

Conklin, Maegan L

RELEASED IN FULL

From: Schulz, Kirsten A
 Sent: Wednesday, July 25, 2007 11:16 AM
 To: Mills, Richard M Jr.; Johnson, David T
 Cc: Bellingier, John B (L Bureau); Roy, Kenneth M; Pease, Leah; Pomper, Stephen; Adams, Kelli; Poisson, Beth L; Erel, Adam J; Bishop, Vaughn F; Tsou, Leslie M; Bell, Richard K; Tremont, Pamela M; Bilgesu, Deniz X; Deeks, Ashley S
 Subject: Intelligence and Security Committee/Renditions

Rick, David,

(C) The Embassy received the Intelligence and Security Committee report on Rendition today. The report is some seventy pages in length and includes some ten pages of summary and recommendations. At first, cursory reading, the report appears to be a history of what the British Intelligence services (MI5, MI6) knew about U.S. detainee and rendition policy and when, as well as a description of HMG's evolving policy toward U.S. detainee and rendition policy since 9/11. Not having read the report in its entirety, I highlight some of its language:

(U) The nature of intelligence sharing

Our intelligence-sharing relationships, particularly with the United States, are critical to providing the breadth and depth of intelligence coverage required to counter the threat to the UK posed by global terrorism. These relationships have saved lives and must continue...

Implications for the Special Relationship...

What the rendition programme has shown is that in what it refers to as 'the war on terror' the U.S. will take whatever action it deems necessary, within U.S. law, to protect its national security from those it considers to pose a serious threat. Although the U.S. may take note of UK protests and concerns, this does not appear materially to affect its strategy on rendition.

It is to the credit of our Agencies that they have now managed to adapt their procedures to work round these problems and maintain the exchange of intelligence that is so critical.

...

*The UK Agencies
 Conclusions and Recommendations*

...The Committee considers that "secret detention," without legal or other representation, is of itself mistreatment. Where there is a real possibility of "rendition to detention" to a secret facility, even if it would be for a limited time, then approval must never be given.

...

Summary of conclusions and recommendations...

Our intelligence-sharing relationships, particularly with the United States, are critical to providing the breadth and depth of intelligence coverage required to counter the threat to the UK posed by global terrorism. These relationships have saved lives and must continue...

In the immediate aftermath of the 9/11 attacks, the UK Agencies were authorized to assist U.S. "rendition to justice" operations in Afghanistan. This involved assistance to the CIA to capture "unlawful combatants" in Afghanistan...

By mid-2003, following the case of Khaled Sheik Mohammed and suspicions that the U.S. authorities were operating "black sites," the Agencies had appreciated the potential risk of renditions and possible mistreatment of detainees. From this point the Agencies correctly sought Ministerial approval and assurances from foreign liaison services whenever there were real risks of rendition operations resulting from their actions...

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The Committee has strong concerns, however, about a potential operation in early 2005 which, had it gone ahead, might have resulted in the xxxxx (sic) The operation was conditional approved by Ministers, subject to assurances on humane treatment and a time limit on detention. These were not obtained and so the operation was dropped. xxx (sic) ...

The use of UK airspace and airports by CIA-operated aircraft is not in doubt. There have been many allegations related to these flights but there have been no allegations, and we have seen no evidence, that suggest that any of these CIA flights have transferred detainees through UK airspace (other than two "rendition to justice" cases in 1998 which were approved by the UK Government following U.S. request.)...

We consider that it would be unreasonable ...to check whether every aircraft transiting UK airspace might have been, at some point in the past, and without UK knowledge, involved in a possibly unlawful operation. We are satisfied that, where there is sufficient evidence of unlawful activity on board an aircraft in UK airspace, be it a rendition operation of otherwise, this would be investigated by UK authorities...

The alleged use of military airfields in the UK by rendition flights has been investigated in response to our questions to the Prime Minister. We are satisfied that there is not evidence that U.S. rendition flights have used UK airspace (except the two cases in 1998 referred to earlier in the report) and that there is no evidence of them having landed at UK military airfields."

There is also language on Guantanamo detainees el-Banna and el-Rawi, among others.

Regards,
Kirsten

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LQ11

Conklin, Maegan L

From: Deeks, Ashley S
Sent: Monday, July 09, 2007 3:04 PM
To: Bellinger, John B (L Bureau); Johnson, Clifton M; Propp, Kenneth R
Cc: Padmanabhan, Vijay M
Subject: FW: Germany: Bundestag Appoints Special Counsel for CIA renditions

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FYI.

From: Robinson, John G
Sent: Monday, July 09, 2007 3:04 PM
To: Deeks, Ashley S; Padmanabhan, Vijay M; Sicade, Lynn M (DRL); Hammond, Sylvia L (DRL)
Subject: Germany: Bundestag Appoints Special Counsel for CIA renditions

Germany: Bundestag Appoints Special Counsel for CIA renditions

(U) This week the Bundestag's Intelligence fact-finding committee appointed a special counsel to deal solely with questions of CIA renditions, secret prisons, and CIA secret flights. The counsel, Joachim Jacob, previously served as the government's data protection commissioner. Jacob's appointment is for six months. (Hugo Guevara, x 7-0345, Embassy Press Summary)

John G. Robinson
EUR/ERA
(202) 647-3913

Classified Confidential by Political Officer John G. Robinson, EUR/ERA, based on definitions provided in E.O. 12958, reasons 1.4 (b) and (d). decl.

UNITED STATES DEPARTMENT OF STATE
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LQ15B

Congress of the United States

Washington, DC 20515

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July 2, 2007

The Honorable Condoleezza Rice
Secretary of State
2201 C Street, N.W.
Washington, D.C. 20520

Dear Madam Secretary:

The House Committee on Foreign Affairs, Subcommittee on International Organizations, Human Rights, and Oversight, and the House Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Civil Liberties are conducting a joint inquiry into the United States's policies and practices in connection with the extrajudicial transfer of a person from one state (i.e., country) to another, often referred to as "extraordinary rendition." The United States's involvement in extraordinary renditions has received world-wide press attention, and has resulted in the attempted prosecution of United States executive branch personnel in Italy. We therefore seek information regarding the United States's policy and practice on renditions.¹

The purpose of this letter is not to request information or documents relating to any specific rendition, nor is it to request any information or documents that relate to any operational matters associated with any rendition. Rather, we are interested in obtaining documents or information as follows:

- 1) Please provide any written materials in the nature of policies or guidelines that relate to the circumstances where the United States will participate in or conduct an extraordinary rendition;
- 2) Please provide written materials or other information that describe or set forth the approval process within the State Department and any and all other branches of government (including, but not limited to the intelligence agencies, the Defense Department, the Department of Justice, the White House, and any other agencies);
- 3) Please provide written materials or other information that describe the legal and factual findings that are typically made or required to be made prior to any such rendition, and please provide a sample set of such findings that redact information that would identify the person to be involuntarily rendered;
- 4) Please provide any written materials in the nature of policies or guidelines that relate to the steps taken by the United States's to determine what the country to which the individual is to

¹As used in this letter, the term "rendition" means the transfer of a person from one state to another in the absence of an extradition treaty or other formal legal process and includes "extraordinary rendition" or "irregular rendition."

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be rendered will do with the individual when rendered, including but not limited to, steps taken and written materials or other information that is obtained as to the country's commitments not to engage in torture (i.e., "diplomatic assurances"). Please indicate how the communications with the receiving country are memorialized and retained. Please also provide information on how the United States ensures that the receiving country abides by its treatment commitment and what, if any, remedy is taken if the United States receives credible information that the receiving country has tortured the rendered individual or otherwise failed to honor its commitments:

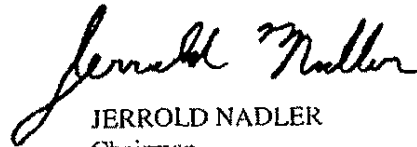
- 5) Please provide any legal analyses that provide authority for the United States's participation in the extraordinary rendition process;
- 6) As to each of the above categories, please provide documents or information that reflect whether the policies or practices (including legal policies) have remained constant or have changed over time;
- 7) Please provide documents or information explaining how many times the United States has participate in or conducted a rendition since January 20, 2001; and
- 8) Please provide documents or information explaining how many times the United States has determined that those rendered were not dangerous terrorists.

We appreciate your prompt attention to this letter, and would request a response no later than Monday, July 16, 2007. If you have any questions, please contact Natalie Coburn, Counsel to the Subcommittee on International Organizations, Human Rights and Oversight at (202) 226-6434, or Heather Sawyer, Counsel to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties, at (202) 225-2585

Sincerely,



WILLIAM D. DELAHUNT
Chairman
Subcommittee on
International Organizations,
Human Rights and Oversight
Committee on Foreign Affairs



JERROLD NADLER
Chairman,
Subcommittee on
the Constitution,
Civil Rights, and Civil Liberties
Committee on the Judiciary



JEFF FLAKE
Member of Congress



RON PAUL
Member of Congress

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LQ20

Conklin, Maegan L

From: Buchwald, Todd F (L-UNA)
Sent: Friday, December 02, 2005 5:16 PM
To: Bellinger, John B (L Bureau)
Cc: Harris, Robert K; Witten, Samuel M; Dorosin, Joshua L
Subject: -- Are there black sites

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Attachments: LEGAL-#124221-v1-Sec_Q's_A's_-_Black_sites__etca1_.doc



LEGAL-#124221-v1
-Sec_Q's_A's_...

This has the change that Bob just discussed with you (Euro Commission vice Euro Court) for the Carlos the Jackal case - he's walking it up in hard copy,

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Conklin, Maegan L

L021

From: Graffy, Colleen P
Sent: Wednesday, November 23, 2005 3:59 PM
To: Bellinger, John B (L Bureau); Hughes, Karen P(R)
Subject: Assessments from Posts

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Attached are assessments by posts on the media coverage that renditions, black sites and Guantanamo are getting in their respective country and its affect on public diplomacy.

This includes Armenia, Austria, Cyprus, Finland, Iceland, Lithuania, Luxembourg, NATO, Slovenia, Spain, Sweden, Turkey and United Kingdom & Netherlands.

On the unclass side is Bosnia and Denmark

Colleen

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3/27/2009

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Paris7785.txt
Susan M Ball 11/16/2005 03:54:32 PM From DB/Inbox: Susan M Ball

Cable
Text:

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TELEGRAM

November 16, 2005

To: SECSTATE WASHDC - IMMEDIATE
Action: EUR
From: AMEMBASSY PARIS (PARIS 7785 - IMMEDIATE)
TAGS: PINR, PINS, PREL, FR
Captions: None
Subject: ACTION REQUEST: GUIDANCE ON RESPONSE TO COE
INVESTIGATION
Ref: None

-
1. (U) This is an action request. See para 3.
 2. (U) Amb. Stapleton received by fax a letter (full text para 4) from Dick Marty, whom the Council of Europe Parliamentary Assembly has appointed to investigate the allegations of CIA secret detention centers in CoE member countries. The key phrase reads, "I would very much appreciate receiving from your authorities any pertinent information they may be able to provide me with on this subject."
 3. (U) ACTION REQUEST: Please provide authorized language for use by Ambassador and Strasbourg consulate in response to COE requests.

4. (U) Text of Marty letter:

Parliamentary Assembly
The Council of Europe
Committee on Legal Affairs and Human Rights
The Chairperson

14 November 2005

Dear Mr. Roberts Stapleton,

I address this letter to you in your capacity as Permanent Observer of the United States of America to the Council of Europe.

As you are no doubt aware, I have recently been instructed by the Parliamentary Assembly's Committee on Legal Affairs and Human Rights to collect information on alleged secret detention centres in Council of Europe member states as a result of communications received on this subject from a number of sources, especially Human Rights Watch.

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With this in mind, and in particular the existence of serious allegations concerning your country,s involvement in such activities in Council of Europe member States as of 2001, I would very much appreciate receiving from your authorities any pertinent information they may be able to provide me with on this subject.

I look forward to receiving a reply to my request at your earliest convenience and thank you for your cooperation.

Yours Sincerely,

Dick Marty

END LETTER TEXT

Please visit Paris' Classified Website at:
<http://www.state.sgov.gov/p/eur/paris/index.cfm>
Hofmann

Additional Addressees:
None

CC:
AMCONSUL STRASBOURG
EUROPEAN POLITICAL COLLECTIVE

Distribution:

TED9534
ACTION EUR-00

INFO	LOG-00	NP-00	ACQ-00	CIAE-00	DODE-00	DS-00	UTED-00
	VCI-00	TEDE-00	INR-00	IO-00	L-00	VCIE-00	NSAE-00
	ISN-00	NSCE-00	OMB-00	PA-00	PM-00	PRS-00	P-00
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	DRL-00	G-00	SAS-00	/000W			

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O 161231Z NOV 05
FM AMEMBASSY PARIS
TO SECSTATE WASHDC IMMEDIATE 1456
INFO EUROPEAN POLITICAL COLLECTIVE PRIORITY
AMCONSUL STRASBOURG PRIORITY

UNCLAS PARIS 007785

E.O. 12958: N/A
TAGS: PREL, PINR, PINS, FR
SUBJECT: ACTION REQUEST: GUIDANCE ON RESPONSE TO COE
INVESTIGATION

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End Cable Text

Susan M Ball 11/16/2005 03:54:32 PM From DB/Inbox: Susan M Ball

Recipient/Profile Information

Cable Recipients:

Steve Adams-Smith
Joanne E Addison
Michael J Adler
Damola A Akeredolu
Worth S Anderson
Jorgan K Andrews
Richard H Appleton
Katherine Arcieri
Michelle E Azevedo
Alejandro H Baez
Susan M Ball
Stephen B Banks
Rene L Bebeau
John P Becker
Lisa J Benthien
Mark A Betka
Joshua Black
Sharon Bowman
Scott A Brandon
Jamar P Broussard
Tiffani Brown
Mia Buck
Jody L Buckneberg
Mary J Bushnaq
Andrea Cameron
Martha L Campbell
Raphael Carland
Amy C Carlon
Amy A Carnie
Lauren W Catipon
Angela M Cervetti
Tania Chomiak-Salvi
Gary A Clements
Marcia E Cole
Ronald Collins
John Conlon
Celeste A Connors
Nerissa J Cook
Anti Crime
John R Crosby
Shawn P Crowley
Thomas R Cunningham
Jennifer M Darrington
Margaret M Dean
Lillian G deValcourt-Ayala
Annick P Ducher
David A Eastmond
Joao M Ecsodi
Colleen S Eddy
Jennifer A Eldridge
Christopher A Ellis
John F Erath
EUR Sp Asst
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John J Fennerty
Terrance R Flynn
Daniel Fried
Martin C Gage
Michael F Gallagher
Gregory G Garramone
Juliette Garvis
Linda A Gayles
Stephen M Geis
Theresa A Grencik
Danny Hall
Morgan C Hall
Joshua Hatcher
Margaret Hawley-Young
Kathryn A Hayter
John Hennessey-niland
Priscilla G Hernandez
John J Hillmeyer
Marcus A Hirsch
Marjorie T Hoefler
Greta C Holtz
Arnold Horowitz
Todd M Huizinga
Cornelia L Johnson
Kim Johnson
Seth A Johnston
Donald L Jordan
Stephanie S Kinney
Heather X Kitchens
Eric W Kneedler
Mary Koenig
David J Kostelancik
Adam D Lamoreaux
John F Larrea
Jacqueline A Lawrence
Thomas M Leary
Frank J Ledahawsky
Thomas E Lersten
Aaron H Levy-Forsythe
J D Lippeatt
Debra Lo
Maria A Longi
Andrew R Lorenz
John O Maher
Joseph Manganiello
Carolann Marino
Gregory L Mattson
James Miervaldis
Stephanie A Miley
Katherine L Mitchell
Matthias J Mitman
Pamela P Montgomery
Joann Moore
Connie A Morella
Alessandro P Nardi
Alain G Norman
Mary M O'Keefe
Thomas A O'Keefe
Tabitha R Oman
Howard Perlow
Peggy L Plunkett
Denise M Pontacoloni
Pamela M Powell

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Kathleen A Powers
Richard L Prosen
Jay Raman
Stephanie A Raney
Jeffrey D Rathke
Lonni H Reazor
Helen G Recinos
Christen C Rhodes
Lawrence G Richter
Gerd Rickert
Maiesha S Riley
John G Robinson
Ana M Rodriguez
Kenneth M Roy
Adele Ruppe
Franciso, D Sainz
Gary E Schaefer
James F Schumaker
Jeffrey R Sexton
Eugenia M Sidereas
Marsha L Singer
Stephen T Smith
Anthony Spakauskas
Lonni H Spiegel
Jeffrey R Starnes
Daphne Z Stavropoulos
Ronald Stephens
Adam H Sterling
Alexandra M Sundquist
David J Tessler
Tracey R Thornton
John C Tucker
Subrena R Tumblin
Robert H Tuttle
Diana N Viggiano
Kurt D Voker
Jacqueline V Voorhees
Ann L Wagner
Ivan S Weinstein
Matthew S Wells
Arke]] D weygandt
Caitlin white
Kami A Witmer
Nelson Wukitsch
Thomas A Yeager
Alan K Yu
Diane R Zeleny
Jane B Zimmerman

LMDS Profiles/office symbols:

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EUR_AGS_A13
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Becker1
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murraycw6
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trostlj_3
hennessey_nilandj_1
brandonSA_1
chomiak-salvit
Cupics1
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hadda_1
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horowitzA1
johnsontc_1
karagiaA1
kostedj3
longmyer3
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powellpm1
profaizal
ROOD1

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mcgahuab1
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Prosenr1
schultze_1
snecl
tribblec1
volkerkd1
ERA1
murraycw1
CarnieAA_1
crouchgd_2
gagem2
goldsteinj2
recinosh_3
TEKACH_5
akeredda
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November 15, 2005

SENSITIVE BUT UNCLASSIFIED
NOTE FOR THE SECRETARY

FROM: John B. Bellinger

SUBJECT: European Response to Reports of CIA Secret Detention Sites in Europe

Press reports about alleged secret CIA detention sites in Eastern Europe have led the Council of Europe to open an investigation into the existence of such sites, resulting in an official request for information. Further, following press reports of suspect air flights in the region, several European countries (including Germany, Denmark, the UK, Italy, and Iceland) have queried us about possible renditions that might have occurred through their airspace. Recent press reports have also drawn international attention to Spain's ongoing investigation of allegations that the CIA has used facilities on Majorca in connection with prisoner transfers. Finally, the European Union has indicated that it will monitor the outcome of the various investigations underway for evidence that EU member states may have acted in contravention of their EU obligations.

On November 8, the Legal Affairs Committee of the Council of Europe (CoE) Parliamentary Assembly (PACE) appointed its Chairperson, Dick Marty (Switzerland), as rapporteur to examine the subject of alleged secret CIA detention centers, with a view to a possible urgent debate at the next Standing Committee's meeting in Bucharest on November 25. The Committee authorized visits to member States as needed, and Marty has requested that our Ambassador in Paris, in his capacity as U.S. Observer to the CoE, provide information regarding the allegations. In earlier resolutions, the Parliamentary Assembly called upon member States to "ensure that their territory and facilities are not used in connection with practices of secret detention or rendition in possible violation of international human rights law." On November 3 EU Commission spokesperson Roscam Abbing announced that the Commission would not investigate the allegations, suggesting that the task fell to the EU's member states. Yesterday, Commission Vice President Frattini asserted in a statement before the EU Parliament that the conduct described in press reports would constitute a "serious violation of the principles of the European Union" by the member states concerned. Finally, the ICRC remains concerned about all detainees whom it believes the USG has kept from ICRC access.

Romanian President Basescu, Prime Minister Tariceanu, and other Romanian officials have advised that they have no evidence of "secret prisons" alleged by Human Rights Watch. The outgoing Polish Defense and Foreign Ministers categorically denied the Washington Post's allegations, as did the President, and leaders of the incoming government expressed disbelief the story could be true. In Spain, Interior Minister Alonso remarked on television that it would be "very serious and intolerable" if the CIA in fact used Spanish airports to take prisoners to unknown destinations, but asked for "caution" as the investigation continues.

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

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Drafted: L/HRR - Gilda Brancato x 72773 11/9/05, updated 11/15/05 124032

Cleared: DRL/MLA - Julieta Noyes - ok

EUR - Kurt Volker - ok

L/PM - Josh Dorosin - ok

L/HRR - Robert Harris - ok

L/EUR - Peter Olson & Damon Terrill - ok

PRM/MCE - Carol Santos - ok

EUR/NCE - Janet Garvey - ok

EUR/NB - Vicky Middleton - ok

EUR/ERA - Rob Faucher - ok

G - Joseph Bracken - ok

EUR/WE - Italy / Spain - Kathy Allegrone - ok

CC: USGeneva - Jeffrey Kovar

L - Ronald Bettauer, Samuel Witten

L/LEI - Kenneth Propp

IO - Mark Lagon

IO/SHA - Bill Lucas

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Q. Europeans say extraordinary renditions violate international law, you say they're legal. Who is right?

-- Properly conducted renditions are permissible under international law, and European tribunals have upheld them in specific cases.

-- I am told for example that the European Commission of Human Rights specifically rejected Carlos the Jackal's claim that his rendition from Sudan violated international law.

-- That is not to say that renditions can never be conducted in a way that would violate international law, such as if torture were involved, either as part of the rendition or if a person were rendered to a place knowing that he would be tortured or even that it is likely that he will be tortured.

-- But I want to be clear:

-- We take the prohibitions against torture, under both international law and domestic law, very seriously.

-- We do not authorize or condone torture.

-- Where there have been cases of unlawful treatment of detainees, such as in connection with Abu Ghraib, we have investigated and where appropriate we prosecute and punish those responsible.

Q. Are you saying you have rendered people from Europe or through European territory?

-- Again, I cannot and will not comment on intelligence activities, but I can say we have worked and will continue to work cooperatively with our friends and partners in Europe and elsewhere.

-- That said, I can say that a large number of the allegations I have seen in the European media are flatly wrong.

Q. Where are they being rendered to? And who are they?

-- I am not in a position to discuss intelligence information that would compromise our intelligence, law enforcement and military operations.

-- In general, these detainees are extremely dangerous terrorists who are being transferred to countries of which they are nationals or sometimes to countries that are able to detain them or prosecute them.

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Q. Are there black sites?

-- I want to be as forthcoming as possible but for reasons I hope you understand I am not going to confirm or deny intelligence activities.

-- As I have said, our publics -- rightfully -- hold us responsible for protecting our countries and our citizens.

-- I am just not in a position to discuss intelligence information that would compromise our intelligence, law enforcement and military operations.

Q. Do you think waterboarding is torture? If not, how can you say it is not cruel, inhumane, or degrading?

-- I want to avoid commenting on allegations about the legalities and details of specific practices.

-- As I've said, it is our policy to comply with all of our international obligations in our treatment of detainees: authorized interrogation procedures will not constitute torture or cruel, inhuman, or degrading treatment, as defined by U.S. obligations under the Convention Against Torture.

-- Our interrogation procedures are given careful legal review by the Department of Justice for compliance with the law.

Q. When you ask countries to cooperate in these renditions, aren't you effectively asking them to break their own laws? Isn't this fundamentally inconsistent with the idea that the United States promotes the rule of law?

-- The premise that renditions are illegal is wrong. Renditions are not automatically legal or automatically illegal -- it depends on how they are carried out.

-- Cooperation in these rendition efforts is voluntary. Democratic governments have obligations to protect their citizens and their countries from the threats posed by terrorists. These governments must decide whether they want to work with us and how they want to work with us.

-- Democratic governments of course are responsible for complying with their own laws. In some cases we and other countries are finding that we need to change or adapt our laws to deal with the threat.

-- But we are certainly not asking anyone to abandon the rule of law.

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Q. Isn't the United States violating the human rights of these individuals? These are enforced disappearances, aren't they? Isn't it correct that international treaties ratified by the U.S. prohibit incommunicado detention of persons in secret locations as well?

-- Members of al Qaeda and its affiliates are unlawful combatants who may be held in accordance with the law of war. And that is what we are doing.

Q. Could the US cooperate in one of these renditions from the United States if another country requested?

-- There are a variety of ways that a person might be "rendered" under US law outside of a traditional extradition procedure. We can cooperate, but it of course depends on what is being requested.

-- So the question is not simply whether the United States could or could not cooperate in a rendition request. There are many, many different kinds of situations, and yes -- we would in an appropriate situation cooperate as best we could.

Q. What about the reports that CIA has rendered the wrong people, such as al-Masri from Germany?

-- I am not going to comment on particular allegations.

-- Our military and intelligence agencies make every effort to ensure that any individual who is detained is a member of al-Qaeda or its affiliates and poses a threat to the United States or its allies.

-- If an individual is detained in error, we take corrective action.

-- But simply because errors are sometimes made does not mean that detention activities should be stopped.

Q. Why are you opposing the McCain amendment?

-- The issues involved in the McCain Amendment are more complicated than might first seem, including issues related to separation of powers, about which there have long been differences of views between the Executive and Legislative branches.

-- Under the Constitution and our system of government, the President has responsibilities as Commander-in-Chief.

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-- Because of this, there are questions about the extent to which it is appropriate or wise for Congress to make laws about how the President should be required to conduct or not conduct interrogations, or otherwise carry out his responsibilities under the Constitution as Commander-in-Chief.

-- That said, we understand the concerns that some in Congress have expressed.

-- And we are working closely with the Congress to try to reach a satisfactory resolution of this issue.

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Conklin, Maegan L

From: Terrill, Damon A
Sent: Thursday, December 15, 2005 12:21 PM
To: Bellinger, John B (L Bureau)
Subject: FW: Amnesty says CIA detainee flights used UK territory

RELEASED IN FULL

John -

This looks like it may have made it to everyone but you, so just passing it along.

Best,

Damon (7-1270)

-----Original Message-----

From: Williams, Veronica X
Sent: Thursday, December 15, 2005 12:19 PM
To: Legal-AI-Deputies-dl; Legal-AI-ALAs-dl; Legal-L-EUR-dl; Legal-L-PM-dl
Subject: FW: Amnesty says CIA detainee flights used UK territory

-----Original Message-----

From: Shvetz, Brendon
Sent: Thursday, December 15, 2005 11:49 AM
To: LW-EUR; LW-Mahogany; SES-O_Shift-II; LW-L
Subject: Amnesty says CIA detainee flights used UK territory

^ABC-SECURITY-BRITAIN-RENDITION

^Amnesty says CIA detainee flights used UK territory

LONDON, Dec 15 (Reuters) - Amnesty International said on Thursday Britain had allowed the CIA to operate flights on its territory to transport terrorism detainees illegally and demanded that the government launch an investigation.

"The UK has allowed these aircraft to land, refuel and take off from their territory," the human rights group's regional director Claudio Cordone said in a statement.

"The UK government must launch an immediate, thorough and independent investigation into mounting evidence that its territory has been used to assist in unlawfully transporting detainees to countries where they may face "disappearance", torture or other ill-treatment," he added.

The British government said on Monday it had no evidence that the current U.S. administration has been transporting terrorism suspects through British airports.

Cordone said: "Whether the U.S. is sending people to other countries to be tortured, or snatching them in other countries to be abused in Guantanamo, international law prohibits the UK, or any other state, from aiding or abetting them."

Human rights groups accuse the CIA of running secret prisons in eastern Europe and covertly transporting detainees -- a practice known as "extraordinary rendition". They say incommunicado detention often leads to torture.

The Amnesty statement named several men it said had been abducted by the CIA and flown to Jordan and Egypt as part of the U.S. campaign of "extraordinary rendition".

In each case a Gulfstream V, registration N379P, had stopped to refuel at Prestwick airport in Scotland on its way back to the United States after dropping off its passengers, it said.

It cited the case of Jamil Qasim Saeed Mohammed who it said was seen being bundled aboard the CIA plane by masked men in Karachi on Oct 23, 2001. The plane then flew to Jordan and the following day, now without its passenger, it flew to Prestwick and then on to Dulles International airport near Washington.

It demanded that the United States reveal Mohammed's whereabouts.

Amnesty said that on Jan. 12, 2002, Indonesian security officials saw Muhammad Saad Iqbal Madni being put on the plane in Jakarta and flown to Cairo. Once again the plane stopped in Prestwick to refuel after depositing its passenger.

It said Iqbal Madni had since been returned to U.S. jurisdiction and was now a detainee in Guantanamo Bay where fellow detainees had said he was on the verge of a breakdown.

Amnesty cited a third case where a Swedish investigation has already revealed that U.S. security officials took Ahmed Agiza and Mohammed al-Zari from Sweden to Cairo for torture.

In total, Gulfstream N379P had been logged between 2001 and 2005 making at least 78 stopovers at British airports while en route to or from destinations such as Baku, Dubai, Cyprus, Karachi, Qatar, Riyadh, Tashkent, and Warsaw, Amnesty said.

UNITED STATES DEPARTMENT OF STATE
 REVIEW AUTHORITY: ARCHIE M BOLSTER
 DATE/CASE ID: 22 JUN 2009 200706444

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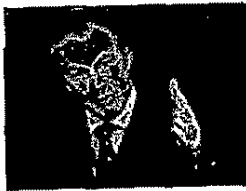
LQ28

Conklin, Maegan L

From: Fried, Daniel
Sent: Thursday, December 22, 2005 9:41 AM
To: Bellinger, John B (L Bureau)
Subject: FW: Blair on renditions
Attachments: image001.jpg; image002.jpg

RELEASED IN FULL

From: Sterling, Adam H
Sent: Thursday, December 22, 2005 7:59 AM
To: Fried, Daniel
Subject: Blair on renditions



(U) Blair's Final 2005 Press Conference: It has been a tough year for the Prime Minister, but in his monthly press conference on December 21, a confident Tony Blair said he was sure he is "doing the right thing" even though he knows he is "battling on all fronts" to save his public reform program. Blair also brushed aside suggestions he would hand over power to Gordon Brown and, when asked whether he would investigate allegations of UK airports being used for "extraordinary rendition," he said "Investigate what? I have absolutely no evidence to suggest anything illegal has been happening."

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

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3/27/2009

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LQ29

Conklin, Maegan L

From: Fried, Daniel
Sent: Thursday, January 19, 2006 12:00 PM
To: Bellinger, John B (L Bureau)
Subject: FW: EP resolution on secret prisons

RELEASED IN FULL

From: Sterling, Adam H
Sent: Thursday, January 19, 2006 10:07 AM
To: Sterling, Adam H; Fried, Daniel; Graffy, Colleen P; Pekala, Mark A
Subject: RE: EP resolution on secret prisons

More from the EP:

(U) European Parliament to set up temporary committee on CIA activities in Europe

The European Parliament voted on January 18, by a large majority, to set up a temporary committee to investigate allegations of the transport and illegal detention of prisoners by the CIA in European countries. The list of 46 committee members will be approved on January 19. The temporary committee will have limited powers of investigation and cannot force anyone to appear or testify. It will run for a maximum of twelve months, unless the EP agrees to extend it. The mandate calls for the committee to collect and analyze information to find out: whether the CIA has carried out abductions, detentions at secret sites, torture, inhumane or degrading treatment of prisoners in EU or candidate countries; whether such actions could be considered a violation of EU or international law, including EU-US agreements on extradition; whether European citizens have been detained; and whether EU Member States or institutions have been involved. The committee would cooperate closely with the Council of Europe and provide an interim report within four months after commencement. According to an EP staffer, the committee is expected to hold its first meeting the week of January 23 when appointments of president, vice-presidents and report drafter are expected.

From: Sterling, Adam H
Sent: Thursday, January 19, 2006 10:06 AM
To: Fried, Daniel; Graffy, Colleen P; Pekala, Mark A
Subject: EP resolution on secret prisons

From USEU:

(U) EP calls on the U.S. to close "secret prisons" in Afghanistan and Guantanamo

The European Parliament adopted on January 18 a resolution on Afghanistan which "calls on the U.S. to close any secret 'dark' prison in the country." MEPs also "condemn the transfer of hundreds of men captured by U.S. troops... to [the] illegal Guantanamo detention center, where torture and other ill-treatment by U.S. personnel have, according to numerous testimonies, been commonplace occurrences, and calls for its immediate closure." MEPs also welcomed the success of the recent Afghan elections as "an extraordinary accomplishment," called for greater visibility of EU funding in the region and for the UN to streamline coordination among donors. MEPs urged the Council and Commission to develop a policy for stability and democracy in the region and to study the advisability of concluding an EU-Afghanistan Association Agreement.

UNITED STATES DEPARTMENT OF STATE
 REVIEW AUTHORITY: ARCHIE M BOLSTER
 DATE/CASE ID: 22 JUN 2009 200706444

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3/27/2009

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LQ32

Conklin, Maegan L

RELEASED IN FULL

From: Greene, Richard L (PRM)
Sent: Friday, November 04, 2005 6:10 PM
To: McCormack, Sean I(PA FRONT); Bellinger, John B (L Bureau)(L-FO)
Subject: FW: 11-04-05 Daily Press Briefing and final guidances + ICRC guidance

Attachments: dpb # 189 November 4.doc; 110405 ICRC - CIA prison.doc; 11-04-05 Final Guidances.doc

Sean -- from our perspective (and I recognize that there are many perspectives on this issue) well done and thanks
 -----Original Message-----

From: Eisenhower, Peter A
Sent: Friday, November 04, 2005 4:46 PM
To: PRM/DAS; PRM/Directors and Deputies; PRM/MCE
Subject: 11-04-05 Daily Press Briefing and final guidances + ICRC guidance

Excerpt from dpb below is re: ICRC queries. Final guidances did not include the cleared guidance on this topic, which I have also attached here.



dpb # 189 member 4.doc (89 K) 110405 ICRC - CIA prison.doc (... 11-04-05 Final Guidances.doc (...

QUESTION: Have you received requests from the EU for cooperation into the reported secret prisons in Europe?

MR. MCCORMACK: I have checked on that, George, and we have not, at this point, received any requests from the EU concerning those news reports. My understanding from reading the news reports is that the EU is actually make requests of member states or potential member states, states with which they are having accession talks. So at this point, we have not received any inquiries from the EU on those news stories.

QUESTION: A follow-up on that?

MR. MCCORMACK: Jonathan, yeah.

QUESTION: Does the International Red Cross have access to all U.S. prisoners?

MR. MCCORMACK: This is a topic that came up yesterday and we --

QUESTION: Okay. Apologies.

MR. MCCORMACK: We talked a bit about it yesterday. We have an ongoing dialogue with the ICRC on a number of -- across a number of different issues. And that dialogue and the contents of that dialogue, by tradition, has been confidential and that has served the aims and work of the ICRC, so I have to respect the diplomatic confidentiality.

There have been news reports and the ICRC has commented in public that it has requested access to all detainees worldwide. And again, we have a dialogue with the ICRC on a number of different issues and we try to engage them as best we can.

I would note that the Department of Defense has -- the ICRC has access to all Department of Defense facilities

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where detainees are held, whether that's in Iraq or Afghanistan or Guantanamo Bay. We've talked a lot about that over the past couple of days.

If there are any future inquiries from the ICRC on these news accounts, I would expect that we would receive those inquiries and continue our dialogue with the ICRC on the broader issue of detainees.

QUESTION: I think that's a confusing answer though, Sean. You said they have access to DOD facilities in Iraq, Guantanamo and Afghanistan and if they made requests, you would, I guess consider them in the future, you said. But they have made requests that, if you have other locations, they want to visit these detainees.

MR. MCCORMACK: As I said, you know, I have to separate out these two things. We do have an ongoing dialogue with the ICRC. We have -- on any given day, we probably have a meeting with the ICRC on a topic of mutual interest, whether it's detainees or other issues. As I said before, those -- that dialogue is a confidential dialogue. It's a confidential diplomatic exchange. I'm not at liberty to discuss the contents of those dialogues.

And as I said, I have seen ICRC statements, public statements in the past, concerning requests to see all detainees. I can only say that we have an ongoing dialogue with the ICRC on questions related to detainees. And I did point out that the ICRC has access to all detainees held by the Department of Defense in those locations where they may be held, whether it's Iraq, Afghanistan or Guantanamo Bay.

QUESTION: I guess my question is have you not received, through your private channels then, a request from the ICRC? Is the only request you know about the one that you've read publicly in news reports?

MR. MCCORMACK: Like I said, we have -- you know, we have meetings every single day or on any given day we may have a meeting with the ICRC if -- you know, based on their public statements, which again, I have read recently. They said they would renew their request to see all detainees based on the recent news reports that have been out in *The Washington Post* and the *Financial Times* and in other news organizations. And I fully expect that, based on their public statements, that they would renew that request.

QUESTION: So they haven't --

MR. MCCORMACK: And as I said, we have meetings -- we have meetings --

QUESTION: You're just being repetitive. Have they or have they not made the request?

MR. MCCORMACK: Again, we have -- you know, we meet with the ICRC. I will try to keep you updated as best I can if, in fact, they have renewed that request. There are bounds in which -- by which I am constrained in terms of the confidentiality of the ICRC dialogue. I will do my best to keep you updated on any requests that they have made.

QUESTION: Without addressing the question of requests they have made, the original question -- well, not the original, but the first follow-up -- was does it have access to all detainees worldwide, not necessarily limited to DOD detainees?

MR. MCCORMACK: Right. And as I said, we do have -- we have a dialogue with them on that issue.

QUESTION: It doesn't go to dialogue. It goes to do they have access to.

MR. MCCORMACK: As I said, they -- and we've talked about this over the past couple of days. They have access to Department of Defense detainees at facilities where those detainees are held, whether that's Guantanamo Bay, Afghanistan or Iraq.

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LQ37

Conklin, Maegan L

RELEASED IN FULL

From: Terrill, Damon A
Sent: Tuesday, November 29, 2005 11:25 AM
To: Bellinger, John B (L Bureau); Allegrone, Kathleen H; Faucher, Robert J; Olson, Peter M; Sagor, Andrew E(S/WCI); Hartley, Brent R(S/CT)
Cc: Witten, Samuel M; Dorosin, Joshua L
Subject: L Press Guidance - EU Inquiry Re: Alleged "Secret Prisons"
Importance: High
Attachments: 112905LPRESSGUIDANCE.doc

Please see the attached press guidance in response to the below tasking. Your clearance as soon as possible will be most appreciated.

L / EUR / INR / REGION: When do we expect an answer to the EU regarding the secret prisons?

Many thanks.

Damon (7-1270)



112905LPRESSGUIDANCE.doc (28 K...)

Damon A. Terrill
Attorney Adviser & Press Officer
United States Department of State
Office of the Legal Adviser
European & Eurasian Affairs (L/EUR)
2201 C Street NW
Washington, DC 20520
(202) 647-1270

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

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LQ37A
RELEASED IN FULL

L Press Guidance
November 29, 2005

Alleged CIA "Secret Prisons" in Europe

Question:

When do we expect an answer to the EU regarding the secret prisons?

Answer:

- We are aware of press reports that the EU plans to make a request for information through the UK Presidency, but we have not yet received any such request.

- We remain in regular communication with our European allies about these issues in the meantime.

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Drafted: L/EUR:DTerrill (7-1270)

Cleared:

L: JBellinger

L/EUR: POlson

EUR/WE: KAllegrone

EUR/ERA: RFaucher

S/CT: BHartley

S/WCI: ASagor

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L038

Conklin, Maegan L

RELEASED IN FULL

From: Terrill, Damon A
Sent: Wednesday, December 14, 2005 11:35 AM
To: Bellinger, John B (L Bureau); Witten, Samuel M; Dorosin, Joshua L
Cc: Jacobson, Linda; Harris, Robert K; Olson, Peter M
Subject: PLEASE CLEAR (Press Tasking to L - CoE Statements on Detainees)

Importance: High

Attachments: 121405LPRESSGUIDANCECOESTATEMENT.DOC

Can we go with the attached for purposes of today's briefing?

Many thanks.

Damon (7-1270)



121405LPRESSGUIDANCECOESTATEMENT.DOC

-----Original Message-----

From: Terrill, Damon A
Sent: Wednesday, December 14, 2005 9:54 AM
To: Bellinger, John B (L Bureau); Jacobson, Linda; Harris, Robert K; Witten, Samuel M; Olson, Peter M; Dorosin, Joshua L
Subject: Press Tasking to L - CoE Statements on Detainees
Importance: High

Please note the below press tasking, on which L has the lead. I have attached a copy of the COE's statement, to which the tasking refers, as well as a template for use in creating the guidance.

L / SWCI / EUR: Comment on the Council of Europe's Committee on Legal Affairs and Human Rights report on inquiry into reports of secret prisons and rendition flights.

Best,

Damon (7-1270)

<< File: COE Statement Secret Detention Centres in Europe.doc >> << File: 121405LPRESSGUIDANCECOESTATEMENT.DOC >>

Damon A. Terrill
Attorney Adviser & Press Officer
United States Department of State
Office of the Legal Adviser
European & Eurasian Affairs (L/EUR)
2201 C Street NW
Washington, DC 20520
(202) 647-1270

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

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LQ39

Conklin, Maegan L

From: Terrill, Damon A
Sent: Tuesday, November 29, 2005 6:13 PM
To: Witten, Samuel M
Cc: Bellinger, John B (L Bureau); Olson, Peter M; Dorosin, Joshua L; Jacobson, Linda; Propp, Kenneth R
Subject: RE: Press Briefing Transcript
Attachments: 11-29-05 Final Guidances.doc

RELEASED IN FULL

Sam -

The whole of what was in his briefing book for today's press conference is in the attached. Ours is the only guidance on the subject.

He does note that he was in the meeting with the Secretary and the Foreign Minister. I very much assume that he prepared on his own (or in personal consultation with the Secretary in the very short while between the conclusion of the meeting and the press briefing) that portion of his remarks that characterized the meeting. Nonetheless, I've asked AGS whether they prepared anything for Sean outside the context of the press briefing book (the attached) and will let you know what I hear back / will pass along anything they put together.

Best,

Damon



11-29-05 Final
Guidances.doc (...)

Damon A. Terrill
 Attorney Adviser & Press Officer
 United States Department of State
 Office of the Legal Adviser
 European & Eurasian Affairs (L/EUR)
 2201 C Street NW
 Washington, DC 20520
 (202) 647-1270

-----Original Message-----

From: Witten, Samuel M
Sent: Tuesday, November 29, 2005 5:57 PM
To: Terrill, Damon A; Bellinger, John B (L Bureau); Olson, Peter M; Dorosin, Joshua L; Jacobson, Linda; Propp, Kenneth R
Subject: RE: Press Briefing Transcript

Damon - Clearly Sean was working from a much better and more detailed script than we gave them. Do we have a copy of what others prepared for him?

-----Original Message-----

From: Terrill, Damon A
Sent: Tuesday, November 29, 2005 5:54 PM
To: Bellinger, John B (L Bureau); Olson, Peter M; Witten, Samuel M; Dorosin, Joshua L; Jacobson, Linda; Propp, Kenneth R
Subject: Press Briefing Transcript

Please see the attached FYI. Over half of the press briefing today was devoted to detainees / "secret prisons" issues.

Damon (7-1270)
 UNITED STATES DEPARTMENT OF STATE
 REVIEW AUTHORITY: ARCHIE M BOLSTER
 DATE/CASE ID: 22 JUN 2009 200706444

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<< File: dpb # 202 November 29.doc >>

Damon A. Terrill
Attorney Adviser & Press Officer
United States Department of State
Office of the Legal Adviser
European & Eurasian Affairs (L/EUR)
2201 C Street NW
Washington, DC 20520
(202) 647-1270

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FINAL
GUIDANCES **CONTENTS** **TUESDAY, NOVEMBER 29, 2005**

POSTED	Statement Media Note	-- U.S.-Israel Strategic Dialogue -- Under Secretary for Political Affairs Nicholas Burns to Give Remarks on U.S. Policy Toward Iran (11/28)
AF	Kenya	-- Ban on Demonstrations
EAP	Hong Kong	-- Readout of Martin Lee Visit
EUR	Region Azerbaijan	-- Alleged CIA "Secret Prisons" -- U.S.-Azerbaijan Economic Task Force
NEA	Iraq Iran Israel Israel/Palestinians	-- Police Training -- Ambassador Khalilzad Communicating with Iran -- U.S.-Israel Strategic Dialog -- Secretary's Meeting with Saeb Erekat
SA	Bangladesh Pakistan	-- Terrorist Attacks -- F-16 Sales
WHA	Venezuela	-- Incident at Airport Involving U.S. Congressional Delegation
MISC.	EB	-- GAO Report on U.S. Terrorist Finance Efforts

THERE WAS A DAILY BRIEFING TODAY.

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LQ396

RELEASED IN FULL

L Press Guidance
November 29, 2005

Alleged CIA "Secret Prisons" in Europe

Question:

When do we expect an answer to the EU regarding the secret prisons?

Answer:

- We are aware of press reports that the EU plans to make a request for information through the UK Presidency, but we have not yet received any such request.

- In the meantime, we are in regular communication with our European allies about a wide range of issues, including the war on terrorism.

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Drafted: L/EUR:DTerrill (7-1270)

Cleared:

L: JBellinger - ok

L/EUR: POlson - ok

EUR/WE: KAllegrone - ok

EUR/ERA: RFaucher - ok

S/CT: BHartley - ok

S/WCI: ASagor - ok

INR/EUR/C: DArmitage - ok

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LQ40B.

RELEASED IN FULL

December 6, 2005

Dear Mr. Marty:

Thank you for your letter of November 14, 2005, concerning "alleged secret detention centers in Council of Europe member states." On December 5, 2005, our Secretary of State made a statement on this issue, a copy of which I enclose. I trust this statement responds to the concerns that CoE member States have raised.

Sincerely,

Craig R. Stapleton

Enclosure: As stated.

Mr. Dick Marty,
Chairperson,
Committee on Legal Affairs and Human Rights,
Parliamentary Assembly of the Council of Europe,
F-67075 Strasbourg Cedex.

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

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LQ40C

RELEASED IN FULL

December 6, 2005

Dear Mr. van der Linden:

Thank you for your letter of December 2, 2005, requesting a meeting with the Secretary of State during her European trip this week concerning "reports alleging that territories of some member states have been used in connection with practices of secret detention or extraordinary rendition in possible violation of international human rights law." Unfortunately, as you can imagine, her schedule does not allow for an additional meeting. On December 5, 2005, the Secretary made a statement on this issue, a copy of which I enclose. I trust this statement responds to the concerns that CoE member States have raised.

Sincerely,

Craig R. Stapleton

Enclosure: As stated.

René van der Linden,
President,
Parliamentary Assembly of the Council of Europe,
F-67075 Strasbourg Cedex.

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

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ROG 11/16/2005

OLM/C:JROSENBLATT

OL:KEBAKER, POL/D: BTURNER

OL/D: BTURNER

OLOUT

MEMBASSY PARIS

ECSTATE WASHDC IMMEDIATE

INFO EUROPEAN POLITICAL COLLECTIVE PRIORITY

MCONSUL STRASBOURG PRIORITY

.O. 12958: N/A

AGS: PREL, PINR, PINS, FR

UBJECT: ACTION REQUEST: GUIDANCE ON RESPONSE TO COE
INVESTIGATION

. (U) This is an action request. See para 3.

. (U) Amb. Stapleton received by fax a letter (full text
para 4) from Dick Marty, whom the Council of Europe
Parliamentary Assembly has appointed to investigate the
allegations of CIA secret detention centers in CoE member
countries. The key phrase reads, "I would very much
appreciate receiving from your authorities any pertinent
information they may be able to provide me with on this
subject."

i. (U) ACTION REQUEST: Please provide authorized
language for use by Ambassador and Strasbourg consulate in
response to COE requests.

.. (U) Text of Marty letter:

Parliamentary Assembly
The Council of Europe
Committee on Legal Affairs and Human Rights
The Chairperson

.4 November 2005

Dear Mr. Roberts Stapleton,

[address this letter to you in your capacity as Permanent

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

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observer of the United States of America to the Council of Europe.

As you are no doubt aware, I have recently been instructed by the Parliamentary Assembly's Committee on Legal Affairs and Human Rights to collect information on "alleged secret detention centres in Council of Europe member states" as a result of communications received on this subject from a number of sources, especially Human Rights Watch.

In light of this in mind, and in particular the existence of serious allegations concerning your country's involvement in such activities in Council of Europe member States as of 2001, I would very much appreciate receiving from your authorities any pertinent information they may be able to provide me with on this subject.

I look forward to receiving a reply to my request at your earliest convenience and thank you for your cooperation.

Yours Sincerely,

Wick Marty

END LETTER TEXT

Please visit Paris' Classified Website at:
<http://www.state.gov/p/eur/paris/index.cfm>
ofmann

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LQ406

Council of Europe

RELEASED IN FULL

Parliamentary Assembly

The President

Strasbourg, 6 December 2005

Dear Secretary of State,

I write further to my letter of 2 December 2005, in which I enquired about the possibility of a meeting with you during your visit to Europe. The purpose of this meeting would have been to discuss the issue of allegations relating to secret detentions and extraordinary renditions involving the C.I.A. and taking place on the territory of Council of Europe member States.

I understand that the programme of your visit did not allow for such a meeting to take place. I would like to take this opportunity, therefore, to express some of the concerns that I would otherwise have stated in person.

Democratic Europe has always enjoyed excellent mutual relations with the USA. We all stand for the same values, given effect through the basic principles of democracy, human rights and the rule of law. I fear, however, that the current allegations risk damaging the image of the USA in Europe and undermining transatlantic relationships, at a time when the global security situation requires strong alliances between our countries.

For the Parliamentary Assembly of the Council of Europe, which brings together 630 members of national parliaments from 46 European countries, this matter is of utmost importance. We consider that such possible practices as secret detention and extraordinary rendition are in clear violation of our basic legal standards concerning the prohibition on torture and inhuman treatment and the right to liberty and security of the person. We have responded to the current situation by establishing an enquiry, to be conducted by the Chairperson of our Committee on Legal Affairs and Human Rights, Mr Dick Marty.

I would urge the U.S. authorities to cooperate fully with Mr Marty's enquiries in order to discover and make public the truth about these allegations. Your country's position on this issue is crucial in order to demonstrate that the same rules apply to all countries. Failing this would seriously undermine the moral foundations of the democratic world order.

Yours sincerely,

René van der Linden

Secretary of State Dr. Condoleezza RICE
U.S. Department of State
2201 C Street NW
Washington DC 20520
United States of America

Postal Address:
17, rue de Strasbourg
67070 Strasbourg Cedex

Tel. +33 (0) 3 88 41 20 99
Fax +33 (0) 3 88 41 31 99
ren.vanderlinden@coe.int

LQ44.

Conklin, Maegan L

From: Terrill, Damon A
Sent: Friday, November 04, 2005 11:40 AM
To: Dorosin, Joshua L; Bellinger, John B (L Bureau)
Subject: RE: URGENT: ICRC - CIA Prisons Press Guidance

RELEASED IN FULL

Importance: High

Attachments: LPressGuidanceICRCInquiry.doc

John and Josh -

This is due now. Really now. Briefing is at noon.

Without objection, I will take down the attached.

Damon



LPressGuidanceICR
CInquiry.doc ...

-----Original Message-----

From: Dorosin, Joshua L
Sent: Friday, November 04, 2005 11:29 AM
To: Eisenhower, Peter A(SA-1); Santos, Carol A(SA-1); Pollack, Margaret J(SA-1); Gorjance, Mary A(SA-1); Miller, Ronald W(S/WCI); Amadeo, Stefanie(P); Fritz, Jonathan D(D); Lagon, Mark P; Greene, Richard L (PRM)(Main State Rm 5824)
Cc: Terrill, Damon A; Schou, Nina E
Subject: URGENT: ICRC - CIA Prisons Press Guidance

<< File: Doc2_.doc >>

All -

We understand that the tasking for guidance on ICRC is back on – please review the attached as soon as possible. We've taken Peter's initial draft and incorporated points from John Bellinger.

Thanks. Josh

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LQ44A

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L Press Guidance
November 4, 2005

ICRC Inquiry About Detention Facilities

Question:

Have we received any requests from the ICRC regarding the reported CIA detention facilities?

Answer:

- The ICRC plays an important humanitarian role and we have an excellent working relationship with them.
- As you know, our relationship is predicated on confidentiality.
- That said, we anticipate that we will be in consultation with them on this story.

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Drafted: L/PM:JDorosin

Cleared:

L: JBellinger

PRM: MPollack

PRM: MGorjance

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LQ53

Conklin, Maegan L

From: Deeks, Ashley S
Sent: Friday, May 12, 2006 6:54 PM
To: Bellinger, John B (L Bureau)
Cc: Filippatos, James; Dorosin, Joshua L
Subject: IM to D on ICRC/undisclosed detention

RELEASED IN FULL

Attachments: LEGAL-#125689-v1-im_on_undisclosed_detention.doc



LEGAL-#125689-v1
-im_on_undiscl...

John: Here's a draft info Memo for D on the ICRC and undisclosed detention. If this looks ok to you, I'll get clearances from P and D staff and PRM Monday morning.

Thanks.

Ashley

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

UNCLASSIFIED

L0685

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LQ57

Conklin, Maegan L

From: Dorosin, Joshua L
Sent: Tuesday, April 25, 2006 6:39 PM
To: Bellinger, John B (L Bureau)
Cc: Deeks, Ashley S
Subject: Note to S on ICRC Report

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Attachments: note to S on undisclosed detention_.doc



note to S on
undisclosed deten...

John -

Attached for your comments is a draft note from you to S on the ICRC's undisclosed locations report.

Josh

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

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L0686

Conklin, Maegan L

LQ82

From: Dolan, JoAnn (L-PM)
Sent: Thursday, October 21, 2004 6:43 PM
To: Thessin, James H (SBU); Deeks, Ashley S (L-PM); Dorosin, Joshua L (L-PM)
Subject: FW: 10/11 AP Report: Al Qaeda suspects have 'disappeared'

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more of same

Report: Al Qaeda suspects have 'disappeared'

NEW YORK (AP) -- At least 11 al Qaeda suspects have "disappeared" in U.S. custody, and some may have been tortured, Human Rights Watch said in a report issued Monday.

The prisoners are probably being held outside the United States without access to the Red Cross or any oversight of their treatment, the human rights group said. In some cases, the United States will not even acknowledge the prisoners are in custody.

The report said the prisoners include the alleged architect of the September 11 attacks, Khalid Shaikh Mohammed, as well as Abu Zubaydah, who is believed to be a close aide to Osama bin Laden.

In refusing to disclose the prisoners' whereabouts or acknowledge the detentions, Human Rights Watch said, the U.S. government has violated international law, international treaties and the Geneva Convention. The group called on the government to bring all the prisoners "under the protection of the law."

"I think the U.S. demeans itself when it adopts the philosophy that the ends justify the means in the fight against terror," said Reed Brody, special counsel with Human Rights Watch.

CIA spokesman Mark Mansfield said the agency has not seen the report and declined to comment.

The report -- titled "The United States' 'Disappeared': The CIA's Long-term 'Ghost Detainees'" -- said many of the prisoners have provided valuable intelligence to U.S. officials. But it also cited reports that some detainees have lied under pressure to please their interrogators.

Human Rights Watch has no firsthand knowledge of the treatment of these detainees. Much of the report stems from news accounts that have cited unidentified government sources acknowledging the torture or mistreatment of detainees.

The report provides a brief sketch of 11 detainees believed to be incommunicado in undisclosed locations. They hail from countries across the Arab world, including Libya, Yemen,

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 DATE/CASE ID: 22 JUN 2009 200706444

4/6/2009

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Saudi Arabia and Kuwait. U.S. authorities have confirmed the detention of six of them, the report said.

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United States Department of Defense.

News Transcript

On the web: <http://www.defenselink.mil/cgi-bin/dlprint.cgi?><http://www.defenselink.mil/transcripts/2004/tr20040617-secdef0881.html>

Media contact: +1 (703) 697-5131

Public contact: <http://www.dod.mil/faq/comment.html> or +1 (703) 428-0711LQ111
RELEASED IN FULL

Presenter: Secretary of Defense Donald Rumsfeld and General Peter Pace, Vice Chairman, Joint Chiefs of Staff

Thursday, June 17, 2004
2:31 p.m. EDT

Defense Department Regular Briefing

SEC. RUMSFELD: Good afternoon.

Media reports in the last few days have focused on what some have termed a surge in violence in Iraq, the attacks being waged by enemies of freedom who are threatened by the steady advances that are being made in that country. The extremists' efforts to intimidate the Iraqi people I believe will fail.

A new Iraqi government is being established with the endorsement of the United Nations and the international community. Iraqis are working to build a free and peaceful society, and the new leaders have thanked the American people for their support and for their sacrifices. A recent survey found that 63 percent of Iraqis believe that the interim government will improve life in their country.

Growing numbers of Iraqi security forces and coalition soldiers will continue to help provide security and train the new Iraqi army and police forces so security responsibilities can be passed to them as rapidly as is possible. Thousands of courageous Iraqis have stepped forward to defend their country, and thousands more are volunteering every day. The number of recruits standing in line to join the various elements of the Iraqi security forces is impressive. As we have seen, this is something that terrorists and assassins want desperately to prevent.

This much is certain: coalition forces cannot be defeated on the battlefield. The only way this effort could fail is if people were to be persuaded that the cause is lost or that it's not worth the pain, or if those who seem to measure progress in Iraq against a more perfect world convince others to throw in the towel. I'm confident that that will not happen.

On another note, I want to address recent suggestions that somehow the war in Iraq might derail our efforts to transform the armed forces to enable them to be better equipped to confront the new threats of the 21st century. I would say that just the opposite is true.

As with any large organization, change can be slow. Sometimes it takes a major event to cause people to realign their priorities. The global war on terror was such an event, and the requirements of its new challenges have allowed us, for example, to begin the urgent task of rebalancing the active and reserve components of our armed forces, moving skill sets that are now found almost exclusively in the Guard and Reserve into the active force so that we're not excessively reliant on the Guard and Reserve for those frequently needed skills.

Second, we're transforming the Army to make brigades more self-contained, more self-sustaining, and available to serve any division commander.

And third, we're adjusting our global posture from a somewhat static, Cold War era defense to one that will enable us to work closely with our friends and allies both within and across regions, and to develop more rapidly deployable capabilities rather than focusing on presence and mass.

These and other changes are needed, and in some cases they were long overdue. The global war on terror has compelled us to take action, and the men and women in uniform and our strong civilian workforce are, in my view, working effectively to achieve these needed changes.

General Pace?

GEN. PACE: Thank you, Mr. Secretary.

There is certainly some good news for the forces that are working in Haiti in support of the new Haitian government. As you know, we've been there about three months now -- U.S. forces, French forces, Canadian and Chilean -- to restore stability over the last three months. At the end of April, the U.N. Security Council voted unanimously to support a resolution to support the Haitian government and the Haitian people, and to have it under U.N. mandate. Brazil has stepped forward as the lead nation. They have the lead elements of their command team there now. During the rest of this month of June the current forces that are there will be replaced by other coalition forces underneath Brazilian leadership. And the U.N. and the coalition countries that have volunteered will continue to provide stability so that the Haitian people can get about forming their own government and becoming more prosperous.

With that, we'll take your questions.

SEC. RUMSFELD: Charlie?

Q Mr. Secretary, I'd like to ask why last November you ordered the U.S. military to keep a suspected Ansar al-Islam prisoner in Iraq secret from the Red Cross. He's now been secret for more than seven months. And there are other such shadowy prisoners in Iraq who are being kept secret from the Red Cross.

SEC. RUMSFELD: With respect to the -- I want to separate the two. Iraq, my understanding is that the investigations on that subject are going forward.

With respect to the detainee you're talking about, I'm not an expert on this, but I was requested by the Director of Central Intelligence to take custody of an Iraqi national who was believed to be a high-ranking member of Ansar al-Islam. And we did so. We were asked to not immediately register the individual. And we did that. It would -- it was -- he was brought to the attention of the Department, the senior level of the Department I think late last month. And we're in the process of registering him with the ICRC at the present time.

Q Well, why did you not register the individual, and has this man simply been lost in the system for -- why didn't you tell the Red Cross that you had him?

SEC. RUMSFELD: The decision was made that it would be appropriate not to for a period. And he wasn't lost in the system. They've known where he was, and that he was there in Iraq, for this period of time.

Q How is that appropriate, sir, when you say that you -- all prisoners in Iraq are being treated humanely under rules set up --

SEC. RUMSFELD: He has been treated humanely. There's no implication of any problem. He was not at Abu Ghraib. He is not there now. He has never been there, to my knowledge. There's no question at all about whether or not he's received humane treatment.

Q But then why wasn't the -- why wasn't the Red Cross told, and there are other such prisoners being detained without the knowledge of the Red Cross?

SEC. RUMSFELD: There are -- there are instances where that occurs. And a request was made to do that, and we did.

Q I -- I mean -- excuse me, is there a reason for that, sir, why -- why they're not told? There are those who would say, I guess, that -- that you're not telling them because you might be mistreating such prisoners. That might be the suspicion.

SEC. RUMSFELD: That -- I understand that. That's not the case at all. And I think that will be clear.

Q Well, the other thing is General Taguba has criticized this practice in his report, calling them ghost detainees.

SEC. RUMSFELD: I recall that. And as I say, that's being investigated. This -- this individual, this Ansar al-Islam individual I think should be looked at separately from that.

Q Why is that? Is he a ghost detainee --

Q Which --

Q -- was he a ghost detainee?

SEC. RUMSFELD: We've had subject matter experts down here to brief you, and they've been briefing the Congress, and the Congress has been briefed on this extensively, I think, Dan, is that correct? And they've been down here and briefed the press as they're able to.

The -- you say why treat them differently. Because, as I understand it, the people who briefed you on the Taguba report have indicated that they are looking into that, that was part of his investigation, and that is ongoing. This is not one of those cases, is my point.

Q Mr. Secretary?

SEC. RUMSFELD: Yes.

Q First of all, where have you been? We've missed you.

SEC. RUMSFELD: (Laughs.) God, where have I been?

(Laughter.)

Q The Army chief of staff, General Schoomaker, the other day, in answer to a question, referred to the difference between pneumonia and cancer, and the implication was that terrorism is a cancer incurable and will be with us forever. Do you agree? And if not, have you taken him to the woodshed?

(Light laughter.)

SEC. RUMSFELD: Pretty big guy to be going to the woodshed. No, I certainly agree with him that this is a long-term proposition. And we've said that repeatedly -- the president has; I have.

You say where have I been. I'm told by Larry that I've done something like eight press and media availabilities since I've been here, and seven major speeches with Q&As and three testimonies before Congress and six media interviews of various types. So I've been very much involved.

Q We just want to see you up there, sir.

SEC. RUMSFELD: Do you?

(Laughter.)

Q Mr. Secretary, I'm wondering, when you get a call or a contact from CIA Director Tenet, and he asks you to do something like this, I have two questions.

SEC. RUMSFELD: Mmm hmm.

Q How does that go about? Does he say -- in other words, "We need you to do this," and then doesn't tell you necessarily why for, you know, as an agreement, and you trust him?

And then second, do you sort of them monitor the progress of an individual like this? In other words, how's he or she doing?

SEC. RUMSFELD: Okay, let me -- yeah. As I recall, it wasn't a phone call in this case, and Dan Dell'Orto is here. I think it was a letter, but I could be wrong. It was a phone call?

DANIEL DELL'ORTO (DoD deputy general counsel): If it was, it was certainly followed up by a letter shortly thereafter.

SEC. RUMSFELD: Yeah. So it was a letter. We know from our knowledge that he has the authority to do this.

And second, I can't speak for every case, but I have some confidence that in most every case, it has been either in writing or very well understood orally that the -- that the specifics that were provided are accurate. And --

Q (Inaudible) -- why the request is made.

SEC. RUMSFELD: And the nature of this individual and why it's important to do what they're doing.

Q And then do you get then follow-up information on, say, the intelligence gleaned from this

individual? I'm trying to ascertain how you get the intelligence on him and other key people.

SEC. RUMSFELD: I don't. I tend not to get the interrogation reports. There are, what, how many thousand detainees in various types and various places? And they're being interviewed, and the people who have the responsibility for doing the interrogating and for integrating that type of intelligence feed the intelligence to people who need it. In some cases -- if you arrest somebody, for example, in a IED manufacturing facility, the question is where did they put the last ones? And so it's more immediate information. If it's a high-ranking Ansar al-Islam individual like this, it's a different type, and then it goes more into the macro or strategic intelligence as to how we might address the entire network.

Q But you're not --

GEN. PACE: It's also important to reaffirm, very important to reaffirm that regardless of how the U.S. military gets custody of an individual that we are expected to treat them humanely -- we will treat them humanely -- and that the orders that go out with regard to those kinds of things are humane treatment. So there's a question --

Q But you're not on the blower saying, "Hey, what's new with the intelligence? Tell me when you hear something new from these folks."

SEC. RUMSFELD: That's true not only of anyone that we might be asked to hold for another government agency, but it's also true of those that we pull in, our forces pull in, whether it's in Afghanistan or in Iraq.

You know, let me say one thing to follow on Pete's comment. I've been kind of following the headlines and the bullets in the television -- the big, powerful hits on torture and this type of thing that we've seen. Needless to say, I can't read all the articles, and so I'm no expert on what every person says, and I know headline writers and people dramatize things.

But in thinking about it all, and I have to be a little careful -- we know that there's still more investigations going on, and we're going to learn more information, so no one can speak with finality or definitively or conclusively at this stage. But -- and second, I have to be a little careful about what I say because of the risk of command influence. But let me just say this: I have read this -- editorials, "torture" -- and one after another. Washington Post the other day -- I forget when it was -- just a great, bold "torture."

The implication -- think of the people who read that around the world. First of all, our forces read it. And the implication is that the United States government has, in one way or another, ordered, authorized, permitted, tolerated torture. Not true. And our forces read that, and they've got to wonder, do we? And as General Pace said, we don't. The President said people will be treated humanely, and that is what the orders are. That's what the requirements are.

Now, we know that people have done some things they shouldn't do. Anyone who looks at those photographs know that. But that's quite a different thing. And that is not the implication that's out there. The implication that's out there is the United States government is engaging in torture as a matter of policy, and that's not true. Think of the second group of people who see it. All those people in the region and in Iraq and in Afghanistan, that we need their cooperation, we need their help, the people in those countries, the people in the neighboring countries, and think how unhelpful that is for them to gain the inaccurate impression that that is what's taking place.

Third, think of the people who, for whatever -- whenever -- today, tomorrow, next year -- capture an American civilian or American military personnel and will use all those headlines about torture and the impact in the world that people think that's what's taking place, and use that as an excuse to torture our people. So this is a very serious business that this country's engaged in.

Now, we're in a war, and I can understand that someone who doesn't think they're in a war or aren't in a war, sitting in an air-conditioned room someplace can decide they want to be critical of this or critical of that, or misstate that or misrepresent something else, or be fast and loose with the facts. But there's an effect to that, and I think we have to be careful. I think people ought to be accountable for that, just as we're accountable.

If you -- when I get up in the morning, I do not say, "Gee, I wonder what some political critic or some editorial writer could say bad about something I'm deciding." When I get up in the morning and have to decide something and -- I have to think about -- people in our positions of responsibility have to think about protecting the American people, and that's what we do, and we have to do it in a manner that's legal, that follows the President's admonition on humane treatment, that is consistent with our laws, consistent with our international treaty obligations -- and we do.

Q (Off mike.)

SEC. RUMSFELD: That -- I can say this. Number one, we're not through with these investigations. But at the moment, I have high confidence that I have not seen anything that suggests that a senior civilian or military official of the United States of America has acted in a manner that's inconsistent with the President's request that everyone be treated humanely, that is -- could be characterized as ordering or authorizing or permitting torture or acts that are inconsistent with our international treaty obligations or our laws or our values as a country.

Now I have not -- I have not seen anything. I have not spent 24 hours a day into all this, but I've been briefed by most of the investigations. I've been briefed by the ones that have been completed. There are a lot of criminal investigations under way. There are various other investigations under way. And there's no question but the people doing -- correction, there's no question but that the photographs depict activities that are, in my view, inhumane and improper. No doubt about that. But that's quite a different thing from what I'm talking about.

Q Mr. Secretary, I'd like to just get a clarification on --

SEC. RUMSFELD: I'll do my best.

Q In the Taguba report, the suggestion is that the movement of prisoners to hide them from the Red Cross is improper. In fact, he says it's deceptive, contrary to Army doctrine and in violation of international law. And that, as you said, is being investigated to the extent that that happened.

SEC. RUMSFELD: We -- and to my knowledge, the --

Q You seem to be drawing a distinction between that and the order that you sent out that allowed this other prisoner to be not registered immediately. Why is --

SEC. RUMSFELD: I'm not an expert on that. Dan Dell'Orto is. And what I can say is that I think it's broadly understood that people do not have to be registered in 15 minutes when they come in.

What the appropriate period of time is I don't know. It may very well be a lot less than seven months, but it may be a month or more.

Dan, do you want to -- is there --

MR. DELL'ORTO: And they should be registered promptly, sir. So --

SEC. RUMSFELD: Its phraseology is "promptly?"

MR. DELL'ORTO: Roughly that, yes.

SEC. RUMSFELD: Fair enough.

Q So -- but was there an intention to hide this prisoner from the Red Cross?

SEC. RUMSFELD: Not on my part.

Q What's the purpose of not registering a prisoner?

SEC. RUMSFELD: I can guess some purposes. Some could be improper, obviously, and that's the concern. You don't want to not register somebody for a reason that you're trying to prevent the ICRC from seeing something that they -- you wouldn't want them to know.

The only reason for a delay in it that I can think of would be that your interest is in not interrupting an interrogation process of some kind.

Q But how did this -- (off mike) -- interrogation --

SEC. RUMSFELD: By having the ICRC gain access.

Q The ICRC --

(Cross talk.)

SEC. RUMSFELD: But I'm not an expert.

Dan, do you want to comment?

Q What did George Tenet ask? Why did he want this done?

SEC. RUMSFELD: We've asked them.

Q Well, can you say what he said to you?

Q I mean, you --

Q It says you received a letter from him, sir.

SEC. RUMSFELD: I did. I think I did in this case. And it's a classified letter.

Q What was his reasoning? Why did he --

SEC. RUMSFELD: Ask him. It's a classified letter.

Q Well, Mr. Secretary, how many --

SEC. RUMSFELD: Just a minute. Just a minute. Dan, I don't want say something that's not accurate here. Do you want to stand up and -- this is the deputy general counsel -- and be clear. You're a lawyer.

Q Microphone. (Cross talk.)

Q If you could just (go to ?) the microphone, sir, so we could all hear what you --

SEC. RUMSFELD: Yeah.

DANIEL J. DELL'ORTO (principal deputy general counsel, the Department of Defense): The Red Cross serial number should have been registered soon, relatively soon. In terms of access, for purposes of imperative military necessity, the Red Cross could be denied access for some period of time to deal with the sorts of things the secretary has indicated. You need to interrogate. You need to find information on this person, and the mere availability of this person for that purpose, for the purpose of seeing the ICRC, might interrupt that or disturb your ability to get information you need to get, particularly there and on the ground, where we had a terrorist of a known terrorist organization, of high rank.

We believe that, again, we should have registered him much sooner than we did. It didn't have to be at the very instant we brought him into our custody. And that's something that we'll just have to examine as to whether there was a breakdown in the quickness with which we registered him.

And that's about, I think, the most we can say at this point.

(Cross talk.)

Q But registering him doesn't mean automatic access by the Red Cross.

MR. DELL'ORTO: True. True.

Q You could say to the Red Cross, "We have Prisoner X. Here is the serial number."

MR. DELL'ORTO: True.

Q "But you can't see him because we're interrogating him."

MR. DELL'ORTO: Yes.

Q Okay.

(Cross talk.)

GEN. PACE: But there are reasons -- if I could -- and I know nothing about the specific case,

so I can say this in a generic sense, and that is, I can see a thing where -- on the battlefield where you would not want others to know that you have captured a particular individual. When you register that individual, that then becomes public knowledge that you now have Peter Pace in your custody. And there may be a reason for a period of time, a short period of time, where you would like to keep that hidden.

SEC. RUMSFELD: And as we get more information, we'll make it available. The Congress has been briefed extensively on this, as I understand it. No.

MR. DELL'ORTO: Not this particular case, as far as I know.

MR. DIRITA: Yes. No, we've done some notifications to the staff on the Hill, both us and the CIA, with respect to the details of this particular case. And as we get more, we will provide it.

SEC. RUMSFELD: As we get more, we'll provide more here that we can.

Q Sir, did he ask you to do this or tell you to do this? You say you had no intention of keeping this man secret from the Red Cross, so why didn't then you --

SEC. RUMSFELD: We had no --

Q -- tell Mr. Tenet, "All right, we'll take custody but we're not going to -- we're going to register him"?

SEC. RUMSFELD: As we get more information, we'll make it available to you.

Q And the last thing. (Off mike.) How is this case different from what Taguba was talking about, the ghost detainees?

SEC. RUMSFELD: It is just different, that's all.

Q But can you explain how and why?

SEC. RUMSFELD: I can't. But we'll be happy to have someone come down and brief you and explain it.

Q In this case, this is not a violation of international law, as opposed to some of the cases that General Taguba was talking about?

SEC. RUMSFELD: I said I don't know. Are you making assertions for the benefit of everyone else?

Q No. No. My question --

SEC. RUMSFELD: I don't know.

Q Okay.

Q Mr. Secretary, is this a one-of-a-kind case, or is this one of several or more?

SEC. RUMSFELD: We have on occasion received people from the agency -- I can think of an additional case right off the top of my head -- where they have, for whatever reason, captured somebody or arrested somebody or been given somebody and at some moment brought them to us and said would you please take custody of this person. I think there are some -- (to staff)-- that's correct, isn't it? Yeah.

Q But how many have they asked you not to register?

SEC. RUMSFELD: I don't know. As I say, we'll be happy to tell you more when we get more.

Q Did Director Tenet ask you to wait for a particular period of time --

SEC. RUMSFELD: Not that I recall.

Q -- or was this an open-ended thing?

SEC. RUMSFELD: Not that I recall.

Q Mr. Secretary, to take you back a little further, to late summer, when a lot of -- a number of officials were expressing concern that adequate intelligence was not being gotten from detainees in Iraq, do you recall discussing that with Steve Cambone? And did you ask that anything in particular be done about that at that point?

SEC. RUMSFELD: I don't recall that.

What I do recall is that when the war started, we began capturing large numbers of detainees, and I can remember vividly saying we don't want large numbers of prisoners of war; that an awful lot of those folks have to be low-level conscripts; and what one ought to do is to do a quick triage, look at them, take their weapons, and to the extent they look not to be a threat, send them back into their communities and be rid of them rather than retaining them. That is a subject I came back to frequently.

But I do not remember the conversation that you're talking about.

Q The problem of not giving adequate intelligence so it could be acted upon quickly to deal with the insurgency as it was developing in late summer. That's what I'm asking about.

SEC. RUMSFELD: Well, there's -- I can remember in -- certainly I can remember military personnel -- (chuckles) -- so can Pete -- saying, "Okay, we need more information. We're getting people killed and wounded, and we need more information about where these terrorists are, and more information about where these IEDs are coming -- the improvised explosive devices are coming from, and help, intelligence community." And: "CIA, give us more information."

I can certainly -- that's a fairly typical thing in a conflict.

Q But did you in particular ask somebody to do something about it to improve the situation?

SEC. RUMSFELD: Not that I recall. I mean, we, obviously, would talk to the intelligence community and say what can we do to gather better information. But I don't remember any specific conversation.

(To General Pace) Do you?

GEN. PACE: No, I do not, sir.

Q Mr. Secretary, how closely has the Pentagon been monitoring the situation in Western Sudan's Darfur region, where even the U.N. is saying a genocide might be underway? The State Department recently described this as a top priority for the administration. Has the Pentagon been looking at possible, either humanitarian or military intervention?

SEC. RUMSFELD: We've not been asked to prepare an intervention, if that's your question.

GEN. PACE: General Jones, who is the European commander, obviously would be keeping -- has been keeping a very close watch on that and provides input as far as the situation is concerned. The actual workings with Sudan and the international community currently reside with the State Department.

Q General Pace, do you have any indications that Abu Musaab al Zarqawi is in Fallujah or has been using that city as a sanctuary? And if so, does it make you think twice about how Fallujah has been handled so far?

GEN. PACE: We have had some information -- I don't recall whether I read it in the newspaper or saw it on television or got it in a telephone call, to be honest with you, but have certainly heard the possibility that Zarqawi is in and around the Fallujah area. Whether that is true, I do not know whether or not that is true.

But I still believe that the process which we have been following in Fallujah is the correct process. We certainly have overwhelming military power available to be brought to bear anytime we need to and want to in that city. What we have chosen to do, what the commanders on the ground have chosen to do, properly, in my mind, is to work with the city fathers, to work with the new Iraqi interim government to find a peaceful Iraqi solution to an Iraqi problem.

SEC. RUMSFELD: Go ahead with the follow-up, and then we'll make this the last question.

Q All right. Mr. Secretary, has the picture of the connection between Saddam Hussein and al Qaeda become clearer since the regime fell, and how so?

SEC. RUMSFELD: This is the question that everyone keeps asking. It -- do you think --

Q (Off mike, laughter.)

SEC. RUMSFELD: It sounds -- you sound like a broken record to me, Brett.

The -- I think the way I would put it is that George Tenet -- first of all, I would say that the -- Iraq has been on the terrorist list for decades, as I recall. Second, they were giving -- Saddam Hussein was giving some \$25,000 to families of people who would go out and become suicide bombers and kill people. Ansar al-Islam was active in the country. Abu Nabal (sic - Nidal) lived there in Baghdad. Zarqawi was there for long periods. People -- George Tenet testified on this subject before the Senate Intelligence Committee, as I recall, and then -- on a classified basis, and then made public an unclassified version of what his testimony was. And it was what it was. And for me to get into the middle of the debate about how to characterize it I think is not terribly useful.

The other thing I would say is that it appears -- I guess I don't know if I should say this or not, but I -- I suppose I can -- it appears that Zarqawi -- who is, everyone in the intelligence community seems to agree, is engaged as a significant leader of a network in Iraq and has in his past been identified by at least some intelligence as being a leader with respect to terrorist activities in other countries, not just Iraq -- may very well not have sworn allegiance to UBL. But he -- maybe, because he disagrees with him on something, maybe because he wants to be "The Man" himself, and maybe for a reason that's not known to me.

Now, therefore you probably -- someone could legitimately say he's not al Qaeda. On the other hand, as many people have testified to in open hearings, the linkages in the relationships and the similarities, in some cases of financing as well as methods of operation, are such that even though he may not have sworn allegiance, he clearly is someone that is doing work of a very similar nature. And therefore, I don't -- since I am not in the intelligence business, my instinct is to leave the direct answer to your question to what was said by Director Tenet before the Senate Intelligence Committee unless the agency is updating it since.

Yeah.

Q Back to Fallujah. Fallujah, General Pace. Zarqawi aside, is there any evidence that any terrorist groups or organizations are using Fallujah as a base of operation to launch attacks in other parts of Iraq? Are the Iraqis involved in the Fallujah Brigade who were involved in the negotiations living up to their end of the bargain in trying to root out those forces from Fallujah? And do you think it may be necessary to use that U.S. force you were talking about a minute ago to go in and clean out those areas of Fallujah in which these elements apparently are still operating?

GEN. PACE: First of all, I do not know whether or not the individuals, the terrorists, the insurgents who are in Fallujah, whether or not they are conducting operations from there. They certainly are there in the city. We do know that. There are pockets of them in the city.

So the Fallujah Brigade, which was the solution of -- from the governing fathers of the city and the interim government, has been the current attempt by the Iraqi people themselves to regain control of their own city. Some of the things have gone very, very well. Since 3 May I think it is there has not been a cease-fire violation throughout that city. That's a significant success. On the other hand, we do not yet have accountability for the murder and torture and desecration of the bodies of the Americans who were burned in their vehicles in Fallujah. We do not yet have large turn in of crew-served weapons and the like. So there's still work to do, but there is progress being made.

As I said, we have more than sufficient -- we have overwhelming coalition-U.S. military power available. However, the best solution is an Iraqi solution, and I believe we're on the correct path with the Iraqi government to find a peaceful way to make this work.

SEC. RUMSFELD: Let me just say one last thing. Larry or Dan, is there anything we want to calibrate on this detainee subject that we talked about? We -- our policy here -- I mean, I'm -- we really want to be careful about this. We want to communicate accurately. And we have a team of people who are working hard on this. Our policy is clear, unambiguous and demonstrable. We are giving everything we find to the Congress. We are doing it as promptly as we can. To the extent it's appropriate and possible to do it, we're giving it to the press and the American people. And we intend to keep on doing that.

One thing I should say before we close, about Iraq and Afghanistan. The American people had a chance to see the president of Afghanistan, Hamid Karzai, here in this country thanking the American people and the Congress and the President for liberating his country, some 25 million people. They are making progress in practically every aspect of what they're doing. It is an important and I think thrilling accomplishment that is being achieved in that country. Women are registering to vote, whereas previously they weren't allowed to sing or laugh or wear bright colored shoes or do practically anything in that country without being severely punished.

In Iraq we have -- something significant is in the process of being accomplished. We've -- and it's, again, truly impressive, although admittedly, we're a year and a half or so behind Afghanistan. And the violence is at a higher level and Iraqi people are being killed by the people who are determined to try to stop what's taking place. But the ability we now have to work with a single individual instead of a 25-person Governing Council is dramatic.

This individual -- the prime minister -- and his team -- the ministers, the president, the vice presidents, the deputy prime minister -- but particularly the prime minister, where the power resides -- has the ability to make a decision. He can do something. He's calling meetings of neighboring countries to talk about border security. He's calling up and making phone calls to friends in the region to ask for additional troops to come in. He is working with the ministries to see that they stand up and get about the task of taking over.

I'm not suggesting that it's going to be a pretty sight between here and when they complete this process of a large conclave with a constitutional convention eventually, and then elections based on the new constitution. It's going to be -- there are going to be bumps in the road. It will difficult, but it's always been difficult. But I am personally convinced that they are off to an excellent start and that they are increasingly going to gain support from the Iraqi people.

People talk about the security situation there and how do you deal with that, what do you do about it? The fact is that the solution to the security situation is not security only; these things have to move together. The Iraqi people have got to see that Iraqis are running that country and not some occupying power or some foreign coalition. They've got to see that Iraqis are making those decisions. And they in fact are.

Will they make decisions that we might not have made? You bet. Will they make decisions we may not even like in some instances? You bet. But is that what it has to be? Absolutely. It's their country. They're going to have to grab hold of it. They're going to be the ones who are going to have to provide security for it. They're going to have to find the template that will allow them to fashion a representative system that is respectful of all of the religious and ethnic minorities in that country. They're going to have to fashion relationships with their neighbors. And they will end up with an Iraqi solution, not a U.S. solution or a U.K. solution, but a solution that will be appropriate to them. And I think they're off -- getting off to a darn good start.

Thank you very much.

Q Secretary, you still haven't mentioned the 9/11 report, the commission today.

SEC. RUMSFELD: I haven't heard their report or read their report. I understand they were on television today.

Q It was kind of scathing in its criticism of --

SEC. RUMSFELD: Why am I not surprised you'd characterize it that way.

(Laughter.)

Q See you tomorrow!

(Laughter.)

Q Thank you.

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<http://www.defenselink.mil/transcripts/2004/tr20040617-secdef0881.html>

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Detainee Working Group: 11/4/04 Meeting

Tab 1: Notification and Treatment of Detainees/Ghost Detainees

- January 6, 2004 ICRC Note Verbale Concerning Detainees in Afghanistan
- March 25, 2004 ICRC List of Detainees Not Notified
- July 19, 2004 Report on Detention at Undisclosed Locations
- July 21, 2004 Memo to Secretary Powell
- August 18, 2004 Memo from NSA Rice (draft response to ICRC on notification)
- August 26, 2004 Memo to NSA Rice (State comments on draft response to ICRC on notification)
- September 30, 2004 ICRC Letter to General Casey (attached to October 14, 2004 ICRC Letter to DOD)

Tab 2: Transfer of Four Individuals

- July 20, 2004 ICRC Letter to General Casey (attached to July 23, 2004 ICRC Letter to DOD)
- Draft DOD Response (with State/L Edits)

Tab 3: Transfer of One Individual

- September 30, 2004 ICRC Letter to General Miller (attached to October 14, 2004 ICRC Letter to DOD)
- October 26, 2004 Taft Letters to DOJ/Criminal and CIA/OIG

Tab 4: Iraq: Nature of Conflict and Treatment

- August 8, 2004 ICRC Statement on Nature of Conflict
- August 11 State Draft Paper on Iraq Detention Authorities
- October 11, 2004 Cable from Embassy Baghdad
- September 13, 2004 ICRC Letter to General Casey
- December 20, 2002 U.S. Aide Memoire on Nature of Conflict in Afghanistan
- November 19, 2002 ICRC Aide Memoire on Nature of Conflict in Afghanistan

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5. Numerous press articles have discussed memoranda that authorize the transfer or rendition of terrorist suspects and other detainees to third nations or other secret locations for interrogation. (A) On December 27, 2004, the *Washington Post* reported that the CIA lacks authority to carry out renditions under a presidential directive. Did President Bush sign or renew a presidential directive or other document authorizing rendition? If so, please provide this document to the Committee. If not, under what authority is the CIA and/or other government entities transferring, or rendering, individuals.

Response: It is my understanding that the United States does not render individuals to countries where we believe it is more likely than not they will be tortured. A presidential directive to the CIA of the sort you describe would, if it exists, be subject to the oversight of the Intelligence Committees.

(B) On January 6, 2005, the *Washington Post* described an OLC memo dated March 13, 2002, titled "The President's Power as Commander-in-Chief to Transfer Captive Terrorists to the Control and Custody of Foreign Nations." The article states that you were involved in the development of the policy reflected in the memo. Will you provide us with a copy of that OLC memo? What did OLC conclude, and do you agree with its conclusion(s)?

Response: As a general matter, it is not the role of Counsel to the President to develop policy. The role of Counsel is to determine which legal issues should be examined by the Justice Department. OLC, as a general matter, provides the definitive legal views of the Executive Branch. The Executive Branch has a substantial need for confidentiality with respect to non-public OLC opinions, in order to protect the deliberative processes of the Executive Branch and the attorney-client relationship between Administration officials and OLC. The longstanding practice is that non-public OLC opinions are not disclosed outside the Executive Branch. Based on this policy, I respectfully must decline either to provide a copy of the opinion or to reveal its conclusions.

6. As you noted in your testimony, several DOD investigations into U.S. detention policies are now complete. However, the narrow mandates and limited scope of these investigations prevented them from addressing critical issues. Key inquiries into issues like contractor abuses and "ghost detainees" were left unexplored. The on-going

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investigations are similarly constrained. In a letter to President Bush dated September 7, 2004, eight retired generals and admirals called for a comprehensive, independent commission to investigate U.S. detention and interrogation practices at Abu Ghraib and other U.S.-operated detention facilities. Do you support the creation of such a commission? If not, why not?

Response: There have been a number of completed investigations into issues relating to detainee operations and interrogations. I understand that a number of investigations are still ongoing, and those should be allowed to proceed. Additionally, there have been numerous trials, courts martial, and administrative proceedings examining individual conduct relating to detainee operations and interrogations. These too should be allowed to proceed. Congress has held numerous hearings and received numerous briefings. Finally, I have read in press accounts that there are several ongoing criminal investigations and those should be allowed to proceed. Relatedly, wherever there is reason to believe that crimes may have been committed that are within the authority of the Department of Justice, you can be assured that if I am confirmed, the Department under my leadership would investigate and, where appropriate, prosecute such crimes. Because there is so much ongoing review, I do not currently have reason to believe that the proposed commission is advisable, but I reserve judgment on that question.

7. *Newsweek* reported on January 8, 2005, that the Defense Department was considering a plan to recruit, train and deploy "death squads" as part of a decapitation operation targeting Iraqi insurgents. Under the proposed plan, insurgents could be assassinated or targeted in so-called "snatch" operations, in which the individuals are sent to secret facilities for interrogation. (A) Were you consulted about this plan? (B) Did the President make a determination of any kind authorizing assassinations in Iraq? (C) Was there an amendment or modification to Executive Order 12333 to implement this program or any other program authorizing assassinations?

Response: I do not recall being consulted about any such plan, nor am I aware of any Presidential determination of the sort described or modification of the Executive Order.

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Geneva Conventions

8. You implied at the hearing that had the United States applied the Geneva Conventions to the conflict in Afghanistan, as Secretary Powell recommended, all persons detained there, including members of al Qaeda, would have been entitled to all the benefits of POW status. (A) Do you acknowledge that had the United States applied Geneva broadly to the conflict, it could still have denied suspected terrorists the privileges of POW treatment, even while retaining its legal obligation to treat them humanely?

Response: Afghanistan as a nation state and signatory is a party to the Geneva Conventions, and the President determined that the Geneva Conventions apply to the United States' armed conflict with the Taliban. The President determined that members of the Taliban were not entitled to the privileges of POW status, in part because they did not fight in accordance with the laws of war. By contrast, al Qaeda plainly is not a party to those Conventions, and thus the United States has no legal obligation under the Geneva Conventions to al Qaeda or its terrorist fighters. Al Qaeda operatives would not qualify for POW status even if the Geneva Conventions applied, however, because among other things they (like their Taliban allies) do not wear an insignia distinguishing them from the civilian population or conduct their operations in accordance with the laws of war.

(B) What advantage did we gain as a nation in not going through the process set forth by Article 5 of the Geneva Convention relative to the Treatment of Prisoners of War ("GPW") and U.S. military regulations for affording or denying POW status to individual detainees?

Response: The Geneva Conventions are treaties; they are contracts between nation-states. And as a general proposition, words and terms in contracts and agreements mean something. The provisions of a treaty are carefully crafted by the Executive Branch. Treaties are signed by a President with a clear understanding of its terms and ratified by the Senate, subject to certain restrictions, understandings, and declarations. For these reasons I believe that in declaring our legal obligations under a treaty, one has to follow the words of the treaty, irrespective of possible conflicting views of an Executive Branch official, an international organization, or another country. The process set forth in article 5 applies only "[s]hould any doubt arise" as to whether captured belligerents satisfy the requirements set forth in article 4

for POW status. The President determined that there was no doubt as to the status of belligerents captured in Afghanistan because al Qaeda plainly was not a party to the Conventions and since the Taliban militia plainly did not satisfy the requirements for POW status because, among other things, they did not distinguish themselves from the civilian population or comply with the laws of war. It is widely recognized that if a group does not satisfy the requirements of article 4, its members are not qualified for POW status, and the United States has made group-based decisions as to POW status in other conflicts, including World War II and Vietnam. Accordingly, article 5 hearings to determine whether individual Taliban or al Qaeda belligerents were eligible for POW status would have been futile. Combatant Status Review Tribunals, the procedures of which are in many ways patterned after article 5 tribunals, are currently conducting individual reviews of the separate question of whether the al Qaeda and Taliban detainees at GTMO are enemy combatants subject to detention under the laws of war.

9. What were the practical consequences of the President's different determinations regarding the applicability of GPW to captured members of al Qaeda and the Taliban? Must al Qaeda and Taliban detainees be treated any differently as a result of the decision to apply GPW to the latter and not the former? Have they been treated any differently in fact?

Response: Neither al Qaeda nor Taliban detainees are entitled to POW status. Both types of detainees are protected by the President's February 7, 2002, directive, by the United States' clear policy against torture, and by various other treaty and statutory provisions. See answers to Question 1 and 2, above.

10. In your draft memo to the President dated January 25, 2002, you identified a number of "positive" ramifications of a presidential determination that GPW does not apply to the Taliban, including "[s]ubstantially reduces the threat of domestic criminal prosecution under the War Crimes Act (18 U.S.C. 2441)." Elaborating on this ramification, you wrote, "[I]t is difficult to predict the needs and circumstances that could arise in the course of the war on terrorism." What did you mean by that? Please give examples of "needs and circumstances" that could, in your view, justify violations of the War Crimes Act by U.S. personnel.

Response: The document to which you refer is a draft that was leaked and never sent to the President in that form. I cannot envision needs or circumstances that would justify violations of the War Crimes Act by U.S. personnel.

11. Defense Secretary Rumsfeld and former CIA Director Tenet have admitted to hiding individuals from the Red Cross in Iraq. (A) Would you agree that this practice violates GPW?

Response: It is my understanding that our legal obligations with respect to the ICRC are derived from the Geneva Conventions. As to specific individuals, my understanding is that there are investigations ongoing into these matters which presumably will determine whether there were any violations of the Geneva Conventions or any other law or treaty.

(B) Do you believe that those who willfully violate GPW should be punished for doing so?

Response: Yes. Pursuant to article 1 of GPW, the United States has undertaken "to respect and to ensure respect for the present Convention in all circumstances." Pursuant to article 129, the United States has undertaken to bring persons who commit grave breaches of GPW "before its own courts" for prosecution, and to "take measures necessary for the suppression" of other violations of the Convention.

(C) When did you first learn that U.S. forces were hiding prisoners from the Red Cross? What did you do about it?

Response: I do not recall when I became aware of issues surrounding ICRC access to certain detainees, but I would have gained such awareness as an attendee at meetings of senior administration officials. I recall understanding that the Department of Defense was investigating the issue.

12. You testified that you relied upon OLC in advising the President because it had "the expertise, the institutional history, [and] the institutional knowledge about what the law is." In January 2002, who did you think had greater expertise and experience in interpreting the Geneva Conventions: John Ashcroft and the lawyers at OLC, or Colin Powell and the lawyers at the State Department? Who did you rely

conduct interrogations in Abu Ghraib contributed to the belief that additional interrogation techniques were condoned in order to gain intelligence (Jones, pages 15-16; Fay, pages 8, 10, 22).

- The lines of authority and the prior legal opinions became blurred (Fay, page 10).
- The existence of multiple policies on interrogation operations for use in different theatres confused Army and civilian interrogators at Abu Ghraib (Fay Finding No. 7).
- CIA detention and interrogation practices in Iraq (conducted under authority of the Bybee Memorandum) led to a loss of accountability, abuse, reduced interagency cooperation, and an unhealthy attitude that poisoned the atmosphere at Abu Ghraib (Fay, pages 52-53).
- The CIA techniques and practices (in accordance with the Bybee memo) led to a perception that such techniques and practices were suitable for Defense Department operations (Fay, pages 118-119).

Response: I would respectfully submit that the Schlesinger, Fay, and Jones reports speak for themselves on the subjects you indicate. However, the Fay and Jones reports conclude there is no single simple explanation for why the abuses at Abu Ghraib occurred. The primary causes are misconduct (ranging from inhumane to sadistic) by a small group of morally corrupt soldiers and civilians, a lack of discipline on the part of the leaders and soldiers of the 205 th MI BDE, and a failure or lack of leadership by multiple echelons within CJTF-7. The reports went on to conclude that contributing factors can be traced to issues affecting command and control, doctrine, training, and the experience of the soldiers we asked to perform this vital mission. The reports also say the abuses at Abu Ghraib primarily fall into two categories: a) intentional violent or sexual abuse and, b) abusive actions taken based on misinterpretations or confusion regarding law or policy. Finally, the reports say that neither the Department of Defense nor Army doctrine caused any abuses; that abuses would not have occurred had doctrine been followed and mission training conducted. The Schlesinger report stated that the "Panel accepts the proposition that these terrorists are not combatants entitled to the protections of Geneva Convention III."

9) In his report on the abuse at Abu Ghraib, General Antonio Taguba concluded that the process of maintaining "ghost detainees" – holding and moving prisoners to avoid review by the International Red Cross – was deceptive and contrary to Army doctrine and a violation of international law. (a) Do you agree with General Taguba's conclusions

about the practice of maintaining ghost detainees? (b) Are you aware of any investigations that have been, are being, or will be conducted into the practice of maintaining ghost detainees? If so please:

- i. Identify the agency or person responsible for the investigation, the title of the investigation, and whether it has been completed.
- ii. Provide a copy of all completed or provisional reports of those investigations.

Response: I believe the work of the International Committee of the Red Cross is vitally important, and I honor this important group for its continuing efforts. Assessments of whether particular practices were consistent with Army doctrine is a matter for determination by the Department of Defense. I am not familiar enough with the facts of the particular instances you cite to have a view whether they represent violations of any law. In any event, I would consult with appropriate lawyers in the Department of Justice before reaching such a conclusion. I am not aware of what investigations may have been, are being, or will be conducted concerning allegations involving "ghost detainees."

10) On March 19, 2004, the Office of Legal Counsel provided a Memorandum, signed by Jack Goldsmith, in response to your request for an opinion on whether the CIA was permitted to relocate prisoners from Iraq to "facilitate interrogation."

- (a) Why did you ask OLC for that opinion?
- (b) Was it your intent to justify the practice of maintaining ghost detainees?
- (c) Why would it ever be necessary to hide a detainee from the International Red Cross?

Response: The memorandum to which you refer was a draft memorandum that was never finalized nor signed. The draft was prepared to assist U.S. personnel abide by all applicable legal requirements. I believe the United States has complied with all of its legal obligations to notify the ICRC.

(d) Do you agree that one consequence of the OLC opinion was to permit abusive interrogation practices to occur without outside monitoring?

Response: No.

(e) Was this and is this the intent of our policy?

Response: The policy of the United States is to comply with all of our legal obligations under the Geneva Conventions.

(f) What do you know about actions conducted under the authority of that opinion?

Response: I do not know whether any actions were conducted in reliance on the draft memorandum.

(g) Do you agree with the legal analysis interpreting Article 49 of the Fourth Geneva Convention contained in the March 19, 2004 Goldsmith Memo?

Response: Because the draft memorandum was never finalized, I did not have occasion to come to definitive views concerning the analysis contained in the draft. I recall believing at the time that the draft presented a reasonable and scholarly interpretation of the terms of the Geneva Convention.

(h) Please identify and provide all notes, correspondence, memoranda, e-mail, audio-recordings, documents of any kind which reflect your request for the Goldsmith memo, requests made to you for opinions on the meaning of Article 49, your positions, advice, assessments, analysis or recommendations after your receipt of the Goldsmith memo, and any objections provided by any Administration personnel to the substance and/or conclusions in the Goldsmith memo.

Response: I have no present knowledge of any such documents, although I have not conducted a search. Any records reflecting the information you specify would involve deliberative material that I am not at liberty to disclose.

(i) Please describe in detail the discussions between you and Mr. Goldsmith on the Bybee Memorandum.

Response: Any discussions between me and Mr. Goldsmith concerning the August 1, 2002 memorandum would involve internal deliberations of the Executive Branch that I am not at liberty to disclose.

intelligence reform legislation that it opposed a provision in the draft legislation that would have provided legal protections to foreign prisoners to which they are not now entitled. The President has repeatedly stated that his Administration does not authorize or condone torture under any circumstances by U.S. personnel. I, of course, fully support the President's policy in this area.

e) The same New York Times story reported that the Defense Department opposed a measure in the military authorization bill which would have explicitly prohibited the use of torture, and cruel, inhuman and other degrading treatment by Defense Department personnel? Why did the administration oppose that provision? Did you participate in the decision to oppose the decision? Did you lobby anyone in Congress on the issue? Do you think the provision should have been included in the legislation?

Response: I am not familiar with the matters referred to in the New York Times story.

16) The trial of Army Specialist Charles Graner for mistreating detainees at Abu Ghraib recently began in Ft. Hood, Texas. Specialist Graner's defense is that the abuse he committed was authorized by his supervisors. As I indicated at the hearing, and as corroborated by the Fay and Schlesinger reports, the policy memos on the Geneva Conventions, torture, and ghost detainees that you wrote, requested, authorized, endorsed, or implemented appear to have contributed to detainee abuses in Afghanistan, Guantanamo Bay, and Iraq, including those at Abu Ghraib prison.

(a) Do you agree that you should personally be disqualified from any investigation or inquiry into detainee abuses due to the appearance of, or actual, conflicts of interest that your past activities as White House Counsel may create?

Response: In a press briefing on August 24, 2004, the Schlesinger Panel clearly concluded that there was no government policy that called for the torture or inhumane treatment of detainees. "But a series of failures across the Department of Defense, the Army, and U.S. Central Command contributed to an atmosphere that allowed some of these abuses to occur." (Congresswoman Fowler) If confirmed, I would take extremely seriously my obligation to recuse myself from any matter whenever appropriate, and

would consult with other lawyers with experience and expertise at the Department of Justice if any such question arises. I would do my best to ensure that the Department does not become politicized. I would treat with equal seriousness my responsibility to enforce the law fairly and equally on behalf of all Americans.

17) When did you first become aware that FBI personnel had observed, and/or complained about, and/or departed various locations because of, such abuses by military, intelligence, or contractor personnel? How were you informed? What did you do in response to that discovery? Please provide details.

Response: I became aware of the reports to which you refer when they were reported in the press. I am confident that all credible allegations of abuse are being vigorously investigated by the appropriate agencies.

18) During the hearing, you made specific reference to the possibility of your having a role in investigating the substance of the FBI e-mails produced by the ACLU that reported interrogation abuses at Guantanamo Bay. You called the accuracy of the e-mails into question due to a claimed erroneous reference to an "Executive Order." I am disturbed that you expressed skepticism about the general veracity of FBI agents reporting human rights violations at Guantanamo Bay because of a possible mistake in bureaucratic terminology.

(a) Do you really believe that FBI agents would falsely describe serious criminal activities by other government agents that they witnessed at Guantanamo Bay in their official, internal correspondence?

Response: I did not express skepticism about the "general veracity of FBI agents." An Executive Order of the type referenced in the e-mail you have cited simply does not exist, and it is, in my view, appropriate to make that fact clear. I have no reason to believe that FBI agents would knowingly provide false descriptions; that does not mean that they are not mistaken.

(b) Don't your comments serve to discourage the reporting of abuses and contribute to an environment that values secrecy above candor?

Response: No. I encourage anyone with information regarding abuses to make that information known to the appropriate authorities.

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GONZALES CONFIRMATION HEARING

LQ 118

THURSDAY, JANUARY 6, 2005

INTERNATIONAL LAW ISSUES

RELEASED IN FULL

Spector: The focus of media attention has been on the issue of Judge Gonzales' roles in analysis and recommendations on the handling of the detainees. Judge Gonzales had issued an opinion to the President that the Geneva Convention did not apply with respect to certain of the combatants. In his memorandum of January 25, 2000, he said, "In my judgment, this new paradigm"--referring to the war on terrorism--"renders obsolete Geneva's strict limitations on questioning of enemy prisoners..." The Committee will seek further amplification on a number of substantive issues from that memorandum, including Judge Gonzales' statement that, "In the treatment of detainees, the United States will continue to be constrained by its commitment to treat the detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Geneva Convention." This statement raises the question of what is the meaning of military necessity and what extent, if at all, does military necessity impact on the "commitment to treat" a detainee humanely.

OPENING STATEMENT OF HON. PATRICK J. LEAHY

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

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Now, the job of Attorney General is not about crafting rationalizations for ill-conceived ideas. It is a much more vital role than that. The Attorney General is about being a forceful, independent--independent--voice in our continuing quest for justice and in defense of the constitutional rights of every single American. We have seen what happens when the rule of law plays second fiddle to a President's policy agenda. Attorney General Ashcroft and with the White House Counsel's office has impulsively facilitated rather than cautiously vetted serious constitutional issues. The administration has taken one untenable legal position after another regarding the rule of law as we fight terrorism. . . .

The policies include this nominee's role in developing interpretation of the law to justify harsh treatment of prisoners. Harsh treatment is tantamount to torture.

America's troops and citizens are at greater risk because of those actions, with terrible repercussions throughout so much of the world. The searing photographs from Abu Ghraib have made it harder to create and maintain the alliances we need to prevail against the vicious terrorists who threaten us, and those abuses serve as recruiting posters for the terrorists. The scandal of Abu Ghraib, allegations of mistreatment at Guantanamo, charges from cases in Iraq and Afghanistan are serious matters, and

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to date we have unresolved accountability.

. . . From the outset of public disclosure of the Abu Ghraib photographs, the Bush administration maintained that any wrongdoing was simply a case of a few bad apples. But as bits of information have been made public not by the administration but by the press over the last year, it has become clear to all that these incidents at U.S. facilities around the world are not just the actions of a few low-ranking members of the military; rather, in the upper reaches of the executive branch, a process was set in motion that rolled forward to produce scandalous results, almost like somebody opening the floodgates in a dam and the water flowed downstream until it overwhelmed everybody below.

The Army Field Manual reflects our Nation's long-held policy toward prisoners. My young son was in the Marines, and he was called up for Desert Storm, the war that was so quick that he was not in harm's way. He was taught these things even as a Marine. But the Army Field Manual reflects our Nation's long-held policies toward prisoners, and it says, "The goal of any interrogation is to obtain reliable information in a lawful manner. U.S. policy expressly prohibits acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment, as a means of or to aid

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interrogation."

Now, the policy is in place for a very good reason. The Field Manual continues, "The use of 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 interrogator wants to hear." It also may place U.S. and allied personnel in enemy hands at greater risk. But senior officials in the Bush White House, the Ashcroft Justice Department, and the Rumsfeld Pentagon set in motion a systematic effort to minimize, distort, and even ignore our laws, our policies, our international agreements on torture and the treatment of prisoners. Defense Secretary Rumsfeld and later Lieutenant General Ricardo Sanchez authorized the use of techniques that were contrary to both U.S. military manuals, but also international law. Former CIA Director Tenet requested and Secretary Rumsfeld approved the secret detention of ghost detainees in Iraq. They did that so they could be hidden from the International Committee of the Red Cross. And still unexplained are instances where the U.S. Government delivered prisoners to other countries so they could be tortured.

. . . .So these hearings, if I may conclude, are an opportunity at long last for some accountability for this meltdown of longstanding U.S. policy on torture. White

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House Counsel Judge Gonzales was at the center of discussions on the applicability of the Geneva Conventions to the wars in Afghanistan and Iraq and the legality of detention and interrogation methods that have been seen as tantamount to torture. He oversaw the formulation of this administration's extreme views of unfettered executive power and unprecedented government secrecy.

Senator Cornyn: . . . Take, for example, the harsh criticism about the Geneva Convention. Judge Gonzales has been harshly attacked for advising the President that all detainees be treated humanely, but that as a legal matter al Qaeda and Taliban fighters are not covered by the Geneva Convention.

Now, I hate to ruin a good story by the President's political opponents who are attacking him through this nominee, but let me just say there is one important point that needs to be made. Judge Gonzales is absolutely right. You do not have to take my word for it. First of all, al Qaeda never signed the Geneva Conventions, but moreover, the Red Cross' own guidelines state that to be entitled to Geneva protection as a prisoner of war, combatants must satisfy four conditions: being commanded by a person responsible for his subordinates; secondly, having a fixed,

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distinctive sign recognizable at a distance; number three, carrying arms openly; and, number four, conducting their operations in accordance with the laws and customs of war.

Does anyone on this Committee, or anywhere else, for that matter, seriously argue that al Qaeda terrorists comply with the law of war?

By the way, it is important to note that Judge Gonzales' legal advice has also been affirmed by three Federal courts throughout this country and has also been endorsed by numerous legal scholars and international legal experts across the political spectrum, as well as both the 9/11 Commission, by the way; the final Schlesinger report, an independent report on DOD detention operations; and a brief filed recently in the United States Supreme Court by former Carter administration officials, State Department legal advisers, judge advocates and military commanders, and liberal international law scholars, who concluded that "[t]he President's conclusion that members of al Qaeda, and the Taliban, are unlawful combatants" is clearly correct. Even Washington advocacy director for the Human Rights Watch, Tom Malinowski, a vocal Bush administration critic, has grudgingly conceded that the administration's interpretation was "probably correct."

Now, the administration's Geneva position is not just right as a legal matter. It is also essential as a matter

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of national security.

I recently published an op-ed that explained that Geneva Convention protections to al Qaeda would threaten the security of our soldiers, dramatically disable us from obtaining the intelligence needed to prevent further attacks on U.S. civilians and soldiers, and badly undermine international law itself, and I would ask, Mr. Chairman, that that be made a part of the record.

Just take a look at all the numerous privileges provided by the Geneva Convention for traditional prisoners of war. For example, questioners could not entice detainees to answer questions by offering them creature comforts or even preferential treatment, even though that is the standard operating procedure in police stations throughout the United States. Because the Convention prohibits the holding of detainees in isolation, al Qaeda fighters would be able to coordinate with each other in a way that would thwart or could thwart effective questioning. POW status, even confers broad combat immunity against current criminal prosecution before civilian and military tribunals alike.

Mr. Chairman, surely, no member of the Committee or anyone else on our side of this conflict actually believes that an al Qaeda terrorist deserves to be treated better

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than an American citizen accused of a crime. I certainly would not think so. President Reagan did not think so, neither did each of his successors in office. Nearly two decades ago President Reagan and every President since that time has rejected a proposed amendment to the Geneva Convention known as Protocol 1 of 1977 to extend that Convention to protect terrorists. As President Reagan rightly argued we must not and need not give recognition and protection to terrorist groups as a price for progress in humanitarian law. Notably even the New York Times and Washington Post agreed at the time.

All of this support from multiple Federal courts, from the 9/11 Commission, the Schlesinger Report, liberal international legal scholars, Carter administration officials, even the New York Times and Washington Post, yet Judge Gonzales is criticized for taking exactly that same position.

Take one more issue, the Justice Department memos that have been alluded to here construing the Federal torture statute. Judge Gonzales is being attacked for a memo he did not write, interpreting the law that he did not draft. It was Congress, not Judge Gonzales, that enacted a strict definition of torture. It was Congress, not Judge Gonzales, that specifically provided that only specific intent to inflict severe pain or mental pain or suffering

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would constitute torture.

As I said, President Bush and Judge Gonzales have both unequivocally, clearly and repeatedly rejected the use of torture. But is there anyone here today who would fail to use every legal means to collect intelligence from terrorists in order to protect American lives? I certainly hope not.

Finally, I know we are going to hear some about Abu Ghraib today, we already have, and I think it is safe to say that everyone agrees that Abu Ghraib represents a shameful episode in this Nation's history, yet some people actually want to exploit that tragedy for their own purposes. Abu Ghraib should be treated seriously, not politically. The Defense Department has been vigorously investigating the misconduct and prosecuting the violators. The independent Schlesinger Report that I alluded to earlier, concluded that, "No approved procedures called for or allowed the kinds of abuse that in fact occurred. There is no evidence of a policy of abuse promulgated by senior officials or military authorities." So if there is no evidence whatsoever that Judge Gonzales was any way responsible for the criminal acts that occurred at Abu Ghraib by a few, why are we talking about this in Judge Gonzales' confirmation hearing? This after all is a confirmation hearing to head the Department of Justice, not

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an oversight hearing of the Department of Defense.

STATEMENT OF HON. ALBERTO R. GONZALES

While I look forward to answering your specific questions concerning my actions and my views, I think it is important to stress at the outset that I am and will remain deeply committed to ensuring the United States Government complies with all of its legal obligations as it fights the war on terror, whether those obligations arise from domestic or international law. These obligations include, of course, honoring the Geneva Conventions whenever they apply. Honoring our Geneva obligations provide critical protection for our fighting men and women, and advances norms for the community of nations to follow in times of conflict. Contrary to reports, I consider the Geneva Conventions neither obsolete nor quaint.

After the attacks of 9/11, our Government had fundamental decisions to make concerning how to apply treaties and U.S. law to an enemy that does not wear a uniform, owes no allegiance to any country, is not a party to any treaties, and most importantly, does not fight according to the laws of war.

As we have debated these questions, the President has

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made clear that he is prepared to protect and defend the United States and its citizens and will do so vigorously, but always in a manner consistent with our Nation's values and applicable law, including our treaty obligations.

Having said that, like all of you, I have been deeply troubled and offended by reports of abuse. The photos from Abu Ghraib sickened and outraged me, and left a stain on our Nation's reputation. And the President has made clear that he condemns this conduct, and that these activities are inconsistent with his policies. He has also made clear that America stands against and will not tolerate torture under any circumstances.

I share his resolve that torture and abuse will not be tolerated by this administration, and commit to you today, that if confirmed, I will ensure that the Department of Justice aggressively pursues those responsible for such abhorrent actions.

Chairman Specter. At the outset of your testimony, Judge Gonzales, you have already covered the matter, but I think it is important to have an unequivocal statement and really a repeat of an unequivocal statement of the position of the administration and your personal views. Do you approve of torture?

Judge Gonzales. Absolutely not, Senator.

Chairman Specter. Do you condemn the interrogators--

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and you already answered this in part--at Abu Ghraib and Guantanamo, but again, for the record, do you condemn the interrogators' techniques at Abu Ghraib shown on the widely publicized photographs?

Judge Gonzales. Let me say, Senator, that as a human being I am sickened and outraged by those photos. But as someone who may be head of the Department, I obviously don't want to provide any kind of legal opinion as to whether or not that conduct might be criminal, and obviously, if anyone is involved in any kind of conduct that is subject to prosecution, I would not want to do anything today to prejudge that prosecution and jeopardize that prosecution. But obviously, if that conduct falls within the jurisdiction of the Department of Justice, I will pursue it aggressively, and you have my word on that.

Chairman Specter. . . . Do you similarly condemn any similar interrogation techniques at Guantanamo?

Judge Gonzales. I am not sure of which specific techniques you're referring to, Senator, but obviously, there is a range of conduct that would be in clear violation of our legal obligations, and those I would absolutely condemn, yes, sir.

Senator Leahy.

I would also note that while al Qaeda does not have POW protection, Geneva still applies, as Secretary Colin

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Powell has stated very emphatically. I do not want to leave the impression that somehow Geneva does not apply just because it involves al Qaeda.

I would like to ask you a few questions about the torture memo that is dated back in August 1st, 2002, signed by Assistant Attorney General Jay Bybee, and he is now a Federal Appellate Court Judge. The memo is addressed to you. It was written at your request. It concludes--this is actually the memo, this is actually the memo here. It is a fairly lengthy memo, but addressed a memorandum from Alberto Gonzales, Counsel to the President. And it says for an act to violate the torture statute it must be equivalent in intensity to the pain accompanying serious physical injury such as organ failure, impairment of bodily function, or even death. In August 2002, did you agree with that conclusion?

Judge Gonzales. Senator, in connection with that opinion, I did my job as the Counsel to the President to ask the question.

Senator Leahy. I just want to know, did you agree--I mean we could spend an hour with that answer, but I am trying to keep it very simple. Did you agree with that interpretation of the torture statute back in August 2002?

Judge Gonzales. If I may, sir, let me try to--I'm going to give you a very quick answer, but I'd like to put

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a little bit of context. Obviously, we were interpreting a statute that had never been reviewed in the courts, a statute drafted by Congress. We were trying the interpretation of a standard by Congress. There was discussion between the White House and the Department of Justice as well as other agencies about what does this statute mean? It was very, very difficult. I don't recall today whether or not I was in agreement with all of the analysis, but I don't have a disagreement with the conclusions then reached by the Department.

Ultimately, it is the responsibility of the Department to tell us what the law means, Senator.

Senator Leahy. Do you agree today that for an act to violate the torture statute it must be equivalent in intensity to the pain accompanying serious physical injury such as organ failure, impairment of bodily function or even death?

Judge Gonzales. I do not, Senator. That does not represent the position of the Executive Branch. As you know--

. . . .

Senator Leahy. But it was the position in 2002--

Judge Gonzales. Senator, what you're asking the counsel to do is to interject himself and direct the Department of Justice, who is supposed to be free of any

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kind of political influence, in reaching a legal interpretation of a law passed by Congress. I certainly give my views. There was of course conversation and a give and take discussion about what does the law mean, but ultimately, ultimately by statute the Department of Justice is charged by Congress to provide legal advice on behalf of the President. We asked the question. That memo represented the position of the Executive Branch at the time it was issued.

Senator Leahy. Well, let me then ask you, if you are going to be Attorney General--and I will accept what you said--and let us put on the hat if you are going to be confirmed as Attorney General, the Bybee memo concludes the President has authority as Commander in Chief to override domestic and international laws prohibiting torture, and can immunize from prosecution anyone, anyone, who commits torture under his act. Whether legal or not he can immunize them. Now, as Attorney General, would you believe the President has authority to exercise a Commander in Chief override and immunize acts of torture?

Judge Gonzales. First of all, Senator, the President has said we are not going to engage in torture under any circumstances. And so you're asking me to answer a hypothetical that is never going to occur. This President has said we're not going to engage in torture under any

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circumstances, and therefore, that portion of the opinion was unnecessary and was the reason that we asked that that portion be withdrawn.

Senator Leahy. I am trying to think what type of opinions you might give as Attorney General. Do you agree with that conclusion?

. . . .

Judge Gonzales. Senator, I do believe there may come an occasion when the Congress might pass a statute that the President may view as unconstitutional, and that is a position and a view not just of this President but many, many Presidents from both sides of the aisle. Obviously, a decision as to whether or not to ignore a statute passed by Congress is a very, very serious one, and it would be one that I would spend a great deal of time and attention before arriving at a conclusion that in fact a President had the authority under the Constitution to—

. . . .

Senator Leahy. Mr. Gonzales, I would almost think that you had served in the Senate. You have learned how to filibuster so well, because I asked a specific question. Does the President have the authority, in your judgment, to exercise a Commander in Chief override and immunize acts of torture?

Judge Gonzales. With all due respect, Senator, the

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President has said we're not going to engage in torture. That is a hypothetical question that would involve an analysis of a great number of factors, and the President simply--

Senator Leahy. How about putting it this way: do you think that other world leaders would have authority to authorize a torture of U.S. citizens if they deemed it necessary for their national security?

Judge Gonzales. Senator, I don't know what laws other world leaders would be bound by. I think it would--I'm not in a position to answer that question.

Senator Leahy. The only reason I ask this is this memo was DOJ policy for a couple years, and it sat there from sometime in 2002, and then just a couple weeks before 2005, late on a Thursday afternoon, it seems to be somewhat overridden. Of course, that may be coincidentally because your confirmation hearing was coming up. Do you think if the Bybee memo had not been leaked to the press, it would still be--because it had never been shown to Congress even though we had asked for it--do you think it would still be the overriding legal opinion?

Judge Gonzales. Sir, that I do not know. I do know that when it became--it was leaked, we had concerns about the fact that people assumed that the President was somehow exercising that authority to engage in torture, and we

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wanted to clarify the record that the President had not authorized or condoned torture, nor had directed any actions or excused any actions under the Commander in Chief override that might otherwise constitute torture, and that was the reason that the decision was made to delete that portion of the opinion.

Senator Leahy. Do you think there is any connection whatsoever between the policies which actually you have to formulate regarding treatment and interrogation of prisoners, policies that were sent out to the Department of Defense and elsewhere, and the widespread abuses that have occurred? Do you acknowledge any accountability for such things, any connection?

Judge Gonzales. Senator, as I said in my remarks, I categorically condemn the conduct that we see reflected in these pictures at Abu Ghraib. I would refer you to the eight completed investigations of what happened at Abu Ghraib and in Guantanamo, and there are still three ongoing. I'm talking about the Taguba report, the Fay-Jones-Kern Report, the Schlesinger report, the Navy IG, the Army IG, Jacoby, Ryder, Miller, all of these reports. And if you listened to the press briefings given in connection with the roll-out of these reports, they do conclude that with respect to the conduct not reflected in the photos, not the conduct that we find the most offensive, but

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conduct related to pure interrogations, that there was some confusion--

Senator Leahy. The same reports you talk about say the Department of Defense relied on the memo. It is quoted extensively in the DOD Working Group report on interrogations. That report has never been repudiated. So apparently they did rely on the memo, and when we find out about the abuses we never find out from the administration, we find out because the press reports it. Is there any accountability here anywhere?

You know, as I mentioned earlier, my son was in the military. He was held to very, very strict standards. He is trained for combat, held to very, very strict standards. The vast majority of the men and women in the military are held to those same strict standards. I am just trying to find out where the accountability is for this terrible blot that you and I both agree is a terrible blot on the United States.

Judge Gonzales. I believe that is a very good question, Senator, and that is why we have these eight completed investigations and these three pending investigations, while we've had four hearings involving the Secretary of Defense and you've had 18 hearings involving the Deputy Secretary, Under Secretary of Defense, you've had over 40 briefings with the Congress, because we care

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very much about finding out what happened and holding people accountable. Unlike other countries that simply talk about Geneva, if there is an allegation that we've done something wrong, we investigate it. We're very serious about our commitments, our legal obligations in Iraq, and if people have done things that they shouldn't have done in violation of our legal obligations, they are going to be held accountable.

. . . .

Senator Hatch.

I think today's hearing is certainly going to dwell to a large degree on ongoing public policy on that debate on how a democratic society with a long tradition of protecting civil liberties should conduct itself when it finds itself threatened and attacked by terrorist groups and individuals who will stop at literally nothing to destroy our way of life, and who do not represent a particular country, do not wear uniforms, do not abide by international principles, and who really are rogue in every sense of that term. It is my hope that in addition to providing an adequate record about Judge Gonzales' qualifications to serve as Attorney General, one of the outcomes of today's hearing will be to educate the Committee and the public about the facts of what actions were taken and were not taken with respect to the treatment

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and interrogations of various classes of individuals who have been detained and taken into custody by the United States as part of our response to the horrific 9/11 terrorist attacks on America.

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Senator Hatch. Let me just ask some questions by reviewing some of the key points with respect to the treatment of detainees. Like most Americans, I was appalled by the abuses at Abu Ghraib. Some have stated that the President's February 7th, 2002 memorandum is somehow responsible for the abuses at Abu Ghraib, at that prison facility in Iraq. But is it not true that the February 7th, 2002 memorandum actually makes clear that the Geneva Conventions do apply in both Afghanistan and Iraq?

Judge Gonzales. Senator, I don't recall that the memo actually talked about Iraq. The President--there was a decision by the President that Geneva would apply with respect to our conflict with the Taliban. However, and I believe there's little disagreement about this as a legal matter, because of the way the Taliban have fought against the United States, that they forfeited their right to enjoy prisoner of war legal protections. There was never any question about whether Geneva would apply in Iraq. There was no decision for the President to make. Iraq was a signatory to the Geneva Convention, so there was no

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decision for the President to make. There was no decision by the Department of Justice as to what kind of techniques should be approved with respect to interrogations in Iraq, because the understanding throughout the administration was the Geneva Conventions apply in Iraq.

Senator Hatch. Is it not also true that the President's February 7th, 2002 memorandum, which is entitled "Humane Treatment of al Qaeda and Taliban Detainees," also requires American forces to treat all detainees humanely, regardless of whether the Geneva Conventions apply; is that not true?

Judge Gonzales. That is correct. The President gave a directive to the military that despite the fact that Geneva may not apply with respect to the conflict and the war on terrorism, it is that everyone should be treated humanely.

Senator Hatch. That was more than two years ago.

Judge Gonzales. That is correct.

Senator Hatch. Am I correct in my understanding that at no time did the President authorize the use of torture against detainees regardless of any of the legal memoranda produced by various entities of the U.S. Government, including the August 2002 Department of Justice memo, the so-called Bybee memo?

Judge Gonzales. Senator, the position of the

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President on torture is very, very clear, and there is a clear record of this. He does not believe in torture, condone torture, has never ordered torture, and anyone engaged in conduct that constitutes torture is going to be held accountable.

Senator Hatch. And that has never been a problem with regard to the President or you as his adviser?

Judge Gonzales. Absolutely not, Senator.

Senator Hatch. As Counsel to the President of the United States, is it your responsibility to approve opinions issued by the Department of Justice?

Judge Gonzales. No, sir, I don't believe it is my responsibility, because it really would politicize the work of the career professionals at the Department of Justice. I know that some have been critical of my actions in not trying to force the opinion a certain way, people that are concerned about certain sections of that opinion, but we have to be very, very careful here. When you use the White House as a shield, it can also be used as a sword. It can be used as a sword to force an opinion, to reach an outcome that would be politically advantageous to the White House, and we don't want that to happen. And so I take my responsibilities very seriously in respecting the role of the Department of Justice given to the Department by Congress to decide for the Executive Branch what the law

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requires.

Senator Hatch. In fact, the Bybee memo was actually withdrawn by the Department of Justice in June of 2004; am I right on that?

Judge Gonzales. The opinion was withdrawn, yes, sir.

Senator Hatch. The Bybee memo was issued, I believe, six months after the President issued his February 7th, 2002 memo requiring all detainees to be treated humanely; is that correct?

Judge Gonzales. That is correct. It has always been the case that everyone should be--that the military would treat detainees humanely, consistent with the President's February order.

Senator Hatch. So that memo did not overrule what the President's 2002 memo actually said?

Judge Gonzales. Of course not.

. . . .

Senator Kennedy. I sit on the Judiciary Committee and also on the Armed Services Committee, and I was a member of the Armed Services Committee in the time that all America saw the Abu Ghraib photos. And just subsequent to that, we, in the Armed Services Committee, had General Taguba, who did the Taguba report that was leaked, and we read the report before a copy was actually provided to the Congress. And immediately the administration claimed during the

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hearings that we had with General Taguba, that the Abu Ghraib was just a few bad apples, there was no higher level of support or encouragement for the mistreatment of detainees.

Then we learned that the Defense Department's Working Group report of April 2003 had provided the broad legal support for the harsh interrogation tactics, and it dramatically narrowed the definition of torture, and it recognized the novel defenses for those who committed the torture. Then we learned that the legal basis for the Working Group report had been provided by the Justice Department in the Bybee memo.

Now, that is what has come up from the administration. That is what has come up, including the President of the United States. This Committee, the Armed Services Committee has asked for these memos. We have depended upon what has been leaked, what has been put on the Internet, and what has been obtained in the Freedom of Information and by various attorneys. So there is a certain kind of sense by many of us here that the administration--and you are the point person on the administration--has not been forthcoming on the whole issues of torture, which not just committed at Abu Ghraib, but is happening today.

The Bybee torture memoranda, written at your request-- and I would be interested in your reactions to this--made

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abuse of interrogation easier. It sharply narrowed the definition of torture and recognized it as new defense for officials who commit torture. For two years, for two years, from August 2002 to June 2004 you never repudiated it. That is the record, you never repudiated it. It was written by the CIA's bidding, and you can clarify that if that is false. We can assume it was probably provided to the CIA as written. Its principles were adopted in the Defense Department's Working Group report. I have it right here, and I will read the identical provisions in the Bybee report that were put in the Defense Department Working Group report that has been the document which has been made available to the Defense Department about how they ought to view torture. This person assumes that the Bybee report has already gone to the CIA in his complacency.

Now, according to the Defense Department's own investigation--you referred to Senator Leahy earlier--as to the Defense Department, the Working Group report was used to justify--this is DOD--was used to justify the many abuses that occurred in Afghanistan and Guantanamo. And according to Fay and Schlesinger, who testified in the Armed Services Committee, the abuse of policies and practice in Afghanistan and Guantanamo migrated to Iraq. You have never repudiated the Bybee assertion that presidential power overrides all the prohibitions against

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torture enacted and ratified. The President's directive to act humanely was hollow. It was vague. It allowed for military necessity exception and did not even apply to the CIA, did not even apply to the CIA. Abuses are still being reported. And you were warned by Secretary Powell and other top military leaders that ignoring our longstanding traditions and rules would lead to abuse and undermine military culture, and that is what has happened.

I am going to get to how the Bybee amendment was first written. As I understand, there is the report in the Washington Post that the CIA asked you for a legal opinion about how much pain and suffering an intelligence officer could inflict on a detainee without violating the '94 anti-torture statute, which I might point out was strongly supported by Ronald Reagan and Bush I, and passed the Foreign Relations Committee unanimously. Republicans have been as concerned about torture as Democrats, and we will get into the various statutes that have been passed in recent times which would indicate that.

Now, the Post article states you chaired several meetings at which various interrogation techniques were discussed. These techniques included the threat of live burial and water-boarding, whereby the detainee is strapped to a board, forcibly pushed under water, wrapped in a wet towel and made to believe he might drown. The article

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states that you raised no objections, and without consulting military and State Department experts. They were not consulted. They were not invited to important meetings. They might have been important to some, but we know what Secretary Taft has said about his exclusion from these. Experts in laws of torture and war prove the resulting memo gave CIA interrogators the legal blessings they sought.

Now, was it the CIA that asked you?

Judge Gonzales. Sir, I don't have specific recollection. I read the same article. I don't know whether or not it was the CIA. What I can say is that after this war began, against this new kind of threat, this new kind of enemy, we realized that there was a premium on receiving information. In many ways this war on terror is a war about information. If we have information we can defeat the enemy. We had captured some really bad people who we were concerned had information that might prevent the loss of American lives in the future. It was important to receive that information, and people at the agencies wanted to be sure that they would not do anything that would violate our legal obligations, and so they did the right thing. They asked questions. What is lawful conduct? Because we don't want to do anything that violates the law.

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Senator Kennedy. You asked, at their request--if this is incorrect, then correct me. I am not attempting, or if there are provisions in that comment here that are inaccurate, I want to be corrected. I want to be fair on this. But it is my understanding, certainly was in the report, that the CIA came to you, asked for the clarification. You went to the OLC. Now, I want to ask you, did you ever talk to any members of the OLC while they were drafting the memoranda? Did you ever suggest to them that they ought to lean forward on this issue about supporting the extreme uses of torture, as reported in the newspaper?

Judge Gonzales. Sir, I don't ever recall using the term "leaning forward" in terms of stretching what the law is.

Senator Kennedy. You talked to the OLC during the drafting of it?

Judge Gonzales. There is always discussions--not always discussions, but there often is discussions between the Department of Justice and OLC and the Counsel's office regarding legal issues. I think that's perfectly appropriate. This is an issue that the White House cared very much about to ensure that the agencies were not engaged in conduct--

Senator Kennedy. What were you urging them? What

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were you urging? They are, as I understand, charged to interpret the law. We have the series of six or seven different laws and conventions on torture and on the rest of it. They are charged to develop and say what the statute is. Now, what did you believe your role was in talking with the OLC and recommending--

Judge Gonzales. To understand their views about the interpretation--

Senator Kennedy. Weren't you going to get the document? Weren't you going to get their document? Why did you have to talk to them during the time of the drafting? It suggests in here that you were urging them to go as far as they possibly could. That is what the newspaper reported. Your testimony is that you did talk to them but you cannot remember what you told them.

Judge Gonzales. Sir, I'm sure there was discussion about the analysis about a very tough statute, a new statute, as I've said repeatedly, that had never been interpreted by our courts, and we wanted to make sure that we got it right. So we were engaged in interpreting a very tough statute, and I think it is perfectly reasonable and customary for lawyers at the Department of Justice to talk with lawyers at the White House. Again, it was not my role to direct that we should use certain kinds of methods of receiving information from terrorists. That was a decision

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made by the operational agencies, and they said we need to try to get this information. What is lawful? And we look to the Department of Justice to tell us what would, in fact, be within the law.

Senator Kennedy. What I would like to do is include in the record the Bybee memoranda and the Defense Department working group report, the analysis where they use virtually word by word the Bybee memoranda in the key aspects of the working group report, which was the basic document which has been the guide to our military about how they should treat prisoners.

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Senator Biden. my good friend from Texas, he held up three reports that did not say what he said they said. The three reports he held up that I am aware of, maybe four, asserting essentially that they confirmed the judgment that you made in your recommendations to the President of the United States of America relating to torture and other matters.

Now, the reason why it is appropriate to ask you about Abu Ghraib is not to go back and rehash Abu Ghraib, but it is relevant as to whether or not what occurred at Abu Ghraib came as a consequence of the judgments made and embraced by the President that were then essentially sent out to the field. The Schlesinger report that was cited,

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it finds, "Lieutenant General Sanchez signed a memo authorizing a dozen interrogation techniques beyond standard Army practice, including five beyond those applied at Guantanamo." He did so "using reasoning from the President's memo of February 7, 2002." So I say to my friend from Texas, that is why this is relevant.

The very reports cited say that--and I will not go through them all. The Red Cross report, the Red Cross did not sign off and say that, you know, the conduct or the recommendations or the memoranda were, in fact, appropriate.

. . . . You know, there is that play we have all seen, "A Man for All Seasons," and there is an exchange in there where Sir Thomas More is engaging Roper, and Roper says--a young man came to seek a job, and he said, "Arrest him. He means you harm." And he said, "He has broken no law." And Roper said, "But he means you harm." And if my recollection is correct, you have Thomas More turning to Roper and saying, "This country is planted thick with laws, coast to coast, man's laws not God's, and if you cut them down, Roper, as you would, what will you do when the devil turns 'round on you? Yes, I give the devil benefit of law for my own safety's sake."

That is the fundamental principle we debate among ourselves here, no matter how you cut it. And that is what

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the debate that took place on these torture memos between Taft and Yoo. I have a copy of the report, the memo sent by the Secretary of State to you all on February 7th, which I am not going to make public. But in that memo, he takes significant issue with the recommendations coming out of your shop, and Mr. Yoo's. And he ends by saying, "Let's talk. We need to talk." And he goes into great detail, as other reports do. Powell contemporaneously on the 7th says basically--and I have the report right here. He says basically, look, you go forward with the line of reasoning you guys are using, and you are going to put my troops, my former troops, in jeopardy. This is about the safety and security of American forces. And he says in here, "What you are doing is putting that in jeopardy." You have the former head of JAG, the top lawyer in the United States military, saying, Hey, man, this is way beyond the interrogation techniques you are signing off, way beyond what the manual, the military manual for guidance of how to deal with prisoners says.

And so the point I am trying to make here--and I will come back with questions, if I have any time--well, I do not have any time. This is important stuff because there was a fundamental disagreement within the administration. And based on the record, it seems to me, although it may not be totally--it may not be dispositive, your judgment

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was not as good as the judgment of the Secretary of State. Your judgment was not as good or as sound as the chief lawyer from the JAG. Your judgment was not as sound. And the question I want to debate about is the judgment. How did you arrive at this, different than these serious people like you who thought what you were doing, recommending to the President in the various memos, was jeopardizing the security of American troops? And that is what I want to get back to, but I want to explain to the public and anybody listening. This is not about your integrity. This is not a witch hunt. This is about your judgment. That is all we are trying to do.

And so when I get to ask my questions, I hope you will be candid about it because--not that it is relevant--I like you. I like you. You are the real deal.

Chairman Specter. Senator Biden, your red light is on.

Senator Biden. My red light is on.

[Laughter.]

Senator Biden. Thank you.

Chairman Specter. Judge Gonzales, while Senator Biden is awaiting round two to formulate a question--

[Laughter.]

Chairman Specter. --I think you ought to be given an opportunity to respond to Senator Biden's observations and

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implicit, perhaps, two dozen questions. So the floor is yours.

Judge Gonzales. Senator Biden, when you are referring to the Powell memo, I'm not sure which memo you're referring to. And I presume you're referring--

Senator Biden. Let me give you a copy of it. For the record, Mr. Chairman, it is dated January 11, 2002, to John Yoo from William Taft, Legal Adviser, and there is overwhelming evidence that you saw it. There was discussion about it, and that is what I am referring to.

Judge Gonzales. There was a great deal of debate within the administration, as that memo partly reflects, about what was legally required and perhaps a policy judgment to be made by the President. And the fact that there was disagreement about something so significant I think should not be surprising to anyone.

Senator Biden. Of course not.

Judge Gonzales. Of course not. And reasonable people can differ.

In the end, it is the Department of Justice who is charged by statute to provide the definitive legal advice on behalf of the executive branch to the President of the United States. What I can tell you--

Senator Biden. With due respect, that does not matter. I do not care about their judgment. I am looking

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at yours.

Judge Gonzales. Sir, of course, I convey to the President my own views about what the law requires, often informed by what the Department of Justice says the law is, because, again, by statute you have conferred upon them that responsibility.

I can tell you that with respect to the decision the President ultimately made, everyone involved, including the Secretary of State, including the chairman of the Joint Chiefs, all of the principals who had equities in the decision about the application of Geneva had an opportunity to present their views and their concerns directly to the President of the United States, and he made a decision.

Chairman Specter. Thank you, Judge Gonzales.

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Senator Sessions. Now, the Department of Justice under the Judiciary Act of 1789 is empowered by statute to issue opinions on various questions of law.

Judge Gonzales. That is correct, Senator.

Senator Sessions. And they have an Office of Legal Counsel.

Judge Gonzales. Yes, sir.

Senator Sessions. That really specializes in that on behalf of the Attorney General.

Judge Gonzales. The Office of Legal Counsel has been

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delegated by regulation the authority of the Attorney General to provide legal advice to the executive branch.

Senator Sessions. Now, the President of the United States is executing a war on terrorism after 3,000 of our people have been killed by what can only be described as unlawful combatants. And it is a difficult, tough time, and you were concerned and the President was deeply concerned that there may be other groups of unlawful combatants, saboteurs that were in the United States planning further attacks to kill more American citizens. And that is the way it was, isn't it?

Judge Gonzales. The President was very concerned about protecting this country from future attacks and doing everything that we could do within the law to protect this country from future attacks.

Senator Sessions. And in the course of all of that, agencies that we had out there, their lives at risk--the military and other agencies--to serve our people, to protect our people, asked the President what the law was with regard to their rights and duties and responsibilities of interrogating people they have apprehended. That came to your attention, I guess, as Counsel to the President.

Judge Gonzales. My understanding is that people in the agencies were very concerned about--they understood that they had a direction from the President to do what

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they could to protect this country within the limits of the law, and they wanted to clearly understand what those limits were.

Senator Sessions. And so you did not undertake to give them an off-the-cuff opinion, as Senator Biden suggests you ought to be able to do today on any question he would desire to ask you, I suppose.

Judge Gonzales. I hope not, Senator. I have been criticized, quite frankly, for going too much to the Department of Justice and making sure that the legal advice we give to the President is the right advice. That is very important to me. I understand that the Office of Legal Counsel, they have the expertise, the institutional history, the institutional knowledge about what the law is. And so I have a great deal of respect for that office and rely upon that office in the advice that I give to the President of the United States.

Senator Sessions. And it is staffed with career people who have dealt with these issues for many, many years, certainly, and when this issue arose, I think you did the absolutely proper thing. You asked the entity of the United States Government that is charged with the responsibility of making those opinions, you asked them to render an opinion.

Judge Gonzales. Absolutely, Senator. We want to get

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it right. It also provides, quite candidly, as the lawyer for the President, protection for the President. We want to make sure the President does not authorize or somehow suggest conduct that is unlawful. And so I felt that I had an obligation as a prudent lawyer to check with the professionals at the Department of Justice.

Senator Sessions. Well, I think you did, and I think that was the first step.

Now, it has been suggested that this was your opinion, that it is your opinion, you asked for this opinion, as if you asked for them to say precisely what they said. You asked for them to give an opinion on the legal question involved. You did not ask them to give an opinion that you wanted. Is that correct?

Judge Gonzales. As I said in my earlier testimony, there was give-and-take. There were discussions about the opinion, but ultimately the opinion represents the position of the Department of Justice. And as such it's a position that I supported at the time.

Senator Sessions. And there is no doubt in anyone's mind, the Office of Legal Counsel or the Attorney General, that that opinion was one that they worked on, that they debated internally, and when they put their name on it, it was their opinion. Isn't that correct?

Judge Gonzales. It was the work of the Department of

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Justice and, again, reflected the position of the executive branch.

Senator Sessions. The official position. Now, the President of the United States--well, let me follow this up: Having been an Attorney General and been involved in the Department of Justice as a part of the executive branch, as you were part of the executive branch, and lawyers in the Department of Justice have to be very careful, do they not, when they issue an opinion that they are not circumscribing legitimate constitutional powers that belong to the executive branch. And they are going to be careful not to render an opinion that would remove constitutional powers that the President legitimately has.

Judge Gonzales. That is correct. But my view about the Office of Legal Counsel is to call them as they see them, I mean, interpret the law and give us their best judgment about what the law is.

Senator Sessions. Well, I agree with that. But once this opinion came in from the Office of Legal Counsel and the President and you, I am sure, reviewed it, he issued some orders, it seemed to me, that were far less expansive than the authority the Legal Counsel said he had.

Judge Gonzales. Well, I am not sure which orders you might be referring to. Let me emphasize for the record that the President was not involved personally in deciding

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which kinds of methods could be used to question terrorists who might have information that might save American lives. The President was not involved personally in connection with that.

What he expected and what he deserved--and I think what he got--was people within the administration trying to understand what the law was and conforming their conduct to legal requirements.

Senator Sessions. And the opinion of the Department of Justice Legal Counsel really isn't policy, is it? It is just the opinion of the Office of Legal Counsel.

Judge Gonzales. At the end of the day, again, as I described to you, I expect the Office of Legal Counsel to give me their best judgment, their best interpretation of what the law is.

Senator Sessions. And the President sets the policy based on his judgment after having received that advice?

Judge Gonzales. That is correct.

Senator Sessions. Now, with regard to al Qaeda, I do not think there is anyone on this Committee, on either side of the aisle, that would say that al Qaeda represents a lawful combatant that is, therefore, entitled to the full protections of the Geneva Conventions, would they? I mean, that is pretty well undisputed that they are not representatives of an organized state and that they do not

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carry arms openly and that they do not--and they clearly do not follow the laws of warfare in the surreptitious methods by which they bomb innocent civilians?

Judge Gonzales. Senator, that is correct. Senator Biden spoke earlier about my judgment. My judgment was based on just reading the words of the Geneva Conventions is that it would not apply to al Qaeda. They weren't a signatory to the Convention and, therefore, it didn't seem to me that they could be--our conflict with al Qaeda could be covered. But obviously--

Senator Sessions. And that would--

Judge Gonzales. The decision by--if I might just interrupt you, the decision by the President as to the fact that Geneva would not apply was not just based upon my judgment. That was the considered judgment of the Department of Justice.

Senator Sessions. And it was clearly correct and clearly consistent with Ex Parte Quirin, the Supreme Court case during World War II.

Judge Gonzales. That is correct, sir.

Senator Sessions. President Roosevelt captured some German saboteurs inside the United States and had a trial or a hearing in the Department of Justice or the FBI building and executed them. I do not think the public even knew about it until after they had been executed. So an

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unlawful combatant is a different matter.

Now, in Iraq, you have said the Geneva Conventions would apply, basically, as I understand it.

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Senator Sessions. And truth be known, a number of those people involved in Iraq really should not qualify, but the President has really gone further than the law requires, it seems to me, in granting them privileges that he did not necessarily have to do as a matter of effecting his policy of humane treatment.

Judge Gonzales. Senator, I think the administration-- it is more accurate to say that the administration policy is and always has been that in our conflict with Iraq, Geneva does apply and we are bound by the requirements of the Geneva Convention. Iraq is a signatory to the Geneva Conventions, and there were never any question, any debate that I'm aware of as to whether or not Geneva would apply with respect to our conflict in Iraq.

Senator Sessions. But the Zarqawi people do not strictly qualify, in my opinion, as a lawful combatant.

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Senator Kohl. Judge Gonzales, the 9/11 Commission's report recognized that winning the hearts and the minds of the Arab world is vital to our success in the war on terror. Photographs that have come out of Abu Ghraib have

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undoubtedly hurt those efforts and contributed to a rising tide of anti-Americanism in that part of the world.

Secretary of State Colin Powell and others raised concerns about the decision not to apply the Geneva Conventions, some even suggesting that it could well undermine U.S. military culture. And we now know that those concerns in large part or significantly were well founded.

When drafting your recommendations for the President on the application of Geneva Conventions, did you ever consider the impact that this could have on winning the hearts and minds of the Arab world in the war on terror? And in light of what has happened, if you could make the recommendation all over again, would you do something different than what you did?

Judge Gonzales. Senator, that is a very good question and thank you for asking that. I think the decision not to apply Geneva in our conflict with al Qaeda was absolutely the right decision for a variety of reasons. First of all, it really would be a dishonor to the Geneva Convention. It would honor and reward bad conduct. It would actually make it more difficult, in my judgment, for our troops to win in our conflict against al Qaeda. It would limit our ability to solicit information from detainees. It would require us to keep detainees housed together where they could share information, they could coordinate their stories, they

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could plan attacks against guards. It would mean that they would enjoy combat immunity from prosecutions of certain war crimes. And so for a variety of reasons, it makes absolutely no sense.

In addition to that, Senator, it is contrary to decades of executive branch position. There was an attempt in 1977, Protocol 1, to provide prisoner of war legal status to terrorists. Now, that protocol included some wonderful humanitarian provisions dealing with extraditions and hostages and things of that nature. But the United States, and many other countries, never ratified that protocol, and the reason is because the protocol arguably provided prisoner of war legal status to terrorists. And so it has been the consistent executive branch position since then that we are not going to do that because it hurts our soldiers. It is contrary to the spirit of Geneva to do so. And so I do believe the decision by the President was absolutely the right thing to do.

Now, that's not to say that we don't--that we are not--that we don't operate without legal limitations and that we don't treat people consistent with our values as Americans. The President was very clear in providing directives that even though Geneva would not apply as a matter of law, we would treat detainees humanely and subject to military necessity and as appropriate,

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consistent with the principles of Geneva.

In my judgment, there has been a very strong attempt to do so at Guantanamo. There has been never any question, as I said in response to earlier questions, about whether or not Geneva should apply in Iraq. That's always been the case.

Do I regret the abuses at Abu Ghraib? Absolutely. I condemn them. Do I believe that they may have hurt us in winning the hearts and minds of Muslims around the world? Yes. And I do regret that. But one of the ways we address that is to show the world that we do not just talk about Geneva, we enforce Geneva. And so as I said in response to an earlier question, that's why we're doing these investigations. That's why you have these military court martials. That's why you have these administrative penalties imposed upon those responsible, because we want to find out what happened so it doesn't happen again. And if someone has done something wrong, they're going to be held accountable.

Senator Kohl. Well, let me ask you, do you think that what happened at Abu Ghraib was just spontaneous, or do you think that those relatively low-level perpetrators got some sort of a sign from people above them who got signs from people above them that these things would be tolerated? What is your opinion?

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Judge Gonzales. Well, we don't know for sure. First of all, I'm not--I haven't conducted an independent investigation. We know eight have been completed. There are at least three ongoing. We know that the Congress is conducting--you know, through hearings and briefings, they're looking at this as well.

As I listened to the briefings of Schlesinger and Faye and Kearns and people like that about their findings and their reports, they divide up the abuses into two categories. One category is the violent physical abuse and sexual abuse. That is the first category. And the second category are abuses related to interrogations and gathering intelligence, stem from confusion about what the policies and the strictures were.

As to the first category, as I read the briefings, they all seem to conclude that what you see in the pictures, the most horrific of the abuses that we see, the ones that we all, you know, condemn and abhor, those do not relate to confusion about policies. Those were not related to interrogations or confusion about how much you could-- what you could do in terms of gathering intelligence. This was simply people who were morally bankrupt trying to-- having fun, and I condemn that.

As to the second category, the reports seem to indicate that there was migration. There was migration

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between what happened in Guantanamo. You had people and standard operating policies that migrated from Guantanamo to Afghanistan and then into Iraq. And so there was some confusion about what were the appropriate standards to use in connection with interrogations and in connection with intelligence gathering.

However, as I read the briefings and the reports, they seem to indicate that the reason that the abuses occurred was not because of some decision back in 2001 or 2002, but because of the fact that you had a prison that was outmanned, under-resourced, and focused on fighting an insurgency, and they didn't pay enough attention to detainee operations. There wasn't adequate supervision. There wasn't adequate training about what the limits were with respect to interrogation. That's how I read the findings and conclusions of some of these reports.

But it's not done yet. Again, there are still ongoing investigations. And so we'll have to wait and see--

Senator Kohl. That would seem to indicate, although we will see what happens, that people above the level of those who committed the atrocities are likely--and we will see what happens--to escape being held accountable. We will see what happens. I know you and I cannot know that right now, but I think I am getting a drift from you that those people who committed the atrocities were acting on

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their own. There really wasn't anybody at a higher level who understood and approved or at least condoned, and the accountability should be held at that level.

I think the American people, by and large, Judge Gonzales, believe that accountability should at least be focused on people above the level of those at that level who committed the atrocities. What do you think, Judge Gonzales?

Judge Gonzales. I believe that people should be held accountable. I do think--and perhaps I misspoke in describing how I reviewed the briefings and how I read the reports. The reports seem to indicate that there was a failure, there was a failure of discipline amongst the supervisors of the guards there at Abu Ghraib, and also they found that there was a failure in training and oversight at multiple layers of Command Joint Task Force 7. And so I think there was clearly a failure well above the actions of the individuals who actually were in the prison. At least that's what the reports seem to indicate, as I review them.

Senator Kohl. Finally, Attorney General Ashcroft said that he does not really believe in torture in the sense that it does not produce anything of value. He has said that on the record. Do you agree with that?

Judge Gonzales. Sir, I don't have a way of reaching a

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conclusion on that. All I know is that the President has said we are not going to torture under any circumstances.

Senator Kohl. Well, do you believe that the policy is a correct one, that we never should have had any torture at Guantanamo or at Abu Ghraib among other reasons because it really does not produce anything of value?

Judge Gonzales. Sir, the United States has never had a policy of torture.

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Senator Graham.

Monday morning quarterbacking is part of a democracy, so just bear with us because what we are trying to do is figure out how to correct mistakes. Now, I am a very ardent supporter of the war. I really do believe if you are going to win the war on terror, you take dictatorships like Saddam Hussein, who was part of the problem, and you give people who lived under his oppression a chance to be free. That is not easy, and I believe we made mistakes along the way.

But one of the reasons that we are talking about this has a lot to do with your confirmation, but really not. I think we have dramatically undermined the war effort by getting on a slipper slope in terms of playing cute with the law because it has come back to bite us. Abu Ghraib has hurt us in many ways. I travel throughout the world

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like the rest of the Members of the Senate, and I can tell you it is a club that our enemies use, and we need to take that club out of their hands.

Guantanamo Bay, the way it has been run, has hurt the war effort. So if we are going to win this war, Judge Gonzales, we need friends and we need to recapture the moral high ground. And my questions are along that line.

To those who think that you can't win a war with the Geneva Convention applying, I have another role in life, I am a judge advocate. I am a reserve judge in the Air Force. I have never been in combat. I had some clients that probably wanted to kill, but I have never been shot at. But part of my job for the last 20 years, along with other judge advocates, is to advise commanders about the law of armed conflict. And I have never had a more willing group of people to listen to the law, because every Air Force wing commander lives in fear of an air crew being shot down and falling into enemy hands. And we instill in our people as much as possible that you are to follow the law of armed conflict because that is what your Nation stands for, that is what you are fighting for, and you are to follow it because it is there to protect you.

Now, to Secretary Powell, he took a position that I disagreed with legally but in hindsight might have been right. I agree with you, Judge Gonzales, that to give

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Geneva Convention protection to al Qaeda and other people like al Qaeda would in the long run undermine the purpose of the Geneva Convention. You would be giving a status in the law to people who do not deserve it, which would erode the Convention.

But Secretary Powell had another role in life, too. He was a four-star general and Chairman of the Joint Chiefs. And to those who think that the Geneva Convention is a nicety or that taking torture off the table is naive and a sign of weakness, my answer to them is the following: that Secretary Powell has been in combat, and I think you weaken yourself as a nation when you try to play cute and become more like your enemy instead of like who you want to be. So I want to publicly say that the lawyers in the Secretary of State's office, while I may disagree with them and while I may disagree with Secretary Powell, were advocating the best sense of who we are as people.

Now, having said that, the Department of Justice memo that we are all talking about now was, in my opinion, Judge Gonzales, not a little bit wrong but entirely wrong in its focus because it excluded another body of law called the Uniform Code of Military Justice. And, Mr. Chairman, I have asked since October for memos from the working group by Judge Advocate General representatives that commented on this Department of Justice policy, and I have yet to get

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those memos. I have read those memos. They are classified, for some bizarre reason. But, generally speaking, those memos talk about that if you go down the road suggested, you are making a U-turn as a nation, that you are going to lose the moral high ground, but more importantly, that some of the techniques and legal reasoning being employed into what torture is, which is an honest thing to talk about--it is okay to ask for legal advice. You should ask for legal advice. But this legal memo I think put our troops in jeopardy because the Uniform Code of Military Justice specifically makes it a crime for a member of our uniformed forces to abuse a detainee. It is a specific article of the Uniform Code of Military Justice for a purpose because we want to show our troops, not just in words but in deeds, that you have an obligation to follow the law.

And I would like for you to comment, if you could, and I would like you to reject, if you would, the reasoning in that memo when it came time to give a tortious view of torture. Will you be willing to do that here today?

Judge Gonzales. Senator, there is a lot to respond to in your statements. I would respectfully disagree with your statement that we're becoming more like our enemy. We are nothing like our enemy, Senator. While we are struggling mightily to try to find out what happened at Abu

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Ghraib, they are beheading people like Danny Pearl and Nick Berg. We are nothing like our enemy, Senator.

Senator Graham. Can I suggest to you that I did not say that we are like our enemy, that the worst thing we did when you compare it to Saddam Hussein was a good day there. But we are not like who we want to be and who we have been. And that is the point I am trying to make, that when you start looking at torture statutes and you look at ways around the spirit of the law, you are losing the moral high ground. And that was the counsel from the Secretary of State's office, that once you start down this road, it is very hard to come back. So I do believe we have lost our way, and my challenge to you as a leader of this Nation is to help us find our way without giving up our obligation and right to fight our enemy.

And the second question--and then I will shut up--is Guantanamo Bay. The Supreme Court has rejected this administration's legal view of Guantanamo Bay. I believe it is a legal chaos down there and that it is not inconsistent to have due process and aggressively fight the war on terror. Nobody wants to coddle a terrorist, and if you mention giving rights to a terrorist, all of a sudden you are naive and weak. I can assure you, sir, I am not naive and weak.

Judge Gonzales. Thank you, Senator.

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With respect to Guantanamo Bay, it is correct that in the Rasul decision the Supreme Court did disagree with the administration position. We felt, reading Supreme Court precedent in Johnson v. Eisentrager, that a non-American enemy combatant held outside the United States did not have the right to file a habeas challenge.

Senator Graham. It is a correct position to take, but you lost. Now here is my question: What do we do now that you lost?

Judge Gonzales. We have implemented a process to provide the opportunity for people at Guantanamo Bay to know of the reasons they're being detained and to have a meaningful opportunity to contest the factual basis of their detention before a neutral decisionmaker, all in accordance with the decision in Hamdi.

Senator Graham. How is that being worked? Who is working on that?

Judge Gonzales. That is being worked through Secretary England, and they have assumed responsibility for--the Navy has assumed responsibility for standing at the combatant status review tribunals, and I can't tell you today where we are in the process, but we are providing a level of process which we believe meets the requirements set out by the Supreme Court.

Senator Graham. Okay. I would like to be informed,

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if possible, in an appropriate way what the executive department is doing to fill in that gap. I do not know if we need legislative action. But the reason I am going to vote for you is because I think I have followed this information enough to know that you are a good lawyer, you ask good questions, and it was ultimately the President's decision. And I think he was right. I think Geneva Convention protection should not be applied to terrorists.

I think humane treatment is the way to go, the only way that we can win this war. My problem is that the DOJ memo was out there for two years, and the only people I can find that spoke against it were professional military lawyers who are worried about our own troops. I want you to get that memo, and if we need three rounds, we will do three rounds. But I would like to get you to comment, if you could.

Is my time up?

Chairman Specter. Almost.

Senator Graham. Okay. Comment if you could. Do you believe that a professional military lawyer's opinion that this memo may put our troops in jeopardy under the Uniform Code of Military Justice was a correct opinion?

Judge Gonzales. Would you like me to try to answer that now, Mr. Chairman?

Chairman Specter. Yes. Judge Gonzales, the question

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is pending.

Judge Gonzales. And the question is do I believe that the military lawyer's judgment that--

Senator Graham. The techniques being espoused in the memo may put our troops at jeopardy under the Uniform Code of Military Justice. And if you want to take some time, that is fine.

Judge Gonzales. Thank you, Senator.

Senator Graham. I mean I want sometime later for you to answer that question, but you do not have to do it right now.

Chairman Specter. Do you want to think it over, Judge Gonzales and respond later?

Judge Gonzales. I do. Thank you, Mr. Chairman..

Chairman Specter. Later during the hearing, that is fine.

Senator Feingold. . . . First I want to follow up on your answer to Senator Kennedy and Senator Leahy regarding the OLC memo. You told Senator Leahy that you did not want to politicize the work of career professionals of DOJ, so you could not weigh in against the interpretation of the law that was expressed in that memo. But then you told Senator Kennedy that it was totally appropriate to have discussions with the DOJ while the memo was being prepared because it was a complicated statute that had never before

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been interpreted. I think there is something of a contradiction there, which I would like you to comment on, but I would like to make two other points first.

First, the authors of the torture memo, in fact, Judge, were political appointees, not career professionals. Second, the issue is whether you disagree with that memo and express that disagreement to the President. You are the President's lawyer. Is it not your job to express your independent view to the President if you disagree with the opinion of the Justice Department, or do you just simply pass on the DOJ's opinion no matter how erroneous or outrageous, and just say to the President, in effect, this is what the DOJ says the law is?

Judge Gonzales. Thank you, Senator, for that question. Let me try to clarify my comments regarding my role in connection with the memo and my role generally as I view it as counsel to the President.

It is of course customary, and I think to be expected that there would be discussions between the Department of Justice and the Counsel's Office about legal interpretation of, say, a statute that had never been interpreted before, one that would be extremely emotional, say, if you're talking about what are the limits of torture under a domestic criminal statute? And so there was discussion about that. But I understand, and it is my judgment that I

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don't get to decide for the Executive Branch what the law is. Ultimately, that is the President, of course. By statute the Department of Justice is giving me authority to provide advice to the Executive Branch. And so while I certainly participate in discussions about these matters, at the end of the day, that opinion represents the position of the Department and therefore the position of the Executive Branch.

Senator Feingold. I am puzzled by that because I think it must be your job as Counsel to the President to give him your opinion about whether the DOJ document was right before he makes a judgment to approve it, and I have always assumed anyway, that that would be the job of the President's lawyer.

Judge Gonzales. I certainly do of course give the President my own opinions about particular matters, but as I said earlier in response to a question, my own judgment, my own conclusions, very often are informed, and very often influenced by the advice given to me by the Department of Justice, and often I communicate with the President, not only sort of my views, but the views of the Department, which of course, by statute, that's their job to do, and so that the President has that information in hand in weighing a decision.

Senator Feingold. I am still puzzled by that. If you

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were my lawyer, I would sure want to know your opinion about something like that independent, but let me move on.

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Senator Cornyn. Judge Gonzales, has it been your experience as a lawyer that sometimes lawyers disagree?

Judge Gonzales. That has been my experience, yes, sir.

Senator Cornyn. That has been my experience too, and I guess it is best exemplified by the lawyers on this Committee who from time to time will disagree with one another, and certainly that is understandable when we disagree about policy matters, even inferences to be drawn from facts which we all know to be true. But I think perhaps if I heard correctly, the Senator from Delaware was questioning whether my facts were correct when I presented the opening statement referring to a number of acknowledgements of the correctness of your judgment and the President's decision that the Geneva Convention does not formally apply to terrorists. So I would like to just quickly refer specifically to the pages, and I would like to ask unanimous consent that they be made part of the record.

First, page 379 through 380, where the 9/11 Commission says that since the international struggle against Islamic terrorism is not internal, these provisions do not formally

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apply.

And then the Schlesinger report, which studied the Department of Defense detention policies, which concluded that there were no high level policies or procedures in place that would allow for torture or abuse of detainees. On page 81 they say the panel accepts the proposition that these terrorists are not combatants entitled to the protection of the Geneva Convention.

And then there was the reference I made to the Red Cross Manual on the Geneva Convention, which on page 53 sets out the three-part test on whether the Geneva Convention actually applies under any given circumstances, and I would like to ask unanimous consent that those be made part of the record, and I am confident they will. But let me ask you this. This has also been contested in three separate Federal courts, has it not?

Judge Gonzales. It has.

Senator Cornyn. And what has been the result?

Judge Gonzales. That the President's decision was the correct legal decision.

Senator Cornyn. Even though lawyers can disagree about judgments, legal judgments or opinions--here again, I hope we do not disagree about certain basic facts, and that is the reason I wanted to go over the content of these documents which the Senator from Delaware suggested I was

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mistaken about. Let me ask you whether you agree with this proposition. Do you agree that the United States Government should use all lawful means to gather intelligence from terrorists in order to save American lives?

Judge Gonzales. I do agree with that. Obviously, that is a policy decision. I think that that is the position of the President of the United States, because as I said earlier, the war on terror is a war about information, and we need information to be successful in winning this war.

Senator Cornyn. You will not be the only witness in this hearing, and here again we are going to hear, I anticipate, since we have had the chance to see their prepared testimony, from other witnesses, who may express different opinions than you have expressed here, as well as the opinions expressed by the 9/11 Commission, the Schlesinger report and those three Federal courts. But I for one do think you have been candid in response to the questions, and I do not suggest I am the only one. . . .
. . . question, they will not be motivated by some improper . . .

Finally, let me just say that there was some suggestion that you have been less, or the White House has been less than responsive about requests for documents.

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Let me just hold up here what I believe to be part of the response that the White House has made to the request by Senator Leahy and others on the other side of the aisle with respect to documents of your office. Does that look at least like a--I will not have you go through them page by page--but have you produced voluminous documents? Has the White House produced voluminous documents in response to Committee requests?

Judge Gonzales. Senator, it's hard for me to gage whether or not that reflects our response. Because of my nomination, I have recused myself from any decisions regarding production of documents that this Committee has requested in connection with my nomination. Decisions about production of documents are being made by others at the White House, as it should be.

Senator Cornyn. Thank you for that clarification. It is my understanding, I have been advised, that the White House has complied completely with the request for documents with two exceptions. One is a document which the White House is claiming wherein the President has received confidential and candid advice from senior advisers relating to the memorandum concerning the application of the Geneva Convention to al Qaeda and the Taliban. The second document that the White House has declined to produce is an Office of Legal Counsel opinion dated

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November 6, 2001, and the reason stated is because that is currently the subject of litigation.

I would just say that this Committee last year had the occasion to revisit the importance of our ability as Senators to receive confidential advice from our own staff, and we learned, unfortunately, that there had been a theft of some staff memos to Senators, and that now has been referred for investigation and possible prosecution.

But do you recognize the importance as a general principle of confidential communications between the President and his senior advisers, or for that matter, between the United States Senate and our staff?

Judge Gonzales. I think it is a very important principle, Senator, that needs to be respected. I think the principals should be able to rely upon candid advice from their advisers. I've seen in four years how it does make a difference in affecting the way you present advice, if not the advice you actually give. And so I think that that is a principle that should be respected, and of course, there is a competing principle as well, and that is, sometimes there is a strong or legitimate Government purpose to try to receive information and to look at that information, either as part of some kind of criminal investigation, or part of the oversight function of a committee, but that always involves a balancing it seems to

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me. It's sort of a case by case analysis in terms of where do you draw the line as to when to produce deliberative information and when not to. But, yes, I think it is a principle that one should always be mindful of, is the fact that you don't want to inhibit candid advice to principals. Otherwise, in my judgment, you do inhibit the decision-making of that principal, and I don't think that's good for the American people.

. . . .

Senator Durbin. . . . I am sorry that there has been some breakdown between this Committee and the White House about the production of documents. As I told you in our office meeting, it is very difficult for us to sit on this side of the table and believe that we have the whole story when the White House refuses to produce documents that tell us what happened about many of the issues that we are raising. But based on what we do have, I want to try to get into a few specific questions on the issue of torture.

The images of Abu Ghraib are likely to be with us for a lifetime and beyond, as many images of war can be. The tragedy of Abu Ghraib and the embarrassment and scandal to the United States are likely to be with us for decades and beyond. Yesterday we paid tribute to our colleague Congressman Robert Matsui, not only a great Congressman but

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particularly great in light of the fact that as a Japanese American, he was sent to an internment camp by his Government that did not trust his patriotism or the patriotism of his family. That shameful chapter in American history is recounted even today more than 50 years later as we think about it. I am afraid that the torture that occurred in Abu Ghraib and Guantanamo will similarly be recounted 50 years from now as a shameful chapter in American history.

When you answered Senator Kohl, you said we are going to divide what happened in Abu Ghraib into two areas: physical and sexual torture, never acceptable; some idea of fun by depraved people. And you condemned it. Then a second area, interrogation techniques that went too far, and you conceded that those interrogation techniques might have migrated or started at Guantanamo and somehow made it to Iraq.

My question to you is: Would you not also concede that your decision and the decision of the President to call into question the definition of torture, the need to comply with the Geneva Conventions, at least opened up a permissive environment for conduct which had been ruled as totally unacceptable by Presidents of both parties for decades?

Judge Gonzales. Thank you, Senator, for the question.

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Maybe perhaps I did misspeak. I thought I was clear that I was not dividing up the categories of abuse into two categories, that that was really--that division had been done within these reports themselves. And those reports did indicate that there was some migration as to the second category. But the reports and the briefings were fairly clear in my judgment, and others may disagree, that the reasons for the migration were because there was inadequate training and supervision, that if there had been adequate training and supervision, if there had been adherence to doctrine, then the abuses would not have occurred. And that's what I see in the reports and what I see in the briefings.

As to whether or not there was a permissive environment, you and I spoke about this in our meeting. The findings in these eight reports universally were that a great majority, an overwhelming majority of our detention operations have been conducted consistent with American values and consistent with our legal obligations. What we saw happen on that cell block in the night shift was limited to the night shift on that cell block with respect to that first category, the more offensive, the intentional severe physical and the sexual abuse, the subject of those pictures. And this isn't just Al Gonzales speaking. This is what, if you look at it, the Schlesinger report

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concludes. And so what you see is that you have got this kind of conduct occurring at the night shift, but the day shift, they don't engage in that kind of conduct because they understand what the rules were.

And so I respectfully disagree with the characterization there was some sort of permissive environment. That's just not the case. The facts don't bear that out, sir.

Senator Durbin. Then let's go to specific questions. Can U.S. personnel legally engage in torture or cruel, inhuman, or degrading treatment under any circumstances?

Judge Gonzales. Absolutely no. Our policy is we do not engage in torture.

Senator Durbin. Good. I am glad that you have stated that for the record. Do you believe that there are circumstances where other legal restrictions like the War Crimes Act would not apply to U.S. personnel?

Judge Gonzales. Senator, I don't believe that that would be the case, but I would like the opportunity to--I want to be very candid with you and obviously thorough in my response to that question. It is sort of a legal conclusion, and I would like to have the opportunity to get back to you on that.

Senator Durbin. I will give you that change.

In your August memo, you created the possibility that

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the President could invoke his authority as Commander-in-Chief to not only suspend the Geneva Convention but the application of other laws. Do you stand by that position?

Judge Gonzales. I believe that I said in response to an earlier question that I do believe it is possible, theoretically possible, for the Congress to pass a law that would be viewed as unconstitutional by a President of the United States. And that is not just the position of this President. That has been the position of Presidents on both sides of the aisle.

In my judgment, making that kind of conclusion is one that requires a great deal of care and consideration, but if you're asking me if it's theoretically possible that Congress could pass a statute that we view as unconstitutional, I'd have to concede, sir, that I believe that's theoretically possible.

Senator Durbin. Has this President ever invoked that authority, as Commander-in-Chief or otherwise, to conclude that a law was unconstitutional and refused to comply with it?

Judge Gonzales. I believe that I stated in my June briefing about these memos that the President has not exercised that authority.

Senator Durbin. But you believe he has that authority? He could ignore a law passed by this Congress,

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signed by this President or another one, and decide that it is unconstitutional and refuse to comply with that law?

Judge Gonzales. Senator, again, you are asking me whether hypothetically does that authority exist, and I guess I would have to say that hypothetically that authority may exist. But let me also just say that we certainly understand and recognize the role of the courts in our system of Government. We have to deal with some very difficult issues, very, very complicated. Sometimes the answers are not so clear.

The President's position on this is that ultimately the judges, the courts will make the decision as to whether or not we've drawn the right balance here. And in certain circumstances, the courts have agreed with administration positions, and in certain circumstances, the courts have disagreed. And we will respect those decisions.

Senator Durbin. Fifty-two years ago, a President named Harry Truman decided to test that premise in Youngstown Steel and Tube v. Sawyer in the Supreme Court. The Supreme Court said, as you know, President Truman, you are wrong, you do not have the authority to decide what is constitutional, what laws you like and do not like.

I am troubled that you would think, as our incoming Attorney General, that a President can pick and choose the laws that he thinks are constitutional and ultimately wait

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for that test in court to decide whether or not he is going to comply with the law.

Judge Gonzales. Senator, you asked me whether or not it was theoretically possible that the Congress could pass a law that we would view as unconstitutional. My response was that obviously we would take that very, very seriously, look at that very carefully. But I suppose it is theoretically possible that that would happen.

Let me just add one final point. We in the executive branch, of course, understand that there are limits on Presidential power. We are very, very mindful of Justice O'Connor's statement in the Hamdi decision that a state of war is not a blank check for the President of the United States with respect to the rights of American citizens. I understand that and I agree with that.

Senator Durbin. Well, let me just say in conclusion, I am glad to hear that. I am troubled by the introduction. The hypothetical is one that you raised in the memo relative to torture as to whether the President had the authority as Commander-in-Chief to ignore the Geneva Conventions or certain other laws. This is not something that comes from our side of the table of our own creation. It is your creation, the hypothetical you created.

My concern is this: I do not believe that this Government should become a symbol for a departure from

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time-honored traditions where we have said that we will not engage in torture, directly or indirectly by rendition-- which I hope to ask you about in the next round--that we will stand by the same standards of Geneva Conventions since World War II and, frankly, dating back to Abraham Lincoln and the Civil War, in terms of the treatment of prisoners.

I am concerned that that round of memos that went through the Department of Justice, Mr. Bybee, into the Department of Defense, into Guantanamo, and then migrated somehow to interrogation techniques in Abu Ghraib has stained our world reputation. I want to win this war on terrorism, but I do not want to do it at the expense of our soldiers who may someday become prisoners themselves.

Thank you, Mr. Gonzales.

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Senator Coburn. I think that the questioning that Senator Graham had I think raises significant questions for us to learn from, especially in terms of the Code of Military Justice that has to be inculcated in decisions that go down the line. But I also want to ask just a couple of questions.

Are you aware of any war that this country has been involved in in its history in which mistakes of human beings have not been made and brought to light?

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Judge Gonzales. Well, as you well know, as I well know, human beings are not perfect. Mistakes happen. Abuses occur. We know that that's true in all conflicts. Abuses occur not just in connection with military operations; abuses occur here in our prisons. It is regrettable, and when we find out the abuses have occurred, we need to correct them and hold people accountable. But it is true that abuses occur and have occurred, as far as I know, in all military conflicts.

Senator Coburn. And is it, to your knowledge, a policy of this administration at any time to tolerate torture or inhumane behavior towards any of the detainees that we have?

Judge Gonzales. It is not the policy of the administration to tolerate torture or inhumane conduct toward any person that the United States is detaining.

Senator Coburn. And then, finally, I would ask as you look at the Geneva Convention in Iraq and the difference that we apply to that versus that against the Taliban and al Qaeda, was there a consideration for those who are not Iraqis in that combatant field? In other words, did the Geneva Convention necessarily apply to all combatants in Iraq whether or not they were Iraqi citizens or they were foreign mercenaries?

Judge Gonzales. That question was considered by the

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Department, and there was a fear about creating a sanctuary for terrorists if we were to say that if you come and fight against America in the conflict with Iraq that you would receive the protections of a prisoner of war. And I believe the Department--I know the Department issued, I believe some guidance, the Department of Justice issued some guidance with respect to whether or not non-Iraqis who came into Iraq as part of the insurgency, whether or not they would also or likewise enjoy the protections of the Geneva Convention. And I believe the conclusion was that they would not. But I would need to go back and confirm that, Senator.

AFTERNOON SESSION, round two.

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Senator Leahy. Judge, I am going to go back to the so-called Commander in Chief override. I listened to your answer to other Senators, and I checked the transcript, and frankly, you never answered my question. I still want to know whether you think the President can suspend the laws prohibiting torture and thus immunize torturers. I think there is a pretty simple answer. I think the answer is just no, the President cannot suspend such laws. Your

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response to me in the earlier round, your comments at your June 2004 press conference, show you disagree, that you presume such power does exist. Only the President has not exercised it yet. I think this is kind of fundamental. Your view of the scope of Executive power is something we need to understand. If you are going to be the chief law enforcement officer of this country, and if you have this view that there is some extraordinary executive power that allows the President to override the laws of the United States, especially something so fundamental, we should know because that sets in motion a whole lot of other things. We saw this in the Nuremberg trials, and I am not in any way equating our President with the leaders in Germany. What I am saying though is that you had people that said, well, we were just following orders. And if the President is able to set aside laws that have been set in place, those who do things that are wrong can just say, well, we were just following orders. But as the United States has always said, and every President has said, this is not a defense.

So I am going to ask you again, can the President immunize from prosecution those who commit torture under his order? I am not suggesting the President has made such orders, but can a President immunize from prosecution those who would commit torture under his order?

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Judge Gonzales. Senator, one thing that I failed to emphasize in the first round is of course if confirmed by the Senate, I will take an oath of office to defend the laws of this country.

Senator Leahy. We all do.

Judge Gonzales. and that means the laws passed by the Congress. So I was responding to a hypothetical question about whether or not is it theoretically possible that Congress could pass a law that a President would not follow because he believed it was unconstitutional, a position that is not unique to this President, but a position--

Senator Leahy. But I am not asking you a hypothetical question. I am asking about a particular law, the torture law. Can the President ignore that law, say it does not apply, and immunize people who then committed torture?

Judge Gonzales. I believe my earlier response, Senator, was that that is a hypothetical situation that is not going to happen. This President is not going to order torture. I will also say--

Senator Leahy. Could a President?

Judge Gonzales. Senator, this President is not going to order torture. We don't condone it. I will say with respect to the opinion, the August 1st opinion has been withdrawn. I reject that opinion. It has been rejected. It does not represent the views of the Executive Branch.

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It has been replaced by a new opinion that does not have that discussion. And so as far as I am concerned, it is not an issue in which the Executive Branch has taken a position on it. I am not prepared in this hearing to give you an answer to such an important question.

Senator Leahy. Let me say this. The order stayed in there, was there for a long time until the press got hold of it. Then there is a lot of scrambling around, and on the first three-day weekend prior to your confirmation, all of a sudden they come up, oh, wait a minute, we have a new order. I am not going to be cynical, but some might be. Let me take you another example. The President has claimed authority to lock up a U.S. citizen arrested in the United States and hold him incommunicado for an indefinite period, without access to a lawyer or a family, without real access to the courts. That is not hypothetical. The President has claimed that authority. Does the President have that authority?

Judge Gonzales. The Supreme Court in the Hamdi decision said yes, the President of the United States does have the authority--

Senator Leahy. Hamdi was the case where he was arrested on the battlefield in Afghanistan. What about a case here, an American citizen, in the United States?

Judge Gonzales. Senator, the Supreme Court has not

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addressed that decision straight on, but in Hamdi the Court did say that the United States could detain an American citizen here in this country for the duration of the hostilities without filing charges.

Senator Leahy. Do you think that here in the United States the President has authority to have a citizen arrested, a U.S. citizen, held incommunicado for an indefinite period, without access to a lawyer or family?

Judge Gonzales. Senator, the--

Senator Leahy. I asked you if the President has that. Now, in Hamdi of course they were talking about the AUMF, the authorization for the use of military force, the Congress had voted on for military force in Afghanistan. Hamdi was picked up in Afghanistan. We had a second case, Padilla. There the Court kind of punted it, they did not answer the question. They have said the jurisdiction was wrong, it was brought in the wrong court. It should have been brought habeas corpus in another court.

All I am asking, does the President, the President today have the authority to hold a U.S. citizen incommunicado for an indefinite period of time in the United States?

Judge Gonzales. Well, the President does have the authority under Hamdi. That is what the Court said, is you could hold an American citizen. Let me be very, very

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clear. The United States Government never took the position that a U.S. citizen detained by its Government could not challenge the detention by the Government.

Senator Leahy. But they are held incommunicado and have no access to a lawyer or a court. Is that not kind of saying, gosh, you could appeal it everywhere else. We are not going to let you out of the cell, we are not going to let you talk to anybody, we are not going to let you have the court. We just want you to know you got all your rights.

Judge Gonzales. Senator, respectfully, not only did Hamdi have access to the courts, he had such good access and such good representation by counsel that his case was heard all the way by the highest court in the land. So, the decision as to whether or not to provide access to counsel is probably one of the most difficult decisions that we have to confront because there are competing interests here. As a lawyer, I have a great deal of concerns about not providing lawyers to American citizens that are being detained by this country. On the other hand, there is a competing interest of gathering information that this American citizen, this enemy combatant, may have information that may save the lives of American citizens, and our position has been is that we provide counsel as quickly as possible that the American

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citizen--I'm sorry, Senator, I didn't mean to interrupt you.

Senator Leahy. No, no. I was just going to say we can go back there, and we will have to, because we are talking about a perfect world. If you do a dragnet, as we have found out, in some of these dragnets are people held for a long time, and say, whoops, we have got the wrong guy. We have--

Chairman Specter. Judge Gonzales, did you finish your last answer? Feel free if you want to.

Judge Gonzales. That's fine. Thank you, Senator.

Senator Leahy. Let us take the Bybee memo. It is a lengthy document, 50 single-spaced pages, relies upon a whole wide range of sources. I think somebody has already put it in the record. It references, for example, health care administrative law at least five times, and that is not the issues we are raising with you. But you know one thing it never does? It never cites this document, which you would think would be the best thing to do, the Army Field Manual on Intelligence Interrogation.

Now, the Army Field Manual on Intelligence Interrogation is something that holds all the experience of this Nation for 200 years, the things we have done right, the things we have done wrong, all the courts. Not once--I mean we are telling our people what to do. Not once does

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it mention this, and this is the manual that says U.S. policy expressly prohibits acts of violence or intimidation including physical or mental torture, threats, insults or exposure, inhumane treatment as a means to or aid interrogation. You think it is at all troubling that Bybee never references it? I mean if it had, if it incorporated this, we probably never would have had the issue raised.

Judge Gonzales. Senator, the work of OLC in connection with interpreting the anti-torture statute was an analysis of that domestic statute in Title 18. The fact that the opinion covers only conduct related to that statute doesn't mean that there might not be other legal prohibitions in which our military soldiers might be bound. OLC was looking only at an interpretation of that domestic statute, and the fact that there may be other laws or regulations that might be binding, of course, they would not be excused from following those other laws and regulations by virtue of the opinion, which again, was focused only in interpretation of a statute in Title 18.

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Senator Cornyn. Judge Gonzales, I know Senator Durbin has raised the issue of whether a President might try to uphold the Constitution by declining to enforce statutes that are unnecessary, and I found the notion fascinating from a legal standpoint, and so I asked staff to look at

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some of the OLC opinions during the Clinton administration during the lunch break, and here is what we found.

In 1994 the Office of Legal Counsel, during the Clinton administration, issued an opinion authored by Walter Dellinger, who is a well-known constitutional legal scholar, that said, "Let me start with a general proposition that I believe to be uncontroversial. There are circumstances in which the President may appropriately decline to enforce a statute that he views as unconstitutional," and of course Presidents of both parties famously reject the War Powers Resolution as unconstitutional. Moreover, in the Dickerson case the Clinton administration refused to defend a Federal statute against constitutional attack in the courts. The Supreme Court had to look to special counsel to offer a defense of that statute. It seems to me that this administration is being attacked for something that the Clinton administration did on a--if not a frequent basis, did at least more than once. Would you care to comment on that?

Judge Gonzales. As I said earlier, Senator, I think that we should look--the Executive Branch should always look very carefully with a great deal of seriousness and care about reaching a decision that a statute passed by Congress is somehow unconstitutional and should not be followed. Certainly if I were confirmed, I would take my

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oath very, very seriously to try to defend any act passed by Congress, but it does appear to me, based upon my review of history and precedent is that Presidents and White Houses on both sides of the aisle have taken the consistent position that a President may choose to not enforce the statute that the President believes is unconstitutional.

Senator Cornyn. I would like to shift subjects a little bit to return to something we have been talking about off and on all day, and that is the policy reasons behind the Geneva Convention decision, and I hope that I have been able to establish the position the administration takes and the position that you advocated for enjoys broad support in the legal community, and by scholars of international law, and we can go back to that again if some of my colleagues still disagree with me and the administration on that. But I can think of at least four reasons, four important reasons why the President's legal determination was correct, and this has to do again with giving terrorists, conferring upon them the status of prisoners of war as provided for under the Geneva Convention.

First of all, is it not true that the Geneva Convention gives prisoners of war rights and protections that could directly endanger their captors if given to combatants who do not respect the laws of war? And if you

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agree with that, could you please talk about some of them?

Judge Gonzales. If a determination were made that the Geneva Convention applied in our conflict with al Qaeda, we would have to provide certain things, certain access to certain items of comfort that could be used as weapons against our soldiers. Also we would be limited in our ability to put them in individual cells. They would have the right to congregate together and to talk, to talk about strategy and responding to interrogations, to perhaps talk about how to attack a guard, or perhaps talk about how to plan an escape. The additional problem with providing Geneva protections, prisoner of war protections to terrorists who do not abide by the laws of war, is that we would in essence provide combat immunity for their engaging in war crimes.

Senator Cornyn. If I can interrupt you briefly, is that not what John Walker Lindh tried to do, the "American Taliban" I believe he was known as? He claimed an immunity by virtue of his prisoner of war status against criminal prosecution for committing war crimes; is that right?

Judge Gonzales. That's my recollection.

Senator Cornyn. When I traveled to Guantanamo Bay about a year or so ago to see for myself the facilities and the conditions under which detainees were kept, I was interested to learn about certain techniques, here again,

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humane techniques, but techniques nonetheless for eliciting cooperation and intelligence from some of these detainees. For example, the providing of certain incentives, for example, what the food that was provided. I remember specifically one instance where detainees who cooperated a little more got to cook out on a grill, basically, or food cooked out on a grill as opposed to the institutional type food they got. They were permitted to move from individual cells into group settings where they could make more arrangements for their own comfort and convenience. Are those the sorts of things that we could do to elicit actionable intelligence if the Geneva Convention applied and these were conventional prisoners of war?

Judge Gonzales. Senator, if the Geneva Conventions applied, you would be prohibited from providing incentives in order to induce cooperation. I, like you, have been down to Guantanamo, and much of the operation of the bases at Guantanamo are to induce cooperation, and we would not be able to do that if the Geneva Conventions applied.

Senator Cornyn. And indeed, I think it has been recounted time and time again, one reason we do not use torture as a matter of policy, period, but one pragmatic reason why it does not work is because people will say things under those circumstances that do not provide good actionable intelligence. So I think one of the things I

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observed and was really fascinated to see in practice was the use of some of these essentially incentives that provided for greater cooperation, but gave us the results we needed, which in fact have saved American lives.

Let me ask you, why would extending the Geneva Convention to terrorists, why would that have a negative impact on international law? What would that do to any incentive that might exist on the part of our enemies to comply with the laws of war?

Judge Gonzales. Senator, it seems to me, it seems logical to me that you want to reward good behavior, and if you want members of al Qaeda to fight according to the laws of war, you don't do that by providing them prisoner of war legal protections.

Now, let me emphasize, and I can't emphasize this strongly enough, there are certain basic values that this country stands for and this President certainly believes in, and those values are reflected in the directives that he has issued regarding the treatment of al Qaeda detainees, and those who do not meet those standards are going to be held accountable. In addition, there are of course other legal restrictions. For example, the convention against torture, that would be applicable, Army regulations that would be applicable. All those exist to conscript the type of conduct that our military can engage

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in with respect to detainees. And so we want to of course meet basic standards of conduct with respect to treatment of al Qaeda, but information is very, very important, and if there are ways we can get that information, for example, through inducements, it seems to me that there is a responsibility of this government to exercise those needs.

Senator Cornyn. Finally, let me just say that that opinion that you just expressed finds you in pretty good company. I have in my hand a legal textbook called "The Legal Status of Prisoners of War" by Rosas, Alan Rosas, that says on page 344: The only effective sanction against perfidious attacks in civilian dress is a deprivation of prisoner of war status. And I take it you would agree with that conclusion?

Judge Gonzales. Yes, sir.

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Senator Kennedy. Now, Mr. Gonzales, let me, if I could, during my last round, there are sort of three general areas I want to try and cover in the time that I have. During my last round of questions, and the reason I come back to this is because, when you come right down to it, that Bybee memo, and the views expressed in that, certainly was policy. It was printed in the working group's report. It was reported by those over in Iraq. It has been referred to in the Armed Services Committee, in

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the Schlesinger report, as being the policy of the Department of Defense. And the change that memorandum gave, in terms of how we were going to treat detainees in there, I believe, runs roughshod or did run roughshod over the Geneva Conventions. But we have a dispute.

You indicated that this was served up by the Office of Legal Counsel, and it is the interpretation that Legal Counsel has provided for statutes that we have passed in 1994.

Judge Gonzales. Senator, if I may, of course, the August 1 memo has been withdrawn. I mean, in essence, it has been rejected. It does not represent the views of the Executive Branch. The views of the Executive Branch regarding the anti-torture statute are now reflected in the December 30th memo which, as we know, the deputy attorney general announced in June that this was going to happen. It was going to be withdrawn. The opinion would be revisited and issued by the end of the year, and it was issued before the end of the year at the request from a member of this Committee.

Senator Kennedy. Well, I think that is very good news in terms of the future. I think that is very good news. But over this period of time, there have been the most extraordinary abuses that have been reported by DIA and the FBI. And I think it is fine and well, and you say now all

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of that memoranda that was interpreted that way is no longer operative. But over a period of time, as has been referenced by others in the Committee, there is no question in my mind--I have listened to you answer the questions about what happened at Abu Ghraib--and there is no question that there were military personnel that bear responsibility, and there is no question there was a lack of training.

But the third part that you have not referenced in any of your answers is that there was also the working group report that effectively would have justified and approved those kinds of activities. Now, you may say that you differ with that. That was the document at DOD, and there is no reason to believe that the same kind of document was not given to the CIA. Was it given to the CIA--the Bybee memo?

Judge Gonzales. Sir, first of all, I am not sure what--was the memo given to the CIA? I suspect that it was given--it represented the Administrative Branch position, and so it would not surprise me, of course, that agencies involved in the war on terror--

Senator Kennedy. Who would have given it to the CIA?

Judge Gonzales. Sir--

Senator Kennedy. Was not this memoranda directed to you?

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Judge Gonzales. Sir, it was addressed to me.

Senator Kennedy. Was it not requested by you?

Judge Gonzales. Sir, I do not recall if it was requested by--

Senator Kennedy. We can--

Judge Gonzales. Let me just say, Senator, in practice, how this may work. An agency, of course, has its own in-house shop. An issue comes up, their lawyers get involved in providing legal advice. From time to time, the issues are so complicated or so complex it may cut across various agencies that the issue gets elevated up to the Office of Legal Counsel. And so it may well have been that the CIA or DOD asked OLC, as an initial matter, for their views on this, and then, for whatever reason, the memo was addressed to me.

I accept responsibility that the memo is addressed to me.

Senator Kennedy. Well, do you accept responsibility that you requested it?

Judge Gonzales. Sir--

Senator Kennedy. Is this such a difficult--

Chairman Specter. Let him answer the question, Senator Kennedy.

Judge Gonzales. I don't recall specifically whether or not I requested this memo or whether or not the initial

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request came from the CIA or the CIA came to me. I don't recall, Senator.

Senator Kennedy. You do not have notes about these various meetings? You do not jot these down, so you would not be able to know whether this happened? You would have no notes, no information, no memoranda that would indicate? On an issue of this kind of importance and consequence, at the time that this country was at war on this and where there is enormous pressure, as we understand now, to gain information and intelligence from this, you would not be able, even today, to be able to respond to the question about how this was initiated, particularly when it is against the background where OLC indicates that it came from you and from the news reports? This is not enormously complicated--I want to get into some other kinds of things--the fact that you basically initiated.

Judge Gonzales. Senator--

Senator Kennedy. Your answer is you cannot remember.

Judge Gonzales. Senator, I certainly don't want to be argumentative with you. I really do not remember. It seems to me what is important here is that we realize, there was a recognition within the agencies, and I believe within the White House, that this was an important issue and that the Department of Justice should play its traditional role of providing legal advice about the

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parameters of this statute.

Senator Kennedy. I just want to point out, if it is true, as the Post reported, that you held several meetings at which the legality of interrogation techniques, such as threat of live burial and water-boarding were discussed; do you remember that?

Judge Gonzales. Senator, I have a recollection that we had some discussions in my office, but let me be very clear with the Committee. It is not my job to decide which type of methods of obtaining information from terrorists would be most effective. That job responsibility falls to folks within the agencies. It is also not my job to make the ultimate decision about whether or not those methods would, in fact, meet the requirements of the anti-torture statute. That would be a job for the Department of Justice. And I never influenced or pressured the Department to bless any of these techniques. I viewed it as their responsibility to make the decision as to whether or not a procedure or method of questioning of these terrorists that an agency wanted, would it, in fact, be lawful.

Senator Kennedy. Well, just as an attorney, as a human being, I would have thought that if there were recommendations that were so blatantly and flagrantly over the line, in terms of torture, that you might have

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recognized them. I mean, it certainly appears to me that water-boarding, with all its descriptions about drowning someone to that kind of a point, would come awfully close to getting over the border and that you would be able to at least say today there were some that were recommended or suggested on that, but I certainly would not have had a part of that as a human being.

Judge Gonzales. Well--

Senator Kennedy. But as I understand, you say now that no matter what they recommended or what they discussed, there was not going to be anything in there that was going to be too bad or too outrageous for you to at least raise some objection.

Judge Gonzales. Senator, of course, we had some discussions about it. And I can't tell you today whether or not I said, "That's offensive. That's not offensive." But it seems to me it's the job of the lawyers to make a determination as to whether or not something is lawful or not and then for the policymakers, the principals, to decide whether or not this is a method of receiving information from terrorists is something that we want to pursue, that the lawyers have deemed lawful, under the directive of a President, who says that we should do everything that we can to win this war on terror, so long as we are meeting our legal obligations.

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Senator Kennedy. Earlier today, you know, this is all against a background, as you know, Mr. Gonzales, of a series of statutes on torture that the Congress has passed in recent times. This is not a new issue. We had the Federal Antitorture Statute in 1994 that both President Reagan and President Bush, unanimous Committee, the Federal War Crimes Act of 1996, the Uniform Code of Military Justice goes back to 1950, the Convention Against Torture ratified by Congress, one was domestic, the other international. The International Covenant on Civil and Political Rights, in 1992, provides "no one shall be subject to torture or cruel, inhumane, degrading treatment or punishment." And then last year Congress reaffirmed, virtually unanimously, that the Nation's commitment not to engage in torture, cruel, inhumane and degrading.

So this is a subject matter that Republicans and Democrats have spoken out very clearly, and many of us find, and perhaps you do--certainly, you do at the present time--that the Bybee memo certainly was in conflict with those particular statutes.

But let me ask you this: In these reports on Guantanamo--

. . . . What I would be interested, just quickly, should you be confirmed, what you are going to do with regards to the FBI. They have been involved in many of

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these reports that they have been involved. It would be interesting if you could tell the Committee what you are going to do, confirm, about the involvement of the FBI in this. And I was going to ask, just the two, if the fact that this memo has been repealed, whether that information now has been communicated to the CIA and the CIA has accepted it and DOD, if they are all together. But if you could just let me know--

Judge Gonzales. Senator, my presumption is--
... --my presumption is it has been communicated to the agencies. I have not, myself, communicated the new position, but again it does represent administrative policy.

And with respect to FBI involvement, the recent reports about these FBI e-mails about abuses in Guantanamo, quite frankly, surprised and shocked me because it is certainly inconsistent with what I have seen. I have traveled down there. And it is certainly inconsistent with other reports I have seen with respect to investigations about activities in Guantanamo.

I would like to sit down with the folks at the FBI and other folks within the Department of Justice to make sure that the facts are accurate because I know one very important fact in these stories, the FBI--much was made of the fact about an FBI agent referring to an Executive Order

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by the President authorizing certain techniques. That is just--that is just plain false. That never occurred. And so if something like that is wrong in these e-mails, there may be other facts that are wrong in the e-mails. And what I am suggesting is I just need to, if confirmed, I need to have the opportunity to go into the Department and the FBI and just try to ascertain the facts.

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Senator Feingold.

Let me switch to a subject that has come up a lot here today. In the August 2002 memorandum, the Justice Department concludes that the President, as Commander-in-Chief, may authorize interrogations that violate the criminal laws prohibiting torture and that the Congress may not constitutionally outlaw such activity when it is authorized by the President. This is the claim, essentially, that the President is above the law so long as he is acting in the interest of national security.

A December 30 rewrite of the August memorandum does not repudiate this view. It simply says the issue is irrelevant because the President has prohibited torture.

Today, in response to questions on this subject, you have been unwilling to repudiate this legal theory. You have danced around the question a bit. But as I understand your answers so far, you have said there may be a situation

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where the President would believe a statute is unconstitutional and would therefore refuse to comply with it, but would abide by a court's decision on its constitutionality. You, also, I am told, said that many Presidents have asserted the power not to enforce a statute that they believe is unconstitutional. But there is a difference between a President deciding not to enforce a statute which he thinks is unconstitutional and a President claiming to authorize individuals to break the law by torturing individuals or taking other illegal actions.

So what I want to do is press you on that because I think perhaps you have misunderstood the question, and it is an important one. It goes to a very basic principle of the country that no one, not even the President of the United States, is above the law. Of course, the President is entitled to assert that an act of Congress is unconstitutional.

This President did so, for example, with respect to some portions of our McCain-Feingold bill when he signed it, but his Justice Department defended the law in court, as it is bound to do with every law duly enacted by the Congress. And his campaign and his party complied with the law while a court challenge was pending. No one asserted that the President had the power to ignore a law that he thought was unconstitutional.

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The question here is what is your view regarding the President's constitutional authority to authorize violations of the criminal law, duly enacted statutes that may have been on the books for many years when acting as Commander-in-Chief? Does he have such authority? The question you have been asked is not about a hypothetical statute in the future that the President might think is unconstitutional. It is about our laws in international treaty obligations concerning torture. The torture memo answered that question in the affirmative, and my colleagues and I would like your answer on that today.

. . . .

Judge Gonzales. Senator, the August 30th memo has been withdrawn. It has been rejected, including that section regarding the Commander-in-Chief's authority to ignore the criminal statutes. So it has been rejected by the Executive Branch. I, categorically, reject it. And, in addition to that, as I have said repeatedly today, this administration does not engage in torture and will not condone torture. And so what we are really discussing is a hypothetical situation that--

Senator Feingold. Judge Gonzales, I have asked a broader question. I am asking whether, in general, the President has a constitutional authority, does he, at least in theory, have the authority to authorize violations of

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the criminal law when there are duly enacted statutes simply because he is Commander-in-Chief? Does he have that power?

Judge Gonzales. Senator, in my judgment, you have phrased sort of a hypothetical situation. I would have to know what is the national interest that the President may have to consider. What I am saying is it is impossible to me, based upon the questions you have presented to me, to answer that question. I can say that there is a presumption of constitutionality with respect to any statute passed by Congress. I will take an oath to defend the statutes. And to the extent that there is a decision made to ignore a statute, I consider that a very significant decision and one that I would personally be involved with, I commit to you on that, and one I will take with a great deal of care and seriousness.

Senator Feingold. Well, that sounds to me like the President still remains above the law.

Judge Gonzales. No, sir.

Senator Feingold. If this is something where you take a good look at it, you give a presumption that the President ought to follow the law, you know, to me that is not good enough under our system of Government.

Judge Gonzales. Senator, if I might respond to that, the President is not above the law. Of course, he is not

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above the law. But he has an obligation, too. He takes an oath as well. And if Congress passes a law that is unconstitutional, there is a practice and a tradition recognized by Presidents of both parties that he may elect to decide not to enforce that law. Now, I think that that would be--

Senator Feingold. I recognize that and I tried to make that distinction, Judge, between electing not to enforce as opposed to affirmatively telling people they can do certain things in contravention of the law.

Judge Gonzales. Senator, this President is not--it's not the policy or the agenda of this President to authorize actions that would be in contravention of our criminal statutes.

Senator Feingold. Finally, will you commit to notify Congress if the President makes this type of decision and not wait 2 years until a memo is leaked about it?

Judge Gonzales. I will commit to advise the Congress as soon as I reasonably can, yes, sir.

Senator Feingold. Well, I hope that would be a very brief period of time, and I thank you again, Judge Gonzales.

. . . .

Senator Schumer. Let me ask you another question, and that is this: We have had a lot of talk about the Geneva

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Convention and what has happened in the past. I want to ask you a prospective question about the Geneva Convention. Do you think that we should seek revisions of the Geneva Convention in the future? I do not know if that is right or wrong, but do you think we should? Have there been any discussions in your office as Counsel or in the White House or in the administration as to whether we should seek those revisions? And if there is a determination that we should seek certain revisions--and I do not know what they would be; they might be reasonable--should Congress be include in that discussion?

Judge Gonzales. Thank you, Senator, for that question. I think it's a very good question because we are fighting a new type of enemy and a new type of war.

Senator Schumer. Sure.

Judge Gonzales. Geneva was ratified in 1949, Geneva Conventions, and I think it is appropriate to revisit whether or not Geneva should be revisited.

Now, I'm not suggesting that the principles of Geneva regarding basic treatment, basic decent treatment of human beings, should be revisited. That should always be our polestar. That should always be the basis on which we look at this. But I am aware--there has been some very preliminary discussion as to whether is this something that we ought to look at. I'm also aware that certain

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academicians and international law scholars have written on this subject as to whether or not should we revisit Geneva and asked whether or not the Senate should play a role or the Congress should play a role. Obviously, if you're talking about modifications of Geneva or a new treaty, the Senate would play a very important role in the ratification process.

Senator Schumer. I understand that, but what I am saying is if the new administration were to begin internal discussions on whether Geneva should be modified and in what way, would they include the Senate in those discussions rather than saying here is what we recommend? You know, I mean, obviously this needs to be negotiated in a multilateral way. But would you include us in those--or would you recommend to the President that we be included in those discussions?

Judge Gonzales. Before answering a question, I want to emphasize, when I indicate that there's been some discussion within the White House or the administration, it's not been a systematic project or effort to look at this question, but some--I know certainly with the people that I deal with, the lawyers have questioned maybe this is something that ought to be looked at. So I do not want to leave the impression--

Senator Schumer. I do not hold any brief against

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that. Obviously, you can re-examine these things.

Judge Gonzales. And it seems to me that it's probably always better to consult with the Senate since the Senate is going to have a role in the ratification process. I think consultation is usually better than not consulting.

Senator Schumer. Okay. And there is no proposal you know that is being formulated right now, is there?

Judge Gonzales. Not that I'm aware of, Senator.

.....

Senator Durbin. Thank you. My gifted legal staff listened closely to your answers to my questions and believe you gave a very carefully worded lawyer answer to a question, which I missed. And so for the record, I want to make certain that I understand your position again on this torture issue. Can U.S. personnel legally engage in torture under any circumstances?

Judge Gonzales. I'm sorry. Can U.S. military personnel--

Senator Durbin. U.S. personnel. Of course, that would include military as well as intelligence personnel, or other who are under the auspices of our Government.

Judge Gonzales. Senator, there are obligations under the treaty against torture and there are obligations under the anti-torture statute. There are obligations, legal obligations in the UCMJ. And so I suppose without--I don't

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believe so, but I'd want to get back to you on that and make sure that I don't provide a misleading answer. But I think the answer to that is no, that there are a number of laws that would prohibit that.

Senator Durbin. I would like if you would give me a definitive answer.

Judge Gonzales. Yes, sir.

Senator Durbin. And then the follow-up question which they tell me I did not ask was whether or not it is legally permissible for U.S. personnel to engage in cruel, inhuman, or degrading treatment that does not rise to the level of torture.

Judge Gonzales. Senator, our obligations under the Convention Against Torture with respect to cruel, inhumane, and degrading conduct, as you know, is under Article 16, I believe. As Counsel to the President--

. . . . As Counsel to the President, my job was to ensure that all authorized techniques were presented to the Department of Justice, to the lawyers, to verify that they met all legal obligations, and I have been told that that is the case.

As you know, when the Senate ratified the Convention Against Torture, it took a reservation and said that our requirements under Article 16 were equal to our requirements under the Fifth, Eighth, and 14th Amendment.

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As you also know, it has been a long-time position of the executive branch and a position that has been recognized and reaffirmed by the Supreme Court of the United States that aliens interrogated by the U.S. outside the United States enjoy no substantive rights under the Fifth, Eighth, and 14th Amendment. So as a legal matter, we are in compliance. But let me just emphasize, we also believe that we are in--we want to be in compliance as a substantive matter under the Fifth, Eighth, and 14th Amendment. I know Jim Haynes wrote a letter to Senator Leahy about whether or not we were meeting our obligations, and the response certainly would lead one to conclude that what we were saying was that we were meeting our substantive obligations under the Fifth, Eighth, and 14th Amendment. And no one has told me otherwise. My understanding is that we are meeting our obligations under Article 16.

Senator Durbin. It is your belief that we are legally bound to do that; is that correct?

Judge Gonzales. Well, subject to the reservations taken by the Senate in ratifying the treaty--

Senator Durbin. Just by definition, which definitions we use.

Judge Gonzales. We are meeting our legal obligations, yes, sir.

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Senator Durbin. And so this morning we read in the paper about rendition, an argument made that we took a prisoner whom we could not, should not torture legally, and turned him over to a country that would torture him. That would be illegal as well, would it not?

Judge Gonzales. Under my understanding of the law, yes, sir, that we have an obligation not to render someone to a country that we believe is going to torture them. That is correct.

. . . .

you articulate in a few words your position about the Senator Graham. The working group that was formed in the Pentagon, as I understand it, occurred in the January time frame of 2003, and one of the documents the working group was working off of was the now infamous August DOJ memo. And I asked you a question before about whether or not you believe that the techniques in the August memo being espoused, whether or not that would put some of our troops at risk for court martial. And I do not expect you to answer that off the cuff, but there was a series of JAG memos as part of this working group that suggested that might be the case.

Have you ever seen those memos?

Judge Gonzales. I don't recall. I don't believe so, sir. Let me just say that I don't believe it's the case

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that our office had anything to do with the work of the working group. I might also say that with respect to your question, the work of the Department of Justice in reviewing--or in that August 1 opinion was related to a review of the anti-torture statute, a particular statute. I don't believe--I mean, if there were other provisions, other restrictions upon people in the military, the fact that the Department has given guidance about the scopes of the anti-torture statute doesn't mean that somehow other binding regulations wouldn't apply. And so it is possible that you could engage in conduct that would satisfy that statute, according to the memo, but be inconsistent with other obligations that would remain binding upon members in our military.

Senator Graham. I think that is probably what happened, and I am try to learn from this process because you have one Department of the Government suggesting techniques that I think run afoul of the way the military is organized. And what I am trying to get us to look at is to make sure we don't go down that road again. And if you didn't see the memos, that to me is a bit disturbing because you are sort of out of the loop. And I think I better understand your role in this. You are trying to collect information. The working group is trying to implement policy.

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Judge Gonzales. If I could just interrupt you, Senator, you said something--if I've said--if I've given the impression that the Department of Justice was suggesting techniques, they never were. What was happening is the Department of Defense, I believe, was suggesting the use of certain methods of obtaining information from the terrorists, and that was presented to the Department of Justice, and the Department then gave its opinion as to whether or not such methods were, in fact, lawful.

Senator Graham. Well, what actually happened, as I understand it, is that the Department of Justice memo in August talks about the torture statutes in ways that I think you and I--I think you have said that you disagree with that original legal reasoning. I can assure you that I do, and it got us into a situation of where we are getting our troops potentially in trouble. And that memo launched a thought process in the Department of Defense that divided the Department. And I think you need to know this and go back and study how this happened because there were 35 techniques suggested, I believe is the number. And when the judge advocates were finally consulted, they looked at the underlying memo from the Department of Justice and said, Whoa, if you go down this road and you look at this definition of what it takes to commit an assault and, you know, the pain level involved, that is

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totally inconsistent with how we are going to govern our troops when it comes time to regulate detainees because there is a specific article in the Uniform Code of Military Justice that makes it a crime to assault a detainee.

And here is the good news. After Secretary Rumsfeld understood that there was a debate within the Department between civilian lawyers and military lawyers, he stopped and required a re-evaluation in April of 2004. The techniques were changed.

The only reason I bring this out is that it illustrates to me, Judge, that when you try to cut corners, it always catches up with you. And I think it has caught up with us. And what I am looking for you to hopefully do is bring us back on the right road. And the new memo coming out of the Department of Justice to me is a step in the right direction.

Do you believe that was a necessary thing to have done?

Judge Gonzales. Sir, first of all, let me--your characterization that we're cutting corners, I believe we have good people at the Department of Justice who did the very best they could interpreting, in my judgment, a difficult statute. So I think they did the very best they could.

Senator Graham. Well, that is where me and you

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disagree. I think they did a lousy job.

Judge Gonzales. That opinion and the analysis has now been withdrawn. It is rejected. It is no longer the position of the executive branch.

.....

Senator Graham. Now to Gitmo. I am very encouraged by the efforts to fill this legal vacuum because once the Supreme Court decided that Gitmo was not Mars and it was part of the American legal system as far as habeas corpus relief, you are confident that this working group now headed by the Navy is going to come up with some due process standards that will meet international scrutiny?

Judge Gonzales. Well, I am not sure it will meet international scrutiny, Senator. What I can say is based upon what I've been told by the lawyers at the Department, what is in place now at Guantanamo should meet our legal obligations as described in the recent Supreme Court cases.

Senator Graham. And maybe the word "international scrutiny" was a bad word, trying to say that there is a French standard that I am trying to adhere to, and that is not it. The point is that the world is watching.

Judge Gonzales. Senator, if I might just comment on that, because I want to emphasize to the Committee how important I think treaties like Geneva are for America, because they do represent our values. And in many way and

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at many times they have protected our troops. And it is true that part of winning the war on terror is winning the hearts and minds of certain communities. And to the extent there is a perception--and I think it's a *wrong perception*, but there's a perception out there that as a matter of policy the United States is ignoring its legal obligations, I think it makes it more difficult to win the hearts and minds of certain communities and, therefore, more difficult to win the war on terror.

Senator Graham. That is encouraging to me, that thought process, but it is not enough, I am afraid, to talk about it unless there are deeds to follow. So what I would suggest--and this is one junior Senator suggesting--is that we do have an international image problem, partly unfair, partly of our own making, that it would serve us well to maybe get Congress involved, maybe not through legislation but to try to form some working environment where we can have input, you can tell us what you think, we can tell you what we think, and the world can see that our country is on the road to correction. I would encourage you to include us where you think we can be fairly included to make sure that what comes out as the new policy at Gitmo is something that kind of achieves the best of who we are and still aggressively fights the war on terror.

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Senator Kennedy. Mr. Gonzales, on March 19th, the Office of Legal Counsel provided you with a memorandum to allow the CIA to relocate certain prisoners from Iraq for the purpose of "facilitating interrogation." The memo interprets Article 49 of the Fourth Geneva Convention which prohibits the forcible transfer or deportations of protected persons from occupied countries like Iraq, and violations of Article 49 are considered to be grave breaches of the Convention and thereby constitute war crimes under our Federal law.

The cover letter from OLC states that the legal opinion was requested by Judge Gonzales. In the newspaper--I do not know whether it was the Times or the Globe or Post--one of them reported that one intelligence official familiar with the operation said the CIA had used the March draft memo as legal support for secretly transporting as many as a dozen detainees out of Iraq in the last 6 months. The agency has concealed the detainees from the International Committee of the Red Cross and other authorities, the official said. In other words, this memoranda is being used to justify the secret movement and interrogation of ghost detainees.

In his report on the prisoner abuse at Abu Ghraib, General Taguba--and as I mentioned, the members of the Armed Services Committee listened to General Taguba testify

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on this very subject matter--criticized the CIA practice of maintaining ghost detainees as deceptive--this is General Taguba--saying that the policy of the CIA maintaining ghost detainees in Iraq is deceptive and contrary to army doctrine and in violation of international law.

Do you agree or disagree with General Taguba's view of the practice?

Judge Gonzales. Senator, I have not reviewed this opinion in quite some time. I believe based on--I believe that we are honoring our legal obligations with respect to these detainees. There was a concern that by the application of Geneva that terrorists would come into Iraq and we would create a safe haven for them, and that's why the opinion was solicited, so that we would not create such a safe haven for al Qaeda, who are not entitled to prisoner of war legal protections. But in terms of the actual facts or specifics of what is actually being done, I don't have any knowledge about what the CIA or DOD is doing. And I am presuming--again, I don't have any knowledge--that they have solicited legal advice as to what constitutes--what would constitute a violation of our legal obligations.

Senator Kennedy. Well, the memo applies to protected persons, as I understand it. As I understand, it was the CIA that actually requested you to request the memoranda, and I think any logical conclusion one would draw is in

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order to protect their agents from being prosecuted. At least that would certainly be my conclusion.

Now, this is what the memoranda from the Office of Legal Counsel interprets Article 49 of the Geneva Convention. The Geneva Convention states, "Individual or mass forcible transfers as well as deportations of protected persons from occupied territory to the territory of the occupying power or to that of any other country, occupied or not, are prohibited, regardless of their motive." And in spite of the clear and unequivocal language of the provision, the OLC concluded that Article 49 does not, in fact, prohibit the temporary removal from Iraq of protected persons who have not been accused of a crime to reason that both the words "deportations" and "transfers" imply a permanent uprooting from one's home, and that because a different provision in the Fourth Geneva Convention prohibits the relocation of persons accused of crime, it follows that persons who aren't accused of crime may be temporarily relocated for interrogation.

Do you believe that this legal advice is sound?

Judge Gonzales. Senator, I really would like the opportunity to re-review this memo. My recollection is that this was a genuine concern, that we had members of al-Qaeda intent on killing Americans flooding into, coming into Iraq, and the question was legitimately raised in my

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judgment as to whether or not--what were the legal limits about how to deal with these terrorists. And I believe-- certainly that opinion represents the position of the executive branch.

Senator Kennedy. Well, do you know why the request came from the Agency? Why did the request come from the CIA? Do you know why they requested this? Did they explain why they wanted it? And do you remember what the CIA actually asked for?

Judge Gonzales. I do not, sir.

Senator Kennedy. The language--and I will move on-- from the OLC clearly contradicts the plain language of the Convention. And there are many that conclude that this was in order to allow the CIA to engage in the unlawful practice.

Did you form any opinion about the whole policy of ghost detainees, the fact that the CIA was moving individuals, ghost detainees around to different prisons in different parts of the world in terms of interrogating them, as was found and mentioned in the Taguba report and in the Red Cross reports? Have you drawn any personal conclusions yourself as to whether this was sound policy or whether it contradicted the Geneva Conventions?

Judge Gonzales. Quite candidly, Senator, my objective as the Counsel to the President would be to try to ensure

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that questions were being asked as to whether or not what kind of conduct someone felt was appropriate or necessary was, in fact, lawful. And I don't think I would have considered it my role necessarily to second-guess whether or not that represented a good policy judgment.

Senator Kennedy. Well, it does appear to some that the CIA is looking out and asking, you know, for the legal authority to do whatever they want to do and be protected from war crimes and other kinds of prosecutions and protections by the Commander-in-Chief provisions. That certainly has been a conclusion that has been drawn by many authorities, and it certainly would appear that way to many.

Judge Gonzales. Sir, if I may, that is the reason why we categorically rejected it, that analysis, when the existence of the memo became public, because we were concerned that someone might assume that, in fact, the President was exercising that authority. That has never been the case, and we have said that there has been no action taken in reliance upon that authority.

Senator Kennedy. Well, you know, we hear now about the recent decision and judgment that was made recently in terms of the Bybee memo. But I asked you at the end what you have done about this since it is so offensive. Clearly you have to feel that given the fact the administration

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does that it is not longer operative. And I was interested, since it wasn't, what was done with the Agency and what was done with DOD. And then I asked just at the end what you were going to do with the FBI should you be appointed, and you indicated that with the FBI you are going to consult, find out the facts, and take action.

But I am just wondering what you have done to implement the more recent decision to say that this Bybee memo is no longer operative since it continues to be a part of the working document that has been made available to DOD.

Judge Gonzales. Sir, as far as I'm concerned, the December 30th opinion from the Office of Legal Counsel represents the executive branch position with respect to the interpretation of the anti-torture statute. The August 1 OLC memo has been withdrawn. It has been rejected and does not represent the position of the executive branch.

Senator Kennedy. That is your position now, but when you first saw it and for a 2-year period when it was in effect, you did not object to it, as I understand.

Judge Gonzales. Sir, there was, of course, as with many decisions, tough legal decisions, discussions between the Department of Justice and the Counsel's Office. Ultimately, as I've said repeatedly during this hearing, it is the responsibility of the Department of Justice to make

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the final call. Ultimately, it is their decision as to what the law requires. And it was accepted by us as the binding interpretation of that statute.

Senator Kennedy. If I could come back to the unprecedented expansion of executive power contained in the Bybee memo, which you seem to have adopted at the time it was issued, so we are clear, the Bybee memo concluded that the law of the land cannot prevent the President from carrying out his Commander-in-Chief authority in any way he sees fit, even if the directives and actions violate clearly established law.

Judge Gonzales. Senator, that old opinion, as I've said, has been withdrawn. That analysis has been rejected, and I consider it rejected.

Senator Kennedy. But at the time when you first saw it, it still was put into--it was effectively the law of the administration's position for some 2 years.

Judge Gonzales. Well, that certainly reflected the position of the Office of Legal Counsel, but, again, let me re-emphasize that that authority was never exercised. As far as I know, the President was never advised of that authority. And so no actions were taken in reliance upon that authority.

Senator Kennedy. That has been repealed. He hasn't exercised it. Your view whether it is legitimate, whether

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it is a legitimate statement of fact.

Judge Gonzales. Sir, respectfully, it doesn't represent the position of the executive branch.

Senator Kennedy. I understand that, but it did for a period of time, and I was just interested in what your view on that is as a legal issue. It has important implications in the separation of powers. It has very important implications on it. We are entitled to understand your view about the separation of powers. This has very important implications on it, and that is why I am asking the question.

Judge Gonzales. Sir, and I appreciate that, Senator, thank you. Whether or not the President has the authority in that circumstance to authorize conduct in violation of a criminal statute is a very, very difficult question, as far as I'm concerned. And I think that any decision relating to this line of reasoning would be one that I would take with a great deal of seriousness, because there is a presumption that the statutes are, in fact, constitutional and should be abided by. And this President does not have a policy or an agenda to execute the war on terror in violation of our criminal statutes.

Senator Kennedy. Let me move on. The Bybee memoranda made up out of whole cloth a necessity defense for torture. It argued that such a defense is viable because Congress

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did not make a determination on values vis-a-vis torture. However, the Congress categorically banned the torture when it enacted the statute in 1994. The Convention Against Torture, which the U.S. ratified in 1994, specifically states that no exceptional circumstances whatsoever, whether a state of war or threat of war, internal political instability, or any other public emergency may be invoked as a justification of torture.

What did you think when you read the memoranda's section on the necessity provision? Did you realize right away that this was bad law and bad guidance for our military and intelligence?

Judge Gonzales. Sir, I don't recall today my reaction to the line-by-line analysis in that opinion. What I did realize, being a former judge, trying to interpret a statute that may not be as clear as one would normally want to see on an issue this important, was that that was an arguable interpretation of the law. They were relying upon the definition of severe physical pain in other statutes passed by the Congress. And I'm sure we had discussions about it, and ultimately it was accepted because that was the ultimate decision and position of the Office of Legal Counsel.

Senator Kennedy. Well, just to reach the conclusion that torture must involve the kind of pain experienced with

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death or organ failure, the Bybee memo relied on unrelated Federal statutes that define emergency medical conditions for purposes of avoiding health benefits, Medicaid statute. I have gone through it. I am not going to take the time on this. But that is how far they went.

As the revised OLC memo on December 30th--

. . . .

Senator Kennedy. As I mentioned on reaching the torture, the OLC used actually the Medicaid standard on health benefits, which is completely unrelated to the whole questions on torture. Now, as the revised OLC memo of December 30th explains, the statutes relied on by the Bybee memo do not define severe pain even in that very different context, and so they do not state that death or organ failure or impairment of bodily function caused severe pain. Clearly, the reasoning was unsound, and I guess what we conclude at this time, I would have thought it would be fairly obvious to you that someone can suffer severe physical pain without being in danger of organ failure.

When I hear this kind of activity, I always remember meeting President Duarte of El Salvador, and when he was in prison, what they did is cut off a joint every week of his fingers. When he shook hands with you, he had four parts of fingers that were left on that part. But every week they used to tell him--they would leave it unattended. It

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got infected and caused him enormous kinds of health hazards on these parts. But I am always mindful about what I have seen with some individuals, as one, like others in this Committee, Republicans, who care about human rights and the excesses that have taken place.

The question that I have is: Wasn't it obvious to you that someone can suffer severe physical pain without being in danger of organ failure? Wouldn't the removal of fingers, for example, fall outside the definition of torture and why we wouldn't have expected that you wouldn't have raised some kind of objection to it?

Judge Gonzales. Senator, if I may answer your question, I don't recall reading that analysis to conclude that it would have to be that kind of pain in order to constitute torture. Obviously, things like cutting off fingers, to me that sounds like torture.

Let me just remind you, Senator, that the Office of Legal Counsel was trying to interpret a statute written by the Congress. The Foreign Relations Committee, in making recommendations to the Congress regarding ratification of the Convention Against Torture, described torture as the top of the pyramid in terms of inflicting pain upon a human being. It described it, the Committee described torture as extreme cruel, extreme inhumane, extreme degrading conduct. This is what the Congress said. And I think the people at

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the Office of Legal Counsel were simply doing their best to interpret a statute drafted by Congress.

. . . .

Senator Leahy. One, I was glad to hear you say--and correct me if I misunderstood you--to Senator Durbin that it is wrong if a U.S. personnel turns somebody over to another country knowing they are going to be tortured. Did I understand you correctly on that?

Judge Gonzales. I believe that is a law. That's certainly U.S. policy.

Senator Leahy. And so they would be prosecuted, people who did that.

Judge Gonzales. Yes.

Senator Leahy. Now, President Bush signed a memorandum on February 7, 2002, which went through you, in which he directed U.S. armed forces to treat al Qaeda and Taliban prisoners humanely. You have said publicly this was the only formal written directive from the President regarding treatment of detainees. Is it your testimony the President has issued no other directive regarding the treatment of detainees? It is not a trick question. I want to make sure you understand it very clearly because you are under oath. My question is meant to include a directive in any form, to any government personnel, regarding any category of detainee from any theater of

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operations, regarding any aspect of detainee treatment, including interrogation.

Judge Gonzales. Senator, I don't have any firsthand knowledge about the President giving directions regarding, say, specific techniques. That was not--in my judgment, in the Schlesinger report, he concluded it would be sort of out of the question to expect the President would be involved in making individual determinations--

Senator Leahy. I am just going by your statement publicly that this was the only formal written directive from the President regarding treatment of detainees. Do you have any firsthand or secondhand knowledge of any other directive?

Judge Gonzales. Sir, other than the directive by the President that we're not going to engage in torture and that we're going to abide by our legal obligations, I'm not aware of any other directive by the President. accusations that that is happening to the Department.

Senator Leahy. . . . The reason I used that example is like Abu Ghraib in a sense that the administration knew about this torture. They have been asked questions by me, by Republican Senators and others that they refuse to answer about the torture before it became public. Nobody said, oh, my gosh, this is horrible. We're all against torture or anything else. When the pictures started

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appearing on the front page of the newspapers or on television, then everybody scrambles around and takes memos and policies that have been in place for some time, and they start changing it. We have talked about the memo on torture that was changed at the beginning of a three-day weekend just before New Year's, coincidentally, just before your coming here to testify. . . .

Here is a softball for you. When he announced your nomination, the President noted that your sharp intellect and sound judgment have helped shape our policies on the war on terror. Looking back on that, were any mistakes made, and were they corrected?

Judge Gonzales. Any mistakes made in the war on terror?

Senator Leahy. Involving you, and were they corrected?

Judge Gonzales. Involving me, Senator, I will be the first to admit I am not perfect, and I make mistakes.

Senator Leahy. Glory, hallelujah, you are the first one in the administration who has said that.

Judge Gonzales. Hopefully, I learned from those mistakes. I think I have learned during these past four years Washington is a different type of environment than the one I am used to. And could I have done things better? Yes. And hopefully I have grown and I have learned. I

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think if confirmed it will make me a more effective Attorney General for the people of this country.

. . . .

Senator Cornyn. . . . I know Senator Kennedy was asking about the memo, I believe it was a draft of March 19th, 2004. This was the memo that was I guess leaked regarding permissibility of relocating certain protected persons from occupied Iraq. It was leaked, was it not?

Judge Gonzales. I believe that's correct.

Senator Cornyn. I will just go back to what I said earlier about very few secrets in Washington, D.C., and I guess this helps to--is further evidence of that. But let me just ask. I see this is a draft memo; is that right?

Judge Gonzales. I believe that is correct.

Senator Cornyn. So it was not a final determination or a final statement of policy or a final legal conclusion, was it?

Judge Gonzales. The draft is a draft.

Senator Cornyn. I also see that the last footnote of the draft--and of course lawyers like footnotes, but they are important--says that protected persons "ordinarily retain Convention benefits." So I guess in a strict sense these are not ghost detainees because the conclusion at least of this draft is that they retain, essentially retain protections under the Convention. Would you agree with

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that?

Judge Gonzales. I believe so, Senator, but I would want the opportunity to look at that again before agreeing without any kind of reservation.

Senator Cornyn. Fair enough. That just struck me as a contradiction with the suggestions we had heard earlier that somehow that this is a lawless enterprise, that indeed the conclusion at least of the draft was that ordinarily these detainees retain Convention benefits.

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Senator Sessions. You know, you were asked about saying some of the language of the Conventions are quaint. I remember when I was in law school at Alabama, my wife and I lived at Northington Campus, and that was where the German prisoners of war were held. I do not think they had much more than a fence. They had a recreation grounds. I am told that they interfaced with the people in the community, and even went to church and played the organ or sang in choirs.

But this is a different type of prisoner from the World War II group that we were looking at, and we do need to--some of the things are not quite as logical, such as guaranteeing them scientific instruments or giving them pay, paying them while they are prisoners, or athletic equipment and clothes. But I guess also the President--and

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you have been with him--feels deeply the responsibility he has and had during this post 9/11 time to protect the American people. That had to be on his mind whenever he made a decision. Is that correct?

Judge Gonzales. That was his number one objective, Senator, to do so, consistent with the legal obligations of this country.

Senator Sessions. And I know that in October of this past year, we released close to 150 detainees at Guantanamo Bay. I guess ACLU or somebody sued over that or whatever, and they were released. Here are some of the headlines that have occurred since. "Freed detainees rejoin fight; Ten ex-Guantanamo inmates have been caught or killed," headline in the Washington Post of October 2004. "Detainees back in battle. At least eight ex-Guantanamo inmates fighting again in Afghanistan," Pittsburgh Post Gazette. "Ten freed from Cuba return to fighting," Chicago Tribune. "Freed detainees return to jihad, at least 10 militants captured or killed Gitmo captors of intent," Orlando Sentinel.

So it is easy to say why do we not just err in the side of being lenient and let people go, but you knew and the President knew and the people supervising Guantanamo Prison knew that there were risks when you did that; is that not true? And that makes you cautious?

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Judge Gonzales. Of course, Senator, we don't want to detain anyone that shouldn't be detained, and not for a minute longer than we need to detain someone. There are multiple screening processes in place with respect to detainees that go to Guantanamo. There are multiple screens when they are captured, when they're moved into Bagram into a central holding facility. There's a multiple screen--I mean there's a screen with respect to deciding whether or not they should go to Guantanamo. Then when they arrive at Guantanamo, there's an additional screen to see whether or not they should be at Guantanamo. And then there are annual review screens. We've now implemented a process to ensure that if we no longer need to hold someone, that we should release them. But it is true that some have been released that we've now discovered have come back to fight against Americans, and that of course is the danger. We obviously don't want to hold anybody longer than we have to, but we don't want to be releasing people that are going to end up killing American soldiers. So it's been a challenge.

I think the good people within DOD have exercised, have addressed that challenge in the very best way they can. It hasn't worked perfectly, but they've done a good job in my judgment.

Senator Sessions. And by the way, this was a

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Department of Defense decision, is that correct, on releasing there at Guantanamo?

Judge Gonzales. Oh, of course. That's not a decision made by the White House. That would be a decision ultimately made by Department of Defense. But they would also consult with the CIA. They would also consult with the Department of Justice to see whether or not those agencies had any information about the detainee. And so it would be a collaborative effort to gather up the intelligence information about a detainee, but ultimately the Department of Defense would make the decision that this is someone that it would be okay to go ahead and release.

Senator Sessions. Well, you did not run the Department of Defense or have any supervisory control over anybody at the Department of Defense, did you?

Judge Gonzales. Absolutely not.

Senator Sessions. Now, of course, so we have 10 rearrested. I think we can logically conclude that more than 10 have returned to terrorist activities, they just have not been caught, maybe twice or three times that many. So that is a pretty good number out of the 150 we took a change on releasing, who have returned to the battlefield. They were released while the war is continuing. And I just want people to note that this is not just an academic exercise. Lives are at stake. You had to make tough

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decisions and recommendations to the President. The President had to make them. Secretary Rumsfeld had to make them. He let some of these go, and some of them returned to battle right away, and we know that is true.

. . . .

Chairman Specter. Just one question about the so-called Bybee memorandum, and it is do you agree with the statement in the memo, "Congress may no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield"?

Judge Gonzales. I reject that statement, Senator.

Chairman Specter. You reject that statement.

Do you agree with the decision by U.S. District Judge James Robertson, handed down on November 24th of this year, when he stopped the military tribunal's ruling that detainees' rights are guaranteed by the Geneva Conventions?

Judge Gonzales. Sir, I haven't studied the rulings. That decision is on appeal. I believe, generally, we respectfully disagree with the judge.

Chairman Specter. Do you believe that the CIA and other governmental intelligence agencies are bound by the same laws and restrictions that constrain the operations of the U.S. armed forces engaged in detention and interrogations abroad?

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Judge Gonzales. Certainly, some of the laws, sir. UCMJ, for example, would be a limitation on military forces that would not be applicable to the CIA.

Chairman Specter. Well, in what circumstances would the CIA have a broader latitude? Why do you not think about that one and give us a response in writing. That is a fairly involved question.

Judge Gonzales. I appreciate that, Mr. Chairman.

Chairman Specter. Do you support affording the International Committee of the Red Cross access to all detainees in U.S. custody?

Judge Gonzales. As a general matter, I very much support the work of the Red Cross and, as a general matter, would agree that they should be provided access. I think the Red Cross serves a very, very important function. They have, in the past, been responsible for the safe treatment and health of U.S. soldiers who are captured by our enemy and so, yes, as a general matter, that is true.

Chairman Specter. Your answer is, yes, to that question.

Judge Gonzales. As a general matter, yes, sir.

.....

Senator Cornyn. I neglected earlier, when I was asking about the written response to the document request that Senator Leahy had made to the White House, I neglected

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to ask unanimous consent that the three letters that were written, I believe authored by David Leitch, in response to Senator Leahy's request, dated December the 17th, 30th, and January the 5th, be made part of the record.

.....

Senator Leahy. If we might, could we, also, then put as part of the record my response letter, pointing out that those were not responsive and my concern that those letters were not responsive.

Chairman Specter. I would offer, for the record, a letter to me, dated December 26th, 2004, from the Committee of Concerned Philadelphia Rabbis.

.....

Our first witness, in alphabetical order, is Dean John Hutson. . . . , dean and president of the Franklin Pierce Law Center in Concord, New Hampshire. Dean Hutson has a record as a rear admiral, a graduate of the University of Minnesota Law School, and has had a long and distinguished Naval career, including being the Navy's judge advocate general during the administration of President Bill Clinton.

STATEMENT OF JOHN D. HUTSON, DEAN AND PRESIDENT OF
THE FRANKLIN PIERCE LAW CENTER, CONCORD, NEW
HAMPSHIRE

Admiral Hutson.

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As Americans, we have been given many gifts by our creator and our forbearers, and we hold these gifts in trust for our progeny and for mankind, generally. One of these gifts is great military strength. This military prowess is enhanced by our legacy of our strong advocacy for human rights for all human beings by virtue of their humanity alone and by our long history of unwavering support and adherence to the rule of law.

These gifts come with a string attached. Like all gifts, there is a responsibility to husband them. We must not squander them; rather, we must nurture them, refine them and pass them on in even better condition than they were given to us. Generations of Americans have understood this responsibility and have accepted it.

In the wake of World War II, Truman, Eisenhower, Marshall, Senator Vinson and others fulfilled their part of that sacred trust. They had seen the horror of war, a horror that few of us have seen, but have only read about. They responded with programs like the Marshall Plan and with international commitments like the Geneva Conventions. I believe that the Geneva Conventions are part of our legacy not unlike the Bill of Rights, the Fourteenth Amendment, and Brown v. Board of Education. They demonstrate the goodness of the United States. They also demonstrate our strength and our military might. Even in

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the midst of that most awful of human endeavors--war--we should treat our enemies humanely, even when we have captured them. To do so is a sign of strength, not weakness. To not do so is a sign of desperation.

I come here to speak in opposition to the confirmation of Judge Gonzales because he appears not to understand that. He finds the Geneva Conventions to be an impediment, a hindrance to our present efforts, quaint and obsolete in important respects. His analysis and understanding of the Geneva Conventions, which I discuss in detail in my written statement, is shallow, shortsighted and dangerous. It is wrong legally, morally, diplomatically, and practically. It endangers our troops in this war and future wars, and it makes our Nation less safe.

My 28 years in the Navy tells me that his analysis of the Geneva Conventions and their applicability to the war in Afghanistan and the war on terror is particularly disturbing because it indicates an utter disregard for the rule of law and human rights. Those are the reasons American fighting men and women shed their blood and why we send them into battle. But if we win this battle and lose our soul in the process, we will have lost the war, and their sacrifices will have been for naught.

The Geneva Conventions have protected American troops from harm for many years. Our forces are more forward

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deployed than any other Nation's in terms of numbers of deployments, locations to which they are deployed, and the number of forces deployed. This has been the case since World War II and will continue to be true. Because of that there is no country for which adherence to the rule of law and to the Geneva Conventions is more important than it is to the United States. It is our troops that benefit. The original U.S. proponents of the Conventions saw them as a way to protect U.S. troops from the enemy not the enemy from U.S. troops.

It is not good for our military if we now throw them over the side just because some people believe they are inconvenient to the present effort. This is only the present war. It is not the last war. It is not even the next-to-last war.

Another important aspect of the Geneva Conventions is that it prepares us for the peace that will ensue. We cannot so alienate our allies that they will not fight alongside us again nor should we embitter our enemies so that they will fight on longer and harder than they otherwise would or be unwilling to relent, even though their cause is hopeless. Abrogating the Geneva Conventions imperils our troops and undermines the war effort. It encourages reprisals. It lowers morale.

I believe that the prisoner abuses that we have seen

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in Iraq, as well as in Afghanistan and Gitmo, found their genesis in the decision to get cute with the Geneva Conventions. At that point, it became a no-holds-barred unlimited warfare not just in Abu Ghraib, but around the country. I remind the Committee that we are conducting 40 or more death investigations in the course of the war on terror for detainees at the hands of their U.S. captors.

Our military doctrine has long been, and I quote from the Department of the Army pamphlet, "The United States abides by the laws of war in spirit and letter. Cruelty on enemy prisoners is never justified."

Twenty-eight years in the military taught me there are two indispensable aspects to military good order and discipline. They are the chain of command and the concept of accountability. Accountability means that you can delegate the authority to take an action, but you may never delegate the responsibility for that action. Young, fresh-caught judge advocates know that Government lawyers cannot hide behind their adviser role to evade accountability for the actions that they recommend.

The value of the chain of command is that what starts at the top of the chain of command drops like a rock down to the bottom of the chain of command, and subordinates execute the orders and adopt the attitudes of their superiors in the chain of command. It has always been

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thus, and that is the way we want it to be.

Government lawyers, including Judge Gonzales, let down U.S. troops in a significant way by their ill-conceived advice. They increased the dangers that they face. At the top of the chain of command, to coin a phrase that we have heard in the past, they set the conditions so that many of those troops would commit serious crimes. Nomination to Attorney General is not accountability.

Only recently, in the face of the confirmation process, has the administration attempted to undo the damage. I have three thoughts on that:

One is that I applaud the administration for doing that.

The second is that it is a little late. We have had several years under the other policy.

And last is that I do not see this as an exoneration of Judge Gonzales; rather, it is somewhat of an indictment. It is an acknowledgment of error. Damage has been done, but it is never too late to do the right thing. If Judge Gonzales goes on to be the chief law enforcement officer in the United States after his involvement in this, we will have failed to undo a wrong, but will have only exacerbated it.

We are at a fork in the road. Somewhat ironically, this nomination has given the United States Senate an

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opportunity to tell the world what you think about those issues. What you do here will send a message, good or bad, to the world and, importantly, to American armed forces and fighting men and women.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Hutson follows:]

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STATEMENT OF DOUGLAS A. JOHNSON, EXECUTIVE
DIRECTOR, THE CENTER FOR VICTIMS OF TORTURE,
MINNEAPOLIS, MINNESOTA

Mr. Johnson.

Although there are different physical symptoms associated with the form of torture they endured, there is a remarkably common pattern of profound emotional reactions and psychological symptoms that transcends cultural and national differences. The effects can include, but are not limited to, besides organ failure and death, emotional numbing, depression, disassociation, depersonalization, atypical behavior, such as impulse control problems and high-risk behavior, psychosis, substance abuse, neurophysiological impairment such as the loss of short-term and long-term memory, perceptual difficulties, the loss of ability to sustain attention or concentration and the loss of the ability to learn. The main psychiatric disorders associated with torture are post-traumatic stress disorder and major depression.

While it is important to recognize that not everyone who has been tortured develops a diagnosable mental disorder, it is equally important to recognize that for many survivors the symptoms and aftereffects of torture endure for a lifetime. Torture is said to be one of the most effective weapons against democracy as survivors

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usually break their ties with their community and retreat from public life.

Now, the memorandum written by and also apparently solicited by White House Counsel Gonzales are replete with legal errors, which the other two members of the Committee will describe, but also, we believe, with political miscalculations and moral lapses. They disregard the human suffering caused by torture and inhumane treatment. They are based on faulty premises, even fantasies about the benefits and payoffs of torture. What is striking about all of these memorandum is the lack of the recognition of the physical and psychological damage of torture and inhumane treatment.

The assumption behind the memoranda, and particularly the Bybee memorandum, and the later Report of the Working Group on Interrogation, is that some form of physical and mental coercion is necessary to get information to protect the American people from terrorism. These are unproven assumptions based on anecdotes from agencies with little transparency, but they have been popularized in the American media by endless repetition of what is called a ticking time bomb scenario.

Based on our experience at the center with torture survivors and understanding the systems in which they have been abused, we believe it is important that these

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discussions not be shaped by speculation, but rather through an understanding of how torture is actually used in the world. From our understanding, we have derived eight broad lessons.

And those are, first of all, torture does not yield reliable information;

Secondly, torture does not yield information quickly;

Third, torture has a corrupting effect on the perpetrator;

Fourth, torture will not be used only against the guilty;

In fact, fifth, torture has never been confined to narrow conditions. Once it is used, it broadens.

Psychological torture results in long-term damage;

Stress and duress techniques are forms of torture;

And, finally, number eight, we cannot use torture and still retain the moral high ground.

The cost to America of abandoning strict opposition to all forms of torture are far-reaching; from the disillusionment and fear of individuals, on the one hand, to complications in our ability to conduct foreign policy on the other. It is up to all of us, as Americans, but particularly to members of the Senate and to U.S. Attorney General, to be clear that torture is a line we will not cross under any circumstances or for any purpose. It is

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imperative that the Attorney General is in agreement with American values and will use the full scope of American and international law to prevent torture and prosecute torturers.

To that end, I respectfully call on the Senate Judiciary Committee to keep torture on its agenda and to require a routine report from the Department of Justice on its work to stop and prevent the use of torture. I ask the Committee to be vigilant in your oversight until it is clear, in both our tacit and explicit policies, and in our actions, that the U.S. is back on course and is in full compliance with national and international law and American values.

When speaking on the Senate floor in support of ratification of the Convention Against Torture, Kansas Senator Nancy Kassebaum said, "I believe we have nothing to fear about our compliance with the terms of this treaty. Torture is simply not accepted in this country and never will be."

Let us also make it true today.

Thank you.

[The prepared statement of Mr. Johnson follows:]

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Chairman Specter. We now turn to Dean Koh, the dean of the Yale Law School, having been named there earlier, well, in July of last year. He has taught at the Yale Law School since 1985 in international law, served as assistant secretary of state, was a U.S. delegate to the United Nations Human Rights Commission and the U.N. Committee on Torture.

STATEMENT OF HAROLD HONGJU KOH, DEAN AND GERARD C.
AND BERNICE LATROBE SMITH PROFESSOR OF
INTERNATIONAL LAW, YALE LAW SCHOOL

Mr. Koh. As I mentioned, I have twice been in the U.S. Government. I served in the Clinton administration as the assistant secretary for Human Rights. But previously I was in the Reagan administration as an attorney at the Office of Legal Counsel, which is the very office which has generated these memoranda.

Let me say that I do not appear today to advise you on how to vote. Your decision as to whether this candidate deserves confirmation turns on many factors on which you are the experts and may involve qualifications and positions that I have not reviewed.

But I do appear today because I want to comment on Mr. Gonzales' positions regarding three very important issues. I think these are issues of the highest significance in American life, and these are issues on which I do have

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legal expertise and Government experience.

They are, first, the clear and absolute illegality of torture and cruel, inhumane and degrading treatment;

Second, the nonexistence of the President's constitutional powers to authorize torture and cruel treatment by U.S. officials--what Senator Leahy has been calling the Commander-in-Chief override. It does not exist as a matter of constitutional law;

And, third, the broad applicability of the Geneva Conventions on the laws of war to alleged combatants held in U.S. custody. This broad applicability has been for the benefit of our soldiers. The more that we ensure broad applicability of the conventions to others the more our own soldiers are entitled to protection.

With regard to each of these, I think the legal position is clear. As Attorney General, Mr. Gonzales has said that his first allegiance would be to uphold the Constitution and laws of the United States. That would mean he would strictly enforce the laws banning torture, he would strictly enforce the ratified treaties regarding torture and the Geneva Conventions, and he would ensure that the President abides by the constitutional principle of checks and balances. But I think more fundamentally he has to assure that no one is above the law, including the President, and that no one is outside the law, whether they

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are an enemy combatant or held in a place like Guantanamo or outside the United States.

And I think that there has been a concern raised about Mr. Gonzales' record and which continues through the hearing today. It is that some of the statements he has made and some of the things that he has tolerated have created the impression that the President is above the law or that certain individuals live outside the law as extralegal persons because they are called enemy combatants or because they are being held in rights-free zones such as Guantanamo.

Let me just address these three issues, starting first with the torture memo--the Bybee memo.

As you mentioned, Senator Specter, I presented the United States report on our compliance with torture in Geneva in 1999 and 2000. And at that presentation, I told the United Nations, as a country, we are unalterably committed to a world without torture. We had cleared through all the agencies at the U.S. Government a statement of zero tolerance, of zero tolerance policy. And the real question is how did we move from the zero tolerance policy of 2000 to the permissive environment that seems to have been created in the last few years.

Now, I think the answer is partly shown by the Bybee memo, and having worked in the Office of Legal Counsel, I

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am very sympathetic with the pressures that people are under in drafting opinions like this. Nevertheless, in my professional opinion, as a law professor and a law dean, the Bybee memorandum is perhaps the most clearly legally erroneous opinion I have ever heard. It has five obvious failures.

First, it asks, "How close can we get to the line," when, in fact, it is supposed to be enforcing a zero tolerance policy.

Second, the way that it defines torture would permit many of the things that Saddam Hussein's forces did during his time as not torture. Just for example, the White House website lists that beating, pulling out of fingernails, burning with hot irons, suspension from ceiling fans were all acts of torture committed by Saddam Hussein's forces. Nevertheless, under the Bybee memorandum, if they did not cause serious organ failure or death, they would not constitute torture.

Third, as I said, the memo grossly overreads the President's constitutional power to order torture. If the President has a constitutional power to order torture in the face of a criminal statute preventing it passed by Congress, it is not clear why he could not similarly order genocide or other kinds of acts.

Fourth, the memorandum says that executive officials

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can escape prosecution if they carrying out the President's orders as Commander-in-Chief. This is the "following orders" defense which was rejected in Nuremberg and is the very basis of our international criminal law.

And, finally, an important point, the Bybee memo essentially is very tolerant with regard to cruel, inhuman or degrading treatment. A convention against torture, and cruel, inhuman and degrading treatment is read to permit various kinds of cruel, inhuman, and degrading treatment. And even today there was some lack of clarity in Mr. Gonzales' answer about whether U.S. officials are barred from cruel, inhuman or degrading treatment.

I think that if this kind of reasoning is left unchallenged, it could be used to justify atrocities of the kind we saw at Abu Ghraib, where lower executive officials felt a license to be cruel, inhuman or degrading to people in their custody.

Now, some have said that the August 1st memo is a lawyer setting out options for their client. But I think, as lawyers, those of you who have served know that if a client asks a lawyer to do something which is flatly illegal, the answer is, no; not here is how we can justify it.

So I believe that this is a stain on our law, a stain on our national reputation, a legal opinion that is so

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contrary to a zero tolerance policy, which has a definition of torture that would have exculpated Saddam Hussein, that reads the Commander-in-Chief power to remove Congress as a check on torture that turns Nuremberg on its head and that gives Government officials a license to be cruel is wrong from the beginning.

If the counsel for the President had received such an opinion, you would have expected him to do at least one of two things: First, reject it on the spot and send it back or, second, send it to other parts of the Government and have them give a second opinion, particularly the State Department, which I believe, following the policies in the U.S. Report on the Convention Against Torture, would have said that the opinion is flatly wrong.

Instead, what happened, as you heard, was that that opinion was allowed to become executive branch policy, was incorporated into the DOD working group report, and remained as executive branch policy for some two and a half years, during which time I believe that a permissive environment was inevitably created.

Now, I welcome the very strong statements that Mr. Gonzales made in finally repudiating this analysis. But I think he also was begging the question of whether the parts of the memo that were not explicitly replaced, namely about the President's constitutional powers to order his

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subordinates to commit legal--to commit torture, should be repudiated. At the beginning of the testimony, Mr. Gonzales said those parts had been withdrawn; by the end, he said he repudiated it. I think he should say, I rejected--I reject them because they are legally wrong and they never should have been put out there in the first place. I do not think our Nation's chief law enforcement officer should tolerate ambiguity on a matter that is so central to our national values. I think that Mr. Gonzales should repudiate all elements of the memorandum, ask for withdrawal of the Defense Department's working group report, and I also agree with Mr. Johnson that it is a very good idea to have a regular report about what we are doing to root out torture within the executive branch.

With regard to the commander in chief power, a very simple point. The statement is made, "Any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's vesting of the commander in chief power in the President." If that were strictly true, large sections of the Uniform Code of Military Justice would also be unconstitutional. I think that is an over-broad position, I do not think it is sustainable as a matter of law, and I think it should be repudiated definitively.

Remember that the Attorney General has a duty not just

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to serve his client, but to preserve the Constitution's system of checks and balances. I think that to ensure that the President is not above the law, Mr. Gonzales should repudiate the constitutional theory that is put out there. A very simple question which you could have asked him today was--

Chairman Specter. Dean Koh, your red light is on. If you would conclude your current thought, we would appreciate it.

Mr. Koh. A simple question you could have asked him today is, Is the anti-torture statute constitutional? If the answer to that question is yes, then it cannot be overridden by the President's commander in chief powers.

And the final thought, the Geneva Conventions, I believe that this point has been made very well. The Geneva Conventions do apply broadly. And the fact that the administration chose, I think, through Mr. Gonzales's recommendation not to apply the Geneva Conventions in Afghanistan was an error which I think that Secretary Powell properly challenged.

Chairman Specter. . . . we could explore the issue of a so-called ticking bomb case on torture.

There are some prominent authorities that if it was known, probable cause, that an individual had a ticking bomb and was about to blow up hundreds of thousands

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of people in a major American city, that consideration might be given to torture. Judge Posner, a very distinguished judge on the Seventh Circuit has commented that this is worth considering, or perhaps even more positively than that. Professor Dershowitz has written extensively on the subject, has come up with a novel idea of a torture warrant. And there runs through some of the considerations on interrogation techniques, not to be decided by the people at the base level but when dealing with higher officials trying to get something out of the ranking al Qaeda person, that an escalation of tactics ought to be left to more mature authorities, perhaps even--well, higher authorities in the Federal chain of command.

The Israeli Supreme Court has opined on the subject by way of dictum. As they put it, recognizing in certain circumstances Israeli interrogators may be able to use torture--not saying they ought to, but those who do may be able to employ the defense of necessity to save lives of a so-called ticking time bomb or other such imminent threat.

Dean Koh, start with you. Are considerations for those tactics ever justifiable even in the face of a ticking bomb threat?

Mr. Koh. Well, Senator, you are a former prosecutor. I think that my approach would be to keep the flat ban, and if someone, the President of the United States, had to make

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a decision like that, someone would have to decide whether to prosecute him or not. But I do not think that the answer is to create an exception in the law. Because an exception becomes a loophole and a loophole starts to water down the prohibition.

I think what we saw at Abu Ghraib is the reality of torture. I have had the misfortune to visit many torture dens in my life. Many of them, I am sure, were justified on emergency national security concerns, and at the end of the day, you have places where they are just places where people are routinely mistreated. And not for any broad national security purpose.

Chairman Specter. That sounds essentially like the hypothetical question defense--if the President does it, then it is a prosecution matter. I do not know about that.

Dean Hutson, what do you think? Ever? On occasion? To even consider that?

Admiral Hutson. I agree with Dean Koh that it is always illegal. Now, you may decide that you are going to take the illegal action because you have to, but two points: One is that that is not necessarily the situation--or, not "necessarily," it is not at all the situation we are talking about here with Gitmo or Abu Ghraib or other prisons. There is no implication that there was a ticking bomb anyplace. The other is that you pose a question in

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which there is by definition in the question not sufficient time to use more effective methods of getting information-- the good guy/bad guy, rewards and punishments, those kinds of things where you are much more capable of getting valuable information.

A third difference is that, by the hypothetical, you are dealing with a particular individual. You are not dealing with 550 people at Gitmo or however many people at Abu Ghraib. So that it is an interesting academic question. We have all debated it. But I do not think that it is the sort of question that the Bybee amendment--or, excuse me, the Bybee memo, for example, addresses.

Chairman Specter. Dean Hutson, there is no doubt that it was not involved at Abu Ghraib for any of the issues which we have taken up. But anybody who has watched on C-SPAN since 9:30, we are off on a long day, might deserve a little academic discussion even if it is only highly theoretical. And it is pretty tough to advocate torture under any circumstances, even with a ticking bomb, so I can understand the reticence of the witnesses because I have the same reticence.

What are your views, Mr. Johnson?

Mr. Johnson. Well, the Israeli Supreme Court concluded that the necessity was a defense in prosecution, it could never be turned on its head to be made a policy

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moving forward. And of course the Bybee memo has the same problem. It takes a question of law about how to prosecute someone for torture and turns it into proactive advice on what is allowed and what is not. And that is the moral problem with that Bybee memorandum.

On the specifics of the ticking time bomb, I think that it is very overblown in our imaginations and it is very right with what I could only call fantasy and mythology. The number one issue, as I said, is that torture is unreliable to get information. We look at our clients. Nearly every client we had confessed to something. They confessed to some crime, they gave up some information, they gave up the name of an innocent friend. What they said was, I would do anything, I would say anything to get it to stop. And one of the major problems with torture from a legal perspective, and especially from an interrogation perspective, is it produces so much extraneous information that it actually distracts from good investigation.

But secondly, the second part of this which is often the question of fantasy, is that we have to do it because the bomb will go off in the next hour, and if I do not agree for the next hour, it will go off in the next five minutes--would you do it there? It actually takes time to make someone break. It takes strategy to make someone

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break. One of the very disturbing things I find in the memorandum is to know that some of the techniques that were used in Gitmo, such as water-boarding, were being used on our own troops, supposedly to train them to resist torture. I have talked to American soldiers who have gone through that training and who have been required to be engaged in that kind of activity, and they tell me that it has taken them 15 years of therapy to get over it.

So I am very disturbed to think that it is any part of the practice of our soldiers at this point, in this day and age. But at the same time, we know it happens. I know of stories in Argentina, where supposedly the professional criminals go through training to resist torture over the 48 hours they need before they get access to their lawyer. Everything I have heard about the operational sophistication and the commitment of al Qaeda would lead me to believe that they go through the same training. So the notion that torture acts quickly to deal with the ticking time bomb is also a fantasy.

Chairman Specter. Well, it may well be fantasy, and we hope that it never arises.

Mr. Koh. Senator, might I just add--

Chairman Specter. Excuse me, I am in the middle of a sentence, Dean Koh.

Let us hope it is fantasy. And as we have examined

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interrogation techniques, we really have not gotten into the subject matter today of the suspect as--or the person subject to interrogation as a relevant factor, or the quality of the information that that person might have, or the sophistication and judgment if it went to the Secretary of Defense or the Under Secretary, where there is more time to have an interrogation technique. And let us hope that no President ever has to face the decision or any official at any level, but there are gradations and complications here which do not provide any easy answers far beyond the scope of what we have heard today.

My red light is on, so I ask no more questions. But you were in the middle of a sentence, Dean Koh.

Mr. Koh. I was just saying that the new OLC opinion of last week withdraws the necessity defense, and so it would not function to permit the invocation of necessity as a reason for torture.

Senator Leahy.

And Dean Koh, you heard Judge Gonzales's testimony today. I asked him a number of questions regarding his views of executive power. I asked him if he agreed with the legal conclusion in the August 1, 2002, memo by Assistant Attorney General Jay Bybee--the President has authority as commander in chief to suspend the torture laws and immunize those who commit torture on his order.

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I never really did get a yes or no answer on that. But can a President override our laws on torture and immunize the person who did the torture?

Mr. Koh. No.

Senator Leahy. That is a good answer. I happen to agree with it.

Now, I asked Judge Gonzales about the administration's claims regarding enemy combatants. The President has claimed unilateral authority to detain a U.S. citizen whom he suspects of being a terrorist, hold him indefinitely, incommunicado, no access to a lawyer, and so on. He says he has this authority with respect to U.S. citizens both abroad and here. Judge Gonzales said the Supreme Court upheld this in Hamdi. Of course, in Hamdi the Court did not decide that, they simply reached the conclusion that the Congress had authorized this.

Do you believe that the President has authority as commander in chief to lock up a U.S. citizen arrested in the United States, and hold him indefinitely without access to counsel or the courts?

Mr. Koh. No, and not when a civilian court is open. I was surprised by the answer, because I think that if you look at the Hamdi decision, the opinion that he was citing, Justice O'Connor's opinion, is a plurality decision. It does not say that he has a right to hold someone

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indefinitely. That very issue is being litigated before the District of South Carolina in the Padilla case on remand. And also, I think at the oral argument in those cases, Justice Stevens asked the solicitor general, How long would you hold the person? And the answer was, For the duration of the war. And he said, What if it was a hundred years war? And then the Government lawyer backed away from the assertion.

So I do not think they were claiming at the time that there was a right to indefinite detention, and I do not think the Supreme Court gave them a right to indefinite detention.

Senator Leahy. Following a question one of the other Senators asked, let us say the President followed Secretary Powell's advice--declared the Geneva Conventions applied to the conflict in Afghanistan. What effect would that have had on our ability to prosecute captured al Qaeda and Taliban fighters for war crimes?

Mr. Koh. Well, I think what was proposed, which I think would have made sense, was for everyone to get a hearing, as required by Article 5 of the Geneva Conventions. Everyone who is taken into captivity ordinarily gets a hearing under the Geneva Conventions, and thousands of these hearings have been given in Iraq and were also given in Vietnam. That is what was not done. I

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think, particularly with regard to the Taliban, they were acting as essentially the army of Afghanistan, and I believe that they should have been given POW status. I think that there was some confusion in the questioning today about whether, quote, Geneva applies or not. Geneva may apply, in the sense that everybody gets a hearing to find out what their status is, but some of them may not be POWs.

Senator Leahy. Well, that is what--thank you. That is what I was looking for. We follow certain standards. Whether the other side does or not, we do. We need to comply with Geneva whether our enemies do or not. Is that not the logic of Geneva?

Mr. Koh. Broad applicability is the logic. We have been the ones who are saying it should apply broadly because we want our troops to have a strong presumption of protection. Afghanistan was the first time in which we said that it did not apply to a conflict. You were also asking questions about rendition. Once it was said that Geneva Conventions did apply in Iraq, there was the danger that people would then be removed from Iraq as a way of bringing them outside of the scope of the Geneva Conventions.

The bottom line, Senator, is we have tried not to create ways in which people can be taken in and out of the

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protections of the Convention, because that might happen to our troops.

Senator Leahy. Well, and if we have somebody who is treating our troops inhumanely, or others, we can also eventually bring about prosecutions of them as war criminals, can we not? And there is a lot of tradition of that.

Admiral, the January 2002 draft memo for the President--this was the one signed by Judge Gonzales--argued the war against terrorism is a new paradigm, renders obsolete the Geneva Convention's, quote, strict limitations in questioning of enemy prisoners. But we have talked about the Army Field Manual. That makes it perfectly clear that POWs can be interrogated, is that not correct?

Admiral Hutson. That is absolutely right, Senator. A couple of thoughts. One is that all the wars are new paradigms when you first start to fight them. You know, there's new weapons systems, there's new enemies, there's new tactics, there's new strategy. So that the fact that it is a new paradigm does not necessarily change things.

The other thing is that the Geneva Conventions place on the detainee an obligation to provide certain information. It does not place on the capturer a limitation on the questions or the numbers of questions or the numbers of times to question. You know, this is not a

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Miranda kind of situation. You can keep asking questions. It does limit the torture, cruel, inhuman, degrading kinds of ways that you may ask questions. If by "obsolete" Judge Gonzales meant that we are going to have to use more kinds of techniques, harsher techniques, more aggressive techniques, tortuous techniques, then I disagree with him very strongly on that. If he is just saying that we need to throw it over the side because we are dealing with terrorists and we cannot ask any question beyond name, rank, serial number, then he is just wrong on the law. You know, it is one or the other. He is either wrong on the law or he is advocating techniques that I would not support.

Senator Leahy. From a military lawyer's perspective, could we have avoided what we see in Afghanistan, Iraq, and Guantanamo?

Admiral Hutson. Absolutely. It goes back, Senator, to what I think I said in my statement, written and oral statement, about the chain of command. You know, those soldiers that we saw in the pictures, the people that are being investigated otherwise have picked up the attitude that started at the top of the chain of command. And if the attitude that started at the top of the chain of command was, They may be terrorists, they may be evildoers, but they are human beings and we will treat them with the

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dignity and respect that Americans treat human beings, we would not have seen what we saw. Rather, the attitude at the top was, They are terrorists so different rules apply-- without really explaining what the rules were that applied. And as Dean Koh said, they ended--or I guess Mr. Johnson-- they ended up in this never neverland where nothing applied, and then we saw what happened.

Senator Leahy. Well, we have some members of Congress in both parties who have suggested we have some kind of an independent, truly independent, investigation of what happened here. Is that your position, too?

Admiral Hutson. Absolutely, it is, Senator. Judge Gonzales referenced several times the number of investigations that are going on, as if that somehow fixed the problem. And, you know, if 10 investigations is good, then 20 would be even better, and 30 better than that.

That is not the point. The point is that we need an investigation, a comprehensive investigation not unlike the investigation that perhaps Admiral Gammon did in the Challenger disaster, in which the investigating body has subpoena power, the power to administer oaths, which raises the specter of perjury, and is told to go wherever their nose leads it--not to look at the few bad apples, you know, atrocities have been committed by a few bad apples, now go out and demonstrate how that happened. And if it goes to

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the E ring, then it goes to the E ring; and if it goes to the Office of Legal Counsel, then it goes to the Office of Legal Counsel. But when you put them in a box with a series of investigations to look at junior enlisted personnel, you are never going to find what happened.

Chairman Specter. Thank you. And Mr. Chairman, you asked the question of Mr. Johnson I was going to ask, basically how effective torture is. And I think he gave a very good answer from his experience. Most people being tortured are going to say whatever you want to stop the torture.

Thank you, Mr. Chairman. And again, I compliment you for the hearing you held today.

Chairman Specter. Thank you very much, Senator Leahy. Senator Cornyn?

Senator Cornyn. Thank you, Mr. Chairman.

Mr. Johnson, Mr. Koh, Mr. Hutson, thank you for being here with us today. I wanted to just ask whether you agree or disagree with this proposition--to begin with, and then we will get into more questions.

Do you agree or disagree that all lawful means to gather actionable intelligence that is likely to save American lives should be permitted?

Let me say that again. Do you agree or disagree that the United States Government should use all lawful means to

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gather actionable intelligence that is likely to save American lives? Dean Hutson?

Admiral Hutson. I agree.

Senator Cornyn. Mr. Koh?

Mr. Koh. I agree with "lawful means," not including torture or cruel, inhuman, or degrading treatment.

Senator Cornyn. Exactly. That is implicit in the question, but thank you for being specific.

Mr. Johnson?

Mr. Johnson. I agree, and my concern is that there has been such a fascination with the supposed effectiveness of forms of torture and duress that all lawful means in fact have not been used.

Senator Cornyn. But as far as the proposition goes, "all lawful means," as qualified--as amplified, I should say, by Dean Koh and you, Mr. Johnson, and Dean Hutson, you would agree with that proposition, would you not, sir?

Mr. Johnson. Yes.

Senator Cornyn. Well, that is the thing. I think we all agree with that. I mean, certainly we do on the Committee, and as I heard Judge Gonzales testify today, that is what he said his position was and what he believed the President's position was.

But let me get to an area where maybe there is--well, I know there is disagreement because we have already talked

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about it some here today, not with you, but these witnesses. But first of all, and I would like to maybe start with Dean Koh and then Dean Hutson and then ask Mr. Johnson some other questions.

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Senator Cornyn. But, you know, I asked earlier Judge Gonzales--I think it was--whether lawyers disagree about even the matters as important as what you have testified here today, Dean Koh and Dean Hutson. And we already, I believe, have established that there are legal scholars and international law experts who hold a contrary opinion to the one you have expressed today, for example, Dean Koh, with regard to the applicability of the Geneva Convention to terrorists. Would you concede the point that there are respectable legal scholars who hold a contrary opinion?

Mr. Koh. Yes. And I think that you have to define exactly what you mean--the applicability to al Qaeda, the applicability to Taliban. There is a different nose count on each one.

Senator Cornyn. I understand your distinction. But let us talk about al Qaeda first. But do you--and you take the position that Geneva applies to al Qaeda. Is that correct, sir?

Mr. Koh. I take the position that Geneva applies to people who are captured and a tribunal could quickly

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determine that someone is al Qaeda. And, as for example in the case of Mousawi, he could then be turned over to a criminal proceeding.

Senator Cornyn. But for example, if there is a status hearing to determine the status of an enemy combatant, and they are determined to be, at that status hearing, a member of al Qaeda, would they be entitled to the protections of the Geneva Convention, in your opinion, Dean Koh?

Mr. Koh. Well, they fall under Geneva, but they are not POWs, and they should then be treated as common criminals and prosecuted.

Senator Cornyn. But nevertheless entitled to humane treatment. Is that correct?

Mr. Koh. Yes.

Senator Cornyn. Okay. And Dean Hutson, do you have a contrary view, or do you take the same position?

Admiral Hutson. I take the same view. You know, one of the issues, I think, here, Senator, at least in my mind one of the issues here is that--I do not want to sound pedantic, so forgive me, but, you know, law is not practiced in a vacuum. It is practiced in real life. And sometimes, whether or not lawyers agree or disagree about the gray areas in the middle--and I do not think this is necessarily a gray area in the middle--there are other factors, like protecting U.S. troops, that have to be taken

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into consideration in making the decision about whether or not you are going to apply the Geneva Conventions or the role that the Conventions are going to take. And I think it is naive to say, well--not you are, but that others, naive on the part of others to say, well, we are going to very narrowly limit this because we are clever lawyers and we can figure out a way to get around this. Because I think that that, in the end, risks U.S. troops in this or future wars.

Senator Cornyn. Well, Dean Hutson, let me pursue that just a second. Is it not naive to assume that al Qaeda, people who employ suicide bombing attacks, who attack innocent civilians, will have any regard whatsoever for the international norms of conflict?

Admiral Hutson. I do not think that they will have any regard for the international norms of conflict, nor do I think that they are suddenly going to say, oh, gee, if we start conducting our--behaving in other ways, we will get the benefit of being POWs; if we start wearing uniforms, everything is going to be okay. You know, I do not think it makes a difference particularly one way or the other.

Senator Cornyn. So it would not influence their decision to treat our troops, were they captured, in any particular humane way, or when they complied with the Geneva Convention.

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Admiral Hutson. I think it may. I think Senator McCain said that he thought that it did in Vietnam. I think that it--

Senator Cornyn. Vietnam is--obviously we were at war with another nation state and one that wore a uniform with insignia and they had a chain of command--all the criteria by which the Geneva Convention is determined to apply--did we not?

Admiral Hutson. They did not necessarily comply with the law of war, which is one of the factors that is determinative of POW status.

Senator Cornyn. Well, let me get back, before we digress too much, to my earlier point, and that is that lawyers disagree. I mean, that is one of the things that attract some of us to the law, either as law professors, as practitioners, or as judges. For example, Dean Koh, you have a colleague at Yale Law School, Ruth Wedgwood, do you not?

Mr. Koh. She has left Yale and gone to Johns Hopkins.

Senator Cornyn. Okay. But at one time she was at Yale. Do you regard her as an expert in international law, including some of the issues we are talking about here, the applicability of Geneva?

Mr. Koh. She is a friend and colleague of mine with whom I often disagree on points of law.

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Senator Cornyn. Exactly. That is really my point. And you do know that she has filed--she joined, along with former Carter administration officials, an amicus brief in Shafiq Rasul v. George Bush and argued, for example, that the President's conclusion that members of al Qaeda and the Taliban are unlawful combatants is clearly correct.

Therein lies your disagreement, is that correct?

Mr. Koh. But I think you make an important point, Senator, which is disputes among lawyers are often resolved at the Supreme Court. In that case, the Bush administration's position in Rasul was rejected definitively by the Supreme Court.

Senator Cornyn. Certainly not on the basis of Geneva Convention applicability?

Mr. Koh. The issue was sent to a habeas corpus proceeding, and Justice Souter, in another opinion issued that day, suggested the question that the issue of Geneva could be raised there.

Senator Cornyn. Sure. And one judge does not make a disposition on a controlling issue of law. You would agree with that, would you not?

Mr. Koh. I think we are moving to a definitive resolution of these issues, but I think that these issues are going to continue to be disputed and resolved in the courts.

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Senator Cornyn. Well, let me just mention a group of other distinguished lawyers: Professor W. Thomas Malison, who has written in Case Western Reserve Journal of International Law; Professor Alan Rosos, who has written on this subject; Professor Ingrid Dieter; Professor Gregory M. Travaglio--and I hope I pronounced that name correctly. And I will not go through a whole long list. But you would acknowledge that there are others who--other legal scholars, people who have written in this area, who agree with Professor Wedgwood and disagree with you on the application of Geneva to al Qaeda. Would you concede that, Dean Koh?

Mr. Koh. I think the question, Senator, is whether Afghanistan can be removed from the scope of the Geneva Conventions. And I do not know that anybody agrees with that.

Senator Cornyn. So you would not concede that there is a fairly lengthy list of distinguished legal scholarship that holds that al Qaeda fighters are not entitled to the protections of the Geneva Convention? You would not concede that?

Mr. Koh. I think this was a point that was made in your Washington Times op ed quoting Mr. Malinowski from Human Rights Watch. But as I think he pointed out in his letter of response, the danger is an assertion that an

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entire conflict is outside the scope of the Geneva Conventions. If that were true, then the U.S. soldiers participating also would not enjoy Geneva Convention protections. So I think the solution is to bring all the combatants who are captured in, to give them hearings, decide who are POWs and who ought to be treated as common criminals, and that al Qaeda members could well be among those who are treated as common criminals.

Chairman Specter. Senator Cornyn, would you like one more round?

Senator Cornyn.

Well, gentlemen, you know, regardless of the disagreement among lawyers on this particular issue with regard to the application of the Geneva Convention, and regardless of whether you say Geneva does not apply or that Geneva does apply but al Qaeda fighters are exempted from the requirement of Geneva's protections with regard to POW status, would each of you--would you agree, Dean Koh, for example, that, you know, some very important lawyers, namely Federal judges, have decided in three different cases that the President's position and Judge Gonzales's position on the Geneva Convention is correct? Are you aware of that?

Mr. Koh. If one of those cases is the Padilla case, that case was reversed by the Second Circuit. If another

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case--

Senator Cornyn. But for lack of jurisdiction, right? And it is not one of the ones I was referring to.

Mr. Koh. And I think you also need to include into the mix Judge Robertson's opinion in the D.C. Circuit, which has in part suspended the military commission proceeding precisely because of the Geneva Conventions.

And--

Senator Cornyn. Is that the one that is on appeal right now?

Mr. Koh. Yes. And then--

Senator Cornyn. Well, for the record, the ones I am referring to are the Arnot case, the John Walker Lindh case, the American Taliban--

Mr. Koh. Which is a plea bargain.

Senator Cornyn. Well, I beg your pardon, sir. It is 212 F.Supp.2d 541. It is not a plea bargain. This is the one where he claims immunity from prosecution by virtue of his being protected by the Geneva Convention and a POW, but the court held he was not entitled to the protection of the Geneva Convention.

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Conklin, Maegan L

B5

From: Deeks, Ashley S
Sent: Monday, July 23, 2007 12:21 PM
To: Bellinger, John B (L Bureau)
Subject: FW: (U) Accusing MEP of foreknowledge changes the EP mood on CIA activities

[Redacted]

B5

From: Robinson, John G
Sent: Monday, July 23, 2007 8:24 AM
To: Deeks, Ashley S; Sicade, Lynn M (DRL); Hammond, Sylvia L (DRL)
Cc: Robinson, John G
Subject: (U) Accusing MEP of foreknowledge changes the EP mood on CIA activities

(U) Accusing MEP of foreknowledge changes the EP mood on CIA activities

On July 17, Council of Europe rapporteur Dick Marty presented his report on alleged CIA renditions and secret prisons to members of three committees of the European Parliament. While strongly critical of the U.S. methods in the war against terrorism, the general discussion was positive towards the U.S., stressing that the American system of checks and balances was working well compared to the European one. The atmosphere in the meeting was tense because the report claims two MEPs, Ioan Pascu (PES, Romania) and Marek Siewiec (PES, Poland) knew of the secret detention centers in their previous roles as Defense Ministers. While supporting the conclusions reached by Marty, socialist MEPs were clearly embarrassed and criticized Marty's methodology of citing specific people without revealing his sources. Siewiec has demanded his name to be withdrawn from the report, which Marty ruled out at a press conference after the EP meeting. Marty dared Pascu and Siewiec to provide him with written denials of the report; Pascu drafted such a denial on the spot and handed it to Marty in front of the press. The EP will be coming back to the issue next September with a report to be drafted by the generally pro-US Foreign Affairs committee (AFET). (Pol/MVaneverbeke)

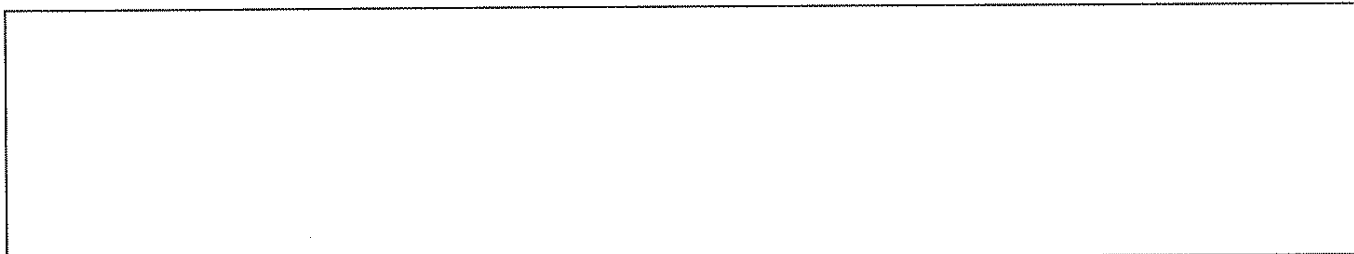
John G. Robinson
EUR/ERA
(202) 647-3913

L216

Conklin, Maegan L

From: Zellkow, Philip D
Sent: Friday, December 02, 2005 12:26 PM
To: Wilkinson, James R; McCormack, Sean I; Gunderson, Brian; Hughes, Karen P; Beecroft, Robert S
Cc: Bellinger, John B (L Bureau)(L-FO)
Subject: FW: Germany cools CIA issue, waits for U.S. reply

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 B5



B5

pz

From: Fogarty, Daniel J
Sent: Friday, December 02, 2005 7:45 AM
To: LW-EUR; SES-O_Shift-II; LW-Mahogany
Subject: Germany cools CIA issue, waits for U.S. reply

^BC-SECURITY-CIA-GERMANY (NO PICTURE)

^Germany cools CIA issue, waits for U.S. reply

BERLIN, Dec 2 (Reuters) - Germany said on Friday it would "wait patiently" for a U.S. response to allegations that the CIA ran secret prisons in Europe and secretly flew terrorist suspects across the continent.

Government spokesman Thomas Steg said Berlin would not rush Washington and did not necessarily expect answers when U.S. Secretary of State Condoleezza Rice visits next week to meet new Chancellor Angela Merkel.

"We're not putting the American government under time pressure," Steg told a news briefing.

"When the other side has given a public assurance that the questions of the Europeans will be answered, then one simply waits patiently for the answer."

His comments were clearly aimed at drawing some of the heat out of the issue, which has prompted the European Union and at least eight member states to request clarification and assurances from the Bush administration.

The Washington Post last month reported that the Central Intelligence Agency had run secret prisons in Eastern Europe for interrogating terrorist suspects.

The continent's leading human rights watchdog, the Council of Europe, is investigating the prisons report and probing flights by 31 aircraft it suspects may have been used by the CIA to transfer prisoners secretly across European borders.

New York-based Human Rights Watch said this week the United States was holding at least 26 "ghost detainees" at undisclosed sites around the world. Critics say incommunicado detention violates international law and often leads to torture.

U.S. officials have defended the use of the secret transfers, known as renditions, as a weapon in the "war on terrorism". They strongly deny that the United States uses torture.

At the same time, Rice this week acknowledged European concerns and pledged that Washington would respond to them.

Merkel's government is keen to improve relations with the Bush administration, which were badly damaged when her predecessor Gerhard Schroeder clashed with Washington over the Iraq war.

But it is under pressure from opposition parties to clarify reports of scores of unexplained CIA flights via German airports.

German prosecutors are investigating two rendition cases -- one involving a German who was seized in Macedonia and taken, allegedly by the CIA, to Afghanistan, and the other an Egyptian who was abducted in Milan and, according to investigators, returned to Egypt via Germany.

But Ernst Uhrlau, the new head of Germany's foreign intelligence agency, said in an interview this week there was no proof German airports had been used for secret prisoner transfers.

"We have no information, no facts, there are only rumours," he told Die Zeit newspaper.

^REUTERS