

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 the 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 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 tactic 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, quote, "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.

SEN. SPECTER: Thank you very much, Mr. Johnson. 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. Welcome, Dean Koh, and we look forward to your testimony.

DEAN KOH: Thank you, Mr. Chairman. Thank you, members of the committee, and especially thank you, senators, for your kind remarks about my family. Let me say in particular, Mr. Chairman, we at Yale Law School are very delighted to have you in this important constitutional role in our country.

SEN. SPECTER: I'm just sorry I wasn't there to take your course, Dean Koh. I would have been better prepared for the job.

DEAN KOH: Thank you. Well, let me give you a little synopsis of what you might have gotten had you taken it. (Laughter.) 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 don't 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 haven't reviewed.

But I do appear today because I want to comment on Mr. Gonzales's 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 legal expertise and government experience. They are first the clear and absolute illegality of torture and cruel, inhuman 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 in the Geneva Conventions, and he would ensure that the president abide 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're an enemy combatant or held in a place like Guantanamo or outside the United States. And I think that there's been a concern that's raised about Mr. Gonzales's record, and which continues through the hearing today. It says some of the statements he's made and some of the things that

he's 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're 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 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 of the U.S. government a statement of zero tolerance, a 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'm 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 read. It has five obvious failures.

First, it asks how close can we get to the line, when in fact it's 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 a fingernail, 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 didn't 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's not clear why he could not similarly order genocide or other kinds of acts.

Fourth, the memorandum says that executive orders -- executive officials can escape prosecution if they are carrying

out the president's orders as commander in chief. This is the following orders defense which was rejected in Nuremberg and is at 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. Gonzalez's 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 of 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 have served know that if a client asks a lawyer to do something which is flatly illegal, the answer is no. It's not, "Here's 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 contrary to a zero tolerance policy, which has a definition of torture that would have exculpated Saddam Hussein, that leaves 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 an executive branch policy for some two and half years, during which time I believe that a permissive environment was inevitably created.

Now, I welcome the very strong statement 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 weren't explicitly replaced -- namely about the president's constitutional powers to order his subordinates to commit legal -- to commit torture -- should be repudiated. At the beginning of the testimony, Mr. Gonzales said those parts have been withdrawn. By the end he said he repudiated it. I think he should say, "I reject them because they are legally wrong and they never should have been put out there in the first place." I don't think that our nation's chief law enforcement officer should tolerate ambiguity on a matter that is so essential to our national values. I think Mr. Gonzales should repudiate all elements of the memorandum, ask for withdrawal of the Defense Department's working group report. And I also with Mr. Johnson it's a very good idea to have a regular report about what we're doing to root out torture within the executive branch.

With regard to the commander in chief powers, 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's an overbroad position. I don't think it's sustainable as a matter of law, and I think it should be repudiated definitively.

Remember that the attorney general has a duty not just 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's put out there. A very simple question which you could have asked him today was --

SEN. SPECTER: Dean Koh, your red light is on, if you would conclude your current thought, we would appreciate it.

DEAN 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. Thank you.

SEN. SPECTER: We will -- thank you, Dean Koh. We will now proceed with a round of 10 minutes each. It's late in the afternoon, and we have had extensive testimony from Attorney General-designate Gonzales dealing with the specifics of the issues which he faced, which the country faced, and now with three individuals who are more perhaps academicians, or at least in part academicians, we could explore a subject which we have not taken up, a delicate subject, and that is the issue of the so-called ticking-bomb case on torture. There are some prominent authorities -- and I do not subscribe to this view, but only set forth for purposes of discussion -- that if it was known probable cause that an individual had a ticking bomb and was about to blow up hundreds of thousands 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 that 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 official 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 than 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 -- who use torture -- not saying that it 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? DEAN KOH: Well, senator, you're a former prosecutor, and I think that my approach would be to keep the flat ban, and if someone -- the president of the United States -- had to make a decision like that, someone would have to decide whether to prosecute him or not. But I don't 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've 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.

SEN. SPECTER: That sounds essentially like the hypothetical question defense -- if the president does it, that's a prosecution matter. I don't know about that.

Dean Hutson, what do you think? Ever an occasion to even consider that?

DEAN 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's not necessarily the situation -- or it's not necessarily -- it's not at all the situation we're talking about here with Gitmo or Abu Ghraib or other prisons. There's no indication that there was a ticking bomb anywhere. The other is that you pose a question in which there is by definition in the question not sufficient time to use more effective methods of getting information -- good guy/bad guy rewards and punishments, you know, those kind of things which 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're not dealing with 550 people at Gitmo, or however many people at Abu Ghraib. So it's an interesting academic question. We've all debated it. But I don't think that it is the sort of question that the Bybee amendments, or excuse me, the Bybee memo for example addresses.

SEN. SPECTER: Dean Hutson, there's no doubt that it wasn't involved at Abu Ghraib in any of the issues which we've taken up, but anybody who has watched on C-SPAN since 9:30, we're off on a long day -- might deserve a little academic discussion, even if it's only highly theoretical. And it's pretty tough to advocate to advocate torture under any circumstances, even with the 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 Supreme Court concluded that the necessity was a defense and prosecution. It could never be

turned on its head to be made a policy 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's not. And that's the moral problem with the Bybee amendment.

On the specifics of the ticking time bomb, I think that it's very overblown in our imaginations, and it's very rife 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 that 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 don't 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 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 from torture. I've talked to American soldiers who've gone through that training and who have been required to be engaged in that kind of activity, and they told me that it's taken them 15 years of therapy to get over it. So I'm very disturbed to think that it's 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 criminal -- the professional criminals go through training to resist torture over the 48 hours they need before they get access to their lawyer. Everything I've 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.



SEN. SPECTER: Well, it may well be fantasy, and we hope that it never arises --

DEAN KOH: Senator, might I just add that --

SEN. SPECTER: Excuse me, I'm in the middle of a sentence, Dean Koh. Let's hope it is fantasy. And as we had examined interrogation techniques, we really haven't 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 or judgment if it went to the secretary of Defense or the undersecretary, where there is more time to have an interrogation technique. And let us hope that no president ever has to face a 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 --

DEAN KOH: I was just saying that the new OLC opinion of last week withdraws the necessity defense and so would not function to permit the invocation of necessity as a reason for torture.

SEN. SPECTER: Senator Leahy?

SEN. LEAHY: Thank you, Mr. Chairman. Admiral Hutson, Dean Koh, Mr. Johnson, I want to thank you for being here. You sat through a long day. I hope though it has been of interest.

I would also hope -- and I apologize for my voice, which is just about done -- I would hope that the senators would read the material you submitted. I read it and I found it fascinating. I've learned from it, obviously, sent most of it around to members of my staff, those who haven't read it. They might read it -- it's well worthwhile.

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 authorities as commander in chief to suspend the torture laws and immunize those who commit torture on his order. 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?

DEAN KOH: No.

SEN. LEAHY: That's 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 who is suspected of being a terrorist, hold him indefinitely incommunicado, no access to a lawyer and so on. He simply 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 Hamdi court didn't decide that. They simply reached a 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?

DEAN KOH: No, and not when a civilian court is open. I was surprised by the answer, because I think if you look at the Hamdi decision, the opinion that you are citing, Justice O'Connor's opinion, is a plurality decision. It doesn't say that he has a right to hold somebody indefinitely. That very issue is being litigated before the District of South Carolina in the Padilla case on remand. And also I think in 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's a 100-years war?" And then the government lawyer backed away from the assertion. So I don't think they were claiming at the time that there was a right to indefinite detention, and I don't think the Supreme Court gave them a right to indefinite detention.

SEN. LEAHY: And there's also a -- following a question one of the other senators asked, let's say the president followed Secretary Powell's advice, declared the Geneva Conventions applied to the conflict in Afghanistan -- what effect would have had on our ability to prosecute captured al Qaeda or Taliban fighters for war crimes?

DEAN 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 V of the tribunal -- 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's what was not done.

I 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 question 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.

SEN. LEAHY: That's what -- thank you, that's 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?

DEAN KOH: Broad applicability of 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 didn't 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 then would 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 protection of the conventions, because that might happen to our troops.

SEN. LEAHY: Well, and if we have somebody who is treating our troops inhumanely, or others, we can also bring about -- eventually bring about prosecutions of them as war criminals, can we not? There's 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 Conventions', quote, "strict limitations in questioning of enemy prisoners." But we talked about the Army field manual. That makes it perfectly clear that POWs can be interrogated. Is that not correct?

DEAN HUTSON: That's 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 the fact that it's a new paradigm doesn't 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 -- this isn't a 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, torturous 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're dealing with terrorists and we can't ask any question beyond name, rank, serial number, then you're just wrong on the law. You know, it's one or the other. You know, it's either wrong on the law or he's advocating techniques that I would not support.

SEN. LEAHY: From a lawyer's -- military lawyer's perspective, could we have avoided what we see in Afghanistan, Iraq and Guantanamo?

DEAN HUTSON: Absolutely. It goes back, senator, to what I think I said in my statement, written and oral statement, about the chain of command. 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 evil-doers, but they are human beings and we will treat them with the dignity and respect that Americans treat human beings, we would not have seen what we saw. Rather, the attitude of 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 up -- or I guess Mr. Johnson -- they ended up in this never-never land where nothing applied, and then we saw what happened.

SEN. LEAHY: We have some members of Congress in both parties -- have suggested we have some kind of an independent -- purely independent investigation of what happened here. Is that your position too? DEAN 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's not the point. The point is that we need an investigation, a comprehensive investigation, not unlike the investigation that perhaps Admiral Gehman 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, this has been -- atrocities have been committed by a few bad apples, you know, go out and demonstrate how that happened. They need -- and if it goes to the E Ring, then it goes to the E Ring. 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.

SEN. LEAHY: Thank you. And, Mr. Chairman, you asked the question that Mr. Johnson has been asked, 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. And thank you, Mr. Chairman. And, again, I compliment you for the hearing you held today.

SEN. SPECTER: Thank you very much, Senator Leahy.

Senator Cornyn?

SEN. CORNYN: Thank you, Mr. Chairman. Mr. Johnson, Mr. Koh, Mr. Hutson, thank you for being here with us today. I just want to ask for whether you agree or disagree with this proposition to begin with, and then we'll get into some 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 gather actionable intelligence that's likely to save American lives?

DEAN HUTSON: I agree.

SEN. CORNYN: Dean Hutson?

DEAN HUTSON: I agree.

SEN. CORNYN: Dean Koh?

DEAN KOH: I agree with lawful means no including torture or cruel, inhuman or degrading treatment.

SEN. CORNYN: Exactly. That's implicit in the question, but thank you for being specific. Mr. Johnson? MR. JOHNSON: I agree. And my concern is that there's been such a fascination with the supposed effectiveness of forms of torture and duress that all lawful means in fact have not been used.

SEN. CORNYN: But as far as the proposition goes, all lawful means, as qualified or amplified I should say, by Dean Koh and you, Mr. Johnson, and Dean Hutson, you would agree with that proposition, would you not, sir?

Well, and that's the thing. I think we all agree with that. I mean, certainly we do on on the committee, and as I heard Judge Gonzales testify today, that's 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's disagreement, because we've already talked about it some here today -- not with you, with these witnesses. But, first of all -- and I'd like to maybe start with Dean Koh, and then Dean Hutson, and then ask Mr. Johnson some other questions. First of all, Mr. Johnson, let me just -- just as a background matter, are you a lawyer by profession, sir?

MR. JOHNSON: No.

SEN. CORNYN: Okay, well, I won't ask you any legal questions.

MR. JOHNSON: Please.

SEN. CORNYN: It's not every day that you get to ask the legal questions of the deans of -- a couple of law school deans, and Mr. Chairman, they wouldn't let me into Yale Law School, so I didn't even bother trying to apply, because I wasn't qualified. So it's a great honor to be here with --

DEAN HUTSON: We would have been glad to have you at Franklin Pierce Law Center. (Laughter.)

SEN. CORNYN: Well, it's great to be here with such distinguished legal minds. But, you know, I asked earlier Judge

Gonzales -- I think it was -- whether lawyers disagree and -- about even the matters as important as to what you testified to 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've expressed today, for example, Dean Koh, with regard to the applicability of the Geneva Conventions to terrorists. Would you concede the point that there are respectable legal scholars who hold a contrary opinion?

DEAN KOH: Yes, and I think you have to define exactly what you mean -- the applicability to al Qaeda, the applicability to Taliban? There's a different nose count on each one. SEN. CORNYN: I understand your distinction. But let's talk about al Qaeda first. But do you -- and you take the position that Geneva applies to al Qaeda -- is that correct, sir?

DEAN KOH: I take the position that Geneva applies to people who are captured, and then a tribunal could quickly determine that someone is al Qaeda, and as for example in the case of Moussaoui he could then be turned over to a criminal proceeding.

SEN. 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?

DEAN KOH: Well, they fall under Geneva, but they are not POWs, and they should then be treated as common criminals and prosecutors.

SEN. CORNYN: But nevertheless entitled to humane treatment, is that correct?

DEAN KOH: Yes.

SEN. CORNYN: And, Dean Hutson, do you have a contrary view, or do you take the same position?

DEAN HUTSON: I take the same view. You know, one of the issues I think here, senator, is that -- at least in my mind one of the issues here is that -- I don't want to sound pedantic, so forgive me, but you know law isn't practiced in a vacuum. It's practiced in real life. And sometimes whether or

not lawyers agree or disagree about the gray areas in the middle -- I don't think there's necessarily a gray area in the middle -- there are other factors, like protecting U.S. troops, that have to be taken into consideration in making the decision about whether or not you are going to apply the Geneva Convention or the role the conventions are going to take. And I think that it's naive to say, Well -- not you are but others -- naive on the part of others to say, Well, we are going to very narrowly limit this, because we're 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.

SEN. CORNYN: Well, Dean Hutson, let me pursue that just a second. Isn't it naive to assume that al Qaeda, people who employ suicide bombing attacks, who attack innocent civilians, will have any regard whatsoever for the international forms of conflict?

DEAN HUTSON: I do not think that they will have any regard for the international forms of conflict. Nor do I think that if they are suddenly going to say, Oh, gee, if we start doing -- conducting or behaving in other ways, we'll get the benefit of being POWs. If we start wearing uniforms everything is going to be okay. You know, I don't think it makes a difference particularly one way or the other.

SEN. CORNYN: So it wouldn't influence their decision to treat our troops, were they captured, in any particular humane --

DEAN HUTSON: Well, I think --

SEN. CORNYN: -- complied with the Geneva Convention?

DEAN HUTSON: I think that it may. I think Senator McCain said that he thought that it did in Vietnam. I think that --

SEN. 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?

DEAN HUTSON: Did not -- they did not necessarily comply with the law of war, which is one of the factors that is determinative of POW status.



DEAN KOH: I think we're 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.

SEN. CORNYN: Well, let me just mention a group of other distinguished lawyers. Professor W. Thomas Malinson (ph), who has written in Case Western Reserve Journal of International Law; Professor Alan Rossis (ph), who has written on this subject, Professor Ingrid Detter, Professor Gregory N. Travalio (ph) -- and I hope I pronounce that name correctly. And I won't go through a whole long list, but you would acknowledge that there are others, 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?

DEAN KOH: I think the question, senator, is whether Afghanistan can be removed from the scope of the Geneva Conventions? And I don't know that anybody agrees with that.

SEN. CORNYN: So you wouldn't agree -- you wouldn't concede that there are 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 wouldn't concede that?

DEAN KOH: I think this is a point that was made in your Washington Times op-ed, quoting Mr. Malinowski from Human Rights Watch. But I think as he pointed out in his letter of response, the danger is an assertion that an entire conflict is outside the scope of the Geneva Conventions. If that were true, then 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.

SEN. SPECTER: Senator Cornyn, would you like one more round?

SEN. CORNYN: I would like two more minutes, and I'll be through.

SEN. SPECTER: Dean.

SEN. CORNYN: Thank you, sir. (Laughter.) 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 doesn't 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, that 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?

DEAN KOH: If one of those cases, if the Padilla case -- that case was reversed by the Second Circuit. If another case --

SEN. CORNYN: But for lack of jurisdiction, right? And it's not one of the ones I was referring to.

DEAN 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 proceedings precisely because the Geneva Conventions, and --

SEN. CORNYN: Is that the one that's on appeal right now?

DEAN KOH: Yes. And then --

SEN. CORNYN: Well, for the record, the ones I'm referring to are the Arnaut (ph) case, the Lindh, John Walker Lindh case --

DEAN KOH: -- a plea bargain.

SEN. CORNYN: Well, I beg your pardon, sir, it's 212 Fed. Sup. 2d 541. It's 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 protection of the Geneva Convention.

Mr. -- or Mr. Chairman, given the late hour and my commitment to you not to go much farther than a couple more questions, we'll save all these interesting discussions perhaps for a later time, but thank you.

SEN. SPECTER: Senator Cornyn, if Yale had an opportunity to consider your application nunc pro tunc, and seen you spar with the distinguished dean of the Yale Law School, I think you would have been admitted beyond any question. But I don't know had you gone to Yale you would have been the superb questioner that you are today. (Laughter.) But I -- Senator Leahy and I are sort of chained to the mast. That's the rule of being ranking and chairman. But you're a free agent, so your presence here is extraordinarily commendable, and I think including your introduction you may have outranked Senator Kennedy on tenure of speeches. That concludes the hearing. Thank you very much, gentlemen.

END.