

INTRODUCTORY STATEMENT of

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BARRISTER, MATRIX CHAMBERS

US HOUSE OF REPRESENTATIVES

COMMITTEE ON THE JUDICIARY

SUB-COMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND CIVIL

LIBERTIES

Hearing on: From the Department of Justice to Guantanamo Bay: Administration

Lawyers and Administration Interrogation Rules, Part IV

JULY 15, 2008, 10 a.m.

[CHECK AGAINST DELIVERY]

Mr Chairman, Honourable Members of the Committee, it is my privilege and honour to have been invited to appear before this Committee on a second occasion, to respond to various matters that have arisen and to address your further questions on the subject of Administration Lawyers and Administration Interrogation Rules.

Since I last appeared, on May 6th, there have been a number of significant developments. This Committee has held two further hearings, and related hearings have been held by the Senate Judiciary Committee (before which I testified) and the Senate Armed Services Committee.

Important details have emerged, filling out and developing the account in my book *Torture Team* and in the article I wrote for Vanity Fair, *The Green Light*. That account - which has been sustained and strengthened by what has emerged since I last appeared - described four simple steps: first, get rid of Geneva and the international rules prohibiting aggressive interrogations; second, find new interrogation techniques and disarm their opponents by circumventing the usual consultations; third, deploy those techniques; and fourth, make it look as though the initiative came from the bottom up. New information and testimony conclusively shows that the decision to move to aggressive military interrogations at Guantanamo came from the top. We now know, for example, that as early as July 2002 the Office of General Counsel at DoD was actively engaged in exploring sources for new techniques of interrogation, including from the SERE programme.¹ That was well before the folks at Guantanamo began their efforts.

There has been no challenge to my conclusion that the Geneva Conventions were set aside to allow new interrogation techniques to be developed and applied. That created the

¹ See Written Testimony of Daniel J Baumgartner before the US Senate Committee on Armed Services, 17 June 2008, <http://armed-services.senate.gov/statemnt/2008/June/Baumgartner%2006-17-08.pdf>. See also related documents, including Memorandum from JPRA Chief of Staff for Office of the Secretary of Defense General Counsel, July 25 2002,

legal vacuum within which the Torture Memo of August 1st 2002 was written by Jay Bybee and John Yoo (it was noteworthy that when he appeared before this Committee Professor Yoo was reluctant to acknowledge his authorship of that Memo, in sharp contrast to his acknowledgement of that role in his book).²

Nothing has emerged to contradict my conclusion – and that of others - that it was Professor Yoo’s Memo – rather than Colonel Beaver’s legal advice - that served as the true basis for Mr Haynes’ recommendation and Mr Rumsfeld’s authorisation of cruelty on December 2nd 2002.

And, most significantly, in her testimony before the Senate Armed Services Committee on June 17th, Jane Dalton (who was general counsel to General Myers, the Chairman of the Joint Chiefs of Staff) confirmed my account that Mr Haynes actively and directly short-circuited the decision-making process.³ Admiral Dalton went further. She revealed that there were serious objections from military lawyers, that these were known to General Myers and Mr Haynes, and that steps were taken to prevent them from being taken any further.⁴ This is consistent with my belief that a conscious decision was taken at the upper echelons to avoid unhelpful legal advice.

These are serious matters. They require further investigation, and that is an important role for this Committee and for Congress, and perhaps also for others.

²Congressman Ellison asked Professor Yoo if he wrote the 1 August 2002 memo. “I did not write it by myself”, Professor Yoo replied. “Did you write it at any part?”, Congressman Ellison asked. “I contributed to a drafting of it”, Professor Yoo replied [See HEARING OF THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES SUBCOMMITTEE OF THE HOUSE JUDICIARY COMMITTEE, 26 JUNE 2008, Federal News Service Transcript, p. 19.] In his book *War by Other Means: An Insider’s Account of the War on Terror* (Atlantic Monthly Press, 2006) Professor Yoo was rather more forthcoming: “We wrote the memo” (page 171) and states: “I realise that we did not explain ourselves as clearly as we could have in 2002” (page 177).

³ PANEL II OF A HEARING OF THE SENATE ARMED SERVICES COMMITTEE; SUBJECT: ORIGINS OF AGGRESSIVE INTERROGATION TECHNIQUES, 17 June 2006, Federal News Service Transcript, p. 14 (“When I learned that Mr. Haynes did not want that broad-based legal and policy to -- review to take place, then I stood down from the plans”).

⁴ *Ibid.*, p 14 et seq.

Professor Yoo testified before this Committee on June 26th. Whether deliberately or accidentally he fell into error with respect to my previous testimony. Professor Yoo said that I had never interviewed him for the book. That is right. But he also asserted that in my testimony I had claimed to have done so. That is wrong. It seems that if he did read my testimony he did so with insufficient care. I did not say to this Committee that I had “interviewed” him. I chose my words with care. What I said on May 6th was this:

“Over hundreds of hours I conversed or debated with many of those most deeply involved in that memo's life. They included, for example,... the deputy assistant attorney general at DOJ, Mr. Yoo.”

I was referring to a debate I had with Professor Yoo in the autumn of 2005, at the World Affairs Council in San Francisco. It is fully described in my book. You can listen to that debate for yourselves on the web.⁵

Congressman King seized on Professor Yoo's words with impressive speed. The Congressman was under the impression that I had made a “false statement” to the Committee, and suggested that might “reflect on the veracity of the balance of the book.” That avenue is not available to him. Because I made no claim in my testimony or in the book to having interviewed Professor Yoo, and because the allegation is serious, I wrote to Professor Yoo inviting him to correct his error. A copy of my letter of June 28th is attached to the written version of this introductory statement. I have not yet received a reply. I also copied the letter to Congressman King. I trust he accepts that if any false statement was made before this House I was not its author.

Mr Addington also appeared before this Committee on June 26th. His appearance was striking in many respects, not least for his apparently generous failure of memory. On many key issues he simply said he could not remember. He couldn't remember, for example, whether he'd been to Guantanamo in September 2002.⁶ He couldn't remember whether he had there discussed interrogation techniques. He couldn't even remember

⁵ *America is Undermining the Global Legal Order... Or Not?* John Yoo and Philippe Sands, 31 October 2005, World Affairs Council, available at: <http://wacsf.vportal.net/?fileid=4131>

⁶ HEARING OF THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES SUBCOMMITTEE OF THE HOUSE JUDICIARY COMMITTEE, 26 JUNE 2008, Federal News Service Transcript, p. 23.

whether he there met with Colonel Beaver, the Staff Judge Advocate.⁷ And yet he was able to recall one point during this meeting with crystal clarity. Asked by Congresswoman Wassermann Schultz whether he had encouraged Guantanamo Bay interrogators “to do whatever needed to be done”, Mr Addington was suddenly able to provide a clear response: “I do deny that”, he said, “that quote is wrong”.⁸ You will appreciate my scepticism at his sudden and selective capacity for recollection. Either he remembers what happened that day or he does not. The combatant commander at Guantanamo certainly remembered Mr Addington’s visit, he told me about it. “As soon as we saw each other we knew each other”, Major General Dunlavey told me.⁹ “They wanted to know what we were doing to get to this guy”, Major General Dunlavey said of Detainee 063 (Mohammed Al Qahtani), adding that “Addington was interested in how we were managing it”.¹⁰ Colonel Beaver also had no difficulty recalling the visit, when Mr Addington was accompanied by his friend Mr Haynes and also by Mr Rizzo of the CIA. She told me in no uncertain terms that Mr Addington was “definitely the guy in charge” (I doubt that description will seem odd to those who watched Mr Addington’s testimony on June 26th). It was Colonel Beaver who recalled the message she got from this group of lawyers to do “whatever needed to be done”.¹¹ Whether or not that is to be taken as a form of pressure, it is indicative of early and direct support from the top for the new direction. It was, at the least, a green light. I faithfully reproduced what I was told by Colonel Beaver and Major General Dunlavey. My contemporaneous notes were checked by the fact-checker at Vanity Fair, who was sent from New York to London to spend a full week reviewing my supporting materials. He found no errors. My account accurately reflects what I was told.

I did interview Mr Feith for my book. He told me much of interest. He told me that the decision not to follow the rules reflected in Geneva was taken in the knowledge that it would remove constraints on military interrogations. He told me that the decision to move to aggressive military interrogations followed “a thoroughly interagency piece of

⁷ *Ibid.*

⁸ *Ibid.*, p. 24.

⁹ *Torture Team: Rumsfeld’s Memo and the Betrayal of American Values* (2008, Palgrave Macmillan), p. 47.

¹⁰ *Ibid.*

¹¹ *Ibid.*

work”, involving DoJ. I learnt that Mr Feith was a little reticent about his own role in the decision to treat Al Qahtani with cruelty. I was able to help him recall that his involvement in that decision came rather earlier than he had wanted me to believe. You can see for yourself in Mr Haynes’ one page memo that I have included amongst the documents. “I have discussed this with ... Doug Feith”, wrote Mr Haynes.

Mr Feith later wrote a letter to the Editor of *Vanity Fair* complaining that my article contained “more misquotations and errors than can be addressed in this letter”. He did not, however, provide even one example of misquotation. I believe that I provided an accurate and fair account of our conversation, and was able to deal shortly with his allegation when the Editor gave me an opportunity to respond. “He may not recall that our conversation was recorded”, I wrote of Mr Feith, “the quotations are accurate”.¹²

Since he has not identified any errors I am not in a position to respond to his allegations. Subsequently, Mr Feith has taken matters to another level. Last month, in the course of an interview on the Canadian Broadcasting Corporation’ programme “The Current”, he expressed his belief that my book was “dishonest”.¹³ That is a serious charge. Perhaps it was made in a moment of excess. Even so, it is wrong. It has been made –once again – without any substantiation.

Mr Feith held an important position. He was the head of policy, the number 3 at the Pentagon after Messrs Rumsfeld and Wolfowitz. Yet it seems that he and his colleagues failed to turn their minds to all the possible consequences of abandoning the rules reflected in Geneva. Having decided to circumvent these international constraints on aggressive interrogation, they seem not to have asked themselves the key questions: were they satisfied that these new techniques could produce reliable information? could the techniques undermine the ‘war on terror’ by alienating allies? would the fact of aggressive interrogation be used as a recruiting tool? It seems that Mr Feith was involved in many aspects of these decisions, from denial of Geneva rights to all the detainees at

¹² *Vanity Fair*, July 2008, p. 22.

¹³ *The Current*, 8 June 2006, <http://www.cbc.ca/thecurrent/2008/200806/20080605.html>, at Part II, at 11 minutes, 30 seconds.

Guantanamo, to the appointment of Major General Dunlavey, to the adoption of aggressive interrogation techniques. You would not know that from his recent book, in which just six pages out of 900 are devoted to the Geneva decision, and the issue of aggressive interrogations is reduced to a mere paragraph.¹⁴ He makes no mention of Detainee 063, or his role on the interrogation issues, or the way in which the DoD Inspector General concluded that the Guantanamo techniques approved on his watch migrated to Abu Ghraib. He airbrushes himself out of his own story.

The removal of Geneva was an act for which, as Mr Feith told me, he was “really a player”. It is now clear that the decision led directly to war crimes, a spectre raised by Justice Kennedy in the Supreme Court’s ruling in *Hamdan v Rumsfeld* that the rules reflected in Geneva’s Common Article 3 applied at Guantanamo. With that important judgment all doubt evaporated as to the commission of war crimes. The issue now is not whether war crimes occurred, but who is responsible for them. As Major General Antonio Taguba has recently written:

“there is no longer any doubt as to whether the current administration has committed war crimes. The only question that remains to be answered is whether those who ordered the use of torture will be held to account.”¹⁵

Articles on this subject are now beginning to appear in the press.¹⁶ One important issue will be the question of criminal intent? That is a question of fact and law. The facts are now emerging, including as a result of these hearings. They show that unhelpful or contrary legal advice was avoided with a view to putting into effect a pre-determined policy of abuse, which may reflect criminal intent. The rules of international criminal law indicate that this may be a basis for criminal liability. This is all the more so if the view is taken that the decision on Geneva was manifestly unlawful, or the authorisation of the new interrogation techniques on Detainee 063 were manifestly unlawful by reference to the conventional or customary standards reflected in Geneva’s Common Article 3. It is difficult to see on what basis a different view could be taken.

¹⁴ Douglas J. Feith, *War and Decision* (Harper, 2008), at p. 165.

¹⁵ See Physicians for Human Rights, *Broken Laws, Broken Lives: Medical Evidence of Torture by the US* (2008), at http://brokenlives.info/?page_id=23

¹⁶ See e.g. Stuart Taylor, ‘Our Leaders are Not War Criminals’, available at: http://www.nationaljournal.com/njmagazine/or_20080628_2022.php

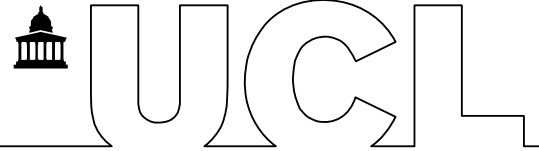
Mr Chairman, Members of the Sub-Committee, at the heart of these hearings lie issues of fact. What Congress must do is fully investigate how it all began: who did what and when; and how precisely the pressures from the top came to be imposed, whether directly or indirectly. In this way a proper reckoning can take place, so that those who are truly responsible can be identified. It is not immediately apparent that these important and welcome efforts by Congress can really get to the heart of a matter which started not on the ground but in the minds and offices of a small number of senior officials such as Mr Feith. Last month, 56 members of this House wrote to the US Attorney General to request the appointment of a special counsel to investigate the issues, to examine whether the Administration had “systematically implemented, from the top down, detainee interrogation policies that constitute torture or otherwise violate the law”. If Congress cannot sort this out, and if the desire for foreign investigations is to be avoided, that call may become impossible to resist.

I thank you for allowing me the opportunity to make this introductory statement.

UCL FACULTY OF LAWS

Philippe Sands QC

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Professor John Yoo
Professor of Law
Boalt Hall School of Law
University of California at Berkeley
Berkeley, CA 94720

By email: jyoo@law.berkeley.edu

28 June 2008

Dear Professor Yoo,

I am writing to you on a matter that I hope can be cleared up quickly and without difficulty.

I have been provided with a copy of an uncorrected transcript prepared by the Federal News Service of your testimony of 26 June 2008 before the Sub-Committee of the House Judiciary Committee. Pages 14 and 15 of the transcript include an exchange between you and Representative King, which includes the following:

MR. YOO: Sir, I haven't read the book. I did read Mr. Sands's testimony before this committee. And I noticed in the testimony he said that he had interviewed me for the book. And I can say that he did not interview me for the book. He asked me for an interview and I declined. So I didn't quite understand why he would tell the committee that he had actually interviewed me.

REP. KING: And with that answer, Professor Yoo, then I'm going to interpret that to mean that at least with regard to that statement -- that he had interviewed you -- you find that to be a false statement, and that would perhaps reflect on the veracity of the balance of the book.

MR. YOO: I can't tell what else is in the book, but I don't understand why he would say that he interviewed me for the book. I can tell the committee that he contacted me once. He wanted to interview me for the book. And I said, I don't want to talk to you. I wrote my own

book. You can look at my own book. Everything I have to say is in my book. And then he told the committee that he had interviewed me.

Your recollection accords with mine (although you may also recollect we also debated in conversation at the World Affairs Council, in the autumn of 2005). I have always been careful to be as accurate as I can, and I do not believe that I indicated to the Sub-Committee that I had interviewed you for the book. The uncorrected transcript of the hearing at which I appeared on 6 May 2008 (prepared by the Federal News Service, copy attached) includes the following from my introductory statement:

Over hundreds of hours I conversed or debated with many of those most deeply involved in that memo's life. They included, for example, the combatant commander and his lawyer at Guantanamo, Major General Dunlavey and Lieutenant Colonel Beaver, the commander of United States Southern Command in Miami, General Hill, the chairman of the Joint Chiefs of Staff, General Myers, the undersecretary of Defense, Mr. Feith, the general counsel of the Navy, Mr. Moorer, and the deputy assistant attorney general at DOJ, Mr. Yoo.

I believe that is an accurate statement. It does not indicate that I interviewed you for the book, and there is no other point in my testimony in which I so indicated. For the avoidance of doubt, in my book *Torture Team* (which I appreciate you have not read), I refer to our debate in conversation at pages 184-5.

I hope you will forgive me for having troubled you with this point. I would not have done so but for the fact that Representative King appears to have concluded that I made "a false statement" to the Committee, and your exchange with him has caused me to receive a number of enquiries by email, raising issues of integrity or veracity.

I am perfectly happy to proceed on the basis that any statement you made (and any error it might have contained) was in good faith, and would be grateful if you could perhaps so communicate to Representative King and the Chairmen of the Committee and the Sub-Committee, and thereby clear up the misperception.

With best wishes,

Philippe Sands

cc. Representative John Conyers, Chairman, Judiciary Committee
Representative Jerrold Nadler, Chairman, Constitution, Civil Rights and Civil Liberties Sub-Committee
Representative Steve King, Member, Chairman, Constitution, Civil Rights and Civil Liberties Sub-Committee

ATTACHMENT 2

UNCLASSIFIED

- C.
- P.



GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1800 DEFENSE PENTAGON
WASHINGTON, D. C. 20301-1800

2002 DEC -2 AM 11: 03

ACTION MEMO

November 27, 2002 (1:00 PM)

OFFICE OF THE
SECRETARY OF DEFENSE

DEPSEC _____

FOR: SECRETARY OF DEFENSE

FROM: William J. Haynes II, General Counsel *[Signature]*

SUBJECT: Counter-Resistance Techniques

- The Commander of USSOUTHCOM has forwarded a request by the Commander of Joint Task Force 170 (now JTF GTMO) for approval of counter-resistance techniques to aid in the interrogation of detainees at Guantanamo Bay (Tab A).
- The request contains three categories of counter-resistance techniques, with the first category the least aggressive and the third category the most aggressive (Tab B).
- I have discussed this with the Deputy, Doug Feith and General Myers. I believe that all join in my recommendation that, as a matter of policy, you authorize the Commander of USSOUTHCOM to employ, in his discretion, only Categories I and II and the fourth technique listed in Category III ("Use of mild, non-injurious physical contact such as grabbing, poking in the chest with the finger, and light pushing").
- While all Category III techniques may be legally available, we believe that, as a matter of policy, a blanket approval of Category III techniques is not warranted at this time. Our Armed Forces are trained to a standard of interrogation that reflects a tradition of restraint.

RECOMMENDATION: That SECDEF approve the USSOUTHCOM Commander's use of those counter-resistance techniques listed in Categories I and II and the fourth technique listed in Category III during the interrogation of detainees at Guantanamo Bay.

SECDEF DECISION

Approved *[Signature]* Disapproved _____ Other _____

Attachments
As stated

cc: CJCS, USD(P)

*However, I stand for 8-10 hours
A day. Why is stand, limited to 4 hours?*

D.A. DEC 0 2 2002

Declassified Under Authority of Executive Order 12958
By Executive Secretary, Office of the Secretary of Defense
William P. Marriot, CAPT, USN
June 18, 2004

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