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COERCIVE INTERROGATION TECHNIQUES: DO THEY WORK, ARE THEY RELIABLE, AND WHAT DID THE FBI KNOW ABOUT THEM?

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COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

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COERCIVE INTERROGATION TECHNIQUES: DO THEY WORK, ARE THEY RELIABLE, AND WHAT DID THE FBI KNOW ABOUT THEM?

TUESDAY, JUNE 10, 2008

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 9:36 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Dianne Feinstein, presiding.

Present: Senators Feinstein, Feingold, Schumer, Durbin, Cardin, Whitehouse, and Specter.

OPENING STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. I would like to quickly announce that there are five votes at 11 o'clock. Our witnesses this morning and I think the members are aware of that. My plan would be to recess the Committee at 11, and if we are not concluded, we will be able to recess and reconvene here at 2 o'clock in the afternoon.

I might say this: For me, this is a very important hearing. I serve on the Intelligence Committee, so I am well aware of enhanced interrogation techniques. And the question before us is a very difficult and important subject: coercive interrogations and torture.

Historically, the United States has been steadfast in its resolve that torture is unnecessary, unreliable, and un-American. Without torture, we succeeded in conflicts that threatened the very existence of our country, including a Civil War, a World War, and numerous other conflicts and enemies.

Despite President Bush's promise that the United States would fight the war on terror consistent with American values and "in the finest traditions of valor," the administration decided, as the Vice President said in 2001, to "go to the dark side"—to use coercive interrogation.

This decision by the Bush administration has had profound effects.

Cruel, inhuman, and degrading treatment of prisoners under American control I believe violates our Nation's laws and values. It damages our reputation in the world, and it serves as a recruitment tool for our enemies. Perhaps more importantly, it has also limited our ability to obtain reliable and usable intelligence to help

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combat the war on terror, prevent additional threats, and bring to justice those who have sought to harm our country.

I have listened to the experts, such as FBI Director Mueller, DIA Director General Maples, and General David Petraeus. All insist that even with hardened terrorists, you get more and better intelligence without resorting to coercive interrogations and torture.

The bottom line is that there are many interrogation techniques that work, even against al Qaeda, without resorting to torture. One of today's witnesses, former FBI Special Agent Jack Cloonan, has personally interrogated members of al Qaeda within the confines of the Geneva Conventions and obtained valuable, reliable, and usable intelligence.

Mr. Cloonan was involved in the interrogation of Ibn al-Sheik Al-Libi, the first high-profile al Qaeda member captured after September 11th, and Ali Abdul Saud Mohammed, one of Osama bin Laden's trainers. In both cases, the FBI used non-coercive interrogations to obtain valuable information about al Qaeda. I look forward to Mr. Cloonan's testimony about how the non-coercive interrogation techniques used by the FBI work to provide reliable and usable intelligence.

The FBI has long recognized the unreliability of information obtained from coercion and torture. It has based its belief on years of experience and behavioral science. This hearing will examine how non-coercive interrogation techniques can be used effectively and why coercive interrogations and torture do not yield reliable and useful intelligence for the most part.

The hearing will also review the recently released Department of Justice Inspector General's report detailing the FBI's knowledge and involvement in the coercive interrogation techniques and torture that occurred in Guantanamo, Afghanistan, and Iraq after the September 11, 2001, attack.

Both Senator Specter, our Ranking Member today, and I have heard numerous times the Inspector General report on the FBI, and let me just say I believe he is a very square shooter and one of our finest Inspector Generals.

To its credit, the FBI was steadfast in its unwillingness to use coercion and torture as a means to obtain information. FBI agents on the ground at Guantanamo and other sites repeatedly voiced concerns about the harsh interrogations being conducted by military and DOD interrogators. In total, over 200 FBI agents raised these concerns. For that, the FBI should be commended.

Questions remain, however, about why FBI leadership was not notified more quickly about the agents' concerns at Guantanamo and why formal guidance was not provided to FBI agents in the field until May of 2004–2 years after the first complaints were received at FBI Headquarters about coercive interrogations. I hope Mr. Fine and Ms. Caproni, the legal counsel of the FBI, can address these issues.

The FBI should also be credited for raising the alarm to the Department of Defense about what was happening at Guantanamo. We now know that as early as October 2002, FBI agents at Guantanamo alerted Marion Bowman, the FBI's Deputy General Counsel in charge of national security, about coercive interrogations occurring at Guantanamo. On November 27, 2002, an FBI agent at

Guantanamo sent a written legal analysis questioning the legality of coercive interrogations and noting that these techniques appeared to violate the U.S. torture statue.

In November and December 2002, Mr. Bowman personally contacted officials in the DOD General Counsel's office, including General Counsel Jim Haynes, about the FBI's concerns. According to Mr. Bowman, Haynes claimed he did not know anything about the coercive interrogation techniques that were occurring at Guantanamo, despite the fact that he recommended on November 27, 2002, that Secretary Rumsfeld formally approve the very techniques that were being used at Guantanamo.

Clearly, there are questions that need to be answered regarding how the interrogation policies at Guantanamo were formulated and authorized, whether they were from the bottom up, as the Administration has stated, or from the top down, as the evidence is beginning to show. Whose idea was it? Who was consulted? And when complaints were raised about what was happening at Guantanamo, what was done?

Historically, the Bush administration has argued that the military commanders and JAG lawyers on the ground requested the initial authorization and provided the legal justification to use coercive interrogation techniques against detainees. In June of 2006, in testimony before this Committee, then-DOD General Counsel Jim Haynes said that the request to use these harsh interrogation techniques was made by the commanding general at Guantanamo, and that the request "came with a concurring legal opinion of his Judge Advocate."

Yet, as time goes by and more facts come out, the administration's explanation has become increasingly discredited. More and more evidence shows that the decision to use coercive interrogation techniques was made at the highest levels of the Bush administration.

Just a moment on the timeline:

On August 1, 2002, the DOJ Office of Legal Counsel completed the so-called Yoo-Bybee memos providing a legal justification for coercive interrogation techniques and torture.

On September 25 and 26, just about a month later, a month and a half, DOD General Counsel Haynes, White House Counsel Alberto Gonzales, and Vice Presidential Counsel David Addington visited Guantanamo and witnessed detainee interrogations.

On November 23, 2002, Secretary of Defense Rumsfeld verbally authorized harsh interrogations of Muhammad Al Qahtani, a high-value detainee at Guantanamo.

On November 27, 2002, Haynes recommended that Secretary Rumsfeld formally authorize coercive interrogation techniques at Guantanamo.

On December 2, 2002, Secretary Rumsfeld approved, in writing, the coercive interrogations at Guantanamo.

Philippe Sands, who is testifying today—and I very much appreciate the fact he has come from London to provide this testimony, and this is one of the reasons that if we are not concluded, we will recess at 11 and come back at 2:00—has interviewed many of the Bush administration officials involved in the authorization to use coercive interrogation techniques at Guantanamo, including former

DOD General Counsel Jim Haynes. He has asked to take the oath, because he wants to be sure that everybody knows he will be telling us the truth as he knows it. And I will administer the oath at that time.

I look forward to hearing what he has learned about how the decision to use coercive interrogations and torture was made in the Bush administration.

It is absolutely essential that we obtain reliable and usable intelligence to successfully fight the war on terror. I believe it is wrong to use coercive interrogation and torture to try to accomplish that goal. I believe we must stop it, and as a member of the Intelligence Committee, I am doing everything I can think of to do just that.

It is also imperative, however, that we examine how complaints about coercive interrogations were handled by the FBI and how those harsh interrogation techniques were first authorized.

So I would like now, if I might, to turn it over to my very distinguished Ranking Member. I am delighted that you are apparently substituting for Senator Kyl today. I thank you very much for being here as Ranking Member of the entire Judiciary Committee, Senator Specter.

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

Senator SPECTER. Well, thank you, Madam Chairwoman. I do not believe that I am substituting for anybody. I am the Ranking Member. This is my position. So I am glad to be here on this—

Senator FEINSTEIN. All right. Thank you.

Senator SPECTER [continuing]. Very important subject.

Senator FEINSTEIN. I misspoke. I did not realize this is a full Committee hearing. I thought it was my Subcommittee hearing. But I am delighted as such to give you due deference, and I do so immediately.

Senator SPECTER. I am not that concerned about deference, due or not, but I think you should note that you are the Chairman of the full Committee today, so your status is a status which has been clarified. But on to the subject.

This is obviously a very, very important hearing to have an airing and public disclosure as to what our interrogation techniques are. There is no doubt that torture is against the law of the United States, the Geneva Convention, and it ought not to be countenanced in any way, shape, or form. We have the famous Bybee memorandum, which has been thoroughly discredited. We have voted on issues like waterboarding, where I voted against having waterboarding as a technique. And as Senator Feinstein has noted, there is obviously a very, very high value on getting important intelligence information.

The war on terrorism is with us all the time. We do not have to talk about the ravages of 9/11 or about terrorism around the world, and it is an ongoing threat. And we need strong law enforcement techniques, but they have to be balanced at all times—at all times—against constitutional rights. And this Committee has been very diligent on a whole range of analyses.

We have taken up the expansion of Executive power with the Terrorist Surveillance Program. My sense is that decades from

now, historians will look back upon this period in our history for the very vast increase of Executive power. And, finally, we brought the Terrorist Surveillance Program under the jurisdiction of the Foreign Intelligence Surveillance Court. Senator Feinstein and I labored long and hard to structure some legislation on that subject. We have seen the signing statements where the executive branch has disregarded the will of Congress. We have seen grave problems on rendition, on state secrets, and it is an ongoing battle. And Congress has not been very effective, in my judgment, on restraining the expansion of Executive authority. Candidly, neither have the courts.

I was very disappointed when the Supreme Court of the United States denied cert. on the litigation challenging the constitutionality of the Terrorist Surveillance Program. It was declared unconstitutional by a Federal judge. In a 2–1 decision, the Sixth Circuit said there was no standing, and the Supreme Court denied cert. We could have used some help on the standing issue. That is just one case where the executive branch has insisted that Article II powers as Commander-in-Chief enable the President to disregard the statutes, the Foreign Intelligence Surveillance Act, just as the administration has disregarded the National Security Act of 1947 in not informing the Intelligence Committees as to what was going on.

And now we have the habeas corpus issue, where the Supreme Court has in effect ducked the issue. We have the Boumediene case where the District of Columbia Circuit ignored the Rasul decision, waiting to see if habeas corpus will be reinstated on what in my legal judgment was a clear-cut opinion by Justice Stevens, that habeas corpus is grounded in the Constitution as well as in the statute.

I make these comments in a broader context of our efforts to restrain Executive authority. And when you come down to the focus as to interrogation techniques, there obviously has to be greater restraint than what the executive branch has undertaken.

It was my hope that we would have General Hayden testify here today. There is a debate in the intelligence agencies about the various levels of responsibility of what the Army needs to do by way of interrogation defined by the Army Field Manual, contrasted with what the FBI does, which is significantly different, contrasted yet again with what the CIA does, which is significantly different.

There have been representations that these interrogation techniques have yielded very, very valuable information to prevent terrorist attacks. Candidly, I have not seen that. And perhaps it has to be disclosed in a closed session, but those are issues which we have to weigh carefully. But it is a great credit to our system that we have a former FBI agent, Jack Cloonan, stepping forward to blow the whistle, in effect, about what is going on with the intelligence tactics at Guantanamo. It is a credit to our system that the Inspector General, Mr. Fine, and counsel, Ms. Caproni, come forward with critical analysis and that this Committee is ready to put a microscope under what is being done.

We have Phil Heymann, former Deputy Attorney General, who has written extensively on this subject and has offered a somewhat different opinion that highly coercive interrogation techniques that

fall short of torture may be necessary and legal, but only if strict guidelines are in place. Well, let's explore that. Let's explore what the guidelines should be and what are those highly coercive interrogation techniques are permissible which fall short of torture.

We all agree that torture is illegal and ought not to be countenanced. You have very extensive writing by a notable civil libertarian, Professor Alan Dershowitz from Harvard, who talks about torture warrants and going to a judicial official. We talk about presenting the matter to the highest authorities in our civil government, including the President of the United States. And we talk about the so-called ticking bomb case. What do you do if hundreds of thousands of people are about to be killed? So we are dealing in very, very deep water, and this ought to have a very heavy glare of congressional analysis. And we are going to try to do that today and in the future.

I am 37 seconds over, Madam Chairwoman. I hope that does not foul up the timing too much.

Senator FEINSTEIN. Yes, I am surprised by that. Thank you very much, and it is good to have you here.

Senator SPECTER. Thank you.

Senator FEINSTEIN. I would like to ask Senator Whitehouse—we serve together on the Intelligence Committee and have worked together on these issues and, I think, see things similarly. Senator Whitehouse, would you like to make a statement?

Senator WHITEHOUSE. Thank you, Chairman. I just want to congratulate you on holding this hearing and express my appreciation that the Ranking Member is here. As you know, months ago when I proposed the first limitation on the CIA's use of these abusive techniques, the only Senator who cosponsored it was you, Chairman, and it was your amendment that ended up passing in the Intelligence authorization, and you have been in the Committee, both behind closed doors and in public, very firm and strong in your views on the subject. And it has been an inspiration for this new Senator to see you in action, and I appreciate that this is going on.

I would like to ask, do you remember we had an interesting hearing in the Intelligence Committee in which a colonel who had 22 years of interrogation experience with the United States Air Force Special Operations Command testified about the relative value of abusive techniques versus effective techniques? I think you and I were perhaps the only people left in the Intelligence hearing at the time that that evidence was taken. But it has been declassified, and I would ask unanimous consent that it be made a part of the record of this hearing.

Senator FEINSTEIN. Without objection.

Senator WHITEHOUSE. And I thank Chair for her courtesy and for this hearing.

Senator FEINSTEIN. Thank you very much.

We will now proceed with panel No. 1. I would like both Mr. Fine and Ms. Caproni, if possible, to summarize. We do have a 5-minute rule. I am going to change it today, but, please, recognize that we have a vote at 11, and we would like to start with the second panel. And so I would appreciate your being relatively concise.

There will be 7-minute rounds for the Committee, and we will follow the early-bird rule, alternating between sides.

So if I may begin with you, Mr. Fine, I would like to introduce you. You have served as the United States Inspector General for the Department of Justice since December 15, 2000. You are charged with conducting independent investigations, audits, and inspections of the United States Department of Justice personnel and programs. Your office recently released a report reviewing the FBI's involvement in and observations of detainee interrogations in Guantanamo, Afghanistan, and Iraq. Prior to becoming Inspector General, Mr. Fine worked in the Office of the Inspector General for over a decade. He has also served as an Assistant United States Attorney.

At this time, I would like to introduce Valerie Caproni as well. She has served as the General Counsel of the FBI's Office of General Counsel since August of 2003. She is responsible for advising FBI officials on all legal issues, including national security law and terrorism. Prior to joining the FBI's General Counsel Office, Ms. Caproni worked as a regional director for the Securities and Exchange Commission. Over the course of her career, she has had extensive experience in both the private and public sector, including time as an Assistant U.S. Attorney in the Eastern District of New York.

Welcome, Mr. Fine. Welcome, Ms. Caproni. Mr. Fine, if you would begin.

STATEMENT OF GLENN A. FINE, INSPECTOR GENERAL, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. FINE. Thank you, Madam Chairwoman, Senator Specter, members of the Committee. Thank you for inviting me to testify about the Office of the Inspector General's report on the FBI's involvement in and observations of detainee interrogations in Guantanamo Bay, Afghanistan, and Iraq. As part of our investigation, the OIG team surveyed over 1,000 FBI employees who were deployed overseas to one of the military zones between 2001 and 2004. In addition, the team interviewed more than 230 witnesses and reviewed more than half a million pages of documents. Our team also made two trips to Guantanamo.

Our investigation focused on detainee treatment in facilities under the control of the Department of Defense. With limited exceptions, we were not able to investigate the observations of FBI employees regarding detainees held at CIA facilities. In my testimony this morning, I will briefly summarize some of our major findings. In line with the subject of this hearing, I will also focus on the FBI's decision not to participate in joint interrogations of detainees with other agencies who were using techniques not permitted by the FBI.

Our investigation found that the vast majority of the FBI agents deployed to the military zones adhered to FBI policies. FBI officials and agents told us that the FBI's approach, coupled with a strong substantive knowledge of al Qaeda, had produced extensive useful information in both pre-September 11th terrorism investigations as well as in the post-September 11th context. DOJ officials also said they agreed with the FBI's approach.

FBI agents, however, encountered interrogators from other agencies who used aggressive interrogation techniques. In August 2002,

FBI Director Mueller decided that the FBI would not participate in the joint interrogation of detainees with other agencies in which techniques not allowed by the FBI were used. This policy was established as a result of the interrogation of Abu Zubaydah, who was captured in Pakistan in March 2002 and interrogated at a CIA facility. We determined that FBI agents observed the CIA use techniques that undoubtedly would not be permitted under FBI interview policies.

The head of the FBI's Counterterrorism Division at the time, Pasquale D'Amuro, gave the OIG several reasons for the FBI's position. First, he said he believed that the military's aggressive techniques were not as effective for developing accurate information as the FBI's rapport-based approach, which he stated was used successfully to obtain cooperation from al Qaeda members.

Second, D'Amuro said that the use of aggressive techniques failed to take into account an "end game." He stated that even a military tribunal would require some standard for admissibility of evidence.

And, third, D'Amuro stated that using these techniques helped al Qaeda in spreading negative views of the United States.

Our investigation found that in 2002, the friction between the FBI and the military increased regarding the interrogation of Muhammad Al Qahtani at Guantanamo. The FBI advocated a long-term rapport-based strategy, while the military insisted on a different, more aggressive approach. Despite the FBI's objections, the military proceeded with its interrogation plan for Al Qahtani. The techniques used on him during this time period included stress positions, 20-hour interrogations, tying a dog leash to his chain and leading him through a series of dog tricks, stripping him naked in the presence of a female, repeatedly pouring water on his head, and instructing him to pray to an idol shrine.

We were unable to determine definitively whether the concerns of the FBI and the Department of Justice about DOD interrogation techniques were addressed by any of the Federal Government's interagency groups that resolve disputes about antiterrorism issues. Several senior Department of Justice officials told us that the DOJ raised concerns about particular DOD practices in 2003 with the National Security Council and the DOD. We found no evidence that these concerns influenced Department of Defense interrogation policies. Ultimately, the DOD made the decisions regarding what interrogation techniques were used by military interrogators because the detainees were held in DOD facilities and the FBI was there in a support capacity.

As part of our review, we also examined the training that FBI agents received regarding issues of detainee interrogation. In May 2004, following the Abu Ghraib disclosures, the FBI issued written guidance stating that the FBI personnel may not participate in interrogation techniques that violate FBI policies regardless of whether the co-interrogators were in compliance with their own policies. We concluded that while the FBI eventually provided some guidance to its agents about conduct in military zones, FBI headquarters did not provide timely guidance or fully respond to requests from its agents for additional guidance.

We also investigated several specific allegations that FBI agents participated in abuse of detainees in connection with interrogations in military zones. In general, we did not substantiate these allegations. We found that most FBI employees adhered to the FBI's traditional interview strategies in the military zones

In conclusion, we believe that while the FBI could have provided clearer guidance earlier and could have pressed harder its concerns about detainee abuse by other agencies, the FBI should be credited for its conduct and professionalism and for generally avoiding participation in detainee abuse.

That concludes my testimony, and I would be pleased to answer any questions.

[The prepared statement of Mr. Fine appears as a submission for the record.]

Senator FEINSTEIN. Thank you very much, Mr. Fine.

Ms. Caproni.

STATEMENT OF VALERIE E. CAPRONI, GENERAL COUNSEL, FEDERAL BUREAU OF INVESTIGATION, WASHINGTON, D.C.

Ms. CAPRONI. Good morning, Madam Chairwoman, Ranking Member Specter, and members of the Committee. It is my pleasure to appear before you today to discuss with the Committee the FBI's knowledge of interrogation techniques used by other agencies. The FBI is pleased that the Office of the Inspector General credited the FBI in its recent report on this subject for its "...conduct and professionalism in the military zones of Guantanamo Bay, Afghanistan, and Iraq."

As you know, the primary mission of the FBI is to lead law enforcement and domestic intelligence efforts to protect the United States and its interests from terrorism. FBI intelligence derived from Iraq, Afghanistan, and Guantanamo Bay has led to numerous investigations to identify and disrupt terrorist threats in the United States and has provided important intelligence in ongoing investigations.

We were gratified to read the conclusion of the IG that "the vast majority of FBI agents in the military zones understood that existing FBI policies prohibiting coercive interrogation tactics continued to apply in the military zones and that they should not engage in conduct overseas that would not be permitted under FBI policy in the United States."

The FBI decided in 2002 that, regardless of what other agencies might be authorized to do, the FBI would continue to apply FBI interrogation policies regardless of where the interrogation was occurring and regardless of who was being interrogated. The IG's report confirmed that our agents complied with that policy with very few exceptions. Significantly, the IG found no instance in which an FBI agent participated in the sort of clear detainee abuse that some members of the military used at Abu Ghraib prison.

Consistent with the FBI's long history of success in custodial interrogations, FBI policy is to employ non-coercive, rapport-based interview techniques, whether we are questioning detainees captured in a military zone or individuals arrested in the United States. The most significant difference between interviews of foreign detainees and interviews of defendants under arrest in the

United States is that foreign detainees are generally not read Miranda warnings.

As the IG's report makes clear, the FBI Director determined in 2002 that the FBI would not participate with other Government agencies in joint interrogations in which techniques that would not be permissible in the United States were used. That decision was consistent with the FBI's longstanding belief that the most effective way to obtain accurate information is to use rapport-building techniques in interviews.

After the Abu Ghraib disclosures, the FBI issued written policy which reaffirmed existing FBI policy and reminded FBI agents that they were prohibited from using coercive or abusive techniques, regardless of whether the technique was authorized by any other agency. The policy also directed agents that they were not to participate in any treatment or interrogation technique that is in violation of FBI guidelines and that they were required to report any incident in which a detainee was abused or mistreated. All allegations of detainee mistreatment during the course of interrogations were reviewed by FBI headquarters and referred to the appropriate agency for investigation.

In short, we are proud of the fact that FBI agents acted consistently with our policies despite the existence of circumstances where it might have been very easy to go along with other agencies' techniques in the interest of interagency harmony. The FBI will continue to use rapport-building techniques when conducting interviews in the military zones because we believe these techniques are the most efficacious way to obtain reliable information during interrogations.

I appreciate the opportunity to appear before the Committee and look forward to your questions. Thank you.

[The prepared statement of Ms. Caproni appears as a submission for the record.]

Senator FEINSTEIN. Thank you very much. The order will be myself, Senator Specter, early bird, Senator Whitehouse, and then Senator Feingold—oh, Senator Feingold was here before Senator Whitehouse? All right. Senator Feingold, then Senator Whitehouse.

Mr. Fine, if I could begin, in your report, did you get any information about FBI agents observing waterboarding?

Mr. FINE. No. We talk about the FBI's involvement with the interrogation of Abu Zubaydah. They did not witness waterboarding. I think the CIA has subsequently acknowledged waterboarding Zubaydah, but they did not report to us that they witnessed that conduct.

Senator FEINSTEIN. Did any of them comment on long periods of isolation?

Mr. FINE. Yes, isolation was a tactic used by the military, and there were periods of isolation, sometimes more than 30 days, that were used in Guantanamo.

Senator FEINSTEIN. And on Al Qahtani, what information do you have on how long he has been held in isolation?

Mr. FINE. I am not sure he was one that was the subject of the long-term isolation. There was a whole series of tactics used on him. Isolation was not the most coercive tactic used on him.

Senator FEINSTEIN. Okay. Now, you pointed out or your report points out that over 200 agents observed or heard military interrogators using a variety of harsh techniques, and you spell them out: stress positions, short shackling, the isolation, growling military dogs, twisting thumbs back, using a female interrogator to touch or provoke a detainee in a sexual manner. And these allegations were made public in FBI e-mails that were obtained by the ACLU through Freedom of Information requests.

The report also states that these agents expressed strong concern about what they observed to senior officials at FBI headquarters and that, in early 2003, FBI agents continued to raise objections and sought guidance, but no response was forthcoming.

Finally, on May 19, 2004, FBI General Counsel finally issued an official policy on what FBI agents should do if they saw coercive or abusive techniques.

I would like you to explain, if you can, what happened to concerns or complaints that were raised prior to when the official policy was finally issued, who received them, how did they go up the chain of command, what was done to follow up on them, and have they ever been dealt with.

Mr. FINE. We talk about that in the report in that the concerns originally arose when the Abu Zubaydah case and the Al Qahtani case, the concerns were raised to FBI headquarters. They eventually resulted in the policy that Director Mueller instituted that the FBI agents were not to participate—

Senator FEINSTEIN. Two years later.

Mr. FINE. Well, that happened in 2002, August of 2002, and the concerns continued. We did find that the concerns went to the Department of Justice, that there were senior officials in the Department of Justice who heard about the concerns and raised the concerns with the Department of Defense, and we also heard that they raised it with the National Security Council.

The issue that was raised, though, from the interviews that we conducted, was more an issue of effectiveness. Was this an effectiveness tactic to obtain reliable and accurate information? They raised the concerns with the Department of Defense, but the Department of Defense, from what we were told, dismissed those concerns and no changes were made in the Department of Defense's strategy. Ultimately, it was the Department of Defense's decision. These detainees were under their control. The Department of Justice and the FBI believed that the Department of Defense tactics that were used were not effective and should have been changed, but they were not successful in—

Senator FEINSTEIN. Did you raise them with the Department of Justice?

Mr. FINE. Did?

Senator FEINSTEIN. Did the FBI raise those concerns with the Department of Justice?

Mr. FINE. Yes, with officials in the Criminal Division, and ultimately we heard that even Attorney General Ashcroft heard about the concerns, particularly with regard to Al Qahtani and raised those codncerns. We were not able to definitively find out what he did because he declined our request to interview him.

Senator FEINSTEIN. Did Department of Justice at any time say that those techniques were legal?

Mr. FINE. Well, that is an issue about what the Office of Legal Counsel has done and its legal opinions, and you talked about the Bybee-Yoo memo. There are other classified memos. So it was—

Senator FEINSTEIN. No, I am not talking about the memos. We are now, fortunately, all aware of them.

Mr. FINE. Right.

Senator FEINSTEIN. I am talking about when these reports came in and somebody in the upper echelons of the FBI—and I will get to who in a minute—called Justice, I would assume they called Justice to say, "Is this legal?" What I am asking is what was the answer that came back.

Mr. FINE. What we were told was that the concerns mostly related not to the legality of it, but to the effectiveness of it. That is what the people told us that the concerns that were raised—

Senator FEINSTEIN. Well, why would they raise effectiveness with DOJ?

Mr. FINE. Pardon me?

Senator FEINSTEIN. Why would they raise effectiveness with Justice?

Mr. FINE. Because Justice is the component overseeing the FBI and had participation in interagency councils, and the FBI believed that these techniques were not getting actionable information, that they were unsophisticated and unproductive, and that they asked the Department of Justice to get involved.

Senator FEINSTEIN. Now, how far up the line at the FBI did these complaints go?

Mr. FINE. In general, the complaints went to the Counterterrorism Division. We talked about it going up higher and that there were some—the concerns were raised at the highest levels, not constant concerns or not in lots of specificity, but particularly with regard to Al Qahtani, those concerns were raised at high levels.

Senator FEINSTEIN. Did they reach the Director?

Mr. FINE. He recalled general concerns. I do not think he recalled in specifics and in clear detail, but he was aware of concerns about the Department of Defense interrogation tactics.

Senator FEINSTEIN. And what did the Director do about those concerns?

Mr. FINE. The first thing he did was institute the policy that the FBI was not to participate in it. In terms of further issues, it is not clear that he was the one who was raising the concerns over to the Department of Defense; rather, we found that officials in the Counterterrorism Division, the Military Liaison and Detainee Unit, and also Spike Bowman, raised concerns with other agencies.

Senator FEINSTEIN. Could one conclude—and I am just asking this question now—that Director Mueller raised these concerns and was rebuffed and, therefore, decided that the FBI would not cooperate in these interrogations?

Mr. FINE. I think what we were told was that when the concerns were raised, he made that decision for the reasons that Pasquale D'Amuro stated that I stated in my oral statement. I do not think it was because he was rebuffed. I think it was because he decided that this was not something that the FBI should participate in.

Senator FEINSTEIN. Thank you very much.

Can you tell me how many reports were made?

Mr. FINE. How many?

Senator FEINSTEIN. Yes.

Mr. FINE. It is not clear how many reports were made, but there were concerns being raised—

Senator FEINSTEIN. Are we talking about dozens of reports coming back?

Mr. FINE. Well, the reports would go through the on-scene commander. The on-scene commander would sometimes raise it in the Counterterrorism Division. The problem was that the people did not know what was authorized and what was not authorized, and at some point they assumed these tactics were authorized. So they sort of stopped making complaints about them because they did not know what was authorized and what was not authorized.

Senator FEINSTEIN. Thank you very much.

Senator Specter.

Senator SPECTER. Mr. Fine, there is a clear distinction as to what the FBI's duty was on the issue of not engaging in these kinds of interrogation techniques and blowing the whistle on them. Now, what did the FBI do by way of blowing the whistle? And the really critical factor, as I listened to your testimony, is how far it went up the chain of command and precisely what did Director Mueller do. It seems to me that where the FBI witnesses interrogation techniques which the FBI believes are improper, perhaps even illegal, perhaps even torture, that there is a duty to take it to the top. And that requires not generalizations but did you interview Director Mueller?

Mr. FINE. Our investigators did interview Director Mueller.

Senator SPECTER. I asked you if you interviewed Director Mueller.

Mr. FINE. No.

Senator SPECTER. Why not?

Mr. FINE. Because our investigation was conducted by trained investigators. I do not conduct the investigations. All the investigations we participated in—

Senator SPECTER. Okay. The trained investigators questioned him. Did they ask him specifically whom he reported these abusive tactics to?

Mr. FINE. I believe they asked him if he made reports of this.

Senator SPECTER. But wait a minute. I do not want to know what you believe. This is a very critical question. It seems to me that if the Director is to be acting properly and he finds out something that is going on which is improper or illegal, he ought to take it up with the Attorney General, and he ought to find out what the Attorney General is doing about it. And if he is not satisfied with what the Attorney General is doing about it, he ought to take it up with White House Counsel, or he ought to take it up with the President. The FBI Director has access to the President. What are the specifics? What did Mueller say or at least what was Mueller asked?

Mr. FINE. I think what Director Mueller said, Senator Specter, was that he was aware that the legality of this was being assessed by the Department of Justice, it was changing; that there were peo-

ple in the Department of Justice, the Office of Legal Counsel, who were blessing some of these tactics; and that the Department of Justice had reviewed it and as a result, he decided that his agents would not be involved with this.

Senator SPECTER. Well, it seems to me that that is insufficient. To say that the practices were changing—your words—that is not to say that they were changed. That is not to say that they were stopped.

Now, you made a brief comment about Attorney General Ashcroft specifically. What did your investigation show as to what Attorney General Ashcroft was told?

Mr. FINE. We were informed that Attorney General Ashcroft was aware of the complaints, mostly in terms of the effectiveness of the tactics that were being used.

Senator SPECTER. Well, could you be more specific? Did your investigators question Ashcroft?

Mr. FINE. No. We asked to, and he declined our request for an interview.

Senator SPECTER. So when he declined, what did you do about that?

Mr. FINE. We asked the people around him. We asked—we interviewed Deputy Attorney General Thompson. We interviewed Michael Chertoff. We interviewed—

Senator SPECTER. You asked the Deputy Attorney General, and what did he say—Thompson?

Mr. FINE. He did not remember the complaints or the specific complaints—

Senator SPECTER. He did not remember the complaints?

Mr. FINE. No.

Senator SPECTER. Did not amount to much in Thompson's opinion?

Mr. FINE. I don't know about that, but he did not remember the specific complaints coming to him.

Senator SPECTER. Well, it seems to me that the investigation—and this is a critical point. You make a distinction in your concluding statement that the FBI could have provided clearer guidance, but they should be credited with generally avoiding participation in detainee abuse. It seems to me it is not sufficient not to participate in improper or illegal conduct; that if they see it, they ought to blow the whistle and do what is necessary to stop it. Isn't that the way it ought to be done?

Mr. FINE. I think that is a fair statement, Senator Specter, and one of the things I did say was not only should they have provided clearer guidance, but they could have pressed harder their concerns. I think they should have pressed harder their concerns.

Senator SPECTER. Well, to say that they should have pressed harder is not to say very much. On your testimony, they did not press much at all.

In your judgment, Mr. Fine, were the tactics used by DOD torture?

Mr. FINE. We did not do a legal analysis of this based upon—

Senator SPECTER. You did not do a legal analysis?

Mr. FINE. No. What we—

Senator SPECTER. Why not?

Mr. FINE. Because that is not our role as the Inspector General. Our role is to provide the facts and to discuss what happened and discuss what the FBI witnessed—

Senator SPECTER. Well, you have got a lawyer, you have got a General Counsel to make a legal judgment.

Mr. FINE. That is correct, and also I am a lawyer. But our role is to provide the facts and to provide reports on this.

Senator SPECTER. Let me ask you—my time is growing short. Let me ask you to review the facts and give this Committee a conclusion. Give us a conclusion as to whether DOD tactics were torture. You are a lot closer to it than we are. We have got 7 minutes to sift through a lot of material. I would like to know what your conclusions are.

How about in 26 seconds, Mr. Fine? We have got a lot of time for these—it does not amount to a whole lot. How about the ticking bomb situation which we theorize about so much? There is an opinion by an Israeli dissenting justice and there are comments by some pretty noted people about unusual circumstances if there is a ticking bomb and hundreds of thousands of people are in jeopardy of being killed. Is there any circumstance which would warrant these excessive interrogation tactics?

Mr. FINE. I can envision certain circumstances, but the problem with that is, you know, were they used widespread and not in a ticking time bomb context, and that is the concern that I would have and the concern that—

Senator SPECTER. So you think it would be appropriate to have an exception in the ticking bomb circumstance?

Mr. FINE. I certainly think we ought to consider that and establish processes and procedures to deal with it.

Senator SPECTER. We ought to consider that? We are considering it. I want your judgment. In a ticking bomb circumstance, should we use these excessive interrogation tactics?

Mr. FINE. I am not sure. I am not sure about that, Senator Specter. I would have to think about that more.

Senator SPECTER. Well, give us your judgment. You are in the middle of it. We are trying to come to conclusions.

Mr. FINE. I think the problem that we saw was that these were not ticking time bomb situations and that there was—

Senator SPECTER. Okay, I grant you that. This is a hypothetical that we have to come to grips with. And if you conclude that in the ticking bomb circumstance these tactics ought to be used, I would like your judgment as to how we do it. Should we have a warrant, which Dershowitz suggests? Should it go to the President? Why not take it to the President if you are in that kind of extremis? We would like to go beyond, Mr. Fine. We have great respect for what you have done and your independence, but, candidly, I do not think you have gone far enough. And we need more hard facts and more pursuit of the facts as to Ashcroft and as to what is going on, and I know we need your judgment as to what we ought to be doing. We are not necessarily going to follow it. That is our responsibility. But we ought to have the benefit of it.

Thank you, Madam Chair.

Senator FEINSTEIN. Thank you very much, Senator Specter.

First of all, the votes have been moved to 11:20 from 11 o'clock, so there is a little more time. For those that were not here, we will continue at 2 o'clock in this room, and we will recess when the votes begin.

Senator Feingold, I believe you are next, then Senator Whitehouse, and then Senator Durbin.

Senator FEINGOLD. Thanks, Madam Chairman. Thank you for holding this hearing. I ask that my full statement be placed in the record, but I just wanted to say that I commend the FBI agents discussed in the Inspector General's report who recognized that the kinds of abusive interrogation practices they witnessed other agencies employing were wrong and, just as important, ineffective. They deserve our credit and they deserve our thanks.

Ms. Caproni, did you personally ever raise concerns about the CIA or Defense Department's use of abusive interrogation techniques with the White House, the National Security Council, or directly with the agencies at issue?

Ms. CAPRONI. A little bit of history might be helpful in terms of when I came to the Bureau. I came to the Bureau in August 2003, so at the point that I arrived, the Director had already determined that the FBI would not participate in these techniques. There were existing OLC opinions that were highly classified and that we did not have access to, though the Bureau, kind of writ large, generally understood that there were existing memos.

The first I learned that aggressive interrogations were being used was when Abu Ghraib broke and when we then started trying to find out what did FBI agents know either about what was going on at Abu Ghraib—actually, that was our first focus, and that then flushed out a lot of other information that was at this point—again, I had only been at the Bureau about 6 months at this point.

Senator FEINGOLD. Is that your way of saying no to my question then, that you personally—

Ms. CAPRONI. I personally did not—

Senator FEINGOLD. Did you ever personally raise questions or concerns about the CIA or Defense Department's use of abusive interrogation techniques with the White House, the National Security Council, or directly with the agencies at issue?

Ms. CAPRONI. I did not.

Senator FEINGOLD. Okay. Did you witness other FBI or DOJ officials raising such concerns with those entities?

Ms. CAPRONI. Again, I was not here when all of this started, so no.

Senator FEINGOLD. So the answer is no.

Ms. CAPRONI. I have heard—I mean, I have learned historically what was done.

Senator FEINGOLD. Okay. The answer is no in terms of your own role or what you observed.

Inspector General Fine, your report concludes that ultimately "neither the FBI nor the DOJ had a significant impact on the practice of the military." Your report also explained that the Office of Legal Counsel at DOJ had opined that "several interrogation techniques sought to be used by the CIA were legal" and that the Secretary of Defense had personally authorized the use of certain abusive techniques at Guantanamo Bay.

Did the OLC opinions and the fact that the techniques were being approved at the highest levels of the Pentagon make it more difficult for the FBI or DOJ to raise concerns? And might it have even dissuaded some from raising these issues at all?

Mr. FINE. I think it did. I think the fact that these opinions existed out there did have an impact on what FBI agents believed was authorized and what they believed was acceptable for other agencies. And I think at a certain point it dissuaded them from raising continuous concerns about this.

Senator FEINGOLD. Inspector General, your report explains in detail how Defense Department interrogation policies changed repeatedly from 2001 to 2004. Just to take an example, in late 2002 Secretary Rumsfeld authorized a series of what I would consider abusive interrogation techniques for use at Guantanamo Bay, but he then rescinded that authorization in early 2003. One of the techniques no longer authorized, as I understand it, was short shackling. Yet FBI agents reported that the use of this technique continued for at least another year at Guantanamo. And I do understand that the focus of your report was on the FBI.

But is it your sense that military interrogators did not know what they were permitted to do given the constantly shifting policies and mixed messages that they were getting?

Mr. FINE. I think there was some sense that with the changes in the policies that did not always get down to the level of the interrogators who were actually conducting the interrogation, and so that at points they were not sure or aware what exactly was authorized.

Senator FEINGOLD. So not necessarily willful defiance of what they understood to be the procedures, but some confusion perhaps.

Mr. FINE. I think to some extent, yes.

Senator FEINGOLD. Mr. Fine, according to your report, an FBI agent told you that Chinese authorities came to Guantanamo Bay to interrogate several Uighur detainees. I know we are in an unclassified setting, so what can you tell me about this incident?

Mr. FINE. What we can tell you is that we were informed by FBI agents at Guantanamo that Chinese authorities did come to interview the Uigurs in Guantanamo, that they were informed that prior to the Chinese officials' visit that the Uigurs were subject to what was called the "frequent flyer program"—that is, they were woken up at regular intervals, every 15 minutes, the night before to put them in a position to be interrogated by the Chinese officials.

Senator FEINGOLD. Ms. Caproni, according to the Inspector General's report, you sent an e-mail in May 2004 to determine whether FBI agents had ever received written guidance about when they should decline to participate in interrogations conducted by the Department of Defense or should report on techniques that they witnessed. You found no such written guidance, as I understand it. Director Mueller determined in 2002 that FBI agents should not participate in any interrogations involving techniques that violated FBI policy. If no written guidance was issued, how was that decision communicated to the agents on the ground?

Ms. CAPRONI. It is my belief, and having read the IG's report, who looked extensively, that it was orally conveyed and that there

was fairly consistent knowledge, despite the fact that it was not written down, that they were supposed to only use FBI technique, regardless of what their co-interrogators might be authorized to do.

Senator FEINGOLD. Why had the FBI not issued any guidance prior to May 2004, despite the fact that FBI agents had been dealing with military detainees for 2 years at that point?

Ms. CAPRONI. Senator, I do not know. I do not know the answer to that. I mean, again, as soon as we realized that it had never—there had never been written guidance

provided, we provided it. But I cannot answer why it was not given earlier.

Senator FEINGOLD. Mr. Fine, what about you? Do you draw any conclusions as to why there was no written guidance prior to May 2004?

Mr. FINE. I think there should have been guidance. I think that it was not focused on, and I think that that was a problem, not providing written guidance. It is one thing to orally tell people things, but some of the agents had different understandings. It is a complicated area. It is not simply what you participate in but what other agencies are authorized to do, what you should report, whether you can interview a detainee who has been subjected to the other agency's interrogation tactics, when can you do that, how you should do that. It is a complicated area, and I think that written guidance was appropriate and should have been issued.

Senator FEINGOLD. I thank both of you and I thank the Chair.

Senator FEINSTEIN. Thank you very much, Senator.

Senator Whitehouse.

Senator WHITEHOUSE. Thank you.

In response to the FBI decision that you would not participate in the coercive methods of interrogation, it strikes me that there are a number of reasons why that might have taken place, and I would like to explore those reasons a little bit with both of you.

The first reason would be to protect statements that were obtained for judicial use in future criminal prosecutions, correct?

Ms. CAPRONI. I think that it accomplished that, but I am not sure that was a motivating factor.

Senator WHITEHOUSE. You are not sure that was a motivating factor.

Ms. CAPRONI. No. I think, again, these interrogations were largely being done for intelligence purposes, and so while it is, in fact, a benefit of our techniques, I do not think that was the major—it was a motivating factor in the sense that, as Agent D'Amuro said, you need an end game, and—

Senator WHITEHOUSE. Would that have been the motivating factor? In the report, page 115 to 116, there is a discussion in November of 2003 in which the concern was raised that the DOD's interrogation methods were making Gitmo detainees unusable in U.S. cases. The unusable-ness, is that what you are referring to?

Mr. FINE. Yes. I think that was one of the reasons why they were concerned about it. I am not sure that is, as Ms. Caproni said, the first reason, but it certainly was a factor, one of the reasons, yes.

Senator WHITEHOUSE. Would you agree with me that for an FBI agent simply to leave when coercive methods are being applied and then come back and resume after they are over clearly would not

be an adequate response in terms—if the goal really were just to preserve evidence for future use judicially?

Mr. FINE. I think that is an important issue, and that is the question of what kind of attenuation there is, from the time that the coercive tactics are used and the FBI gets involved, what do you have to do, how long a period of time it is, what do you have to tell the detainee, what are the circumstances of the interrogation that the FBI does after the military interrogation. That is a complicated issue, and simply coming in a few hours later probably is not sufficient.

Senator WHITEHOUSE. So that takes us to a second issue, which I think you have already discussed in your testimony, which is that the coercive methods are either not effective or not as effective as traditional expert interrogation techniques. Was that another motivating factor in the Director's decision, as best you know, to refuse to participate in the coercive methods.

Ms. CAPRONI. Yes.

Senator WHITEHOUSE. Okay. A third would be concern about the legality of the techniques and of agent or agency liability for participating in them. Was that a concern?

Ms. CAPRONI. It is my belief, as I have tried to reconstruct who knew what when, that at the time that this became crystallized, after Abu Zubaydah was captured, that there were, in fact, existing opinions so that—again, I was not at the Bureau at the time, so I was trying to reconstruct how this happened—is that that actually shifted the debate from it is illegal to, okay, OLC may have said it is legal, but we have still got to decide whether we are going to participate in it, we, the FBI, are going to be involved in something that, A, we do not think is effective; B, it is going to make the statements unusable in whatever the judicial end game is; and, three, do we want to expose our agents, who eventually, unlike CIA employees, unlike DOD employees, will be testifying in Article III courtrooms, do we want them involved in this. And I think all of those all came together, but it was with a backdrop of OLC had been involved in—

Senator WHITEHOUSE. Let's talk about OLC for a minute. Are you comfortable with the OLC opinions? One of them has already been publicly withdrawn.

Ms. CAPRONI. Again, I am the General Counsel of the FBI. OLC is the agency within the Department who is charged with the responsibility of making those decisions. So OLC's decision ultimately controls.

Senator WHITEHOUSE. Did the FBI make any effort to either review the OLC decisions or to reach its own internal determination as to the merits of the conclusions drawn by those decisions?

Ms. CAPRONI. Not to my knowledge.

Senator WHITEHOUSE. To date, still?

Ms. CAPRONI. I mean, I have my opinion on the merits of those decisions, but, again, OLC's decisions are binding on the Department of Justice in terms of what is lawful and what is not, what is the meaning of statutes. They get the last word.

Senator WHITEHOUSE. Well, ultimately a court gets the last word.

Ms. CAPRONI. Perhaps.

Senator WHITEHOUSE. That is a very scary word you just used.

Ms. CAPRONI. No, no. I mean, Senator, a court gets the last word if the issue is joined in a courtroom. Of course, the court gets the last word.

Senator WHITEHOUSE. And with respect to the ultimate prospect that a court might get the last word, the FBI never did its own sort of double-checking or kind of due diligence to take a look at the OLC opinions even after one was withdrawn?

Ms. CAPRONI. There was a point when I requested to see the opinions, and I was not shown the opinions. In fact, I did not really press the issue because we were not participating. So from the standpoint of our agents, we were not involved in the techniques. My understanding was that OLC had passed on them. And so from our perspective, we were not—I did not have employees that were at risk.

Senator WHITEHOUSE. When did you first become aware of the OLC opinions, of their content? When did you first have a chance to review them?

Ms. CAPRONI. I still have not reviewed them.

Senator WHITEHOUSE. Just the declassified ones?

Ms. CAPRONI. Correct.

Senator WHITEHOUSE. But the classified ones you still have not had a chance to review?

Ms. CAPRONI. No.

Senator WHITEHOUSE. Have you done research of your own on this subject?

Ms. CAPRONI. No.

Senator WHITEHOUSE. Well, maybe you should.

Ms. CAPRONI. Again, FBI agents are not participating in techniques that go beyond what the FBI—

Senator WHITEHOUSE. No, but FBI agents may take cases into court, and as the case agent, they may be obliged to have to manage a prosecution that brings to light that these coercive techniques and methods were used. So it could very well become a part of their role as a case agent to have to respond to this, and in that guise, you would think that they would be wanting some guidance from their General Counsel.

Ms. CAPRONI. I think our agents want guidance in terms of what is their responsibility if they are interviewing someone who has been subjected to these techniques, and we have had extensive discussions on that, and particularly with the high-value detainees that are now in Guantanamo, worked very carefully with the Department of Justice—

Senator WHITEHOUSE. My light just went. Let me ask you one last question. You said you had an opinion about these OLC opinions. What is it?

Ms. CAPRONI. It would not have been my opinion.

Senator WHITEHOUSE. Fair enough. My time has expired.

Senator FEINSTEIN. Thank you very much, Senator Whitehouse. Senator Durbin.

Senator DURBIN. Thank you. I want to thank you, Senator Feinstein, for this hearing, and I have said on the floor and in this Committee that I really believe that when the history of this time is written, one of the most unfortunate, embarrassing chapters will

deal with this administration's decision to set aside what had been time-honored for generations, our opposition to torture. The next President will have an awesome responsibility to restore the image of this great Nation in the eyes of many people around the world who, unfortunately, will identify us by some of the extreme conduct which was the subject of this effort by the Inspector General.

It is my understanding, Mr. Fine, that you have set out to interview some 1,000 different witnesses and actually had opportunity to speak to over 200 of them. Is that correct?

Mr. FINE. Well, we sent out a survey to 1,000 witnesses, FBI witnesses who were deployed overseas. About 900 of them sent back responses. We picked the ones where they had relevant information, and we interviewed over 200 witnesses.

Senator DURBIN. I went to the floor of the Senate in June of 2005 to talk about an FBI agent's observations, which are chilling and I will not read back into the record, but involved short shackling, extreme temperatures, and the like. Four of my Republican colleagues came to the floor 2 days later, and one raised the question as to whether this had even happened, whether it was even possible, whether the report was accurate from this FBI agent, which had been obtained through normal means.

So I would like to ask you, based on what you have seen here and what you have heard and the questions that have been asked, is there any doubt in your mind that, for example, the short shackling for prolonged periods of time, where a detainee's hands were shackled close to his feet to prevent him from standing or sitting, occurred?

Mr. FINE. We believe the evidence showed that it did occur. The FBI agents witnessed it and reported it to us.

Senator DURBIN. The use of extreme temperatures, another commonly reported technique, did that occur?

Mr. FINE. They reported that as well.

Senator DURBIN. FBI agents also told you that short shackling was sometimes used in conjunction with holding detainees in rooms where these extreme temperatures were being applied as well. Is that correct?

Mr. FINE. That is correct.

Senator DURBIN. And, finally, isn't it true that Secretary Rumsfeld approved the use of stress positions, like short shackling and temperature manipulation, as interrogation techniques and that these were not the actions of a few bad apples on the night shift, as we have been told?

Mr. FINE. There was an evolution of the policies, and, yes, there were periods of time where those techniques were approved and authorized.

Senator DURBIN. Ms. Caproni, I have struggled here in this Committee trying to understand the position of the Department of Justice, and particularly our current Attorney General, when it comes to waterboarding and other cocercive techniques. And throughout history we as a Nation have taken a pretty clear position on some of these issues, and I might say that the Judge Advocates General, the highest-ranking uniformed military lawyers, told me unequivocally that the following techniques are illegal and violate Common Article 3 of the Geneva Conventions: painful stress positions,

threatening detainees with dogs, forced nudity, mock execution, and waterboarding.

Ms. Caproni, you are the FBI's highest-ranking legal officer, so I would like to ask for your position on these interrogation techniques. Are they abusive? Are they illegal?

Ms. CAPRONI. Again, the issue of legality or non-legality is not mine to reach. That truly is the responsibility of the Office of Legal Counsel, and as much as I might like to be able to overrule any other component of the Department, I cannot. It is really their responsibility to make that decision.

Senator DURBIN. Have they made that decision? Are they illegal? Abusive? Do they violate the Geneva Conventions?

Ms. CAPRONI. I have not read the OLC opinion, so I cannot answer that question.

Senator DURBIN. Well, let me ask you, if you cannot answer the question, how do you expect rank-and-file FBI agents to determine whether these techniques are abusive?

Ms. CAPRONI. I think there is a different question about whether something is abusive versus whether something violates the Geneva Accords or whether it violates—

Senator DURBIN. I asked that question. Are they abusive, illegal, or violate Geneva Conventions?

Ms. CAPRONI. I am sorry. I was running them all together, Senator. I would say they are all abusive.

Senator DURBIN. Under all circumstances?

Ms. CAPRONI. Short shackling, waterboarding—I am sorry, what was the other—

Senator DURBIN. Painful stress positions, threatening detainees with dogs, forced nudity, mock execution, and waterboarding.

Ms. CAPRONI. Yes, those are abusive under all circumstances.

Senator DURBIN. Do you consider them torture?

Ms. CAPRONI. Again, torture has a legal definition, and that is what OLC has passed on, and it is not within my pay grade to overrule OLC.

Senator DURBIN. And how could it be within the pay grade of those below you to understand whether what they are doing is torture or not?

Ms. CAPRONI. Again, the FBI agents' responsibilities was, one, not to participate. These techniques are clearly not permissible in the United States. We train our agents well. They would have known that none of those techniques were they permitted to participate in. In terms of reporting, I believe from May 2004, when we made it clear that they were obligated to report abusive techniques, unless they knew it was authorized, and that was not part of the policy. But if they called in and they said if it was authorized, we did not need to report, the answer is no, if it is authorized, you do not need to report; that an agent would understand these to be abusive techniques.

Senator DURBIN. Mr. Fine, I was struck by your findings that Director Mueller was unaware of the dispute between the FBI and the Defense Department regarding interrogation techniques which began in 2002 until after the Abu Ghraib scandal in May of 2004?

Mr. FINE. He was aware of it in 2002 in connection with the Abu Zubaydah matter.

Senator DURBIN. So were there reports from his agents about activities at Guantanamo and other places involving these interrogation techniques?

Mr. FINE. Mostly reports related to Abu Zubaydah. After that, the reporters filtered through the FBI, but most of them were handled in the Counterterrorism Division and over to the Department of Justice Criminal Division and through the Department of Justice. So—

Senator DURBIN. Beyond Abu Zubaydah, do you believe that there was a regular communication of reported abuse and techniques that were questionable to the Director?

Mr. FINE. I do not believe that there was a regular report to the Director of abusive techniques, no.

Senator DURBIN. I quote from your report: "Director Mueller told the OIG that, in general, he did not recall being aware of the dispute between the military and the FBI over interrogation techniques at Guantanamo prior to the spring of 2004 after the Abu Ghraib disclosures. He said he didn't recall seeing either the November 2002 EC written by Foy or the May 2003 EC written by McMahon."

Mr. FINE. Abu Zubaydah was not held at Guantanamo at that time. He was held at a CIA facility.

Senator DURBIN. So in terms of Guantanamo, if the Director says it was not until after Abu Ghraib that he was given any kind of basic information, 2 years after this had been going on, that is what you found in the course of your investigation?

Mr. FINE. We found that the reports did filter up. It filtered up through the Counterterrorism Division. They went over to the Department of Justice. We did not have clear evidence that these reports went up to the Director of the FBI in specificity.

Senator DURBIN. I see my time has expired, Madam Chair. Thank you very much.

Senator FEINSTEIN. Thank you very much, Senator Durbin.

We are joined by Senator Cardin. Welcome.

Senator CARDIN. Madam Chair, thank you very much, and let me thank our witnesses for being here.

There are many reasons why this Committee and the American people need to be concerned about the interrogation techniques that have been used by the CIA and others that clearly, as reported, would violate, in my view, U.S. law, would be a moral issue for this country, the values that we hold so dear. The techniques, in my view, are torture and, therefore, are illegal not only by our domestic laws but by our international commitments. And I think my colleagues have questioned in regards to those points.

I want to raise another issue, and that is, the reliability of the information that is obtained through these enhanced techniques. Is there anything that either one of you can report on as to whether the use of these enhanced techniques has produced information that is reliable and helpful in dealing with the threats against America?

Now, just to give you—there have been several reported cases of misinformation that was obtained through enhanced techniques. I will give you one example. IBN Al-Sheikh Al-Libi, who ran al Qaeda's training camp in Afghanistan, told authorities that Iraq

provided chemical and biological weapons training to al Qaeda operatives. That ended up in Secretary Powell's comments to the United Nations. It was used as justification for U.S. military action in Iraq. Al-Libi later recanted, saying he made it all up under coercive interrogation and he was subsequently deemed A "FABRICATOR" by the CIA.

So I would like to know whether in your investigations you have uncovered information that would show whether this is useful to America as far as intelligence gathering. We could also go back historically that if coercive practices worked, we probably had a lot of witches in America back a couple hundred—a couple decades ago, or I guess a hundred years ago. So any information you have that can shed light on this?

Mr. FINE. Senator Cardin, our investigation was not an investigation of what intelligence was obtained and whether more useful information was obtained in one way or the other. But what I can tell you is the FBI believes strongly that their techniques, which have been used successfully in various contexts, both domestically and internationally, with people not wanting to give them information, have been successful and are successful in getting reliable, accurate information.

In addition, they believe that these other techniques, which are used to break people or to coerce them into testifying, can have the effect of getting the person to say whatever he thinks the interrogator wants him to say in order to get the interrogator to stop using those techniques. And, therefore, the accuracy or the reliability of that information is undermined.

They believe strongly in their rapport-based approach. I will also note that after the Detainee Treatment Act and the change of the Army Field Manual, the Army has now moved towards—closer to the FBI's techniques and rapport-based approach rather than a coercive approach. So I think that tells one something as well.

Senator CARDIN. So what you are basically telling us is that the FBI, the Army interrogators believe that it is not only the right method to interrogate by not using the so-called enhanced techniques that many of us think are illegal, but it also from a pragmatic point of view produces more reliable and timely information.

Mr. FINE. That is clearly what the FBI believes.

Senator CARDIN. I see that you are shaking your—

Ms. CAPRONI. Correct. The FBI believes that the most efficacious way of conducting interrogations is through rapport-based interview techniques.

Senator CARDIN. And, of course, there are many other reported examples. These are reported examples where we know that information obtained through coercive techniques has proved to be unreliable. We had the three British detainees at Gitmo, the "Tipton Three," who were reportedly subject to a year and a half of coercive interrogation. They eventually admitted to being present at a speech by Osama bin Laden in an Al Qaeda training camp. The authorities later found out that they were in the United Kingdom at that time, so that information was inaccurate. And there are more and more examples of those types that have been reported. We do not know how much information, because of the classified nature of the interrogations and refusal of the CIA to release details, how

much more information we have obtained is unreliable and how we perhaps were delayed in getting important information because of the failure to follow more traditional techniques for interrogating detainees.

Madam Chair, we had a hearing on this in the Helsinki Commission to try to figure out what is the most effective way, and that hearing is totally consistent with the testimony of our two witnesses here, that using the conventional techniques—admittedly, we are more sophisticated today than we were. We now know more sophisticated ways to interrogate, but not using the coercive tactics that have been reported being used by CIA. And the experts we heard, including people who were former interrogators, was that the most reliable way to get information is to use interrogation techniques that are not coercive or do not border on or are torture in nature. And for the life of me, I cannot understand why the CIA continues to hold out the use of techniques that clearly question America's commitments to its principles and not producing the information we need in order to keep Americans safe.

Thank you, Madam Chair.

Senator FEINSTEIN. Thank you very much.

I have a memo that was drafted by a supervising special agent, whose name is redacted, of the FBI—it is unclassified—from Guantanamo. This is the memo that was forwarded to Marion Bowman, and according to Mr. Bowman, this memo did not reach him for 6 months, that for some reason it resided at Quantico for a period of time.

On the second—and it is a very good memo. On the second page, in the legal analysis, this memo states that—first of all, it states the three categories of interrogation, and then it goes on to say, "Information obtained through these methods will not be admissible in any criminal trial in the U.S. Although information obtained through these methods might be admissible in military commission cases, the judge and/or panel may determine that little or no weight should be given to information that is obtained under duress." And then it gives some examples of coercive interrogation techniques, Categories 2 and 3.

It finally says—and I think it is very interesting—"It is possible that those who employee these techniques may be indicted, prosecuted, and possibly convicted if the trier of fact determines that the user had the requisite intent. Under these circumstances, it is recommended that these techniques not be utilized."

I am going to place this in the record, and I am going to ask you, Mr. Fine, have you looked at this memo?

Mr. FINE. We have that memo. We discuss it on page 120 and 121 of our report. It was by the FBI agents from the Behavioral Analysis Unit who were down there involved in the Al Qahtani matter. They raised those concerns in an electronic communication memo to Spike Bowman. It did take a long time to get to him. It took 6 months before it got to him. By that time, the interrogation of Al Qahtani had changed, and Spike Bowman used the memo and raised concerns with the Department of Defense, which we do discuss on page 121.

Senator FEINSTEIN. What is the present mental condition of Mr. Al Qahtani?

Mr. FINE. The present condition?

Senator FEINSTEIN. Yes.

Mr. FINE. I don't know the present condition. We did interview him. We interviewed him when we were at Guantanamo.

Senator FEINSTEIN. And what did you find?

Mr. FINE. He described things that happened to him, and he was able to communicate with us.

We interviewed him in the presence of his lawyer. He seemed to understand our questions and was able to communicate with us.

Senator FEINSTEIN. And what did he tell you about his conditions?

Mr. FINE. He told us about the abusive techniques that had been utilized on him, which we describe.

Senator FEINSTEIN. Okay. So that will go in the record.

Are you aware that Spike Bowman called the DOD General Counsel in November or December of 2002?

Mr. FINE. He called the General Counsel's office. He did discuss the concerns. The exact timing of it I would have to get straight, but he did raise concerns with the Department of Defense about the treatment of Al Qahtani. And, really, when he called back to follow up, he was unable to obtain any information about what actions the DOD took in response to his concerns and his information. He basically got the response that the Department of Defense was handling it.

Senator FEINSTEIN. So he was effectively stonewalled?

Mr. FINE. His concerns were not addressed.

Senator FEINSTEIN. One other question, and then I would like to turn to Senator Whitehouse. Senator Whitehouse asked the question about the effectiveness, and you both indicated that you did not believe that these types

of enhanced interrogation techniques are effective. I would like to ask you to explore that for a moment and give us some substantiation of what you are stating for the record.

Mr. FINE. Well, I was not giving a personal opinion. What I was giving is what the FBI was telling us and what their position is, and they have been doing this for years and years and years. They are trained professionals at this. They do it on a regular basis, trying to get information in custodial interrogations from all sorts of people in an adversarial context who do not want to give it to them, both before and after September 11th. They believe strongly that the best way to get actionable, accurate information is to use the rapport-based approach. By that, it is not simply being a nice guy. There are all sorts of techniques that they use, that they can pressure people, that they can make it clear to them that it is better to provide information, giving them justifications for it—a whole variety of techniques that they regularly employ. They believe that that was the way to approach this situation as well.

Senator FEINSTEIN. Ms. Caproni, do you have a comment?

Ms. CAPRONI. Again, I would agree with the Inspector General that, based on our experience, if you know who you are interrogating—I think that may be one of the things that our agents would say is most critical, is you need to know the person. You need to know all the information we have about them. You need to know the subject matter. So if you are interrogating about al

Qaeda, you need to know al Qaeda. If you are interrogating about the Colombo family, you need to know the Colombo family. But if you are well prepared, rapport-based techniques are a better way to go because you get reliable information, and it is an effective interrogation technique.

Senator FEINSTEIN. Thank you very much. Well, thanks to the help of Senator Whitehouse, we have included in the intelligence authorization bill an amendment put in in the conference between the House and the Senate that the CIA will follow the Army Field Manual. That is a part of the bill. The bill will not pass without it. And the Chairman of Intelligence has indicated that, and we will make this change, that is for sure, 1 day.

Senator Whitehouse, you wanted to say something?

Senator WHITEHOUSE. Yes, Chairman. I just wanted to ask a couple more questions, try to punch through these relatively quickly.

On page 106 of the report, there is a reference to Special Agent Brett's legal analysis of the interrogation techniques. May I ask for a copy of that for the record?

Mr. FINE. Certainly we will work with you on that, and the FBI.

Senator WHITEHOUSE. That appears to be responsive to my earlier question about whether the FBI had done some independent legal analysis. I would like to see a copy of it.

Ms. CAPRONI. That is fine.

Senator WHITEHOUSE. The second thing is just with respect to what Inspector General Fine just said about the FBI being trained professionals. The spin that has come out of the administration on this subject is that the CIA are the trained professionals, they are the experts. By contrast, military interrogators are amateurs and not experienced and, therefore, need to be constrained by the Army Field Manual to prevent them from doing irresponsible things, but you can trust the trained experts of the CIA. Presumably, the same analysis applied to the FBI, that you can trust the trained agents of the CIA, but you FBI amateurs do not measure up in that respect and, therefore, have to operate under different rules.

Is there anything that your investigation showed that would bear on the credibility of that argument as a defense of these techniques?

Mr. FINE. We did not look at the relative, you know, professionalism or training of the CIA versus the FBI, but we do know that the FBI are trained professionals. They do this all the time. They have a history of success in this area, and there is, in my view, no reason to doubt their interrogation abilities.

Senator WHITEHOUSE. Did you have occasion to look at the experience and the training of trained expert military interrogators as well?

Mr. FINE. Well, we looked at what the military interrogators were doing with regard to the detainees and how they came up with their plans. And it was not a well-thought-out, sophisticated plan based upon training or experience.

Senator FEINSTEIN. Senator Whitehouse, would you yield?

Senator WHITEHOUSE. Of course.

Senator FEINSTEIN. When the FBI does interrogations, they do it with their trained government people. The CIA uses contractors, and this is a huge difference, in my view.

I am sorry. Thank you.

Senator WHITEHOUSE. No, a very good point. I am glad you interjected it.

The Vice President indicated that waterboarding amounted to a dunk in the water. Secretary Rumsfeld indicated that standing stress positions were of no particular consequence because he stands at his desk longer than that every day. Do these statements, based on your investigation, fairly and accurately describe the effect of these coercive treatments at issue?

Mr. FINE. Well, first of all, we did not look at waterboarding because that was not done by the military or the FBI, and the stress positions are not simply just standing up for a period of time.

Senator WHITEHOUSE. No, but is it fair and accurate to equate a standing stress position with standing at your desk for hours?

Mr. FINE. I do not believe so, particularly depending on the duration of the stress position.

Senator WHITEHOUSE. That raises the question, at least with respect to Secretary Rumsfeld's statement, as to whether he simply did not know what the effect is of these stress positions, which is kind of an alarming thought that they are signing off on these things so ignorant of them that they do not really know what they mean or what they do. The only alternative, unfortunately, is that he knew perfectly well what they are and what they do, and he was dissembling or misleading.

Did your investigation turn up any evidence as to which of those is the more likely explanation of the discrepancy between his description of the technique and the actual true effect of the technique?

Mr. FINE. No, we did not look at Secretary Rumsfeld, or his state of mind, or the statements of Department of Defense high-level officials.

Senator WHITEHOUSE. Last question. Have you looked at *United States* v. *Lee*, the Fifth Circuit decision in which Texas sheriffs were prosecuted by the Department of Justice for waterboarding prisoners?

Mr. FINE. I have not looked at that, no.

Senator WHITEHOUSE. Ms. Caproni.

Ms. CAPRONI. No.

Senator WHITEHOUSE. Do you know if the FBI—well, a question for the record whether the FBI was involved in that prosecution.

Ms. CAPRONI. I will have to check. I would guess probably. Just based on what you have described, that would be sort of within our core jurisdiction.

Senator WHITEHOUSE. Very good. I appreciate it.

I thank the Chair for allowing a second round here.

Senator FEINSTEIN. You are very welcome.

I know Senator Schumer wanted to come to ask some questions, so I will ask just one question in the hope that he will arrive, or else we will go on to the next panel.

Mr. Fine, your report states that there was some friction between FBI officials and the military over the interrogation plans for Al Qahtani. Could you describe the nature of that friction, please?

Mr. FINE. The friction was whether these were appropriate plans, effective plans to be used on Al Qahtani. The military wanted to

use this phased, aggressive approach. The FBI did not believe it was effective or would obtain actionable, accurate intelligence. They objected to it. They raised concerns about it with both the Department of Defense, and we have indications they raised it with the National Security Council as well. Ultimately, the Department of Defense had the ultimate call on what techniques were used on Al Qahtani.

Senator FEINSTEIN. Thank you.

Senator Schumer has arrived. Senator Schumer, a 7-minute round. If you would like to make a statement, go ahead.

Senator SCHUMER. Well, thank you. And I first, Madam Chair, want to thank you for holding this very important hearing on a very important topic that goes right to the heart of who we are as a Nation and how we keep our Nation safe—the age-old balance between security and liberty, which has been one of the major topics of discussion in America since the days of the writing of the Constitution.

Now, speaking for myself, I abhor torture. I believe waterboarding and other similar techniques are unlawful and un-American, and not only that, but that Congress needs to ask, as we are doing in this hearing, whether coercive interrogation techniques are effective. That has been one of the great debates here. And by "effective," I mean that we need to know whether coercive interrogation yields accurate information that can help keep us safe. That is the ultimate standard.

The FBI has determined, based on decades of experience and expertise, that non-coercive, rapport-based interrogation techniques are the most effective ways to obtain information; and as Mr. Fine noted in his excellent and thorough report, numerous FBI officials question the effectiveness of coercive interrogation techniques.

So let me first ask a few questions of Ms. Caproni, and I thank you for being here, and you can answer them yes or no. You will see.

Does the FBI want to protect America?

Ms. CAPRONI. Yes.

Senator SCHUMER. And does the FBI want to make sure that criminals and terrorists are brought to justice?

Ms. CAPRONI. Absolutely.

Senator SCHUMER. Is the FBI's commitment any less strong than any other agency or component in the U.S. Government?

Ms. CAPRONI. No.

Senator SCHUMER. And the FBI has decades of experience and expertise in understanding what works and what does not in terms of investigation and interrogation, does it not?

Ms. CAPRONI. Yes, it does.

Senator SCHUMER. Then why the profound difference of opinion between the FBI and other U.S. agencies on the wisdom and effectiveness of using coercive techniques such as waterboarding?

Ms. CAPRONI. Senator, I do not know. I do not know why the CIA currently believes that these are the right techniques to use. I do not question their good faith. They believe it. We simply disagree on this.

Senator SCHUMER. And the kind of people you interrogate are not terribly different. They are similar in a lot of ways, or in certain instances—

Ms. CAPRONI. Frequently, they are the same people.

Senator SCHUMER.—drug dealers here in America, but—pardon?

Ms. CAPRONI. I said frequently they are the same people.

Senator SCHUMER. Yes, exactly. Okay. Now, I have a few more questions about this, Madam Chair.

The most fascinating case is provided by none other than Saddam Hussein. Ms. Caproni, isn't it right that the interrogation of Saddam Hussein was handled by FBI Special Agent George Piro?

Ms. CAPRONI. Yes, it is.

Senator SCHUMER. And Special Agent Piro has said publicly that no coercive techniques were ever used in interrogating Saddam Hussein, just traditional rapport building and manipulation. Is that correct, as far as you know?

Ms. CAPRONI. That is correct.

Senator SCHUMER. Now, as I understand it, that 7-month interrogation of Saddam Hussein was very successful. Special Agent Piro was able to find out how Hussein evaded American military forces for so long, and he got Hussein to confirm that Iraq's weapons of mass destruction had been destroyed years before our 2003 invasion.

Ms. Caproni, would you agree that this was an effective interrogation?

Ms. CAPRONI. Yes.

Senator SCHUMER. Did anyone in the administration ever push the FBI to use coercive techniques with Saddam Hussein?

Ms. CAPRONI. Not to my knowledge.

Senator SCHUMER. Okay. Do you think that coercive techniques would have been effective with Saddam Hussein?

Ms. CAPRONI. Again, we do not believe that coercive techniques are effective. We believe—

Senator SCHUMER. Let me just—Special Agent Piro, that was the interrogator, he says that coercive techniques would not have worked with Hussein because he had "demonstrated that he would not respond to threats or any type of fear-based approach." Do you have any reason to disagree with this view that coercive techniques would not have been effective?

Ms. CAPRONI. I have no reason to disagree.

Senator SCHUMER. Okay. So we are talking here about a notorious, cruel dictator, a tyrant, against whom the United States went to war twice, someone who hates the U.S., everything we stand for, we thought hiding weapons of mass destruction to use against us, and yet this pitiless tyrant cracked under the traditional technique of building rapport. He fell under the power of Special Agent Piro, gave up all kinds of information. If we did not use the coercive techniques with Saddam Hussein and if coercive methods would not have worked with Saddam Hussein, I cannot imagine why we would need to use them against anybody else. It is befuddling to me.

Now, I just have a little bit more on these disputes that there are in the agencies. Again, this is for you, Ms. Caproni. It has been suggested that there was "trench warfare" between the DOJ/FBI on

the one hand and DOD/NSC on the other with respect to what kinds of interrogation techniques should be used on detainees. Ms. Caproni, is that a fair characterization?

Ms. CAPRONI. I am not quite sure what "trench warfare" means in that context.

Senator SCHUMER. Pretty tough stuff, though, pretty heated discussions.

Ms. CAPRONI. There were definite disagreements between FBI/DOJ on the one hand and DOD on the other hand.

Senator SCHUMER. Okay. Let me ask you, did anyone in the Government put pressure on you, Director Mueller, or anyone else at the FBI to participate more directly in the coercive techniques at issue?

Ms. CAPRONI. You were not here when I gave my disclaimer, which is that I came to the Bureau in August of 2003, after the Director had made the decision that we would not participate. I know there were discussions within the administration. I do not know whether there was any pressure put on—

Senator SCHUMER. To your knowledge, you do not know one way or the other.

Ms. CAPRONI. I do not know one way or the other.

Senator SCHUMER. How about you, Mr. Fine?

Mr. FINE. No, we are not aware of that.

Senator FEINSTEIN. Would you yield for one moment?

Senator SCHUMER. I would be happy to yield to you, Madam Chair.

Senator FEINSTEIN. We invited Director Mueller to be here today, and in his stead, very ably, is Ms. Caproni. But I had hoped to be able to ask him that kind of question.

Senator SCHUMER. Right. And I would ask in the interim, could you—I do not know who is—I guess it would be Ms. Caproni. Could you inquire and get back to us? Could you ask some of the leadership?

Ms. CAPRONI. I will.

Senator SCHUMER. Great. Okay. Let's see. And did anyone—do you know this, either of you, did anyone at the FBI or DOJ threaten to resign over issues or disputes relating to the issue of coercive interrogation techniques on detainees?

Ms. CAPRONI. Not to my knowledge.

Mr. FINE. Not to my knowledge either.

Senator SCHUMER. Okay. And so you would not know then if there was any retaliation or retribution of any kind against anyone at the FBI or DOJ based on the refusal to participate in those interrogations?

Mr. FINE. No.

Senator SCHUMER. Let's see. I have 23 seconds, and you have been nice in waiting for me, so I will submit my last round of questions about destruction of documents for the record. And could I ask unanimous consent that the witnesses send written answers?

Senator FEINSTEIN. Without objection.

Senator SCHUMER. Thank you, Madam Chair.

Senator FEINSTEIN. Senator, you might be interested—and I thank you for those questions—in the fact that this afternoon, former FBI Agent Cloonan, who has interrogated al Qaeda suspects

and was very successful in so doing using these techniques, and we will hear from him directly, I think, as to the success that he has had. Now, of course, that was in the 1990s after the first World Trade Center bombing but, nonetheless, I think highly relevant to this discussion today. And we will continue this at 2 o'clock here. We are about to start—why don't I do this, because we are 20 minutes into the vote. Why don't we bring up the next panel, since I have got two Senators here.

Let me thank you both. You really do this Nation a service by being so straightforward, and it is very much appreciated. So thank you for being here this morning.

Senator FEINSTEIN. We will ask the next panel to come to the table, and I think we will have an opportunity to begin.

Pursuant to Mr. Sands' request, I will ask that you gentlemen stand and raise your right hand, please. Do you affirm that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. CLOONAN. I do.

Mr. SANDS. I do.

Mr. HEYMANN. I do.

Senator FEINSTEIN. Thank you very much. And I will make the three introductions together, and then we will begin.

The first witness will be Jack Cloonan. He is the president of the security firm Clayton Consultants. He was a special agent for the FBI from 1977 to 2002. He was assigned to the Bureau's Osama bin Laden Unit in 1996. He has personally conducted interviews of members of al Qaeda and has received several commendations and awards for his work for the FBI in counterterrorism investigations. Since retiring from the FBI, Mr. Cloonan has served as a counterterrorism consultant and commentator for ABC News.

The next witness will be Philippe Sands. He is a professor of law at the University College of London, and, again, I thank him for crossing the pond to be here today. And he is director of their Centre of International Courts and Tribunals. Mr. Sands has appeared before many international courts, including the European Court of Justice, the International Court of Justice, and the Special Court for Sierra Leone. He has written extensively on the subject of coercive interrogations and torture, including the books "Torture Team," published in 2008, and "Lawless World," published in 2006.

Philip B. Heymann has been the James Barr Ames Professor of Law at Harvard University since 1989. He has appeared before this Committee several times. He has authored several books addressing the balance between civil rights and security from terrorist attacks. Professor Heymann served as Deputy U.S. Attorney General in the Clinton administration, as Assistant Attorney General in charge of the Criminal Division, and as an associate prosecutor for the Watergate Special Task Force.

We will begin with Jack Cloonan. Mr. Cloonan, please proceed.

STATEMENT OF JOHN E. CLOONAN, RETIRED SPECIAL AGENT, WEST CALDWELL, NEW JERSEY

Mr. CLOONAN. Senator Feinstein and distinguished members of the Committee. Good morning and thank you for the opportunity to testify about coercive interrogation techniques, their effective-

ness, the reliability of the information obtained in this way and, the FBI's knowledge of these matters. It is my belief, based on a 27-year career as a special agent and interviews with hundreds of subjects in custodial settings, including members of al Qaeda, that the use of coercive interrogation techniques is not effective. The alternative approach, sometimes referred to as "rapport building," is more effective, efficient, and reliable. Scientists, psychiatrists, psychologists, law enforcement and intelligence agents, all of whom have studied both approaches, have come to the same conclusion. The CIA's own training manual advises its agents that heavy-handed techniques can impair a subject's ability to accurately recall information and, at worst, produce apathy and complete withdrawal.

I have personally used the rapport-building approach successfully with al Qaeda members and other terrorists who were detained by U.S. authorities. The information elicited led to numerous indictments, successful prosecutions, and actionable intelligence which was then disseminated to the CIA and the NSA and others. This approach, which the FBI practices, is effective, lawful, and consistent with the principles of due process. And in addition to its intelligence-gathering potential, it can do nothing but improve our image in the eyes of the world community.

A skilled interrogator, using elicitation techniques and understanding the end game, will serve the public's safety and our national security. The ultimate outcomes might be gathering evidence to support a prosecution or obtaining actionable intelligence to prevent a terrorist attack. I accept the argument that coercion will obtain a certain kind of information. I do not, however, accept the argument that sleep deprivation, sensory deprivation, head slapping, isolation, temperature extremes, stress positions, waterboarding, and the like will produce accurate information. An interrogation using rapport building obtains more reliable information and changes the relationship between the interrogator and the subject. Once a bond is formed between the two, the latter takes the investigator on a journey of discovery and sheds light on the darkest, most closely held secrets of an organization like al Qaeda. U.S. intelligence and law enforcement agents seldom get the chance to interrogate al Qaeda subject matter experts like Khalid Sheikh Mohammed, Ramzi Bin Al-Shib, Jamal Ahmed Al-Fadel, L'houssaine Kertchtou, Ali Abelseoud Mohamed, and Ibhn Sheikh Al-Libi, and these opportunities are too precious to waste. I am convinced by my experience that the rapport-building approach is the way to go in these circumstances.

As the conversion from antagonist to ally takes hold within the process and the recalcitrant subject begins to cooperate, the interrogator assumes the role of caretaker. He or she can then shape the conversation, listen intently for inconsistencies, and, finally, save untold man-hours chasing after false leads.

Critics of rapport building often say that the enemy we face today—the radical Islamist who is ready and willing to die for Allah—requires a more aggressive approach. They frame the debate by injecting the ticking bomb scenario. They suggest that there is no time to break bread with these killers. In fact, there are those who believe that the 9/11 attacks occurred because we treat-

ed terrorism as a law enforcement issue. This was not the case. In the months before the attacks, the "chatter" suggested that "something big" was imminent, but neither the law enforcement nor the intelligence community had an agent who knew what al Qaeda intended to do on that fateful day. The rapport-building approach used on an al Qaeda operative might have helped to address this frightening and dangerous reality.

I participated in many interviews with suspected al Qaeda members where actionable, reliable information was obtained. It was used in the successful prosecutions of al Qaeda operatives who murdered American citizens. The image of a former al Qaeda operative testifying under oath in district court and repudiating bin Laden and al Qaeda and its ideology of hate sent a powerful message to citizens of America and the world. Showcasing that message had an immediate impact. It highlighted the fact that bin Laden and al Qaeda are vulnerable, and it effectively answered those who believe in his omnipotence, America's weakness, and the hypocrisy of her leaders.

Bin Laden and his advisors often refer to U.S. intelligence and law enforcement agents as "blood" people. They mean simply this: We, according to bin Laden, use torture to extract information. Bin Laden has theorized that the most loyal al Qaeda sympathizer will break within 72 hours and give up operational information. Therefore, he has kept operational details about impending attacks strictly compartmentalized. In other words, those in the know or with a need to know were limited to a few trusted followers. My experiences and those of my former FBI colleagues would certainly support this conclusion.

The majority of jihadists detained post-9/11 were clueless when it came to al Qaeda's operational plans, and I do not believe many of the detainees posed a direct threat to the U.S. or were confidants of bin Laden or Ayman Zawahiri. A heavy-handed approach with these detainees was unlikely to generate any useful intelligence, and it served to validate bin Laden's take on America and our intelligence-gathering propensities.

Of course, obtaining reliable information from jihadist foot soldiers in Afghanistan and Iraq is vital to protect our troops, who are in harm's way. But even on the battlefield and under exigent circumstances, rapport building is more effective in gaining information for force protection in my opinion. Enhanced and coercive interrogation techniques are ineffective even under extreme circumstances. Senator, I have spoken to a number of FBI agents who were seconded to Gitmo as interrogators. In confidence, they told me the vast majority of detainees questioned under these stressful conditions were of little or no value as sources of useful intelligence.

Information is power, and the lack of reliable human intelligence assets, who are capable of telling us what al Qaeda is up to, is the greatest challenge facing U.S. law enforcement and the intelligence community. Technological assets, like signals intelligence, targeted wiretapping, and computer exploitation have preempted some terrorist attacks, and we are all grateful for that. I submit, however, that the most effective countermeasure to the threat posed by al Qaeda and like-minded groups is and always will be the apostate

who chooses to cooperate and, if you will pardon the expression, "spills the beans." Gaining the cooperation of an al Qaeda member is a formidable task, but it is not impossible. I have witnessed al Qaeda members who pledged "bayat" to bin Laden cross the threshold and cooperate with the FBI because they were treated humanely, understood what due process was about, and were literally seduced by our legal system, as strange as that may sound.

I am reminded of a conversation I had with an aide to bin Laden. He told me al Qaeda believes in the "sleeping dog" theory. The sheik is very patient, and the brothers will wait for as long as it takes for the dog to nod off before they attack. I believe we cannot relax our vigilance in the hope that bin Laden will forget.

There are three questions I would like this Committee to ponder. Has the use of coercive interrogation techniques lessened al Qaeda's thirst for revenge against the U.S.? Have these methods helped to recruit a new generation of jihadist martyrs? Has the use of coercive interrogation produced the reliable information its proponents claim for it? I would suggest that the answers are no, yes, and no.

Based on my experience in talking to al Qaeda members, I am persuaded that revenge, in the form of a catastrophic attack on the homeland, is coming, that a new generation of jihadist martyrs, motivated in part by the images from Abu Ghraib, is, as we speak, planning to kill Americans and that nothing gleaned from the use of coercive interrogation techniques will be of any significant use in forestalling this calamitous eventuality.

Torture degrades our image abroad and complicates our working relationships with foreign law enforcement and intelligence agencies. If I were the director of marketing for al Qaeda and intent on replenishing the ranks of jihadists, I know what my first piece of marketing collateral would be. It would be a blast e-mail with an attachment. The attachment would contain a picture of Private England pointing at the stacked, naked bodies of the detainees at Abu Ghraib. This picture screams out for revenge, and the day of reckoning will come. The consequences of coercive intelligence gathering will not evaporate with time.

I am hopeful that this Committee will use its oversight responsibility judiciously and try to move the debate in the direction of the prohibition of coercive interrogation techniques. This debate is a crucial one, and I know each member of the Committee understands that. The decisions you make will have a far-reaching impact on our national security.

Proponents of the ticking bomb scenario seek to forestall discussions on interrogation techniques by ratcheting up the intensity of the debate to panic mode. There simply is no time to talk to a terrorist who might have information about an impending attack.

Senator FEINSTEIN. Mr. Cloonan, I hate to do this because your statement is truly an excellent one and you are delivering it very well. But the time is running out on the vote, as you might be able to tell. So if you will permit me, I am going to recess the hearing, allow you to be first up to finish at 2 o'clock, and we will proceed from that point on and, I think, have a very interesting afternoon.

So I apologize to the three of you, but it is the way of the Senate. Thank you. This meeting is recessed until 2 p.m.

[Whereupon, at 11:35 a.m., the Committee was adjourned, to reconvene at 2 p.m., this same day.]

AFTERNOON SESSION [2:07 p.m.]

Senator FEINSTEIN. I am going to reconvene the hearing, and I am particularly thankful to Senator Whitehouse for being here, because we have an Intelligence Committee meeting that I know he very much wants to attend. And I want to make another apology to the witnesses. We had our votes at 11 o'clock, and it is my information, it came to my attention that there is going to be an objection on the Republican side to committees meeting. So we may have to stop. But then the Majority Leader may be able to recess so that this testimony can be taken.

I feel very strongly that this is an important subject, and I feel very strongly that we need to prepare a record and that we need to come to grips with what is happening out there and make some changes. And so I think this morning's hearing was helpful in that direction, and, Mr. Cloonan, you were concluding. I would like to give you the opportunity to conclude, and then we will move to Mr. Sands and to Professor Heymann.

Mr. CLOONAN. Thank you, Senator. I will be very quick with this.

When I left off, I wanted to start again. Proponents of the ticking bomb scenario seek to forestall discussions on interrogation techniques by ratcheting up the intensity of the debate to panic mode. There simply is no time to talk with a terrorist who might have information about an impending attack. Lives are at stake and the clock is ticking, so it just makes sense to do whatever it takes to get the information. Experienced interrogators do not buy this scenario. They know that a committed terrorist caught in this conundrum will seek to throw his interrogator off the track or use it to his propaganda advantage. "Go ahead and kill me, God is great." Neither the ticking bomb scenario nor the idea of a torture warrant makes sense to me.

To the best of my recollection, the first time I learned that coercive interrogation techniques were being used on detainees was in November 2001 at Bagram Air Base in Afghanistan. One case I am personally aware of involved Ibhn Sheikh Al-Libi, the emir of an al Qaeda training camp in Afghanistan. The FBI agents on the scene were prepared to accord Al-Libi the due process rights he might expect as an American citizen. The agents concluded after questioning that he would be a high-value and cooperative source of information as well as a potential witness in the trials of Richard Reid and Zacarias Moussaoui. Before the agents could proceed, a robust debate ensued between the FBI and the CIA. The CIA prevailed, and Al-Libi was rendered to parts unknown, possibly Egypt. I do not know the exact nature of the information his interrogation produced, but it is common knowledge that he has since recanted all that he said. I feel that a very significant opportunity to utilize the rapport-building approach was missed.

Without compromising delicate investigations, I can tell you that the FBI has amassed a considerable amount of reliable information on al Qaeda using rapport building. I will not attempt a full recounting in the interest of brevity, but here are a few salient examples.

I personally learned that al Qaeda tried unsuccessfully to obtain fissionable material in 1993 and that they experimented with chemical and biological agents. I also became aware of how they selected targets and conducted surveillance on them. And I learned of their intentions to use airplanes as weapons before this became a deadly reality. These interrogations also yielded information about al Qaeda's finances, recruiting methods, the location of camps, the links between al Qaeda and Hezbollah, bin Laden's security detail, and the identities of other al Qaeda members who were subsequently indicted in absentia and remain on the FBI's most wanted list. I am convinced of the efficacy of rapport-building interrogation techniques by these and other experiences.

Senator and gentlemen of the Committee, let me say that my heart tells me that torture and all forms of excessive coercion are inhumane and un-American, and my experience tells me that they just don't work.

With that, I conclude my comments and welcome your questions.

[The prepared statement of Mr. Cloonan appears as a submission for the record.]

Senator FEINSTEIN. Thank you very much, Mr. Cloonan.

Professor Sands.

STATEMENT OF PHILIPPE SANDS QC, PROFESSOR OF LAW AND DIRECTOR OF THE CENTRE OF INTERNATIONAL COURTS AND TRIBUNALS, UNIVERSITY COLLEGE LONDON

Mr. SANDS. Madam Chairwoman, honorable members of the Committee, it is my privilege and honor to appear before you. As Professor of Law at the University of London and as a practicing member of the English Bar, it may be said that I appear before you as something of an outsider. I hope you will bear in mind that I am from a country that is both friend and ally, that shares this country's abiding respect for the rule of law, and that has had its own long, painful experiences of dealing with the very real threat of terror. I have come to know America well over more than two decades, since I was a visiting scholar at Harvard Law School. I then taught at Boston College Law School and at NYU Law School. I happen to be married to an American. And I am deeply proud of the fact that my three children share British and American nationality.

A few weeks ago, I published an article in Vanity Fair, "The Green Light," and my new book, "Torture Team: The Rumsfeld Memo and the Betrayal of American Values." These both tell an unhappy story: the circumstances in which the U.S. military was allowed to abandon President Lincoln's famous disposition of 1863, that "military necessity does not admit of cruelty." This Committee will be very familiar with those events since it was a focus of the judicial confirmation hearings for William J. Haynes II in July 2006. You will recall that on December 2, 2002, on the recommendation of Mr. Haynes, Secretary Rumsfeld authorized the use of new, aggressive techniques of interrogation on Guantanamo Detainee 063. It is the famous memo, the one in which Mr. Rumsfeld wrote: "I stand for 8 to 10 hours a day. Why is standing limited to 4 hours?"

My book tells the story of that memo, the circumstances in which it came to be written, relied on, and rescinded, and how the techniques migrated. It is a snapshot of the subject of these hearings. To write the book, I journeyed around America, meeting with many of the people who were directly involved. I met a great number and was treated with a respect and hospitality for which I remain very grateful. Over hundreds of hours, I conversed or debated with, amongst others, the combatant commander and his lawyer at Guantanamo, Major General Dunlavey and Lieutenant Colonel Beaver; the Commander of United States Southern Command, General Hill; the Chairman of the Joint Chiefs of Staff, General Myers; the Under Secretary of Defense, Mr. Feith; the General Counsel of the Navy, Mr. Mora; and the Deputy Assistant Attorney General at DOJ, Mr. Yoo. I met twice with Mr. Haynes who, along with the Vice President's counsel, Mr. Addington, took a central role on the key decisions. I also met twice with Spike Bowman, the FBI Deputy General Counsel who received complaints from Guantanamo and took them to DOD. From these and many other exchanges, I pieced together what I believe to be a truer account than that which has been presented by the administration. In particular, I learned that in the case on which I focused, the aggressive techniques of interrogation selected for use on Detainee 063 came from the top down, not from the bottom up; that they did not produce reliable information, or indeed any meaningful intelligence; and that they were strongly opposed by the FBI.

My account is consistent, fully consistent with that of the report recently published by the Inspector General at the DOJ, on which we heard more this morning, although I do go further on some points of detail, I suspect for jurisdictional reasons. I did not have his limitations. I learned, for example, that the concerns of FBI personnel at Guantanamo were communicated directly to Mr. Haynes' office, in telephone conversations in November and December 2002 between Mr. Spike Bowman and, first, Mr. Bob Dietz; then Mr. Dan Dell'Orto, who was then Mr. Haynes' deputy and is now his acting successor; and third, Mr. Haynes himself. Mr. Bowman told me it was "a very short conversation, he did not want to talk about it all, he just stiff-armed me." You can find a full account of that at pages 112 to 121 of the U.S. edition of my book.

My conclusion, taking into account my conversations with Mr. Haynes, is that he was able to adopt that approach because by then, contrary to the impression he sought to create when he appeared before this Committee 2 years ago, he had knowledge of the contents of the DOJ legal memos written by Jay Bybee and John Yoo on the 1st of August 2002, memo No. 1 of which was most certainly intended for use also by the DOD.

On the basis of these conversations, I believe that the administration has spun a false narrative. It claims that the impetus for the new interrogation techniques came from the bottom up. It is not true. The abuse was the result of pressures driven from the highest levels of Government. It claims the so-called torture memo of the 1st of August 2002 had no connection with policies adopted by the administration. That, too, is false, as it is that memo that truly provided cover for Mr. Haynes. It claims that in its actions it simply followed the law. To the contrary—

Senator FEINSTEIN. I must interrupt you. Apparently, the Republican Leader has just objected to Committees proceeding, so for the moment, we will have to stop. And we will know as soon as it is acceptable to go ahead.

Mr. SANDS. Thank you, Madam Chair.

Senator FEINSTEIN. Thank you.

[Recess 2:15 p.m. to 2:21.]

Senator FEINSTEIN. The Majority Leader has just recessed the Senate so that we are now able to proceed. So, Mr. Sands, please proceed with your testimony.

Mr. SANDS. Thank you, Madam Chairwoman. I will try to not double up what I have already done.

I was restating the arguments of the administration and indicating the extent to which I feel those are not accurate. The administration claims, for example, that in its actions, it simply followed the law. To the contrary, the administration consciously sought legal advice to set aside international constraints on detainee interrogations, without apparently turning its mind to the consequences of its actions. In this regard, the position adopted by the Pentagon's head of policy at the time, Mr. Feith, in failing apparently to turn his mind to the key issues, appears most striking.

As a result of all of this, Common Article 3 of the Geneva Conventions was violated, along with provisions of the 1984 Convention prohibiting torture. The specter of war crimes was raised by United States Supreme Court, and in particular by Justice Anthony Kennedy, in the 2006 judgment in Hamdan v Rumsfeld. That judgment corrected the illegality of President Bush's determination that none of the detainees at Guantanamo had any rights under Geneva.

Madam Chairwoman, honorable members of the Committee, this is an unhappy story. It points to the early and direct involvement of those at the highest levels of Government, often through their lawyers. When he appeared before this Committee in July 2006, Mr. Haynes did not share with you his involvement—and that of Secretary Rumsfeld—which began well before that stated in their official version. He did not tell you, for example, that in September 2002 he had visited Guantanamo, together with Mr. Gonzales and Mr. Addington, and discussed interrogations. This is not, sadly, only a story of abuse and crime opposed by the FBI; it is also a story about a cover-up.

Chairman, for what purpose was this done? The administration claims that coercive interrogation of Detainee 063 produced meaningful information. That is not what I was told by those I interviewed. The coercive interrogations were illegal, they did not work, they have undermined moral authority, they have migrated, they have served as a recruiting tool for those who seek to do harm to the United States and to Britain, and they have made it more difficult for allies to transfer detainees and to cooperate in other ways. They have resulted in the very opposite of what was intended, contributing to an extension of the conflict and endangering the national security of this country. Astonishingly, on May the 14th last, the Pentagon announced that charges against Detainee 063 were being dropped. He is now, apparently, unprosecutable. It is not clear what future he has.

These unhappy consequences mirror Britain's experience in using similar techniques against the IRA in the early 1970s, and these were widely believed to have extended the conflict. The five techniques, as I referred, more or less identical to those used here, were very soon abandoned, but not before great damage was done. They have never been picked up again. Across the political spectrum, from left to right, in Britain there exists a unanimous belief that such techniques are wrong and can never be justified. Coercive interrogation, aggression, and torture must never be institutionalized. The view in Britain is that once the door is open, it is difficult, if not impossible, to close. And that is why, with the greatest respect to Professor Heymann, we have turned our back firmly against the institutionalization of coercive interrogation that appears to have been recommended by some in his report of 2000. And that is why even more strongly we are so vigorously opposed to the related idea of torture warrants, as floated by Professor Dershowitz, an idea which, as I describe in my book, and somewhat to my surprise, directly undermined the efforts of those who opposed the abuse at Guantanamo.

In conclusion, Chairwoman, I can put it no better than George Kennan, the great American diplomat. In 1947, he wrote a telex that issued this warning in relation to a perceived Soviet threat: "[W]e must have courage," he wrote, "and self-confidence to cling to our own methods and conceptions of human society. [T]he greatest danger that can befall us . . . is that we shall allow ourselves to become like those with whom we are coping."

Chairwoman, honorable members of the Committee, no country—no country—has done more to promote the international rule of law than the United States of America. Uncovering the truth is a first step in restoring this country's necessary leadership role; in undoing the great damage that has been caused; and in providing a secure, sustainable, and effective basis for responding to what is a very real threat of terrorism.

I thank you for allowing me the opportunity to make this introductory statement, and, of course, I would be delighted to take your questions.

[The prepared statement of Mr. Sands appears as a submission for the record.]

Senator FEINSTEIN. Thank you very much, Mr. Sands.

Professor Heymann, it is good to see you again, sir. Please proceed.

STATEMENT OF PHILIP B. HEYMANN, JAMES BARR AMES PROFESSOR OF LAW, HARVARD LAW SCHOOL, CAMBRIDGE, MASSACHUSETTS

Mr. HEYMANN. Thank you, Madam Chairwoman.

I have been viciously defamed by Professor Sands and maybe the Ranking Minority Member. I am of course, not serious but joking. I think I am here under the illusion that I—that you wanted someone on the panel who would defend torture and cruel, inhuman, and degrading or highly coercive techniques. That's not me.

What Juliette Kayyem and I recommended and published was something that takes the step that I think has not been discussed at all today, Madam Chairwoman, and I think it is an essential

one. We recommended that the Attorney General should propose to the President a list of permissible techniques consistent with the ban on torture and consistent with the ban on cruel, inhuman, and degrading treatment; and that there be no exception to this list. The United States would not do anything that was torture and it would not do anything that violated the ban on cruel, inhuman, and degrading treatment, which means under the Senate's reservation it would not do anything that the Supreme Court would hold "shocked the conscience." It does not say of whom. Presumably of the American people.

We then went on and said that that list has to be made available to the appropriate committees of the Senate and the House. It cannot be kept secret from them.

We said if anybody is ever going to engage in an interrogation technique that is not on that list, it would have to be on a published finding by the President that lives were imminently at stake, that this individual had the information that could save lives, and that there was no other technique that would work. In short, I think that our proposal was more protective than any proposal that has been made to this Committee, including today.

My written testimony is very consistent with Mr. Cloonan's testimony and Professor Sands'. It says that we do not need torture. I have met with the leading interrogators in France, Britain, Spain, Israel, the CIA, the DOD, the FBI over a 3- or 4-year period. I have to say that I agree with Mr. Cloonan's description. But the problem that the Committee faces, the problem that the Congress faces, is that the words saying what is not permissible have lost their meaning. The administration agrees that torture is absolutely forbidden with no exception—in my testimony, I have quoted where they say that, "no exception"—but they do not regard waterboarding as torture. And thus we have no idea what they regard as torture.

The Detainee Treatment Act of 2005 belatedly forbids all forms of cruel, inhuman, and degrading treatment. But nobody knows whether the steps that Inspector General Fine described—putting in solitary confinement, environmental manipulation, food changes, stress positions, prolonged shackling, sleep deprivation—are cruel, inhuman, and degrading. They feel pretty cruel to me. But the problem is that we are talking in vague terms with no determinate meaning.

The only way for the United States to give determinate, proud meaning to those terms is for either the Congress or the President, with congressional oversight, to list what is permissible. Nothing is permissible that is torture; but what is torture and what is permissible under the category of non-torture? That list must be made available to the Congress and the administration must be bound by that list unless the President himself says that we have an emergency so severe that he has to depart from the list and why.

The President's argument has been that if you tell the terrorists what can be done to them, they will be at an advantage in meeting that in interrogation. Well, the Congress, the relevant committees of Congress, will know what is on the list. The terrorists will not.

I agree with Mr. Cloonan's statement and the statement of a number of others that the ticking bomb case is largely a red her-

ring. We have not had a situation in the last 7 years since September 11th in which we have been able to identify an individual who has information that would prevent a lethal attack of a substantial size and that could not—and information that cannot be obtained as well in a different way.

That particular event is a difficult one. It is a philosophically hard one. It is the example that all of the supporters of coercive interrogation argue from. We dealt with that—not in the only way. We dealt with that by saying no torture, but you could, on the President's order, if all those conditions were met and if he filed a statement to that effect, he could depart from a list of techniques to choose others that were also consistent—consistent—with the prohibition of cruel, inhuman, and degrading. We did not give him a lot of leeway. We gave him very little leeway. But the real ticking time bomb situation has not happened, and it is not likely to happen, and we should not pay much attention to that highly unusual possibility in defining what the American rules are. We tried to leave a little bit of leeway. You can do it other ways, too.

I think I can stop there, but, again, my point is that we are at a stage now where everybody agrees and says that torture is forbidden. And now the Congress has said, without providing a remedy, in 2005 that anything cruel, inhuman, and degrading, meaning "shocking the conscience" from the Supreme Court precedent, is forbidden. But we have no agreement on what "shocking the conscience" means or what "torture" means and no possibility of the courts filling in that gap. That should not be a decision made by the President alone. It is not his conscience that has to be shocked. It is the conscience of the American people, and the Congress can speak to that.

[The prepared statement of Mr. Heymann appears as a submission for the record.]

Senator FEINSTEIN. Thank you very much, Professor Heymann. Just a comment and then I want to recognize Senator Whitehouse, who has done so much work in this area.

I think—well, Senator, I will save my comment. I was just going to say the thing that we would replace this with is the Army Field Manual, which prohibits eight specific interrogation tactics and has some 18 to 21—I forget exactly how many—various strategies which are comprehensive and individuals are taught how to do what Mr. Cloonan essentially spoke about. And we believe that there should be one standard throughout our entire Government, and because this is accepted now by the military, has been worked on for 4 years, revised just about a year ago, that it is really the best way to proceed.

Let me turn it over to Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Madam Chair. We are having a slight delay in the Intelligence Committee, so I was able to come back for a moment. We have OLC in the Intelligence Committee, so torture is the theme throughout this building today.

First, I just want to say thank you to Special Agent Cloonan for his career of service to our country. Anybody who has read "The Looming Tower" and seen the references to him in there knows how hard the FBI worked towards the end to try to be prepared

for the eventuality that became the 9/11 disaster, and I just want to express my personal appreciation to you for your service.

I will ask again the question that I asked before. You had the Vice President of the United States publicly comparing waterboarding—this is a term that most Americans were not particularly familiar with—to a dunk in the water. You had the Secretary of Defense of the United States of America comparing the stress position interrogation method to himself standing at his desk. Would you first give me your view on the extent to which either of those comparisons fairly or accurately represents the effect and substance of those two methods? Anyone who feels qualified to answer.

Mr. CLOONAN. To your question, Senator, the issue of stress positions, waterboarding, whether it is a short dunk or whether these prolonged stress techniques amount to torture in my view, I—

Senator WHITEHOUSE. My question is: Do you think that is a fair way to describe—

Mr. CLOONAN. I do not think it is a fair way. I do not think it is a fair way of describing it. I mean, waterboarding is an extreme interrogation technique. It is torture. Those who have been submitted to it will tell you so. I have never undergone it myself. I know a number of people who have.

The stress positions that you were talking about are extreme, being hung from the ceiling and various other things. Those are very, very extreme and counterproductive. So they are not things that we should treat lightly. The way they were described, I would disagree with the way they were described.

Senator WHITEHOUSE. Professor Sands, do you disagree with that?

Mr. SANDS. I agree with what Mr. Cloonan has said. I would start this from the proposition of how we would look at it dealing with the situations in the U.K. We have English law. We have international obligations. We look to our international obligations. There is no one I can think of in the United Kingdom who would not immediately conclude that the use of waterboarding, which is creating the misperception of suffocation, is torture in all circumstances, and we are, frankly—

Senator WHITEHOUSE. The reason that I am asking this—I have limited time, so forgive me if I jump in from time to time. The reason I am asking this is that we have two very significant officials of the Government of the United States of America who have apparently a fairly considerable misperception of what the techniques are that they authorized. And it strikes me that if they have authorized these techniques under the misperception that you all have identified, that is a pretty significant failure of communication and knowledge. It is ignorance of a very high order at a very high level about a very significant matter.

The only alternative, which is not any better, is that they actually do know how devilish these techniques are and how devilish their application can be, and they deliberately sought to mislead the American people about exactly what America was now responsible for doing. And I do not see a third road. It seems it is either—you either knew it or you did not. You either should have known or you should have told the truth.

Mr. SANDS. I regret to say I think the answer is that your first option is excessively generous. Your second option is the one that I would go for, and I think I have got a pretty reasoned basis for doing that.

The administration, if you go back to December 2001, January 2002, February 2002, forms the clear view that the Geneva Conventions, and in particular Common Article 3—outrages against human dignity, cruel, degrading treatment, et cetera, as well as torture—stood in the way of aggressive techniques of interrogation. And they, therefore, designed an approach led by people like Doug Feith to set aside the Geneva Conventions. And that is consistent with the conclusion that they knew very well what they were doing and that the use of this language was actually intended to signal to people on the ground that the people at the highest levels have no problem with it.

Senator WHITEHOUSE. Green-lighted it, to use your phrase.

Professor Heymann, you are now a professor of law at Harvard University. You have served in the United States Department of Justice. Very briefly, the Office of Legal Counsel, what is its tradition and history within the Department? What has its reputation been prior to the Bush administration?

Mr. HEYMANN. I think prior to the Bush administration it had a very high—was held in very high repute for the fairness and objectivity of its opinions.

Senator WHITEHOUSE. Have you had the occasion to review the unclassified opinion authorizing torture?

Mr. HEYMANN. Yes, I have.

Senator WHITEHOUSE. Have you had occasion to review the sourcing of the definition of "severe pain" back into the Medicare and Medicaid reimbursement statutes?

Mr. HEYMANN. Yes. I thought it was highly creative. It has nothing—it is a totally impermissible reading of law. Professor Sands had said to me earlier before you began how much he enjoyed being at Harvard for a year because it brought him into an open-minded and intelligent attitude towards what a law means. This was totally beyond the pale.

Senator WHITEHOUSE. Let me ask you this: Are you familiar with the Fifth Circuit decision in *United States* v. *Lee*, in which the Department of Justice in the 1980s brought a prosecution against a Texas sheriff and two of his associates for waterboarding prisoners in order to extract confessions from them?

Mr. HEYMANN. The first time I heard of that was when you mentioned it this morning. I did know that we have—we prosecuted Japanese for war crimes for waterboarding after World War II.

Senator WHITEHOUSE. As a professor of law, would you consider a case that addressed waterboarding in the United States and described it as water torture to be on point to the question whether waterboarding was torture as a matter of law?

Mr. HEYMANN. The Fifth Circuit case, Senator?

Senator WHITEHOUSE. Would you consider it an on-point case to the questions they are trying to answer?

Mr. HEYMANN. Not having read it, it sounds, as you describe it, very close.

Senator WHITEHOUSE. Would it surprise you that the Office of Legal Counsel would, on the one hand, find precedent in Medicare and Medicaid reimbursement law and, on the other hand, not find the case that is directly on point that was actually prosecuted by the Department of Justice itself?

Mr. HEYMANN. I think that the Office of Legal Counsel was working hand in hand with the counterterrorism policy officials in the White House, was consulting with them regularly, and had very much in mind what decision they intended to reach and were expected to reach.

Senator WHITEHOUSE. Thank you very much.

Senator FEINSTEIN. Thank you very much, Senator.

Mr. Sands, if I might, the Bush administration has said that the coercive intelligence techniques and torture used at Guantanamo originated from the military interrogators and JAG lawyers at Guantanamo, and you speak about that in your articles and your book. In testimony before this Committee, former DOD General Counsel Jim Haynes said, and I quote, that he "did not seek a written opinion from the Department of Justice" on coercive interrogation techniques at Guantanamo. He also said that he "did not have a copy of it," and "it" is the August 1, 2002, Yoo memo, and "did not shape its legal analysis."

You have interviewed Mr. Haynes on how many occasions?

Mr. SANDS. I have met with him on two occasions.

Senator FEINSTEIN. On two occasions. Did you ask him if he had read or was otherwise aware of the conclusions in the August 1, 2002, OLC memo before recommending that Secretary Rumsfeld authorize coercive interrogations at Guantanamo?

Mr. SANDS. Chairman, I wonder if I can come to this in a roundabout sort of way.

Senator FEINSTEIN. Okay. Any way you—

Mr. SANDS. I am very familiar with his testimony before this Committee on, I think, the 11th of July—

Senator FEINSTEIN. "His testimony" being Mr. Haynes'?

Mr. SANDS. Mr. Haynes' testimony of 11th of July 2006. The one question he was not asked was whether he had knowledge of the contents of the memo of the 1st of August 2002. I established to my complete satisfaction that he did have knowledge of the contents of that memorandum, and I established that on the basis of my conversations with General Myers, with General Hill, with Mr. Feith, amongst others.

I then had occasion to meet with—

Senator FEINSTEIN. You understand you are under oath.

Mr. SANDS. I then had occasion to meet with him, and I met with him on an undertaking that although the fact of our meeting would not be confidential, I gave him an undertaking that the conversations were off the record and, therefore, I did not in the book make any reference to the conversations that we had.

What I did was in the penultimate chapter indicate in the last sentence that my conclusions would take fully into account everything I had learned from him, and in the last chapter, I set out very clearly my view that he had knowledge of the content—he, Mr. Haynes, had knowledge of the contents of that memo, certainly by the time he went down to Guantanamo in September 2002.

Mr. HEYMANN. Madam Chairwoman?

Senator FEINSTEIN. Yes, Professor Heymann?

Mr. HEYMANN. I would like to speak up a little bit for Jim Haynes.

Senator FEINSTEIN. All right. Please do. That is fine.

Mr. HEYMANN. When Juliette Kayyem and I wrote our recommendations on the ten hardest questions—highly coercive interrogation, detention without judicial trial, targeted killings, et cetera—I sent them to Jim Haynes, and he asked me if I would come down and present them to Attorney General Gonzales and Harriet Miers, the White House counsel. I did that, and I think he did it because he thought that it was time to look at those questions in a less frightened, less knee-jerk way. And I appreciated it very much. I thought he was trying to move the administration—unsuccessfully, I may say.

Senator FEINSTEIN. Okay. Thank you.

I would like to proceed along this line for a moment. This morning I mentioned the special agent's memo to Mr. Bowman, the Deputy General Counsel for national security law at the FBI. Mr. Sands, did Mr. Bowman tell you that he contacted Jim Haynes and other officials at DOD earlier in November and December 2002 about the concerns relating to coercive interrogation techniques at Guantanamo?

Mr. SANDS. He did. Mr. Bowman told me very clearly—and I met with him twice, and I went in great detail over these issues and managed to ratchet down the dates. He spoke first to his friend Bob Dietz, who was a senior intelligence person in DOD, whom he knew well; and I described that conversation in the book. Mr. Dietz evidently told him that the person who was dealing with this was Mr. Dell'Orto, so when he received a further complaint from Guantanamo, by now we are about the 19th or so of November. So this is well before the memorandum was written on the 27th of November 2002. He contacted Mr. Dell'Orto. Mr. Dell'Orto evidently told him he would look into these things, but most significantly, Mr. Dell'Orto, who was, of course, Mr. Haynes' deputy, confirmed that he already had knowledge that there were concerns about what was happening. Mr. Dell'Orto did not then get back to him. Mr. Bowman told me he did not read anything negative into that because he just assumed it was being sorted out. It did not occur to him for a moment that there was actual systematic abuse taking place.

Unfortunately, he then received a further communication from an FBI agent down at Guantanamo, and at some point in early December—he could not remember the specific date; he just remembered—telling me, "I remember that there was a lot of snow on the ground on that date." He called Mr. Dell'Orto. Mr. Dell'Orto was not there. He spoke to Mr. Haynes, and Mr. Haynes fobbed him off. On that basis, I think it is pretty clear on Mr. Bowman's account that Mr. Haynes would have had knowledge of concerns of what was going on down at Guantanamo by the time he signed his memorandum on the 27th of November and further confirmation after that date and before it was rescinded.

Senator FEINSTEIN. Okay. Now, one of the presiding concepts, I think, of this administration has been that the Article II powers of

the President, the Commander-in-Chief authority derived thereof, is such that it virtually overrides anything. It has been asserted that the Geneva Conventions do not apply to detainees, that the President has the constitutional authority to violate the Convention Against Torture and the U.S. torture statute, and that the President's Executive power essentially trumps the powers of the other branches of Government in times of war.

Professor Heymann, I would like to get your view of that from a constitutional, legal point of view.

Mr. HEYMANN. Well, I am afraid that a great deal of very detailed work, hundreds and hundreds of pages have been done by my colleague, David Barron and by Marty Lederman. I have a quite different view of the whole thing, and I can state it very simply.

Number 1, I do not think the problem is a Commander-in-Chief problem. I think the President may have to violate a statute if we have an earthquake, like China has just had; if we have an outbreak of the plague or a smallpox epidemic; if we have a flood in New Orleans; that statutes are not themselves absolute. Every country that I know of except the United States has emergency powers. We do not have emergency powers, and we are probably better off for not having emergency powers in the Executive. But I think that the problem that we then have to deal with as a Nation is what do we want to have happen when there is a very grave emergency and there is a law that stands between the Executive and dealing with it.

If I can say one other thing, as to the Commander-in-Chief powers, I think it cannot—I do not think the Framers of the Constitution, who separated powers and gave great powers in Article I to the Congress and in Article III to the Supreme Court, and who would not pass the Constitution without a Bill of Rights, could not have agreed that the President can decide when he can set aside those protections that they insisted on by deciding that we were at war. I think a totally clear decision by the Congress—it does not have to be a declaration of war—would have to be necessary. It is hard to imagine the writers of the Constitution saying we want this protection, that protection, and this and that, all against the Executive power, and then saying, However, when the President says there is a war, he can ignore it as Commander-in-Chief.

Senator FEINSTEIN. Thank you very much. That is really the heart of the argument of much of what has gone on.

I want to be concise here because the Senate is in recess, and I do not want to keep—there are important issues on the floor, so, Professor Sands, do you have a comment you would like to make?

Mr. SANDS. Very briefly on that, and I am not an expert on the U.S. constitutional provision so I cannot express any view on that. But I think it is also important to put this in an international context. We are dealing with treaties from which, particularly in relation to torture, there is no national security or emergency exception. The ban is absolute. So whatever may be the position under the domestic law within the United States—or indeed any other country—as a matter of international law you violate that law and you expose yourself to the risk of international criminality and international investigation. That is the first point I would make.

The second point is this: Imagine the same argument being made by a foe of the United States. Why can't the President of Iran or the President of some other country that may from time to time be feeling hostile toward the United States—and, actually, we too face such a national security emergency—that we are going to justify the use of these techniques? And the danger with the argument in a globalized world is that by adopting these techniques domestically within the United States, you expose U.S. troops to their use internationally. And no country is more peripatetic than the United States.

Senator FEINSTEIN. Thank you.

I would like to ask one question, if I might, of Mr. Cloonan. Mr. Cloonan, you were speaking in your comments that you gave earlier to the effect that there are certain instances where certain kinds of intelligence, SIGINT, other kinds of intelligence, have produced information that really was valuable. Do you know offhand of any cases where torture as we mean it in terms of the broader expanse of enhanced interrogation techniques has actually produced critical intelligence information?

Mr. CLOONAN. No, Senator, I don't.

Senator FEINSTEIN. So it is your belief, as someone who has looked at this, that most of it has come from other means of intelligence gathering rather than HUMINT?

Mr. CLOONAN. I would say—

Senator FEINSTEIN. Other than torture, let me put it that way.

Mr. CLOONAN. Yes, I understood what you said. Yes, back to my statement, yes, a lot of good information has come from the techniques that you have discussed or the technological assets we have deployed. But most of the good stuff, Senator, comes from good old field work and from that rapport-building approach that I alluded to. That is where the rubber meets the road. That is when the skill of a good interrogator who is confronted with this issue, who sits across the table from a member of al Qaeda, as I said in my statement, a person who has pledged their allegiance to bin Laden, a person who knows the information, that is where it works.

This is the challenge that we have, and I think that when you do and are successful at getting that information, it is unbelievable, Senator, how much time and effort you save, how much resources you save from chasing after fruitless leads. And if you will pardon the expression, when you do reach that point in an interrogation and that subject is broken—and I have seen it happen any number of times—there is literally a physical reaction. And you know at that point that you have hit it. You know that you have hit a home run. And in my particular case, dealing with these people from al Qaeda, Egyptian Islamic Jihad, and other groups, they almost feel in their heart that they have a moral obligation to cooperate with you.

Senator FEINSTEIN. How many al Qaeda members did you interrogate?

Mr. CLOONAN. Many.

Senator FEINSTEIN. Give me a number.

Mr. CLOONAN. I would say people who pledged "bayat," who were members of al Qaeda, I would say half a dozen.

Senator FEINSTEIN. And how many—

Mr. CLOONAN. There were many that were on the periphery.

Senator FEINSTEIN. Right. Of that half dozen, how many were prosecuted?

Mr. CLOONAN. Several, and some were—

Senator FEINSTEIN. Several.

Mr. CLOONAN. Three or four, and some were put into the witness protection program.

Senator FEINSTEIN. And the three or four that were prosecuted, what was the verdict? Were they convicted?

Mr. CLOONAN. They are guilty. In fact, everybody that we spoke to and everybody that agreed to cooperate with us walked into the Southern District of New York in a sealed courtroom and pled guilty. So we were very, very successful in that. I mean, we had a wonderful team of prosecutors. And it is amazing, Senator, when you sat, again, in these situations and you explained to these people from al Qaeda what the consequences were going to be, you would think that the cooperation would end right there. It did not. They understood what the consequences were going to be, and in some instances, their exposure was zero to life. And I can assure you that pleading guilty and being sentenced to life in prison and spending a life at Supermax in Florence, Colorado, is something that is incredibly powerful.

And I alluded in my statement, we have a tendency sometimes to sort of poke fun at our legal system. We complain about it. When you have a member from al Qaeda and you literally explain to them what their rights are and that they understand that they do not necessarily have to speak to you, they are perplexed by that. They are troubled by it. And, frankly, it starts a dialogue. And when you have the opportunity to take information that the United States Government has in its possession under the rules of discovery and you give those to an al Qaeda member to look at, for example, and he thinks this is an amazing system, the United States Government is allowing me to see what it has against me, and for them, to correct what you think to be accurate, again, is amazing.

Senator FEINSTEIN. I cannot help but contrast what you are saying with Khalid Sheikh Mohammed, who has admitted that he was the perpetrator of the murder of the Wall Street Journal reporter Danny Pearl, who has admitted that he planned 9/11, and yet would cooperate in no way, shape, or form and wants to die.

Mr. CLOONAN. Well, as you probably recall, Senator, Khalid Sheikh Mohammed was indicted in the Southern District of New York in 1996 for his role in the Bojinka plot. So the FBI in New York knew an awful lot about Khalid Sheikh Mohammed, and that was a real difficult situation for us, the fact that we did not have access to him right away.

I think when Khalid Sheikh Mohammed, frankly, gave his interview to Al Jazeera, you might recall, on the first anniversary of 9/11, I think you saw in that that he was celebrating the fact. I had an opportunity, frankly, to look at some of the videotape when he was first detained by the Pakistani authorities. And it was my conclusion, just based on looking at him very quickly, he was not going to be a tough nut to crack. This is a man who is very proud of what he did. He was celebrating what he did. This is what his life was.

And all you had to do, frankly, is have the opportunity to let him tell his story. And I believe that we did not have to engage in any techniques that are alleged to have occurred against him, waterboarding being one.

Senator FEINSTEIN. Thank you very much.

I want to take this opportunity to thank the three of you and once again to apologize for the vagaries of the United States Senate and the schedule. I am very grateful to you for being here.

Mr. Cloonan, I want to echo what Senator Whitehouse said to you. Thank you for your excellent service to this country.

Dr. Sands, thank you for, again, crossing the ocean to be here today. It is very much appreciated.

And, Professor Heymann, I am sure I will see you again and again before this Committee. Thank you very much for your excellent testimony.

Thank you, gentlemen, and the hearing is adjourned.

[Whereupon, at 3:02 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

November 20, 2009

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

Dear Mr. Chairman:

Please find enclosed responses to questions arising from the June 10, 2008, appearance before the Committee of FBI general counsel Valerie Caproni at a hearing entitled "Coercive Interrogation Techniques: Do They Work, Are They Reliable, and What Did the FBI Know About Them?" The responses were current as of December 19, 2008.

We hope that this information is helpful to the Committee. The Office of Management and Budget has advised us that, from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Ronald Weich
Assistant Attorney General

cc: The Honorable Jeff Sessions
Ranking Minority Member

Responses of the Federal Bureau of Investigation to Questions for the Record Arising from the June 10, 2008, Hearing Before the Committee on the Judiciary United States Senate Entitled "Coercive Interrogation Techniques: Do They Work, Are They Reliable, and What Did the FBI Know About Them?"

Questions Posed by Senator Kennedy

1. The recent Office of the Inspector General (OIG) report indicates that on several occasions, the FBI made the commendable decision not to participate in interrogations because of the use of harsh techniques that the Bureau had rejected. The report also notes other instances in which FBI agents learned of physical abuse of detainees and were uncertain whether U.S. government interrogators were violating U.S. law (see, e.g., pp. 238-39). Yet, despite these concerns and the fact that CIA's Inspector General referred five cases of potential misconduct to the Justice Department between February 2003 and 2004, the FBI chose not to pursue any investigations into detainee abuse (p. 112). The FBI is the chief investigative arm of the Department of Justice, and we now know that on multiple grounds, the Bureau had reason to believe that some U.S. interrogators' actions may have been illegal. Why didn't the FBI begin any investigations?

Response:

This question appears not to distinguish the treatment of detainees by members of the military from the treatment of detainees by employees of the Central Intelligence Agency (CIA).

Consistent with Section C.2 of the "Memorandum of Understanding Between the Departments of Justice And Defense Relating to the Investigation and Prosecution of Certain Crimes" (hereinafter MOU) and implementing Department of Defense Directive 5525.7 (1985), the FBI referred all instances of abusive or arguably abusive treatment of military detainees known to the FBI to the Department of Defense (DoD), which bears responsibility for such investigations under the MOU. Pursuant to the MOU, DoD is required to provide notice of such investigations to the Department of Justice (DOJ), and may refer a case to DOJ if evidence supports prosecution before civilian courts. After their own investigation, DoD did make some referrals to DOJ, which referred these cases to a task force in the United States Attorney's Office in the Eastern District of Virginia for potential prosecution.

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The referrals discussed at page 112 of the OIG report related to allegations of misconduct against CIA employees or contractors. The CIA OIG referred these incidents, as well as later, additional incidents, to DOJ for investigation.

The FBI conducted additional investigation as needed in the cases that were referred to DOJ. As an investigative agency, the FBI is not charged with the ultimate decision to prosecute a particular case; this determination is instead made by others in DOJ.

2. Since September 11, 2001, according to the OIG report, the FBI has adhered to its preexisting policies on interrogation, which had been tried and tested in prior counterterrorism investigations. Yet, the report also notes that FBI agents sought guidance from their superiors on four distinct issues following the 9/11 attacks: which techniques FBI agents could use in military zones, what they should do when other agencies used non-FBI-approved techniques, when to interview detainees who had been harshly interrogated, and how to report these incidents (p. 144). Before issuing its written policy on these questions in May 2004, did the FBI ever seek or receive guidance from the Office of Legal Counsel or any other arm of the Justice Department regarding interrogations in which coercive tactics were being used?

Response:

The FBI did not seek or receive guidance from the Office of Legal Counsel (OLC) or any other arm of the Justice Department before issuing its guidance in May 2004.

3. The OIG report reveals that after the Abu Ghraib scandal became public in April 2004, the FBI developed and deployed a policy to address situations in which FBI agents were present at or otherwise knew of interrogations in which other government agencies were using non-FBI approved interrogation techniques by May 19th. However, the report also states that the FBI knew of the abuses at Abu Ghraib prison in January, but took no measures at that time to clarify its own policies or to gain a better understanding of the legal limits of other agencies' behavior. Why did the FBI wait until the Abu Ghraib scandal broke before taking such action?

Response:

As indicated in the OIG report, agents who were deployed in Iraq were aware in January 2004 that the allegations of mistreatment of detainees by United States government personnel at Abu Ghraib were "founded" and that the Army's Criminal Investigation Command (CID) was investigating those allegations. The FBI determined that the responsibility for investigating the conduct of military personnel in Iraq rightfully fell to the military. There was no indication at that time that FBI employees had any doubt about the standards they were to use when conducting interrogations. Nor was there any indication at that time that the sort of

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misconduct being investigated (beatings and a rape) was the result of policies that allowed aggressive techniques to be used during military interrogation as opposed to blatant misconduct. In addition, it is not accurate to suggest that the FBI "wait[ed] until the Abu Ghraib scandal broke" to take action. Rather, the publicity surrounding the Abu Ghraib scandal brought to FBI management's attention the fact that we had not previously specifically reminded FBI employees that FBI policy governing interrogation techniques, which has been in effect for years, had not changed, regardless of what policies were in place for other government agencies.

4. Over the course of U.S. involvement in Iraq and Afghanistan since 9/11, there have been numerous allegations about contractors mistreating detainees in military zones. The FBI itself has documented serious allegations of mistreatment by contractors at the Guantanamo Bay prison camp.

a. What procedures does the FBI follow when it receives such allegations?

Response:

In accordance with FBI policy, if an FBI employee knows or suspects that a detainee has been abused or mistreated, the FBI employee must report the incident to the FBI's on-scene commander and to the appropriate FBI chain of command. As discussed in the response to Question 1, above, in accordance with Section C.2 of the "Memorandum of Understanding Between the Departments of Justice And Defense Relating to the Investigation and Prosecution of Certain Crimes" and implementing DoD Directive 5525.7 (1985), the FBI refers any allegations of abusive, or arguably abusive, treatment of detainees under DoD control to DoD for investigation. Pursuant to the MOU, responsibility for investigating such matters belongs to DoD. Under the MOU, DoD is required only to provide notice to DOJ, although a DoD investigative agency may refer a case to DOJ if the evidence supports prosecution before civilian courts. Under the Fiscal Year 2007 Military Authorization Act, U.S. military contractors deployed to Iraq and Afghanistan became subject to the Uniform Code of Military Justice (UCMJ). Under the MOU, DoD is only required to notify DOJ of crimes committed by personnel subject to the UCMJ in "significant cases in which an individual subject/victim is other than a military member or dependent thereof."

b. Has it investigated these allegations as potential criminal violations?

Response:

As noted above, the FBI has referred such allegations to DoD for appropriate investigation.

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5. Numerous sources have reported on the U.S. government's use of "extraordinary rendition" in recent years, even though domestic and international law prohibit the United States from transferring people to places where there is a substantial risk they will face torture. Did the FBI ever initiate, or was the FBI ever involved in, any renditions of prisoners to or from a non-U.S. territory for the purpose of interrogation?

Response:

The FBI has not initiated or intentionally participated in the rendition of suspects to third countries. In one incident, however, an FBI source invited an individual from one foreign country to another and, over the objection of the FBI, the person was taken into custody and removed to a third country by another U.S. government agency.

6. After Attorney General Ashcroft reportedly conveyed the FBI's concern over the use of harsh interrogation tactics to DOD and the CIA, those agencies continued their practices unchanged. Did officials in the FBI ever try to convey its views to different senior administration officials or otherwise elevate its concern? Did it ever do so in writing? If not, why not?

Response:

The FBI understood that OLC, which is charged with responsibility for drafting opinions on questions of law, had issued opinions concerning the legality of certain aggressive interrogation techniques. Accordingly, the FBI's discussion regarding interrogation techniques was necessarily limited to the effectiveness of the aggressive techniques, not their legality. Although FBI management did not reduce its concerns to writing, it is our belief that the CIA and DoD were well aware that the FBI did not believe aggressive interrogation techniques were an effective means of gathering accurate intelligence from detainees.

7. The OIG report reveals that the FBI has Memoranda of Understanding in place with both the CIA and the Defense Department regarding requirements to report allegations of abuse, confidentiality safeguards, and information sharing (pp. 18-19). Has the FBI considered entering into new MOUs to address standards for interrogation of detainees by all of the agencies and the protocol for joint investigations?

Response:

The FBI has not considered entering into MOUs with other agencies to address standards for the interrogation of detainees. When interrogating detainees, the FBI will use only interview techniques that are non-coercive. Those techniques have been proven effective over time when used by trained FBI agents. While the FBI has long stated that it believes non-coercive techniques are the most effective

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means of obtaining accurate information, we also understand that other agencies operate pursuant to policies that have been established by those agencies.

Questions Posed by Senator Feingold

8. When I asked whether you had raised any concerns about the CIA or Defense Department's use of abusive interrogation techniques with the White House, the National Security Council, or directly with the agencies at issue, you responded that you were not aware that abusive techniques were being used until the news about Abu Ghraib "broke."

a. According to the Inspector General report, the FBI learned about the abuses at Abu Ghraib in January 2004, months before the pictures documenting that abuse became public. In what month did you personally become aware of the Abu Ghraib abuses, and was it before or after the pictures documenting the abuse became public?

Response:

The FBI General Counsel first became personally aware that other government agencies were using aggressive interrogation techniques after the pictures documenting the abuse of detainees at Abu Ghraib became public.

b. Why did you choose not to raise concerns with the any of the agencies involved?

Response:

The FBI General Counsel was aware that OLC had opined on the legality of certain interrogation techniques the CIA and DoD had proposed to use. Because the OLC has the delegated authority to provide authoritative legal advice to executive departments and agencies on the meaning of federal laws, its views on the legality of the activities of these agencies was final within the Executive Branch -- subject, of course, to reversal or modification by OLC, the Attorney General, or the President.

9. At the hearing, you responded to a question I asked by saying the following: "There were existing OLC opinions that were highly classified and that we did not have access to, though the bureau, kind of, writ large, generally understood that there were existing memos."

a. Did you try to get access to these OLC opinions?

Response:

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In mid-2004, the FBI General Counsel requested access to the OLC opinions governing interrogation techniques.

b. Did anyone else at the FBI try to get access to these OLC opinions?

Response:

To our knowledge, the only person at the FBI who attempted to obtain access to the OLC opinions prior to 2008 was the General Counsel.

c. When, if ever, did you get access to OLC opinions governing the use of enhanced interrogation techniques?

Response:

The FBI General Counsel has never been provided access to the classified OLC opinions governing the use of enhanced interrogation techniques. She does, though, have access to publicly available unclassified information, including any declassified opinions publicly released by the Department.

d. When, if ever, did anyone at the FBI get access to OLC opinions governing the use of enhanced interrogation techniques?

Response:

In connection with the investigation into the destruction of videotapes of detainee interrogations, in 2008 some or all of these OLC opinions were obtained by the investigative team, which includes FBI agents working under the direction of DOJ-appointed prosecutor John Durham.

10. According to the Inspector General report, in January 2004 the FBI's On-Scene Commander in Iraq contacted senior managers in the Counterterrorism Division at FBI Headquarters with allegations of abuse at Abu Ghraib. The On-Scene Commander suggested that an FBI investigation of these allegations might make it difficult for the FBI to maintain a good relationship with the military. FBI Assistant Director Gary Bald's response was: "Agreed. Let's let [Army] CID [Criminal Investigation Command] handle it."

a. Why, in your opinion, did the FBI not take action on these allegations? How would you have handled this information if it had been given to you?

Response:

The FBI did not take action because, as stated in the report, an investigation was already being conducted by the Army's CID. Investigation of the matter by Army

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CID rather than the FBI was consistent with Section C.2 of the "Memorandum of Understanding Between the Departments of Justice And Defense Relating to the Investigation and Prosecution of Certain Crimes" and implementing DoD Directive 5525.7 (1985).

b. In this instance, the FBI did not take action despite its knowledge that detainees were abused. Is it the FBI's policy to ignore allegations of misconduct when interagency relationships are at stake?

Response:

The FBI has a long-standing MOU with the military and has long relied on Attorney General Guidelines that govern the intra-governmental responsibilities for investigations of government employees' alleged criminal conduct. Pursuant to existing agreements and guidelines, the responsibility to address employee misconduct falls, in the first instance, to the employing agency. For example, criminal conduct by active duty military personnel is initially addressed through the military's court-martial system, which is typically a highly efficient process. Although the language in the on-scene commander's email suggests that the FBI did not become involved with the inquiry into Abu Ghraib because such an FBI investigation might have impaired the working relationship between the FBI and the military in Iraq, that was not an accurate statement of FBI policy.

11. According to the Inspector General report, you told the Office of the Inspector General that there was an "expectation" that an agent would report incidents of torture or other egregious conduct by another agency's interrogator.

a. On what information did you base your view that such an expectation existed?

Response:

FBI Special Agents, all of whom are well trained and educated, follow a strict code of conduct that requires them to report any conduct they suspect may violate the laws of the United States. The FBI General Counsel based her expectation on the education, training, and experience of the FBI Special Agents.

b. If such an expectation did exist, why did the Inspector General's report conclude that very few agents in Iraq or Afghanistan reported detainee mistreatment at the time that it occurred?

Response:

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The OIG report identified very few instances in which FBI agents were personally aware of mistreatment of detainees in Iraq or Afghanistan and took no steps in response. See, for example, the OIG Report at pages 231 ("the vast majority of FBI agents who served in Afghanistan reported that they never saw or heard about any incidents of detainee treatment that caused them discomfort . . .") and 261 ("Most agents said they saw no abuses [in Iraq] to report."). As a general matter, the agents either reported the mistreatment they saw to their on-scene commander or dealt directly with the member of the military who was mistreating the detainee in order to stop the mistreatment. See, for example, the OIG Report at page 234 ("Another FBI agent deployed to Bagram reported to military supervisors his objection to military police shoving a shackled detainee against a wall. The agent told us that the soldier was removed from detainee escort duty as a result.").

12. According to the report, you told the Inspector General's Office that the FBI never finalized more detailed guidance on when FBI agents should report incidents of abusive interrogation by other agencies because you were unable to list every technique or scenario that agents might face. Given that all military interrogators are now required to follow the Army Field Manual, why can't you simply tell FBI agents to report the use of any techniques by military interrogators that are not authorized in that Manual?

Response:

The standardization of the techniques the military may use has made advising FBI employees who are deployed with the military far easier than it was when there were shifting policies governing military interrogators. During their pre-deployment training, FBI employees are now informed that the military is limited to the techniques in the Army Field Manual. They are also informed that if they see a detainee being abused, they should report the abuse to their on-scene commander. We believe the standardization of detainee treatment by the military in accordance with the Detainee Treatment Act of 2005 has eliminated the uncertainty a few employees had about the parameters of "abuse." Nevertheless, we instruct our employees during pre-deployment training that if they have any doubt about whether treatment constitutes abuse, it should be reported and they should use as a test whether they would view particular treatment to be abusive if it were used against one of their colleagues. We believe the combination of standardized military techniques with expanded discussion of this issue during pre-deployment training adequately apprizes our employees of the circumstances under which they should report questionable treatment of detainees.

13. The Inspector General's report indicates that your office worked for months in 2004 and 2005 on draft guidance for how the FBI should handle situations in which FBI agents want to interview someone who had previously been subjected to harsh techniques by other agencies. As you put it, the FBI could unwittingly end up playing the "good cop" to the military's "bad cop." But no guidance was ever issued.

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a. Why was that guidance never finalized?

Response:

Finalizing the guidance was complicated by the many different scenarios it tried to address. Ultimately, the FBI determined that a better way to proceed was to handle this during pre-deployment training, when the various scenarios could be discussed. Currently, with the benefit of the Detainee Treatment Act, this is no longer a substantial problem. While the FBI could end up being the "good cop" to the military's "bad cop," the "bad cop" treatment of every detainee should be within the parameters set by Congress. If, of course, the detainee has been treated outside the parameters of the Detainee Treatment Act and the requirements of the Army Field Manual, FBI Special Agents are trained that the agent must leave the interrogation and report the mistreatment to the on-scene commander.

b. Do you have any plans to finalize the guidance in the future?

Response:

As discussed above, the FBI determined that the standardization of the methods allowed under the Detainee Treatment Act and Army Field Manual, along with the standardized training provided to FBI personnel before deployment, was the most effective approach to addressing these issues.

14. According to the Inspector General's report, in 2004 you sent an email to an FBI Assistant General Counsel at Guantanamo saying that "there needs to be a system so that when we learn of allegations against our agents, even if we believe them to be untrue, someone needs to run it down so we have a record that we did so." Later, a memo was issued to create a process for reporting allegations of abuse in Guantanamo Bay. Has the FBI instituted any reporting requirements for agent misconduct in Iraq or Afghanistan? If not, why hasn't that been done?

Response:

There is standing written FBI policy regarding standards of conduct and discipline for misconduct. Any allegation of misconduct on the part of an FBI Special Agent in Iraq or Afghanistan would be handled in accordance with these policies in the same manner as an allegation of abuse or misconduct made by a person in custody in the United States. Any such allegation is required to be reported and investigated through the proper chain of command as articulated in that policy.

Special procedures were implemented for Guantanamo Bay because of the nature of the work being done there in connection with the Military Commissions and the Office for the Administrative Review of the Detention of Enemy Combatants. FBI

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agents review many documents containing detainees' statements in connection with these proceedings, and the FBI wanted to ensure that, during this process (which occurs in Guantanamo and not in either Iraq or Afghanistan), our employees understand that the normal FBI policies regarding reporting allegations of misconduct are followed.

15. The Inspector General's report states that the vast majority of FBI agents did not participate in the use of abusive interrogation techniques – something the FBI should be proud of. However, the report did cover some incidents where FBI agents did participate.

a. When the FBI receives allegations that its agents have been involved in the use of abusive techniques, what action is taken to address these allegations?

Response:

All allegations of employee misconduct are referred to the Internal Investigation Section (IIS) of the FBI's Inspection Division for investigation. DOJ's OIG has a right of first refusal to investigate any such allegation. Whether the FBI's IIS or DOJ's OIG investigates the allegation, upon completion of the investigation the matter is either closed or referred to the FBI's Office of Professional Responsibility (OPR) for adjudication and disciplinary action as deemed appropriate.

b. What disciplinary actions have been taken with respect to the incidents discussed in the IG report?

Response:

The FBI's IIS received an allegation of detainee abuse from an FBI agent formerly assigned to Guantanamo Bay and in 2005 an investigation was opened by DOJ's OIG. In May 2008, the OIG completed its investigation and forwarded its findings to the FBI's OPR for adjudication. In August 2008, the FBI's OPR concluded, as had the OIG, that the nine named subjects, who were FBI agents previously assigned to Guantanamo Bay or Iraq, had not engaged in misconduct. On August 7, 2008, letters were forwarded to the nine subjects advising that the allegations were unsubstantiated and the administrative inquiry was closed.

16. In July 2004, the FBI surveyed about 500 employees who served at Guantanamo to determine the FBI's knowledge of aggressive interviews of detainees. This investigation was not as thorough as that conducted by the Office of the Inspector General, and it did not reveal as many incidents or types of abuse. However, it did discover numerous incidents of misconduct, such as a detainee being observed with a bloody nose, detainees being put in stress positions and urinating on themselves, and disrespectful treatment of the Koran. Despite the discovery of these events, you sent an email to the Deputy General Counsel for the Department of Defense, John H. Smith, in which you stated that "no employee reported

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conduct appropriate for referral." What about this conduct made it inappropriate for referral?

Response:

All FBI reports of aggressive treatment (including reports that were clearly second-hand or that reported treatment that was authorized) were referred to DoD for such action as it deemed appropriate. The reference in the letter from the FBI's General Counsel to the DoD Deputy General Counsel to conduct not appropriate for referral related to allegations that were either very general, not first-hand observations, or related to conduct that was known to be an allowable technique.

17. Since 2004, the end of the time period covered by the Inspector General report, have any incidences of abuse been reported by FBI agents serving in military zones? How have these reports been handled?

Response:

Since 2004, FBI employees serving in military zones have reported incidents of alleged abuse of detainees. In accordance with FBI policy, if an FBI employee knows or suspects that a detainee has been abused or mistreated, the FBI employee must report the incident to the FBI on-scene commander and to the appropriate FBI chain of command. In accordance with the MOU discussed in response to Question 1, these allegations have also been referred to DoD for further investigation and potential prosecution under applicable law.

Questions Posed by Senator Schumer

It has been reported that the Pentagon may have instructed interrogators at Guantánamo Bay to destroy handwritten notes from questioning sessions, in case interrogators were called to testify about the treatment of detainees. (Associated Press, June 9, 2008)

18. Are you aware of government personnel destroying any notes or other evidence relating to interrogations or the treatment of detainees?

Response:

Other than the destruction of videotapes by the CIA, which has been publicly acknowledged by the CIA and which is currently under investigation, the FBI General Counsel is not aware of any government personnel destroying any notes or other evidence relating to interrogations or the treatment of detainees.

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19. Are you aware of the Pentagon instructing its employees or contractors to destroy notes or other evidence relating to interrogations or the treatment of detainees?

Response:

The FBI General Counsel is not aware of the Pentagon instructing its employees or contractors to destroy notes or other evidence relating to interrogations or the treatment of detainees.

20. Has the FBI ever instructed its employees or contractors to destroy notes or other evidence relating to interrogations or the treatment of detainees?

Response:

The FBI has never instructed its employees or contractors to destroy notes or other evidence relating to interrogations or the treatment of detainees.

21. At the hearing, you agreed to look into, and provide a response for, the following question: Did anyone in the government outside of the FBI demand, encourage, or pressure Director Mueller or anyone else at the FBI to participate in the coercive techniques that were used by other government interrogators?

Response:

The FBI General Counsel discussed this with Director Mueller. No one demanded, encouraged, or pressured Director Mueller or anyone else at the FBI to participate in the coercive techniques that were used by other government interrogators.

22. Who, if anyone, expressed disappointment or disapproval of the FBI's decision or policy not to participate in the coercive techniques that were used by other government interrogators? Specifically, did any of the following express disappointment or disapproval:

a. Personnel at the National Security Council;

Response:

The FBI is unaware of anyone at the National Security Council expressing disappointment or disapproval of the FBI's decision or policy not to participate in the coercive techniques that were used by other government interrogators.

b. Personnel at the Department of Defense, including Secretary Donald Rumsfeld or General Counsel William Haynes;

Response:

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The FBI is unaware of anyone at DoD, including former Secretary Donald Rumsfeld or former General Counsel William Haynes, expressing disappointment or disapproval of the FBI's decision or policy not to participate in the coercive techniques that were used by other government interrogators.

c. Personnel at the White House, including Vice President Cheney or his staff members David Addington or I. Lewis Libby?

Response:

The FBI is unaware of anyone at the White House, including former Vice President Cheney or his staff members David Addington or I. Lewis Libby, expressing disappointment or disapproval of the FBI's decision or policy not to participate in the coercive techniques that were used by other government interrogators.

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QUESTIONS FOR THE RECORD
Coercive Interrogation Techniques: Do They Work, Are They Reliable, and What Did the FBI Know About Them?
Tuesday, June 10, 2008 at 10:00 a.m.

Answers to Questions for Jack Cloonan

1. During the 1990s, you were involved with the investigation of al Qaeda through interviews with several members loyal to Osama bin Laden. You learned of al Qaeda's experimentation with chemical and biological agents, their surveillance methods, and even their planned methods of terrorism. You also learned the identities of key al Qaeda members, as well as their movements.

    a. At any time during your investigation, did you use coercive interrogation techniques?

At no time did I ever use coercive interrogation techniques on suspected al Qaeda suspects who were in my custody. Each was treated humanely with all the rights and privileges afforded suspects under the constitution, to include their right to counsel. Each suspect was advised of their rights and each affirmed those rights by signing an FD -395 acknowledging same.

    b. Did you feel that the failure to use coercive techniques resulted in any loss of information?

No. In point of fact, each member of al Qaeda I dealt with came to value our approach to eliciting information., Each warmed to the idea that their rights were respected and they would not be subjected to coercive interrogation techniques. The "rapport building" approach created an atmosphere which was conducive to discussing critical details involving a range of actions by al Qaeda. Using the law enforcement model helped remove the stigma suspects felt about cooperating with the "unbelievers."

2. In your experience as an FBI investigator, you had notable success in learning about al Qaeda movements and terrorist activity in the 1990s. By contrast, coercive techniques are notorious for producing unreliable and misleading intelligence. As Professor Heymann pointed out, the revised Army Field Manual recognizes this in its ban on abusive techniques and its instruction that torture "is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the [intelligence] collector wants to hear." Likewise, CIA official Bob Baer has said that "you can get anyone to confess to anything if the torture's bad enough."

    a. Do you believe that the Army Field Manual's standards allow an interrogator to conduct effective interrogations?

I've not read through the most current version of the Army Field Manual. My knowledge base about what's contained in the Manual comes from the public record.. That being said, I firmly believe if the Manual pro hibits so-called coercive interrogation techniques, a skilled investigator/interrogator, who knows the subject, can be successful gaining

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actionable intelligence to protect troops in the field and the public at large. Training investigator/interrogations in the art of interviewing is undervalued in both the military and civilian law enforcement. The Senate Judiciary Committee, in my view, should look to subject matter experts in this field for assistance in this regard. The talent and solutions are there; it requires Senate leadership. Senators Leahy and Feinstein are uniquely qualified to make this a priority.

b. Do you think these guidelines should apply to all counterterrorism investigations performed by the U.S. government?

Yes. There should be no exceptions. Critics of "rapport building" claim that using enhanced interrogation techniques on suspected terrorists has been effective and have saved countless lives. Unfortunately, we have no public record to examine. I submit the reason we have no public record to examine is not to prevent the terrorist from learning our techniques but rather to protect those who possibly violated both U. S. and international law.

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GLENN A. FINE ANSWERS TO QUESTIONS FROM SENATOR SCHUMER

It has been reported that the Pentagon may have instructed interrogators at Guantánamo Bay to destroy handwritten notes from questioning sessions, in case interrogators were called to testify about the treatment of detainees. (Associated Press, June 9, 2008)

1. Did your investigation cover the question of whether evidence relevant to interrogations was destroyed?

Our investigation reviewed the conduct and observations of Federal Bureau of Investigation (FBI) employees. We did not receive evidence or allegations that FBI employees destroyed evidence or witnessed any destruction of evidence relevant to interrogations.

2. Does any other ongoing investigation cover this issue?

The Department of Justice Office of the Inspector General (OIG) is not addressing this issue in any ongoing investigation. However, as has been reported publicly, the Department of Justice has assigned a prosecutor to investigate whether Central Intelligence Agency (CIA) tapes of interrogations were destroyed.

3. Are you aware of government personnel destroying any notes or other evidence relating to interrogations or the treatment of detainees?

We did not receive evidence of this. However, as noted in response to question 2, the Department of Justice has assigned a prosecutor to investigate whether CIA tapes of interrogations were destroyed.

4. Are you aware of the Pentagon instructing its employees or contractors to destroy notes or other evidence relating to interrogations or the treatment of detainees?

No.

5. Has the FBI ever instructed its employees or contractors to destroy notes or other evidence relating to interrogations or the treatment of detainees?

We did not find evidence of such an instruction.

QUESTIONS FROM SENATOR FEINGOLD

1. Your report found that very few FBI agents in Iraq and Afghanistan reported incidents of abuse to their supervisors. Do you have a sense of why there were so few reports out of those theaters? Why were there more reports out of Guantanamo Bay?

The vast majority of FBI agents in Afghanistan and Iraq told us they never saw instances of detainee abuse. A larger percentage of agents in Guantanamo Bay than agents serving in the other theaters told us they saw or heard about one or more of the specified harsh techniques in our survey.

However, we do not believe that one should draw the inference from this that abusive or harsh tactics were more or less prevalent at Guantanamo than in the other military theaters. There were differences in the functions that FBI agents performed in the military theaters that could have affected how often they observed the treatment of detainees by other agencies. Also, the instruction given to the FBI agents regarding what techniques the military was allowed to use varied among theaters and among rotations of agents. In addition, FBI agents often believed, sometimes incorrectly, that the techniques they were observing were approved under Department of Defense policy and therefore did not require reporting. Further, there was no formal requirement to report suspected abuse prior to May 2004, and the FBI agents we surveyed gave widely varying accounts of the instructions they received before that date.

In addition, another difference between Guantanamo and the other military theaters that may have contributed to the difference in frequency of reporting was that FBI agents in Iraq and Afghanistan were in a war zone in which they were dependent on the military for their protection and material support. This factor may also have contributed to a greater reluctance to report concerns about detainee abuse.

2. In your report, you state that several FBI agents raised concerns almost immediately after the release of the May 2004 FBI detainee policy. They were concerned about the lack of clarity regarding the definition of "abuse," as well as whether they would technically be "participating" in techniques not permitted by the FBI if they interrogated a detainee who had recently been interrogated by the military. The general response of the FBI has been to encourage agents to "rely on their judgment." Do you think it is acceptable for the FBI to rely solely on the judgment of individual agents to determine what constitutes "abuse" and how they should separate

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themselves from military interrogations that use abusive techniques?

No. These are difficult and ambiguous areas, and we believe more detailed and timely guidance should have been given to FBI employees on these issues.

As discussed in detail in Section IV of Chapter Six of our report, we found that the FBI's May 2004 Detainee Policy did not address several of the more difficult issues faced by FBI agents in the military zones. In particular, the policy did not adequately explain when agents should report other agencies' treatment of detainees. Moreover, no definition of "abuse" was provided, and this problem was exacerbated when agents were told that they need not report "routine" harsh interrogation techniques that the Department of Defense had authorized its interrogators to use. FBI agents often did not know what techniques other agencies' interrogators were authorized to use. We believe that asking FBI agents to rely on their judgment was not a sufficient response to these issues.

3. Do you believe that FBI agents currently have clear policy guidance and adequate training on when they can participate in interrogations and what abuses they are required to report?

We believe that the policy on when FBI agents can participate in interrogations is now sufficiently clear: agents must withdraw from any interrogation in which techniques are being used that would not be available to the FBI agent, even if the technique is within the other interrogator's authority. However, we believe that the policy is less clear regarding when an FBI agent must report another agency's conduct. We recommend that the FBI clarify the definition of abuse and what FBI agents must report with examples in training or a supplemental policy. If the triggering event for reporting is when the treatment exceeds the other interrogator's authority, the FBI should train its agents regarding what other agencies are permitted to do. In addition, we believe the FBI should provide guidance on when it can interrogate a detainee who has been subjected to techniques not permitted by the FBI.

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QUESTIONS FROM SENATOR KENNEDY

1. Media reports indicate that the CIA's use of "enhanced" interrogation techniques on high-value detainees has been approved in writing. In researching your report, did you make any effort to verify the existence of such writings, and if so, what did you find?

Our investigation reviewed the conduct and observations of FBI employees. It was beyond the scope of our review to verify the existence of any written approvals for CIA interrogation techniques.

2. Last week, the Associated Press uncovered evidence that a military operations manual had instructed military interrogators not to retain documents that may relate to investigations. The manual, which was attached to the 2005 Schmidt-Furlow report, instructed agents to keep "the number of documents with interrogation information to a minimum" in order to "minimize certain legal issues." As you know, destruction of documents may be a federal crime under the obstruction of justice statute.

a. You rely on parts of the Schmidt-Furlow report in your report. Did your investigation note any evidence of the intentional destruction of documents or the intentional underreporting of events?

No.

3. Numerous sources have reported on the U.S. government's use of "extraordinary rendition" in recent years, even though domestic and international law prohibits the United States from transferring people to places where there is a substantial risk they will face torture. In researching your report, did you consider any issues of rendition policy, such as how determinations are made on whether a transfer to a particular country would be consistent with U.S. obligations under Article 3 of the Convention Against Torture?

We did not assess the consistency of rendition policy with statutory or treaty obligations.

4. Did the OIG discover any evidence or reports of abuses of detainees by government contractors employed by any federal agency during the course of its investigation? If so, did you inquire into whether and how those abuses are being investigated?

Several FBI agents reported observing incidents or hearing allegations of harsh techniques being used by contract interrogators at Guantanamo, including striking a detainee, short-shackling a detainee, and placing women's clothing on a detainee. These matters are described at pages 178, 179, and 195 of the unclassified versions of the OIG report. However, it should be noted that some FBI agents told us that it was not always clear to them whether interrogators they observed in the military zones were military, CIA, or contract interrogators.

5. The OIG report reveals that at meetings in 2002, National Security Council Principals gathered to discuss detainee issues. ABC News recently reported that at these meetings, the Principals approved a list of "enhanced" interrogation tactics, one of which was waterboarding.

a. George Tenet, Donald Rumsfeld, Colin Powell, Richard Cheney, Condoleeza Rice, and John Ashcroft were all reportedly present at these meetings. During its investigation, did the OIG contact any of these officials to ask for comment?

We sought an interview from former Attorney General Ashcroft, who declined our request. We did not seek interviews with the other individuals because they, and their actions, were beyond the jurisdiction of the Department of Justice OIG.

b. If so, did the OIG find evidence that the use of waterboarding or any other specific techniques were approved at these meetings?

As noted above, we did not interview any of the above-referenced officials.

6. According to the OIG report, the FBI has maintained a policy of not using coercive techniques because it believes they are ineffective and do not produce reliable intelligence. Yet when the Director of the FBI learned in 2002 that other agencies were using such techniques, it appears that he did not raise concerns with the White House or other executive officials. Do you believe that the Director of the FBI has an obligation to raise a red flag when he sees other agencies using tactics that the Bureau has determined may be illegal, improper, or pose a danger to the American people?

According to our investigation, the FBI Director did not decide that interrogation techniques used on detainees by other agencies were illegal, improper, or posed a danger to the American people. The decision on the legality and propriety of the tactics used by other agencies were assessed by others in the Department of Justice, particularly in the Office of Legal Counsel. Rather, Director Mueller decided that the FBI

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would not participate in any interrogation in which techniques that would not be permitted under the FBI's longstanding witness interrogation policies were being used. However, we agree that if a high government official determines that another agencies tactics are illegal or improper, he or she should raise concerns about those tactics.

7. The OIG reports indicates that Director Mueller "was aware of concerns about the Department of Defense interrogation tactics" in 2002, and yet we know that the FBI's first written policy guidance on this issue did not come until May 2004. Do you believe this delay was justified?

For the reasons stated in Section IV of Chapter Six of our report, we concluded that the delay was not justified and the FBI should have provided guidance prior to May 2004.

8. The OIG report reveals that, with a few exceptions, you did not interview FBI agents about FBI involvement at detention facilities run by the CIA. Page 3 of the OIG report states: "We were unable, with limited exceptions, to obtain highly classified information about these facilities, what occurred there and what legal authorities governed their operations." The fact that your office was denied access to information about its own agents operating at facilities run by a government agency is troubling.

a. What, specifically, was the reason behind the denial of access to the legal authorities governing the operation of these facilities? Who issued the denial of access?

Both the Department of Justice and other agencies believed that the operations of other agencies were beyond the jurisdiction of the Department of Justice OIG. In addition, as noted in the report, the CIA OIG had initiated a review of the CIA terrorist detention and interrogation program. Moreover, as discussed in footnote 4 to the report, when we attempted to obtain access to a high-value detainee, Abu Zubaydah, the CIA Acting General Counsel objected.

b. Do you think this denial was appropriate?

No.

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Dear Senator Leahy,

I hope you don't mind my responding in the form of sections of my testimony (after page 11) that I expanded into a memo form.

In particular, I think that incorporating the rules of the Army Field Manual is the best idea out of the 6 possibilities for what Congress might do. That point is very important, as I argue at pages 13-16.

My response to the 1st and 3rd questions is also in the expanded piece taken from my earlier testimony. Anything like torture will always produce unreliable intelligence but there are imaginable – but highly unlikely – grave emergencies in which any President is likely to believe it appropriate and right to violate a statute written for more normal occasions, costly as that reminder of Watergate illegality is politically. It is hard to imagine prosecution in those circumstances. But if the President can be prevented, by statute, from acting without congressional consultation, without specified findings about why he must act, and with an acceptance of political responsibility for behaving illegally, I think the problem is narrowed almost to the vanishing point.

Phil

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Professor Philip B. Heymann*
09 July 2008

SETTING A LEGAL CEILING ON PERMISSIBLE INTERROGATION TECHNIQUES

I think I can be most helpful by addressing, as precisely as I can, eight related questions. Raised by the discovery that we have been engaged in interrogation practices that we have long condemned, the questions are about what should be permissible and what is wise in the way of interrogation practices. As to the latter, Appendix A spells out the case in detail.

I think it is clarifying to break the questions into three groups: (1) four about interrogation practices that may amount to torture; (2) two questions about the more likely coercive successors to any such practices -- practices that are not torture but may be questionable as cruel, inhuman, and degrading practices prohibited by the Detainee Treatment Act of 2005; and (3) two questions about how an intelligent scheme of authorization or prohibition of various interrogation techniques might work.

A. Four Questions About Torture

1. Is the prohibition against torture absolute or does the prohibition depend upon the need for the information and the harms that information may prevent?

* James Barr Ames Professor of Law, Harvard Law School; Deputy Attorney General, 1993-1994; Asst. Attorney General in charge of Criminal Division, 1978-1981; Dept. of State, 1965-1969

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The prohibition of torture -- in the Convention Against Torture ("CAT") and in the statute passed in 1994 by Congress to enforce that convention – is an absolute prohibition of certain, defined conduct, whatever the situation or exigency. The conduct is defined in the Convention Against Torture to forbid "any act by which severe pain or suffering .... is intentionally inflicted on a person". Article 2 of the convention then says "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political stability, or any other public emergency may be invoked as a justification of torture." Adhering to the convention, the Senate stated its understanding of what should constitute severe mental, as opposed to physical, pain or suffering prohibited by Article 1 but it stated no objection to the unqualified obligation to avoid torture which Article 2 demanded. This issue does not seem to be contested. In its second periodic report to the Committee Against Torture, our government stated on May 6, 2005 "The United States is unequivocally opposed to the use and practice of torture ... No circumstances ... may be invoked as justification for or defense to committing torture." (As we shall see, there is a strong but contested argument that exigencies and dangers may be considered in assessing what lesser forms of coercion are prohibited by Article 16 and U.S. statutes as "cruel, inhuman, and degrading.").

What constitutes severe physical suffering is the subject of some dispute, at the margins. Any U.S. interpretation that departed very sharply from the understanding of our closest allies would be equivalent to our renouncing the treaty as far as they were concerned. An interpretation that concluded that waterboarding is not intended to inflict the severe physical suffering on which it relies as an interrogation technique would be outside the limits of plausible interpretation.

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2. Should the United States renounce its obligations under several international conventions in order to be able to defend ourselves by torture in extreme circumstances?

The short answer is "no". The reason is that the case for torture being an advantageous, much less critical, way of getting information from a suspect is unproven and weak, while the costs of reserving a right to engage in torture are real, demonstrated, and large. And so would be the costs of withdrawing from the convention against torture and other international conventions prohibiting it.

Let me very quickly detail some of the costs of preserving a "right" to torture, even in extreme emergencies. It is easiest to list them in terms of some of the groups that would pay the price.

- Those against whom torture is used who are, or turn out to be, innocent of any terrorist activity.

- Our military and civilians whose safety is at risk of reciprocal behavior by other countries.

- All of us who need the cooperation of foreign allies who have frequently decided to withhold cooperation in handling suspects because of fear of our use of torture.

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- Anyone threatened by the creation of new pools of potential terrorists recruited by their sense of injustice such as followed the release of the photos from Abu Ghraib.

- The interrogators asked to participate in torture and the organizations charged with employing torture in the face of public rejection of that technique.

- Those whose political support any President needs in times of national danger and whose pride in their nation and support of its policies depend on their beliefs in the traditional decency of American practices.

- The citizens of undemocratic states whose subjection to torture has previously been lessened by their governments' fear of western reaction -- a reaction which is made impossible if we accept the same practices when the government considers them necessary.

None of these groups are affiliated with terrorism. Each of them would pay a heavy price for abandoning out commitment to avoid torture.

These costs could only be justified by quite certain and substantial benefits from withdrawing from our various obligations under international conventions to avoid torture or, alternatively, from ignoring our obligations either publicly or secretly. The benefits of keeping torture

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available as a tool of foreign policy or war for use in dire circumstances are, instead, rare, uncertain, and undocumented. There are, of course, undocumented claims of valuable information obtained by torture, but there is no record of how frequently we have been misled by the tortured suspects, nor has there been any effort to show that the information could not have been obtained in other ways. Supporters of torture in dire circumstances refer to the possibility of a ticking bomb situation where they allege that only the speed of torture would help. Opponents of torture point out that we have never had an occasion where the ticking bomb applies and that the likelihood that torture would be useful on that occasion is small. Let me briefly review the arguments in terms of the menu of information-gathering techniques.

Information-gathering about terrorist threats begins with a tip from an observer or a general suspicion about an organization that may be planning attacks or about a particular plan. By far the most important, as well as the first, decision our intelligence agencies have to make is whether to gather information about the organization or plan by covert techniques or to rely on overt techniques whose cost is to allow the members of the organization to know that they are being investigated. The British have relied primarily on covert techniques with notable success.

The covert techniques we can use to gather information without tipping off the organization include human surveillance, technologically enhanced physical surveillance, various forms of electronic surveillance, secret agents and informants, undercover offers, secret intelligence searches, and review of records with or without computerized data mining. These techniques have two vast advantages: they produce reliable and accurate information because the suspects do not know that information is being gathered about them; and they produce information in

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real-time, allowing us to act at once, not only after several hours or days of interrogation during which the terrorist group knows to hide its operation and to change its plans. In contrast, overt techniques such as interrogation allow the terrorist group to know, rather promptly, that one of its members has been captured and is being interrogated. Using that information, the group will take steps to retreat to backup plans as substitutes for whatever plan was under way and to make it more difficult for us to disable the other members of the organization.

Even in the cases where we should be paying the high price of alerting the group by moving quickly to detention and interrogation of a suspect, the benefits of torture or other forms of highly coercive interrogation are widely disputed. Coercion is likely to elicit a statement, but frequently one that is false. Any accurate information furnished can therefore only be detected by time-consuming verification. It was this disadvantage of unreliability that first caused our Supreme Court to forbid the use of coerced confessions. The problem is most severe when dealing with a carefully planned operation; for the plan is likely to include a cover story that is hard to unravel in any short period of time. The information furnished is likely to be narrow as well as unreliable. A tortured suspect is unlikely to reveal matters about which we did not know to ask; nothing will be volunteered. In sum, as the new Army Field Manual of September, 2006, states, torture "is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the HUMINT collector wants to hear." (at 5-21)

Unreliability and narrowness of torture-induced statements have led highly trained questioners to turn to any of a number of alternative techniques. The FBI has had notable success in

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investigating the embassy bombings in 1998 by developing a mutually supportive relationship between the suspect and the agent. As Inspector General Fine's report documents, this is plainly the preferred practice of the FBI. A similar technique was embraced by Hanns Scharff, the very successful Luftwaffe interrogator of allied pilots in World War II (The Interrogator, by Raymond Toliver). Some of our allies have used deception about the privacy of induced conversations while an individual is detained; or they have gathered enough information to make the suspect believe that he is simply confirming what is already known, leaving him with little reason to bear the dangers and costs of silence. A number of interrogators consider it to be crucial to create resentment or suspicion of his former colleagues, believing that loyalty is the major barrier to cooperation. Prosecutors rely for intelligence primarily upon offers of reduced periods of detention. In forbidding coercion, the U.S. Supreme Court recognized that coercive interrogation was a tempting shortcut replacing more reliable and sophisticated ways of investigating.

Pressed with this argument, the supporters of maintaining a willingness to use torture turned quickly to the example of the ticking bomb placed in a major population center. They point out that many of the interrogation techniques listed above require more time than torture requires. Even in this case the benefits of torture are greatly exaggerated. We often have the wrong person. We may have the right person but the information he has may be inadequate to prevent the event. He may deceive us in a costly way or delay us long enough for the other conspirators to make alternative plans. Even under the pressure of torture, he may fall back to a cover story that was chosen to be not only false but also difficult to disprove.

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Perhaps most important, since 9/11, we have not had a ticking bomb case – a case where we can identify a guilty suspect who we firmly believe has information that is urgently needed to save lives and where we have no other covert or overt way of obtaining that information in time. Abandoning the international obligations we have solemnly accepted at the costs I have described seems a very bad trade to preserve the mere possibility of using torture in a situation unlikely to ever arise.

3. What should a President do if he finds he is really facing a ticking bomb situation where the conditions I have just described are met?

He has three alternatives. He can, somewhat like Lincoln at the time of the Civil War, announce that he is going to disobey a law that prevents him from taking the steps essential to save many lives in an emergency; and that it is not possible to go to Congress to change the law in time to avoid a disaster. Alternatively, he can obey the torture statute and our treaty obligations, but perhaps at the cost of many lives. Citizens will differ on their preferences between the first and the second. I would prefer the first as long as the President's actions are transparent and he accepts the political, if not legal, risks of violating the law in a situation that is unexpected and is highly unlikely to occur. The third option – to act secretly on the basis of classified, implausible legal opinions – is surely the worst because it invites a broad spread of unaccountable mistreatment and invites widespread fears of what is suspected but cannot be known.

4. Do the President's options depend on whether we are at war in a way that triggers the President's commander-in-chief powers?

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No. The heart of the issue has nothing in particular to do with war or terrorism. The question is what we want the President to do in the face of unanticipated emergencies. Most nations grant their chief executive extraordinary powers to deal with grave emergencies. Our constitution does not have emergency powers, but that does not avoid the problem. The emergency may be the flooding of New Orleans, the sudden arrival of a lethal flu, an earthquake like that China has just experienced, or any of a number of events that the Congress can hardly have anticipated in limiting the powers the President is authorized to execute. In each of these situations, which have nothing to do with armed conflict, the President also has to decide whether to exceed his authority in order to save lives. The decision is the same.

A. Two Questions About Highly Coercive Interrogation Short of Torture

The following questions arise legally under the prohibition of cruel, inhuman, and degrading treatment found in Article 16 of the Conventions Against Torture (CAT) and made applicable to all American interrogators by the Detainee Treatment Act of 2005 (as well as Common Article 3 of the Geneva Conventions).

5. How does the 1994 statutory prohibition of torture relate to the 2005 statutory prohibition of cruel, inhuman, and degrading treatment?

If questions arise as to the propriety of a form of interrogation, the first question to be asked is whether it is torture. If it is, it is absolutely forbidden, without any legal exception. Many

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believe waterboarding fits in this category. Nor is a very narrow interpretation a "way out" of this obligation Our interpretation of "torture" must respect the reasonable expectations of many other nations for whom mutual acceptance of obligations would have been a consideration in signing the treaty. Moreover, it would not greatly increase discretion. Since we are also committed by treaty and statute not to violate the prohibition on cruel, inhuman, and degrading conduct the only two effects of defining "torture" very narrowly, as John Yoo did, would be: to avoid the criminal penalties, which are applicable only to "torture" and (2) to allow consideration of emergencies in assessing the scope of our obligations.

If the administration argues that something it proposes is not the intentional infliction of severe physical pain or suffering (i.e., "torture"), it will still have to satisfy the Congress that the interrogation technique is not "cruel, inhuman, or degrading" under the Detainee Act of 2005. These words are very broad and quite vague – and, as construed by the European Court of Human Rights, might well encompass most of the contested techniques that were used frequently in Guantanamo, Abu Ghraib, or Baghram. The U.S. reservation on adopting CAT limits the scope of our commitment to interrogation methods the Supreme Court would say "shock the conscience". This standard is even less precise.

6. Is the prohibition of cruel, inhuman, and degrading treatment absolute or does our reservation make relevant the harms the interrogation may prevent?

The prohibition of cruel, inhuman, and degrading treatment found in Article 16 of the Convention Against Torture (CAT) was accepted by the Senate only with the reservation that, to

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qualify, any such treatment would have to violate the 5th, 8th, or 14th amendment to the Constitution of the United States. The Detainee Act now prohibits any interrogation that violates Article 16 as interpreted with our reservation. It is supported by the President's executive order interpreting Common Article 3 of the Geneva Conventions. Although it is not clear that other nations interpret the scope of this prohibition as variable with the danger and dependent upon the importance of the information to save lives, there are certainly arguments to that effect for the United States.

The provision of the 5th, 8th, or 14th amendments that seems most applicable to interrogation with the object of gathering intelligence (and not producing any usable confession) is the "due process" prohibition of investigative activities that "shock the conscience" under the 5th and 14th amendments. That provision was most recently construed by the Supreme Court in Chavez v. Martinez 538 U.S. 760 (2003). In deciding whether damages should be paid to an individual who was interrogated while in great pain, having been shot by a police officer, the court split a number of ways. Still, much in the opinion suggests that it may not shock the conscience to continue interrogation in such circumstances if the police have "legitimate reasons, borne of exigency … [such as] locating the victim of a kidnapping, ascertaining the whereabouts of a dangerous assailant or accomplice, or determining whether there is a rogue police officer" (Kennedy, J.) There is also no provision forbidding exceptions applicable to Article 16 of CAT – no provision analogous to the prohibition in Article 2 of any emergency exceptions to the prohibition of torture. Finally, the very broad word "degrading" is perfectly sensible in dealing with interrogations in familiar circumstances but is so inclusive that it suggests that many people would expect exceptions to be made if lives were at stake.

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7. Should a new administration continue to claim full discretion to act wherever it feels an interrogation technique does not, in light of its necessity, "shock the conscience"?

So long as we continue to claim a right to go far further, in the use of interrogation techniques, than any of our major Western allies recognize as permissible, we will pay a very significant cost. It will be obvious that whatever commitments we have made to avoid anything other than torture can be freely interpreted away by the United States. No President has ever claimed the right to do something that shocks his conscience; so the standard imposes no real limit. No President and none of his subordinates will consider what steps they regard as useful in fighting terrorism as shocking to an American conscience.

So the central question becomes should a new administration go beyond the "shock the conscience" treaty obligations and its reinforced applicability in federal statutes and the President's executive order. Only by drawing sharper limits can the United States shed a newly attained notoriety for the use of forms of interrogation that we have condemned in the past, would condemn now, and would not tolerate if applied to our citizens.

The cost of an executive order or statute that imposed sharper and narrower limits on what is permissible in an interrogation --- for example, the Army Field Manual --- is slight compared to the benefits of avoiding the variety of costs described on pages 3 and 4. The techniques approved by the Defense Department, as observed by FBI agents in Guantanamo, included

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prolonged solitary confinement, hooding, stress positions including prolonged standing, sleep deprivation, temperature variations, and various forms of humiliation. The continued availability of these techniques is not important in dealing with the "ticking bomb" situation described under questions 2 and 3 above, since these techniques are not designed to obtain information extremely quickly, nor is the history of their use promising in that capacity.

During the early days of battling the IRA, some British officials argued that such methods obtained important information. Frank Steele, a former British intelligence officer, disagreed sharply: "in practical terms, the additional use of information it produced was minimal." Steele's statement applies to strategic information as well. Most interrogators in most western countries believe that other forms of interrogation are more useful to obtain accurate information important for understanding an enemy or its strategies.

Finally, the limits of what we will permit in the way of interrogation must be specified more precisely than the "shock the conscience" test permits. The FBI, the CIA, and the DOD are presently operated under three quite different sets of limits. That makes little sense now and no sense in the long run.

8. How should a new administration define and enforce, more precisely, the limits of permissible interrogation?

The limits imposed on impermissible interrogation techniques to eliminate their high costs will require more specific words than "shock the conscience"; vague words will provide little

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reassurance to our allies and have little effect on our actions in the face of frightening dangers. (Beyond clearer definition, developing legitimacy will also require careful allocation of responsibility for decisions, and adequate transparency both as to the rules and as to our practices.) New, better-defined rules could be adopted by the congress or by a new administration. They could attempt to specify what is permitted or what is forbidden or, like the Army Field Manual, both. The rules could be proposed by the President as either a statute or an executive order after having been made available for comment to the congress or appropriate committees (again like the Army Field Manual). (Another alternative, substituting judicial for congressional oversight, would rely on the courts, rather than selected officials, to develop, by precedent over time, a richer definition of what "shocks the conscience".)

Before reviewing the possibilities for clear rules, it is important to recall that the rules we are considering are intended to provide the outer limits of what will be permissible as interrogation techniques. They are not designed to provide wisdom or skill in what is likely to work in what situation and with what interviewee. It will be essential for the U.S. government to make substantial efforts to develop comparative and scientific knowledge and useful theories about what leads to truthful and reliable responses and what generates unsuspected but important information as well as what is the price of each technique in terms of time, political support, renewed respect for legality, etc. Our government will have to develop systems for training, supervision, and oversight, too. Little of this is adequately addressed by simply defining, in a way that is designed to restore our domestic and international credibility, what are the limits of interrogation techniques.

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In terms of the question of limits, there are a half-dozen possibilities. (1) With the widest latitude, a new administration could consider itself free to use any technique that did not shock its conscience. I've already described the cost in credibility of this standard. (2) It could consider itself bound by the few interpretations of prohibited CID given by the European Court of Human Rights. But being bound by a court of which we are not even a member and one that is in no way responsible for U.S concerns is implausible. (3) The President could submit to congress, or embody in an executive order, after allowing time for congressional response, a list of what can be done and what cannot be done roughly comparable to the listing in 2006 Army Field Manual ("AFM"). It could be made public like the AFM or partially public as Israel did in its Landau Commission report or it could be available only to particular designated committees of the congress. The list could attempt to capture the effects of the extended use of a technique or the use of multiple techniques, but this would make a difficult task of definition even harder.

The next two possibilities are more feasible and therefore promising. (4) Following the FBI practice, the controlling document could apply the relatively well developed law of coerced confessions (as it stood and still stands and grows for purposes of impeachment and suppression of derivative evidence) without Miranda. The advantage of this is not only that the precedents are relatively well established compared to the sparseness of decisions under "shock the conscience"; this body of law will continue to be developed in domestic criminal cases, and the standards applied would be the same for Americans as for others. And the FBI has a well-developed, effective, and broadly acceptable set of practices for criminal and intelligence interrogation. (5) We could, instead, decide to apply only the carefully thought out techniques described in the 2006 Army Field Manual, except perhaps in the highly unlikely event where the

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President would feel obligated to go further than that in an extreme emergency (as described under question 3 above). If accomplished by executive order, this regime, quite similar to that applied by the FBI, would require only that the CIA come into alignment with the other two agencies to establish a set of uniform rules. It also has the advantage of having the credibility in national security areas of its military development and ownership. However limited it may be as a prescription of how to effectively interview for intelligence purposes, none of the techniques which the AFM precludes are obviously useful, let alone necessary; and this option, too, would quickly re-establish credibility with a relatively well-defined set of acceptable techniques. If the list turned out to be too restrictive in some way, it could be easily dealt with by a provision authorizing the President to inform the congress of his intention to, after an adequate waiting period, have the Army Field Manual amended in a particular way. (6) Finally, and most restrictive, we could apply the standards of the third Geneva Convention as we would to prisoners in any normal war.

The fifth alternative seems the best of an imperfect list of possibilities. It could be adopted quickly and credibly in terms of national security. It would quickly restore a high measure of legitimacy to the organizations and activities in this area, and end the morale-destroying concerns of many Americans. Setting such a ceiling on our interrogation activities would make most sense if it was accompanied by a commitment and investment in developing the knowledge, structures, oversight, and organization for a truly professional group of intelligence interviewers. Making obvious that need to fill in by carefully creating a professional structure for intelligence interviewing is an advantage, not a disadvantage. Our present weakness in these areas is already there and we must deal with it promptly and intelligently.

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APPENDIX A

The Too Shaky Case For Highly Coercive Interrogation

By Professor Philip B. Heymann

Introduction and overview

The information we need to prevent as many terrorist attacks as possible falls into two categories. We want to know, first, everything we can about any present scheme: when it will occur, what is the target, how is it to be carried out, who are the participants, who is knowingly or unknowingly to provide assistance, etc. This information would permit us to prevent a particular attack and, by arrests, prevent the same participants from engaging in other attacks. It will also allow us to focus our attention on similar or related targets.

We also want to know, second, everything we can about any organization that is committed to attacking us or our allies, whether or not a particular plan is imminent or has even been formulated. We want to know the purpose or ideology of the organization; its more immediate goals, leadership and membership; its financing and how it plans to communicate; how it transports people and acquires and maintain weapons to be used; its alliances; the locations of its havens, etc. With this information, we may be able to monitor the organization's activities, deny it the resources and help it needs, mislead it, disable its leaders and members, and more. Roughly, we might call the first type of information about schemes "tactical"; and the second about organizations, "strategic".

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The many ways of gathering information, including coercive interrogation, are more or less costly to use and more or less likely to be productive if used, depending on the situation and the information sought. The differences are often great. So, we must choose in terms of the marginal benefit of any particular way of gathering information, including highly coercive interrogation. "Marginal", for our purposes, means the net of benefits less costs for one way of gathering information compared to other alternatives available in the context of an overall plan that often uses multiple techniques with multiple suspects.

Assessing the costs of an information-gathering technique ("IGT") involves a range of factors, many of which are difficult to measure. Is the technique legal? Does it undermine domestic support because of an apparent inconsistency with traditional sources of American pride? Will its use increase the risk to U.S. soldiers and civilians? Will it be acceptable to our allies? Will it generate more terrorists, more terrorist organizations, and more attacks on the U.S.? What is the effect on the Americans who carry out the technique and on the organizations to which they are attached? And more. The answers to these questions as well as --- on the benefit side --- issues of efficacy depend importantly on a variety of contextual matters.

An intelligent system for gathering the types of information we need would, either on a case-by-case basis before using one IGT or another or on a category-by-category basis, consider these questions and would systematically develop the organization, information, training, and oversight that intelligent choice among IGTs requires. Against this background, the case for highly coercive interrogation appears unconsidered and shaky. But we should start with more general questions about turning suspicions into useful intelligence or even evidence.

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The process of information-gathering

As in any effort to gather information, we generally begin by scanning the setting (police would call it "patrol") to develop a defensible suspicion or an intelligent guess either that a terror attack is under consideration or in the early stages of execution or that a terrorist organization exists. Without that we can hardly develop our own plans to discover more about either of our types of interest. Whether the beginnings of a suspicion either of a plan or of an organization's terrorist goals comes from the observation of suspicious activities or from tips from individuals knowledgeable about the people in a neighborhood or in another social network, it is likely to include uncertain suspicions about a specific set of individuals -- the tentative suspects in an as yet unidentified scheme or organization. We then have to use information-gathering techniques to discover a good bit more about the secret scheme or organization. We need that "more" to justify using more intrusive forms of information-gathering and then more serious types of action (such as arrests) to disable the plotters, the organization, or its supporters.

The most important distinction among the information-gathering techniques available to turn a suspicion into an actionably full and reliable belief is between those IGTs whose use will remain secret ("covert" techniques) and those that necessarily tip-off the suspected parties ("overt" techniques). Two immense advantages of gathering information about an enemy covertly are that the information is undistorted by the opponents' desire to deceive and that it arrives in "real-time", allowing continuing and expanding surveillance of activities that, were the investigation known, would quickly be more carefully hidden or closed down.

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To be covert, an information-gathering technique cannot involve the obvious use of force by government agents, whether in the form of detention, interrogation, or physical search. But that still leaves many options for information-gathering. If a suspect has been identified, physical surveillance and a check of records are likely to remain covert. The use of secret agents, informants, or undercover agents all can occur, at somewhat greater risk of discovery, without generating suspicion on the part of their targets. The same is true of a secret intelligence search or electronic surveillance.

Overt IGTs are done in ways that are likely to tip off suspects, causing them to destroy evidence, to abort plans, and to develop alternative conspiracies. Falling prominently in this category are: the use of orders to produce material, open searches of locations, seizure of the suspect or his friends, and questioning with or without detention.

Obviously, a number of these ways of gathering information from a suspect or a group of suspects can be used simultaneously or successively as part of a broader information-gathering plan. There are only a few limits on this statement. Covert efforts to obtain information obviously must precede overt efforts, for the activities that can readily be investigated covertly will stop the moment the suspect knows, from overt steps, that an investigation is under way. Still, the possibility of combinations over time means that it is better to think in terms of plans for information-gathering rather than in terms of individual steps and in terms of the marginal gain from one step, compared to another, as possible parts of a broader plan.

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The question is which of the covert and overt information-gathering techniques should be used under what circumstances. They vary in legality, effectiveness, and their balance of costs and benefits as part of an information-gathering plan. The variation along these three dimensions depends upon the situation in which the technique is used, the nature of the information that we already have, and the information we seek. Nothing in our recent history suggests a recognition of the importance of the questions thus presented and the sophistication required to deal with them intelligently.

The absence of careful thought and choice among IGTs by the Bush administration before turning to higher coercive interrogation

Among all the covert and overt techniques available, the Bush Administration has given unusual emphasis to interrogation and, within that category, to highly coercive interrogation. When it has had even limited or unreliable information suggesting that a foreign individual may be connected to -- and therefore knowledgeable about -- a terrorist plan or organization, it has frequently gone "overt", relying upon a very broad "wartime" justification to detain the individual in military or intelligence facilities as "an unlawful combatant", a category now defined in the Military Commissions Act of 2006 as

> a person who has engaged in hostilities against the U.S. or who has purposely and materially supported hostilities against the U.S. or its cobelligerants who is not a lawful enemy combatant (including a person who is part of the Taliban, Al Qaeda, or associated forces).

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Then, to develop a picture of the threat posed by a suspected plan or organization, it has often turned to coercive interrogation without having considered the costs in terms of losing better covert options, violating international treaties, or incurring political liabilities.

Even within the "overt" category of interrogation, it has ignored relevant variations. Interrogation of a terrorist suspect can rely, more or less plausibly, on any of several broad mechanisms including: offers of benefits (such as reduced sentences), contingent upon the verification of information provided; deception as to the privacy of certain conversations while detained; convincing the suspect that he is simply confirming what we already know so that his reasons for bearing the costs of silence are pointless; creating in the suspect resentment or suspicion of his former colleagues; and/or developing a mutually supportive relationship between the suspect and the questioner – a relationship that the suspect comes to value and understands is endangered by either refusing conversation completely or by being caught attempting to deceive the questioner. The use of threats to the detainee or oved ones, pain, or disorienting conditions of detention to overwhelm the suspect's willingness to withhold information must compete with each of these and others – such as those described in the 2006 Army Field Manual – as well.

There has in fact been a sharp division among investigative agencies as to what form of interrogation are, in particular situations, more promising in terms of obtaining information and what forms are least costly. Prosecutors routinely promise a shortened period of captivity if the individual cooperates. The FBI had notable success in investigating the embassy bombings of 1998 by developing a mutually supportive relationship between a suspect and the agent and

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endorses that method. Other law enforcement agencies have used informants among the detained population to develop information.

The CIA and the military in the early days of Guantanamo have used coercion ranging from threats, to creating sustained unpleasant conditions in order to generate extreme anxiety, to use of prolonged solitary confinement or other emotionally disruptive treatment, and finally to imposing greater or lesser pain or fear of death (such as waterboarding). President Bush has vetoed a bill that would forbid the more extreme forms of coercion. As we shall show, the case for preserving them --- in light of the questionable legality and their balance of costs and benefits compared to alternative information-gathering steps --- is very shaky indeed.

The special costs of illegality

Before illustrating the comparisons among IGTs that must be made, we should start with a special category: violations of explicit U.S. legal commitments embodied in statutes or treaties. To the U.S. public, such violations are almost indefensible, not really "merely" costs. In contrast, violations of the prohibitions found in customary international law are far less serious concerns than violations of explicit, agreed-to commitments. The use of covert techniques in a foreign country will, for example, often be in violation of international customary law as well as of that country's laws, exposing our intelligence officers to some local risk. But still the illegality is not a major concern of the American public. Violation of U.S. statutory or treaty commitments is such a concern. The reasons for concern are related but distinct.

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The American people attach immense importance to the obligation of their officials to keep the promises of restraint embodied in statutory law because of the fears of governmental abuse that arise whenever the government oversteps its powers with regard to its citizens. Some laws can be changed to reflect new and different dangers. On rare, dangerous occasions the President may have to act at his political peril, as Lincoln did, in defiance of legal constraints. But, despite these escape valves, a crucial first cut among information-gathering techniques has to be in terms of whether what is done is lawful under U.S. law.

Similarly, because of the importance our allies as well as many U.S. citizens attach to the reliability of solemn national promises, techniques must also be sorted in terms of the extent to which they respect clear obligations of existing treaties even if they are not embodied in U.S. statutes. For this reason, too, a special type of "cost" to be considered, in assessing the use of any IGT in a plan for intelligence gathering, must be the price of flagrant illegality under U.S. treaties. In this case too, defying a tradition of acceptance of lawfulness under U.S. law carries real costs in security and trust.

Whether the high costs of violating U.S. law are incurred may depend upon whether the target of a technique that is part of an intelligence-gathering plan ("IGP") is a U.S. person or on whether the technique is used in the United States. These variations exist in our present law, although not in the law of a number of our closest allies. For those who are not U.S. persons, U.S. law broadly allows covert intelligence-gathering abroad. For U.S. persons who are abroad, the equivalent of the Foreign Intelligence Surveillance Act standards must be applied, less formally by the Attorney General, to authorize electronic surveillance or secret searches. Everyone, U.S.

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person or not, is protected against electronic surveillance, communications and searches within the United States except with a court order. All other forms of covert surveillance including the use of informants, spies, and undercover agents is largely unregulated by law.

In contrast, torture, renditions to countries known to use torture, and lesser forms of highly coercive interrogation are IGTs that are extensively regulated by the Constitution, treaties, and statutes wherever they occur and to whomever they are done. Most friendly nations consider some of our declared interrogation policies illegal under treaties; many Americans agree. There is no such super-cost of lawlessness to the range of covert IGTs.

Comparing the benefits and costs of different IGT's in different situations

The best way to illustrate what an intelligent choice process would look like is to provide a picture or an example. It is complicated because for each of several techniques we must consider the benefits and the costs, although predictions about either category are highly uncertain. Then we must recognize a variety of situational variables that will help determine the weight to be given to different categories of benefits or costs. And all of this takes place in the context of the decision as to how the technique fits into a broader plan.

For example, the benefits and costs of a particular technique, such as the use of electronic surveillance, will depend upon the usefulness of this way of getting information in the context of the particular activities of the suspect and, as a matter of legality under FISA, on the existence of probable cause to believe that the place or phone monitored is to be used by an agent of a foreign power engaged in terrorism. The marginal or relative benefits of the particular technique, in

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light of its costs, will also depend upon what other techniques are available and in what sequence they might be used in a single plan. With that warning, let's begin.

Benefits

In general, the relative or marginal benefits of the inclusion of one particular IGT in a plan for gathering information on a particular suspect or a group of suspects are of two sorts. We must ask to what extent using that IGT at that stage is likely to increase accurate information about plans and organizations compared to what could be learned reliably from using instead, or first, an alternative IGT. That means we should not be counting all the information it is likely to develop as the benefit of adding a particular IGT to the plan but only that information we could not have obtained at less cost in another way.

Any assessment of the likely benefits of using a particular IGT is inevitably speculative. No one knows, with any degree of certainty, the probability of success of a particular IGT – the likelihood of finding important clues in a house or on a computer, of successfully developing a source within a group, or of getting truthful information by interrogation. The choice is further complicated because, depending on the situation, we may value more highly either the reliability or fullness of the information we seek or the promptness with which it can be used either to facilitate a further investigation or to prevent terrorist attacks.

Costs

Assessing the costs of using one IGT rather than another is even more difficult than assessing the benefits. Some are opportunity costs. Once an overt investigative step is taken, it is no longer

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possible to take covert steps. The other costs of using particular IGTs in a specific setting are diverse and, aside from budgeted expenses, are very difficult to measure. These other costs include the effects on almost a dozen groups:

- those against whom an IGT is used at some personal cost who are, or turn out to be, innocent of any terrorist activity
- those whose valued belief in the special decency of American practices is undermined by an unjustified IGT
- those never investigated who fear, and lose their sense of security against, such governmental uses of particular IGTs
- our military and civilians whose safety is at risk from reciprocal behavior by other countries
- allied nations whose cooperation we need
- potential terrorist recruits moved by a sense of injustice in our use of some IGTs
- nations assessing the reliability and thus the value of having the U.S. as a treaty partner
- states considering with what reliability they must follow inconvenient treaties and conventions
- the citizens of undemocratic states whose subjection to human rights abuses by their leaders has been lessened by fear of Western reaction
- those individuals asked to employ the IGT

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- the organizations charged with employing it in the face of public fear and embarrassment

There may be more. Each of these is obviously extremely difficult to measure or even to predict crudely, but each is as real as dollar costs. In short, the process of intelligent choice of an IGT at a particular time for a particular plan in a particular setting is frought with both complexity and factual uncertainty in both benefits and costs. But this does not justify ignoring plainly significant considerations.

Situational variables

I have said that the benefits and costs are likely to vary with the situation in which they are used, and not just with their relationship to other IGTs in a single, coherent plan. Some obvious situational variables that affect benefits and costs are: how imminent and how lethal is a feared attack; how high is the probability that the suspect has information we seek; is the suspect a terrorist, an innocent bystander, or somewhere in-between; how available are other less costly or more promising IGTs; how much do we already know about the dangerous situation and to what extent do we hope that the particular IGT will take us from a position of dangerous ignorance to one of much more complete knowledge; how critical is the suspect to the plan (i.e., how does the danger change by detaining the individual?); what do we know about the suspect's characteristics that bear on the likelihood of success of one or another IGT; how if at all does the location or the nationality of the suspect affect the practical or legal availability of any option; if the IGT is likely to produce unreliable information, is the situation such that we are likely to know, or to be able to quickly determine, whether or not it is accurate; etc.? Each of these, and

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other situational variables, can bear importantly on the likelihood and importance of benefits and the weight of costs in using one or another IGT.

Illustrating a sensible process of choice

Let us illustrate all this with a comparison of three possible ways of building on the information that creates reasonable suspicion that someone (X) is in regular and close association with three others (A, B, and C) who themselves have regular contacts with members of an Al Qaeda affiliate. It is important to ask what additional background information is available because general concerns that should be considered in choosing an IGT will have more or less weight depending on the factual background. For example, it would make a great difference if X was in the United States rather than, as we shall assume, in Morocco. Assume that the nature of X's contacts creates reasonable suspicions that he is himself involved in supporting their activities but that we don't know more about the organizational structure, the set of associations, much less any specific plan than the facts I have mentioned.

What are the options for IGTs? Depending on the cooperation of the local government and the availability of U.S. intelligence officers, the first broad option would be to secretly surveille X by following or photographic or electronic means. Only if he were a U.S. person within the United States would a U.S. law require an adequate factual predicate before seeking the content of his electronic communications or searching his house or office. A second option is to detain X. Let us break that into two alternatives. First, that could be preventive detention accompanied by non-coercive questioning of a sort that could be used on a POW: for example, attempting to build a valued relationship between the detainee and the interrogator while closely checking the

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accuracy of any information that X furnishes. The second option under detention is to subject X to more coercive forms of intelligence gathering, ranging from prolonged interrogation to solitary confinement to something as severe as waterboarding.

Comparing benefits

Consider first the benefits of each. Depending on what we know about the frequency and manner of contact that X has with A, B, and C, we might expect continuing covert investigation to reveal colleagues' locations and preparations that no member of the group, including X, wants to have known. Covert investigation by surveillance is also likely to lead to clues as to what type of attack is planned, where, and when. Without that information, we are at a great disadvantage in trying to prevent the attack. If the investigative step were overt, the other members would know to change their plans and hide their human and physical resources.

Now consider the benefits that follow detention. They obviously do not include the advantages we get from being able to continue to investigate without the group knowing of our suspicions. In place of that, by detention alone we remove one player from the terrorist team. Only in the rare case where X is a critically important player, would that make a significant difference in the prospect of an attack. Non-coercive interrogation would have a fair chance of producing valuable information, but would take time. The disadvantage of interrogation built on a relationship is that it takes time and the ability to penetrate a false cover story. Its benefits, compared to coercive interrogation, are that it is far more likely, over time, to produce information about structures and events about which we did not know enough to ask.

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What about trying to overwhelm X's will to resist? If X has been provided with a cover story, especially one that is designed to be difficult to disprove, the result of coercive interrogation is likely to, for some time, gradually produce that cover story and not the truth. The threat of coercion will, in some cases, produce truthful answers quickly but, even in those cases, the terrorist group will have an opportunity to regroup and replan as soon as it knows that X has been detained. Finally, coercion or the threat of coercion is unlikely to produce information that we had no reason to suspect and therefore did not ask about.

Comparing costs

Now let us turn to the cost side. The costs of detention followed by highly coercive interrogation can be immense. Perhaps the greatest is demoralization at home and a loss of support for the struggle flowing from a sense that we no longer occupy "the high ground" but are using forms of coercion such as waterboarding that we have condemned our enemies for adopting. Losing American belief in our virtue is immensely costly. Highly coercive interrogation, which has and will become known, also disrupts cooperative relationships with allies such as those that we would need in any covert operation or noncoercive detention. Like the history of the pictures from Abu Ghraib, knowledge of a practice of coercion used only on suspected jihadists is likely to become a recruiting tool for terrorist organizations. Finally, in the first category of costs, our steps increase the danger of reciprocal, coercive treatment of our military and other personnel.

Even the second order of costs is significant. We are disabling ourselves from being able to protest interrogation techniques up to and including torture when carried out by nations abroad. By violating relatively clear treaty obligations, we are encouraging others to disregard treaties

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and conventions that are important to us. The effects on interrogators may be severe. In a related way, we undermine the appeal to idealistic young people of whatever organization has been assigned responsibility for highly coercive interrogation.

The costs of detention followed by the type of interrogation allowed for POWs --- and contemplated by Common Article 3 even for non-POWs --- are far less, so long as detention is limited in occasion and duration, especially if it is assimilated to the processes of criminal trial as it is in France and the United Kingdom, eliminating many questions of illegitimacy.

The costs of covert investigation of X, even without the cooperation of the local government, are a limited amount of irritation at a technical violation of customary international law and the often significant expenses of physical, photographic, or electronic surveillance. The costs in terms of the attitudes of Americans, allies, and the states that are the major sources of terrorists are almost non-existent.

The benefits and costs I have described might vary some if we change the situation in any number of ways. X might be a U.S. person or in the United States. We may not believe that he is a terrorist but only that he knows about a terrorist group. He may be located in a place where covert investigative techniques are particularly difficult, pushing us toward one of the forms of detention. It may be possible to reap the benefits of multiple IGTs if we start with one and not another --- for example, covert before overt.

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The factual variation that is taken most seriously is that we may know of information leading to the belief that a "highly" destructive event is likely to take place in the "very near" future. In this urgent situation, the alternative of detention followed by building a relationship with an interrogator will not help prevent an immediate event. On the other hand, detention and highly coercive interrogation will not help if the activities are being carried by even a small group, if X's unavailability is not disabling, and if the group learns of his detention before they are themselves seized. In these circumstances, even if X later reveals the names of co-conspirators and the location and means that were initially planned before his group learned of X's capture, there is every likelihood that the danger has been delayed and not eliminated.

The most important point about "ticking bombs" lies elsewhere, though. We have not yet had a ticking bomb case of a suspect with information urgently needed to save lives and if we deal with that unusual possibility by developing rules permissive enough to justify highly coercive interrogation in many other situations --- which we have --- we will incur the costs I have just described whether or not they ever prevent the explosion of a ticking bomb. The chance that we will learn reliably of a "ticking bomb" situation -- where only highly coercive techniques are likely to eliminate, not merely delay, a grave danger – are too slight to make it sensible to deal with the possibility by a broad authorization applicable to many other situations with immense costs. Either we should have an extremely narrow exception that only the President may invoke or we should expect the President, like Lincoln, to take the political risks and pay the political costs of openly violating immensely valuable laws in a situation where thousands of lives may be at stake. I have come to believe the latter is the preferable alternative.

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Conclusion

The occasions when the use of highly coercive interrogation is preferable to other techniques as a means of gathering intelligence are rare. Among those rare occasions, in only a very few will it be worth its exceptionally high costs. Maintaining legal permission for its use (or secrecy to hide its use) itself imposes a wide range of costs and invites thoughtless, blunt investigation when we need sophisticated choice. It is a bad bargain for the United States.

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UCL FACULTY OF LAWS

Philippe Sands QC
Professor of Laws and Director,
Centre for International Courts and Tribunals

Senator Patrick Leahy
Chairman,
Committee on the Judiciary
United States Senate
Washington DC 20510-6275

By email (Justin_Pentenrieder@Judiciary-dem.senate.gov)

23 July 2008

Dear Senator Leahy,

Thank you for your letter of July 1st last.

I am pleased to attach a note of my answers to your questions.

I would be pleased to provide such further assistance to you and your Committee. In this regard, and in the event that you wish to take further the issues I have addressed, I would welcome an opportunity to share with you, on an informal and private basis, further information concerning the circumstances in which Mr Haynes made his recommendation to Mr Rumsfeld.

Yours sincerely,

Philippe Sands

Attachment

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Answers to Questions for Professor Philippe Sands:

1. In your recent testimony before the House Judiciary committee, you said that the Administration "consciously sought legal advice to set aside international constraints on detainee interrogations." Could you elaborate on that statement?

In relation to military interrogations I address this issue in my book *Torture Team: Rumsfeld's Memo and the Betrayal of American Values* (Palgrave Macmillan, 2008).

As described in the book, there were three key decisions which required legal advice:

(i) the decision to set aside the Geneva Conventions, taken by the President on February 7th 2002 (which I believe to have been taken in part order to allow a regime of cruel and aggressive interrogations to be developed);

(ii) the decision to raise the bar on the definition of torture, which was achieved with three OLC (DoJ) opinions written by Jay Bybee and/or John Yoo on August 1st 2002; and

(iii) the decision to authorize new techniques of interrogation for the military at Guantanamo, recommended by William J, Haynes on November 27th 2002 and approved by Donald Rumsfeld on December 2nd 2002.

Each of these decisions was taken on the basis of legal advice given by selected individuals who were known to share the Administration's policy objectives favouring cruelty and the utility of aggressive interrogation. In each case, legal advice from lawyers who did not share these objectives (at the Department of State or within the uniformed military) was either rejected or not sought.

For example, as regards the decision to set aside Geneva, Mr Douglas J Feith (the then Undersecretary of Defense for Policy) told me that *"The point is that the Al Qaeda people were not entitled to have the Convention applied at all, period. Obvious."* (see *Torture Team*, pp. 34 et seq.). Contrary to that view, other lawyers in the Administration (as well as uniformed military lawyers) did support the view that Al Qaeda detainees could and should have rights under Geneva (including by implication Common Article 3). For example, on February 2nd 2002 Mr William H Taft IV, The Legal Adviser at the Department of State, wrote a memo to the White House Counsel that had the effect of arguing in favour of that position in relation to the conflict in Afghanistan (where Al Qahtani was apprehended before being taken to Guantanamo). Such an approach, he wrote, "demonstrates that the United States bases its conduct not just on its policy preferences but on its international legal obligations" (reproduced in Karen J. Greenberg and Joshua L. Dratel, *The Torture Papers: The Road to Abu Ghraib* (Cambridge University Press, 2005), at p. 129).

Thereafter, the views of Mr Taft and other State Department lawyers were not sought, presumably because they would not have been helpful to positions the Administration wished to take on the new direction for military interrogations. This is particularly notable in relation to the memoranda written by Messrs Bybee and Yoo, on which I understand there was no inter-agency consultation.

The effort to avoid unhelpful legal advice becomes most evident in relation to the adoption of the memorandum signed by Mr Rumsfeld on December 2nd 2002. As described in *Torture Team* (p. 134), Alberto Mora (the Navy General Counsel) learnt from Jane Dalton (General Counsel to the Joint Chiefs of Staff) that Jim Haynes short-circuited the normal decision-making process. "I heard that from Jane Dalton", Mora told me, "She said to me 'Jim pulled this away, we never had a chance to complete the assessment'."

When I wrote that I had not fully appreciated that by then unformed military lawyers had already objected in strong terms to the proposed new interrogation techniques. That emerged during Jane Dalton's testimony before the Senate Armed Service Committee on June 17th 2008. In response to questions from Senator Warner (based on an article I wrote in *Vanity Fair* magazine (May 2008), entitled *The Green Light*, that drew on my book), Jane Dalton stated that Mr Haynes had intervened to stop further legal review by uniformed military lawyers:

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"SEN. WARNER: In other words, this article -- and I think you've confirmed it's correct -- you stopped your analysis, which you were doing for the chairman at that time, Richard Myers. Am I correct?

ADM. DALTON: Yes, Senator. [...] When the memo came in from General Hill asking for the enhanced techniques, the memo was distributed to the services and the services, as have already been mentioned, provided their input.

SEN. WARNER: Correct.

ADM. DALTON: They asked for -- they -- the services --

SEN. WARNER: Now, the they, being the services, ask for them? [...]

ADM. DALTON: I'm sorry -- yes, sir. The services sent in responses to the Joint Staff tasker asking for inputs on the General Hill memo.

SEN. WARNER: Right.

ADM. DALTON: All of the services expressed concerns about the techniques that were listed in the memo. They also expressed their understanding and appreciation for the need for intelligence and good intelligence.

SEN. WARNER: Correct.

ADM. DALTON: And then they -- my recollection is that all four of them suggested that there needed further legal and policy review as General Hill had suggested in his memo.

SEN. WARNER: Correct.

ADM. DALTON: And so the next step then was to proceed with a larger general and policy review, which is what I intended to do.

SEN. WARNER: Correct. And in -- not only intended, but you initiated.

ADM. DALTON: I initiated -- yes, that's right, Senator. When I learned that Mr. Haynes did not want that broad-based legal and policy to -- review to take place, then I stood down from the plans --

SEN. WARNER: All right. Let's now clarify exactly how you were told to stand down. Was it in writing or was it verbal?

ADM. DALTON: It was not in writing, Senator and my -- the best of my recollection as to how this occurred is that the chairman called me aside and indicated to me that Mr. Haynes did not want this broad- based review to take place, and that I should not continue to interact with -- I mean, the chairman's words were not this detailed. It was a very brief meeting where he called me aside and said, "Mr. Haynes does not want this process to proceed.""

On the basis of what I have learnt, I believe that this broad based legal review was stopped in order to prevent further legal advice from being obtained that might undermine the policy direction the Administration was already committed to. In this way, the upper echelons consciously sought legal advice that was supportive of a pre-determined policy decision, and took active steps to avoid receiving legal advice that would tend to undermine such policy decisions.

In this regard, it is of singular importance to my conclusions that the central legal advice relied upon by Mr Haynes in making his recommendation to Mr Rumsfeld was not the legal advice prepared by Lieutenant Colonel Diane Beaver (dated October 11th 2002) but rather the legal memos prepared by Mr Bybee and Mr Yoo on August 1st 2002. I have no doubt that Mr Haynes had knowledge of the contents of those memos when he visited Guantanamo on September 25th 2002 and when he wrote his memo to Mr Rumsfeld (November 27th 2002). In testimony before the Senate Armed Services Committee on June 26th 2008 he said he could not remember when he first saw those memos. I think it would be useful to revisit Mr Haynes' testimony before the Senate Judiciary Committee on July 11th 2006, which

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I describe in detail at pages 217-222 of *Torture Team*, to assess its accuracy and candour.

2. Your research on U.S. interrogation policies has produced a number of troubling findings, including the manner in which abusive practices came from the top down and systematic attempts to avoid accountability or publicity around these acts. Based on your investigation, what information remains for Congress to uncover, and how can Congress ensure that investigations of these practices can proceed?

Please see the answer to the previous question. I have focused on the role of the most senior lawyers in the administration because I believe it sheds light on the manner in which decision-making proceeded. I believe Congress has an important role in establishing the facts, and the series of hearings held before the House Judiciary Committee, the Senate Judiciary Committee and the Senate Armed Services Committee have already uncovered new and important facts that confirm my conclusions.

I believe that the most useful thing Congress can do is focus on decision-making in relation to three matters:

(i) the decision to set aside the Geneva Conventions, taken by the President on February 7th 2002 (which I believe to have been taken in part order to allow a regime of cruel and aggressive interrogations to be developed);

(ii) the decision to raise the bar on the definition of torture, which was achieved with OLC (DoJ) opinions written by Jay Bybee and/or John Yoo on August 1st 2002; and

(iii) the decision to authorize new techniques of interrogation for the military at Guantanamo, recommended by William J, Haynes on November 27th 2002 and approved by Donald Rumsfeld on December 2nd 2002.

I believe these decisions are closely related. The heart of the investigation is the relationship between the OLC opinions of August 1st 2002 and Mr Haynes' recommendation of November 27th 2002. The Administration has been unwilling to confirm the existence of a connection, presumably because it would undermine the narrative that decision-making began on the ground at Guantanamo. The existence of a connection would also raise serious issues about Mr Haynes' veracity when he appeared before the Senate Judiciary Committee on July 11th 2006, including his answers to questions put by Senator Kennedy.

Professor Philippe Sands QC
23 July 2008

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SUBMISSIONS FOR THE RECORD

Statement of
Valerie E. Caproni
General Counsel
Federal Bureau of Investigation
Before the
Committee on the Judiciary
United States Senate
Hearing on
"Coercive Interrogation Techniques:
Do They Work, Are They Reliable,
and What Did the FBI Know About Them?"
June 10, 2008

Good morning Madame Chairwoman, Ranking Member Specter, and Members of the Committee. It is my pleasure to appear before you today to discuss with the Committee the Inspector General's report - "A Review of the FBI's involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq." The FBI is pleased that the Office of the Inspector General (IG) credited the FBI for its "…conduct and professionalism in the military zones of Guantanamo Bay, Afghanistan, and Iraq."

The primary mission of the FBI is to lead law enforcement and domestic intelligence efforts to protect the United States and its interests from terrorism. FBI intelligence derived from Iraq, Afghanistan and Guantanamo

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Bay has led to numerous investigations to identify and disrupt terrorist threats in the United States and has provided important intelligence in ongoing investigations. We were also pleased to see the conclusion of the IG that "the vast majority of FBI agents in the military zones understood that existing FBI policies prohibiting coercive interrogation tactics continued to apply in the military zones and that they should not engage in conduct overseas that would not be permitted under FBI policy in the United States." The IG credited the FBI for deciding in 2002 to continue to apply FBI interrogation policies to the detainees in the military zones. The report found that "most FBI agents adhered to the FBI's traditional rapport-based interview strategies in the military zones…" The IG also "found no instances in which an FBI agent participated in clear detainee abuse of the kind that some military interrogators used at Abu Ghraib prison." The IG credited "the good judgment of the agents deployed to the military zones as well as guidance that some FBI supervisors provided."

Consistent with the FBI's long history of success in custodial interrogations, FBI policy is to employ the same non-coercive, rapport-based interview techniques when interviewing detainees encountered in military zones that

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we employ in every aspect of our mission, whether in the United States or abroad. As the IG's report emphasizes, the FBI chose not to participate with other government agencies in joint interrogations in which techniques not allowed by the FBI in the United States were used. When confronted with the question whether the FBI should join agencies using more aggressive interviewing techniques, FBI Director Mueller decided that the FBI would not do so. As the IG report notes: "…the FBI has consistently stated its belief that the most effective way to obtain accurate information is to use rapport-building techniques in interviews."

The IG found that FBI employees, for the most part, sought to resolve any concern that they had with the interrogation techniques used by other agencies by either reporting them to their supervisors or by working directly with the other agencies.

As the IG report notes, after the Abu Ghraib disclosures, the FBI issued written policy which reaffirmed existing FBI policy and reminded FBI agents that they were prohibited from using coercive or abusive techniques. The policy directed agents that they were not to participate in any treatment or interrogation technique that is in violation of FBI guidelines and that FBI agents were

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required to report any incident in which a detainee was either abused or mistreated. The policy relied on the education, training and experience of the FBI agents to have a sufficient understanding of the words "abuse" and "mistreatment" and to use the same sound judgment required to make such determinations while executing their duties domestically.

All allegations of detainee mistreatment during the course of interrogations were reviewed by FBI Headquarters and referred to the appropriate agency for investigation.

Conclusion

In short, FBI agents performed admirably in a war-zone environment unfamiliar to many of them. The FBI will continue to use rapport-building techniques when conducting interviews in the military zones. Additionally, as Director Mueller has stated, "The FBI will continue to provide comprehensive training and pre-deployment preparation to our agents and other employees who may be assigned to military zone … These individuals perform a vital function in dangerous environments in order to fulfill the FBI's post-9/11 mission to develop intelligence and prevent terrorist attacks."

I appreciate the opportunity to appear before the Committee, and look forward to your questions. Thank you.

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"Coercive Interrogation Techniques: Do They Work, Are They Reliable, and What did the FBI Know About Them?"

Opening Comments by John E. Cloonan, Retired FBI Special Agent

June 10, 2008

Senator Leahy and distinguished members of the Committee. Good morning and thank you for the opportunity to testify about coercive interrogation techniques, their effectiveness, the reliability of the information obtained in this way and the FBI's knowledge of these matters. It is my belief, based on a 27 year career as a Special Agent and interviews with hundreds of subjects in custodial settings, including members of al Qaeda, that the use of coercive interrogation techniques is not effective. The alternative approach, sometimes referred to as "rapport building" is more effective, efficient and reliable. Scientists, psychiatrists, psychologists, law enforcement and intelligence agents, all of whom have studied both approaches, have came to the same conclusion The CIA's own training manual advises its agents that heavy-handed techniques can impair a subject's ability to accurately recall information and, at worst, produce apathy and complete withdrawal.

I have personally used the rapport building approach successfully with al Qaeda members and other terrorists who were detained by US authorities. The information elicited led to numerous indictments, successful prosecutions and actionable intelligence which was then disseminated to the CIA and the NSA and others.. This approach, which the FBI practices, is effective, lawful and consistent with the principles of due process - And in addition to its intelligence gathering potential, it can do nothing but improve our image in the eyes of the world

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community.

A skilled interrogator, using elicitation techniques and understanding the end game, will serve the public's safety and our national security. The ultimate outcomes might be gathering evidence to support a prosecution or obtaining actionable intelligence to prevent a terrorist attack. I accept the argument that coercion will obtain a certain kind of information. I do not, however, accept the argument that sleep deprivation, sensory deprivation, head slapping, isolation, temperature extremes, stress positions, water boarding and the like will produce accurate information. An interrogation using rapport building obtains more reliable information and changes the relationship between the interrogator and the subject. Once a bond is formed between the two, the latter takes the investigator on a journey of discovery and sheds light on the darkest, most closely held secrets of an organization like al Qaeda. US intelligence and law enforcement agents seldom get the chance to interrogate al Qaeda subject matter experts like Khalid Sheikh Mohammed, Ramzi Bin Al-Shib. Jamal Ahmed Al-Fadel, L'houssaine Kertchtou, Ali Abelseoud Mohamed and Ibhn Sheikh Al-Libi and these opportunities are too precious to waste. I am convinced by my experience that the rapport building approach is the way to go n these circumstances.

As the conversion from antagonist to ally takes hold within the process and the recalcitrant subject begins to cooperate, the interrogator assumes the role of caretaker. He or she can then shape the conversation, listen intently for inconsistencies and finally save untold man hours (or woman) chasing after false leads. Critics of rapport building often say that the enemy we face today(the radical Islamist who is ready and willing to die for Allah) requires a more aggressive approach. They frame the debate by injecting the "ticking bomb" scenario. They suggest that there is no time to break bread with these killers. In fact, there are those who believe that the

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9/11 attacks occurred because we treated terrorism as a law enforcement issue. This was not the case. In the months before the attacks, the "chatter" suggested that "something big" was imminent, but neither the law enforcement or intelligence community has an agent who knew what al Qaeda intended to do on that fateful day. The rapport building approach used on an al Qaeda might have helped to address this frightening and dangerous reality.

I participated in many interviews with suspected al Qaeda members where actionable, reliable information was obtained. It was used in the successful prosecutions of al Qaeda operatives who murdered American citizens. The image of former al Qaeda operatives testifying under oath in District Court and repudiating Bin Laden and al Qaeda and its ideology of hate sent a powerful message to citizens of America and the world. Showcasing that message had an immediate impact. It highlighted the fact that Bin Laden and al Qaeda are vulnerable and it effectively answered those who believe in his omnipotence, America's weakness and the hypocrisy of her leaders.

Bin Laden and his advisors often refer to US intelligence and law enforcement agents as "blood" people. They mean simply this: we, according to Bin Laden, use torture to extract information. Bin Laden has theorized that the most loyal al Qaeda sympathizer will break within 72 hours and give up operational information. Therefore, he has kept operational details about impending attacks strictly compartmentalized. In other words, those in the know or with a need to know were limited to a few trusted followers. My experiences and those of my former FBI colleagues would certainly support this conclusion.

The majority of jihadists detained post 9/11 were clueless when it came to al Qaeda's operational plans, and I don't believe many of the detainees posed a direct threat to the US or were confidants of Bin Laden or Ayman Zawahiri. A heavy-handed approach with these

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detainees was unlikely to generate any useful intelligence, and it served to validate Bin Laden's take on American and our intelligence gathering propensities.

Of course, obtaining reliable information from jihadist foot soldiers in Afghanistan and Iraq is vital to protect our troops, who are in harm's way. But even on the battlefield and under exigent circumstances, rapport building is more effective in gaining information for force protection in my opinion. Enhanced and coercive interrogation techniques are ineffective even under extreme circumstances. I've spoken to a number of FBI agent's who were seconded to Gitmo as interrogator's. In confidence, they told me the vast majority of detainees questioned under these stressful conditions were of little or no value as sources of useful intelligence.

Information is power, and the lack of reliable human intelligence assets, who are capable of telling us what al Qaeda is up to, is the greatest challenge facing US law enforcement and intelligence communities faces. Technological assets, like signals intelligence, targeted wire-tapping and computer exploitation have pre-empted some terrorist attacks, and we are all grateful for that. I submit, however, that the most effective countermeasure to the threat posed by al Qaeda and like-minded groups is and always will be the apostate who chooses to cooperate, and, if your pardon the expression "spills the beans." Gaining the cooperation of an al Qaeda member is a formidable task, but it is not impossible. I've witnessed al Qaeda members, who pledged "bayat" to Bin Laden, cross the threshold and cooperate with the FBI because they were treated humanely, understood what due process was about and were literally seduced by our legal system, as strange as that might sound.

I am reminded of a conversation I had with an aide to Bin Laden. He told me al Qaeda believes in the "sleeping dog" theory. The Sheik is very patient and the brothers will wait for as long as it takes for the dog to nod off before they attack. I believe we cannot relax our vigilance

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in the hope that Bin Laden will forget. There are 3 questions I would like this committee to ponder. Has the use of coercive interrogation techniques lessened Al Qaeda's thirst for revenge against the US? Have these methods helped to recruit a new generation of jihadist martyrs? Has the use of coercive interrogation produced the reliable information its proponents claim for it? I would suggest that the answers are "no", "yes" and "no". Based on my experience in talking to al Qaeda members, I am persuaded that revenge, in the form of a catastrophic attack on the homeland, is coming, that a new generation of jihadist martyrs, motivated in part by the images from Abu Ghraib, is, as we speak, planning to kill American and that nothing gleaned from the use of coercive interrogation techniques will be of any significant use in the forestalling this calamitous eventuality.

Torture degrades our image abroad and complicates our working relationships with foreign law enforcement and intelligence agencies. If I were the director of marketing for al Qaeda and intent on replenishing the ranks of jihadists. I know what my first piece of marketing collateral would be. It would be a blast e-mail with an attachment. The attachment would contain a picture of Private England (sp) pointing at the stacked, naked bodies of the detainees at Abu Ghraib. The picture screams out for revenge and the day of reckoning will come. The consequences of coercive intelligence gathering will not evaporate with time.

I am hopeful that this committee will use its oversight responsibility judiciously and try to move the debate in the direction of the prohibition of coercive interrogation techniques. This debate is a crucial one, and I know each member of the committee understands that. The decisions you make will have a far-reaching impact on our national security.

Proponents of the "ticking bomb" scenario seek to forestall discussions on interrogation techniques by ratcheting up the intensity of the debate to "panic mode". There simply is no time

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to talk with a terrorist who might have information about an impending attack. Lives are at stake, and the clock is ticking, so it just makes sense to do whatever it takes to get the information. Experienced interrogators do not buy this scenario. They know that a committed terrorist caught in this conundrum will seek to throw his interrogator off the track or use it to his propaganda advantage. " Go ahead and kill me, God is great." Neither the "ticking bomb" scenario nor the idea of a torture warrant makes sense to me.

To the best of my recollection, the first time I learned that coercive interrogation techniques were being used on detainees was in November, 2001 at Bagram Air Base in Afghanistan. One case I'm personally aware of involved Ibhn Sheikh Al-Libi, the emir of an al-Qaeda training camp in Afghanistan. The FBI agents on the scene were prepared to accord Al-Libi the due process rights he might expect as and American citizen. The agents concluded after questioning that he would be a high value and cooperative source of information as well as a potential witness in the trials of Richard Reid and Zacharias Massouai (sic). Before the agents could proceed, a robust debate ensued between the FBI and the CIA. The CIA prevailed , and Al-Libi was rendered to parts unknown, possibly Egypt. I don't know the exact nature of the information his interrogation produced, bit it is common knowledge that he has since recanted all that he said. I feel that a very significant opportunity to utilize the rapport building approach was missed.

Without compromising delicate investigations, I can tell you that the FBI has amassed a considerable amount of reliable information on al Qaeda using rapport building. I won't attempt a full recounting in the interest of brevity, but here are a few salient examples. I personally learned that al Qaeda tried unsuccessfully to obtain fissionable material in 1993 and that they experimented with chemical and biological agents. I also became ware of how they selected

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targets and conducted surveillance on them. I learned of their intention to use airplanes as weapons before this became a deadly reality. These interrogations also yielded information about al Qaeda's finances, recruiting methods, the location of camps, the links between al-Qaeda and Hezbollah, Bin Laden's security detail and the identities of other al-Qaeda members who were subsequently indicted in absentia and remain on the FBI's most wanted list. I am convinced of the efficacy of rapport building interrogation techniques by these and other experiences. Ladies and gentlemen of the committee, let me say that my heart tells me that torture and all forms of excessive coercion are inhumane and un-American, and my experience tells me that they just don't work.

With that , I conclude my comments and welcome your questions.

Statement of U.S. Senator Russ Feingold
Senate Judiciary Committee
Hearing on "Coercive Interrogation Techniques: Do They Work, Are They Reliable, and What Did the FBI Know About Them?"
June 10, 2008

Madam Chairman, thank you for holding this hearing.

I want to start by commending the Justice Department Office of Inspector General for its thorough, thoughtful report documenting FBI observations of and participation in the U.S. government's interrogations of detainees at Guantanamo Bay, in Iraq and in Afghanistan.

And I want to commend the FBI agents who recognized that the kinds of abusive interrogation practices they witnessed other agencies employing were wrong – and just as important, ineffective. It is a testament to the professionalism and the courage of those FBI agents that, even in the months after September 11 and when they were under great pressure to disregard their high standards of behavior, they stood their ground and stuck to the policies that they have long employed to keep Americans safe, and reported what they witnessed to their superiors.

The FBI's leadership also deserves credit for deciding unequivocally in 2002 that FBI agents would not participate in interrogations that used abusive techniques that violated longstanding FBI rules. The FBI's policy has been not to use undue coercion in its interrogations but instead to use "rapport-building" techniques, which the FBI has found are "the most effective way to obtain accurate information," according to the Inspector General.

But this report is not all good news for the FBI. For too long, FBI leadership left agents in the field with no formal guidance on what to do when they witnessed other agencies conducting abusive interrogations. It took more than two years for the FBI to provide its agents with a specific policy on how to work in military zones. And the Inspector General concluded that the FBI still has not provided agents in the field with adequate guidance about when the FBI can interview detainees who have been subjected to more aggressive techniques by other agencies, and when FBI agents must report incidents of abusive interrogations that they witness.

While I understand that the deployment of FBI agents to military zones is a relatively recent development, that is not an adequate excuse to leave FBI agents without the training and guidance necessary to help ensure humane treatment and

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effective questioning of detainees in U.S. custody. The FBI should remedy this situation immediately.

I was also disappointed that senior officials at the FBI and Justice Department who learned what military and CIA interrogators were doing did not – or could not – do more to stop it. What this IG report documents about military, and in some instances CIA, interrogation techniques is no longer surprising. But it remains profoundly disturbing. I have consistently opposed the use of these types of abusive techniques on moral, legal and national security grounds. They do not represent who we are as a nation and they do not make America safer. We need to ensure that all government agencies conduct themselves in accordance with our values and the rule of law.

Fortunately, since 2006, all elements of the Department of Defense have followed the interrogation policies laid out in the Army Field Manual. I have strongly supported proposals to require all government agencies – including the CIA – to do the same. We fought World War II and the battles of the Cold War without resorting to legally sanctioned government torture. We can surely defend America now without sacrificing our principles.

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"Coercive Interrogation Techniques: Do They Work, Are They Reliable, and What Did the FBI Know About Them?"

Statement of Senator Dianne Feinstein

June 10, 2008

"For me, this is a very important hearing. I serve on the Intelligence Committee, so I am well-aware of enhanced interrogation techniques. The question before us is a very difficult and important subject: Coercive interrogations and torture.

Historically, the United States has been steadfast in its resolve that torture is unnecessary, unreliable, and un-American. Without torture, we succeeded in conflicts that threatened the very existence of our country, including a Civil War, a World War, and numerous other conflicts and enemies.

Despite President Bush's promise that the United States would fight the war on terror consistent with American values and 'in the finest traditions of valor,' the Administration decided, as the Vice President said in 2001, to 'go to the dark side' – to use coercive interrogation.

This decision by the Bush Administration has had profound effects.

Cruel, inhuman, and degrading treatment of prisoners under American control violates our Nation's laws and values. It damages America's reputation in the world and serves as a recruitment tool for our enemies. Perhaps most importantly, it has also limited our ability to obtain reliable and usable intelligence to help combat the war on terror, prevent additional threats, and bring to justice those who have sought to harm our country.

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I have listened to the experts, such as FBI Director Mueller, DIA Director General Maples, and General David Petraeus. All insist that even with hardened terrorists, you get more and better intelligence without resorting to coercive interrogations and torture.

The bottom line is that there are many interrogation techniques that work, even against al Qaeda, without resorting to torture. One of today's witnesses, former FBI Special Agent Jack Cloonan, has personally interrogated members of al Qaeda within the confines of the Geneva Conventions and obtained valuable, reliable, and useable intelligence.

Mr. Cloonan was involved in the interrogation of Ibn al-Sheik al-Libi, the first high-profile al Qaeda member captured after September 11th, and Ali Abdul Saud Mohammed, one of Osama Bin Laden's trainers. In both cases, the FBI used non-coercive interrogations to obtain valuable information about al Qaeda. I look forward to Mr. Cloonan's testimony about how the non-coercive interrogation techniques used by the FBI work to provide reliable and useable intelligence.

The FBI has long recognized the unreliability of information obtained from coercion and torture. It has based its belief on years of experience and behavioral science. This hearing will examine how non-coercive interrogation techniques can be used effectively, and why coercive interrogations and torture do not yield reliable and useful intelligence for the most part.

The hearing will also review the recently released Department of Justice Inspector General's report detailing the FBI's knowledge and involvement in the coercive interrogation techniques and torture that occurred in Guantanamo, Afghanistan, and Iraq after September 11, 2001.

Both Senator Specter, our ranking member today, and I have heard the Inspector General report numerous times on the FBI, and let me just say I believe he is a very square shooter and one of our finest Inspector Generals.

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To its credit, the FBI was steadfast in its unwillingness to use coercion and torture as a means to obtain information. FBI agents on the ground at Guantanamo and other sites repeatedly voiced concerns about the harsh interrogations being conducted by military and DOD interrogators. In total, over 200 FBI agents raised these concerns. For that, the FBI should be commended.

Questions remain, however, about why FBI leadership wasn't notified more quickly about the agents' concerns at Guantanamo and why formal guidance wasn't provided to FBI agents in the field until May of 2004 – two years after the first complaints were received at FBI Headquarters about coercive interrogations. I hope Mr. Fine and Ms. Caproni, the legal counsel of the FBI, can address those issues.

The FBI should also be credited for raising the alarm to the Department of Defense about what was happening at Guantanamo. We now know that as early as October 2002, FBI agents at Guantanamo alerted Marion Bowman, the FBI's Deputy General Counsel in charge of national security, about coercive interrogations occurring at Guantanamo. On November 27, 2002, an FBI agent at Guantanamo sent a written legal analysis questioning the legality of coercive interrogations and noting that these techniques appeared to violate the U.S. torture statue.

In November and December 2002, Mr. Bowman personally contacted officials in the DOD General Counsel's office, including General Counsel Jim Haynes, about the FBI's concerns. According to Mr. Bowman, Haynes claimed he didn't know anything about the coercive interrogation techniques that were occurring at Guantanamo, despite the fact that he recommended on November 27, 2002, that Secretary Rumsfeld formally approve the very techniques that were being used at Guantanamo.

Clearly, there are questions that need to be answered regarding how the interrogation policies at Guantanamo were formulated and authorized. Whether they were from the bottom up, as the Administration has stated, or from the top down, as the evidence is beginning to show. Whose idea was it? Who was consulted? And when complaints were raised about what was happening at Guantanamo, what was done?

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Historically, the Bush Administration has argued that the military commanders and JAG lawyers on the ground requested the initial authorization and provided the legal justification to use coercive interrogation techniques against detainees. In June 2006, in testimony before this Committee, then-DOD General Counsel Jim Haynes said that the request to use these harsh interrogation techniques was made by the commanding general at Guantanamo, and that the request 'came with a concurring legal opinion of his Judge Advocate.'

Yet, as time goes by and more facts come out, the Administration's explanation has become increasingly discredited. More and more evidence shows that the decision to use coercive interrogation techniques was made at the highest levels of the Bush Administration.

Just a moment on the timeline:

- On August 1, 2002, the DOJ Office of Legal Counsel completed the so-called Yoo-Bybee memos providing a legal justification for coercive interrogation techniques and torture.

- On September 25 and 26, 2002, DOD General Counsel Haynes, White House Counsel Alberto Gonzalez, and Vice Presidential Counsel David Addington visited Guantanamo and witnessed detainee interrogations.

- On November 23, 2002, Secretary of Defense Rumsfeld verbally authorized harsh interrogations of Mohammed al-Qhatani, a high-value detainee at Guantanamo.

- On November 27, 2002, Haynes recommended that Secretary Rumsfeld formally authorize coercive interrogation techniques at Guantanamo.

- On December 2, 2002, Secretary Rumsfeld approved, in writing, the coercive interrogations at Guantanamo.

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Philippe Sands, who is testifying today – and I very much appreciate the fact he has come from London to provide this testimony -- has interviewed many of the Bush Administration officials involved in the authorization to use coercive interrogation techniques at Guantanamo, including former DOD General Counsel Jim Haynes.

He has asked to take the oath, because he wants to be sure that everybody knows he will be telling us the truth as he knows it.

I look forward to hearing what he has learned about how the decision to use coercive interrogations and torture was made in the Bush Administration.

It is absolutely essential that we obtain reliable and useable intelligence to successfully fight the war on terror. I believe it is wrong to use coercive interrogation and torture to try to accomplish that goal. I believe we must stop it, and as a member of the Intelligence Committee I am doing everything I can think of to do just that.

It is also imperative, however, that we examine how complaints about coercive interrogations were handled by the FBI, and how those harsh interrogation techniques were first authorized. I would now, if I might, turn it over to my very distinguished ranking member. I thank you very much for being here."

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Office of the Inspector General
United States Department of Justice

Statement of Glenn A. Fine
Inspector General, U.S. Department of Justice

before the

Senate Committee on the Judiciary

concerning

Detainee Interrogation Techniques

June 10, 2008

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Statement of Glenn A. Fine
Inspector General, U.S. Department of Justice
before the
Senate Committee on the Judiciary
concerning
Detainee Interrogation Techniques

Madame Chairwoman, Ranking Member Specter, and Members of the Judiciary Committee:

Thank you for inviting me to testify about the Office of the Inspector General's (OIG) recent report on the Federal Bureau of Investigation's (FBI) involvement in and observations of detainee interrogations in Guantanamo Bay, Afghanistan, and Iraq.

The OIG investigation focused on whether FBI agents witnessed incidents of detainee abuse in the military zones, whether FBI employees reported any such abuse to their supervisors or others, and how those reports were handled by the FBI and the Department of Justice (DOJ). In addition, the OIG examined whether FBI employees participated in any incident of detainee abuse. Our investigation also examined the development and adequacy of the policies, guidance, and training that the FBI provided to the agents it deployed to the military zones.

The OIG's review covered the time period from 2001 to 2004. The OIG team investigating these issues developed and distributed a detailed survey to over 1,000 FBI employees who were deployed overseas to one of the military zones during these 4 years. Among other things, the OIG survey sought information regarding observations or knowledge of specifically listed interrogation techniques and detainee treatment, and whether the FBI employees had reported such incidents to their FBI supervisors or others.

The OIG team interviewed over 230 witnesses and reviewed more than 500,000 pages of documents. In addition, our team made two trips to Guantanamo to tour the detention facilities, review documents, and interview witnesses, including five detainees. We also interviewed one released detainee by telephone.

Our review focused on the activities and observations of FBI employees in facilities under the control of the Department of Defense (DOD). With limited exceptions, we were not able to investigate the conduct or observations of FBI agents regarding detainees held at Central Intelligence Agency (CIA) facilities. However, our investigation did examine the FBI's involvement with the CIA in

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the interrogation of one high-value detainee, Abu Zubaydah, at an overseas location shortly after his capture, and the subsequent deliberations within the FBI regarding the participation of FBI agents in joint interrogations with other agencies. Our investigation also examined the dispute between the FBI and the DOD regarding the treatment of another high value detainee, Muhammad Al-Qahtani, who was held at Guantanamo.

It is important to note that our investigation relied heavily on the testimony and observations of the FBI and DOJ witnesses. While we reviewed the findings from several prior reports prepared by the military that examined the issue of detainee treatment at Abu Ghraib and in the military zones, we did not attempt to make an ultimate determination regarding any alleged misconduct by military or CIA personnel, or whether they did, or did not, violate their own agencies' interrogation policies. The OIG did not have access to all the outside agency witnesses, such as DOD or CIA personnel, and such a determination would also have exceeded the OIG's jurisdiction.

In October 2007, when we completed a draft of this report, consistent with our normal practice we provided a copy of the report to the FBI, the DOJ, the DOD, and the CIA for a factual accuracy and classification and sensitivity review. We received timely responses from the FBI, DOJ, and the CIA on these reviews. However, the Department of Defense took many months to provide the results of its review. Eventually, however, we received the DOD's comments on classification, and we redacted from the public version of the report information the agencies considered classified. We have provided the full versions of the report to Congress.

In my testimony, I will summarize our major findings with respect to the FBI's involvement in and observations of detainee interrogations.

I will also focus on the FBI's decision not to participate in joint interrogations of detainees with other agencies in which techniques not allowed by the FBI were used.

FBI and DOD Detainee Interrogation Policies

Most of the FBI's written policies regarding permissible interview techniques for agents and for agent conduct in collaborative or foreign interviews were developed prior to the September 11 terrorist attacks. When these policies were drafted, they reflected the FBI's primary focus on domestic law enforcement, which emphasized obtaining information for use in investigating and prosecuting crimes. These policies are designed to assure that witness statements meet legal and constitutional requirements of voluntariness so that they are admissible in court and do not undermine the

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admissibility of any other evidence developed in the investigation as a result of the witness interview.

However, constitutional and evidentiary considerations were not the only rationales for the FBI's prohibition on the use of coercive interview techniques. On numerous occasions, the FBI has stated its belief that the most effective way to obtain accurate information for both evidentiary and intelligence purposes is to use rapport-building techniques in interviews.

The FBI's interrogation policies are set forth in the FBI's Legal Handbook for Special Agents, the Manual of Investigative Operations and Guidelines (MIOG), and the Manual of Administrative and Operational Procedures (MAOP). For example, Section 7-2.1 of the Handbook states, among other things, that "[i]t is the policy of the FBI that no attempt be made to obtain a statement by force, threats, or promises."

The FBI's MAOP also describes the importance of FBI agents not engaging in certain activities when conducting investigative activities, including foreign counterintelligence. The MAOP states that "[n]o brutality, physical violence, duress or intimidation of individuals by our employees will be countenanced...."

Our investigation found that the vast majority of the FBI agents deployed to the military zones in Guantanamo, Iraq, and Afghanistan continued to adhere to FBI policies and separated themselves from other agencies' interrogators who were using non-FBI-approved techniques. In only a few instances did FBI agents use techniques that would not normally be permitted in the United States or participate in interrogations during which such techniques were used by others.

In our report, we discuss that when detainee interrogations began at Guantanamo in January 2002, military interrogation policies in the military zones allowed the use of methods that, depending on the manner of their use, might not be permitted under FBI policies. Such methods included, at various times, sleep disruption, prolonged isolation, stress positions, and military dogs. Military policies changed over time and were different for Guantanamo, Afghanistan, and Iraq. In December 2005, the Detainee Treatment Act established the U.S. Army Field Manual as the uniform standard for detainee treatment in DOD custody. In September 2006 the DOD revised the U.S. Army Field Manual and adopted U.S. Army Field Manual 2-22.3 as a uniform interrogation policy for all services and military zones. The new Field Manual places much greater emphasis on rapport-based interrogation techniques similar to those endorsed by the FBI, and it identifies several prohibited techniques such as nudity, waterboarding, and mock executions. However,

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Field Manual 2-22.3 was not in effect during any part of the period that was the focus of the OIG's review.

Differences Between the FBI and Military Approaches to Interrogations

FBI witnesses and documents described the rationale for its non-coercive rapport-based techniques traditionally used by the FBI in combination with purposeful and incremental manipulation of a detainee's environment and perceptions. As explained by FBI agents and described in FBI documents, these techniques are designed to obtain reliable cooperation on a long-term basis.

FBI agents told us that the FBI's approach, coupled with a strong substantive knowledge of al Qaeda, had produced extensive useful information in both pre-September 11 terrorism investigations as well as in the post-September 11 context. Many FBI witnesses also stated that they believed that FBI agents had skills and expertise that would enable them to make a significant contribution to the government's overseas intelligence gathering mission.

The FBI understood that the more aggressive or coercive techniques used by military intelligence were originally designed for short-term use in a combat environment with recently captured individuals where the immediate retrieval of tactical intelligence is critical for force protection. Some military techniques were based on methods used in military training known as SERE (Survival, Evasion, Resistance, and Escape), which is intended to prepare the U.S. military on methods to resist interrogation.

DOJ officials also told the OIG that they agreed with the FBI's viewpoint regarding the best approach to take with the detainees. For example, David Nahmias, Counsel to the Assistant Attorney General for the Criminal Division, stated that this view, which was "shared strongly by those of us in the Criminal Division and . . . in the Department generally," was that the FBI's approach to detainees had been very successful with terrorism subjects. This approach, according to Nahmias, is to establish a rapport, treat the people with respect, and try to make them into long-term strategic sources of information "in the way we flip bad guys all the time." Nahmias told the OIG that the military's aggressive approach was rooted in military intelligence training designed to obtain time-sensitive battlefield information, but that these techniques do not work in the long run.

Interrogations of "High-Value" Detainees

Our investigation examined the evolution of FBI policies and guidance regarding its agents' involvement with detainee interrogations. In particular,

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the OIG report examined the interrogation of Abu Zubaydah, a "high-value" detainee held by the CIA. His interrogation, and the FBI's response to it, led to the decision that the FBI would not participate with other agencies when they used interrogation techniques not followed by the FBI.

Zubaydah was captured in Pakistan in March 2002, and was taken to a CIA facility. Two FBI agents who were familiar with al-Qaeda and the Zubaydah investigation, who were skilled interviewers, and who spoke Arabic were assigned to assist the CIA in interviewing Zubaydah. The FBI agents conducted the initial interviews of Zubaydah, assisting in his care and developing rapport with him. However, when CIA interrogators arrived at the site they assumed control of the interrogation. The FBI agents observed the CIA use classified techniques that undoubtedly would not be permitted under FBI interview policies. While the CIA has since acknowledged water boarding Zubaydah, we did not find evidence that the FBI agents witnessed this. However, at the time, one of the FBI agents expressed strong concerns about the techniques he did witness to senior officials in the FBI's Counterterrorism Division.

This agent's reports led to discussions at FBI Headquarters, with the DOJ, and with the CIA about the FBI's role in joint interrogations with other agencies. Ultimately, in August of 2002 the head of the FBI's Counterterrorism Division, Assistant Director Pasquale D'Amuro, recommended that the FBI not participate in joint interrogations of detainees with other agencies in which harsh or extreme techniques not allowed by the FBI would be employed. FBI Director Robert Mueller agreed.

D'Amuro gave several reasons to the OIG for his recommendation. First, he said he felt that these techniques were not as effective for developing accurate information as the FBI's rapport-based approach, which he stated had previously been used successfully to obtain cooperation from al-Qaeda members. He explained that the FBI did not believe these harsh techniques would provide the intelligence the FBI needed and that the FBI's proven techniques would. He also said the individuals being interrogated came from parts of the world where much worse interview techniques were used, and they expected the United States to use these harsh techniques. As a result, D'Amuro did not think the techniques would be effective in obtaining accurate information. He said what the detainees did not expect was to be treated as human beings. He also said the FBI had successfully obtained information without the use of aggressive techniques. D'Amuro said that if aggressive techniques are used long enough, detainees will start saying things they think the interrogator wants to hear just to get them to stop.

Second, D'Amuro told the OIG that the use of the aggressive techniques failed to take into account an "end game." D'Amuro stated that even a military

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tribunal would require some standard for admissibility of evidence. Obtaining information by way of aggressive techniques would not only jeopardize the government's ability to use the information against the detainees, but also might have a negative impact on the agents' ability to testify in future proceedings.

Third, D'Amuro stated that, in addition, using these techniques was wrong and helped al-Qaeda in spreading negative views of the United States.

We found that after the FBI's decision not to participate in the use of these techniques, later in 2002 FBI agents assigned to Guantanamo began raising concerns to FBI Headquarters focused particularly on the interrogation of Muhammad Al-Qahtani. Al-Qahtani had unsuccessfully attempted to enter the United States shortly before the September 11 attacks, allegedly to be an additional hijacker. After he was captured in Pakistan and transferred to Guantanamo Bay, Al-Qahtani resisted initial FBI attempts to interview him. In September 2002, the military assumed control over his interrogation, although behavioral specialists from the FBI continued to observe and provide advice.

The FBI agents saw military interrogators use increasingly harsh and demeaning techniques, such as menacing Al-Qahtani with a snarling dog during his interrogation. FBI agents also objected when the military announced a phased plan which included keeping Al-Qahtani awake during continuous 20-hour interviews every day for an indefinite period, preventing him from speaking for a week, and using very harsh techniques of the sort used for training U.S. military special forces to resist interrogation. The plan also included an option for sending Al-Qahtani to another country to employ its interrogation techniques to obtain information from him.

The friction between FBI officials and the military over the interrogation plans for Al-Qahtani increased, with the FBI advocating a long-term rapport-based strategy and the military insisting on a more aggressive approach. As a result of the interrogations of Al-Qahtani and other detainees at Guantanamo, several FBI agents raised concerns with DOD and FBI Headquarters. The concerns related to: (1) the legality and effectiveness of DOD techniques, (2) the impact of these techniques on the future prosecution of detainees in court or before military commissions, and (3) the potential problems that public exposure of these techniques would create for the FBI as an agency and FBI agents individually.

Despite the FBI's objections, the military proceeded with its interrogation plan for Al-Qahtani, without the FBI's participation or observation. According to several military reviews of detainee treatment, as well as other military records, the techniques used on Al-Qahtani during this time period included stress positions, 20-hour interrogations, tying a dog leash to his chain and

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leading him through a series of dog tricks, stripping him naked in the presence of a female, repeatedly pouring water on his head, and instructing him to pray to an idol shrine.

One of the DOD's later military reviews, the Schmidt-Furlow Report, concluded that many of the techniques that the DOD used on Al-Qahtani were authorized under military policies in effect at the time. However, that report concluded that other techniques used on Al-Qahtani by the military during this time period were "unauthorized" at the time they were employed. Although we found no evidence that the FBI was aware of the specific techniques used by the military during this period, one FBI agent learned from a member of the military that Al-Qahtani was hospitalized during this time frame for what the military said was low blood pressure along with low body core temperature.

We determined that some of the FBI agents' concerns regarding DOD interrogation techniques at Guantanamo were communicated by the FBI to senior officials in the DOJ Criminal Division and ultimately to the Attorney General. The DOJ senior officials we interviewed generally said they recalled that the primary concern expressed about the Guantanamo interrogations was that DOD techniques and interrogators were ineffective at developing actionable intelligence.

We were unable to determine definitively whether the concerns of the FBI and the DOJ about DOD interrogation techniques were ever addressed by any of the federal government's inter-agency structures created for resolving disputes about antiterrorism issues. Several senior DOJ Criminal Division officials told us that they raised concerns about particular DOD detainee practices in 2003 with the National Security Council. Several witnesses also told us that they believed that Attorney General Ashcroft spoke with the National Security Council or the DOD about these concerns, but we could not confirm this because former Attorney General Ashcroft declined to be interviewed for this review.

However, we found no evidence that the FBI's concerns influenced DOD interrogation policies. Ultimately, the DOD made the decisions regarding what interrogation techniques would be used by military interrogators at Guantanamo, because Guantanamo was a DOD facility and the FBI was there in a support capacity.

David Ayres, Chief of Staff to former Attorney General Ashcroft, told us that the dispute between the DOJ and the FBI on one side and elements of the military on the other was the subject of "ongoing, longstanding, trench warfare in the interagency discussions." Similarly, David Nahmias, a counsel in the Criminal Division, described the issue of detainee interrogation approaches as "an ongoing fight," which "DOD always won . . . because they controlled the

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locations and they had ultimate control, which we acknowledged, of the [detainees]."

While FBI witnesses almost uniformly told us that they strongly favored non-coercive rapport-based interview techniques to the harsher techniques being used on Al-Qahtani, we did find one proposal that was advanced by certain officials from the FBI and the DOJ in late 2002 to subject Al-Qahtani to interrogation techniques of the sort that had previously been used by the CIA on Zubaydah and another detainee. We found a draft letter with this proposal that was prepared for the National Security Council. Two DOJ and FBI officials involved with this proposal told us that the rationale for this proposal was to bring more effective interrogation techniques to bear on Al-Qahtani than the ineffective interrogation techniques that the military had been using on him up to that time.

We determined that some officials in the DOJ and the FBI were aware of the harsh techniques that had been used or approved for use by the CIA on Zubaydah. However, the two DOJ and FBI officials involved in the proposal for Al-Qahtani told us that they did not learn what specific techniques had been used on Zubaydah until much later, and that they based their recommendation in the proposal for Al-Qahtani on the fact that such techniques had been effective at obtaining useful information from Zubaydah.

Ultimately the DOD opposed the proposal and it was never implemented. However, we concluded that the proposal was inconsistent with the FBI Director's determination that the FBI would not be involved in harsh or coercive interrogations, and we believe that senior FBI officials would not have supported the proposal had it reached them. Moreover, we were troubled that FBI and DOJ officials would advocate for an interrogation plan without knowing what interrogation techniques the plan entailed.

FBI Training and Guidance to its Employees Regarding Detainee Interrogation Issues

We also examined the training that FBI agents received regarding issues of detainee interrogation and detainee abuse or mistreatment in connection with their deployments to the military zones. A large majority of agents who completed their deployments prior to May 2004 – when the FBI issued written guidance on FBI agents' conduct in detainee interrogations – reported in the OIG survey that they did not receive any training, instruction, or guidance concerning FBI or other agency standards of conduct relating to detainees prior to or during their deployment.

We also examined the guidance that the FBI provided to its employees on detainee interrogations. We found that the FBI initially did not issue specific

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guidance to its agents about acceptable interrogation techniques when they were first deployed to conduct interrogations in the military zones. Most of the FBI's written policies regarding permissible interrogation techniques for its agents or for its agents' conduct in collaborative or foreign interviews were developed prior to the September 11 attacks. Although general FBI policies prohibited FBI agents from utilizing coercive interview techniques, no policy had ever been issued to address the question of what FBI agents should do if they witnessed non-FBI interrogators using coercive or abusive techniques.

Eventually, following the Abu Ghraib disclosures in April 2004, on May 19, 2004, the FBI issued an official policy stating that FBI personnel may not participate in any treatment or use any interrogation technique that violates FBI policies, regardless of whether the co-interrogators are in compliance with their own guidelines. The policy also stated that if an FBI employee knows or suspects that non-FBI personnel have abused or are abusing or mistreating a detainee, the FBI employee should report the incident to the FBI On-Scene Commander.

Almost immediately after the FBI's May 2004 policy was issued, however, several FBI employees raised concerns about it. Among other things, the FBI On-Scene Commander in Iraq told FBI Headquarters that the policy did not draw an adequate line between conduct that is "abusive" and techniques such as stress positions, sleep management, stripping, or loud music that, while seemingly harsh, may have been permissible under orders or policies applicable to non-FBI interrogators.

In late May 2004, the FBI General Counsel stated in an e-mail to the FBI Director that, in response to their questions, agents were instructed that the intent of the policy was for agents to report conduct that they knew or suspected was beyond the authorization of the person doing the harsh interrogation. Agents told us, however, that they often did not know what techniques were permitted under military policies.

We concluded that while the FBI provided some guidance to its agents about conduct in the military zones, FBI Headquarters did not provide timely guidance or fully respond to repeated requests from its agents in the military zones for additional guidance regarding their participation in detainee interrogations.

FBI Observations Regarding Detainee Treatment

Our report also describes the results of our survey of FBI employees who served at Guantanamo and in Afghanistan and Iraq. The survey sought information about whether FBI agents observed or heard about approximately 40 separate aggressive interrogation techniques, including such techniques as

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using water to create the sense of drowning (water boarding), using military dogs to frighten detainees, and mistreating the Koran.

A majority of FBI employees who served at Guantanamo reported in response to our survey that they never saw or heard about any of the specific aggressive interrogation techniques listed in our survey. However, over 200 FBI agents said they had observed or heard about military interrogators using a variety of harsh interrogation techniques on detainees. These techniques generally were not comparable to the most egregious abuses that were observed at Abu Ghraib prison in Iraq. Moreover, it appears that some but not all of these harsh interrogation techniques were authorized under military policies in effect at Guantanamo.

The most commonly reported technique used by non-FBI interrogators on detainees at Guantanamo was sleep deprivation or disruption. "Sleep adjustment" was explicitly approved for use by the military at Guantanamo under the policy approved by the Secretary of Defense in April 2003. Numerous FBI agents told the OIG that they witnessed the military's use of a regimen known as the "frequent flyer program" to disrupt detainees' sleep in an effort to lessen their resistance to questioning and to undermine cell block relationships among detainees.

Other FBI agents described observing military interrogators use a variety of techniques to keep detainees awake or otherwise wear down their resistance. Many FBI agents told the OIG that they witnessed or heard about the military's use of bright flashing strobe lights on detainees, sometimes in conjunction with loud rock music. Other agents described the use of extreme temperatures on detainees.

Prolonged short-shackling, in which a detainee's hands were shackled close to his feet to prevent him from standing or sitting comfortably, was another of the most frequently reported techniques observed by FBI agents at Guantanamo. This technique was sometimes used in conjunction with holding detainees in rooms where the temperature was very cold or very hot in order to break the detainees' resolve.

A DOD investigation, discussed in the Church Report, described the practice of short-shackling prisoners as a "stress position." Stress positions were prohibited at Guantanamo under DOD policy beginning in January 2003. However, these FBI agents' observations confirm that prolonged shortshackling continued at Guantanamo for at least a year after the revised DOD policy took effect.

Many FBI agents reported the use of isolation at Guantanamo, sometimes for periods of 30 days or more. In some cases, isolation was used to

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prevent detainees from coordinating their responses to interrogators. It was also used to deprive detainees of human contact as a means of reducing their resistance to interrogation.

In addition, a few FBI agents reported other harsh or unusual interrogation techniques used by the military at Guantanamo. These incidents tended to be small in number, but they became notorious because of their nature. They included using a growling military dog to intimidate a detainee during an interrogation, twisting a detainee's thumbs back, using a female interrogator to touch or provoke a detainee in a sexual manner, wrapping a detainee's head in duct tape, and exposing a detainee to pornography.

In Iraq, FBI agents served at Abu Ghraib and other detention facilities. Most of the FBI employees reported to the OIG that they never observed potentially abusive treatment of detainees in Iraq or heard about it from detainees or other witnesses. Overall, of the 267 survey respondents who served in Iraq between March 2003 and the end of 2004, 188 stated that they neither observed nor heard about any of the kinds of detainee treatment described in the survey.

Several FBI agents said they observed detainees deprived of clothing. Other frequently reported techniques identified by FBI agents as used by military personnel in Iraq included sleep deprivation or interruption, loud music and bright lights, isolation of detainees, and hooding or blindfolding during interrogations. FBI employees also reported the use of stress positions, prolonged shackling, and forced exercise in Iraq. In addition, several FBI agents told the OIG that they became aware of unregistered "ghost detainees" at Abu Ghraib whose presence was not reflected in official DOD records.

Although several FBI agents had been deployed to the Abu Ghraib prison in Iraq, they told us that they did not witness the extreme conduct that occurred at that facility in late 2003 and that was publicly reported in April 2004. The FBI agents explained that they typically worked outside of the main prison building where the abuses occurred, and they did not have access to the facility at night when much of the abuse took place.

In Afghanistan, most of the FBI employees we contacted reported that they never observed or heard about any potentially abusive treatment of detainees. Overall, most of the 172 FBI agents who responded to our survey and who served in Afghanistan between late 2001 and the end of 2004, stated that they neither observed nor heard about any of the kinds of detainee treatment described in the survey. We received similar reports during our interviews with agents who had served in Afghanistan. A few FBI agents sent to Afghanistan reported that they observed or heard about various rough or aggressive treatment of detainees by military interrogators, including harsh or

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prolonged use of shackles or restraints, coercive use of stress positions, deprivation of clothing, and sleep deprivation by means of frequent awakenings, loud music, or lights.

Allegations of Misconduct by FBI Agents

We also investigated several specific allegations that particular FBI agents participated in abuse of detainees in connection with interrogations in the military zones. Some of these allegations were referred to us by the FBI, while others came to our attention during the course of our review. We describe in detail our findings regarding these allegations in Chapter 11 of the report.

In general, we did not substantiate these allegations. We found that the vast majority of FBI agents in the military zones understood that existing FBI policies prohibiting coercive interrogation tactics continued to apply in the military zones and that they should not engage in conduct overseas that would not be permitted under FBI policy in the United States. As noted above, the FBI decided in 2002 to continue to apply FBI interrogation policies to the detainees in the military zones. We found that most FBI agents adhered to the FBI's traditional interview strategies in the military zones and avoided participating in the interrogation techniques that the military employed.

Conclusion

The FBI deployed agents to military zones after the September 11 attacks in large part because of its expertise in conducting custodial interviews and in furtherance of its expanded counterterrorism mission. The FBI has had a long history of success in custodial interrogations using non-coercive, rapport-based interview techniques developed for the law enforcement context. Some FBI agents experienced disputes with the DOD, which used more aggressive interrogation techniques. These disputes placed FBI agents in difficult situations in the military zones. However, apart from raising concerns about the DOD's techniques, the FBI had little leverage to change DOD policy.

The FBI decided in the summer of 2002 that it would not participate in joint interrogations of detainees with other agencies in which techniques not allowed by the FBI were used. However, the FBI did not issue formal written guidance about detainee treatment to its agents until May 2004, shortly after the Abu Ghraib abuses became public. We believe that the FBI should have recognized earlier the issues raised by the FBI's participating with the military in detainee interrogations in the military zones and should have moved more quickly to provide clearer guidance to its agents on these issues.

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Nevertheless, our investigation found that the vast majority of the FBI agents deployed in the military zones dealt with these issues by separating themselves from other interrogators who used non-FBI techniques and by continuing to adhere to FBI policies.

In sum, we believe that while the FBI could have provided clearer guidance earlier, and could have pressed harder its concerns about detainee abuse by other agencies, the FBI should be credited for generally avoiding participation in detainee abuse.

That concludes my testimony, and I would be pleased to answer any questions.

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Testimony for the Senate Judiciary Committee
June 10, 2008

"Coercive Interrogation Techniques:
Do They Work, Are They Reliable, and What Did the FBI Know About Them?"

Testimony of Professor Philip B. Heymann*

Madam Chairwoman, Members of the Committee:

I think I can be most helpful today by addressing, as precisely as I can, the six questions that have most concerned this committee. Raised by the discovery that we have been engaged in interrogation practices that we have long condemned, the questions are about what should be permissible and what is wise in the way of interrogation practices.

I think it is clarifying to break the questions into two groups: (1) four about interrogation practices that may amount to torture; and (2) two questions about the more likely coercive successors to any such practices -- practices that are not torture but may be illegal as cruel, inhuman, and degrading practices prohibited by the Detainee Treatment Act of 2005. Finally, I will address what legislation is needed.

* James Barr Ames Professor of Law, Harvard Law School; Deputy Attorney General, 1993-1994; Asst. Attorney General in charge of Criminal Division, 1978-1981; Dept. of State, 1965-1969

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A. Four Questions About Torture

1. Is the prohibition against torture absolute or does the prohibition depend upon the need for the information and the harms that information may prevent?

The prohibition of torture -- in the Convention Against Torture ("CAT") and in the statute passed in 1994 by Congress to enforce that convention -- is an absolute prohibition of certain, defined conduct, whatever the situation or exigency. The conduct is defined in the Convention Against Torture to forbid "any act by which severe pain or suffering ..... is intentionally inflicted on a person". Article 2 of the convention then says "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political stability, or any other public emergency may be invoked as a justification of torture." Adhering to the convention, the Senate stated its understanding of what should constitute severe mental, as opposed to physical, pain or suffering prohibited by Article 1 but it stated no objection to the unqualified obligation to avoid torture which Article 2 demanded. This issue does not seem to be contested. In its second periodic report to the Committee Against Torture, our government stated on May 6, 2005 "The United States is unequivocally opposed to the use and practice of torture .... No circumstances .... may be invoked as justification for or defense to committing torture." (As we shall see, there is a strong but contested argument that exigencies and dangers may be considered in assessing what lesser forms of coercion are prohibited by Article 16 and U.S. statutes as "cruel, inhuman, and degrading.").

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What constitutes severe physical suffering is the subject of some dispute, at the margins. Any U.S. interpretation that departed very sharply from the understanding of our closest allies would be equivalent to our renouncing the treaty as far as they were concerned. An interpretation that concluded that waterboarding is not intended to inflict the severe physical suffering on which it relies as an interrogation technique would be outside the limits of plausible interpretation.

2. *Should the United States renounce its obligations under several international conventions in order to be able to defend ourselves by torture in extreme circumstances?*

The short answer is "no". The reason is that the case for torture being an advantageous, much less critical, way of getting information from a suspect is unproven and weak, while the costs of reserving a right to engage in torture are real, demonstrated, and large. And so would be the costs of withdrawing from the convention against torture and other international conventions prohibiting it.

Let me very quickly detail some of the costs of preserving a "right" to torture, even in extreme emergencies. It is easiest to list them in terms of some of the groups that would pay the price.

- Those against whom torture is used who are, or turn out to be, innocent of any terrorist activity.

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- Our military and civilians whose safety is at risk of reciprocal behavior by other countries.

- All of us who need the cooperation of foreign allies who have frequently decided to withhold cooperation in handling suspects because of fear of our use of torture.

- Anyone threatened by the creation of new pools of potential terrorists recruited by their sense of injustice such as followed the release of the photos from Abu Ghraib.

- The interrogators asked to participate in torture and the organizations charged with employing torture in the face of public rejection of that technique.

- Those whose political support any President needs in times of national danger and whose pride in their nation and support of its policies depend on their beliefs in the traditional decency of American practices.

- The citizens of undemocratic states whose subjection to torture has previously been lessened by their governments' fear of western reaction -- a reaction which is made impossible if we accept the same practices when the government considers them necessary.

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None of these groups are affiliated with terrorism. Each of them would pay a heavy price for abandoning out commitment to avoid torture.

These costs could only be justified by quite certain and substantial benefits from withdrawing from our various obligations under international conventions to avoid torture or, alternatively, from ignoring our obligations either publicly or secretly. The benefits of keeping torture available as a tool of foreign policy or war for use in dire circumstances are, instead, rare, uncertain, and undocumented. There are, of course, undocumented claims of valuable information obtained by torture, but there is no record of how frequently we have been misled by the tortured suspects, nor has there been any effort to show that the information could not have been obtained in other ways. Supporters of torture in dire circumstances refer to the possibility of a ticking bomb situation where they allege that only the speed of torture would help. Opponents of torture point out that we have never had an occasion where the ticking bomb applies and that the likelihood that torture would be useful on that occasion is small. Let me briefly review the arguments in terms of the menu of information-gathering techniques.

Information-gathering about terrorist threats begins with a tip from an observer or a general suspicion about an organization that may be planning attacks or about a particular plan. By far the most important, as well as the first, decision our intelligence agencies have to make is whether to gather information about the organization or plan by covert techniques or to rely on

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overt techniques whose cost is to allow the members of the organization to know that they are being investigated. The British have relied primarily on covert techniques with notable success.

The covert techniques we can use to gather information without tipping off the organization include human surveillance, technologically enhanced physical surveillance, various forms of electronic surveillance, secret agents and informants, undercover offers, secret intelligence searches, and review of records with or without computerized data mining. These techniques have two vast advantages: they produce reliable and accurate information because the suspects do not know that information is being gathered about them; and they produce information in real-time, allowing us to act at once, not only after several hours or days of interrogation during which the terrorist group knows to hide its operation and to change its plans. In contrast, overt techniques such as interrogation allow the terrorist group to know, rather promptly, that one of its members has been captured and is being interrogated. Using that information, the group will take steps to retreat to backup plans as substitutes for whatever plan was under way and to make it more difficult for us to disable the other members of the organization.

Even in the cases where we should be paying the high price of alerting the group by moving quickly to detention and interrogation of a suspect, the benefits of torture or other forms of highly coercive interrogation are widely disputed. Coercion is likely to elicit a statement, but frequently one that is false. Any accurate information furnished can therefore only be detected by time-consuming verification. It was this disadvantage of unreliability that first caused our Supreme Court to forbid the use of coerced confessions. The problem is most severe when dealing with a carefully planned operation; for the plan is likely to include a cover story that is

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hard to unravel in any short period of time. The information furnished is likely to be narrow as well as unreliable. A tortured suspect is unlikely to reveal matters about which we did not know to ask; nothing will be volunteered. In sum, as the new Army Field Manual of September, 2006, states, torture "is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the HUMINT collector wants to hear." (at 5-21)

Unreliability and narrowness of torture-induced statements have led highly trained questioners to turn to any of a number of alternative techniques. The FBI has had notable success in investigating the embassy bombings in 1998 by developing a mutually supportive relationship between the suspect and the agent. As Inspector General Fine's report documents, this is plainly the preferred practice of the FBI. A similar technique was embraced by Hanns Scharff, the very successful Luftwaffe interrogator of allied pilots in World War II (The Interrogator, by Raymond Toliver). Some of our allies have used deception about the privacy of induced conversations while an individual is detained; or they have gathered enough information to make the suspect believe that he is simply confirming what is already known, leaving him with little reason to bear the dangers and costs of silence. A number of interrogators consider it to be crucial to create resentment or suspicion of his former colleagues, believing that loyalty is the major barrier to cooperation. Prosecutors rely for intelligence primarily upon offers of reduced periods of detention. In forbidding coercion, the U.S. Supreme Court recognized that coercive interrogation was a tempting shortcut replacing more reliable and sophisticated ways of investigating.

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Pressed with this argument, the supporters of maintaining a willingness to use torture turned quickly to the example of the ticking bomb placed in a major population center. They point out that many of the interrogation techniques listed above require more time than torture requires. Even in this case the benefits of torture are greatly exaggerated. We often have the wrong person. We may have the right person but the information he has may be inadequate to prevent the event. He may deceive us in a costly way or delay us long enough for the other conspirators to make alternative plans. Even under the pressure of torture, he may fall back to a cover story that was chosen to be not only false but also difficult to disprove.

Perhaps most important, since 9/11, we have not had a ticking bomb case – a case where we can identify a guilty suspect who we firmly believe has information that is urgently needed to save lives and where we have no other covert or overt way of obtaining that information in time. Abandoning the international obligations we have solemnly accepted at the costs I have described seems a very bad trade to preserve the mere possibility of using torture in a situation unlikely to ever arise.

3. What should a President do if he finds he is really facing a ticking bomb situation where the conditions I have just described are met?

He has three alternatives. He can, somewhat like Lincoln at the time of the Civil War, announce that he is going to disobey a law that prevents him from taking the steps essential to save many lives in an emergency; and that it is not possible to go to Congress to change the law in time to avoid a disaster. Alternatively, he can obey the torture statute and our treaty obligations, but

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perhaps at the cost of many lives. Citizens will differ on their preferences between the first and the second. I would prefer the first as long as the President's actions are transparent and he accepts the political, if not legal, risks of violating the law in a situation that is unexpected and is highly unlikely to occur. The third option – to act secretly on the basis of classified, implausible legal opinions – is surely the worst because it invites a broad spread of unaccountable mistreatment and invites widespread fears of what is suspected but cannot be known.

4. Do the President's options depend on whether we are at war in a way that triggers the President's commander-in-chief powers?

No. The heart of the issue has nothing in particular to do with war or terrorism. The question is what we want the President to do in the face of unanticipated emergencies. Most nations grant their chief executive extraordinary powers to deal with grave emergencies. Our constitution does not have emergency powers, but that does not avoid the problem. The emergency may be the flooding of New Orleans, the sudden arrival of a lethal flu, an earthquake like that China has just experienced, or any of a number of events that the Congress can hardly have anticipated in limiting the powers the President is authorized to execute. In each of these situations, which have nothing to do with armed conflict, the President also has to decide whether to exceed his authority in order to save lives. The decision is the same.

B. Two Questions About Highly Coercive Interrogation Short of Torture

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The following questions arise legally under the prohibition of cruel, inhuman, and degrading treatment found in Article 16 of the Conventions Against Torture (CAT) and made applicable to all American interrogators by the Detainee Treatment Act of 2005 (as well as Common Article 3 of the Geneva Conventions).

5. Is the prohibition of cruel, inhuman, and degrading treatment absolute or does our reservation make relevant the harms the interrogation may prevent?

The prohibition of cruel, inhuman, and degrading treatment found in Article 16 of the Convention Against Torture (CAT) was accepted by the Senate only with the reservation that, to qualify, any such treatment would have to violate the 5th, 8th, or 14th amendment to the Constitution of the United States. The Detainee Act now prohibits any interrogation that violates Article 16 as interpreted with our reservation. It is supported by the President's executive order interpreting Common Article 3 of the Geneva Conventions. Although it is not clear that other nations interpret the scope of this prohibition as variable with the danger and depending upon the importance of the information to save lives, there are certainly arguments to that effect for the United States.

The provision of the 5th, 8th, or 14th amendments that seems most applicable to interrogation with the object of gathering intelligence (and not producing any usable confession) is the "due process" prohibition of investigative activities that "shock the conscience" under the 5th and 14th amendments. That provision was most recently construed by the Supreme Court in Chavez v. Martinez 538 U.S. 760 (2003). In deciding whether damages should be paid to an individual

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who was interrogated while in great pain, having been shot by a police officer, the court split a number of ways. Still, much in the opinion suggests that it may not shock the conscience to continue interrogation in such circumstances if the police have "legitimate reasons, borne of exigency ... [such as] locating the victim of a kidnapping, ascertaining the whereabouts of a dangerous assailant or accomplice, or determining whether there is a rogue police officer" (Kennedy, J.) There is also no provision forbidding exceptions applicable to Article 16 of CAT – no provision analogous to the prohibition in Article 2 of any emergency exceptions to the prohibition of torture. Finally, the very broad word "degrading" is perfectly sensible in dealing with interrogations in familiar circumstances but is so inclusive that it suggests that many people would expect exceptions to be made if lives were at stake.

6. How does the 1994 statutory prohibition of torture relate to the 2005 statutory prohibition of cruel, inhuman, and degrading treatment?

If questions arise as to the propriety of a form of interrogation, the first question to be asked is whether it is torture. If it is, it is absolutely forbidden, without any legal exception. Many believe waterboarding fits in this category.

If the administration argues that something it proposes is not the intentional infliction of severe physical pain or suffering (i.e., "torture"), it will still have to satisfy the Congress that the interrogation technique is not "cruel, inhuman, or degrading" under the Detainee Act of 2005. Because these words are very broad and quite vague -- and might well encompass most of the contested techniques that were used frequently in Guantanamo, Abu Ghraib, or Baghram as

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described by I.G. Fine – it was wise for the Congress to require in §6(c)3 of the Military Commanders Act that:

> The President shall take actions to ensure compliance [with the prohibition of cruel, inhuman, and degrading treatment], including through the establishment of administrative rules and procedures.

Besides arguing that what was done would not, even in a routine case, be considered cruel, inhuman, or degrading under our reservation to CAT because it did not "shock the conscience", an administration defending the use of techniques that others claim are "degrading" or "cruel" would have available to it an argument from exigency – that, applying the "shock the conscience" test, the Supreme Court would tolerate their use, to save lives under analogous emergency circumstances, for example by a local police department.

Whether such techniques will really help deal with an urgent terrorist danger is also widely disputed. For example, during the early days of battling the IRA, some British officials argued that such methods obtained important information. Frank Steele, a former British intelligence officer, disagreed: "In practical terms, the additional useful information they produced was … minimal."

C. Should the Congress Attempt to Give More Specific Meaning to the Very Vague Terms "Cruel, Inhuman, and Degrading" or "Shock the Conscience" and, If So, How?

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In 2005, Juliette Kayyem (now Massachusetts State Undersecretary for Homeland Security) and I proposed the following in our book "Protecting Liberty in an Age of Terror":

> The Attorney General shall recommend and the President shall promulgate and provide to the Senate and House Judiciary , Intelligence, and Armed Services Committees, guidelines stating which specific highly coercive interrogation techniques are authorized....these guidelines shall address the duration and repetition of use of a particular technique and the effect of combining several different techniques together. The Attorney General shall brief appropriate committees of both houses of congress upon request, and no less frequently than every six months, as to which highly coercive interrogation techniques are presently being utilized by federal officials or those acting on their behalf.

This is not the only possibility. Let me try to list them all.

1. The Congress itself or the Administration with oversight by Congress could develop a list of:

    a. Permitted forms of interrogation, or

    b. Forbidden techniques

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2. All or some part of that list could be classified and made available only to appropriate committees of the Congress.

3. Congress could, in addition and more broadly, provide for judicial review, by either a federal district court or the FISA court, of claims by an individual who believes his interrogation violated the due process, "shock the conscience" test.

Under the Military Commissions Act, the Congress adopted the option of directing the President to develop administrative rules and procedures for any form of coercive interrogation that might violate the "shock the conscience" standard it had mandated.

It is hard to overstate the importance of the Congress acting in one of these ways. The debates about coercive interrogation in the days to come are likely to focus on a number of the steps described by I.G. Fine, as observed by FBI agents, including: solitary confinement; hooding, prolonged standing; stress positions, sleep deprivation, and a variety of other things that do not constitute "torture" but have been considered as cruel, inhuman, or degrading by our European allies and many Americans. The FBI, the CIA, and the DOD are presently operating under three quite different sets of limits. (The FBI, like the British in recent decades, applies familiar law enforcement standards.) The Congress should provide guidance on what it considers appropriate, in light of American traditions and pride, in this realm of highly coercive interrogation.

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Statutes now require every agency to comply, at a minimum, with the prohibition of interrogation techniques that "shock the conscience". But this was not to be a personal judgment of the President. Congress and federal courts should have an opportunity to express their judgments on what is consistent with the traditions of America and its closest democratic allies. That is not only required for democratic decision and essential to foreign alliances; it is also the most plausible way to give meaning to the Senate's and the Supreme Court's prohibition of what shocks the conscience of the American people.

Congress must give guidance as to what is permissible in the absence of the highly unlikely "ticking bomb". We have as a nation rejected torture, but we lack definition of what else is forbidden as a general, American practice. That lack is one of the major complaints of the FBI agents described by I.G. Fine. They are right.

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Statement of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
Hearing On "Coercive Interrogation Techniques: Do They Work, Are They Reliable, and What Did the FBI Know About Them?"
June 10, 2008

I thank Senator Feinstein for chairing this important hearing. For more than six years this administration has made a mess of this nation's policies for dealing with detainees. Their treatment of detainees has been a stain on this country, and our reputation will reflect it for many years to come. The dysfunctional military commission system put on display last week is just one glaring example of those failures. Even 9/11 victims and their families have been ignored in that process, and last week, I wrote to Attorney General Mukasey after hearing reports that the victims' families were excluded from the arraignments of the 9/11 perpetrators. I urged him to ensure that the 9/11 victims are treated with respect and dignity, and are provided adequate access to the proceedings, as they would be if the government had chosen to proceed in our established court system.

The government's use of abusive interrogation practices, which is the subject of today's hearing, is another sad example of the failure of detainee policy. No one, either in the United States or in the international community, will forget the chilling images from Abu Ghraib. We have since heard of similar practices at the Guantanamo Bay Detention facility and at other facilities overseas. Inspector General Glenn Fine's report is perhaps the most thorough narrative yet of the cruel and aggressive interrogation techniques our government employed at Guantanamo Bay. The report raises alarming questions about the behavior of government agencies, including the Department of Defense.

I asked Director Mueller in March when he was before this Committee about the FBI interrogation practices in counterterrorism. He testified that the FBI follows proscriptions against coercive interrogations. The Inspector General's report appears to confirm this, finding that agents at the FBI generally have adhered to FBI policy in their treatment of detainees at Guantanamo Bay, and in Iraq and Afghanistan. Alarmingly, however, the report also chronicles abuses that FBI agents witnessed.

I am concerned that it took so many years for this Committee to hear about those reports of abuse. I and others on this Committee have been pursuing documents and information about abusive interrogation by our government since before the Abu Ghraib scandal. I asked Director Mueller years ago about what he knew of these techniques. I wish he had been more forthcoming then – it might have assisted the Congress in investigating allegations of abuse sooner.

One of the great tragedies of this issue is that the coercive techniques this administration was so determined to use are in fact not more effective. As we will learn today from our witness panel, rapport-building techniques are the most effective means of obtaining reliable information from radical terrorists, like members of Al Qaeda. The FBI has

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amassed considerable information from Al Qaeda suspects that has proven to be more accurate and reliable than the information obtained through exclusively coercive techniques.

The FBI's interrogations yielded information about Al Qaeda's finances, recruiting methods, location of training camps, and the identities of many of the operatives we are still hunting today. None of this information required torture or harsh interrogation techniques; in fact, such harsh techniques may have failed to produce such successes. As we all know, when you are in pain, you will say anything to stop that pain, whether it is true or not. The last things an interrogation should yield are false leads, which waste time and resources.

In addition, a cooperative subject is the most valuable way to obtain high value intelligence. The witnesses' written testimony for today's hearing provides vivid examples of this fact. As a former prosecutor, I know first-hand that the most valuable information you can receive from any suspect is through complete and full cooperation. That will only come through non-coercive interrogations, not through abuse.

Too often those who would have us use torture or other harsh interrogation techniques say it cannot be ruled out because in the post 9/11 world, you may need to get information quickly from a suspect to save lives, or even to prevent another catastrophic attack. But as today's witnesses will make clear, this is just not so. Experienced interrogators, like 27-year veteran FBI Special Agent Jack Cloonan will tell us that this "ticking bomb" scenario is a red herring. A committed terrorist will use those situations to his advantage either to provide interrogators false information or simply to act in defiance, hoping to become a martyr. The ticking time bomb scenario is not taken seriously by experienced interrogators, and cannot and should not be used to justify illegal acts or torture.

I am grateful to our witnesses for appearing at today's hearing. I am confident their testimony will increase our knowledge and understanding of these important issues.

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Drafted by SSA [redacted] FBI (BAU) at Guantanamo Bay and forwarded to Marion Bowman, Legal Counsel, FBIHQ, on 11/27/2002.

LEGAL ANALYSIS OF INTERROGATION TECHNIQUES:

Interrogation Techniques

Category I –

1. Gagging with gauze.
2. Yelling at detainee.
3. Deception
   a. Multiple Interrogators
   b. Interrogator posing as an interrogator from a foreign nation with a reputation of harsh treatment of detainees.

Category II-

1. Use of stress positions (such as standing) for a maximum of 4 hrs.
2. Use of falsified documents or reports.
3. Isolation facility for 30 day increments.
4. Non-standard interrogation environment/booth.
5. Hooding detainee.
6. Use of 20-hour interrogation segments.
7. Removal of all comfort items (including religious items).
8. Switching detainee from hot rations to MRE's.
9. Removal of all clothing.
10. Forced grooming (shaving of facial hair etc...)
11. Use of individual phobias (such as fear of dogs) to induce stress.

Category III-

1. Use of scenarios designed to convince detainee that death or severe pain is imminent for him or his family.
2. Exposure to cold weather or water (with medical monitoring).
3. Use of wet towel and dripping water to induce the misperception of drowning.
4. Use of mild physical contact such as grabbing, light pushing and poking with finger.

Category IV-

1. Detainee will be sent off GTMO, either temporarily or permanently, to Jordan, Egypt, or another third country to allow those countries to employ interrogation techniques that will enable them to obtain the requisite information.

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE [illegible] BY [illegible]

P.03

Legal Analysis

The following techniques are examples of coercive interrogation techniques which are not permitted by the U.S. Constitution:

Category I -

3. b. Interrogator posing as an interrogator from a foreign nation with a reputation of harsh treatment of detainees.

Category II-

1. Use of stress positions (such as standing) for a maximum of 4 hrs.
2. Use of falsified documents or reports.
5. Hooding detainee.
6. Use of 20-hour interrogation segments.
9. Removal of all clothing.
11. Use of individual phobias (such as fear of dogs) to induce stress.

Category III-

1. Use of scenarios designed to convince detainee that death or severe pain is imminent for him or his family.
2. Exposure to cold weather or water (with medical monitoring).
3. Use of wet towel and dripping water to induce the misperception of drowning.

Information obtained through these methods will not be admissible in any Criminal Trial in the U.S. Although, information obtained through these methods might be admissible in Military Commission cases, the Judge and or Panel may determine that little or no weight should be given to information that is obtained under duress.

The following techniques are examples of coercive interrogation techniques which may violate 18 U.S.C. s. 2340, (Torture Statute):

Category II-

5. Hooding detainee.
11. Use of individual phobias (such as fear of dogs) to induce stress.

Category III-

1. Use of scenarios designed to convince detainee that death or severe pain is imminent for him or his family.
2. Exposure to cold weather or water (with medical monitoring).
4. Use of wet towel and dripping water to induce the misperception of drowning.

In 18 U.S.C. s. 2340, (Torture Statute), torture is defined as "an act committed by a person acting under color of law specifically intended to inflict severe physical or mental pain or suffering upon another person within his custody or control." The torture statute defines "severe mental pain or suffering" as "the prolonged mental harm caused by or resulting from the intentional infliction or threatened infliction of severe physical pain or suffering; or the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses of the personality; or the threat of imminent death; or the threat that another person will imminently be subject 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 of the personality."

Although the above interrogation techniques may not be per se violations of the United States Torture Statute, the determination of whether any particular use of these techniques is a violation of this statue will hinge on the intent of the user. The intent of the user will be a question of fact for the Judge or Jury to decide. Therefore, it is possible that those who employ these techniques may be indicted, prosecuted, and possibly convicted if the trier of fact determines that the user had the requisite intent. Under these circumstances it is recommended that these techniques not be utilized.

The following technique is an example of a coercive interrogation technique which appears to violate 18 U.S.C. s. 2340, (Torture Statute):

Category IV-

1. Detainee will be sent off GTMO, either temporarily or permanently, to Jordan, Egypt, or another third country to allow those countries to employ interrogation techniques that will enable them to obtain the requisite information.

In as much as the intent of this category is to utilize, outside the U.S., interrogation techniques which would violate 18 U.S.C. s. 2340 if committed in the U.S., it is a per se violation of the U.S. Torture Statute. Discussing any plan which includes this category, could be seen as a conspiracy to violate 18 U.S.C. s. 2340. Any person who takes any action in furtherance of implementing such a plan, would inculpate all persons who were involved in creating this plan. This technique can not be utilized without violating U. S. Federal law.

FINAL DRAFT

INTRODUCTORY STATEMENT of

PHILIPPE SANDS QC

PROFESSOR OF LAWS, UNIVERSITY COLLEGE LONDON
BARRISTER, MATRIX CHAMBERS

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

Hearing on: Coercive Interrogation Techniques: Do They Work, Are they Reliable, And What Did the FBI Know About Them

JUNE 10, 2008, 10 a.m.

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[CHECK AGAINST DELIVERY]

Chairman, Honourable Members of the Committee, it is my privilege and honour to appear before this Committee. As Professor of Law at the University of London, and as a practising member of the English Bar, it may be said that I appear before you as something of an outsider. I hope you will bear in mind that I am from a country that is friend and ally, that shares this country's abiding respect for the rule of law, and that has had its own long, painful experiences dealing with the real threat of terror. I have come to know America well over more than two decades, since I was a visiting scholar at Harvard Law School, then teaching at Boston College Law School and New York University Law School. I am married to an American. I am proud of the fact that my three children share American and British nationality.

A few weeks ago I published an article in Vanity Fair, *The Green Light* (attached) and my new book *Torture Team: the Rumsfeld Memo and the Betrayal of American Values.* These tell an unhappy story: the circumstances in which the US military was allowed to abandon President Lincoln's famous disposition of 1863, that "military necessity does not admit of cruelty". This Committee will be familiar with those events: it was a focus of the judicial confirmation hearings for William J Haynes II in July 2006. You will recall that on December 2nd, 2002, on the recommendation of Mr Haynes, Secretary Rumsfeld authorised the use of new, aggressive techniques of interrogation on Guantanamo Detainee 063. It is now a famous memo, the one in which he wrote: "I stand for 8-10 hours a day. Why is standing limited to 4 hours?"

My book tells the story of that memo. The circumstances in which it came to be written, relied on and rescinded, and how the techniques migrated. It is a snapshot of the subject of this hearing. To write the book I journeyed around America, meeting with many of the people who were directly involved. I met a great number, and was treated with a respect and hospitality for which I remain very grateful. Over hundreds of hours I conversed or debated with, amongst others, the combatant commander and his lawyer at Guantanamo

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(Major General Dunlavey and Lieutenant Colonel Beaver); the Commander of US Southern Command (General Hill); the Chairman of the Joint Chiefs of Staff (General Myers); the Undersecretary of Defense (Mr Feith); the General Counsel of the Navy (Mr Mora); and the Deputy Assistant Attorney General at DoJ (Mr Yoo). I met twice with Mr Haynes who, along with the Vice President's Counsel, Mr Addington, took a central role on the key decisions. I also met twice with Spike Bowman, an FBI Deputy General Counsel who received complaints from Guantanamo and took them to the DoD. From these and many other exchanges I pieced together what I believe to be a truer account than that which has been presented by the Administration. In particular, I learnt that in the case on which I focused – a snapshot – the aggressive techniques of interrogation selected for use on Detainee 063 came from the top down, not from the bottom up; that they did not produce reliable information, or indeed any meaningful intelligence; and that they were opposed by the FBI.

My account is that of the Report recently published by the Inspector General at the DOJ, although I go further on some points of detail. I learnt that the concerns of FBI personnel at Guantanamo were communicated directly to Mr Haynes' office, in telephone conversations in November and December 2002 between Mr Bowman and, first, Mr Bob Dietz; second, Mr Dan Dell'Orto (who was then Mr Haynes' Deputy and is now his Acting successor); and third, Mr Haynes himself. Mr Bowman told me it was "a very short conversation , he did not want to talk about it all, he just stiff-armed me". You can find a full account at pages 136-146 of the British edition of my book (pp. 112-121 of the US edition, attached). My conclusion, taking into account my conversations with Mr Haynes, is that he was able to adopt that approach because by then – contrary to the impression he sought to create when he appeared before this Committee – he had knowledge of the contents of the DOJ legal memos written by Jay Bybee and John Yoo on 1 August 2002.

On the basis of these conversations I believe that the Administration has spun a false narrative. It claims that the impetus for the new interrogation techniques came from the bottom-up. That is not true: the abuse was a result of pressures driven from the highest

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levels of government. It claims the so-called Torture Memo of 1 August 2002 had no connection with policies adopted by the Administration: that too is false, as the memo provided cover for Mr Haynes. It claims that in its actions it simply followed the law. To the contrary, the Administration consciously sought legal advice to set aside international constraints on detainee interrogations, without apparently turning its mind to the consequences of its actions. In this regard, the position adopted by the Pentagon's head of policy at the time, Mr Feith, appears most striking.

As result, Common Article 3 of the Geneva Conventions was violated, along with provisions of the 1984 Convention prohibiting Torture. The spectre of war crimes was raised by US Supreme Court Justice Anthony Kennedy, in the 2006 judgment in *Hamdan v Rumsfeld.* That judgment corrected the illegality of President Bush's determination that none of the detainees at Guantanamo had any rights under Geneva.

Chairman, Honourable Members of the Committee, this is an unhappy story. It points to the early and direct involvement of those at the highest levels of government, often through their lawyers. When he appeared before this Committee in July 2006, Mr Haynes did not share with you that his involvement (and that of Secretary Rumsfeld) began well before that stated in the official version. He did not tell you that in September 2002 he had visited Guantanamo, together with Mr Gonzales and Mr Addington, and discussed interrogations. This is a story not only of abuse and crime opposed by the FBI, but also of cover-up.

Chairman, for what purpose was this done? The Administration claims that coercive interrogation of Detainee 063 produced meaningful information. That is not what I was told by those I interviewed. The coercive interrogations were illegal, did not work, have undermined moral authority, have migrated, have served as a recruiting tool for those who seek to do harm to the US, and have made it more difficult for allies to transfer detainees and cooperate in other ways. They have resulted in the very opposite of what was intended, contributing to an extension of the conflict and endangering the national

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security they were meant to protect. On May 14 last the Pentagon announced charges against Detainee 063 were dropped. He is, apparently, unprosecutable.

These unhappy consequences mirror Britain's experience in using similar techniques against the IRA in the early 1970's, widely believed to have extended the conflict. The five techniques were soon abandoned, but not before great damage was done. They have never been picked up again. Across the political spectrum in Britain there exists a unanimous belief that such techniques are wrong and can never be justified. Coercive interrogation, aggression and torture must never be institutionalised: once the door is open it is difficult to close. That is why, with the greatest respect, we have turned our back firmly against the institutionalisation of coercive interrogation that appears to have been recommended by Professor Heymann in his 2004 Report.[1] It is why we are so strongly opposed to the related idea of torture warrants, as floated by Professor Dershowitz, an idea which, as I describe in my book, directly undermined the efforts of those who opposed the abuse at Guantanamo.[2]

In conclusion, I can put it no better than George Kennan, the great American diplomat. In 1947 he wrote a telex that issued this warning in relation to a perceived Soviet threat: "[W]e must have courage and self-confidence to cling to our own methods and conceptions of human society. [T]he greatest danger that can befall us ... is that we shall allow ourselves to become like those with whom we are coping." Chairman, Honourable Members of the Committee, no country has done more to promote the international rule of law than the United States. Uncovering the truth is a first step in restoring this country's necessary leadership role; in undoing the damage caused; and in providing a secure, sustainable and effective basis for responding to what is a real threat of terrorism.

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[1] Phillip B. Heymann and Juliette Kayyem, *Preserving Security and Democratic Freedoms in the War on Terrorism*, 2004, available at: http://belfercenter.ksg.harvard.edu/files/ltls_final_5_3_05.pdf

[2] Alan Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (Yale University Press, 2002); see Philippe Sands, *Torture Team* (2008, Palgrave Macmillan, p. 127).

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I thank you for allowing me the opportunity to make this introductory statement.

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ATTACHMENTS

[1]

THE GREEN LIGHT, by Philippe Sands
VANITY FAIR, MAY 2008

[2]
TORTURE TEAM: RUMSFELD'S MEMO AND THE
BETRAYAL OF AMERICAN VALUES [2008, PALGRAVE MACMILLAN]
Frontispiece and pages 112-121

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VANITY FAIR

The White House

The Green Light

As the first anniversary of 9/11 approached, and a prized Guantánamo detainee wouldn't talk, the Bush administration's highest-ranking lawyers argued for extreme interrogation techniques, circumventing international law, the Geneva Conventions, and the army's own Field Manual. The attorneys would even fly to Guantánamo to ratchet up the pressure—then blame abuses on the military. Philippe Sands follows the torture trail, and holds out the possibility of war crimes charges.

by Philippe Sands | May 2008

Changing the long-accepted rules on interrogation required concerted action. From left: Undersecretary of Defense Douglas J. Feith, then vice-presidential counsel David S. Addington, then White House counsel Alberto Gonzales, President George W. Bush, and Vice President Dick Cheney. *Photo illustration by Chris Mueller.*

The abuse, rising to the level of torture, of those captured and detained in the war on terror is a defining feature of the presidency of George W. Bush. Its military beginnings, however, lie not in Abu Ghraib, as is commonly thought, or in the "rendition" of prisoners to other countries for questioning, but in the treatment of the very first prisoners at Guantánamo. Starting in late 2002 a detainee bearing the number 063 was tortured over a period of

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more than seven weeks. In his story lies the answer to a crucial question: How was the decision made to let the U.S. military start using coercive interrogations at Guantánamo?

The Bush administration has always taken refuge behind a "trickle up" explanation: that is, the decision was generated by military commanders and interrogators on the ground. This explanation is false. The origins lie in actions taken at the very highest levels of the administration—by some of the most senior personal advisers to the president, the vice president, and the secretary of defense. At the heart of the matter stand several political appointees—lawyers—who, it can be argued, broke their ethical codes of conduct and took themselves into a zone of international criminality, where formal investigation is now a very real option. This is the story of how the torture at Guantánamo began, and how it spread.

"Crying. Angry. Yelled for Allah."

One day last summer I sat in a garden in London with Dr. Abigail Seltzer, a psychiatrist who specializes in trauma victims. She divides her time between Great Britain's National Health Service, where she works extensively with asylum seekers and other refugees, and the Medical Foundation for the Care of Victims of Torture. It was uncharacteristically warm, and we took refuge in the shade of some birches. On a table before us were three documents. The first was a November 2002 "action memo" written by William J. (Jim) Haynes II, the general counsel of the U.S. Department of Defense, to his boss, Donald Rumsfeld; the document is sometimes referred to as the Haynes Memo. Haynes recommended that Rumsfeld give "blanket approval" to 15 out of 18 proposed techniques of aggressive interrogation. Rumsfeld duly did so, on December 2, 2002, signing his name firmly next to the word "Approved." Under his signature he also scrawled a few words that refer to the length of time a detainee can be forced to stand during interrogation: "I stand for 8–10 hours a day. Why is standing limited to 4 hours?"

The second document on the table listed the 18 proposed techniques of interrogation, all of which went against long-standing U.S. military practice as presented in the Army Field Manual. The 15 approved techniques included certain forms of physical contact and also techniques intended to humiliate and to impose sensory deprivation. They permitted the use of stress positions, isolation, hooding, 20-hour interrogations, and nudity. Haynes and Rumsfeld explicitly did not rule out the future use of three other techniques, one of which was waterboarding, the application of a wet towel and water to induce the perception of drowning.

The third document was an internal log that detailed the interrogation at Guantánamo of a man identified only as Detainee 063, whom we now know to be Mohammed al-Qahtani, allegedly a member of the 9/11 conspiracy and the so-called 20th hijacker. According to this log, the interrogation commenced on November 23, 2002, and continued

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until well into January. The techniques described by the log as having been used in the interrogation of Detainee 063 include all 15 approved by Rumsfeld.

"Was the detainee abused? Was he tortured?," I asked Seltzer. Cruelty, humiliation, and the use of torture on detainees have long been prohibited by international law, including the Geneva Conventions and their Common Article 3. This total ban was reinforced in 1984 with the adoption of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which criminalizes torture and complicity in torture.

A careful and fastidious practitioner, Seltzer declined to give a straight yes or no answer. In her view the definition of torture is essentially a legal matter, which will turn on a particular set of facts. She explained that there is no such thing as a medical definition of torture, and that a doctor must look for pathology, the abnormal functioning of the body or the mind. We reviewed the definition of torture, as set out in the 1984 Convention, which is binding on 145 countries, including the United States. Torture includes "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person."

Seltzer had gone through the interrogation log, making notations. She used four different colors to highlight moments that struck her as noteworthy, and the grim document now looked bizarrely festive. Yellow indicated episodes of abusive treatment. Pink showed where the detainee's rights were respected—where he was fed or given a break, or allowed to sleep. Green indicated the many instances of medical involvement, where al-Qahtani was given an enema or was hospitalized suffering from hypothermia. Finally, blue identified what Seltzer termed "expressions of distress."

We talked about the methods of interrogation. "In terms of their effects," she said, "I suspect that the individual techniques are less important than the fact that they were used over an extended period of time, and that several appear to be used together: in other words, the cumulative effect." Detainee 063 was subjected to systematic sleep deprivation. He was shackled and cuffed; at times, head restraints were used. He was compelled to listen to threats to his family. The interrogation leveraged his sensitivities as a Muslim: he was shown pictures of scantily clad models, was touched by a female interrogator, was made to stand naked, and was forcibly shaved. He was denied the right to pray. A psychiatrist who witnessed the interrogation of Detainee 063 reported the use of dogs, intended to intimidate "by getting the dogs close to him and then having the dogs bark or act aggressively on command." The temperature was changed, and 063 was subjected to extreme cold. Intravenous tubes were forced into his body, to provide nourishment when he would not eat or drink.

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We went through the marked-up document slowly, pausing at each blue mark. Detainee 063's reactions were recorded with regularity. I'll string some of them together to convey the impression:

Detainee began to cry. Visibly shaken. Very emotional. Detainee cried. Disturbed. Detainee began to cry. Detainee bit the IV tube completely in two. Started moaning. Uncomfortable. Moaning. Began crying hard spontaneously. Crying and praying. Very agitated. Yelled. Agitated and violent. Detainee spat. Detainee proclaimed his innocence. Whining. Dizzy. Forgetting things. Angry. Upset. Yelled for Allah.

The blue highlights went on and on.

Urinated on himself. Began to cry. Asked God for forgiveness. Cried. Cried. Became violent. Began to cry. Broke down and cried. Began to pray and openly cried. Cried out to Allah several times. Trembled uncontrollably.

Was Detainee 063 subjected to severe mental pain or suffering? Torture is not a medical concept, Seltzer reminded me. "That said," she went on, "over the period of 54 days there is enough evidence of distress to indicate that it would be very surprising indeed if it had not reached the threshold of severe mental pain." She thought about the matter a little more and then presented it a different way: "If you put 12 clinicians in a room and asked them about this interrogation log, you might get different views about the effect and long-term consequences of these interrogation techniques. But I doubt that any one of them would claim that this individual had not suffered severe mental distress at the time of his interrogation, and possibly also severe physical distress."

The Authorized Version

The story of the Bush administration's descent down this path began to emerge on June 22, 2004. The administration was struggling to respond to the Abu Ghraib scandal, which had broken a couple of months earlier with the broadcast of photographs that revealed sickening abuse at the prison outside Baghdad. The big legal guns were wheeled out. Alberto Gonzales and Jim Haynes stepped into a conference room at the Eisenhower Executive Office Building, next to the White House. Gonzales was President Bush's White House counsel and would eventually become attorney general. Haynes, as Rumsfeld's general counsel, was the most senior lawyer in the Pentagon, a position he would retain until a month ago, when he resigned—"returning to private life," as a press release stated. Gonzales and Haynes were joined by a third lawyer, Daniel Dell'Orto, a career official at the Pentagon. Their task was to steady the beat and make it clear that the events at Abu Ghraib were the actions of a few bad eggs and had nothing to do with the broader policies of the administration.

Gonzales and Haynes spoke from a carefully prepared script. They released a

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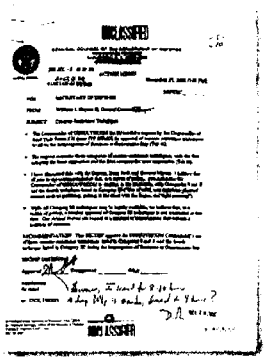
thick folder of documents, segmented by lawyerly tabs. These documents were being made public for the first time, a clear indication of the gravity of the political crisis. Among the documents were the Haynes Memo and the list of 18 techniques that Seltzer and I would later review. The log detailing the interrogation of Detainee 063 was not released; it would be leaked to the press two years later.



The famous Haynes Memo, recommending enhanced "counter-resistance" techniques, as signed and annotated with a jocular comment by Rumsfeld. Enlarge this.

For two hours Gonzales and Haynes laid out the administration's narrative. Al-Qaeda was a different kind of enemy, deadly and shadowy. It targeted civilians and didn't follow the Geneva Conventions or any other international rules. Nevertheless, the officials explained, the administration had acted judiciously, even as it moved away from a purely law-enforcement strategy to one that marshaled "all elements of national power." The authorized version had four basic parts.

First, the administration had moved reasonably—with care and deliberation, and always within the limits of the law. In February 2002 the president had determined, in accordance with established legal principles, that none of the detainees at Guantánamo could rely on any of the protections granted by Geneva, even Common Article 3. This presidential order was the lead document, at Tab A. The administration's point was this: agree with it or not, the decision on Geneva concealed no hidden agenda; rather, it simply reflected a clear-eyed reading of the actual provisions. The administration, in other words, was doing nothing more than trying to proceed by the book. The law was the law.

Relating to this was a second document, one that had been the subject of media speculation for some weeks. The authors of this document, a legal opinion dated August 1, 2002, were two lawyers in the Justice Department's Office of Legal Counsel: Jay Bybee, who is now a federal judge, and John Yoo, who now teaches law at Berkeley. Later it would become known that they were assisted in the drafting by David Addington, then the vice president's lawyer and now his chief of staff. The Yoo-Bybee Memo declared that physical torture occurred only when the pain was "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death," and that mental torture required "suffering not just at the moment of infliction but ... lasting psychological harm." Interrogations that did not reach these thresholds—far less stringent than those set by international law—were allowed. Although findings that issue from the Office of Legal Counsel at Justice typically

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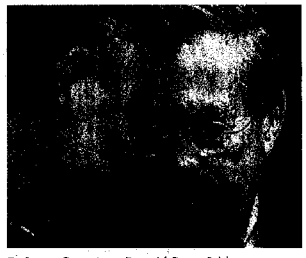
carry great weight, at the press conference Gonzales went out of his way to decouple the Yoo-Bybee Memo from anything that might have taken place at Guantánamo. The two lawyers had been asked, in effect, to stargaze, he said. Their memo simply explored "the limits of the legal landscape." It included "irrelevant and unnecessary" discussion and never made it into the hands of the president or of soldiers in the field. The memo did not, said Gonzales, "reflect the policies that the administration ultimately adopted."



Defense Secretary Donald Rumsfeld (with General Richard Myers) before questioning by the Senate about the Abu Ghraib abuses, May 2004. *By Gary Hershorn/Reuters/Corbis.*

The second element of the administration's narrative dealt with the specific source of the new interrogation techniques. Where had the initiative come from? The administration pointed to the military commander at Guantánamo, Major General Michael E. Dunlavey. Haynes would later describe him to the Senate Judiciary Committee, during his failed confirmation hearings for a judgeship in 2006, as "an aggressive major general." The techniques were not imposed or encouraged by Washington, which had merely reacted to a request from below. They came as a result of the identification locally of "key people" at Guantánamo, including "a guy named al-Qahtani." This man, Detainee 063, had proved able to resist the traditional non-coercive techniques of interrogation spelled out in the Army Field Manual, and as the first anniversary of 9/11 approached, an intelligence spike pointed to the possibility of new attacks. "And so it is concluded at Guantánamo," Dell'Orto emphasized, reconstructing the event, "that it may be time to inquire as to whether there may be more flexibility in the type of techniques we use on him." A request was sent from Guantánamo on October 11, 2002, to the head of the U.S. Southern Command (SouthCom), General James T. Hill. Hill in turn forwarded Dunlavey's request to General Richard Myers, the chairman of the Joint Chiefs of Staff. Ultimately, Rumsfeld approved "all but three of the requested techniques." The official version was clear: Haynes and Rumsfeld were just processing a request coming up the chain from Guantánamo.

The third element of the administration's account concerned the legal justification for the new interrogation techniques. This, too, the administration said, had originated in Guantánamo. It was not the result of legal positions taken by politically appointed lawyers in the upper echelons of the administration, and certainly not the Justice Department. The relevant document, also dated October 11, was in the bundle released by Gonzales, a legal memo prepared by Lieutenant Colonel Diane Beaver, the staff judge advocate at Guantánamo. That document—described pointedly by Dell'Orto as a "multi-page, single-spaced legal review"—sought to provide legal authority for all the interrogation techniques. No other legal memo was cited as bearing on aggressive interrogations. The finger of

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responsibility was intended to point at Diane Beaver.

The fourth and final element of the administration's official narrative was to make clear that decisions relating to Guantánamo had no bearing on events at Abu Ghraib and elsewhere. Gonzales wanted to "set the record straight" about this. The administration's actions were inconsistent with torture. The abuses at Abu Ghraib were unauthorized and unconnected to the administration's policies.

Gonzales and Haynes laid out their case with considerable care. The only flaw was that every element of the argument contained untruths.

The real story, pieced together from many hours of interviews with most of the people involved in the decisions about interrogation, goes something like this: The Geneva decision was not a case of following the logic of the law but rather was designed to give effect to a prior decision to take the gloves off and allow coercive interrogation; it deliberately created a legal black hole into which the detainees were meant to fall. The new interrogation techniques did not arise spontaneously from the field but came about as a direct result of intense pressure and input from Rumsfeld's office. The Yoo-Bybee Memo was not simply some theoretical document, an academic exercise in blue-sky hypothesizing, but rather played a crucial role in giving those at the top the confidence to put pressure on those at the bottom. And the practices employed at Guantánamo led to abuses at Abu Ghraib.

The fingerprints of the most senior lawyers in the administration were all over the design and implementation of the abusive interrogation policies. Addington, Bybee, Gonzales, Haynes, and Yoo became, in effect, a torture team of lawyers, freeing the administration from the constraints of all international rules prohibiting abuse.

Killing Geneva

In the early days of 2002, as the number of al-Qaeda and Taliban fighters captured in Afghanistan began to swell, the No. 3 official at the Pentagon was Douglas J. Feith. As undersecretary of defense for policy, he stood directly below Paul Wolfowitz and Donald Rumsfeld. Feith's job was to provide advice across a wide range of issues, and the issues came to include advice on the Geneva Conventions and the conduct of military interrogations.

I sat down with Feith not long after he left the government. He was teaching at the school of foreign service at Georgetown University, occupying a small, eighth-floor office lined with books on international law. He greeted me with a smile, his impish face supporting a mop of graying hair that seemed somehow at odds with his 54 years. Over the course of his career Feith has elicited a range of reactions. General Tommy Franks, who led the invasion of Iraq, once called Feith "the fucking stupidest guy on the face of the earth." Rumsfeld, in contrast, saw him as an

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"intellectual engine." In manner he is the Energizer Bunny, making it hard to get a word in edgewise. After many false starts Feith provided an account of the president's decision on Geneva, including his own contribution as one of its principal architects.

"This was something I played a major role in," he began, in a tone of evident pride. With the war in Afghanistan under way, lawyers in Washington understood that they needed a uniform view on the constraints, if any, imposed by Geneva. Addington, Haynes, and Gonzales all objected to Geneva. Indeed, Haynes in December 2001 told the CentCom admiral in charge of detainees in Afghanistan "to 'take the gloves off' and ask whatever he wanted" in the questioning of John Walker Lindh. (Lindh, a young American who had become a Muslim and had recently been captured in northern Afghanistan, bore the designation Detainee 001.)

A month later, the administration was struggling to adopt a position. On January 9, John Yoo and Robert Delahunty, at the Justice Department, prepared an opinion for Haynes. They concluded that the president wasn't bound by traditional international-law prohibitions. This encountered strong opposition from Colin Powell and his counsel, William H. Taft IV, at the State Department, as well as from the Tjags—the military lawyers in the office of the judge advocate general—who wanted to maintain a strong U.S. commitment to Geneva and the rules that were part of customary law. On January 25, Alberto Gonzales put his name to a memo to the president supporting Haynes and Rumsfeld over Powell and Taft. This memo, which is believed to have been written by Addington, presented a "new paradigm" and described Geneva's "strict limitations on questioning of enemy prisoners" as "obsolete." Addington was particularly distrustful of the military lawyers. "Don't bring the Tjags into the process—they aren't reliable," he was once overheard to say.

Feith took up the story. He had gone to see Rumsfeld about the issue, accompanied by Myers. As they reached Rumsfeld's office, Myers turned to Feith and said, "We have to support the Geneva Conventions If Rumsfeld doesn't go along with this, I'm going to contradict them in front of the president." Feith was surprised by this uncharacteristically robust statement, and by the way Myers referred to the secretary bluntly as "Rumsfeld."

Douglas Feith had a long-standing intellectual interest in Geneva, and for many years had opposed legal protections for terrorists under international law. He referred me to an article he had written in 1985, in *The National Interest,* setting out his basic view. Geneva provided incentives to play by the rules; those who chose not to follow the rules, he argued, shouldn't be allowed to rely on them, or else the whole Geneva structure would collapse. The only way to protect Geneva, in other words, was sometimes to limit its scope. To uphold Geneva's protections, you might have to cast them aside.

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But that way of thinking didn't square with the Geneva system itself, which was based on two principles: combatants who behaved according to its standards received P.O.W. status and special protections, and everyone else received the more limited but still significant protections of Common Article 3. Feith described how, as he and Myers spoke with Rumsfeld, he jumped protectively in front of the general. He reprised his "little speech" for me. "There is no country in the world that has a larger interest in promoting respect for the Geneva Conventions as law than the United States," he told Rumsfeld, according to his own account, "and there is no institution in the U.S. government that has a stronger interest than the Pentagon." So Geneva had to be followed? "Obeying the Geneva Conventions is not optional," Feith replied. "The Geneva Convention is a treaty in force. It is as much part of the supreme law of the United States as a statute." Myers jumped in. "I agree completely with what Doug said and furthermore it is our military culture It's not even a matter of whether it is reciprocated—it's a matter of who we are."

Feith was animated as he relived this moment. I remained puzzled. How had the administration gone from a commitment to Geneva, as suggested by the meeting with Rumsfeld, to the president's declaration that none of the detainees had any rights under Geneva? It all turns on what you mean by "promoting respect" for Geneva, Feith explained. Geneva didn't apply at all to al-Qaeda fighters, because they weren't part of a state and therefore couldn't claim rights under a treaty that was binding only on states. Geneva did apply to the Taliban, but by Geneva's own terms Taliban fighters weren't entitled to P.O.W. status, because they hadn't worn uniforms or insignia. That would still leave the safety net provided by the rules reflected in Common Article 3— but detainees could not rely on this either, on the theory that its provisions applied only to "armed conflict not of an international character," which the administration interpreted to mean civil war. This was new. In reaching this conclusion, the Bush administration simply abandoned all legal and customary precedent that regards Common Article 3 as a minimal bill of rights for everyone.

In the administration's account there was no connection between the decision on Geneva and the new interrogation rules later approved by Rumsfeld for Detainee 063; its position on Geneva was dictated purely by the law itself. I asked Feith, just to be clear: Didn't the administration's approach mean that Geneva's constraints on interrogation couldn't be invoked by *anyone* at Guantánamo? "Oh yes, sure," he shot back. Was that the intended result?, I asked. "Absolutely," he replied. I asked again: Under the Geneva Conventions, no one at Guantánamo was entitled to any protection? "That's the point," Feith reiterated. As he saw it, either you were a detainee to whom Geneva didn't apply or you were a detainee to whom Geneva applied but whose rights you couldn't invoke. What was the difference for the purpose of interrogation?, I asked. Feith answered with a certain satisfaction, "It turns out, none. But that's the

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point."

That indeed was the point. The principled legal arguments were a fig leaf. The real reason for the Geneva decision, as Feith now made explicit, was the desire to interrogate these detainees with as few constraints as possible. Feith thought he'd found a clever way to do this, which on the one hand upheld Geneva as a matter of law—the speech he made to Myers and Rumsfeld—and on the other pulled the rug out from under it as a matter of reality. Feith's argument was so clever that Myers continued to believe Geneva's protections remained in force—he was "well and truly hoodwinked," one seasoned observer of military affairs later told me.

Feith's argument prevailed. On February 7, 2002, President Bush signed a memorandum that turned Guantánamo into a Geneva-free zone. As a matter of policy, the detainees would be handled humanely, but only to the extent appropriate and consistent with military necessity. "The president said 'humane treatment,'" Feith told me, inflecting the term sourly, "and I thought that was O.K. Perfectly fine phrase that needs to be fleshed out, but it's a fine phrase—'humane treatment.'" The Common Article 3 restrictions on torture or "outrages upon personal dignity" were gone.

"This year I was really a player," Feith said, thinking back on 2002 and relishing the memory. I asked him whether, in the end, he was at all concerned that the Geneva decision might have diminished America's moral authority. He was not. "The problem with moral authority," he said, was "people who should know better, like yourself, siding with the assholes, to put it crudely."

"I Was on a Timeline"

As the traditional constraints on aggressive interrogation were removed, Rumsfeld wanted the right man to take charge of Joint Task Force 170, which oversaw military interrogations at Guantánamo. Two weeks after the decision on Geneva he found that man in Michael Dunlavey. Dunlavey was a judge in the Court of Common Pleas in Erie, Pennsylvania, a Vietnam veteran, and a major general in the reserves with a strong background in intelligence.

Dunlavey met one-on-one with Rumsfeld at the end of February. They both liked what they saw. When I met Dunlavey, now back at his office in Erie, he described that initial meeting: "He evaluated me. He wanted to know who I was. He was very focused on the need to get intelligence. He wanted to make sure that the moment was not lost." Dunlavey was a strong and abrasive personality ("a tyrant," one former jag told me), but he was also a cautious man, alert to the nuances of instruction from above. Succinctly, Dunlavey described the mission Rumsfeld had given him. "He wanted me to 'maximize the intelligence production.' No one ever said to me, 'The gloves are off.' But I didn't

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need to talk about the Geneva Conventions. It was clear that they didn't apply." Rumsfeld told Dunlavey to report directly to him. To the suggestion that Dunlavey report to SouthCom, Dunlavey heard Rumsfeld say, "I don't care who he is under. He works for me."

He arrived at Guantánamo at the beginning of March. Planeloads of detainees were being delivered on a daily basis, though Dunlavey soon concluded that half of them had no intelligence value. He reported this to Rumsfeld, who referred the matter to Feith. Feith, Dunlavey said, resisted the idea of repatriating any detainees whatsoever. (Feith says he made a series of interagency proposals to repatriate detainees.)

Dunlavey described Feith to me as one of his main points of contact. Feith, for his part, had told me that he knew nothing about any specific interrogation issues until the Haynes Memo suddenly landed on his desk. But that couldn't be right—in the memo itself Haynes had written, "I have discussed this with the Deputy, Doug Feith and General Myers." I read the sentence aloud. Feith looked at me. His only response was to tell me that I had mispronounced his name. "It's Fythe," he said. "Not Faith."

In June, the focus settled on Detainee 063, Mohammed al-Qahtani, a Saudi national who had been refused entry to the United States just before 9/11 and was captured a few months later in Afghanistan. Dunlavey described to me the enormous pressure he came under—from Washington, from the top—to find out what al-Qahtani knew. The message, he said, was: "Are you doing everything humanly possible to get this information?" He received a famous Rumsfeld "snowflake," a memo designed to prod the recipient into action. "I've got a short fuse on this to get it up the chain," Dunlavey told me, "I was on a timeline." Dunlavey held eye contact for more than a comfortable moment. He said, "This guy may have been the key to the survival of the U.S."

The interrogation of al-Qahtani relied at first on long-established F.B.I. and military techniques, procedures sanctioned by the Field Manual and based largely on building rapport. This yielded nothing. On August 8, al-Qahtani was placed in an isolation facility to separate him from the general detainee population. Pressure from Washington continued to mount. How high up did it go?, I asked Dunlavey. "It must have been all the way to the White House," he replied.

Meanwhile, unbeknownst to Dunlavey and the others at Guantánamo, interrogation issues had arisen in other quarters. In March 2002 a man named Abu Zubaydah, a high-ranking al-Qaeda official, was captured in Pakistan. C.I.A. director George Tenet wanted to interrogate him aggressively but worried about the risk of criminal prosecution. He had to await the completion of legal opinions by the Justice Department, a task that had been entrusted by Alberto Gonzales to Jay Bybee and John Yoo. "It took until August to get clear guidance on what Agency officers

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could legally do," Tenet later wrote. The "clear guidance" came on August 1, 2002, in memos written by Bybee and Yoo, with input from Addington. The first memo was addressed to Gonzales, redefining torture and abandoning the definition set by the 1984 torture convention. This was the Yoo-Bybee Memo made public by Gonzales nearly two years later, in the wake of Abu Ghraib. Nothing in the memo suggested that its use was limited to the C.I.A.; it referred broadly to "the conduct of interrogations outside of the United States." Gonzales would later contend that this policy memo did "not reflect the policies the administration ultimately adopted," but in fact it gave carte blanche to all the interrogation techniques later recommended by Haynes and approved by Rumsfeld. The second memo, requested by John Rizzo, a senior lawyer at the C.I.A., has never been made public. It spells out the specific techniques in detail. Dunlavey and his subordinates at Guantánamo never saw these memos and were not aware of their contents.

The lawyers in Washington were playing a double game. They wanted maximum pressure applied during interrogations, but didn't want to be seen as the ones applying it—they wanted distance and deniability. They also wanted legal cover for themselves. A key question is whether Haynes and Rumsfeld had knowledge of the content of these memos before they approved the new interrogation techniques for al-Qahtani. If they did, then the administration's official narrative—that the pressure for new techniques, and the legal support for them, originated on the ground at Guantánamo, from the "aggressive major general" and his staff lawyer—becomes difficult to sustain. More crucially, that knowledge is a link in the causal chain that connects the keyboards of Feith and Yoo to the interrogations of Guantánamo.

When did Haynes learn that the Justice Department had signed off on aggressive interrogation? All indications are that well before Haynes wrote his memo he knew what the Justice Department had advised the C.I.A. on interrogations and believed that he had legal cover to do what he wanted. Everyone in the upper echelons of the chain of decision-making that I spoke with, including Feith, General Myers, and General Tom Hill (the commander of SouthCom), confirmed to me that they believed at the time that Haynes had consulted Justice Department lawyers. Moreover, Haynes was a close friend of Bybee's. "Jim was tied at the hip with Jay Bybee," Thomas Romig, the army's former judge advocate general, told me. "He would quote him the whole time." Later, when asked during Senate hearings about his knowledge of the Yoo-Bybee Memo, Haynes would variously testify that he had not sought the memo, had not shaped its content, and did not possess a copy of it—but he carefully refrained from saying that he was unaware of its contents. Haynes, with whom I met on two occasions, will not speak on the record about this subject.

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The Glassy-Eyed Men

As the first anniversary of 9/11 approached, Joint Task Force 170 was on notice to deliver results. But the task force was not the only actor at Guantánamo. The C.I.A. had people there looking for recruits among the detainees. The Defense Intelligence Agency (D.I.A.) was interrogating detainees through its humint (human intelligence) Augmentation Teams. The F.B.I. was carrying out its own traditional non-aggressive interrogations.

The source of the various new techniques has been the stuff of speculation. In the administration's official account, as noted, everything trickled up from the ground at Guantánamo. When I suggested to Mike Dunlavey that the administration's trickle-up line was counter-intuitive, he didn't disabuse me. "It's possible," he said, in a tone at once mischievous and unforthcoming, "that someone was sent to my task force and came up with these great ideas." One F.B.I. special agent remembers an occasion, before any new techniques had been officially sanctioned, when military interrogators set out to question al-Qahtani for 24 hours straight—employing a variation on a method that would later appear in the Haynes Memo. When the agent objected, he said he was told that the plan had been approved by "the secretary," meaning Rumsfeld.

Diane Beaver, Dunlavey's staff judge advocate, was the lawyer who would later be asked to sign off on the new interrogation techniques. When the administration made public the list, it was Beaver's legal advice the administration invoked. Diane Beaver gave me the fullest account of the process by which the new interrogation techniques emerged. In our lengthy conversations, which began in the autumn of 2006, she seemed coiled up—mistreated, hung out to dry. Before becoming a military lawyer Beaver had been a military police officer; once, while stationed in Germany, she had visited the courtroom where the Nuremberg trials took place. She was working as a lawyer for the Pentagon when the hijacked airplane hit on 9/11, and decided to remain in the army to help as she could. That decision landed her in Guantánamo.

It was clear to me that Beaver believed Washington was directly involved in the interrogations. Her account confirmed what Dunlavey had intimated, and what others have told me—that Washington's views were being fed into the process by people physically present at Guantánamo. D.I.A. personnel were among them. Later allegations would suggest a role for three C.I.A. psychologists.

During September a series of brainstorming meetings were held at Guantánamo to discuss new techniques. Some of the meetings were led by Beaver. "I kept minutes. I got everyone together. I invited. I facilitated," she told me. The sessions included representatives of the D.I.A. and the C.I.A. Ideas came from all over. Some derived from personal training experiences, including a military program known as sere (Survival, Evasion, Resistance, and Escape),

designed to help soldiers persevere in the event of capture. Had sere been, in effect, reverse-engineered to provide some of the 18 techniques? Both Dunlavey and Beaver told me that sere provided inspiration, contradicting the administration's denials that it had. Indeed, several Guantánamo personnel, including a psychologist and a psychiatrist, traveled to Fort Bragg, sere's home, for a briefing.

Ideas arose from other sources. The first year of Fox TV's dramatic series *24* came to a conclusion in spring 2002, and the second year of the series began that fall. An inescapable message of the program is that torture works. "We saw it on cable," Beaver recalled. "People had already seen the first series. It was hugely popular." Jack Bauer had many friends at Guantánamo, Beaver added. "He gave people lots of ideas."

The brainstorming meetings inspired animated discussion. "Who has the glassy eyes?," Beaver asked herself as she surveyed the men around the room, 30 or more of them. She was invariably the only woman present—as she saw it, keeping control of the boys. The younger men would get particularly agitated, excited even. "You could almost see their dicks getting hard as they got new ideas," Beaver recalled, a wan smile flickering on her face. "And I said to myself, You know what? I don't have a dick to get hard—I can stay detached."

Not everyone at Guantánamo was enthusiastic. The F.B.I. and the Naval Criminal Investigative Service refused to be associated with aggressive interrogation. They opposed the techniques. One of the N.C.I.S. psychologists, Mike Gelles, knew about the brainstorming sessions but stayed away. He was dismissive of the administration's contention that the techniques trickled up on their own from Guantánamo. "That's not accurate," he said flatly. "This was not done by a bunch of people down in Gitmo—no way."

That view is buttressed by a key event that has received virtually no attention. On September 25, as the process of elaborating new interrogation techniques reached a critical point, a delegation of the administration's most senior lawyers arrived at Guantánamo. The group included the president's lawyer, Alberto Gonzales, who had by then received the Yoo-Bybee Memo; Vice President Cheney's lawyer, David Addington, who had contributed to the writing of that memo; the C.I.A.'s John Rizzo, who had asked for a Justice Department sign-off on individual techniques, including waterboarding, and received the second (and still secret) Yoo-Bybee Memo; and Jim Haynes, Rumsfeld's counsel. They were all well aware of al-Qahtani. "They wanted to know what we were doing to get to this guy," Dunlavey told me, "and Addington was interested in how we were managing it." I asked what they had to say. "They brought ideas with them which had been given from sources in D.C.," Dunlavey said. "They came down to observe and talk." Throughout this whole period, Dunlavey went on, Rumsfeld was "directly and regularly involved."

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Beaver confirmed the account of the visit. Addington talked a great deal, and it was obvious to her that he was a "very powerful man" and "definitely the guy in charge," with a booming voice and confident style. Gonzales was quiet. Haynes, a friend and protégé of Addington's, seemed especially interested in the military commissions, which were to decide the fate of individual detainees. They met with the intelligence people and talked about new interrogation methods. They also witnessed some interrogations. Beaver spent time with the group. Talking about the episode even long afterward made her visibly anxious. Her hand tapped and she moved restlessly in her chair. She recalled the message they had received from the visitors: Do "whatever needed to be done." That was a green light from the very top—the lawyers for Bush, Cheney, Rumsfeld, and the C.I.A. The administration's version of events—that it became involved in the Guantánamo interrogations only in November, after receiving a list of techniques out of the blue from the "aggressive major general"—was demonstrably false.

"A Dunk in the Water"

Two weeks after this unpublicized visit the process of compiling the list of new techniques was completed. The list was set out in a three-page memorandum from Lieutenant Colonel Jerald Phifer, dated October 11 and addressed to Dunlavey.

The Phifer Memo identified the problem: "current guidelines" prohibited the use of "physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation." The prohibition dated back to 1863 and a general order issued by Abraham Lincoln.

The list of new interrogation techniques turned its back on this tradition. The 18 techniques were divided into three categories and came with only rudimentary guidance. No limits were placed on how many methods could be used at once, or for how many days in succession. The detainee was to be provided with a chair. The environment should be generally comfortable. If the detainee was uncooperative, you went to Category I. This comprised two techniques, yelling and deception.

If Category I produced no results, then the military interrogator could move to Category II. Category II included 12 techniques aimed at humiliation and sensory deprivation: for instance, the use of stress positions, such as standing; isolation for up to 30 days; deprivation of light and sound; 20-hour interrogations; removal of religious items; removal of clothing; forcible grooming, such as the shaving of facial hair; and the use of individual phobias, such as the fear of dogs, to induce stress.

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January 2002: detainees in a holding area at Guantánamo's Camp X-Ray, the original detention facility, where the first military interrogations took place. *By Ron Sachs/CNP/Corbis.*

Finally came Category III, for the most exceptionally resistant. Category III included four techniques: the use of "mild, non-injurious physical contact," such as grabbing, poking, and light pushing; the use of scenarios designed to convince the detainee that death or severely painful consequences were imminent for him or his family; exposure to cold weather or water; and waterboarding. This last technique, which powerfully mimics the experience of drowning, was later described by Vice President Cheney as a "dunk in the water."

By the time the memo was completed al-Qahtani had already been separated from all other detainees for 64 days, in a cell that was "always flooded with light." An F.B.I. agent described his condition the following month, just as the new interrogation techniques were first being directed against him: the detainee, a 2004 memo stated, "was talking to non-existent people, reporting hearing voices, [and] crouching in a corner of the cell covered with a sheet for hours on end."

Ends and Means

Diane Beaver was insistent that the decision to implement new interrogation techniques had to be properly written up and that it needed a paper trail leading to authorization from the top, not from "the dirt on the ground," as she self-deprecatingly described herself. "I just wasn't comfortable giving oral advice," she explained, as she had been requested to do. "I wanted to get something in writing. That was my game plan. I had four days. Dunlavey gave me just four days." She says she believed that senior lawyers in Washington would review her written advice and override it if necessary. It never occurred to her that on so important an issue she would be the one to provide the legal

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assessment on which the entire matter would appear to rest—that her word would be the last word. As far as she was concerned, getting the proposal "up the command" was victory enough. She didn't know that people much higher up had already made their decisions, had the security of secret legal cover from the Justice Department, and, although confident of their own legal protection, had no intention of soiling their hands by weighing in on the unpleasant details of interrogation.

Marooned in Guantánamo, Beaver had limited access to books and other documents, although there was Internet access to certain legal materials. She tried getting help from more experienced lawyers—at SouthCom, the Joint Chiefs, the D.I.A., the jag School—but to no avail.

In the end she worked on her own, completing the task just before the Columbus Day weekend. Her memo was entitled "Legal Review of Aggressive Interrogation Techniques." The key fact was that none of the detainees were protected by Geneva, owing to Douglas Feith's handiwork and the president's decision in February. She also concluded that the torture convention and other international laws did not apply, conclusions that a person more fully schooled in the relevant law might well have questioned: "It was not my job to second-guess the president," she told me. Beaver ignored customary international law altogether. All that was left was American law, which is what she turned to.

Given the circumstances in which she found herself, the memo has a certain desperate, heroic quality. She proceeded methodically through the 18 techniques, testing each against the standards set by U.S. law, including the Eighth Amendment to the Constitution (which prohibits "cruel and unusual punishment"), the federal torture statute, and the Uniform Code of Military Justice. The common theme was that the techniques were fine "so long as the force used could plausibly have been thought necessary in a particular situation to achieve a legitimate government objective, and it was applied in a good faith effort and not maliciously or sadistically for the very purpose of causing harm." That is to say, the techniques are legal if the motivation is pure. National security justifies anything.

Beaver did enter some important caveats. The interrogators had to be properly trained. Since the law required "examination of all facts under a totality of circumstances test," all proposed interrogations involving Category II and III methods had to "undergo a legal, medical, behavioral science, and intelligence review prior to their commencement." This suggested concerns about these new techniques, including whether they would be effective. But in the end she concluded, I "agree that the proposed strategies do not violate applicable federal law." The word "agree" stands out—she seems to be confirming a policy decision that she knows has already been made.

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Time and distance do not improve the quality of the advice. I thought it was awful when I first read it, and awful when I reread it. Nevertheless, I was now aware of the circumstances in which Beaver had been asked to provide her advice. Refusal would have caused difficulty. It was also reasonable to expect a more senior review of her draft. Beaver struck me as honest, loyal, and decent. Personally, she was prepared to take a hard line on many detainees. She once described them to me as "psychopaths. Skinny, runty, dangerous, lying psychopaths." But there was a basic integrity to her approach. She could not have anticipated that there would be no other piece of written legal advice bearing on the Guantánamo interrogations. She could not have anticipated that she would be made the scapegoat.

Once, after returning to a job at the Pentagon, Beaver passed David Addington in a hallway—the first time she had seen him since his visit to Guantánamo. He recognized her immediately, smiled, and said, "Great minds think alike."

The "voco"

On October 11, Dunlavey sent his request for approval of new techniques, together with Diane Beaver's legal memo, to General Tom Hill, the commander of SouthCom. Two weeks later, on October 25, Hill forwarded everything to General Myers, the chairman of the Joint Chiefs, in Washington. Hill's cover letter contains a sentence—"Our respective staffs, the Office of the Secretary of Defense, and Joint Task Force 170 have been trying to identify counter-resistant techniques that we can lawfully employ"—which again makes it clear that the list of techniques was no surprise to Rumsfeld's office, whatever its later claims. Hill also expressed serious reservations. He wanted Pentagon lawyers to weigh in, and he explicitly requested that "Department of Justice lawyers review the third category of techniques."

At the level of the Joint Chiefs the memo should have been subject to a detailed review, including close legal scrutiny by Myers's own counsel, Jane Dalton, but that never happened. It seems that Jim Haynes short-circuited the approval process. Alberto Mora, the general counsel of the navy, says he remembers Dalton telling him, "Jim pulled this away. We never had a chance to complete the assessment."

When we spoke, Myers confessed to being troubled that normal procedures had been circumvented. He held the Haynes Memo in his hands, looking carefully at the sheet of paper as if seeing it clearly for the first time. He pointed: "You don't see my initials on this." Normally he would have initialed a memo to indicate approval, but there was no confirmation that Myers had seen the memo or formally signed off on it before it went to Rumsfeld. "You just see I've 'discussed' it," he said, noting a sentence to that effect in the memo itself. "This was not the way this should have come about." Thinking back, he recalled the "intrigue" that was going on, intrigue "that I wasn't aware of, and Jane wasn't aware of, that was probably occurring between Jim Haynes, White House general counsel, and Justice."

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Further confirmation that the Haynes Memo got special handling comes from a former Pentagon official, who told me that Lieutenant General Bantz Craddock, Rumsfeld's senior military assistant, noticed that it was missing a buck slip, an essential component that shows a document's circulation path, and which everyone was supposed to initial. The Haynes Memo had no "legal chop," or signature, from the general counsel's office. It went back to Haynes, who later signed off with a note that said simply, "Good to go."

Events moved fast as the process was cut short. On November 4, Dunlavey was replaced as commander at Guantánamo by Major General Geoffrey Miller. On November 12 a detailed interrogation plan was approved for al-Qahtani, based on the new interrogation techniques. The plan was sent to Rumsfeld for his personal approval, General Hill told me.

Ten days later an alternative plan, prepared by Mike Gelles and others at the N.C.I.S. and elsewhere, using traditional non-aggressive techniques, was rejected. By then the F.B.I. had communicated its concerns to Haynes's office about developments at Guantánamo. On November 23, well before Rumsfeld gave formal written approval to the Haynes Memo, General Miller received a "voco"—a vocal command—authorizing an immediate start to the aggressive interrogation of al-Qahtani. No one I spoke with, including Beaver, Hill, and Myers, could recall who had initiated the voco, but an army investigation would state that it was likely Rumsfeld, and he would not have acted without Haynes's endorsement.

Al-Qahtani's interrogation log for Saturday, November 23, registers the immediate consequence of the decision to move ahead. "The detainee arrives at the interrogation booth His hood is removed and he is bolted to the floor."

Reversal

Four days after the voco, Haynes formally signed off on his memo. He recommended, as a matter of policy, approval of 15 of the 18 techniques. Of the four techniques listed in Category III, however, Haynes proposed blanket approval of just one: mild non-injurious physical contact. He would later tell the Senate that he had "recommended against the proposed use of a wet towel"—that is, against waterboarding—but to the contrary, in his memo he stated that "all Category III techniques may be legally available." Rumsfeld placed his name next to the word "Approved" and wrote the jocular comment that may well expose him to difficulties in the witness stand at some future time.

As the memo was being approved, the F.B.I. communicated serious concerns directly to Haynes's office. Then, on December 17, Dave Brant, of the N.C.I.S., paid a surprise visit to Alberto Mora, the general counsel of the navy. Brant told him that N.C.I.S. agents had information that abusive actions at Guantánamo had been authorized at a "high

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level" in Washington. The following day Mora met again with Brant. Mike Gelles joined them and told Mora that the interrogators were under extraordinary pressure to achieve results. Gelles described the phenomenon of "force drift," where interrogators using coercion come to believe that if some force is good, then more must be better. As recounted in his official "Memorandum for Inspector General, Department of the Navy," Mora visited Steve Morello, the army's general counsel, and Tom Taylor, his deputy, who showed him a copy of the Haynes Memo with its attachments. The memorandum describes them as demonstrating "great concern." In the course of a long interview Mora recalled Morello "with a furtive air" saying, "Look at this. Don't tell anyone where you got it." Mora was horrified by what he read. "I was astounded that the secretary of defense would get within 100 miles of this issue," he said. (Notwithstanding the report to the inspector general, Morello denies showing Mora a copy of the Haynes Memo.)

On December 20, Mora met with Haynes, who listened attentively and said he would consider Mora's concerns. Mora went away on vacation, expecting everything to be sorted out. It wasn't: Brant soon called to say the detainee mistreatment hadn't stopped. On January 9, 2003, Mora met Haynes for a second time, expressing surprise that the techniques hadn't been stopped. Haynes said little in response, and Mora felt he had made no headway. The following day, however, Haynes called to say that he had briefed Rumsfeld and that changes were in the offing. But over the next several days no news came.

On the morning of Wednesday, January 15, Mora awoke determined to act. He would put his concerns in writing in a draft memorandum for Haynes and Dalton. He made three simple points. One: the majority of the Category II and III techniques violated domestic and international law and constituted, at a minimum, cruel and unusual treatment and, at worst, torture. Two: the legal analysis by Diane Beaver had to be rejected. Three: he "strongly non-concurred" with these interrogation techniques. He delivered the draft memo to Haynes's office. Two hours later, at about five p.m. on January 15, Haynes called Mora. "I'm pleased to tell you the secretary has rescinded the authorization," he said.

The abusive interrogation of al-Qahtani lasted a total of 54 days. It ended not on January 12, as the press was told in June 2004, but three days later, on January 15. In those final three days, knowing that the anything-goes legal regime might disappear at any moment, the interrogators made one last desperate push to get something useful out of al-Qahtani. They never did. By the end of the interrogation al-Qahtani, according to an army investigator, had "black coals for eyes."

The Great Migration

Mike Gelles, of the N.C.I.S., had shared with me his fear that the al-Qahtani techniques would not simply fade into history—that they would turn out to have been horribly contagious. This "migration" theory was controversial,

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because it potentially extended the responsibility of those who authorized the Guantánamo techniques to abusive practices elsewhere. John Yoo has described the migration theory as "an exercise in hyperbole and partisan smear."

But is it? In August 2003, Major General Miller traveled from Guantánamo to Baghdad, accompanied by Diane Beaver. They visited Abu Ghraib and found shocking conditions of near lawlessness. Miller made recommendations to Lieutenant General Ricardo Sanchez, the commander of coalition forces in Iraq. On September 14, General Sanchez authorized an array of new interrogation techniques. These were vetted by his staff judge advocate, who later told the Senate Armed Services Committee that operating procedures and policies "in use in Guantánamo Bay" had been taken into account. Despite the fact that Geneva applied in Iraq, General Sanchez authorized several techniques that were not sanctioned by the Field Manual—but were listed in the Haynes Memo. The abuses for which Abu Ghraib became infamous began one month later.

Three different official investigations in the space of three years have confirmed the migration theory. The August 2006 report of the Pentagon's inspector general concluded unequivocally that techniques from Guantánamo had indeed found their way to Iraq. An investigation overseen by former secretary of defense James R. Schlesinger determined that "augmented techniques for Guantanamo migrated to Afghanistan and Iraq where they were neither limited nor safeguarded."

Jim Haynes and Donald Rumsfeld may have reversed themselves about al-Qahtani in January 2003, but the death blow to the administration's outlook did not occur for three more years. It came on June 29, 2006, with the U.S. Supreme Court's ruling in *Hamdan* v. *Rumsfeld*, holding that Guantánamo detainees were entitled to the protections provided under Geneva's Common Article 3. The Court invoked the legal precedents that had been sidestepped by Douglas Feith and John Yoo, and laid bare the blatant illegality of al-Qahtani's interrogation. A colleague having lunch with Haynes that day described him as looking "shocked" when the news arrived, adding, "He just went pale." Justice Anthony Kennedy, joining the majority, pointedly observed that "violations of Common Article 3 are considered 'war crimes.'"

Jim Haynes appears to remain a die-hard supporter of aggressive interrogation. Shortly after the Supreme Court decision, when he appeared before the Senate Judiciary Committee, Senator Patrick Leahy reminded him that in 2003 Haynes had said there was "no way" that Geneva could apply to the Afghan conflict and the war on terror. "Do you now accept that you were mistaken in your legal and policy determinations?," Leahy asked. Haynes would say only that he was bound by the Supreme Court's decision.

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As the consequences of *Hamdan* sank in, the instinct for self-preservation asserted itself. The lawyers got busy. Within four months President Bush signed into law the Military Commissions Act. This created a new legal defense against lawsuits for misconduct arising from the "detention and interrogation of aliens" between September 11, 2001, and December 30, 2005. That covered the interrogation of al-Qahtani, and no doubt much else. Signing the bill on October 17, 2006, President Bush explained that it provided "legal protections that ensure our military and intelligence personnel will not have to fear lawsuits filed by terrorists simply for doing their jobs."

In a word, the interrogators and their superiors were granted immunity from prosecution. Some of the lawyers who contributed to this legislation were immunizing themselves. The hitch, and it is a big one, is that the immunity is good only within the borders of the United States.

A Tap on the Shoulder

The table in the conference room held five stacks of files and papers, neatly arranged and yellow and crisp with age. Behind them sat an elderly gentleman named Ludwig Altstötter, rosy-cheeked and cherubic. Ludwig is the son of Josef Altstötter, the lead defendant in the 1947 case *United States of America* v. *Josef Altstoetter et al.*, which was tried in Germany before a U.S. military tribunal. The case is famous because it appears to be the only one in which lawyers have ever been charged and convicted for committing international crimes through the performance of their legal functions. It served as the inspiration for the Oscar-winning 1961 movie *Judgment at Nuremberg,* whose themes are alluded to in Marcel Ophuls's classic 1976 film on wartime atrocities, *The Memory of Justice,* which should be required viewing but has been lost to a broader audience. Nuremberg was, in fact, where Ludwig and I were meeting.

The Altstötter case had been prosecuted by the Allies to establish the principle that lawyers and judges in the Nazi regime bore a particular responsibility for the regime's crimes. Sixteen lawyers appeared as defendants. The scale of the Nazi atrocities makes any factual comparison with Guantánamo absurd, a point made to me by Douglas Feith, and with which I agree. But I wasn't interested in drawing a facile comparison between historical episodes. I wanted to know more about the underlying principle.

Josef Altstötter had the misfortune, because of his name, to be the first defendant listed among the 16. He was not the most important or the worst, although he was one of the 10 who were in fact convicted (4 were acquitted, one committed suicide, and there was one mistrial). He was a well-regarded member of society and a high-ranking lawyer. In 1943 he joined the Reich Ministry of Justice in Berlin, where he served as a *Ministerialdirektor,* the chief of the civil-law-and-procedure division. He became a member of the SS in 1937. The U.S. Military Tribunal found him

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guilty of membership in that criminal organization—with knowledge of its criminal acts—and sentenced him to five years in prison, which he served in full. He returned to legal practice in Nuremberg and died in 1979. Ludwig Altstötter had all the relevant documents, and he generously invited me to go over them with him in Nuremberg.

I took Ludwig to the most striking passage in the tribunal's judgment. "He gave his name as a soldier and a jurist of note and so helped to cloak the shameful deeds of that organisation from the eyes of the German people." The tribunal convicted Altstötter largely on the basis of two letters. Ludwig went to the piles on the table and pulled out fading copies of the originals. The first, dated May 3, 1944, was from the chief of the SS intelligence service to Ludwig's father, asking him to intervene with the regional court of Vienna and stop it from ordering the transfer of Jews from the concentration camp at Theresienstadt back to Vienna to appear as witnesses in court hearings. The second letter was Altstötter's response, a month later, to the president of the court in Vienna. "For security reasons," he wrote, "these requests cannot be granted." The U.S. Military Tribunal proceeded on the basis that Altstötter would have known what the concentration camps were for.

The words "security reasons" reminded me of remarks by Jim Haynes at the press conference with Gonzales: "Military necessity can sometimes allow ... warfare to be conducted in ways that might infringe on the otherwise applicable articles of the Convention." Haynes provided no legal authority for that proposition, and none exists. The minimum rights of detainees guaranteed by Geneva and the torture convention can never be overridden by claims of security or other military necessity. That is their whole purpose.

Mohammed al-Qahtani is among the first six detainees scheduled to go on trial for complicity in the 9/11 attacks; the Bush administration has announced that it will seek the death penalty. Last month, President Bush vetoed a bill that would have outlawed the use by the C.I.A. of the techniques set out in the Haynes Memo and used on al-Qahtani. Whatever he may have done, Mohammed al-Qahtani was entitled to the protections afforded by international law, including Geneva and the torture convention. His interrogation violated those conventions. There can be no doubt that he was treated cruelly and degraded, that the standards of Common Article 3 were violated, and that his treatment amounts to a war crime. If he suffered the degree of severe mental distress prohibited by the torture convention, then his treatment crosses the line into outright torture. These acts resulted from a policy decision made right at the top, not simply from ground-level requests in Guantánamo, and they were supported by legal advice from the president's own circle.

Those responsible for the interrogation of Detainee 063 face a real risk of investigation if they set foot outside the United States. Article 4 of the torture convention criminalizes "complicity" or "participation" in torture, and the same

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principle governs violations of Common Article 3.

It would be wrong to consider the prospect of legal jeopardy unlikely. I remember sitting in the House of Lords during the landmark Pinochet case, back in 1999—in which a prosecutor was seeking the extradition to Spain of the former Chilean head of state for torture and other international crimes—and being told by one of his key advisers that they had never expected the torture convention to lead to the former president of Chile's loss of legal immunity. In my efforts to get to the heart of this story, and its possible consequences, I visited a judge and a prosecutor in a major European city, and guided them through all the materials pertaining to the Guantánamo case. The judge and prosecutor were particularly struck by the immunity from prosecution provided by the Military Commissions Act. "That is very stupid," said the prosecutor, explaining that it would make it much easier for investigators outside the United States to argue that possible war crimes would never be addressed by the justice system in the home country—one of the trip wires enabling foreign courts to intervene. For some of those involved in the Guantánamo decisions, prudence may well dictate a more cautious approach to international travel. And for some the future may hold a tap on the shoulder.

"It's a matter of time," the judge observed. "These things take time." As I gathered my papers, he looked up and said, "And then something unexpected happens, when one of these lawyers travels to the wrong place."

Philippe Sands is an international lawyer at the firm Matrix Chambers and a professor at University College London. His latest book is *Torture Team: Rumsfeld's Memo and the Betrayal of American Values* (Palgrave Macmillan).

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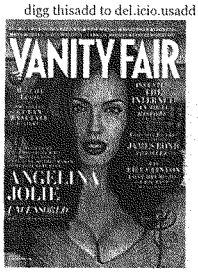

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TORTURE TEAM

Rumsfeld's Memo and the Betrayal of American Values

PHILIPPE SANDS

palgrave
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The first interrogators of al-Qahtani were from the military and the Defense Intelligence Agency. In the background was an Exploitation Team charged with assessing the information that emerged. The team was set up by the Defense Intelligence Agency's Joint Intelligence Task Force for Combating Terrorism (JITF-CT), overseen by Cal Temple in Washington. Interrogators from other services present at Guantánamo didn't get involved in this phase of the interrogation: the FBI was there from the outset, for example, with behavioral psychologists and interrogators, but didn't participate; nor did the Naval Criminal Investigation Service. As Thanksgiving approached, and al-Qahtani's special interrogation plan was prepared, alarm bells were ringing with the FBI and the NCIS, even before the VOCO arrived. One of the FBI's behavioral psychologists called headquarters in Washington. Eventually the call reached Spike Bowman.

Spike Bowman's real name is Marion. "I've never forgiven my mother for that," he said with a grin that may or may not have been genuine. I reminded him that James Bond once impersonated a Scotsman called Hilary, and that he might have fewer problems in Britain. He grinned again. "Everybody calls me Spike," he said, "you do the same." We were in London, where he was attending a law enforcement conference. A tall, solid man in his late fifties, when I told Linda, our perceptive receptionist, that he was with the FBI, she replied "Yup, looks like it."

Quiet-spoken and deliberative, Bowman joined the U.S. Navy in 1969, and worked in intelligence for several years before going to law school in Idaho. In 1979 he became the first ever Judge Advocate at the National Security Agency. He prosecuted espionage cases, taught international law at the U.S. Naval War College, worked at the U.S. embassy in Rome, and litigated cases for the Navy. In 1995 he went over to the FBI.

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On September 11 he was in his office at the FBI headquarters in northwest Washington, D.C. The attacks surprised him, but he hadn't expected the rule-book to be torn up. For the FBI, terrorism was both an intelligence matter and a criminal matter. FBI investigations were carried out within the law, so that intelligence could be used as evidence in criminal proceedings. But that wasn't the only reason the FBI objected to aggressive interrogations. "You need to maintain the quality control of that information," Bowman explained, "so that you can put it together with other information that may be found in subsequent years." Working within the law preserved the integrity of the information and its usefulness. The FBI had long believed that the only way to interrogate was by building rapport. Behavioral scientists figured out a plan for each detainee, focused on the individual, his background, his family, which provided specific issues to aim at.

In late October, or perhaps early November 2002, Bowman first became aware of serious concerns at Guantánamo among FBI staff. This was after the memos from Dunlavey and Beaver went to General Hill, although Bowman was unaware of them. He also knew nothing about the Bybee and Yoo memos. If they had reached the FBI they would have come to him, since they raised issues of international law. "As far as I know," he said, "the FBI was cut out of that process, completely." By November the FBI had an entourage of about twenty staff at Guantánamo, not counting the behavioral scientists. The FBI supervisor and interviewers were on relatively short tours of duty, between thirty and forty-five days, as compared with the DoD's military interrogators, who were there for six months, which meant that the FBI team had less continuity and influence. There would have been one person who was relatively more senior than the others, an assistant special agent in charge from some field office, but the others were street agents. Nevertheless everybody with the FBI at Guantánamo was experienced in interrogation.

In October concerns were raised by an FBI Special Agent who'd been at Guantánamo since mid-September. When the agent arrived al-Qahtani was already "incarcerated in a darkened cell in the naval Brig."[1] He was interrogated by the FBI, and the plan was for military personnel to interrogate him for twenty-four hours straight. The FBI agent objected but was told that this technique was approved by "the Secretary," meaning Donald Rumsfeld. This confirmed Rumsfeld's involvement even before the VOCO. al-Qahtani was moved to a plywood interrogation hut in Camp X-Ray, where he was "aggressively interrogated by military reservists," according to the FBI Special Agent, under the direction of a

civilian who was with the military and who wanted to do things that were "off the charts." The FBI Agent described how "the reservists yelled and screamed" at al-Qahtani, and "a German shepherd was positioned at the door of the interrogation hut and made to growl and bark at the detainee." At one point a copy of the Koran was placed in front of al-Qahtani while he was handcuffed to a chair, and an interrogator "straddled the Koran." The detainee became very angry, but still refused to provide any information. The agent later told investigators that al-Qahtani exhibited "bizarre behavior," observing remote objects and displaying extreme ranges of emotion. On November 22, the day before VOCO, he put this in writing in an electronic communication that was sent to the FBI's Counterterrorism Division.[2]

Around this time, Bowman was contacted. "I got a call from our behavioral scientists telling me that they thought that the military was going down the wrong path," he told me, "that they were going to have dysfunctional interrogation techniques." The FBI's behavioral scientists—psychologists—believed that Bowman had a direct line to the Pentagon, something few people in the FBI had. Bowman called the DoD's Acting Deputy General Counsel for Intelligence, Bob Dietz, an old friend, who had come over from his permanent position at the National Security Agency. This was the 10th or 12th of November, and it was the first of three calls he made. Dietz told Bowman that he wasn't working the issues, but that Haynes's deputy, Dan Dell'Orto, was. "In that conversation Bob said he already knew there were concerns," said Bowman, "by then they had heard complaints through military channels."

A few days later, around November 19, well before the VOCO and Thanksgiving, Bowman made his second call, to Dell'Orto. "I told him about it, and he said that he was aware of information, that he was still looking into it, which seemed fine to me." Dell'Orto told him he would get back to him. Was it possible that these concerns hadn't yet reached Haynes, I asked. Haynes told a Senate Committee he didn't recall "specific FBI complaints at the time of the November 27, 2002, memorandum" although he knew there were concerns about the appropriate means of questioning the detainees at Guantánamo "at that time."[3] "Impossible," said Bowman. He leaned across the table and pulled over a paper napkin. He drew two parallel lines, to show a corridor, then he drew a little square to show Dietz's office, and on the other side of the corridor, just across from the first square, he marked out a second square to show Haynes's office. So there were just a few feet between the two

offices? "Correct," he replied, "It was impossible for Haynes not to have known."

A couple of weeks later Bowman got another call from the FBI psychologists. "I was being told that they had gone down and offered to help them construct an interrogation routine, and that they had been rejected, saying that they didn't have time to do rapport building—they needed to get information from these people immediately." By now Bowman was aware that new interrogation plans were well advanced for two detainees, including Detainee 63, whose name he didn't know. "They were certainly the ones that they concentrated on, but I don't think the techniques adopted were limited to them. 063 was one that clearly they were focused on." Bowman didn't know the identity of the second detainee, who turned out to be Mohammedou Ould Slahi, a Mauretanian who was subject to a special interrogation plan in the spring of 2003.[4]

Dell'Orto didn't get back to Bowman. "I hadn't expected him to really," he said, "I thought he'd just take care of it." But later he received a second call from the psychologists, saying the situation was getting worse. Their concerns were now that the interrogations were dysfunctional and there was mistreatment. "They didn't say it was bad mistreatment, they didn't say whether he was being hurt, but you have to understand that the FBI has a very, very strict way of interrogating, so anything that falls outside it is going to raise significant issues within the FBI."

Bowman's chronology of events was confirmed by a document I saw after our first meeting: an email from the Behavioral Analysis Unit at the FBI's Critical Incident Response Group (CIRG) that was copied to Bowman. Written in May 2003, it described events at Guantánamo a few months earlier, in November and December 2002, as observed by an FBI Special Agent. It referred to serious tensions between the FBI and the Defense Intelligence Agency's Defense Humint Services (DHS), who "were being encouraged to use aggressive interrogation tactics" that were of questionable effectiveness and at odds with legally permissible interviewing techniques. The email claimed that military interrogators had "little, if any, experience eliciting information for judicial purposes."[5]

The FBI personnel clearly objected to these new techniques, but their arguments were met with skepticism and resistance by senior DHS officials at GTMO. Things came to a head on November 21. The DIA's interrogation plan for Detainee 063 was complete and was based on the eighteen techniques outlined in the memo sitting on Jim Haynes's desk. The FBI and the Criminal Investigation Task Force now prepared a separate interrogation

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plan and in draft form shared it with the DIA (it was finalized the following day). Their plan did not use aggressive techniques. There was an animated discussion between the FBI and the DIA about the differences between the two plans, addressing, among other things, "legal problems" that could arise. According to the FBI group, the DIA team was "adamant" that its more aggressive plan was preferable, despite the absence of evidence that such techniques worked.

Later that day—November 21—the email described "an awkward teleconference between GTMO and Pentagon officials." According to the FBI Special Agent, the Army Colonel who oversaw military interrogations "blatantly misled the Pentagon into believing that the [FBI's Behavioral Analysis Unit] endorsed DHS's aggressive and controversial Interrogation Plan" for Detainee 063. This caused the FBI supervisor to write a letter to Major General Miller, Dunlavey's replacement, correcting the misstatement during the teleconference and requesting an urgent meeting. At this meeting, Miller acknowledged the positive aspects of the FBI plan, but "it was apparent that he favored DHS's interrogation methods," despite FBI assertions that such methods could easily result in unreliable and legally inadmissible information. The FBI concluded that Miller was "biased in favor of DHS's interrogation methods."

At that time Bowman was unaware of Dunlavey's memo and the list of eighteen techniques. "However, I think it is possible that the behavioral scientists were aware of this," he said. He explained: "The reason why that's relevant is that when I had the second phone call from them I told them that I'll make a call to the Pentagon, but in the meantime can you give me something in writing—lay out your views on this, because I wanted to be able to very concretely explain to people in the Pentagon, the General Counsel's Office, why they thought the interrogation techniques would be faulty." Bowman told me that he didn't get that written document until much later, in March or April 2003. Why did it come so late? "Probably in their mind it wasn't the most important thing," he countered, "I think they felt like me, that we should be able to straighten this out." But they didn't straighten it out. "I think if I had known that I wasn't going to have any effect with the phone calls, then I think I would have had to take the issues at least to Director Mueller of the FBI." John Ashcroft was Attorney General then, he added, so that might not have worked. Apparently the documents were sent to the FBI office at Quantico and not forwarded to Bowman until much later.

Bowman told me that the second phone call from the psychologists at Guantánamo probably came to him because he was thought to have influence

at the Pentagon. This prompted him to call Dan Dell'Orto again—by now it was early December. Dell'Orto wasn't available, so he asked for, and got, Jim Haynes. "Jim basically blew me off. He said, 'Dan's handling that. I don't know what's going on with that—you'll have to talk with him.'" A short conversation? "A very short conversation, he did not want to talk about it at all, he just stiff-armed me." I was curious that he had direct access to Haynes. "Haynes didn't want to talk to me about what the FBI was saying." The significance of the encounter was that Haynes knew early on there were concerns. He couldn't claim ignorance.

Bowman's account was consistent with what General Myers had told me. I had asked Myers whether he was aware of the concerns expressed by the FBI at that time, even if he hadn't dealt directly with Bowman. "Yes, I did hear some issues," Myers said. Had that given him pause for thought? "Yes, absolutely, we wrestled with that, tried to reconcile all that."

So Bowman had come across Haynes before. "He didn't want to engage himself in anything that was controversial. It was very clear that he was trying to keep his name below the radar screen." Bowman knew Haynes's style. He had been involved in the investigation of Larry Franklin, a Pentagon civilian later charged and convicted of communicating classified U.S. national defense information to the American Israel Public Affairs Committee, a lobbying group.[6] Franklin had worked for the Office of Special Plans, which was (coincidentally) led by Doug Feith. "I came to the opinion that he was not the person we needed in the Pentagon," was Bowman's attitude to Feith.

At an early stage of the Franklin investigation, Bowman went to see Haynes to brief him. "We took a report with us on what they'd found. I gave the report to Jim. He declined to look at it, saying that he couldn't unread anything once he'd read it, so he didn't want to read anything." Did he turn a blind eye? "He couldn't turn a blind eye to it because we had given him a report, an oral report on what was going on, he just didn't want to get too deeply involved in it." Bowman could see why Haynes had met Rumsfeld's selection criteria. "He would not have appointed anybody who he did not think was going to do what Rumsfeld wanted him to do. He would not appoint anybody to anything who wouldn't toe the line." That also applied to Dunlavey.

The conversation in early December 2002 was the last that Haynes and Bowman had until the spring of 2003, when Bowman received a bundle of

documents from the FBI's behavioral analysis unit. He went to see Haynes. "I told him what I had, I said there are some papers here that you really ought to look at." Haynes responded that he'd seen those papers, about abuse at Guantánamo, including the documents concerning al-Qahtani's treatment in the days before November 23. "I never heard from him again." By now, however, Bowman had formed a clear view of Haynes, who was insisting that every lawyer in the Department of Defense, uniformed or otherwise, work directly for him. Haynes didn't want to leave any room for independent thinking, and liked to leave no tracks. Bowman did not know whether anybody had come to Haynes about the issue of interrogation early on or not (he was unaware that Haynes had visited Guantánamo in September). "But," he added, "I would think that the way he was trying to run things this would not have come as a surprise, because he tried to control what everybody was doing there. I don't know whether he listened to anybody else on any of this or not." He paused. "But I don't think he was of a mind to say 'no' about anything."

Bowman objected to aggressive interrogation techniques. In his mind the function of interrogation was to obtain information that was reliable, that could be used. For him, developing rapport with the detainee was the only thing that worked: that was the criteria against which the eighteen techniques should have been tested. Bowman did not see the list until later in 2003; he had no idea where the techniques came from. Some were recognizable, similar to ones used on him in SERE training (he went through Navy SERE training during Vietnam; "not fun" was all he would say about that experience). "I did not see any rational process—or any thought process—that went into the idea of how you were going to get information out of a person." Drawing up a list of authorized techniques without having something in mind for particular individuals was irrational. "You have to ask the question, what's it going to give me? If you can't answer that question, then the technique isn't harmless, it's dysfunctional."

Some techniques raised serious concerns for Bowman, namely stress positions. "If you are going to cause people physical discomfort, they're going to get pissed off, they aren't going to talk to you as readily." The same went for sleep deprivation. It didn't produce results: "I don't have much difficulty with a 20-hour interrogation, but if you do it for four or five days in a row, the person who is not getting enough sleep isn't going to have coherent thoughts in a very short period of time." I asked about fifty-four days on the trot. Bowman raised his eyebrows. "If you do it for a week, you're going to come out with a guy on the other end who doesn't know what he's talking about."

We moved on through the list. Forced grooming? Objectionable because it was culturally significant. Phobias and dogs? "Absolutely unacceptable." Mild non-injurious physical contact, like grabbing and poking? "It looks intuitively non-problematic," he said, "unless the person doing the pushing is a female." When I first saw the list that had not occurred to me. And, he added, a lot of the females that were down at Guantánamo were there for precisely that purpose. Al-Qahtani's interrogation log was filled with references to female interrogators and the use of girly magazines.

Bowman objected because these techniques would not produce meaningful information. "If it were me being harassed with some of these techniques, I might be tempted to give them any kind of spurious information to get them to stop." Even worse than the absence of limits, he said, was the fact that the techniques weren't geared to elicit a specific response. "What you are doing is giving these techniques to a bunch of young soldiers who don't have a clue about interrogation, who are told this is OK, but not told why it's OK, or what they are going to get from it." This was in contrast to the FBI interrogators, who knew how to interrogate and knew what al-Qaeda was all about. The FBI were able to tell the Commanding General what to look for, who were the key figures, their training, what they'd been doing, who to go after.

A particular interrogation technique was used because you expected to elicit a response that was directly connected to your objective: that was the aim of behavioral analysis. Some of these techniques might work on the battlefield—where you had somebody who was probably grateful to be alive and not sure they were going to remain that way—and might have immediate tactically significant information that could be scared out of them. "But if you put somebody behind bars," Bowman suggested, "and they know that they're not going to be killed . . . then this stuff becomes more harassing than it is productive."

Bowman thought two things had gone wrong at Guantánamo. The first was that after September 11 there was "a very high degree of urgency to try and get information to head off something else." That feeling of urgency had to be taken into account, but it was allowed to dominate. The second factor was a lowering of standards of training for the treatment of prisoners in times of conflict. Bowman was exasperated by this. "I find it almost mind boggling that it could have eroded as fast as it has, considering how much effort went into that for such a long period of time."

There were plenty of experts on military law around, but they weren't used or even consulted—anywhere. The military lawyers were cut out by the civilians, by Haynes and the like, who bore particular responsibility for

what followed. "The General Counsel has a responsibility to make sure that he is completely steeped in all the issues," said Bowman. "The fact that the first Bybee memo came out as it did gives you an indication that there was a lack of understanding." For Bowman the buck stopped with Haynes. "If he perceives that there is an illegality going on and he can't stop it, then his responsibility is to resign."

And the signs of illegality were there, even as the Haynes memo was being written. I showed Bowman a document entitled "Legal Analysis of Interrogation Techniques." It was a photocopy of an undated and unsigned three-page document that was sent by fax on November 27, 2002. At the top of the first page, almost illegible, it said: "Drafted by SSA [redacted] FBI (BAU) at Guantánamo Bay and forwarded to Marion Bowman, Legal Counsel, FBIHQ, on 11/27/2002."[7] This was one of the documents that Bowman said only reached him much later. It concluded that ten of the eighteen techniques were examples of coercive interrogation that were unlawful under the U.S. Constitution. These techniques included hooding, twenty-hour interrogations, the removal of clothing, stress positions and dogs. The analysis went further: these interrogation techniques could violate the U.S. Torture Statute. "It is possible," wrote the unnamed author, "that those who employ these techniques may be indicted, prosecuted, and possibly convicted if the trier of fact determines that the user had the requisite intent. Under these circumstances it is recognized that these techniques not be utilized." All these techniques were used on al-Qahtani.

Bowman looked at the document. He recognized it; there was no doubt about its authenticity. "It was drafted by someone at Guantánamo, yes." It was part of a three-quarter-inch package of documents sent him by a Special Agent to take to the Pentagon, and also included an opinion by some Judge Advocates, deploring the treatment of detainees. However he didn't receive it until the spring of 2003, probably because it was sent to the FBI's Behavioral Analysis Unit at Quantico to be forwarded on to him. Bowman thought the legal analysis wasn't drafted by the Special Agent, but by someone else at Guantánamo, almost certainly a lawyer. "I know the procedures for the FBI, no supervisory special agent would have drafted this on his own. He would have asked one of the attorneys to look at what's going on and to draft something." The legal analysis made it quite clear that some lawyers at Guantánamo were concerned enough about the new techniques to express their opposition in writing.

Bowman knew there was a problem—and he reacted—but in the end he didn't do enough. This thoughtful and phlegmatic man finally concluded:

"The lawyers are the gatekeepers. The question is, whether you've got the right lawyers."

INTERROGATION LOG OF DETAINEE 063

Day 30, December 22 2002

0030: Lead (the leading interrogator) began the "attention to detail" theme with the fitness model photos. Detainees refused to look at photos claiming it was against his religion. Lead poured a 24 oz bottle of water over detainee's head. . . .

Day 31, 23 December 2002

0001: Upon entering booth, lead changed white noise music and hung pictures of swimsuit models around his neck. Detainee was left in booth listening to white music.

0030: Lead pulled pictures of swimsuit models off detainee and told him the test of his ability to answer questions would begin. Detainee refused to answer, and finally stated that he would after lead poured water over detainees head and was told he would be subjected to this treatment day after day. . . .

0230: Detainee requested that lead add wearing the towel over his head to list of detainee problems. Detainee related that he already knows where he is, so why does he continue to wear a towel over his head. . . .

1115: Detainee was offered water and refused, so the interrogator poured some of the bottle over the detainee's head. . . .

1 statement. I'd just like to point something out. On page 2, subsection (e),
2 where it states that "wilful and outrageous acts of personal abuse done for
3 the purpose of humiliating or degrading the individual in a manner so
4 serious," et cetera, but I gather if it's done for the purpose of collecting
5 foreign intelligence, it's okay. I think that's a real problem with the
6 statement.
7 Have you looked at that? Do you agree with this, or do you
8 have any other thoughts?
9 **GENERAL OTSTOTT:** I absolutely agree with you on that. It
10 opens the door for bad behavior.
11 **MR. TURNER:** You will remember from law school, no doubt,
12 the Latin expression "*expressio unius est exclusio allerius*" – the
13 expression of one thing is the exclusion of another. And when you say if
14 you do this for the purpose of humiliating people, you can't threaten to
15 sexually mutilate them and so forth, implicit in that, at least a reasonable
16 interpretation of that is that if your purpose is, as you say, collecting
17 intelligence or trying to protect against the next terrorist attack, then these
18 things are not off limits.
19 That's very offensive.
20 **SENATOR FEINSTEIN:** Thank you. Senator Whitehouse,
21 you're on.
22 **SENATOR WHITEHOUSE:** Thank you.
23 I'd like to join you in thanking these witnesses. I found their
24 testimony very helpful. Professor Turner, it's nice to see a professor from
25 my alma mater here testifying.

1 **SENATOR FEINSTEIN:** Oh, that's why you're so smart.
2 **SENATOR WHITEHOUSE:** For the record, she was referring
3 to Professor Turner.
4 [Laughter]
5 **SENATOR WHITEHOUSE:** I thought, Ms. Massimino, that
6 your comparisons with some of the historical antecedents where we were
7 on the other side was extremely helpful to understand particularly the
8 episode of the Japanese officer sentenced to hard labor for war crimes for
9 the techniques that you indicated.
10 Colonel Kleinman, you entered the service in 1985?
11 **COLONEL KLEINMAN:** I was commissioned in '85, yes, sir.
12 **SENATOR WHITEHOUSE:** And you're still on active duty
13 today?
14 **COLONEL KLEINMAN:** I'm an active reservist. I'm the
15 senior reserve intelligence officer for the Air Force Special Operations
16 Command.
17 **SENATOR WHITEHOUSE:** In the 22 years that you have
18 been serving, how much of that time has been dedicated to interrogation
19 and human intelligence collection?
20 **COLONEL KLEINMAN:** One hundred percent, sir. That's my
21 career. The sum total of my career has been in human intelligence, much
22 of it relating to either interrogation or resisting interrogation.
23 **SENATOR WHITEHOUSE:** And you've been an advisor to
24 intelligence teams and interrogators operating truly at the forefront of our
25 most significant conflicts, correct?

1 **COLONEL KLEINMAN:** Yes, sir. I've conducted
2 interrogations myself. I was also a team chief during the Gulf War, where
3 I had all the services under my command interrogating literally thousands
4 of Iraqis. I was an advisor to a Special Operations Task Force on
5 Interrogation during Iraqi Freedom. So I've had a chance to really look at
6 the academic theoretical side, but I am steeped in the operational side.
7 **SENATOR WHITEHOUSE:** If you look at what we're allowed
8 to do to collect information under the Army field manual, there are
9 arguably two constraints on it, two limiting factors. One is the limiting
10 factor that we have discussed here, the sort of moral limiting factor, the if
11 we do it to them they can do it to us factor – the sort of golden rule of
12 interrogation, if you will.
13 Let me ask you, just for purposes of argument, to set that
14 aside for a minute and consider, as a real career expert in intelligence-
15 gathering from people who you have custody over, if you could set aside
16 the rest of it, if you were in a dark room, you knew nobody would ever
17 look, the intelligence that you needed to get was of urgent value, would
18 you feel that from a point of view of intelligence-gathering effectiveness
19 you would or could or should go beyond the Army field manual and the
20 techniques that are authorized in the Army field manual in order to obtain
21 that intelligence?
22 **COLONEL KLEINMAN:** Senator, I thank you so much for that
23 question, because I think I've been waiting twenty years to answer it.
24 That is, absolutely not. I am not at all limited by the Army field manual in
25 terms of what I need to do to generate useful information. That's the key

1 – accurate, useful information, not leading questions to force somebody to
2 say what they think I want to hear and the full spectrum of their
3 knowledgeability, not answering only the questions I ask but developing
4 what I call operational accord, a relationship such that they see it's in their
5 best interests, under non-pressure, non-coercive circumstances that it
6 would be in their best interest to answer these questions fully.
7 I've had situations during the Iraq war where we were very
8 interested in the location of SCUD missile systems. I had a source that
9 nobody would have suspected would have knowledge of that. At the
10 conclusion of four hours of interrogating him about other elements – and it
11 was a treasure trove of information – we had a relationship such that as I
12 was getting up, shuffling my papers, he said, "didn't you want to know
13 where the SCUD missiles were?" So I said, of course, we've spent four
14 hours, I'm tired, we'll do this tomorrow.
15 [Laughter.]
16 **COLONEL KLEINMAN:** I, of course, sat back down and he
17 gave us incredible information. And the reason, he told me, was, he said,
18 I'm so amazed at my treatment. I wanted, if I was going to be captured, to
19 be captured by one of your allies, not by the Americans, because I was
20 told you were animals. You've treated me like a gentleman. You've
21 treated me with respect, and you are clearly knowledgeable of my
22 customs and my culture. I'm more than happy to answer any question
23 you have.
24 **SENATOR WHITEHOUSE:** May I follow up? I'm afraid
25 something you said might be taken out of context. I'd like to go back and

1 ask you to go over with it again with me. You said briefly "I am not limited
2 by the Army field manual." When you said that, I assume you did not
3 mean that in the actions that you undertake in your professional capacity
4 there's anything you do that's not limited by the Army field manual, as a
5 matter of law.
6 I assume that what you meant to say was that you did not see
7 the constraints of the Army field manual – the moral constraints, the legal
8 constraints – as in any way inhibiting the effectiveness of your
9 examination techniques – that you could do everything you wanted to,
10 that you missed for nothing because of those restrictions. Is that what
11 you intended to say?
12 **COLONEL KLEINMAN:** Senator, I am forever in your debt for
13 allowing me to correct myself, because that's precisely what I meant to
14 say. I don't see those as limiting my ability to work – the spirit or the letter
15 of that guidance. My approach was what we call a relationship-based
16 approach – far more than just rapport-building. I've never felt any
17 necessity or operational requirement to bring physical, psychological or
18 emotional pressure on a source to win their cooperation.
19 So, following the guidance in the field manual, I feel
20 unconstrained in my ability to work in the paradigm that I've taught for so
21 many years.
22 **SENATOR WHITEHOUSE:** Can you assume another country
23 in which there is no such constraint, in which the Chinese feel at liberty to
24 put American prisoners into prolonged stress positions or the Japanese
25 feel free to take American prisoners of war and lean them against the wall

1 on their fingertips for extended hours, or other such devices that would
2 exceed the limitations of the Army field manual are pursued? Why is it
3 that those interrogators utilize those techniques? Is it just professional
4 disagreement? Do they have a sort of different view of what is effective?
5 Why do they do it?
6 Again, setting aside the moral constraints, which I know
7 animate you very much and me as well, but for purposes of discussion,
8 from a pure intelligence collection perspective and setting aside any moral
9 or golden rule limitations on the behavior that you would want to limit
10 yourself to, why is that some interrogators would feel that it was
11 appropriate to go beyond what's permitted by the Army field manual?
12 **COLONEL KLEINMAN:** As a graduate of the University of
13 California, I tip my hat to the University of Virginia for the critical thinking
14 skills that are taught to the graduates, because, sir, that gets to the very
15 heart of the matter, and it is this: there is two objectives that one can
16 pursue in interrogation – either winning cooperation or compliance. They
17 seem very similar, but there are profound differences.
18 Compliance means to take action that's against your interests,
19 that you don't support, has nothing to do with intelligence. Cooperation is
20 winning a source's willingness to provide useful information. What the
21 Chinese were interested in, what the Koreans were interested in, what the
22 North Vietnamese were interested in was maybe five percent intelligence,
23 95 percent compliance, meaning creating propaganda.
24 Now that's a whole different paradigm. And the approaches
25 that they used – like sleep deprivation and torture – ultimately will get any

1 one of us in this room to do things that we couldn't imagine today. But it
2 doesn't necessarily mean our ability to provide useful information.
3 The other part of that paradigm is the fact that getting
4 intelligence – as I mentioned in my opening remarks – is getting access to
5 somebody's functioning memory. If you think back to just the panel before
6 ours, if I were to question each of you systematically, under the best of
7 circumstances, to tell me what happened – who said what, when, what
8 were the proposals, who agreed, who disagreed and so forth – we would
9 find some real deficits in your memory – again under perfect
10 circumstances.
11 Imagine now if I had had you standing for twelve hours or in
12 stress positions and now I'm asking you to call upon your memory. Even
13 if you wanted to, even if you were wilful, you would be undermined in your
14 ability to do so. So I think the key point, sir, is are we trying to produce
15 compliance, which is propaganda, or cooperation, which leads to
16 intelligence.
17 **SENATOR WHITEHOUSE:** Madam Chair, thank you for
18 letting me go over. It's been enormously valuable to me to hear firsthand
19 from somebody who has such firsthand lifelong experience in the field in
20 this discussion. So thank all of the panel. Colonel, I thank you, and I
21 thank the Chair for letting me expend the time.
22 **SENATOR FEINSTEIN:** You are very welcome. Let me ask
23 one last question.
24 This is a very troubling aspect, I think, of our processes now,
25 and the question really comes how to handle it. There is a real element of