Circuit and the D.C. Circuit have emerged as the courts to which the Administration directs issues on which the President asserts unitary executive power and wants to be sustained.

The key to our constitutional system is the separation and balance of power. The legislative and judicial branches must serve as a check on the Executive. The Republican Congress has failed to act as a check, instead acting as a rubber stamp for this President's policies. That makes the independent judiciary all the more important. Mr. Haynes's record of helping to formulate, justify and defend this Administration's damaging policies and his failure to commit to recusing himself from hearing cases as a judge on these very same policies raise major concerns whether he would act as a check on the Executive.

I also have concerns about whether Mr. Haynes has always in the past been straightforward with Congress, with the American people, and with me. Mr. Haynes wrote a letter to me on June 25, 2003 in response to a letter I had sent to then-National Security Advisor Condoleeza Rice. In his letter, Mr. Haynes wrote that, under Article 16 of the Convention Against Torture, "the United States also has an obligation to 'undertake ... to prevent other acts of cruel, inhuman, or degrading treatment or punishment which do not amount to torture.'" He defined "cruel, inhuman, or degrading treatment" as that treatment or punishment prohibited by the Fifth, Eighth or Fourteenth Amendments to our constitution and said, "United States policy is to treat all detainees and conduct all interrogations, wherever they may occur, in a manner consistent with this commitment."

I found that letter reassuring, as did many others. Press reports suggest, though, that when Mr. Haynes sent that letter to me, the Department of Defense had recently approved many harsh interrogation techniques and had adopted a working group report presenting a flawed legal justification for cruel treatment of detainees. Indeed, press accounts suggest that as recently as late last year, Mr. Haynes helped to defeat a proposal that would have made it official Department of Defense policy that detainees be treated in accordance with Common Article Three of the Geneva conventions, barring cruel, inhumane, and degrading treatment. It is of great concern to me if Mr. Haynes made reassuring statements to Members of Congress, while pursuing a very different policy.

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1 of 10 DOCUMENTS

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How an internal effort to ban the abuse and torture of detainees was thwarted.

BYLINE: JANE MAYER

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One night this January, in a ceremony at the Officers' Club at Fort Myer, in Arlington, Virginia, which sits on a hill with a commanding view across the Potomac River to the Washington Monument, Alberto J. Mora, the outgoing general counsel of the United States Navy, stood next to a podium in the club's ballroom. A handsome gray-haired man in his mid-fifties, he listened with a mixture of embarrassment and pride as his colleagues toasted his impending departure. Amid the usual tributes were some more pointed comments.

"Never has there been a counsel with more intellectual courage or personal integrity," David Brant, the former head of the Naval Criminal Investigative Service, said. Brant added somewhat cryptically, "He surprised us into doing the right thing." Conspicuous for his silence that night was Mora's boss, William J. **Haynes** II, the general counsel of the Department of Defense.

Back in **Haynes's** office, on the third floor of the Pentagon, there was a stack of papers chronicling a private battle that Mora had waged against **Haynes** and other top Administration officials, challenging their tactics in fighting terrorism. Some of the documents are classified and, despite repeated requests from members of the Senate Armed Services Committee and the Senate Judiciary Committee, have not been released. One document, which is marked "secret" but is not classified, is a twenty-two-page memo written by Mora. It shows that three years ago Mora tried to halt what he saw as a disastrous and unlawful policy of authorizing cruelty toward terror suspects.

The memo is a chronological account, submitted on July 7, 2004, to Vice Admiral Albert Church, who led a Pentagon investigation into abuses at the U.S. detention facility at Guantánamo Bay, Cuba. It reveals that Mora's criticisms of Administration policy were unequivocal, wide-ranging, and persistent. Well before the exposure of prisoner abuse in Iraq's Abu Ghraib prison, in April, 2004, Mora warned his superiors at the Pentagon about the consequences of President Bush's decision, in February, 2002, to circumvent the Geneva conventions, which prohibit both torture and "outrages upon personal dignity, in particular humiliating and degrading treatment." He argued that a refusal to outlaw cruelty toward U.S.-held terrorist suspects was an implicit invitation to abuse. Mora also challenged the legal framework that the Bush Administration has constructed to justify an expansion of executive power, in matters ranging from interrogations to wiretapping. He described as "unlawful," "dangerous," and "erroneous" novel legal theories granting the President the right to authorize abuse. Mora warned that these precepts could leave U.S. personnel open to criminal prosecution.

In important ways, Mora's memo is at odds with the official White House narrative. In 2002, President Bush declared that detainees should be treated "humanely, and to the extent appropriate and consistent with military necessity, in a manner consistent with the principles" of the Geneva conventions. The Admini-

stration has articulated this standard many times. Last month, on January 12th, Secretary of Defense Donald Rumsfeld, responding to charges of abuse at the U.S. base in Cuba, told reporters, "What took place at Guantánamo is a matter of public record today, and the investigations turned up nothing that suggested that there was any policy in the department other than humane treatment." A week later, the White House press spokesman, Scott McClellan, was asked about a Human Rights Watch report that the Administration had made a "deliberate policy choice" to abuse detainees. He answered that the organization had hurt its credibility by making unfounded accusations. Top Administration officials have stressed that the interrogation policy was reviewed and sanctioned by government lawyers; last November, President Bush said, "Any activity we conduct is within the law. We do not torture." Mora's memo, however, shows that almost from the start of the Administration's war on terror the White House, the Justice Department, and the Department of Defense, intent upon having greater flexibility, charted a legally questionable course despite sustained objections from some of its own lawyers.

Mora had some victories. "America has a lot to thank him for," Brant, the former head of the N.C.I.S., told me. But those achievements were largely undermined by a small group of lawyers closely aligned with Vice-President Cheney. In the end, Mora was unable to overcome formidable resistance from several of the most powerful figures in the government.

Brant had joked at the farewell party that Mora "was an incredible publicity hound." In fact, Mora-whose status in the Pentagon was equivalent to that of a four-star general-is known for his professional discretion, and he has avoided the press. This winter, however, he agreed to confirm the authenticity and accuracy of the memo and to be interviewed. A senior Defense Department official, whom the Bush Administration made available as a spokesman, on the condition that his name not be used, did so as well. Mora and the official both declined to elaborate on internal Department of Defense matters beyond those addressed in the memo. Mora, a courtly and warm man, is a cautious, cerebral conservative who admired President Reagan and served in both the first and the second Bush Administrations as a political appointee. He strongly supported the Administration's war on terror, including the invasion of Iraq, and he revered the Navy. He stressed that his only reason for commenting at all was his concern that the Administration was continuing to pursue a dangerous course. "It's my Administration, too," he said.

Mora first learned about the prob lem of detainee abuse on December 17, 2002, when David Brant approached him with accusations of wrongdoing at Guantánamo. As head of the Naval Criminal Investigation Service, Brant often reported to Mora but hadn't dealt with him on anything so sensitive. "I wasn't sure how he would react," Brant, a tall, thin man with a mustache, told me. Brant had already conveyed the allegations to Army leaders, since they had command authority over the military interrogators, and to the Air Force, but he said that nobody seemed to care. He therefore wasn't hopeful when he went to Mora's office that afternoon.

When we spoke, Mora recalled the mood at the Pentagon at the time, just fifteen months after the September 11th attacks. "The mentality was that we lost three thousand Americans, and we could lose a lot more unless something was done," he said. "It was believed that some of the Guantánamo detainees had knowledge of other 9/11-like operations that were under way, or would be executed in the future. The gloves had to come off. The U.S. had to get tougher." Mora had been inside the Pentagon on September 11th and recalled the jetliner crashing into the building one facet over. He said that it "felt jarring, like a large safe had been dropped overhead." From the parking lot, he watched the Pentagon burn. The next day, he said, he looked around a room full of top military leaders, and was struck by the thought that "these guys were going to be the tip of the spear."

Brant oversaw a team of N.C.I.S. agents working with the F.B.I. at Guantánamo Bay, in what was called the Criminal Investigative Task Force. It had been assigned to elicit incriminating information from the nearly six hundred detainees being held there. Unlike a group run by Army intelligence, Joint Task Force 170, or J.T.F.-170, which was looking for intelligence that would help American au-

thorities determine Al Qaeda's next move, Brant's investigators gathered evidence that eventually could be used for prosecutions in military tribunals or civilian courts. He and his agents had experience and training in law enforcement: Brant, a civilian, holds an advanced degree in criminology, and worked as a policeman in Miami in the nineteen-seventies.

Brant informed Mora that he was disturbed by what his agents told him about the conduct of military-intelligence interrogators at Guantánamo. These officials seemed poorly trained, Brant said, and were frustrated by their lack of success. He had been told that the interrogators were engaging in escalating levels of physical and psychological abuse. Speaking of the tactics that he had heard about, Brant told me, "Repugnant would be a good term to describe them."

Much of Brant's information had been supplied by an N.C.I.S. psychologist, Michael Gelles, who worked with the C.I.T.F. and had computer access to the Army's interrogation logs at Guantánamo. Brant told me that Gelles "is phenomenal at unlocking the minds of everyone from child abusers to terrorists"; he took it seriously when Gelles described the logs as shocking.

The logs detailed, for example, the brutal handling of a Saudi detainee, Mohammed al-Qahtani, whom an F.B.I. agent had identified as the "missing twentieth hijacker"-the terrorist who was supposed to have been booked on the plane that crashed in a Pennsylvania field. Qahtani was apprehended in Afghanistan a few months after the terrorist attacks.

Qahtani had been subjected to a hundred and sixty days of isolation in a pen perpetually flooded with artificial light. He was interrogated on forty-eight of fifty-four days, for eighteen to twenty hours at a stretch. He had been stripped naked; straddled by taunting female guards, in an exercise called "invasion of space by a female"; forced to wear women's underwear on his head, and to put on a bra; threatened by dogs; placed on a leash; and told that his mother was a whore. By December, Qahtani had been subjected to a phony kidnapping, deprived of heat, given large quantities of intravenous liquids without access to a toilet, and deprived of sleep for three days. Ten days before Brant and Mora met, Qahtani's heart rate had dropped so precipitately, to thirty-five beats a minute, that he required cardiac monitoring.

Brant told me that he had gone to Mora because he didn't want his team of investigators to "in any way observe, condone, or participate in any level of physical or in-depth psychological abuse. No slapping, deprivation of water, heat, dogs, psychological abuse. It was pretty basic, black and white to me." He went on, "I didn't know or care what the rules were that had been set by the Department of Defense at that point. We were going to do what was morally, ethically, and legally permissible." Recently declassified e-mails and orders obtained by the American Civil Liberties Union document Brant's position, showing that all C.I.T.F. personnel were ordered to "stand clear and report" any abusive interrogation tactics.

Brant thinks that the Army's interrogation of Qahtani was unlawful. If an N.C.I.S. agent had engaged in such abuse, he said, "we would have relieved, removed, and taken internal disciplinary action against the individual-let alone whether outside charges would have been brought." Brant said he feared that such methods would taint the cases his agents needed to make against the detainees, undermining any attempts to prosecute them in a court of law. He also doubted the reliability of forced confessions. Moreover, he told me, "it just ain't right."

Another military official, who worked closely with Brant and who has been denied permission to speak on the record, told me that the news "rocked" Mora. The official added that Mora "was visionary about this. He quickly grasped the fact that these techniques in the hands of people with this little training spelled disaster."

In his memo, Mora noted that Brant asked him if he wanted to hear more about the situation. He wrote, "I responded that I felt I had to."

Mora was a well-liked and successful figure at the Pentagon. Born in Boston in 1952, he is the son of a Hungarian mother, Klara, and a Cuban father, Lidio, both of whom left behind Communist regimes for America. Klara's father, who had been a lawyer in Hungary, joined her in exile just before the Soviet Union took control. From the time Alberto was a small boy, Klara Mora told me, he heard from his grandfather the message that "the law is sacred." For the Moras, injustice and abuse were not merely theoretical concepts. One of Mora's great-uncles had been interned in a Nazi concentration camp, and another was hanged after having been tortured. Mora's first memory, as a young child, is of playing on the floor in his mother's bedroom, and watching her crying as she listened to a report on the radio declaring that the 1956 anti-Communist uprising in Hungary had been crushed. "People who went through things like this tend to have very strong views about the rule of law, totalitarianism, and America," Mora said.

At the time, Mora's family was living in Cuba. His father, a Harvard-trained physician, had taken his wife and infant son back in 1952. When Castro seized power, seven years later, the family barely escaped detention after a servant informed the authorities that they planned to flee to America. In the ensuing panic, Alberto obtained an emergency passport from the American Embassy in Havana. "This was my first brush with the government," he said. "When I swore an oath of allegiance to the American government, part of the oath involved taking up arms to defend the country. And I was thinking, This is a serious thing for me to be an eight-year-old boy, raising my hand before the American vice-consul and taking the oath of allegiance." Cuban customs officials, seeing Alberto's American passport, threatened not to let him board a ship. At the last minute, one of his father's colleagues, who had been put in charge of the port, allowed Alberto's emigration.

Mora's family settled in Jackson, Mississippi, where his father taught at the state medical school and Mora attended a Catholic school. For the most part, Jackson was "a wonderful place," Mora recalled, although it was also "very conservative." Racism was rampant and everyone, including Mora, backed Barry Goldwater in the 1964 election. Mora had never met anyone who opposed the Vietnam War until he enrolled at Swarthmore College, a school that he chose after reading an S.A.T.-preparation booklet that described it as small and especially rigorous. He also had never met a feminist before going to hear Kate Millett speak at Bryn Mawr, during his freshman year; her talk infuriated him. After growing up in the South among friends who played sports, drank beer, and had a good time, he found the Northeastern liberal élite curiously "nerdish." The girls had thrown away their skirts-if they'd ever had them, he joked-and there were no parties. Yet he loved the intellectual environment. "You just had these intense discussions," he recalled. "I revelled in it." Mora said that he was the only person among his friends who wasn't a conscientious objector to the war.

Mora graduated in 1974 with honors, and joined the State Department, working in Portugal; in 1979, he entered law school in Miami. Finding litigation work more "a living than a life," Mora said, he was happy to get an appointment as general counsel of the U.S. Information Agency in the first Bush Administration. During the Clinton years, he was appointed to a Republican seat on the Broadcasting Board of Governors, where he was an advocate for Radio Martí, the American news operation aimed at Cuba. He also practiced international law in several private firms. When George W. Bush was elected, Mora-with the backing of former Defense Secretary Frank Carlucci, whom he had befriended in Portugal-was appointed general counsel of the Navy. He expected to spend most of his time there streamlining the budget.

The day after Mora's first meeting with Brant, they met again, and Brant showed him parts of the transcript of Qahtani's interrogation. Mora was shocked when Brant told him that the abuse wasn't "rogue activity" but was "rumored to have been authorized at a high level in Washington." The mood in the room, Mora wrote, was one of "dismay." He added, "I was under the opinion that the interrogation activities described would be unlawful and unworthy of the military services." Mora told me, "I was appalled by the whole thing. It was clearly abusive, and it was clearly contrary to everything we were ever taught about American values."

Mora thinks that the media has focussed too narrowly on allegations of U.S.-sanctioned torture. As he sees it, the authorization of cruelty is equally pernicious. "To my mind, there's no moral or practical distinction," he told me. "If cruelty is no longer declared unlawful, but instead is applied as a matter of policy, it alters the fundamental relationship of man to government. It destroys the whole notion of individual rights. The Constitution recognizes that man has an inherent right, not bestowed by the state or laws, to personal dignity, including the right to be free of cruelty. It applies to all human beings, not just in America-even those designated as 'unlawful enemy combatants.' If you make this exception, the whole Constitution crumbles. It's a transformative issue."

Mora said that he did not fear reprisal for stating his opposition to the Administration's emerging policy. "It never crossed my mind," he said. "Besides, my mother would have killed me if I hadn't spoken up. No Hungarian after Communism, or Cuban after Castro, is not aware that human rights are incompatible with cruelty." He added, "The debate here isn't only how to protect the country. It's how to protect our values."

After the second meeting with Brant, Mora called his friend Steven Morello, the general counsel of the Army, and asked him if he knew anything about the abuse of prisoners at Guantánamo. Mora said that Morello answered, "I know a lot about it. Come on down."

In Morello's office, Mora saw what he now refers to as "the package"-a collection of secret military documents that traced the origins of the coercive interrogation policy at Guantánamo. It began on October 11, 2002, with a request by J.T.F.-170's commander, Major General Michael Dunlavey, to make interrogations more aggressive. A few weeks later, Major General Geoffrey Miller assumed command of Guantánamo Bay, and, on the assumption that prisoners like Qahtani had been trained by Al Qaeda to resist questioning, he pushed his superiors hard for more flexibility in interrogations. On December 2nd, Secretary of Defense Rumsfeld gave formal approval for the use of "hooding," "exploitation of phobias," "stress positions," "deprivation of light and auditory stimuli," and other coercive tactics ordinarily forbidden by the Army Field Manual. (However, he reserved judgment on other methods, including "waterboarding," a form of simulated drowning.) In Mora's memo, Morello is quoted as saying that "we tried to stop it." But he was told not to ask questions.

According to a participant in the meeting, Mora was "ashen-faced" when he read the package. The documents included a legal analysis, also dated October 11th, by Lieutenant Colonel Diane Beaver, who was then the top legal adviser to J.T.F.-170. She noted that some of the more brutal "counter-resistance" techniques under consideration at Guantánamo, such as waterboarding (for which soldiers had been court-martialled in earlier conflicts), might present legal problems. She acknowledged that American military personnel at Guantánamo, as everywhere else in the world, were bound by the Uniform Code of Military Justice, which characterizes "cruelty," "maltreatment," "threats," and "assault" as felonies. Beaver reasoned, however, that U.S. soldiers preparing to violate these laws in their interrogations might be able to obtain "permission, or immunity" from higher authorities "in advance."

The senior Defense Department official designated to speak for the Administration acknowledged that Beaver's legal argument was inventive. "Normally, you grant immunity after the fact, to someone who has already committed a crime, in exchange for an order to get that person to testify," he said. "I don't know whether we've ever faced the question of immunity in advance before." Nevertheless, the official praised Beaver "for trying to think outside the box. I would credit Diane as raising that as a way to think about it." (Beaver was later promoted to the staff of the Pentagon's Office of General Counsel, where she specializes in detainee issues.)

Mora was less impressed. Beaver's brief, his memo says, "was a wholly inadequate analysis of the law." It held that "cruel, inhuman, or degrading treatment could be inflicted on the Guantánamo detainees with near impunity"; in his view, such acts were unlawful. Rumsfeld's December 2nd memo approving these "counter-

resistance" techniques, Mora wrote, "was fatally grounded on these serious failures of legal analysis." Neither Beaver nor Rumsfeld drew any "bright line" prohibiting the combination of these techniques, or defining any limits for their use. He believed that such rhetorical laxity "could produce effects reaching the level of torture," which was prohibited, without exception, under both U.S. and international law. Mora took his concerns to Gordon England, the Secretary of the Navy, who is now the Deputy Secretary of Defense. Then, on December 20th, with England's authorization, Mora went to William **Haynes,** the Pentagon's general counsel; they met in **Haynes's** office, an elegant suite behind vault-like metal doors.

In confronting **Haynes,** Mora was engaging not just the Pentagon but also the Vice-President's office. **Haynes** is a protégé of Cheney's influential chief of staff, David Addington. Addington's relationship with Cheney goes back to the Reagan years, when Cheney, who was then a representative from Wyoming, was the ranking Republican on a House select committee investigating the Iran-Contra scandal. Addington, a congressional aide, helped to write a report for the committee's Republican minority, arguing that the law banning covert aid to the Contras-the heart of the scandal-was an unconstitutional infringement of Presidential prerogatives. Both men continue to embrace an extraordinarily expansive view of executive power. In 1989, when Cheney was named Secretary of Defense by George H. W. Bush, he hired Addington as a special assistant, and eventually appointed him to be his general counsel. Addington, in turn, hired **Haynes** as his special assistant and soon promoted him to general counsel of the Army.

After George W. Bush took office, Addington came to the White House with Cheney, and **Haynes** took his boss's old job at the Pentagon. Addington has played a central part in virtually all of the Administration's legal strategies, including interrogation and detainee policies. The office of the Vice-President has no statutory role in the military chain of command. But Addington's tenacity, willingness to work long hours, and unalloyed support from Cheney made him, in the words of another former Bush White House appointee, "the best infighter in the Administration." One former government lawyer described him as "the Octopus"-his hands seemed to reach into every legal issue.

Haynes rarely discussed his alliance with Cheney's office, but his colleagues, as one of them told me, noticed that "stuff moved back and forth fast" between the two power centers. **Haynes** was not considered to be a particularly ideological thinker, but he was seen as "pliant," as one former Pentagon colleague put it, when it came to serving the agenda of Cheney and Addington. In October, 2002, almost three months before his meeting with Mora, **Haynes** gave a speech at the conservative Federalist Society, disparaging critics who accused the Pentagon of mistreating detainees. A year later, President Bush nominated him to the federal appeals court in Virginia. His nomination is one of several that have been put on hold by Senate Democrats.

In his meeting with **Haynes,** Mora told me, he said that, whatever its intent, what Rumsfeld's memo permitted was "torture."

According to Mora, **Haynes** replied, "No, it isn't."

Mora asked **Haynes** to think about the techniques more carefully. What did "deprivation of light and auditory stimuli" mean? Could a prisoner be locked in a completely dark cell? If so, could he be kept there for a month? Longer? Until he went blind? What, precisely, did the authority to exploit phobias permit? Could a detainee be held in a coffin? What about using dogs? Rats? How far could an interrogator push this? Until a man went insane?

Mora drew **Haynes's** attention to a comment that Rumsfeld had added to the bottom of his December 2nd memo, in which he asked why detainees could be forced to stand for only four hours a day, when he himself often stood "for 8-10 hours a day." Mora said that he understood that the comment was meant to be jocular. But he feared that it could become an argument for the defense in any prosecution of terror suspects. It also could be read as encouragement to disregard the limits established in the memo. (Colonel Lawrence Wilkerson, a retired military officer who was a chief of staff to former Secretary of State Colin Powell, had a simi-

lar reaction when he saw Rumsfeld's scrawled aside. "It said, 'Carte blanche, guys,' " Wilkerson told me. "That's what started them down the slope. You'll have My Lais then. Once you pull this thread, the whole fabric unravels.")

Haynes said little during the meeting with Mora, but Mora left the room certain that **Haynes** would realize he had been too hasty, and would get Rumsfeld to revoke the inflammatory December 2nd memo. Mora told me, "My feeling was it was just a blunder." The next day, he left Washington for a two-week Christmas holiday.

The authorization of harsh interrogation methods which Mora had seen was no aberration. Almost immediately after September 11th, the Administration had decided that protecting the country required extraordinary measures, including the exercise of executive powers exceeding domestic and international norms. In January, 2002, Alberto Gonzales, then the White House counsel (he is now the Attorney General), sent a memo to President Bush arguing for a "new paradigm" of interrogation, declaring that the war on terror "renders obsolete" the "strict limitations on questioning of enemy prisoners" required by the Geneva conventions, which were ratified by the United States in 1955. That August, the Justice Department's Office of Legal Counsel, which acts as an in-house law firm for the executive branch, issued a memo secretly authorizing the C.I.A. to inflict pain and suffering on detainees during interrogations, up to the level caused by "organ failure." This document, now widely known as the Torture Memo, which Addington helped to draft, also advised that, under the doctrine of "necessity," the President could supersede national and international laws prohibiting torture. (The document was leaked to the press in 2004, after the Abu Ghraib scandal broke.)

Lawrence Wilkerson, whom Powell assigned to monitor this unorthodox policy-making process, told NPR last fall of "an audit trail that ran from the Vice-President's office and the Secretary of Defense down through the commanders in the field." When I spoke to him recently, he said, "I saw what was discussed. I saw it in spades. From Addington to the other lawyers at the White House. They said the President of the United States can do what he damn well pleases. People were arguing for a new interpretation of the Constitution. It negates Article One, Section Eight, that lays out all of the powers of Congress, including the right to declare war, raise militias, make laws, and oversee the common defense of the nation." Cheney's view, Wilkerson suggested, was fuelled by his desire to achieve a state of "perfect security." He said, "I can't fault the man for wanting to keep America safe, but he'll corrupt the whole country to save it." (Wilkerson left the State Department with Powell, in January, 2005.)

At the time, the Administration's embrace of interrogation measures normally proscribed by the Army Field Manual remained largely unknown to the public. But while Mora was on Christmas vacation, the Washington *Post* published a story, by Dana Priest and Barton Gellman, alleging that C.I.A. personnel were mistreating prisoners at the Bagram military base, in Afghanistan. Kenneth Roth, the director of Human Rights Watch, warned that if this was true U.S. officials who knew about it could be criminally liable, under the doctrine of command responsibility. The specific allegations closely paralleled what Mora had seen authorized at Guantánamo.

Upon returning to work on January 6, 2003, Mora was alarmed to learn from Brant that the abuse at Guantánamo had not stopped. In fact, as *Time* reported last year, Qahtani had been stripped and shaved and told to bark like a dog. He'd been forced to listen to pop music at an ear-splitting volume, deprived of sleep, and kept in a painfully cold room. Between confessing to and then recanting various terrorist plots, he had begged to be allowed to commit suicide.

Mora suspected that such abuse was a deliberate policy, and widened his internal campaign in the hope of building a constituency against it. In the next few days, his arguments reached many of the Pentagon's top figures: Deputy Secretary of Defense Paul Wolfowitz; Captain Jane Dalton, the legal adviser to the Joint Chiefs of Staff; Victoria Clarke, who was then the Pentagon spokeswoman; and Rumsfeld.

Meanwhile, on January 9, 2003, Mora had a second meeting with **Haynes.** According to Mora's memo, when he told him how disappointed he was that nothing had been done to end the abuse at Guantánamo, **Haynes** explained that "U.S. officials believed the techniques were necessary to obtain information," and that the interrogations might prevent future attacks against the U.S. and save American lives. Mora acknowledged that he could imagine "ticking bomb" scenarios, in which it might be moral-though still not legal-to torture a suspect. But, he asked **Haynes,** how many lives had to be saved to justify torture? Thousands? Hundreds? Where do you draw the line? To decide this question, shouldn't there be a public debate?

Mora said he doubted that Guantánamo presented such an urgent ethical scenario in any event, since most of the detainees had been held there for more than a year. He also warned **Haynes** that the legal opinions the Administration was counting on to protect itself might not withstand scrutiny-such as the notion that Guantánamo was beyond the reach of U.S. courts. (Mora was later proved right: in June, 2004, the Supreme Court, in Rasul v. Bush, ruled against the Administration's argument that detainees had no right to challenge their imprisonment in American courts. That month, in a related case, Justice Sandra Day O'Connor declared that "a state of war is not a blank check for the President.")

Mora told **Haynes** that, if the Pentagon's theories of indemnity didn't hold up in the courts, criminal charges conceivably could be filed against Administration officials. He added that the interrogation policies could threaten Rumsfeld's tenure, and could even damage the Presidency. "Protect your client!" he said.

Haynes, again, didn't say much in response, but soon afterward, at a meeting of top Pentagon officials, he mentioned Mora's concerns to Secretary Rumsfeld. A former Administration official told me that Rumsfeld was unconcerned; he once more joked that he himself stood eight hours a day, and exclaimed, "Torture? That's not torture!" ("His attitude was 'What's the big deal?' " the former official said.) A subordinate delicately pointed out to Rumsfeld that while he often stood for hours it was because he chose to do so, and he could sit down when he wanted. Victoria Clarke, the Pentagon spokeswoman, also argued that prisoner abuse was bad from a public-relations perspective. (Clarke declined to discuss her conversations with Administration officials, other than to say that she regarded Mora as "a very thoughtful guy, who I believed had a lot of important things to say.")

By mid-January, the situation at Guantánamo had not changed. Qahtani's "enhanced" interrogation, as it was called in some documents, was in its seventh week, and other detainees were also being subjected to extreme treatment. Mora continued to push for reform, but his former Pentagon colleague told me that "people were beginning to roll their eyes. It was like 'Yeah, we've already heard this.' "

On January 15th, Mora took a step guaranteed to antagonize **Haynes,** who frequently warned subordinates to put nothing controversial in writing or in e-mail messages. Mora delivered an unsigned draft memo to **Haynes,** and said that he planned to "sign it out" that afternoon-making it an official document-unless the harsh interrogation techniques were suspended. Mora's draft memo described U.S. interrogations at Guantánamo as "at a minimum cruel and unusual treatment, and, at worst, torture."

By the end of the day, **Haynes** called Mora with good news. Rumsfeld was suspending his authorization of the disputed interrogation techniques. The Defense Secretary also was authorizing a special "working group" of a few dozen lawyers, from all branches of the armed services, including Mora, to develop new interrogation guidelines.

Mora, elated, went home to his wife and son, with whom he had felt bound not to discuss his battle. He and the other lawyers in the working group began to meet and debated the constitutionality and effectiveness of various interrogation techniques. He felt, he later told me, that "no one would ever learn about the best thing I'd ever done in my life."

A week later, Mora was shown a lengthy classified document that negated almost every argument he had made. **Haynes** had outflanked him. He had solicited a separate, overarching opinion from the Office of Legal Counsel, at the Justice Department, on the legality of harsh military interrogations-effectively superseding the working group.

There was only one copy of the opinion, and it was kept in the office of the Air Force's general counsel, Mary Walker, whom Rumsfeld had appointed to head the working group. While Walker sat at her desk, Mora looked at the document with mounting disbelief; at first, he thought he had misread it. There was no language prohibiting the cruel, degrading, and inhuman treatment of detainees. Mora told me that the opinion was sophisticated but displayed "catastrophically poor legal reasoning." In his view, it approached the level of the notorious Supreme Court decision in Korematsu v. United States, in 1944, which upheld the government's internment of Japanese-Americans during the Second World War.

The author of the opinion was John Yoo, a young and unusually influential lawyer in the Administration, who, like **Haynes,** was part of Addington's circle. (Yoo and **Haynes** were also regular racquetball partners.) In the past, Yoo, working closely with Addington, had helped to formulate the argument that the treatment of Al Qaeda and Taliban suspects, unlike that of all other foreign enemies, was not covered by the Geneva conventions; Yoo had also helped to write the Torture Memo. Before joining the Administration, Yoo, a graduate of Yale Law School, had clerked for Justice Clarence Thomas and taught law at Berkeley. Like many conservative legal scholars, he was skeptical of international law, and believed that liberal congressional overreaction to the Vietnam War and Watergate had weakened the Presidency, the C.I.A., and the military. However, Yoo took these arguments further than most. Constitutional scholars generally agreed that the founders had purposefully divided the power to wage war between Congress and the executive branch; Yoo believed that the President's role as Commander-in-Chief gave him virtually unlimited authority to decide whether America should respond militarily to a terror attack, and, if so, what kind of force to use. "Those decisions, under our Constitution, are for the President alone to make," he wrote in a law article.

A top Administration official told me that Yoo, Addington, and a few other lawyers had essentially "hijacked policy" after September 11th. "They thought, Now we can put our views into practice. We have the ability to write them into binding law. It was just shocking. These memos were presented as faits accomplis."

In Yoo's opinion, he wrote that at Guantánamo cruel, inhumane, and degrading treatment of detainees could be authorized, with few restrictions.

"The memo espoused an extreme and virtually unlimited theory of the extent of the President's Commander-in-Chief authority," Mora wrote in his account. Yoo's opinion didn't mention the most important legal precedent defining the balance of power between Congress and the President during wartime, Youngstown Sheet & Tube Company v. Sawyer. In that 1952 case, the Supreme Court stopped President Truman from forcing the steel worker's union, which had declared a strike, to continue producing steel needed in the Korean War. The Court upheld congressional labor laws protecting the right to strike, and ruled that the President's war powers were at their weakest when they were challenging areas in which Congress had passed legislation. Torture, Mora reasoned, had been similarly regulated by Congress through treaties it had ratified.

In an e-mail response to questions this month, Yoo, who is now back at Berkeley, defended his opinion. "The war on terrorism makes Youngstown more complicated," he said. "The majority opinion explicitly said it was not considering the President's powers as Commander-in-Chief in the theater of combat. The difficulty for Youngstown created by the 9/11 attacks is that the theater of combat now includes parts of the domestic United States." He also argued that Congress had ceded power to the President in its authorization of military force against the perpetrators of the September 11th attacks.

Mora concluded that Yoo's opinion was "profoundly in error." He wrote that it "was clearly at variance with applicable law." When we spoke, he added, "If everything is permissible, and almost nothing is prohibited, it makes a mockery of the law." A few days after reading Yoo's opinion, he sent an e-mail to Mary Walker, saying that the document was not only "fundamentally in error" but "dangerous," because it had the weight of law. When the Office of Legal Counsel issues an opinion on a policy matter, it typically requires the intervention of the Attorney General or the President to reverse it.

Walker wrote back, "I disagree, and I believe D.O.D. G.C."-**Haynes,** the Pentagon's general counsel-"disagrees."

On February 6th, Mora invited Yoo to his office, in the Pentagon, to discuss the opinion. Mora asked him, "Are you saying the President has the authority to order torture?"

"Yes," Yoo replied.

"I don't think so," Mora said.

"I'm not talking policy," Yoo said. "I'm just talking about the law."

"Well, where are we going to have the policy discussion, then?" Mora asked.

Mora wrote that Yoo replied that he didn't know; maybe, he suggested, it would take place inside the Pentagon, where the defense-policy experts were. (Yoo said that he recalled discussing only how the policy issues should be debated, and where. Torture, he said, was not an option under consideration.)

But Mora knew that there would be no such discussion; as the Administration saw it, the question would be settled by Yoo's opinion. Indeed, Mora soon realized that, under the supervision of Mary Walker, a draft working-group report was being written to conform with Yoo's arguments. Mora wrote in his memo that contributions from the working group "began to be rejected if they did not conform to the OLC"-Office of Legal Counsel-"guidance."

The draft working-group report noted that the Uniform Code of Military Justice barred "maltreatment" but said, "Legal doctrine could render specific conduct, otherwise criminal, *not* unlawful." In an echo of the Torture Memo, it also declared that interrogators could be found guilty of torture only if their "specific intent" was to inflict "severe physical pain or suffering" as evidenced by "prolonged mental harm." Even then, it said, echoing Yoo, the Commander-in-Chief could order torture if it was a military necessity: "Congress may no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield."

A few days after his meeting with Yoo, Mora confronted **Haynes** again. He told him that the draft working-group report was "deeply flawed." It should be locked in a drawer, he said, and "never let out to see the light of day again." He advised **Haynes** not to allow Rumsfeld to approve it.

In the spring of 2003, Mora waited for the final working-group report to emerge, planning to file a strong dissent. But the report never appeared. Mora assumed that the draft based on Yoo's ideas had not been finalized and that the suspension of the harsh techniques authorized by Rumsfeld was still in effect.

In June, press accounts asserted that the U.S. was subjecting detainees to "stress and duress" techniques, including beatings and food deprivation. Senator Patrick Leahy, Democrat of Vermont, wrote to Secretary of State Condoleezza Rice, asking for a clear statement of the Administration's detainee policy. **Haynes** wrote a letter back to Leahy, which was subsequently released to the press, saying that the Pentagon's policy was never to engage in torture, or cruel, inhumane, or degrading treatment-just the sort of statement Mora had argued for. He wrote in his memo that he saw **Haynes's** letter as "the happy culmination of the long debates in the Pentagon." He sent an appreciative note to **Haynes,** saying that he was glad to be on his team.

On April 28, 2004, ten months later, the first pictures from Abu Ghraib became public. Mora said, "I felt saddened and dismayed. Everything we had warned against in Guantánamo had happened-but in a different setting. I was stunned."

He was further taken aback when he learned, while watching Senate hearings on Abu Ghraib on C-SPAN, that Rumsfeld had signed the working-group report-the draft based on Yoo's opinion-a year earlier, without the knowledge of Mora or any other internal legal critics. Rumsfeld's signature gave it the weight of a military order. "This was the first I'd heard of it!" Mora told me. Mora wrote that the Air Force's deputy general counsel, Daniel Ramos, told him that the final working-group report had been "briefed" to General Miller, the commander of Guantánamo, and General James Hill, the head of the Southern Command, months earlier. (The Pentagon confirmed this, though it said that the generals had not seen the full report.) "It was astounding," Mora said. "Obviously, it meant that the working-group report hadn't been abandoned, and that some version of it had gotten into the generals' possession."

The working-group report included a list of thirty-five possible interrogation methods. On April 16, 2003, the Pentagon issued a memorandum to the U.S. Southern Command, approving twenty-four of them for use at Guantánamo, including isolation and what it called "fear up harsh," which meant "significantly increasing the fear level in a detainee." The Defense Department official told me, "It should be noted that there were strong advocates for the approval of the full range of thirty-five techniques," but **Haynes** was not among them. The techniques not adopted included nudity; the exploitation of "aversions," such as a fear of dogs; and slaps to the face and stomach. However, combined with the legal reasoning in the working-group report, the April memorandum allowed the Secretary to approve harsher methods.

Without Mora's knowledge, the Pentagon had pursued a secret detention policy. There was one version, enunciated in **Haynes's** letter to Leahy, aimed at critics. And there was another, giving the operations officers legal indemnity to engage in cruel interrogations, and, when the Commander-in-Chief deemed it necessary, in torture. Legal critics within the Administration had been allowed to think that they were engaged in a meaningful process; but their deliberations appeared to have been largely an academic exercise, or, worse, a charade. "It seems that there was a two-track program here," said Martin Lederman, a former lawyer with the Office of Legal Counsel, who is now a visiting professor at Georgetown. "Otherwise, why would they share the final working-group report with Hill and Miller but not with the lawyers who were its ostensible authors?"

Lederman said that he regarded Mora as heroic for raising crucial objections to the Administration's interrogation policy. But he added that Mora was unrealistic if he thought that, by offering legal warnings, he could persuade the leaders of the Administration to change its course. "It appears that they weren't asking to be warned," Lederman said.

The senior Defense Department official defended as an act of necessary caution the decision not to inform Mora and other legal advisers of official policy. The interrogation techniques authorized in the signed report, he explained, were approved only for Guantánamo, and the Pentagon needed to prevent the practices from spreading to other battlefronts. "If someone wants to criticize us for being too careful, I accept that criticism willingly, because we were doing what we could to limit the focus of that report . . . to Guantánamo," the official said.

In fact, techniques that had been approved for use at Guantánamo were quickly transferred elsewhere. Four months after General Miller was briefed on the working-group report, the Pentagon sent him to Iraq, to advise officials there on interrogating Iraqi detainees. Miller, who arrived with a group of Guantánamo interrogators, known as the Tiger Team, later supervised all U.S.-run prisons in Iraq, including Abu Ghraib. And legal advisers to General Ricardo Sanchez, the senior U.S. commander in Iraq at the time, used the report as a reference in determining the limits of their interrogation authority, according to a Pentagon report on Abu Ghraib.

A lawyer involved in the working group said that the Pentagon's contention that it couldn't risk sharing the report with its authors "doesn't make any sense." He explained, "We'd seen everything already." The real reason for their exclusion, he speculated, was to avoid dissent. "It would have put them in a bind," he said. "And it would have created a paper trail."

Meanwhile, Mora's warnings about the legal underpinnings of the working-group report proved prophetic. In December, 2003, in an extraordinary repudiation of the Administration's own legal work, the Office of Legal Counsel quietly withdrew the Yoo opinion. The new head of the O.L.C., Jack Goldsmith, a conservative legal scholar who now teaches at Harvard Law School, told the Pentagon that it could no longer rely on the legal analysis. Among other problems, Goldsmith had found Yoo's interpretation of the President's powers overly broad. In March, 2005, the Pentagon declared the working-group report a non-operational "historical" document. By that time, however, much of the most serious abuse at Guantánamo had already occurred.

At the Pentagon in recent weeks, officials portrayed Mora's memo as ancient history. They argued that they had acted quickly to rectify the wrongs he helped expose, by limiting the list of approved interrogation techniques. But while Mora believes that the use of cruel treatment in interrogation has diminished, he feels that the fight to establish clear, humane standards for the treatment of detainees is not over. He also worries that the Administration's views on interrogation have undermined American foreign policy, in part by threatening the international coalition needed to fight terrorism. Allied countries may not be able to support U.S. military actions, he said, if detainees are treated in a manner that most nations deemed illegal.

Just a few months ago, Mora attended a meeting in Rumsfeld's private conference room at the Pentagon, called by Gordon England, the Deputy Defense Secretary, to discuss a proposed new directive defining the military's detention policy. The civilian Secretaries of the Army, the Air Force, and the Navy were present, along with the highest-ranking officers of each service, and some half-dozen military lawyers. Matthew Waxman, the deputy assistant secretary of defense for detainee affairs, had proposed making it official Pentagon policy to treat detainees in accordance with Common Article Three of the Geneva conventions, which bars cruel, inhumane, and degrading treatment, as well as outrages against human dignity.Going around the huge wooden conference table, where the officials sat in double rows, England asked for a consensus on whether the Pentagon should support Waxman's proposal.

This standard had been in effect for fifty years, and all members of the U.S. armed services were trained to follow it. One by one, the military officers argued for returning the U.S. to what they called the high ground. But two people opposed it. One was Stephen Cambone, the under-secretary of defense for intelligence; the other was **Haynes.** They argued that the articulated standard would limit America's "flexibility." It also might expose Administration officials to charges of war crimes: if Common Article Three became the standard for treatment, then it might become a crime to violate it. Their opposition was enough to scuttle the proposal.

In exasperation, according to another participant, Mora said that whether the Pentagon enshrined it as official policy or not, the Geneva conventions were already written into both U.S. and international law. Any grave breach of them, at home or abroad, was classified as a war crime. To emphasize his position, he took out a copy of the text of U.S. Code 18.2441, the War Crimes Act, which forbids the violation of Common Article Three, and read from it. The point, Mora told me, was that "it's a statute. It exists-we're not free to disregard it. We're bound by it. It's been adopted by the Congress. And we're not the only interpreters of it. Other nations could have U.S. officials arrested."

Not long afterward, Waxman was summoned to a meeting at the White House with David Addington. Waxman declined to comment on the exchange, but, according to the *Times*, Addington berated him for arguing that the Geneva conventions should set the standard for detainee treatment. The U.S. needed maximum flexibility,

Addington said. Since then, efforts to clarify U.S. detention policy have languished. In December, Waxman left the Pentagon for the State Department.

To date, no charges have been brought against U.S. personnel in Guantánamo. The senior Defense Department official I spoke to affirmed that, in the Pentagon's view, Qahtani's interrogation was "within the bounds." Elsewhere in the world, as Mora predicted, the controversy is growing. Last week, the United Nations Human Rights Commission called for the U.S. to shut down the detention center at Guantánamo, where,it said, some practices "must be assessed as amounting to torture." The U.N. report, which the White House dismissed, described "the confusion with regard to authorized and unauthorized interrogation techniques" as "particularly alarming."

Mora recently started a new job, as the general counsel for Wal-Mart's international operations. A few days after his going-away party, he reflected on his tenure at the Pentagon. He felt that he had witnessed both a moral and a legal tragedy.

In Mora's view, the Administration's legal response to September 11th was flawed from the start, triggering a series of subsequent errors that were all but impossible to correct. "The determination that Geneva didn't apply was a legal and policy mistake," he told me. "But very few lawyers could argue to the contrary once the decision had been made."

Mora went on, "It seemed odd to me that the actors weren't more troubled by what they were doing." Many Administration lawyers, he said, appeared to be unaware of history. "I wondered if they were even familiar with the Nuremberg trials-or with the laws of war, or with the Geneva conventions. They cut many of the experts on those areas out. The State Department wasn't just on the back of the bus-it was left off the bus." Mora understood that "people were afraid that more 9/11s would happen, so getting the information became the overriding objective. But there was a failure to look more broadly at the ramifications.

"These were enormously hardworking, patriotic individuals," he said. "When you put together the pieces, it's all so sad. To preserve flexibility, they were willing to throw away our values."

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LETTER FROM WASHINGTON

THE HIDDEN POWER

by JANE MAYER

The legal mind behind the White House's war on terror.

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On December 18th, Colin Powell, the former Secretary of State, joined other prominent Washington figures at FedEx Field, the Redskins' stadium, in a skybox belonging to the team's owner. During the game, between the Redskins and the Dallas Cowboys, Powell spoke of a recent report in the *Times* which revealed that President Bush, in his pursuit of terrorists, had secretly authorized the National Security Agency to eavesdrop on American citizens without first obtaining a warrant from the Foreign Intelligence Surveillance Court, as required by federal law. This requirement, which was instituted by Congress in 1978, after the Watergate scandal, was designed to protect civil liberties and curb abuses of executive power, such as Nixon's secret monitoring of political opponents and the F.B.I.'s eavesdropping on Martin Luther King, Jr. Nixon had claimed that as President he had the "inherent authority" to spy on people his Administration deemed enemies, such as the anti-Vietnam War activist Daniel Ellsberg. Both Nixon and the institution of the Presidency had paid a high price for this assumption. But, according to the *Times*, since 2002 the legal checks that Congress constructed to insure that no President would repeat Nixon's actions had been secretly ignored.

According to someone who knows Powell, his comment about the article was terse. "It's Addington," he said. "He doesn't care about the Constitution." Powell was referring to David S. Addington, Vice-President Cheney's chief of staff and his longtime principal legal adviser. Powell's office says that he does not recall making the statement. But his former top aide, Lawrence Wilkerson, confirms that he and Powell shared this opinion of Addington.

Most Americans, even those who follow politics closely, have probably never heard of Addington. But current and former Administration officials say that he has played a central role in shaping the Administration's legal strategy for the war on terror. Known as the New Paradigm, this strategy rests on a reading of the Constitution that few legal scholars share—namely, that the President, as Commander-in-Chief, has the authority to disregard virtually all previously known legal boundaries, if national security demands it. Under this framework, statutes prohibiting torture, secret detention, and warrantless surveillance have been set aside. A former high-ranking Administration lawyer who worked extensively on national-security issues said that the Administration's legal positions were, to a remarkable degree, "all Addington." Another lawyer, Richard L. Shiffrin, who until 2003 was the Pentagon's deputy general counsel for intelligence, said that Addington was "an unopposable force."

The overarching intent of the New Paradigm, which was put in place after the attacks of September 11th, was to allow the Pentagon to bring terrorists to justice as swiftly as possible. Criminal courts and military courts, with their exacting standards of evidence and emphasis on protecting defendants' rights, were deemed too cumbersome. Instead, the President authorized a system of detention and interrogation that operated outside the international standards for the treatment of prisoners of war established by the 1949 Geneva Conventions. Terror suspects would be tried in a system of military commissions, in Guantánamo Bay, Cuba, devised by the executive branch. The Administration designated these suspects not as criminals or as prisoners of war but as "illegal enemy combatants," whose treatment would be ultimately decided by the President. By emphasizing interrogation over due process, the government intended to preëmpt future attacks before they materialized. In November, 2001, Cheney said of the military commissions, "We think it guarantees that we'll have the kind of treatment of these individuals that we believe they deserve."

Yet, almost five years later, this improvised military model, which Addington was instrumental in creating, has achieved very limited results. Not a single terror suspect has been tried before a military commission. Only ten of the more than seven hundred men who have been imprisoned at Guantánamo have been formally charged with any wrongdoing. Earlier this month, three detainees committed suicide in the camp. Germany and Denmark, along with the European Union and the United Nations Commission on Human Rights, have called for the prison to be closed, accusing the United States of violating internationally accepted standards for humane treatment and due process. The New Paradigm has also come under serious challenge from the judicial branch. Two years ago, in Rasul v. Bush, the Supreme Court ruled against the Administration's contention that the Guantánamo prisoners were beyond the reach of the U.S. court system and could not challenge their detention. And this week the Court is expected to deliver a decision in Hamdan v. Rumsfeld, a case that questions the legality of the military commissions.

For years, Addington has carried a copy of the U.S. Constitution in his pocket; taped onto the back are photocopies of extra statutes that detail the legal procedures for Presidential succession in times of national emergency. Many constitutional experts, however, question his interpretation of the document, especially his views on Presidential power. Scott Horton, a professor at Columbia Law School, and the head of the New York Bar Association's International Law committee, said that Addington and a small group of Administration lawyers who share his views had attempted to "overturn two centuries of jurisprudence defining the limits of the executive branch. They've made war a matter of dictatorial power." The historian Arthur Schlesinger, Jr., who defined Nixon as the extreme example of Presidential overreaching in his book "The Imperial Presidency" (1973), said he believes that Bush "is more grandiose than Nixon." As for the Administration's legal defense of torture, which Addington played a central role in formulating, Schlesinger said, "No position taken has done more damage to the American reputation in the world—ever."

Bruce Fein, a Republican legal activist, who voted for Bush in both Presidential elections, and who served as associate deputy attorney general in the Reagan Justice Department, said that Addington and other Presidential legal advisers had "staked out powers that are

a universe beyond any other Administration. This President has made claims that are really quite alarming. He's said that there are no restraints on his ability, as he sees it, to collect intelligence, to open mail, to commit torture, and to use electronic surveillance. If you used the President's reasoning, you could shut down Congress for leaking too much. His war powers allow him to declare anyone an illegal combatant. All the world's a battlefield—according to this view, he could kill someone in Lafayette Park if he wants! It's got the sense of Louis XIV: '*I* am the State.' " Richard A. Epstein, a prominent libertarian law professor at the University of Chicago, said, "The President doesn't have the power of a king, or even that of state governors. He's subject to the laws of Congress! The Administration's lawyers are nuts on this issue." He warned of an impending "constitutional crisis," because "their talk of the inherent power of the Presidency seems to be saying that the courts can't stop them, and neither can Congress."

The former high-ranking lawyer for the Administration, who worked closely with Addington, and who shares his political conservatism, said that, in the aftermath of September 11th, "Addington was more like Cheney's agent than like a lawyer. A lawyer sometimes says no." He noted, "Addington never said, 'There is a line you can't cross.' " Although the lawyer supported the President, he felt that his Administration had been led astray. "George W. Bush has been damaged by incredibly bad legal advice," he said.

David Addington is a tall, bespectacled man of forty-nine, who has a thickening middle, a thatch of gray hair, and a trim gray beard, which gives him the look of a sea captain. He is extremely private; he keeps the door of his office locked at all times, colleagues say, because of the national-security documents in his files. He has left almost no public paper trail, and he does not speak to the press or allow photographs to be taken for news stories. (He declined repeated requests to be interviewed for this article.)

In many ways, his influence in Washington defies conventional patterns. Addington doesn't serve the President directly. He has never run for elected office. Although he has been a government lawyer for his entire career, he has never worked in the Justice Department. He is a hawk on defense issues, but he has never served in the military.

There are various plausible explanations for Addington's power, including the force of his intellect and his personality, and his closeness to Cheney, whose political views he clearly shares. Addington has been an ally of Cheney's since the nineteen-eighties, and has been referred to as "Cheney's Cheney," or, less charitably, as "Cheney's hit man." Addington's talent for bureaucratic infighting is such that some of his supporters tend to invoke, with admiration, metaphors involving knives. Juleanna Glover Weiss, Cheney's former press secretary, said, "David is efficient, discreet, loyal, sublimely brilliant, and, as anyone who works with him knows, someone who, in a knife fight, you want covering your back." Bradford Berenson, a former White House lawyer, said, "He's powerful because people know he speaks for the Vice-President, and because he's an extremely smart, creative, and aggressive public official. Some engage in bureaucratic infighting using slaps. Some use knives. David falls into the latter category. You could make the argument that there are some costs. It introduces a little fear into the policymaking process. Views might be more candidly expressed without that fear. But David is like the Marines. No better friend—no worse enemy." People who have sparred with him agree.

"He's utterly ruthless," Lawrence Wilkerson said. A former top national-security lawyer said, "He takes a political litmus test of everyone. If you're not sufficiently ideological, he would cut the ground out from under you."

Another reason for Addington's singular role after September 11th is that he offered legal certitude at a moment of great political and legal confusion, in an Administration in which neither the President, the Vice-President, the Secretary of Defense, the Secretary of State, nor the national-security adviser was a lawyer. (In the Clinton Administration, all these posts, except for the Vice-Presidency, were held by lawyers at some point.) Neither the Attorney General, John Ashcroft, nor the White House counsel, Alberto Gonzales, had anything like Addington's familiarity with national-security law. Moreover, Ashcroft's relations with the White House were strained, and he was left out of the inner circle that decided the most radical legal strategies in the war on terror. Gonzales had more influence, because of his longtime ties to the President, but, as an Administration lawyer put it, "he was an empty suit. He was weak. And he doesn't know shit about the Geneva Conventions." Participants in meetings in the White House counsel's office, in the days immediately after September 11th, have described Gonzales sitting in a wingback chair, asking questions, while Addington sat directly across from him and held forth. "Gonzales would call the meetings," the former high-ranking lawyer recalled. "But Addington was always the force in the room." Bruce Fein said that the Bush legal team was strikingly unsophisticated. "There is no one of legal stature, certainly no one like Bork, or Scalia, or Elliot Richardson, or Archibald Cox," he said. "It's frightening. No one knows the Constitution—certainly not Cheney."

Conventional wisdom holds that September 11th changed everything, including the thinking of Cheney and Addington. Brent Scowcroft, the former national-security adviser, has said of Cheney that he barely recognizes the reasonable politician he knew in the past. But a close look at the twenty-year collaboration between Cheney and Addington suggests that in fact their ideology has not changed much. It seems clear that Addington was able to promote vast executive powers after September 11th in part because he and Cheney had been laying the political groundwork for years. "This preceded 9/11," Fein, who has known both men professionally for decades, said. "I'm not saying that warrantless surveillance did. But the idea of reducing Congress to a cipher was already in play. It was Cheney and Addington's political agenda."

Addington's admirers see him as a selfless patriot, a workaholic defender of a purist interpretation of Presidential power—the necessary answer to threatening times. In 1983, Steve Berry, a Republican lawyer and lobbyist in Washington, hired Addington to work with him as the legislative counsel to the House Intelligence Committee; he has been a career patron and close friend ever since. He said, "I know him well, and I know that if there's a threat he will do everything in his power, within the law, to protect the United States." Berry added that Addington is acutely aware of the legal tensions between liberty and security. "We fought ourselves every day about it," he recalled. But, he said, they concluded that a "strong national security and defense" was the first priority, and that "without a strong defense, there's not much expectation or hope of having other freedoms." He said that there is no better defender of the country than Addington: "I've got a lot of respect for the guy. He's probably the foremost expert on intelligence and national-security law in the nation right now." Berry has a daughter who works in New

York City, and he said that when he thinks of her safety he appreciates the efforts that Addington has made to strengthen the country's security. He said, "For Dave, protecting America isn't just a virtue. It's a personal mission. I feel safer just knowing he's where he is."

Berry said of his friend, "He's methodical, conscientious, analytical, and logical. And he's as straight an arrow as they come." He noted that Addington refuses to let Berry treat him to a hamburger because it might raise issues of influence-buying—instead, they split the check. Addington, he went on, has a dazzling ability to recall the past twenty-five years' worth of intelligence and national-security legislation. For many years, he kept a vast collection of legal documents in a library in his modest brick-and-clapboard home, in Alexandria, Virginia. One evening several years ago, lightning struck a nearby power line and the house caught fire; much of the archive burned. The fire started at around nine in the evening, and Addington, typically, was still in his office. His wife, Cynthia, and their three daughters were fine, but the loss of his extraordinary collection of papers and political memorabilia, Berry said, "was very hard for him to accept. All you get in this work is memorabilia. There is no cash. But he's the type of guy who gets psychic benefit from going to work every day, making a difference."

Though few people doubt Addington's knowledge of national-security law, even his admirers question his political instincts. "The only time I've seen him wrong is on his political judgment," a former colleague said. "He has a tin ear for political issues. Sometimes the law says one thing, but you have to at least listen to the other side. He will cite case history, case after case. David doesn't see why you have to compromise." Even Berry offered a gentle criticism: "His political skills can be overshadowed by his pursuit of what he feels is legally correct."

Addington has been a hawk on national defense since he was a teen-ager. Leonard Napolitano, an engineer who was one of Addington's close childhood friends, and whose political leanings are more like those of his sister, Janet Napolitano, the Democratic governor of Arizona, joked, "I don't think that in high school David was a believer in the divine right of kings." But, he said, Addington was "always conservative."

The Addingtons were a traditional Catholic military family. They moved frequently; David's father, Jerry, an electrical engineer in the Army, was assigned to a variety of posts, including Saudi Arabia and Washington, D.C., where he worked with the Joint Chiefs of Staff. As a teen-ager, Addington told a friend that he hoped to live in Washington himself when he grew up. Jerry Addington, a 1940 graduate of West Point who won a Bronze Star during the Second World War, also served in Korea and at the North American Air Defense Command, in Colorado; he reached the rank of brigadier general before he retired, in 1970, when David was thirteen. David attended public high school in Albuquerque, New Mexico, and his father began a second career, teaching middle-school math. His mother, Eleanore, was a housewife; the family lived in a ranch house in a middle-class subdivision. She still lives there; Jerry died in 1994. "We are an extremely close family," one of Addington's three older sisters, Linda, recalled recently. "Discipline was very important for us, and faith was very important. It was about being

ethical—the *right* thing to do whether anyone else does it or not. I see that in Dave." She was reluctant to say more. "Dave is most deliberate about his privacy," she added.

Socially, Napolitano recalled, he and Addington were "the brains, or nerds." Addington stood out for wearing black socks with shorts. He and his friends were not particularly athletic, and they liked to play poker all night on weekends, stopping early in the morning for breakfast. Their circle included some girls, until the boys found them "too distracting to our interest in cards," Napolitano recalled.

When he and Addington were in high school, Napolitano said, the Vietnam War was in its final stages, and "there was a certain amount of 'Challenge authority' and alcohol and drugs, but they weren't issues in our group." Addington's high-school history teacher, Irwin Hoffman, whom Napolitano recalled as wonderful, exacting, and "a flaming liberal," said that Addington felt strongly that America "should have stayed and won the Vietnam War, despite the fact that we were losing." Hoffman, who is retired, added, "The boy seemed terribly, terribly bright. He wrote well, and he was very verbal, not at all reluctant to express his opinions. He was pleasant and quite handsome. He also had a very strong sarcastic streak. He was scornful of anyone who said anything that was naïve, or less than bright. His sneers were almost palpable."

Addington graduated in 1974, the year that Nixon resigned. In the aftermath of Watergate, liberal Democratic reformers imposed tighter restraints on the President and reined in the C.I.A., whose excesses were critiqued in congressional hearings, led by Senator Frank Church and Representative Otis Pike, that exposed details of assassination plots, coup attempts, mind-control experiments, and domestic spying. Congress passed a series of measures aimed at reinvigorating the system of checks and balances, including an expanded Freedom of Information Act and the Foreign Intelligence Surveillance Act, the law requiring judicial review before foreign suspects inside the country could be wiretapped. It also created the House and Senate Intelligence Committees, which oversee all covert C.I.A. activities.

After high school, Addington pursued an ambition that he had had for years: to join the military. Rather than attending West Point, as his father had, he enrolled in the U.S. Naval Academy, in Annapolis. But he dropped out before the end of his freshman year. He went home and, according to Napolitano, worked in a Long John Silver's restaurant. "The academy wasn't academically challenging enough for him," Napolitano said.

Addington went to Georgetown University, graduating summa cum laude, in 1978, from the school of foreign service; he went on to earn honors at Duke Law School. After graduating, in 1981, he married Linda Werling, a graduate student in pharmacology. The marriage ended in divorce. His current wife, Cynthia, takes care of their three girls full-time.

Soon after leaving Duke, Addington started his first job, in the general counsel's office at the C.I.A. A former top agency lawyer who later worked with Addington said that Addington strongly opposed the reform movements that followed Vietnam and Watergate. "Addington was too young to be fully affected by the Vietnam War," the lawyer said. "He was shaped by the postwar, post-Watergate years instead. He thought

the Presidency was too weakened. He's a believer that in foreign policy the executive is meant to be quite powerful."

These views were shared by Dick Cheney, who served as chief of staff in the Ford Administration. "On a range of executive-power issues, Cheney thought that Presidents from Nixon onward yielded too quickly," Michael J. Malbin, a political scientist who has advised Cheney on the issue of executive power, said. Kenneth Adelman, who was a high-ranking Pentagon official under Ford, said that the fall of Saigon, in 1975, was "very painful for Dick. He believed that Vietnam could have been saved—maybe—if Congress hadn't cut off funding. He was against that kind of interference."

Jane Harman, the ranking Democrat on the House Intelligence Committee, who has spent considerable time working with Cheney and Addington in recent years, believes that they are still fighting Watergate. "They're focussed on restoring the Nixon Presidency," she said. "They've persuaded themselves that, following Nixon, things went all wrong." She said that in meetings Addington is always courtly and pleasant. But when it comes to accommodating Congress "his answer is always no."

In a revealing interview that Cheney gave last December to reporters travelling with him to Oman, he explained, "I do have the view that over the years there had been an erosion of Presidential power and authority. . . . A lot of the things around Watergate and Vietnam both, in the seventies, served to erode the authority I think the President needs." Further, Cheney explained, it was his express aim to restore the balance of power. The President needed to be able to act as Alexander Hamilton had described it in the Federalist Papers, with "secrecy" and "despatch"—especially, Cheney said, "in the day and age we live in . . . with the threats we face." He added, "I believe in a strong, robust executive authority, and I think the world we live in demands it."

At the C.I.A., where Addington spent two years, he focussed on curtailing the ability of Congress to interfere in intelligence gathering. "He was a rookie, plenty bright," Frederick Hitz, another C.I.A. lawyer, who later became Inspector General, recalled. After the Church and Pike hearings, legislators came up with hundreds of pages of oversight recommendations, he said. "Addington was very pro-agency. He was trying to figure out how to comply with government oversight without getting hog-tied." Addington viewed the public airings of the C.I.A.'s covert activities as "an absolute disaster," Berry recalled. "We both felt that Congress did great harm by flinging open the doors to operational secrets."

When Addington joined the C.I.A., it was directed by William J. Casey, who also regarded congressional constraints on the agency as impediments to be circumvented. His sentiment about congressional overseers was best captured during a hearing about covert actions in Central America, when he responded to tough questioning by muttering the word "assholes." After Reagan's election in 1980, the executive branch was dominated by conservative Republicans, while the House was governed by liberal Democrats. The two parties fought intensely over Central America; the Reagan Administration was determined to overthrow the leftist Sandinista government in Nicaragua. Using their constitutional authority over appropriations, the Democrats in Congress forbade the C.I.A. to spend federal funds to support the Contras, a rightist rebel group. But Casey's attitude, as Berry recalled it, was "We're gonna fund these freedom fighters whether

Congress wants us to or not." Berry, then the staff director for the Republicans on the House Intelligence Committee, asked Casey for help in fighting the Democrats. Soon afterward, Addington joined Berry on Capitol Hill.

When the Iran-Contra scandal broke, in 1986, it exposed White House arms deals and foreign fund-raising designed to help the anti-Sandinista forces in Nicaragua. Members of Congress were furious. Summoned to Capitol Hill, Casey lied, denying that funds for the Contras had been solicited from any foreign governments, although he knew that the Saudis, among others, had agreed to give millions of dollars to the Contras, at the request of the White House. Even within the Reagan Administration, the foreign funding was controversial. Secretary of State George Shultz had warned Reagan that he might be committing an impeachable offense. But, under Casey's guidance, the White House went ahead with the plan; Shultz, having expressed misgivings, was not told. It was a bureaucratic tactic that Addington reprised after September 11th, when Powell was left out of key deliberations about the treatment of detainees. Lawrence Wilkerson, Powell's aide, said that he was aware of Addington's general strategy: "We had heard that, behind our backs, he was saying that Powell was 'soft, but easy to get around.' "

The Iran-Contra scandal substantially weakened Reagan's popularity and, eventually, seven people were convicted of seventeen felonies. Cheney, who was then a Republican congressman from Wyoming, worried that the scandal would further undercut Presidential authority. In late 1986, he became the ranking Republican on a House select committee that was investigating the scandal, and he commissioned a report on Reagan's support of the Contras. Addington, who had become an expert in intelligence law, contributed legal research. The scholarly-sounding but politically outlandish Minority Report, released in 1987, argued that Congress—not the President—had overstepped its authority, by encroaching on the President's foreign-policy powers. The President, the report said, had been driven by "a legitimate frustration with abuses of power and irresolution by the legislative branch." The Minority Report sanctioned the President's actions to a surprising degree, considering the number of criminal charges that resulted from the scandal. The report also defended the legality of ignoring congressional intelligence oversight, arguing that "the President has the Constitutional and statutory authority to withhold notifying Congress of covert actions under rare conditions." And it condemned "legislative hostage taking," noting that "Congress must realize . . . that the power of the purse does not make it supreme" in matters of war. In his December interview with reporters, Cheney proudly cited this document. "If you want reference to an obscure text, go look at the minority views that were filed in the Iran-Contra committee, the Iran-Contra report, in about 1987," he said. "Part of the argument was whether the President had the authority to do what was done in the Reagan years."

Addington and Cheney became a formidable team, but it was soon clear that Addington would not join Cheney as a politician. Adelman recalled Addington's personality as "dour," adding that, "unlike with Dick, I never saw much of a sense of humor. Cheney can be witty and funny. David is sober. I didn't see him at social events much." But, he added, "Dick wasn't looking for friends at work. He was looking for performance. And David delivers. He's efficient and dedicated. He's a doer." He went on, "Cheney's not a lawyer, so he would defer to David on the law."

In 1989, President George H. W. Bush appointed Cheney Secretary of Defense. Cheney hired Addington first as his special assistant and, later, as the Pentagon's general counsel. At the Pentagon, Addington became widely known as Cheney's gatekeeper—a stickler for process who controlled the flow of documents to his boss. Using a red felt-tipped pen, he covered his colleagues' memos with comments before returning them for rewrites. His editing invariably made arguments sharper, smarter, and more firm in their defense of Cheney's executive powers, a former military official who worked with him said.

At the Pentagon, Addington took a particular interest in the covert actions of the Special Forces. A former colleague recalled that, after attending a demonstration by Special Forces officers, he mocked the C.I.A., which was constrained by oversight laws. "This is how *real* covert operations are done," he said. (After September 11th, the Pentagon greatly expanded its covert intelligence operations; these programs have less congressional oversight than those of the C.I.A.) Cheney, throughout his tenure as Defense Secretary, shared with Addington a pessimistic view of the Soviet Union. Both remained skeptical of Gorbachev long after the State Department, the national-security adviser, and the C.I.A. had concluded that he was a reformer. "They were always, like, 'Whoa—beware the Bear!' " Wilkerson recalled. They immersed themselves in "continuity of government exercises"—studying with unusual intensity how the government might survive a nuclear attack. According to "Rise of the Vulcans," a history of the period by James Mann, Cheney, more than once, spent the night in an underground bunker.

A decade later, when hijacked planes slammed into the Twin Towers and the Pentagon, Addington, perhaps more than anyone else in the U.S. government, was ready to act. During the Clinton Presidency, he had worked as a lawyer for various business interests, such as the American Trucking Associations, and in 1994 he had led an exploratory Presidential campaign for Cheney, who decided against running. Once Cheney became Vice-President, Addington helped oversee the transition, setting up the most powerful Vice-Presidency in America's history. Addington's high-school friend Leonard Napolitano said Addington told him that he and Cheney were merging the Vice-President's office with the President's into a single "Executive Office," instead of having "two different camps." Napolitano added, "David said that Cheney saw the Vice-President as the executive and implementer of the President." Addington created a system to insure that virtually all important documents relating to national-security matters were seen by the Vice-President's office. The former high-ranking Administration lawyer said that Addington regularly attended White House legal meetings with the C.I.A. and the National Security Agency. He received copies of all National Security Council documents, including internal memos from the staff. And, as a former top official in the Defense Department, he exerted influence over the legal office at the Pentagon, helping his protégé William J. Haynes secure the position of general counsel. A former national-security lawyer, speaking of the Pentagon's legal office, said, "It's obvious that Addington runs the whole operation."

In the days after September 11th, a half-dozen White House lawyers had heated discussions about how to frame the Administration's legal response to the attacks. Bradford Berenson, one of the participants, recalled how "raw" feelings were at the time:

"There were thousands of bereaved American families. Everyone was expecting additional attacks. The only planes in the air were military. At a moment like that, there's an intense focus on responsibility and accountability. Preventing another attack should always be within the law. But if you have to err on the side of being too aggressive or not aggressive enough, you'd err by being too aggressive."

Berry said that Addington felt this keenly. "I've talked to David about this a little. Psychologically, it's really taxing to read every day not about one or two but about a dozen, or two dozen, legitimate reports about efforts to take out U.S. citizens. . . . There's a little bit of a bunker mentality that set in among some of the national-security-policy officials after 9/11."

Almost immediately, other Administration lawyers noticed that Addington dominated the internal debates. His assumption, shared by other hard-line lawyers in the White House counsel's office and in the Justice Department's Office of Legal Counsel, was that the criminal-justice system was insufficient to handle the threat from terrorism. The matter was settled without debate, Berenson recalled: "There was a consensus that we had to move from retribution and punishment to preëmption and prevention. Only a warfare model allows that approach."

Richard Shiffrin, the former Pentagon lawyer, said that during a tense White House meeting held in the Situation Room just a few days after September 11th "all of us felt under a great deal of pressure to be willing to consider even the most extraordinary proposals. The C.I.A., the N.S.C., the State Department, the Pentagon, and the Justice Department all had people there. Addington was particularly strident. He'd sit, listen, and then say, 'No, that's not right.' He was particularly doctrinaire and ideological. He didn't recognize the wisdom of the other lawyers. He was always right. He didn't listen. He knew the answers." The details of the discussion are classified, Shiffrin said, but he left with the impression that Addington "doesn't believe there should be co-equal branches." Another participant recalled, "If you favored international law, you were in danger of being called 'soft on terrorism' by Addington." He added that Addington's manner in meetings was "very insistent and very loud." Yet another participant said that, whenever he cautioned against executive-branch overreaching, Addington would respond brusquely, "There you go again, giving away the President's power."

Some of the protests from Democrats about the Administration's legal arguments and some of the declarations of high principle from Republicans are mere partisan gestures. Both sides have changed their views about the need for a strong President, depending on whether they were in power. "It's a matter of degree," the liberal Princeton historian Sean Wilentz said. "War always expands the powers of the Presidency. And Presidents always overreach." Lincoln infamously suspended habeas-corpus rights during the Civil War, locking up thousands of Confederate sympathizers without due process, and Franklin D. Roosevelt interned more than a hundred thousand innocent Japanese-Americans. "Someone said that this Administration is monarchical," Wilentz added. "That's just rhetoric. We're not a dictatorship. At the same time, this White House has assumed powers for itself that no previous Administration has done." Bush's defenders frequently cite the example of Lincoln as a justification for placing national security above the rule of law. But Schlesinger, in his book "War and the American Presidency" (2004), points

out that Lincoln never "claimed an inherent and routine right to do what [he] did." The Bush White House, he told me, has seized on these historical aberrations and turned them into a doctrine of Presidential prerogative.

On September 25th, the Office of Legal Counsel issued a memo declaring that the President had inherent constitutional authority to take whatever military action he deemed necessary, not just in response to the September 11th attacks but also in the prevention of any future attacks from terrorist groups, whether they were linked to Al Qaeda or not. The memo's broad definition of the enemy went beyond that of Congress, which, on September 14th, had passed legislation authorizing the President to use military force against "nations, organizations, or persons" directly linked to the attacks. The memo was written by John Yoo, a lawyer in the Office of Legal Counsel who worked closely with Addington, and said, in part, "The power of the President is at its zenith under the Constitution when the President is directing military operations of the armed forces, because the power of the Commander-in-Chief is assigned solely to the President." The memo acknowledged that Article I of the Constitution gives Congress the power to declare war, but argued that it was a misreading to assume that the article gives Congress the lead role in making war. Instead, the memo said, "it is beyond question that the President has the plenary Constitutional power to take such military actions as he deems necessary and appropriate to respond to the terrorist attacks upon the United States on September 11, 2001." It concluded, "These decisions, under our Constitution, are for the President alone to make."

Another memo sanctioned torture when the President deems it necessary; yet another claimed that there were virtually no valid legal prohibitions against the inhumane treatment of foreign prisoners held by the C.I.A. outside the U.S. Most of these decisions, according to many Administration officials who were involved in the process, were made in secrecy, and the customary interagency debate and vetting procedures were sidestepped. Addington either drafted the memos himself or advised those who were drafting them. "Addington's fingerprints were all over these policies," said Wilkerson, who, as Powell's top aide, later assembled for the Secretary a dossier of internal memos detailing the decision-making process.

On November 13, 2001, an executive order setting up the military commissions was issued under Bush's signature. The decision stunned Powell; the national-security adviser, Condoleezza Rice; the highest-ranking lawyer at the C.I.A.; and many judge advocate generals, or JAGs, the top lawyers in the military services. None of them had been consulted. Michael Chertoff, the head of the Justice Department's criminal division, who had argued for trying terror suspects in the U.S. courts, was also bypassed. And the order surprised John Bellinger III, the National Security Council legal adviser and deputy White House counsel, who had been formally asked to help create a legal method for trying foreign terror suspects. According to multiple sources, Addington secretly usurped the process. He and a few hand-picked associates, including Bradford Berenson and Timothy Flanigan, a lawyer in the White House counsel's office, wrote the executive order creating the commissions. Moreover, Addington did not show drafts of the order to Powell or Rice, who, the senior Administration lawyer said, was incensed when she learned about her exclusion.

The order proclaimed a state of "extraordinary emergency," and announced that the rules for the military commissions would be dictated by the Secretary of Defense, without review by Congress or the courts. The commissions could try any foreign person the President or his representatives deemed to have "engaged in" or "abetted" or "conspired to commit" terrorism, without offering the right to seek an appeal from anyone but the President or the Secretary of Defense. Detainees would be treated "humanely," and would be given "full and fair trials," the order said. Yet the order continued that "it is not practicable" to apply "the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." The death penalty, for example, could be imposed even if there was a split verdict. Moreover, in December, 2001, the Department of Defense circulated internal memos suggesting that, in the commission system, defendants would have only limited rights to confront their accusers, see all the evidence against them, or be present during their trials. There would be no right to remain silent, and hearsay evidence would be admissible, as would evidence obtained through physical coercion. Guilt did not need to be proved beyond a reasonable doubt. The order firmly established that terrorism would henceforth be approached on a war footing, endowing the President with enhanced powers.

The precedent for the order was an arcane 1942 case, ex parte Quirin, in which Franklin Roosevelt created a military commission to try eight Nazi saboteurs who had infiltrated the United States via submarines. The Supreme Court upheld the case, 8–0, but even the conservative Justice Antonin Scalia has called it "not this Court's finest hour." Roosevelt was later criticized for creating a sham process. Moreover, while he used military commissions to try a handful of suspects who had already admitted their guilt, the Bush White House was proposing expanding the process to cover thousands of "enemy combatants." It was also ignoring the Uniform Code of Military Justice, which, having codified procedures for courts-martial in 1951, had rendered Quirin out of date.

Berenson said, "The legal foundation was very strong. F.D.R.'s order establishing military commissions had been upheld by the Supreme Court. This was almost identical. What we underestimated was the extent to which the culture had shifted beneath us since World War Two." Concerns about civil liberties and human rights, and anger over Vietnam and Watergate, he said, had turned public opinion against a strong executive branch: "But Addington thought military commissions had to be a tool at the President's disposal."

Rear Admiral Donald Guter, who was the Navy's chief JAG until June, 2002, said that he and the other JAGs, who were experts in the laws of war, tried unsuccessfully to amend parts of the military-commission plan when they learned of it, days before the order was formally signed by the President. "But we were marginalized," he said. "We were warning them that we had this long tradition of military justice, and we didn't want to tarnish it. The treatment of detainees was a huge issue. They didn't want to hear it." In a 2004 report in the *Times*, Guter said that when he and the other JAGs told Haynes that they needed more information, Haynes replied, "No, you don't." (Haynes's office offered no comment.)

At the Defense Department, Shiffrin, the deputy general counsel for intelligence, and a career lawyer rather than a political appointee, was taken aback when Haynes showed

him the order. Earlier in Shiffrin's career, at the Justice Department, his office had been in the same room where the Nazi defendants were tried, and he had become interested in the case, which he said he regarded as "one of the worst Supreme Court cases ever." He recalled informing Haynes that he was skeptical of the Administration's invocation of Quirin. "Gee, this is problematic," Shiffrin told him.

Marine Major Dan Mori, the uniformed lawyer who has been assigned to defend David Hicks, one of the ten terror suspects in Guantánamo who have been charged, said of the commissions, "It was a political stunt. The Administration clearly didn't know anything about military law or the laws of war. I think they were clueless that there even *was* a U.C.M.J. and a Manual for Courts-Martial! The fundamental problem is that the rules were constructed by people with a vested interest in conviction."

Mori said that the charges against the detainees reflected a profound legal confusion. "A military commission can try only violations of the laws of *war*," he said. "But the Administration's lawyers didn't understand this." Under federal criminal statutes, for example, conspiring to commit terrorist acts is a crime. But, as the Nuremburg trials that followed the Second World War established, under the laws of war it is not, since all soldiers could be charged with conspiring to fight for their side. Yet, Mori said, a charge of conspiracy "is the only thing there is in many cases at Guantánamo—guilt by association. So you've got this big problem." He added, "I hope that nobody confuses military justice with these 'military commissions.' This is a political process, set up by the *civilian* leadership. It's inept, incompetent, and improper."

Under attack from defense lawyers like Mori, the military commissions have been tied up in the courts almost since the order was issued. Bellinger and others fought to make the commissions fairer, so that they could withstand court challenges, and the Pentagon gradually softened its rules. But Administration lawyers involved in the process said that Addington resisted at every turn. He insisted, for instance, on maintaining the admissibility of statements obtained through coercion, or even torture. In meetings, he argued that officials in charge of the military commissions should be given maximum flexibility to decide whether to include such evidence. "Torture isn't important to Addington as a scientific matter, good or bad, or whether it works or not," the Administration lawyer, who is familiar with these debates, said. "It's more about his philosophy of Presidential power. He thinks that if the President wants torture he should get torture. He always argued for 'maximum flexibility.' "

Last month, Addington lost this internal battle. The Administration rescinded the provision allowing coerced testimony, after even the military officials overseeing the commissions supported the reform. According to a senior Administration legal adviser who participated in discussions about the commissions, Addington remained opposed to the change. "He wanted no changes," the lawyer said. "He said the rules were good, right from the start." Addington accused officials who were trying to reform the rules of "giving away the President's prerogatives."

President Bush has blamed the legal challenges for the delays in prosecuting Guantánamo detainees. But many lawyers, even some inside the Administration, believe that the challenges were inevitable, considering the dubious constitutionality of the commissions. The Supreme Court's ruling in the Hamdan case is expected to establish whether the

commissions meet basic standards of due process. The Administration lawyer isn't sanguine about the outcome. "It shows again that Addington overreached," he said.

Meanwhile, Addington has fought tirelessly to stem reform of other controversial aspects of the New Paradigm, such as the detention and interrogation of terror suspects. Last year, he and Cheney led an unsuccessful campaign to defeat an amendment, proposed by Senator John McCain, to ban the abusive treatment of detainees held by the military or the C.I.A. Government officials who have worked closely with Addington say he insists that legal flexibility is necessary, because of the iniquity of the enemy; moreover, he does not believe that the legal positions taken by the Bush Administration in the war on terror have damaged the country's international reputation. "He's a very smart guy, but he gives no credibility to those who say these policies are hurting us around the world," the senior Administration legal adviser said. "His feeling is that there are no costs. He'll say people are just whining. He thinks most of them would be against us no matter what." In Addington's view, critics of the Administration's aggressive legal policies are just political enemies of the President.

Yet, from the start, some of the sharpest critics of detainee-treatment policies have been military and law-enforcement officials inside the Bush Administration; people close to it, like McCain; and our foreign allies. Just a few months after the Guantánamo detention centers were established, members of the Administration began receiving reports that questioned whether all the prisoners there were really, as Secretary of Defense Donald Rumsfeld had labelled them, "the worst of the worst." Guter said that the Pentagon had originally planned to screen the suspects individually on the battlefields in Afghanistan; such "Article 5 hearings" are a provision of the Geneva Conventions. But the White House cancelled the hearings, which had been standard protocol during the previous fifty years, including in the first Gulf War. In a January 25, 2002, legal memorandum, Administration lawyers dismissed the Geneva Conventions as "obsolete," "quaint," and irrelevant to the war on terror. The memo was signed by Gonzales, but the Administration lawyer said he believed that "Addington and Flanigan were behind it." The memo argued that all Taliban and Al Qaeda detainees were illegal enemy combatants, which eliminated "any argument regarding the need for case-by-case determination of P.O.W. status." Critics claim that the lack of a careful screening process led some innocent detainees to be imprisoned. "Article 5 hearings would have cost them nothing," the Administration lawyer, who was involved in the process, said. "They just wanted to make a point on executive power—that the President can designate them *all* enemy combatants if he wants to."

Guter, the Navy JAG, said that, before long, he and other military experts began to wonder whether the reason they weren't getting much useful intelligence from Guantánamo was that, as he puts it, "it wasn't there." Guter, who was in the Pentagon on September 11th, said, "I don't have a sympathetic bone in my body for the terrorists. But I just wanted to make sure we were getting the right people—the real terrorists. And I wanted to make sure we were doing it in a way consistent with our values."

While the JAGs' questions about the treatment of detainees went largely unheeded, he said, the C.I.A. was simultaneously raising similar concerns. In the summer of 2002, the

agency had sent an Arabic-speaking analyst to Guantánamo to find out why more intelligence wasn't being collected, and, after interviewing several dozen prisoners, he had come back with bad news: more than half the detainees, he believed, didn't belong there. He wrote a devastating classified report, which reached General John Gordon, the deputy national-security adviser for combatting terrorism. In a series of meetings at the White House, Gordon, Bellinger, and other officials warned Addington and Gonzales that potentially innocent people had been locked up in Guantánamo and would be indefinitely. "This is a violation of basic notions of American fairness," Gordon and Bellinger argued. "Isn't that what we're about as a country?" Addington's response, sources familiar with the meetings said, was "These are 'enemy combatants.' Please use that term. They've all been through a screening process. We don't have anything to talk about."

A former Administration official said of Addington's response, "It seemed illogical. How could you deny the possibility that one or more people were locked up who shouldn't be? There were old people, sick people—why do we want to keep them?" At the meeting, Gordon and Bellinger argued, "The American public understands that wars are confusing and exceptional things happen. But the American public will expect some due process."

Addington and Gonzales dismissed this concern. The former Administration official recalled that Addington was "the dominant voice. It was a non-debate, in his view." The confrontation made clear, though, that Addington had been informed early that there were problems at Guantánamo. "There wasn't a lack of knowledge or understanding," the former official said.

Addington has proved deft at outmaneuvering his critics. Documents embarrassing to Addington's opponents have been leaked to the press, if not necessarily by him. A top-secret N.S.C. memo describing Powell's request to reconsider the suspension of the Geneva Conventions appeared in the Washington *Times* the day after it was circulated to the Secretary of Defense, the Attorney General, and the Vice-President; the article cited unnamed sources who accused Powell of "bowing to pressure from the political left." The Administration lawyer said, "The way Addington works, he controls the flow of information very tightly." Addington chastised a Justice Department official who showed a legal opinion on the treatment of detainees to the State Department. He repeatedly directed Gonzales, the White House counsel, to keep Bellinger, the N.S.C. lawyer, out of meetings about national-security issues. "Lip-lock" is the word Addington's old Pentagon colleague Sean O'Keefe, now the chancellor of Louisiana State University, used to describe his discretion. "He's like Cheney," O'Keefe said. "You can't get anything out of him with a crowbar." The Administration lawyer said, "He's a bully, pure and simple." Several talented top lawyers who challenged Addington on important legal matters concerning the war on terror, including Patrick Philbin, James Comey, and Jack Goldsmith, left the Administration under stressful circumstances. Other reform-minded government lawyers who clashed with Addington, including Bellinger and Matthew Waxman, both of whom were at the N.S.C. during Bush's first term, have moved to the State Department.

Waxman, a young lawyer who headed the Pentagon's office of detainee affairs, departed soon after he had a major confrontation with Addington over the issue of clarifying

military rules for the treatment of prisoners. Waxman believed that international standards for the humane treatment of detainees should be followed, and argued for reforms in the Army Field Manual. He hoped to reinstate the basic standards that are specified in the Geneva Conventions. This meant the prohibition of torture, overt acts of violence, and "outrages on personal dignity, in particular humiliating and degrading treatment." Although the Vice-President's office is not part of the military chain of command, last September Addington summoned Waxman to his office and berated him. Waxman declined to comment on the incident, but a former colleague in the Pentagon, in whom Waxman confided, said that Addington accused Waxman of wanting to fight the war on terror his own way, rather than the President's way. The Army Field Manual still hasn't been revised, and, according to those involved, Addington and his protégé Haynes remain the major obstacles.

Last fall, Richard Shiffrin, the Pentagon lawyer who was left out of the Administration's initial discussions of the military commissions, learned from the *Times* about the Administration's decision to sanction warrantless domestic electronic surveillance by the National Security Agency. This was remarkable, because Shiffrin was the Pentagon lawyer in charge of supervising the N.S.A.'s legal advisers. "It was exceptional that I didn't know about it—extraordinary," Shiffrin said. "In the prior Administration, on anything involving N.S.A. legal issues I'd have been made aware. And I should have been in this one."

Shortly after September 11th, Addington and Cheney, without alerting Shiffrin, held meetings with top N.S.A. lawyers in the Vice-President's office and told them that the President, as Commander-in-Chief, had the authority to override the FISA statutes and not seek warrants from the special court. According to the *Times*, Addington and Cheney pushed the N.S.A. to engage in practices that the agency thought were illegal, such as the warrantless wiretapping of American suspects making domestic calls. General Michael Hayden, the former head of the N.S.A., who was recently confirmed as director of the C.I.A., has denied being pressured. Shiffrin, however, doubted that the N.S.A. lawyers were expert enough in Article II of the Constitution, which defines the President's powers, to argue back. He described the Administration's legal arguments on wiretapping as "close calls."

Others are more critical. Fourteen prominent constitutional scholars, representing a range of political views, recently wrote an open letter to Congress, claiming that the N.S.A. surveillance program "appears on its face to violate existing law." The scholars noted that Bush had made no effort to amend the FISA law to suit national-security needs—he simply ignored it. The Republican legal activist Bruce Fein said, "What makes this so sinister is that the members of this Administration have unchecked power. They don't *care* if the wiretapping is legal or not." But the former high-ranking Administration lawyer suggested that the situation is more serious than an intentional infraction of the law. "It's not that they think they're skirting the law," he said. "They think that this *is* the law."

Fein suggested that the only way Congress will be able to reassert its power is by cutting off funds to the executive branch for programs that it thinks are illegal. But this approach

has been tried, and here, too, Addington has had the last word. John Murtha, the ranking Democrat on the House Appropriations Subcommittee on Defense, put a provision in the Pentagon's appropriations bills for 2005 and 2006 forbidding the use of federal funds for any intelligence-gathering that violates the Fourth Amendment, which protects the privacy of American citizens. The White House, however, took exception to Congress's effort to cut off funds. When President Bush signed the appropriations bills into law, he appended "signing statements" asserting that the Commander-in-Chief had the right to collect intelligence in any way he deemed necessary. The signing statement for the 2005 budget, for instance, noted that the executive branch would "construe" the spending limit only "in a manner consistent with the President's constitutional authority as Commander-in-Chief, including for the conduct of intelligence operations."

According to the Boston *Globe,* Addington has been the "leading architect" of these signing statements, which have been added to more than seven hundred and fifty laws. He reportedly scrutinizes every bill before President Bush signs it, searching for any language that might impinge on Presidential power. These wars of words are yet another battlefront between Addington and Congress, and some constitutional scholars find them troubling. Few of the signing statements were noticed until one of them was slipped into Bush's signing of the McCain amendment. The language was legal boilerplate, reserving the right to construe the legislation only as it was consistent with the Constitution. But, considering that Cheney's office had waged, and lost, a public fight to defeat the McCain amendment democratically—the vote in the Senate was 90–9—the signing statement seemed sneaky and subversive.

Earlier this month, the American Bar Association voted to investigate whether President Bush had exceeded his constitutional authority by reserving the right to ignore portions of laws that he has signed. Richard Epstein, the University of Chicago law professor, said, "What's frightening to me is that this Administration is always willing to push the conventions to the limits—and beyond. With his signing statements, I think the President just goes too far. If you sign these things with a caveat, do the inferior officers follow the law or the caveat?"

Bruce Fein argues that Addington's signing statements are "unconstitutional as a strategy," because the Founding Fathers wanted Presidents to veto legislation openly if they thought the bills were unconstitutional. Bush has not vetoed a single bill since taking office. "It's part of the balancing process," Fein said. "It's about accountability. If you veto something, everyone knows where you stand. But this President wants to do it sotto voce. He wants to give the image that he's accommodating on torture, and then reserves the right to torture anyway."

David Addington is a satisfactory lawyer, Fein said, but a less than satisfactory student of American history, which, for a public servant of his influence, matters more. "If you read the Federalist Papers, you can see how rich in history they are," he said. "The Founders really understood the history of what people *did* with power, going back to Greek and Roman and Biblical times. Our political heritage is to be skeptical of executive power, because, in particular, there was skepticism of King George III. But Cheney and Addington are not students of history. If they were, they'd know that the Founding Fathers would be shocked by what they've done." ✦

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JUL - 7 2004

SECRET - Unclassified upon removal of attachments

MEMORANDUM FOR INSPECTOR GENERAL, DEPARTMENT OF THE NAVY

Subj: STATEMENT FOR THE RECORD: OFFICE OF GENERAL COUNSEL INVOLVEMENT IN INTERROGATION ISSUES

Ref: (a) NAVIG Memo 5021 Ser 00/017 of 18 Jun 04

This responds to your request at reference (a) for a statement that chronicles any involvement by the Department of the Navy Office of the General Counsel (OGC) or me personally in the development of the "interrogation rules of engagement" (IROE) for Operation Enduring Freedom and Operation Iraqi Freedom. The following narrative adopts a slightly broader focus. It seeks to describe any such knowledge or involvement as OGC or I had on any aspect of the interrogation techniques used or contemplated following September 11, 2001, including participation in legal analysis or discussions of such issues. In the end, it is largely an account of my personal actions or knowledge. Unless otherwise indicated, the use below of the term "OGC" includes my personal knowledge or activity as well as that of other OGC attorneys or personnel.

Before discussing the specifics of this involvement, four key factors or events warrant mention by way of background:

First, as a general rule, OGC has not had any official responsibility for or involvement in detainee interrogation practices, procedures, or doctrines, including IROE. Because the Department of the Navy (DON) does not have and has not had assigned responsibilities for detainee interrogation matters, OGC was neither consulted nor informed of such issues. Apart from the incidental events recounted here, the one exception to this occurred on January 17, 2003, when the General Counsel of the Air Force, acting pursuant to SECDEF and DOD GC direction, requested that OGC participate in an inter-Service Detainee Interrogation Working Group. When the Working Group ceased its work in late March 2003, OGC official involvement in detainee interrogation issues also stopped.

Second, my duties as General Counsel of the Navy include serving as the Reporting Senior within the DON Secretariat for

the Naval Criminal Investigative Service (NCIS). These duties extend beyond the function of providing legal counsel and include general oversight responsibility over NCIS operations, policies, and budget. As a component under the operational control of other commands, NCIS has had some worldwide involvement on issues of detainee custody, treatment, and criminal interrogations and, specifically, those involving the Guantanamo detainees. As a result, I gained a measure of insight into detainee treatment and interrogation practices commensurate with NCIS's scope and degree of involvement.

Third, in December 2002, I received a report of detainee abuse occurring at Guantanamo Naval Base, Cuba, and complaints about interrogation guidelines pertaining to those detainees. Because the Guantanamo detainee interrogations, as noted above, were not the responsibility of the DON, I had no official oversight responsibilities in the matter. These alleged abuses were not being inflicted by Navy or Marine Corps personnel or pursuant to DON authorities or actions. OGC attorneys were not involved. Nonetheless, I chose to inquire further into the allegations. This narrative largely involves my response to the allegations that interrogation abuses were occurring at Guantanamo.

Fourth, in the following narrative a number of meetings and conversations are recounted, but this account is by necessity somewhat incomplete. While I have attempted to identify all individuals who participated, this was not always possible. Also, the narrative does not attempt to document the numerous meetings or conversations on the issues that I held with DON staff and colleagues as the events unfolded, in particular with my two Deputy General Counsel, Tom Kranz and William Molzahn; my Executive and Military Assistants, CAPT Charlotte Wise and LtCol Rick Schieke; the Judge Advocate General, RADM Michael Lohr; the Staff Judge Advocate to the Commandant, BGen Kevin Sandkuhler; the Counsel to the Commandant, Peter Murphy; and many senior OGC attorneys.

With this background, the following constitutes a chronological narrative of the significant events pertaining to detainee interrogations in which OGC or I participated or of which I had knowledge.

17 Dec 02

In a late afternoon meeting, NCIS Director David Brant informed me that NCIS agents attached to JTF-160, the criminal investigation task force in Guantanamo, Cuba, had learned that

some detainees confined in Guantanamo[1] were being subjected to physical abuse and degrading treatment. This treatment — which the NCIS agents had not participated in or witnessed — was allegedly being inflicted by personnel attached to JTF-170, the intelligence task force, and was rumored to have been authorized, at least in part, at a "high level" in Washington, although NCIS had not seen the text of this authority. The NCIS agents at Guantanamo and civilian and military personnel from other services were upset at this mistreatment and regarded such treatment as unlawful and in violation of American values. Director Brant emphasized that NCIS would not engage in abusive treatment even if ordered to and did not wish to be even indirectly associated with a facility that engaged in such practices.

Director Brant asked me if I wished to learn more. Disturbed, I responded that I felt I had to. We agreed to meet again the following day. That evening, I emailed RADM Michael Lohr, the Navy JAG, and invited him to attend the next morning's meeting with NCIS.

18 Dec 02

I met with Director Brant and NCIS Chief Psychologist Dr. Michael Gelles. Dr. Gelles had advised JTF-160 in interrogation techniques and had spent time at the detention facility. Also present were OGC Deputy General Counsel William Molzahn, RADM Michael Lohr, and my Executive Assistant, CAPT Charlotte Wise.

Dr. Gelles described conditions in Guantanamo and stated that guards and interrogators with JTF-170, who were under pressure to produce results, had begun using abusive techniques with some of the detainees. These techniques included physical contact, degrading treatment (including dressing detainees in female underwear, among other techniques), the use of "stress" positions, and coercive psychological procedures. The military interrogators believed that such techniques were not only useful, but were necessary to obtain the desired information. NCIS agents were not involved in the application of these techniques or witnesses to them, but had learned of them through discussions with

[1] Guantanamo Naval Base is operated by the Navy. However, tenant operations reporting through different chains of commands — such as JTF-160 and JTF-170 — or different agencies do not provide operational reports to the base commander. Thus, such information would not necessarily filter up to OGC or the DON Secretariat.

personnel who had been involved and through access to computer databases where interrogation logs were kept. Dr. Gelles showed me extracts of detainee interrogation logs[2] evidencing some of this detainee mistreatment. (Att 1)

These techniques, Dr. Gelles explained, would violate the interrogation guidelines taught to military and law enforcement personnel and he believed they were generally violative of U.S. law if applied to U.S. persons. In addition, there was great danger, he said, that any force utilized to extract information would continue to escalate. If a person being forced to stand for hours decided to lie down, it probably would take force to get him to stand up again and stay standing. In contrast to the civilian law enforcement personnel present at Guantanamo, who were trained in interrogation techniques and limits and had years of professional experience in such practices, the military interrogators were typically young and had little or no training or experience in interrogations. Once the initial barrier against the use of improper force had been breached, a phenomenon known as "force drift" would almost certainly begin to come into play. This term describes the observed tendency among interrogators who rely on force. If some force is good, these people come to believe, then the application of more force must be better. Thus, the level of force applied against an uncooperative witness tends to escalate such that, if left unchecked, force levels, to include torture, could be reached. Dr. Gelles was concerned that this phenomenon might manifest itself at Guantanamo.

Director Brant reiterated his previous statements that he and the NCIS personnel at Guantanamo viewed any such abusive practices as repugnant. They would not engage in them even if ordered and NCIS would have to consider whether they could even remain co-located in Guantanamo if the practices were to continue. Moreover, this discontent was not limited to NCIS; law enforcement and military personnel from other services were also increasingly disturbed by the practice.

Director Brant also repeated that NCIS had been informed that the coercive interrogation techniques did not represent simply rogue activity limited to undisciplined interrogators or even practices sanctioned only by the local command, but had been reportedly authorized at a "high level" in

[2] My recollection is that I was shown extracts of these interrogation logs on this date. However, OGC documents indicate that these log extracts were emailed to me on January 13, 2003.

Washington. NCIS, however, had no further information on this.

The general mood in the room was dismay. I was of the opinion that the interrogation activities described would be unlawful and unworthy of the military services, an opinion that the others shared. I commended NCIS for their values and their decision to bring this to my attention. I also committed that I would try to find out more about the situation in Guantanamo, in particular whether any such interrogation techniques had received higher-level authorization.

19 Dec 02

Knowing that the Department of the Army had Executive Agent responsibility for Guantanamo detainee operations, I called Steven Morello, the Army General Counsel, and told him that I had heard of alleged interrogation abuses in Guantanamo. Mr. Morello responded that he had information on the issue and invited me to visit with him and his deputy, Tom Taylor, to discuss it further.

In the Army OGC offices, Mr. Morello and Mr. Taylor provided me with a copy of a composite document (Att 2) capped by an Action Memo from DOD General Counsel William Haynes to the Secretary of Defense entitled "Counter-Resistance Techniques." The memo, which I had not seen before,[3] evidenced that on December 2, 2002, Secretary Rumsfeld had approved the use of certain identified interrogation techniques at Guantanamo, including (with some restrictions) the use of stress positions, hooding, isolation, "deprivation of light and auditory stimuli," and use of "detainee-individual phobias (such as fear of dogs) to induce stress." This composite document (further referred to as the "December 2nd Memo") showed that the request for the authority to employ the techniques had originated with an October 11, 2002, memorandum from MG Michael Dunlavey, the Commander of JTF-170, to the Commander, SOUTHCOM, and had proceeded up the chain of command through the Joint Staff until reaching the Secretary. The Dunlavey memo was accompanied by a legal brief signed by

[3] Later, we would determine that this memo had been circulated by the Joint Staff to the OPNAV Staff, where it had been reviewed by a Navy captain who, on November 2, 2002, had concurred in the memo with caveats, including the need for a more detailed interagency legal and policy review. (Att 3) The memo was apparently not circulated further within the DON and had never reached my office or RADM Lohr's.

LTC Diane Beaver, the SJA to JTF-170, generally finding that application of the interrogation techniques complied with law.

Mr. Morello and Mr. Taylor demonstrated great concern with the decision to authorize the interrogation techniques. Mr. Morello said that "they had tried to stop it," without success, and had been advised not to question the settled decision further.

Upon returning to my office, I reviewed the Secretary's December 2nd Memo and the Beaver Legal Brief more closely. The brief held, in summary, that torture was prohibited but cruel, inhuman, or degrading treatment could be inflicted on the Guantanamo detainees with near impunity because, at least in that location, no law prohibited such action, no court would be vested with jurisdiction to entertain a complaint on such allegations, and various defenses (such as good motive or necessity) would shield any U.S. official accused of the unlawful behavior. I regarded the memo as a wholly inadequate analysis of the law and a poor treatment of this difficult and highly sensitive issue. As for the December 2nd Memo, I concluded that it was fatally grounded on these serious failures of legal analysis. As described in the memo and supporting documentation, the interrogation techniques approved by the Secretary should not have been authorized because some (but not all) of them, whether applied singly or in combination, could produce effects reaching the level of torture, a degree of mistreatment not otherwise proscribed by the memo because it did not articulate any bright-line standard for prohibited detainee treatment, a necessary element in any such document. Furthermore, even if the techniques as applied did not reach the level of torture, they almost certainly would constitute "cruel, inhuman, or degrading treatment," another class of unlawful treatment.

In my view, the alleged detainee abuse, coupled with the fact that the Secretary of Defense's memo had authorized at least aspects of it, could — and almost certainly would — have severe ramifications unless the policy was quickly reversed. Any such mistreatment would be unlawful and contrary to the President's directive to treat the detainees "humanely." In addition, the consequences of such practices were almost incalculably harmful to U.S. foreign, military, and legal policies. Because the American public would not tolerate such abuse, I felt the political fallout was likely to be severe.

I provided RADM Lohr with a copy of the December 2nd Memo and requested that Navy JAG prepare a legal analysis of the issues. I also decided to brief Secretary of the Navy Gordon England and take my objections to DOD GC Haynes as quickly as possible.

Later that day, RADM Lohr wrote via email that he had brought the allegations of abuse to the attention of the Vice Chief of Naval Operations, ADM William Fallon. (Att 4)

20 Dec 02

At 1015, in a very short meeting, I briefed Navy Secretary Gordon England on the NCIS report of detainee abuse, on the December 2nd Memo authorizing the interrogation techniques, and on my legal views and policy concerns. I told him I was planning to see DOD GC Haynes that afternoon to convey my concerns and objections. Secretary England authorized me to go forward, advising me to use my judgment.[4]

That afternoon I met with Mr. Haynes in his office. I informed him that NCIS had advised me that interrogation abuses were taking place in Guantanamo, that the NCIS agents considered any such abuses to be unlawful and contrary to American values, and that discontent over these practices were reportedly spreading among the personnel on the base. Producing the December 2nd Memo, I expressed surprise that the Secretary had been allowed to sign it. In my view, some of the authorized interrogation techniques could rise to the level of torture, although the intent surely had not been to do so. Mr. Haynes disagreed that the techniques authorized constituted torture. I urged him to think about the techniques more closely. What did "deprivation of light and auditory stimuli" mean? Could a detainee be locked in a completely dark cell? And for how long? A month? Longer? What precisely did the authority to exploit phobias permit? Could a detainee be held in a coffin? Could phobias be applied until madness set in? Not only could individual techniques applied singly constitute torture, I said, but also the application of combinations of them must surely be recognized as potentially capable of reaching the level of torture. Also, the memo's fundamental problem was that it was

[4] At this time, Secretary England's nomination to serve as Deputy Secretary of the Department of Homeland Security had been announced, and he was transitioning out of the DON. He would ultimately transfer out of the Department on January 23, 2003. This would be my only conversation with him on the issue until months later, well after his return as Navy Secretary.

completely unbounded — it failed to establish a clear boundary for prohibited treatment. That boundary, I felt, had to be at that point where cruel and unusual punishment or treatment began. Turning to the Beaver Legal Brief, I characterized it as an incompetent product of legal analysis, and I urged him not to rely on it.

I also drew Mr. Haynes's attention to the Secretary's hand-written comment on the bottom of the memo, which suggested that detainees subjected to forced standing (which was limited to four hours) could be made to stand longer since he usually stood for longer periods during his work day.[5] Although, having some sense of the Secretary's verbal style, I was confident the comment was intended to be jocular, defense attorneys for the detainees were sure to interpret it otherwise. Unless withdrawn rapidly, the memo was sure to be discovered and used at trial in the military commissions. The Secretary's signature on the memo ensured that he would be called as a witness. I told Mr. Haynes he could be sure that, at the end of what would be a long interrogation, the defense attorney would then refer the Secretary to the notation and ask whether it was not intended as a coded message, a written nod-and-a-wink to interrogators to the effect that they should not feel bound by the limits set in the memo, but consider themselves authorized to do what was necessary to obtain the necessary information. The memos, and the practices they authorized, threatened the entire military commission process.

Mr. Haynes listened attentively throughout. He promised to consider carefully what I had said.

I had entered the meeting believing that the December 2nd Memo was almost certainly not reflective of conscious policy but the product of oversight — a combination of too much work and too little time for careful legal analysis or measured consideration. I left confident that Mr. Haynes, upon reflecting on the abuses in Guantanamo and the flaws in the December 2nd Memo and underlying legal analysis, would seek to correct these mistakes by obtaining the quick suspension of the authority to apply the interrogation techniques.

21 Dec 02 - 3 Jan 03

On these dates I left for and returned from Miami on a family Christmas vacation. During this time, I learned via

[5] The notation reads: "However, I stand for 8 - 10 hours a day. Why is standing limited to 4 hours?"

emails from RADM Lohr that he had brought the allegations of abuse to VADM Kevin Green, the Deputy Chief of Naval Operations for Plans, Policy, and Operations, and COL Manny Supervielle, SOUTHCOM SJA. I returned to the office on Friday, January 3, 2003.

6 Jan 03

NCIS Director Brant informed me that the detainee mistreatment in Guantanamo was continuing and that he had not heard that the December 2nd Memo had been suspended or revoked. This came as an unpleasant surprise since I had been confident that the abusive activities would have been quickly ended once I brought them to the attention of higher levels within DOD. I began to wonder whether the adoption of the coercive interrogation techniques might not have been the product of simple oversight, as I had thought, but perhaps a policy consciously adopted — albeit through mistaken analysis — and enjoying at least some support within the Pentagon bureaucracy. To get them curbed I would have to develop a constituency within the Pentagon to do so.

I met with Under Secretary of the Navy Susan Livingstone and informed her, for the first time, of the evidence of abuse in Guantanamo, my legal and policy views, and my various meetings and conversations on the matter. I recommended an NCIS brief, which she accepted. That afternoon, Director Brant and other NCIS agents briefed her along the same lines of the brief they provided me on December 18th. I attended the brief. This would be the first of almost daily conversations or meetings that I had with Under Secretary Livingstone on this issue. Her views and mine coincided, and she provided great support during this entire period.

On this and the following day, I reviewed the product of research that had been begun almost immediately following the news of the detainee abuse, in particular a memorandum of law prepared under RADM Lohr's direction by Navy JAG attorneys. (Att 5) In addition, I reviewed a letter (Att 6) dated December 26, 2002, from Kenneth Roth, the Executive Director of Human Rights Watch, a prominent human rights organization, to President Bush. The letter, which contained legal analysis I considered largely accurate, had been cited in a Washington Post article published on the same date.[6] (Att 7) Both the letter and the article were confirmation that the accounts of

[6] D. Priest, B. Gellman, "U.S. Decries Abuse but Defends Interrogations," *Washington Post*, p. A1 (Dec. 26, 2002).

prisoner abuse had begun to leak out, as they were bound to do.

8 Jan 03

I met in my office with Jaymie Durnan, a Special Assistant to Secretary Rumsfeld and Deputy Secretary Paul Wolfowitz. Showing him the December 2nd Memo, I informed Mr. Durnan about the alleged prisoner abuse at Guantanamo, the repugnance that NCIS and other U.S. officials at the base felt about the practice, and my view that the mistreatment was illegal and contrary to American values. In addition to their unlawfulness, the abusive practices — once they became known to the American public and military — would have severe policy repercussions: the public and military would both repudiate them; public support for the War on Terror would diminish; there would be ensuing international condemnation; and, as a result, the United States would find it more difficult not only to expand the current coalition, but even to maintain the one that existed. The full political consequences were incalculable but certain to be severe. I also informed Mr. Durnan of my December 20th conversation with Mr. Haynes and my surprise to learn, following my return from vacation, that the interrogation authorities had not been suspended in the intervening time. I told him I would be seeing Mr. Haynes again the following day and asked for his help in reversing the policy.

Mr. Durnan expressed serious concern over the matter and promised to look into it at his level. He asked for a copy of the December 2nd Memo, which I had delivered to him later that same day (Att 8) along, I believe, with the Navy JAG legal memo. He also asked that I keep him informed of my conversation with Mr. Haynes.

9 Jan 03

I met with Mr. Haynes in his office again that afternoon. He was accompanied by an Air Force major whose name I cannot recall. I told him that I had been surprised to learn upon my return from vacation that the detainee abuses appeared to be continuing and that, from all appearances, the interrogation techniques authorized by the December 2nd Memo were still in place. I also provided him a draft copy of the Navy JAG legal memo.

Mr. Haynes did not explain what had happened during the interval, but said that some U.S. officials believed the

techniques were necessary to obtain information from the few Guantanamo detainees who, it was thought, were involved in the 9/11 attacks and had knowledge of other al Qaeda operations planned against the United States. I acknowledged the ethical issues were difficult. I was not sure what my position would be in the classic "ticking bomb" scenario where the terrorist being interrogated had knowledge of, say, an imminent nuclear weapon attack against a U.S. city. If I were the interrogator involved, I would probably apply the torture myself, although I would do so with full knowledge of potentially severe personal consequences. But I did not feel this was the factual situation we faced in Guantanamo, and even if I were willing to do this as an individual and assume the personal consequences, by the same token I did not consider it appropriate for us to advocate for or cause the laws and values of our nation to be changed to render the activity lawful. Also, the threats against the United States came from many directions and had many different potential consequences. Does the threat by one common criminal against the life of one citizen justify torture or lesser mistreatment? If not, how many lives must the threat jeopardize? Where does one set the threshold, if at all? In any event, this was not for us to decide in the Pentagon; these were issues for national debate.

My recollection is that I raised the following additional points with Mr. Haynes:

- The December 26th Washington Post article recounting allegations of prisoner mistreatment at Guantanamo and elsewhere demonstrated that the discontent of those in the military opposed to the practice was leaking to the media, as was inevitable.

- Even if one wanted to authorize the U.S. military to conduct coercive interrogations, as was the case in Guantanamo, how could one do so without profoundly altering its core values and character? Societal education and military training inculcated in our soldiers American values adverse to mistreatment. Would we now have the military abandon these values altogether? Or would we create detachments of special guards and interrogators, who would be trained and kept separate from the other soldiers, to administer these practices?

- The belief held by some that Guantanamo's special jurisdictional situation would preclude a U.S. court

finding jurisdiction to review events occurring there was questionable at best. The coercive interrogations in Guantanamo were not committed by rogue elements of the military acting without authority, a situation that may support a finding of lack of jurisdiction. In this situation, the authority and direction to engage in the practice issued from and was under review by the highest DOD authorities, including the Secretary of Defense. What precluded a federal district court from finding jurisdiction along the entire length of the chain of command?

- The British Government had applied virtually the same interrogation techniques against Irish Republican Army detainees in the '70s. Following an exhaustive investigation in which the testimony of hundreds of witnesses was taken, the European Commission of Human Rights found the interrogation techniques to constitute torture. In *Ireland v. United Kingdom*,[7] a later law suit brought by the victims of the interrogation techniques, the European Court of Human Rights in a split decision held that the techniques did not rise to the level of torture, but did amount to "cruel, inhuman, and degrading" treatment, a practice that was equally in violation of European law and international human rights standards. The court awarded damages. Ultimately, the then-Prime Minister, standing in the well of Parliament, admitted that the government had used the techniques, forswore their further use, and announced further investigations and remedial training. This case was directly applicable to our situation for two reasons. First, because of the similarity between U.S. and U.K. jurisprudence, the case helped establish that the interrogation techniques authorized in the December 2nd Memo constituted, at a minimum, cruel, inhuman, and degrading treatment. Further, depending on circumstances, the same treatment may constitute torture — treatment that may discomfit a prizefighter may be regarded as torture by a grandmother. Second, at present, British Prime Minister Tony Blair had lost significant electoral

[7] *Republic of Ireland v. United Kingdom*, (Series A, No. 25) European Court of Human Rights (1979-80), 2 EHRR 25 (Jan. 18, 1978).

support and was under heavy political pressure because of his staunch support for the United States in the War on Terror and Operation Iraqi Freedom. What would be the impact on Blair's political standing upon the disclosure that his partner, the United States, was engaged in practices that were unlawful under British and European law? Could the British Government be precluded from continuing to cooperate with us on aspects of the War on Terror because doing so would abet illegal activity? Besides Blair, what impact would our actions have with respect to the willingness of other European leaders, all of whom are subject to the same law, to participate with us in the War on Terror?

- A central element of American foreign policy for decades had been our support for human rights. By authorizing and practicing cruel, inhuman, and degrading treatment, we were now engaged in the same sort of practices that we routinely condemned. Had we jettisoned our human rights policies? If not, could we continue to espouse them given our inconsistent behavior?

Mr. Haynes said little during our meeting. Frustrated by not having made much apparent headway, I told him that the interrogation policies could threaten Secretary Rumsfeld's tenure and could even damage the Presidency. "Protect your client," I urged Mr. Haynes.

After the meeting, I reported back to Mr. Durnan by email. (Att 9) Two sentences summarized my view of the meeting. Speaking of Mr. Haynes, I wrote: "He listened — as he always does — closely and intently to my arguments and promised to get back to me, but didn't say when. I've got no inkling what impact, if any, I made."

10 Jan 03

I met in my office with CAPT Jane Dalton, JAGC, USN, the Legal Adviser to the Chairman of the Joint Chiefs of Staff, who had called for the meeting at Mr. Haynes's request. I reviewed the December 2nd Memo with her, making many of the same points that I had made in my previous conversations with Mr. Haynes, Mr. Durnan, and others.

Also as a result of action by Mr. Haynes, I presented my views and objections at an afternoon meeting attended by the

other service General Counsel and the senior Judge Advocates General. My arguments were similar to those discussed above. I reported both meetings in a brief email to Mr. Durnan. (Att 10)

I regarded Mr. Haynes's initiative to schedule the above two meetings as a positive development and a sign that he not only took my arguments seriously, but that he possibly agreed with some or many of them. Later that afternoon, he called to say that Secretary Rumsfeld was briefed that day on my concerns. Mr. Haynes suggested that modifications to the interrogation policy were in the offing and could come as early as next week. I reported this to Mr. Durnan in an email. (Att 11)

13 Jan 03

In separate meetings, I met alone with Air Force General Counsel Mary Walker, Army General Counsel Steve Morello, and DOD Deputy General Counsel Dan Dell'Orto. The arguments I raised were roughly the same ones I had made to Mr. Haynes in our earlier conversations.

14 Jan 03

I met with VADM Kevin Green and gave him a full account of my concerns and objections, as well as of my meetings and conversations on the issues.

15 Jan 03

Uncertain whether there would be any change to the interrogation policy and dissatisfied at what I viewed as the slow pace of the discussions, I prepared a draft memorandum addressed to Mr. Haynes and CAPT Dalton (Att 12) providing my views on the JTF-170[8] October 11, 2002, request (contained as part of the December 2nd Memo) requesting authority to engage in the counter-resistance interrogation techniques. My memo: (a) stated that the majority of the proposed category II and all of the category III techniques were violative of domestic and international legal norms in that they constituted, at a minimum, cruel and unusual treatment and, at worst, torture; (b) rejected the legal analysis and recommendations of the Beaver Legal Brief; and (c) "strongly non-concurred" with the adoption of the violative interrogation techniques. The memo further cautioned that even "the misperception that the U.S.

[8] After a name change, it was now designated JTF GTMO.

Government authorizes or condones detention or interrogation practices that do not comply with our domestic and international legal obligations . . . probably will cause significant harm to our national legal, political, military and diplomatic interests."

I delivered the memo in draft form to Mr. Haynes's office in the morning. In a telephone call, I told Mr. Haynes that I was increasingly uncomfortable as time passed because I had not put down in writing my views on the interrogation issues. I said I would be signing out the memo late that afternoon unless I heard definitively that use of the interrogation techniques had been or was being suspended. We agreed to meet later that day.

In the later meeting, which Mr. Dell'Orto attended, Mr. Haynes returned the draft memo to me. He asked whether I was not aware about how he felt about the issues or the impact of my actions. I responded that I did not and, with respect to his own views, I had no idea whether he agreed totally with my arguments, disagreed totally with them, or held an intermediate view. Mr. Haynes then said that Secretary Rumsfeld would be suspending the authority to apply the techniques that same day. I said I was delighted and would thus not be signing out my memo. Later in the day and after our meeting, Mr. Haynes called to confirm that Secretary Rumsfeld had suspended the techniques. I reported the news widely, including to the Under Secretary (Att 13) and VADM Green (Att 14).

17 Jan 03

Secretary Rumsfeld, through General Counsel Haynes, established a Working Group headed by Air Force General Counsel Mary Walker to develop recommendations by January 29 on detainee interrogations. (Att 15) The sub-issues associated with the tasking were divided among the services. Navy OGC was assigned the task to develop a paper on the applicability of the 5th, 8th, and 14th Amendments to detainee interrogations. Early in this process, the Working Group was advised that the Office of Legal Counsel (OLC) in the Department of Justice would be developing a comprehensive legal memorandum that was to serve as definitive guidance on

the issues addressed by it.[9] I appointed LtCol Rick Schieke to serve as the OGC representative to the Working Group.[10]

I met with NCIS Chief Psychologist Dr. Michael Gelles and senior NCIS Special Agent Mark Fallon. In the meeting, I mentioned my concern that simple opposition to the use of the coercive interrogation techniques may not be sufficient to prevail in the impending bureaucratic reexamination of which procedures to authorize. We couldn't fight something with nothing; was there anything in the scientific or academic literature that would support the use of non-coercive interrogation techniques? Dr. Gelles replied that there was. Most behavioral experts working in the field, he said, viewed torture and other less coercive interrogation tactics not only as illegal, but also as ineffective. The weight of expert opinion held that the most effective interrogation techniques to employ against individuals with the psychological profile of the al Qaeda or Taliban detainees were "relationship-based," that is, they relied on the mutual trust achieved in the course of developing a non-coercive relationship to break down the detainee's resistance to interrogation. Coercive interrogations, said Dr. Gelles, were counter-productive to the implementation of relationship-based strategies.

At my direction, Dr. Gelles began the preparation of two memos, the first to be a summary of the thesis intended to be injected as quickly as possible into the Working Group and inter-agency deliberations, and the second a comprehensive discussion of the subject. This actually would lead to the preparation of three memoranda, which are identified below on the dates they were circulated.

18 Jan - 29 Jan 03

This was the principal period for the Working Group activities. Sometime during this period, OLC delivered its draft legal memo on interrogation techniques (the "OLC Memo") to Air Force GC Walker, the chairperson of the Group. Although the lengthy memo covered many issues and did so with

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[9] By 28 C.F.R. § 0.25, the Attorney General delegated to the Office of Legal Counsel the authority to render opinions on questions of law when requested by the President or heads of executive departments pursuant to 28 U.S.C § 511-512.

[10] The Working Group process generated a large volume of paper through the course of numerous meetings. I did not participate in the daily work of the group. Because its activities were well documented and a large number of participants were involved, the following narrative will focus only on the principal points of my own involvement in the process.

seeming sophistication, I regarded it as profoundly in error in at least two central elements. First, the memo explicitly held that the application of cruel, inhuman, and degrading treatment to the Guantanamo detainees was authorized with few restrictions or conditions. This, I felt, was a clearly erroneous conclusion that was at variance with applicable law, both domestic and international, and trends in constitutional jurisprudence, particularly those dealing with the 8th Amendment protections against cruel and unusual punishment and 14th Amendment substantive due process protections that prohibited conduct "shocking to the conscience." And second, the memo espoused an extreme and virtually unlimited theory of the extent of the President's commander-in-chief authority. A key underpinning to the notion that cruel treatment could be applied to the detainees, the OLC formulation of the commander-in-chief authority was wrongly articulated because it failed to apply the *Youngstown Steel* test to the Guantanamo circumstances. If applied, the test would have yielded a conclusion that the commander-in-chief authority was probably greatly attenuated in the non-battlefield Guantanamo setting. In summary, the OLC memo proved a vastly more sophisticated version of the Beaver Legal Brief, but it was a much more dangerous document because the statutory requirement that OLC opinions are binding provided much more weight to its virtually equivalent conclusions.

Soon upon receipt of the OLC Memo, the Working Group leadership began to apply its guidance to shape the content of its report. As illustrated below, contributions from the members of the Working Group, including OGC, began to be rejected if they did not conform to the OLC guidance.

30 Jan 03

In an email chain initiated by Ms. Walker, she objected to an effort by the OGC representative, which I had directed, to insert 8th Amendment analysis into the Working Group report. In my reply I sought to alert her to the mistakes in the OLC Memo's legal analysis and to its unreliability as guidance. I wrote: "The OLC draft paper is fundamentally in error: it spots some of the legal trees, but misses the constitutional forest. Because it identifies no boundaries to action — more, it alleges there are none — it is virtually useless as guidance as now drafted and dangerous in that it might give some a false sense of comfort."[11] Ms. Walker's response

[11] Ultimately, the Justice Department would apparently come to the same conclusion. In late June 2004, in the aftermath of the Abu Ghraib scandal

dismissed my warning: "I disagree and moreover I believe DOD GC disagrees." (Three emails at Att 16)

Even before this date, it became evident to me and my OGC colleagues[12] that the Working Group report being assembled would contain profound mistakes in its legal analysis, in large measure because of its reliance on the flawed OLC Memo. In addition, the speed of the Working Group process and the division of responsibility among the various Services made it difficult to prepare detailed comments or objections to those sections not assigned to OGC. My intent at this stage was to review the final draft report when it was circulated for clearance but, based on the unacceptable legal analysis contained in the early draft versions that were likely to be retained in the final version, I anticipated that I would non-concur with detailed comments.

4 Feb 03

Under a cover memo entitled "Proposed Alternative Approach to Interrogations," I circulated a January 31, 2003, NCIS memo entitled "An Alternative Approach to the Interrogation of Detainees at Guantanamo Bay, Cuba." This was the first of the three NCIS memos described above in the narrative entry above for 17 Jan 03. (Att 17)

Mr. Haynes convened a meeting of the Working Group principals. I believe that it was at this meeting that Mr. Haynes asked the group's opinion whether a matrix of interrogation techniques (Att 18), which used a green/yellow/red light system to indicate whether the individual technique was in conformity with U.S. law, was

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— and the separate scandal generated by the offensive reasoning in the OLC Memo and another OLC brief — the Justice Department announced that it was withdrawing the OLC Memo. See, e.g., T. Lacy and J. Biskupic, "Interrogation Memo to be Replaced," *USA Today*, p. A02 (June 23, 2004).

[12] The DON legal leadership was united in its view that the OLC Memo was rife with mistaken legal analysis. RADM Lohr, Mr. Murphy, and BGEN Sandkuhler all shared this view. For that matter, the senior leadership among DON civilian and military attorneys shared a common view of virtually all the legal and policy issues throughout the debate on detainee interrogation. Unfortunately, because this narrative is mainly a personal account, it tends to mask the role these individuals — including OGC Deputy General Counsel Kranz and Molzahn, Marine Corps Counsel Murphy, and NCIS Director Brant — played in the effort to correct the mistaken interrogation policies. For example, RADM Lohr and BGEN Sandkuhler were instrumental in both the legal analysis of the interrogation issue and the advocacy effort, not only within the Navy and Marine Corps but also among the other military services, to ensure that the interrogation techniques conformed to law.

correct and approved by the individuals in the room. I indicated that it was my belief that the matrix conformed to law, and I believe that everyone else in the meeting also indicated the same view.

6 Feb 03

OGC Deputy General Counsel Bill Molzahn and I met in my office with OLC Deputy Director John Yoo. The principal author of the OLC Memo, Mr. Yoo glibly defended the provisions of his memo, but it was a defense of provisions that I regarded as erroneous. Asked whether the President could order the application of torture, Mr. Yoo responded, "Yes." When I questioned this, he stated that his job was to state what the law was, and also stated that my contrary view represented an expression of legal policy that perhaps the administration may wish to discuss and adopt, but was not the law. I asked: "Where can I have that discussion?" His response: "I don't know. Maybe here in the Pentagon?"

I circulated a second version of the January 31st NCIS interrogation memo described above in the narrative entry for 4 Feb 03. This memo, the second of three memos described above in the narrative entry of 17 December 03, differed from the first only in that it contained an 11-page classified attachment that addressed the issue in much greater detail. (Att 19)

10 Feb 03

At some point in February, and most probably on this date, I met with Mr. Haynes at his request and Mr. Dell'Orto to discuss the Working Group report. I informed them that the draft report was not a quality product. It was the product of a flawed working group process and deeply flawed OLC Memo. I believe I urged him to keep the report in draft form and not finalize it. I do recall suggesting that he should take the report, thank the Working Group leadership for its efforts, and then stick the report in a drawer and "never let it see the light of day again."

26 Feb 03

Under a cover memo entitled "Proposed Interrogation Strategy," I circulated the third NCIS memo addressing recommended interrogation techniques. This classified paper constituted an academic treatment of the issue. (Att 20)

2 Mar 03

This is the date of the last Working Group report in OGC files. This draft was as unacceptable as prior drafts.

8 Mar 03

Mr. Haynes convened a meeting of the service General Counsel and the JAGs to discuss the Working Group process. During the course of this Saturday morning meeting, Secretary Rumsfeld entered the room. He thanked us for our work and stressed how important the issues were. He emphasized the need to ensure that the Group's recommendations were consistent with U.S. law and values.

27 Jun 03

I read in the Washington Post[13] (Att 21) that Mr. Haynes had written a letter to Sen. Patrick Leahy declaring that it was the policy of the Department of Defense, in essence, never to apply torture or inflict cruel, inhuman, or degrading treatment on its prisoners or detainees. I regarded the letter (Att 22), which was dated June 25, 2003, as the perfect expression of the legal obligations binding DOD and the happy culmination of the long debates in the Pentagon as to what the DOD detainee treatment policy should be. I wrote an email to Mr. Haynes (Att 23) expressing my pleasure on his letter and stating that I was proud to be on his team.

I should note that neither I, OGC, nor — to my knowledge — anyone else in the DON ever received a completed version of the Working Group report. It was never circulated for clearance. Over time, I would come to assume that the report had never been finalized.[14]

Epilogue

The issue of detainee interrogation has three principal components: (1) the legal analysis that creates a boundary limiting interrogation tactics and techniques; (2) the

[13] P. Slevin, "U.S. Pledges to Avoid Torture," *Washington Post*, p. A11 (June 27, 2003).

[14] I learned otherwise only on May 12, 2004, when I called Air Force Deputy General Counsel Dan Ramos to advise him that I had heard references to the report in televised congressional hearings on the Abu Ghraib scandal. Mr. Ramos informed that it in fact had been signed out and briefed to SOUTHCOM Commander GEN Hill and JTF GTMO Commander MGEN Miller in March or April 2003.

policies adopted following the identification of the legal limits; and (3) the actual effects on the detainees. This is how I viewed each of these areas — law, policy, and detainee treatment — in the Guantanamo context in the period after the events described above.

Law. To my knowledge, the two principal DOD documents that address the legal aspects of detainee interrogation are DOD GC Haynes's June 25, 2003, letter to Sen. Leahy, which I view as the definitive and appropriate statement on the legal boundaries to detainee interrogation and treatment, and the Working Group Report. Because I viewed the Report as inconsistent with the Haynes Letter, I would be concerned to the extent that the legal analysis in the Report is still regarded as valid.[15] However, since the Department of Justice has publicly announced that they have withdrawn the OLC Memo,[16] I would regard — and I should assume DOD would also regard — the Working Group Report that so heavily relied on the OLC Memo as no longer serving as any kind of appropriate guidance on the issues.

Policy. To my knowledge, all interrogation techniques authorized for use in Guantanamo after January 15, 2003, fell well within the boundaries authorized by law. Certainly the interrogation matrix discussed at pages 18-19 above also fell within appropriate boundaries.

Detainee Treatment. NCIS advised me, following Secretary Rumsfeld's January 15, 2003, suspension of the interrogation authorities contained in the December 2nd Memo, that the reports of detainee abuses at Guantanamo had ceased. At no subsequent time, up to and including the present, did NCIS or any other person or organization forward to me any report of further detainee abuse. Because of NCIS's demonstrated integrity and ability to detect detainee abuse at Guantanamo, I felt a high degree of confidence that the prisoner abuses at Guantanamo had indeed stopped after January 15, 2003.

Alberto J. Mora

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[15] Apparently, it was also used as the legal analysis informing the Secretary of Defense's April 2003 renewed guidance memo to JTF GTMO on interrogation techniques (of which I was also not aware until May 2004).

[16] See, footnote 11 above.

Attachments:
1. JTF-Gitmo Interrogation Logs/Notes (S)
2. DOD GC Action Memo of 27 Nov 02 w/SECDEF note of 2 Dec 02 and/supporting docs (S)
3. OPNAV memo N3/N5L NPM 466-02 of 4 Nov 02 to J-5
4. RADM Lohr e-mail to Alberto Mora of 19 Dec 02 (U)
5. JAG Memo of Law of 16 Jan 03 (S)
6. Human Rights Watch ltr of 26 Dec 02 (U)
7. Washington Post article "U.S. Decries Abuse but Defends Interrogations" 26 Dec 02 (U)
8. Alberto Mora e-mail of 9 Jan 03 8:29 to Jaymie Durnan (U)
9. Alberto Mora e-mail of 9 Jan 03 4:15 to Jaymie Durnan (U)
10. Alberto Mora e-mail of 10 Jan 03 1:19 to Jaymie Durnan (U)
11. Alberto Mora e-mail of 10 Jan 03 4:53 to Jaymie Durnan (U)
12. U.S. Navy General Counsel Counter-Resistance Techniques draft memo (S)
13. Alberto Mora e-mail of 17 Jan 03 to Susan Livingstone (U)
14. Alberto Mora e-mail of 17 Jan 03 to VADM Green (U)
15. Mary Walker memo to Detainee Interrogation Working Group, dtd 17 Jan 03 (S)
16. E-mails (3) between Alberto Mora and Mary Walker of 29-30 Jan 03 (U)
17. Alberto Mora memo re Proposed Alternative Approach to Interrogations, dtd 4 Feb 03 (S)
18. Matrix of Detainee Interrogation Techniques (S)
19. Alberto Mora memo re Proposed Alternative Approach to Interrogations dtd, 6 Feb 03 (S)
20. Alberto Mora memo re Proposed Interrogation Strategy, dtd 26 Feb 03 (S)
21. Washington Post article "U.S. Pledges to Avoid Torture" 27 Jun 03 (U)
22. Mr. Haynes ltr to Sen. Leahy of 25 Jun 03 (U)
23. Alberto Mora e-mail of 27 Jun 03 to Mr. Haynes (U)

USP

THE SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

APR 11 2005

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
COMMANDERS OF THE COMBATANT COMMANDS
DIRECTORS OF THE DEFENSE AGENCIES

SUBJECT: FY 2005 National Defense Authorization Act Provisions Regarding Persons Detained by the Department of Defense

The guidance provided in enclosures (1) and (2) is intended to ensure effective implementation of the training and reporting requirements contained in the provisions of the Ronald W. Reagan National Defense Authorization Act (NDAA) for Fiscal Year 2005, Public Law 108-375, Sections 1091-1093.

The Deputy Assistant Secretary of Defense for Detainee Affairs, under the Under Secretary of Defense for Policy, is the primary contact for implementation of this guidance.

OSD 06748-05

Implementing Section 1092

- All Federal employees and civilian contractors engaged in the handling or interrogation of individuals detained by the Department of Defense, including employees from other government agencies working at DoD facilities, shall complete annual training on the law of war, including the obligations of the United States under domestic and international law.

- This training will be consistent with established Department directives, policies, and regulations concerning law of war training.

- The Secretaries of the Military Departments, the Commanders of the Combatant Commands, and other Department of Defense Components responsible for Federal employees or civilian contractors engaged in the handling or interrogation of individuals detained by the Department of Defense shall complete a report annually, no later than October 31, on the fulfillment of the annual training requirement for the fiscal year ending September 30 for purposes of making the certification under Section 1092(c).

- The Under Secretary of Defense for Acquisition, Technology and Logistics will establish procedures to ensure that each DoD contract for which contract personnel in the course of their duties interact with individuals detained by DoD includes a requirement that such contract personnel have received documented training regarding the international obligations and laws of the United States applicable to the detention of personnel.

- Combatant Commanders who have detention or interrogation facilities in their area of responsibility will ensure that standard operating procedures (SOPs) are established for the treatment of detainees, and that all assigned personnel are provided documented training regarding the law of war, including the Geneva Conventions.

    - Commander, U.S. Southern Command is responsible for complying with the provisions of this memorandum as they pertain to the Guantanamo Bay detention facility.

    - Commander, U.S. Joint Forces Command is responsible for complying with the provisions of this memorandum as they pertain to detainees held in the Charleston facility.

- Combatant Commanders will ensure that detainees are provided with information, in their own language, on the applicable protections afforded under the Geneva Conventions.
- Combatant Commanders will ensure that periodic announced and unannounced inspections of detention facilities, including temporary holding areas, are conducted to provide continued oversight of interrogation and detention operations.
- Combatant Commanders, consistent with current policies, directives, and regulations, will ensure that, to the maximum extent practicable, detainees and detention facility personnel of a different gender are not alone together.
- Not later than two weeks from the date of this memorandum, you will report on the steps taken to date to implement Section 1092, NDAA.

Implementing Section 1093—Reporting Requirements

- Reports providing the following information, required by Section 1093, shall be provided no later than July 1, 2005, for the 12 months preceding June 15, 2005, and then annually thereafter, until December 31, 2007:
  - Notice of any investigation into any violation of international obligations or U.S. laws regarding treatment of individuals detained by the U.S. Armed Forces or by a DoD contractor, if notice will not compromise any ongoing criminal or administrative investigation.
  - The following information on detainees under your control during the reporting period (U.S. Transportation Command excepted):
    - Number of detainees under your control as of June 15;
    - Total number of detainees released from your control during the period covered by the report;
    - Aggregate summary of the number of persons detained as enemy prisoners of war, civilian internees, and enemy combatants, and the average length of detention for persons in each category;
    - Aggregate summary of the nationality of the persons detained; and
    - Aggregate information on number of detainees transferred from your control to the jurisdiction of other countries, and the countries to which the detainees were transferred.
- Note: For this reporting, a "detainee" is defined as "a person in the custody or under the physical control of the Department of Defense as a result of armed conflict."
- Note: Reports provided under this section shall be, to the extent practicable, in unclassified form, but may include a classified annex as necessary.

09/27/2006 22:33 FAX ☑022/023

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ASSISTANT SECRETARY OF DEFENSE
1400 DEFENSE PENTAGON
WASHINGTON, DC 20301-1400

PUBLIC AFFAIRS

27 February 2006

Editor
The New Yorker
The Conde Nast Publications, Inc.
Four Times Square
New York, New York 10036

To the Editor:

In another attempt to put the most negative spin on the Department of Defense's approach to handling captured terrorists, *The New Yorker* has failed to present the facts objectively. Jane Mayer's article ["Annals of the Pentagon, The Memo" – February 20, 2006] misleads your readers by misstatements of fact, by withholding key aspects of Alberto Mora's memorandum and by seriously distorting the Department's record on interrogations and detainee operations.

Most significantly, the premise and conclusion of the entire article – that the concerns of Mr. Mora and some other attorneys from the military branches were ignored in an attempt to install abusive interrogation policies – is demonstrably false. A fair reading of the leaked memorandum and the record shows that the opposite is true, that in fact the General Counsel and the Secretary of Defense were open and responsive to concerns raised by Mr. Mora and others.

Consider the case of the interrogation techniques requested – with some urgency – by the Commanders of Guantanamo and Southern Command in October 2002, during a period of heightened threat reporting about possible attacks on the United States. By that time it had become clear that several captured terrorists – including the intended 20th hijacker from the September 11 plot – with potential knowledge of future attacks had been trained to resist existing interrogation methods from the Army Field Manual. The additional techniques approved by Secretary Rumsfeld on December 2, 2002, applied only to the limited group of dangerous detainees held at, and only at, Guantanamo Bay.

It is true that Mr. Mora believed that some of the techniques were problematic and had heard reports from people not directly involved in the interrogations that they were being applied in an overly aggressive manner to an Al Qaeda detainee. It should be noted that this view was contradicted by the information received though command channels from people who *did* have direct knowledge of interrogations.

Nonetheless, Secretary Rumsfeld rescinded the memo on January 12, 2003, soon after being told by Mr. Haynes of the concerns being voiced by some – notwithstanding the

assurances from the field that painted a different picture. (This decision became official in writing three days later, less then seven weeks after the memo was first approved).

And regardless of Mr. Mora's objections to the analysis of the Office of Legal Counsel [OLC], or to the conclusions of the Working Group report that followed, his memo clearly shows that he was satisfied with the interrogation policies that were ultimately approved by the Secretary of Defense in April 2003.

In a passage ignored by the article, Mr. Mora's memo states: "To my knowledge, all interrogation techniques authorized for use in Guantanamo after January 15, 2003, fell *well within* the boundaries authorized by law." (emphasis added)

As the Church Report observed, the objections of the military service lawyers to the Justice Department's OLC memorandum "ultimately carried the day when the Secretary dramatically cut back on the Working Group's recommendations."

Testifying before the Senate Armed Services Committee on July 14, 2005, one of the military Judge Advocates General explained: "We did express opposition to certain things that were being proposed. Other things we did not. And I believe that our opposition was accepted in some cases, and maybe not in all cases. But it did modify the proposed list of techniques and procedures. So I have to say that we did have an impact. It was listened to."

In contrast to *The New Yorker's* account, the factual record shows a General Counsel and Secretary of Defense who, in the face of unprecedented threats to the people of the United States, were open to dissent and willing to make the necessary adjustments to ensure that detainees were treated appropriately and humanely.

Sincerely,

/s/

Dorrance Smith
Assistant Secretary of Defense
for Public Affairs

July 10, 2006

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Specter and Ranking Member Leahy:

We write to support William J. Haynes' nomination for a judgeship on the United States Court of Appeals for the Fourth Circuit. Each of us worked closely with Jim in different capacities during our time in government service and had the opportunity to get to know him well. He is a fine lawyer, a dedicated public servant, and a man of great integrity. We believe he would be an outstanding judge.

In all of our experience in working with him as General Counsel at the Department of Defense, we have come to know that Jim takes pains to address all pertinent legal questions and to ensure, to the best of his ability, compliance with the law. Unfortunately, in a flurry of criticism, the record of his service has been distorted, particularly with respect to the development of DOD interrogation policies, and he has wrongly been portrayed as developing misguided policies without regard to the law. That is not true.

In that regard, we would like to emphasize two matters that have long been documented in the public record and were examined by those of us involved when the matters were made public, but that seem to have been overlooked.

First, when aggressive interrogation techniques were first requested by the Joint Task Force in Guantanamo Bay in 2002, Jim actually recommended that the Secretary of Defense *restrict* authorized techniques to a more limited set than those that had been approved by military lawyers below him. Jim reasoned that "[o]ur armed forces are trained to a standard of interrogation that reflects a tradition of restraint." When even those techniques approved in December 2002 raised concerns in some quarters within the military, Jim brought those concerns to the Secretary of Defense, the policies were rescinded in January 2003, and Jim organized a working group to address the development of new interrogation policies.

Second, Jim has been wrongly criticized based on the fact that he directed the working group convened in 2003 to accept a legal analysis presented by the Office of Legal Counsel of the Department of Justice concerning the application of certain laws and treaties (as we understand it, issues under the UCMJ were left for military lawyers to address). We would like to make clear the effect of an OLC opinion within the Executive Branch. It is important to understand that the opinions of the Office of Legal Counsel are binding on the Executive Branch. The Attorney General has delegated his authority to interpret the law for the Executive Branch to the Office of Legal Counsel, and thus other departments of the Executive Branch -- including

DOD -- are bound by OLC's legal opinions. Jim Haynes was not taking any untoward or cavalier action by deciding, as chief legal officer for his department, that his department would abide by an OLC opinion. To the contrary, he was following the law.

More important, when the working group ultimately approved 35 interrogation techniques, Jim's role was once again to apply sound judgment and a cautious restraint by recommending to the Secretary of Defense that only 24 of those techniques be approved, at least 17 of which came directly from the Army Field Manual. And as one of us testified before the House Permanent Select Committee on Intelligence in July 2004, even after the withdrawal of the OLC memorandum concerning the torture statute, all 24 of those techniques were deemed lawful by the Department of Justice.

Finally, we want to emphasize that, while interrogation practices have attracted a great deal of attention in the public debate concerning Jim Haynes' nomination, the Committee should not lose sight of the fact that those issues represent only a tiny fraction of the myriad matters Jim handled in more than five years of outstanding service as General Counsel at DOD -- matters that Jim has handled with great skill and integrity and many of which we have worked on with him. Those of us with experience running large organizations both inside and outside the government understand that managing the legal issues of an organization the size of DOD is a gargantuan task even in the best of times. With extraordinary dedication to his job, Jim has handled not only the overwhelming mass of routine issues generated by one of the largest organizations in the world, but also the unprecedented challenges presented by the need to apply legal rules to a new type of armed conflict.

We believe that Jim Haynes will make an excellent judge. He is a careful lawyer who has been dedicated throughout his time at DOD to ensuring adherence to the rule of law. He has done extraordinary service to our Nation during a time of unprecedented challenges, and he will be a further credit to the Nation on the bench.

Sincerely,

Larry D. Thompson

James B. Comey

Jack Goldsmith

Patrick F. Philbin