STATEMENT BY DOUGLAS J. FEITH
BEFORE THE
CONSTITUTION, CIVIL RIGHTS AND CIVIL LIBERTIES SUBCOMMITTEE
OF THE
HOUSE COMMITTEE ON THE JUDICIARY
JULY 15, 2008

Mr. Chairman, I'm pleased to have a chance to testify today. I think it's important to help counter some widely held false beliefs about the administration's policies on detainee interrogation.

I agreed to testify voluntarily. I did so because the Committee staff gave the assurance that the aim was a serious review of administration policy – not a vitriolic hearing designed to promote personal attacks. I wish to note for the record why I did not attend the originally scheduled hearing: On the afternoon before that hearing, the Chairman's staff told me my panel would include someone who has made a practice lately of directing baseless and often vicious attacks on me personally. That violated the assurances I had been given, so I insisted on a new date to testify. I'm glad we quickly arranged a new hearing date, but I object to the Committee's having needlessly issued a subpoena for me. It falsely implies that I was not willing to appear voluntarily.

The history of war-on-terrorism detainee policy goes back nearly seven years. It involves many officials and both the law and the facts are enormously complex. Some critics of the administration have simplified and twisted that history into what has been called the "torture narrative," which centers on the unproven allegation that top-level administration officials sanctioned or encouraged abuse and torture of detainees.

The "torture narrative" is grounded in the claim that the administration's top leaders, including those at the Defense Department, were contemptuous of the Geneva Convention (which I refer to here as simply "Geneva.") The claim is false, however. It is easy to grasp the political purposes of the "torture narrative" and to see why it is promoted. But these hearings are an

opportunity to check the record – and the record refutes the "torture narrative".

The book by Phillipe Sands[1] is an important prop for that false narrative. Central to the book is its story about me and my work on the Geneva Convention. Though I'm not an authority on many points in Sands's book, I do know that what he writes about me is fundamentally inaccurate – false not just in its detail, but in its essence. Sands builds that story, first, on the accusation that I was hostile to Geneva and, second, on the assertion that I devised the argument that detainees at GTMO should not receive any protections under Geneva – in particular, any protections under common Article 3. But the facts are (1) that I strongly championed a policy of respect for Geneva and (2) that I did not recommend that the President set aside common Article 3.

I will briefly review my role in this matter and then discuss Sands's misreporting. As it becomes clear that the Sands book is not rigorous scholarship or reliable history, members of Congress and others may be persuaded to approach the entire "torture narrative" with more skepticism.

My main involvement in the issue of detainee interrogation was in January and February 2002. US forces in Afghanistan had just taken custody of the first detainees. Administration lawyers brought forward to the President the question of the detainees' legal status. The lawyers distinguished between the worldwide US war against al Qaida and the US war with the Taliban regime in Afghanistan. As I recall, no one in the administration argued that Geneva applied to the war against al Qaida, which is neither a state nor a party to Geneva.

There was controversy, however, over whether the war with the Taliban was governed by Geneva. Some lawyers contended that the President could lawfully decide that Geneva did not apply even though Afghanistan was a party to the Convention. Their argument was that Afghanistan was at that time a failed state, and the Taliban could be seen not as a government, but as as merely a criminal gang. Those lawyers were obviously straining to give their client, the President, as much flexibility as possible to handle the unprecedented requirements of the war on terrorism. I did not question their

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[1] Philippe Sands, *Torture Team: Rumsfeld's Memo and the Betrayal of American Values* (New York: Palgrave Macmillan, 2008).

good faith, but I strongly favored a different approach, one that gave greater weight to Geneva as a treaty that embodied important American principles.

Secretary of Defense Rumsfeld called in the Chairman of the Joint Chiefs of Staff, General Richard Myers, and me to discuss this controversy. I describe that discussion in my book, *War and Decision.*[2]

The main point that General Myers and I made to the Secretary was that the United States had a compelling interest in showing respect for Geneva. The Secretary, we said, should urge the President to acknowledge that Geneva governed our war with the Taliban. We argued that Taliban detainees should receive the treatment to which they were entitled under Geneva. But we did *not* think they had met the defined conditions for POW privileges under Geneva.

After our meeting, Secretary Rumsfeld asked me to write up what General Myers and I had argued for. The Secretary wanted to use the write up as "talking points" for the National Security Council meeting with the President on February 4, 2002.

The memo I drafted and then cleared with General Myers[3] stressed that Geneva is crucial for our own armed forces. It said that it is "important that the President appreciate DOD's interest in the Convention." I described Geneva as a "good treaty" that "requires its parties to treat prisoners of war the way we want our captured military personnel treated." I noted that "US armed forces are trained to treat captured enemy forces according to the Convention" and this training is "an essential element of US military culture." I wrote that Geneva is "morally important, crucial to US morale" and it is also "practically important, for it makes US forces the gold standard in the world, facilitating our winning cooperation from other countries."

The memo said that "US forces are more likely to benefit from the Convention's protections if the Convention is applied universally." So I warned: It is "Highly dangerous if countries make application of [the] Convention hinge on subjective or moral judgments as to the quality or

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[2] Douglas J. Feith, *War and Decision: Inside the Pentagon at the Dawn of the War on Terrorism* (New York: Harper, 2008).

[3] See attached.

decency of the enemy's government. (That's why it is dangerous to say that [the] US is not legally required to apply the Convention to the Taliban as the illegitimate government of a 'failed state.')"

The memo explained why a "pro-Convention" position is dictated by the logic of our stand against terrorism. I argued:

- The essence of the Convention is the distinction between soldiers and civilians (i.e., between combatants and non-combatants).
- Terrorists are reprehensible precisely because they negate that distinction by purposefully targeting civilians.
- The Convention aims to protect civilians by requiring soldiers to wear uniforms and otherwise distinguish themselves from civilians.
- The Convention creates an incentive system for good behavior. The key incentive is that soldiers who play by the rules get POW status if they [are] captured.
- The US can apply the Convention to the Taliban (and al-Qaida) detainees as a matter of policy without having to give them POW status because none of the detainees remaining in US hands played by the rules.

The memo urged "Humane treatment for all detainees" and recommended that the President explain that Geneva "does not squarely address circumstances that we are confronting in this new global war against terrorism, but while we work through the legal questions, we are upholding the principle of universal applicability of the Convention."

This memo represented the thinking of the top civilian and military leadership of the Defense Department. I felt confident being aligned with General Myers on this matter and we were both pleased that Secretary Rumsfeld asked me to make these points to the President at the NSC meeting, which I did. The department's leadership took a strongly pro-Geneva position.

The Committee can therefore see that the charge that the department's leadership was hostile to Geneva is untrue. The picture that Mr. Sands's book paints of me as an enemy of the Geneva Convention is false – wildly so.

Mr. Sands also misrepresents my position on the treatment GTMO detainees were entitled to under Geneva. He writes that I argued that they were entitled to none at all. But that is not true; I argued simply that they were not entitled to POW privileges.

I pointed out that Geneva grants POW privileges to captured fighters as a incentive to encourage good behavior. Geneva's drafters wisely demanded that fighters meet four conditions if they are to receive such privileges: They must (1) wear uniforms, (2) carry their arms openly, (3) operate within a chain of command and (4) obey the laws of war. These conditions serve the Convention's highest purpose, which is protecting the safety of non-combatants in war zones. Many journalists and others wrongly assume that if Geneva governs a conflict then the detainees must receive POW treatment. But that is misconception. Detainees in wars governed by Geneva are entitled to POW treatment *only* if they meet these four conditions.

In early 2002, it was clear that the President would be urged by some commentators to grant POW status to all the detainees as a magnanimous gesture, without regard to whether they met the conditions. I believed that would be a bad idea. First of all, it would have the opposite of its intended humanitarian result. Granting POW status to terrorists who pose as civilians and who purposefully target civilians would undermine the incentive mechanism that Geneva's drafters knew was crucial to the Convention's humanitarian purposes.

I had strong views specifically on the issue of POW status because I had worked on that issue in the Reagan administration Defense Department in connection with a treaty called "Protocol I," which aimed to amend the Geneva Convention. President Reagan, in line with my analysis, opposed the amendments. One of his main objections was that they would have granted POW status to terrorists. I relate in my book the favorable press reaction to President Reagan's position:

> The *New York Times* and the *Washington Post*, not usually Reagan supporters, both praised his decision. In an editorial titled "Denied: A Shield for Terrorists," the *New York Times* said that Protocol I created "possible grounds for giving terrorists the legal status of P.O.W.'s," and declared that, if the president had ratified it, "nations might also have read that as legitimizing terrorists." The *Post's* editorial, "Hijacking the Geneva Conventions," highlighted POW status for terrorists as among the "worst" features of Protocol I. "The Reagan administration has often and rightly

> been criticized for undercutting treaties negotiated by earlier administrations," it concluded. "But it is right to formally abandon Protocol I. It is doing so, moreover, for the right reason: 'we must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law.'"

Preserving Geneva's incentive system was an important reason not to grant POW status to detainees who had not earned it. Also, the purpose of holding POWs in a conventional war was different from the purpose for holding detainees in the war on terrorism. The former were held simply to keep them off the battlefield. But the latter were being held for that reason *and also* to interrogate them for information to prevent future 9/11-type attacks.

It was legal and proper – furthermore, it was necessary and urgent – that U.S. officials interrogate war-on-terrorism detainees effectively. In fighting the enemy after 9/11, the key intelligence was not discoverable by satellite, as it was during the Cold War when we could watch from space for signs of an imminent attack by monitoring armored divisions in the USSR's western military district. In our post-9/11 challenge, the most important intelligence was not visible from space. It was inside the heads of a few individuals. Our best hope of preventing future attacks against the United States was to learn what captured terrorists knew about their groups' plans, capabilities and organizations.

A detainee entitled to POW status under Geneva could not be subjected to any kind of pressure at all to provide information. He is required to reveal only his name, rank and serial number. Interrogators are not allowed to subject him to even the most ordinary techniques employed every day in U.S. jails on American criminal defendants. Regarding *unlawful* combatants, on the other hand, Geneva does not prohibit *humane* forms of pressure by interrogators.

President Bush had a constitutional duty to safeguard our national defense and to try to prevent future 9/11-type attacks. He knew the importance of the intelligence available only through detainee interrogations. It would have made no sense for him to throw away the possibility of effective interrogations by bestowing POW status on detainees who were not actually entitled to it under Geneva.

Three days after the February 4, 2002 NSC meeting at which General Myers and I made our case, the President decided – in line with the Defense Department recommendation – that Geneva governed the U.S. conflict with the Taliban and that the Taliban detainees would *not* receive POW privileges because they had not met Geneva's conditions for eligibility. He decided also that Geneva did *not* govern the worldwide U.S. conflict with al Qaida. So neither the Taliban nor the al Qaida detainees would be given POW privileges.

So what standard of treatment should these detainees receive? U.S. forces in Afghanistan had been ordered from the outset to give any and all detainees "humane treatment." President Bush reaffirmed the standard of "humane treatment."

How to define the term "humane treatment" was a question on which the President looked to his lawyers for guidance. In his book, Mr. Sands focuses on whether Article 3 of the Geneva Convention (known as common Article 3, explained below) should have been the basis for the definition of "humane treatment."

This gets to the essence of the book's attack on me. Mr. Sands asserts that in the deliberations leading up to the President's decision on common Article 3, I not only argued against relying on that provision, but that I was somehow the source of the argument. These assertions are false and utterly without evidence. I did not invent any argument against common Article 3. I was not even making such an argument. In fact, I was receptive to the view that common Article 3 should be used.

So Mr. Sand's account is altogether inaccurate, both in his book and in his *Vanity Fair* article. This is important not simply because it smears me. It is significant because it exposes the astonishing carelessness of his book and his article. It impeaches Mr. Sands as a commentator.

In the weeks before the NSC meeting on the detainees' legal status, administration lawyers discussed how to flesh out the term "humane treatment." The President evidently considered this to be a legal rather than a policy question.

I was a policy official and did not serve in the administration as a lawyer, but I occasionally raised questions about matters being handled in legal

channels. Two of the questions I know I raised were: Why not use common Article 3 to define "humane treatment"? And why not use so-called Article 5 tribunals to make *individual* determinations that the detainees are not entitled to POW status? I posed these questions not because I had done my own legal analysis or had firm opinions myself – I had not. But I remembered these provisions generally from my Geneva-related work during the Reagan administration and I thought that using them, if judged legally appropriate, would be a further sign of U.S. support for Geneva.

Answers came back to me through the Defense Department's office of the General Counsel. The lawyers resolved against using Article 5 tribunals because the President had found that the Taliban fighters collectively failed to meet the Geneva conditions for POW status, so there was no need for individual determinations. And the lawyers also decided that common Article 3 was not applicable because (by its own terms) it covered only conflicts "not of an international character" and the conflicts with the Taliban and with al Qaida were both of an international character.

I don't believe I even attended any of the early 2002 meetings where the lawyers debated common Article 3. But my understanding is that they gave the issue good-faith consideration. Stressing that it was a legal (rather than policy) judgment, the President declared on February 7, 2002 that he accepted "the legal conclusion of the Department of the Justice" and determined that "Common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to 'armed conflict not of an international character.'"

Now, I know that lawyers dispute the Justice Department's legal conclusion about common Article 3. Reasonable people differ on the matter. As a policy official, I never studied the legal arguments in enough depth to have a confident judgment of my own on this question. When the U.S. Supreme Court eventually dealt with common Article 3's applicability to the GTMO detainees (a question of first impression), the justices split – the majority ruled against the administration, but there were justices who went the other way.

In no way does the record bear out Mr. Sands's allegation that I argued against using common Article 3, much less that I invented the legal argument against it. Mr. Sands dragged me into his book and painted me as

a villain without supporting evidence. He seems to have made that mistake either because he was not rigorous in his research or he interpreted what he read and heard through his own inaccurate preconceptions.

Mr. Sands's book is a weave of inaccuracies and distortions. He misquotes me by using phrases of mine like "That's the point" and making the word "that" refer to something different from what I referred to in our interview. I challenge Mr. Sands to publish whatever on-the-record audio he has of our interview. I believe it will clearly show that he has given a twisted account.

Likewise, Mr. Sands's book presents a skewed account of the Rumsfeld memo referred to in the book's subtitle. By what he says and what he omits to say, he gives the reader an extreme misimpression of the nature of SOUTHCOM's request for authority to use a list of counter-resistance techniques on some important, recalcitrant detainees. I hope we will get into this issue during today's hearing.

I want to conclude this statement by reiterating that I have focused on issues relating to me not because they are necessarily the most important, but because I can authoritatively say that Mr. Sands has presented those issues inaccurately. His ill-informed attack on me is a pillar of the broader argument of his book. And that flawed book is a pillar of the argument that Bush administration officials despised the Geneva Convention and encouraged abuse and torture of detainees. Congress and the American people should know that this so-called "torture narrative" is built on sloppy research, misquotations and unsubstantiated allegations.

List of Attachments to the Statement by Douglas J. Feith
Before the Constitution, Civil Rights and Civil Liberties Subcommittee of the
House Committee on the Judiciary – July 15, 2008

1. Douglas J. Feith Memorandum on *Points for 2/4/02 NSC Meeting on Geneva Convention*, February 3, 2002

2. President George W. Bush Memorandum for the Vice President, Secretary of State, Secretary of Defense, Attorney General, Chief of Staff to the President, Director of Central Intelligence, Assistant to the President for National Security Affairs, and Chairman of the Joint Chiefs of Staff on *Humane Treatment of al Qaeda and Taliban Detainees*, February 7, 2002

3. William J. Haynes Action Memo for Secretary of Defense on *Counter-Resistance Techniques*, November 27, 2002 (with attachments)

4. Secretary of Defense Donald H. Rumsfeld Memorandum for Commander of USSOUTHCOM on *Counter-Resistance Techniques*, January 15, 2003

5. Statement by Douglas J. Feith, Under Secretary for Policy before the House Permanent Committee on Intelligence on *The Need for Interrogation in the Global War on Terrorism*, July 14, 2004

6. John Moustakas Letter to the Honorable John Conyers, Jr., June 16, 2008

7. John Moustakas Letter to the Honorable John Conyers, Jr., June 18, 2008

February 3, 2002
Feith draft

Points for 2/4/02 NSC Meeting on Geneva Convention

The options as to law and policy:

- US is applying the Convention to *all* detainees as a matter of *policy*.
  - All detainees are getting the humane treatment to which they would be entitled if the US were legally bound to apply the Convention to them.
  - None is entitled to POW status under the Convention.
- All USG agencies (though State's position is unclear) agree that US is *not legally bound* to apply the Convention to *al-Qaida* detainees. (Convention applies only to wars between states or to civil wars, not to a war between a state and al-Qaida worldwide.)
- The question for the President: What should USG say about whether the US is *legally bound* to apply the Convention to *Taliban* detainees.
  - There are three options:
  - 1. Declare that US is *not* legally required to apply Convention to Taliban.

    Option 1 – not a good option, given DOD's interest in universal respect for the Convention for the benefit of our own forces.
  - 2. Declare that US is legally required to apply Convention to Taliban.

    Option 2 – a good option. Would help dampen criticism.
  - 3. Declare only that US is applying the Convention to Taliban (and to al-Qaida, for that matter), though USG has not resolved the difficult (but academic) question of whether we are legally required to do so.

    Option 3 – also a good option.

    US could make a virtue of its analytical conundrum by noting that the legal question is difficult precisely because our war on terrorism is unique and does not fit neatly into the categories of war envisioned in 1949 by the Convention's drafters. (Meanwhile, as noted, the US is applying the Convention to all detainees.)

DOD interest in the Geneva Convention

- Important that the President appreciate DOD's interest in the Convention.
- The Convention is a good treaty.
    - One could quibble about details, but the Convention is a sensible document that requires its parties to treat prisoners of war the way we want our captured military personnel treated.
- US armed forces are trained to treat captured enemy forces according to the Convention.
    - This training is an essential element of US military culture. It is morally important, crucial to US morale.
    - It is also practically important, for it makes US forces the gold standard in the world, facilitating our winning cooperation from other countries.
- US forces are more likely to benefit from the Convention's protections if the Convention ~~commands~~ is applied universally.
    - Highly dangerous if countries make application of Convention hinge on subjective or moral judgments as to the quality or decency of the enemy's government. (That's why it is dangerous to say that US is not legally required to apply the Convention to the Taliban as the illegitimate government of a "failed state.")
- A "pro-Convention" position reinforces USG's key themes in the war on terrorism.
    - The essence of the Convention is the distinction between soldiers and civilians (i.e., between combatants and non-combatants).
    - Terrorists are reprehensible precisely because they negate that distinction by purposefully targeting civilians.
    - The Convention aims to protect civilians by requiring soldiers to wear uniforms and otherwise distinguish themselves from civilians.
    - The Convention creates an incentive system for good behavior. The key incentive is that soldiers who play by the rules get POW status if they captured.
    - The US can apply the Convention to the Taliban (and al-Qaida) detainees as a matter of policy without having to give them POW status because none of the

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detainees remaining in US hands played by the rules.

- In sum, US public position on this issue should stress:
    - Humane treatment for all detainees.
    - US is applying the Convention. All detainees are getting the treatment they are (or would be) entitled to under the Convention.
    - US supports the Convention and promotes universal respect for it.
    - The Convention does not squarely address circumstances that we are confronting in this new global war against terrorism, but while we work through the legal questions, we are upholding the principle of universal applicability of the Convention.

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THE WHITE HOUSE

WASHINGTON

February 7, 2002

MEMORANDUM FOR THE VICE PRESIDENT
THE SECRETARY OF STATE
THE SECRETARY OF DEFENSE
THE ATTORNEY GENERAL
CHIEF OF STAFF TO THE PRESIDENT
DIRECTOR OF CENTRAL INTELLIGENCE
ASSISTANT TO THE PRESIDENT FOR NATIONAL SECURITY AFFAIRS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF

SUBJECT: Humane Treatment of al Qaeda and Taliban Detainees

1. Our recent extensive discussions regarding the status of al Qaeda and Taliban detainees confirm that the application of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (Geneva) to the conflict with al Qaeda and the Taliban involves complex legal questions. By its terms, Geneva applies to conflicts involving "High Contracting Parties," which can only be states. Moreover, it assumes the existence of "regular" armed forces fighting on behalf of states. However, the war against terrorism ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians, sometimes with the direct support of states. Our Nation recognizes that this new paradigm -- ushered in not by us, but by terrorists -- requires new thinking in the law of war, but thinking that should nevertheless be consistent with the principles of Geneva.

2. Pursuant to my authority as Commander in Chief and Chief Executive of the United States, and relying on the opinion of the Department of Justice dated January 22, 2002, and on the legal opinion rendered by the Attorney General in his letter of February 1, 2002, I hereby determine as follows:

   a. I accept the legal conclusion of the Department of Justice and determine that none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva.

   b. I accept the legal conclusion of the Attorney General and the Department of Justice that I have the authority under the Constitution to suspend Geneva as between the United States and Afghanistan, but I decline to

NSC DECLASSIFICATION REVIEW [E.O. 12958 as amended]
DECLASSIFIED IN FULL ON 6/17/2004
by R.Soubers

Reason: 1.5 (d)
Declassify on: 02/07/12

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exercise that authority at this time. Accordingly, I determine that the provisions of Geneva will apply to our present conflict with the Taliban. I reserve the right to exercise this authority in this or future conflicts.

c. I also accept the legal conclusion of the Department of Justice and determine that common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to "armed conflict not of an international character."

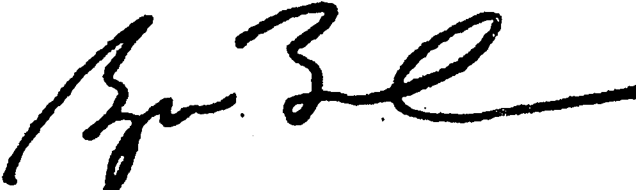
d. Based on the facts supplied by the Department of Defense and the recommendation of the Department of Justice, I determine that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva. I note that, because Geneva does not apply to our conflict with al Qaeda, al Qaeda detainees also do not qualify as prisoners of war.

3. Of course, our values as a Nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment. Our Nation has been and will continue to be a strong supporter of Geneva and its principles. As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.

4. The United States will hold states, organizations, and individuals who gain control of United States personnel responsible for treating such personnel humanely and consistent with applicable law.

5. I hereby reaffirm the order previously issued by the Secretary of Defense to the United States Armed Forces requiring that the detainees be treated humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.

6. I hereby direct the Secretary of State to communicate my determinations in an appropriate manner to our allies, and other countries and international organizations cooperating in the war against terrorism of global reach.



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GENERAL COUNSEL

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-1600

2002 DEC -2 AM 11: 03
OFFICE OF THE
SECRETARY OF DEFENSE

ACTION MEMO

November 27, 2002 (1:00 PM)

DEPSEC________

FOR: SECRETARY OF DEFENSE

FROM: William J. Haynes II, General Counsel

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 D.R. Disapproved __________ Other __________

Attachments
As stated

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

D.R. DEC 0 2 2002

cc: CJCS, USD(P)

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

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DEPARTMENT OF DEFENSE
UNITED STATES SOUTHERN COMMAND
OFFICE OF THE COMMANDER
3511 NW 91ST AVENUE
MIAMI, FL 33172-1217

REPLY TO ATTENTION OF

SCCDR

25 October 2002

MEMORANDUM FOR Chairman of the Joint Chiefs of Staff, Washington, DC 20318-9999

SUBJECT: Counter-Resistance Techniques

1. The activities of Joint Task Force 170 have yielded critical intelligence support for forces in combat, combatant commanders, and other intelligence/law enforcement entities prosecuting the War on Terrorism. However, despite our best efforts, some detainees have tenaciously resisted our current interrogation methods. Our respective staffs, the Office of the Secretary of Defense, and Joint Task Force 170 have been trying to identify counter-resistant techniques that we can lawfully employ.

2. I am forwarding Joint Task Force 170's proposed counter-resistance techniques. I believe the first two categories of techniques are legal and humane. I am uncertain whether all the techniques in the third category are legal under US law, given the absence of judicial interpretation of the US torture statute. I am particularly troubled by the use of implied or expressed threats of death of the detainee or his family. However, I desire to have as many options as possible at my disposal and therefore request that Department of Defense and Department of Justice lawyers review the third category of techniques.

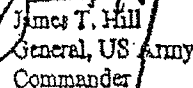
3. As part of any review of Joint Task Force 170's proposed strategy, I welcome any suggested interrogation methods that others may propose. I believe we should provide our interrogators with as many legally permissible tools as possible.

4. Although I am cognizant of the important policy ramifications of some of these proposed techniques, I firmly believe that we must quickly provide Joint Task Force 170 counter-resistance techniques to maximize the value of our intelligence collection mission.

James T. Hill
General, US Army
Commander

Encls

1. JTF 170 CDR Memo dtd 11 October, 2002
2. JTF 170 SJA Memo dtd 11 October, 2002
3. JTF 170 J-2 Memo dtd 11 October, 2002



Declassify Under the Authority of Executive Order 12958
By Executive Secretary, Office of the Secretary of Defense
By William P. Marriott, CAPT, USN
June 21, 2004

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DEPARTMENT OF DEFENSE
JOINT TASK FORCE 170
GUANTANAMO BAY, CUBA
APO AE 09360

JTF 170-CG

11 October 2002

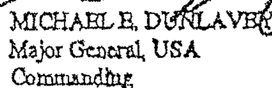
MEMORANDUM FOR Commander, United States Southern Command, 3511 NW 91st Avenue, Miami, Florida 33172-1217

SUBJECT: Counter-Resistance Strategies

1. Request that you approve the interrogation techniques delineated in the enclosed Counter-Resistance Strategies memorandum. I have reviewed this memorandum and the legal review provided to me by the JTF-170 Staff Judge Advocate and concur with the legal analysis provided.

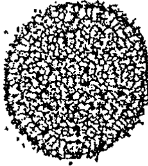
2. I am fully aware of the techniques currently employed to gain valuable intelligence in support of the Global War on Terrorism. Although these techniques have resulted in significant exploitable intelligence, the same methods have become less effective over time. I believe the methods and techniques delineated in the accompanying J-2 memorandum will enhance our efforts to extract additional information. Based on the analysis provided by the JTF-170 SJA, I have concluded that these techniques do not violate U.S. or international laws.

3. My point of contact for this issue is LTC Jerald Phifer at DSN 660-3476.



MICHAEL B. DUNLAVEY
Major General, USA
Commanding

2 Encls
1. JTF 170-J2 Memo, 11 Oct 02
2. JTF 170-SJA Memo, 11 Oct 02



DEPARTMENT OF DEFENSE
JOINT TASK FORCE 170
GUANTANAMO BAY, CUBA
APO AE 09360

JTF 170-SJA 11 October 2002

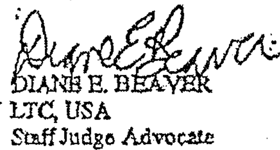
MEMORANDUM FOR Commander, Joint Task Force 170

SUBJ: Legal Review of Aggressive Interrogation Techniques

1. I have reviewed the memorandum on Counter-Resistance Strategies, dated 11 Oct 02, and agree that the proposed strategies do not violate applicable federal law. Attached is a more detailed legal analysis that addresses the proposal.

2. I recommend that interrogators be properly trained in the use of the approved methods of interrogation, and that interrogations involving category II and III methods undergo a legal review prior to their commencement.

3. This matter is forwarded to you for your recommendation and action.



DIANE E. BEAVER
LTC, USA
Staff Judge Advocate

2 Encls
1. JTF 170-J2 Memo, 11 Oct 02
2. JTF 170-SJA Memo, 11 Oct 02

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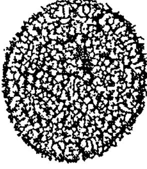

DEPARTMENT OF DEFENSE
JOINT TASK FORCE 170
GUANTANAMO BAY, CUBA
APO AE 09860

JTF-J2 11 October 2002

MEMORANDUM FOR Commander, Joint Task Force 170

SUBJECT: Request for Approval of Counter-Resistance Strategies

1. (~~S/NF~~) U PROBLEM: The current guidelines for interrogation procedures at GTMO limit the ability of interrogators to counter advanced resistance.

2. (~~S/NF~~) U Request approval for use of the following interrogation plan.

a. Category I techniques. During the initial category of interrogation the detainee should be provided a chair and the environment should be generally comfortable. The format of the interrogation is the direct approach. The use of rewards like cookies or cigarettes may be helpful. If the detainee is determined by the interrogator to be uncooperative, the interrogator may use the following techniques.

(1) Yelling at the detainee (not directly in his ear or to the level that it would cause physical pain or hearing problems)

(2) Techniques of deception:

(a) Multiple interrogator techniques.

(b) Interrogator identity. The interviewer may identify himself as a citizen of a foreign nation or as an interrogator from a country with a reputation for harsh treatment of detainees.

b. Category II techniques. With the permission of the OIC, Interrogation Section, the interrogator may use the following techniques.

(1) The use of stress positions (like standing), for a maximum of four hours.

(2) The use of falsified documents or reports.

(3) Use of the isolation facility for up to 30 days. Request must be made to through the OIC, Interrogation Section, to the Director, Joint Interrogation Group (JIG). Extensions beyond the initial 30 days must be approved by the Commanding General. For selected

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By Executive Secretary, Office of the Secretary of Defense
By William P. Marriott, CAPT, USN
June 21, 2004

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JTF 170-J2
SUBJECT: Request for Approval of Counter-Resistance Strategies

detainees, the OIC, Interrogation Section, will approve all contacts with the detainee, to include medical visits of a non-emergent nature.

(4) Interrogating the detainee in an environment other than the standard interrogation booth.

(5) Deprivation of light and auditory stimuli.

(6) The detainee may also have a hood placed over his head during transportation and questioning. The hood should not restrict breathing in any way and the detainee should be under direct observation when hooded.

(7) The use of 20-hour interrogations.

(8) Removal of all comfort items (including religious items).

(9) Switching the detainee from hot rations to MREs.

(10) Removal of clothing.

(11) Forced grooming (shaving of facial hair etc...)

(12) Using detainees individual phobias (such as fear of dogs) to induce stress.

c. Category III techniques. Techniques in this category may be used only by submitting a request through the Director, JIG, for approval by the Commanding General with appropriate legal review and information to Commander, USSOUTHCOM. These techniques are required for a very small percentage of the most uncooperative detainees (less than 3%). The following techniques and other aversive techniques, such as those used in U.S. military interrogation resistance training or by other U.S. government agencies, may be utilized in a carefully coordinated manner to help interrogate exceptionally resistant detainees. Any or these techniques that require more than light grabbing, poking, or pushing, will be administered only by individuals specifically trained in their safe application.

(1) The use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family.

(2) Exposure to cold weather or water (with appropriate medical monitoring).

(3) Use of a wet towel and dripping water to induce the misperception of suffocation.

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(4) Use of mild, non-injurious physical contact such as grabbing, poking in the chest with the finger, and light pushing.

3. (U) The POC for this memorandum is the undersigned at x3476.

JERALD PHIFER
LTC, USA
Director, J2

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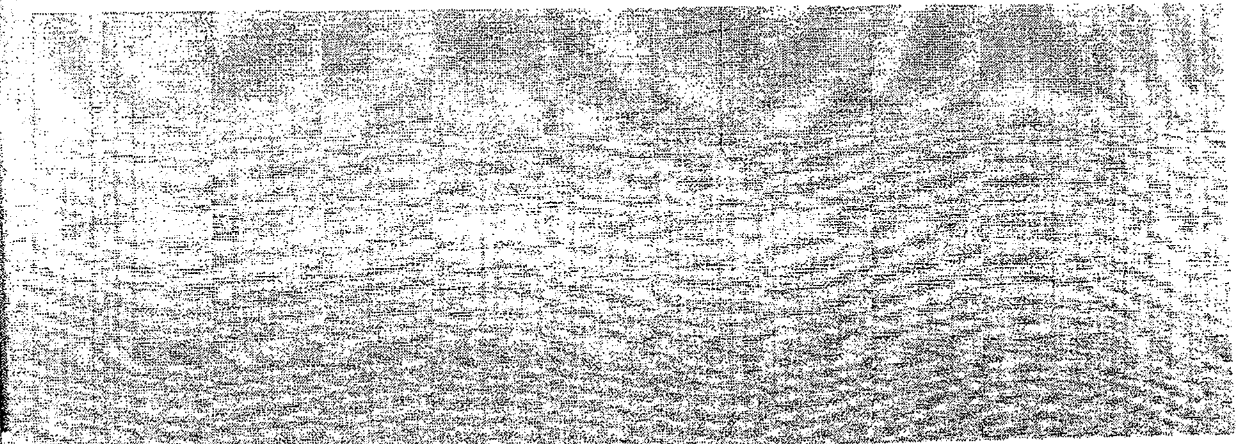

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DEPARTMENT OF DEFENSE
JOINT TASK FORCE 170
GUANTANAMO BAY, CUBA
APO AE 09860

JTF 170-SJA 11 October 2002

MEMORANDUM FOR Commander, Joint Task Force 170

SUBJECT: Legal Brief on Proposed Counter-Resistance Strategies

1. (S/NF) U ISSUE: To ensure the security of the United States and its Allies, more aggressive interrogation techniques than the ones presently used, such as the methods proposed in the attached recommendation, may be required in order to obtain information from detainees that are resisting interrogation efforts and are suspected of having significant information essential to national security. This legal brief references the recommendations outlined in the JTF-170-J2 memorandum, dated 11 October 2002.

2. (S/NF) U FACTS: The detainees currently held at Guantanamo Bay, Cuba (GTMO), are not protected by the Geneva Conventions (GC). Nonetheless, DoD interrogators trained to apply the Geneva Conventions have been using commonly approved methods of interrogation such as rapport building through the direct approach, rewards, the multiple interrogator approach, and the use of deception. However, because detainees have been able to communicate among themselves and debrief each other about their respective interrogations, their interrogation resistance strategies have become more sophisticated. Compounding this problem is the fact that there is no established clear policy for interrogation limits and operations at GTMO, and many interrogators have felt in the past that they could not do anything that could be considered "controversial." In accordance with President Bush's 7 February 2002 directive, the detainees are not Enemy Prisoners of War (EPW). They must be treated humanely and, subject to military necessity, in accordance with the principles of GC.

3. (S/NF) U DISCUSSION: The Office of the Secretary of Defense (OSD) has not adopted specific guidelines regarding interrogation techniques for detainee operations at GTMO. While the procedures outlined in Army FM 34-52 Intelligence Interrogation (28 September 1992), are utilized, they are constrained by, and conform to the GC and applicable international law, and therefore are not binding. Since the detainees are not EPWs, the Geneva Conventions limitations that ordinarily would govern captured enemy personnel interrogations are not binding on U.S. personnel conducting detainee interrogations at GTMO. Consequently, in the absence of specific binding guidance, and in accordance with the President's directive to treat the detainees humanely, we must look to applicable international and domestic law in order to determine the legality of the more aggressive interrogation techniques recommended in the J2 proposal.

a. (U) International Law: Although no international body of law directly applies, the more notable international treaties and relevant law are listed below.

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(1) (U) In November of 1994, the United States ratified The Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment. However, the United States took a reservation to Article 16, which defined cruel, inhumane and degrading treatment or punishment, by instead deferring to the current standard articulated in the 8th Amendment to the United States Constitution. Therefore, the United States is only prohibited from committing those acts that would otherwise be prohibited under the United States Constitutional Amendment against cruel and unusual punishment. The United States ratified the treaty with the understanding that the convention would not be self-executing, that is, that it would not create a private cause of action in U.S. Courts. This convention is the principal U.N. treaty regarding torture and other cruel, inhumane, or degrading treatment.

(2) (U) The International Covenant on Civil and Political Rights (ICCPR), ratified by the United States in 1992, prohibits inhumane treatment in Article 7, and arbitrary arrest and detention in Article 9. The United States ratified it on the condition that it would not be self-executing, and it took a reservation to Article 7 that we would only be bound to the extent that the United States Constitution prohibits cruel and unusual punishment.

(3) (U) The American Convention on Human Rights forbids inhumane treatment, arbitrary imprisonment, and requires the state to promptly inform detainees of the charges against them, to review their pretrial confinement, and to conduct a trial within a reasonable time. The United States signed the convention on 1 June 1977, but never ratified it.

(4) (U) The Rome Statute established the International Criminal Court and criminalized inhumane treatment, unlawful deportation, and imprisonment. The United States not only failed to ratify the Rome Statute, but also later withdrew from it.

(5) (U) The United Nations' Universal Declaration of Human Rights, prohibits inhumane or degrading punishment, arbitrary arrest, detention, or exile. Although international declarations may provide evidence of customary international law (which is considered binding on all nations even without a treaty), they are not enforceable by themselves.

(6) (U) There is some European case law stemming from the European Court of Human Rights on the issue of torture. The Court ruled on allegations of torture and other forms of inhumane treatment by the British in the Northern Ireland conflict. The British authorities developed practices of interrogation such as forcing detainees to stand for long hours, placing black hoods over their heads, holding the detainees prior to interrogation in a room with continuing loud noise, and depriving them of sleep, food, and water. The European Court concluded that these acts did not rise to the level of torture as defined in the Convention Against Torture, because torture was defined as an aggravated form of cruel, inhuman, or degrading treatment or punishment. However, the Court did find that these techniques constituted cruel, inhumane, and degrading treatment. Nonetheless, and as previously mentioned, not only is the United States not a part of the European Human Rights Court, but as previously stated, it only ratified the definition of cruel, inhuman, and degrading treatment consistent with the U.S. Constitution. See also Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322 (N.D. Geor. 2002); Committee Against Torture v. Israel, Supreme Court of Israel, 6 Sep 99, 7 BHRC 31; Ireland v. UK (1978), 2 EHRR 25.

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SUBJECT: Legal Brief on Proposed Counter-Resistance Strategies

b. (U) Domestic Law. Although the detainee interrogations are not occurring in the continental United States, U.S. personnel conducting said interrogations are still bound by applicable Federal Law, specifically, the Eighth Amendment of the United States Constitution, 18 U.S.C. § 2340, and for military interrogators, the Uniform Code of Military Justice (UCMJ).

(1) (U) The Eighth Amendment of the United States Constitution provides that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. There is a lack of Eighth Amendment case law relating in the context of interrogations, as most of the Eighth Amendment litigation in federal court involves either the death penalty, or 42 U.S.C. § 1983 actions from inmates based on prison conditions. The Eighth Amendment applies as to whether or not torture or inhumane treatment has occurred under the federal torture statute.[1]

(a) (U) A principal case in the confinement context that is instructive regarding Eighth Amendment analysis (which is relevant because the United States adopted the Convention Against Torture, Cruel, Inhumane and Degrading Treatment, it did so deferring to the Eighth Amendment of the United States Constitution) and conditions of confinement if a U.S. court were to examine the issue is Hudson v. McMillian, 503 U.S. 1 (1992). The issue in Hudson stemmed from a 42 U.S.C. § 1983 action alleging that a prison inmate suffered minor bruises, facial swelling, loosened teeth, and a cracked dental plate resulting from a beating by prison guards while he was cuffed and shackled. In this case the Court held that there was no governmental interest in beating an inmate in such a manner. The Court further ruled that the use of excessive physical force against a prisoner might constitute cruel and unusual punishment, even though the inmate does not suffer serious injury.

(b) (U) In Hudson, the Court relied on Whitley v. Albers, 475 U.S. 312 (1986), as the seminal case that establishes whether a constitutional violation has occurred. The Court stated that the extent of the injury suffered by an inmate is only one of the factors to be considered, but that there is no significant injury requirement in order to establish an Eighth Amendment violation, and that the absence of serious injury is relevant to, but does not end, the Eighth Amendment inquiry. The Court based its decision on the "...settled rule that the unnecessary and wanton infliction of pain ... constitutes cruel and unusual punishment forbidden by the Eighth Amendment." Whitley at 319, *quoting* Ingraham v. Wright, 430 U.S. 651, 670 (1977). The Hudson Court then held that in the excessive force or conditions of confinement context, the Eighth Amendment violation test delineated by the Supreme Court in Hudson is that when prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency are always violated, whether or not significant injury is evident. The extent of injury suffered by an inmate is one factor that may suggest whether the use of force could plausibly have been thought necessary in a particular situation, but the question of whether the measure taken inflicted unnecessary and wanton pain and suffering, ultimately turns on whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically for the very (emphasis added) purpose of causing harm. If so, the Eighth Amendment claim will prevail.

[1] Notwithstanding the argument that U.S. personnel are bound by the Constitution, the detainees confined at GTMO have no jurisdictional standing to bring a section 1983 action alleging an Eighth Amendment violation in U.S. Federal Court.