FROM THE DEPARTMENT OF JUSTICE TO GUANTANAMO BAY: ADMINISTRATION LAWYERS AND ADMINISTRATION INTERROGATION RULES (PART II)

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

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WEDNESDAY, JUNE 18, 2008

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:11 p.m., in room 2141, Rayburn House Office Building, the Honorable Jerrold Nadler (Chairman of the Subcommittee) presiding.

Present: Representatives Nadler, Davis, Wasserman Schultz, Ellison, Conyers, Scott, Watt, Franks, Issa and King.

Staff Present: David Lachmann, Subcommittee Chief of Staff; Elliot Minchberg, Majority Counsel; Sam Sokol, Majority Counsel; Caroline Mays, Professional Staff Member; Paul B. Taylor, Minority Counsel; and Crystal Jezierski, Minority Counsel.

Mr. NADLER. This hearing will come to order. Without objection, the Chair is authorized to declare recess of the hearing, which the Chair will endeavor to do only if there are votes on the floor.

We now proceed to Members' opening statements. As has been the practice of the Subcommittee, I will recognize the Chairs and Ranking Members of the Subcommittees and full Committee to make opening statements. In the interest of proceeding to our witnesses, and mindful of our busy schedules, I would ask the other Members to submit their statements for the record. Without objection, all Members will have 5 legislative days to submit opening statements for inclusion into the record.

[The prepared statement of Mr. Cohen follows:]

PREPARED STATEMENT OF THE HONORABLE STEVE COHEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE, AND MEMBER, SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

As a lawyer, I am keenly aware of the ethical and professional responsibilities that lawyers owe to our clients to advise them and to represent their interests zealously. I also know, however, that lawyers have a higher obligation to the rule of law, and that lawyers do not exist simply as the instruments of their clients' will. Based on some of the information that has been coming to light recently, it appears that Bush Administration lawyers played a significant role in crafting, justifying, and implementing interrogation techniques that may be illegal and, in so doing, these lawyers failed in meeting that obligation to the rule of law. Sadly, after a year and a half of serving on the House Judiciary Committee and participating in numer-

ous oversight hearings, I cannot say that I am surprised by these latest revelations or by the apparent disrespect for the proper vetting of issues and the rule of law evinced by this Administration.

Mr. NADLER. The Chair now recognizes himself for 5 minutes for an opening statement.

Today the Subcommittee continues its investigation into the Administration's interrogation policies, their source, the legal justification for those policies, and how they were carried out.

The more we look at this question, the more disturbing the facts appear to be. The practices appear to have been more widespread and the legal justifications more flimsy than was initially reported. Evidence also appears to be mounting that officials at the highest levels of the Administration may have been directly involved to a far greater extent and far earlier in the process in ordering these techniques, which many characterize as torture, than had previously been represented to Congress and the American people.

We need to get to the facts. The purpose of these hearings is to get those facts. Although one of the witnesses who would appear to have direct personal knowledge of these matters, Douglas Feith, withdrew from the hearing this morning, we have Colonel Wilkerson here, who will be able to provide important information and an important perspective on these events and the issues they raise from personal knowledge. Mr. Feith will appear before this Committee before too much more time has elapsed.

I have endeavored to ensure that we get on the record testimony from people with actual knowledge of these matters and the perspective and expertise of military people who I believe were ill served by political appointees. This is not, as some have suggested, a witch hunt or a lynching, high- or low-tech. American people have a right to know what their Government has done in their name and what it is continuing to do. That is why we are here today. We all want America to be secure, but our national security and our Nation's values have not been well served by what I believe to have been dangerous, novel, and illegal policies. I look forward to the testimony of our witnesses.

I yield back the balance of my time.

Mr. NADLER. I now recognize our distinguished Ranking Minority Member, the gentleman from Arizona, Mr. Franks for his opening statement.

Mr. FRANKS. Thank you, Mr. Chairman.

Mr. Chairman, the subject of detainee treatment was actually the subject of over 60 hearings, markups, and briefings during the last Congress in the Armed Services Committee alone, of which I am a Member. And I just want to reiterate, like I try to every time, that torture is banned by various provisions by law, and I agree with that. Torture should be banned, including a 2005 Senate amendment prohibiting the cruel, inhumane, or degrading treatment of anyone in U.S. custody. Incidentally, if you break that law, if the person dies, that person that did it is subject to death penalty.

Severe interrogations by contrast do not involve torture, and they are still legal. The fact is if waterboarding is torture, then we are torturing our own soldiers in the training process.

Severe interrogation is rarely ever used. CIA Director Michael Hayden has confirmed that, despite the incessant hysteria in some quarters, the waterboarding technique has only been used on three high-level captured terrorists, the very worst of the worst. The CIA waterboarded 9/11 mastermind Khalid Sheikh Mohammed, Abu Zubaidah, and Abdul Rahim Nashiri for approximately 1 minute each. The result of a total of 3 minutes of the severe interrogations were of immeasurable benefits to the American people. CIA Director Hayden has said that Mohammed and Zubaidah provided roughly 25 percent of all of the information the CIA had on al Qaeda from human sources. A full 25 percent of all of the human intelligence we received on al Qaeda derived from 3 minutes' worth of rarely used interrogation tactics.

Mr. Chairman, I have done this before, but let's remind ourselves what Senator Schumer of New York said at a Judiciary Committee hearing on terror policy on June 8, 2004, and it should come up on the screen.

[Video shown: Senator Schumer: "We ought to be reasonable about this. I think there are probably very few people in this room or in America who would say that torture should never, ever be used, particularly if thousands of lives are at stake. Take the hypothetical. If we knew that there was a nuclear bomb hidden in an American city and we believed that some kind of torture, fairly severe maybe, would give us a chance of finding that bomb before it went off, my guess is most Americans and most Senators, maybe all, would say, do what you have to do. So it is easy to sit back in the armchair and say that torture can never be used. But when you are in the foxhole, it is a very different deal. And I respect, I think we all respect, the fact that the President is in the foxhole every day."]

Mr. FRANKS. Mr. Chairman, the fact is I don't know that I agree with everything that Mr. Schumer said. We are talking in this particular situation about not torture, but severe interrogations, and I would take issue with some of the things the Senator said. So I think it is very important to somehow separate these two kinds of activities.

After the May 6, 2008, House Constitutional Subcommittee hearing, our august Chairman John Conyers, who I respect very much, stated, "Radio silence was the response when today's witnesses were asked to identify a single example of a true ticking bomb scenario ever occurring." And I can only respond to that. Certainly we don't know what those ticking bomb scenarios—we have not been able to nail those down. But as Stewart Taylor said and wrote in the National Journal, "The CIA had reason to believe that unlocking the secrets in Khalid Sheikh Mohammed's head might save hundreds of lives and perhaps many, many more in the unlikely but then conceivable event that al Qaeda was preparing a nuclear or biological attack on a major American city. This tough, smart, committed Jihadist was not about to betray his cohorts to his hated enemies if interrogators stuck to the kid glove interrogation rules demanded by human rights groups and, recently, by most congressional Democrats."

Mr. Chairman, I believe that Mr. Taylor is correct. Al Qaeda leader Osama bin Laden has said, "It is our duty"—this is his quote: "It is our duty to gain access to nuclear weapons."

For example, at a May 16 Subcommittee hearing, I asked the Democrat witness Marjorie Cohn, president of the National Lawyers Guild, how she would write a statute defining how terrorists should be treated when they refused to provide vital, lifesaving information voluntarily. I left it open to her. I said: Tell me what it should be. Let's listen to her reply.

"What kind of statute would I write? I would write a statute that says that when you are interrogating a prisoner and you want to get information from him, you treat him with kindness, compassion, and empathy. You gain his trust. You get him to like and trust you, and then he will turn over information to you."

Mr. Chairman, I am suggesting that it might be a little more difficult to get al Qaeda terrorists dedicated to the destruction of the Western world to like and trust us. I am afraid it is a little more complicated than that. I wish it weren't. But I would suggest that the statement was indeed dangerously naive. And I thank you and the Chairman of the full Committee for your indulgence, and I yield back.

Mr. NADLER. I thank the gentleman.

I now recognize for 5 minutes for an opening statement the Chairman of the full Committee, the Judiciary Committee, the gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Chairman Nadler. And to my good friend Trent Franks, the Ranking Member of this Subcommittee, we have some excellent witnesses to continue the Committee's oversight responsibility.

It is true you have been subjected, Mr. Franks, to almost 60 hearings somewhere else, but that doesn't do us much good here in this Committee. We have got our own individual responsibilities. And I am glad you take exception with some of Senator Schumer's comments. I do, too. But what difference does it make? He is one of the 535 of us. I take exception on occasion with your statements; but I am not going to play them back and then tell you I don't agree with some of them. And Marjorie Cohn, a wonderfully gifted lawyer, I am sorry you thought that she was naive.

But here is what we are trying to do. Here is what I think the focus of this very important Committee on the Judiciary is about. What we are trying to determine, how clear the legal advice intended for the Central Intelligence Agency made its way to military interrogators at Guantanamo Bay. Yesterday, and I don't have the voiceover of Senator Carl Levin, the Chairman of the Armed Services Committee, but he revealed comments by a particular CIA attorney at Guantanamo that, according to the Justice Department, whether something is torture is, "basically subject to perception."

This lawyer also stated that, "If the detainee dies, you are doing it wrong."

These comments, I think, demonstrate some of the flaws in some of the legal opinions in this area, and I am hoping our witnesses' reaction to these statements will help bring clarification.

Now, some of our research here has brought to my attention the Central Intelligence Agency's network of secret prisons, of their

own use of beating and what is generally regarded as torture. This was not the role of a civilian intelligence service in a democratic society, but it seemed to have been clearly what the White House wanted the CIA to do. And so I have been talking with our friend from California, former legislator Tom Hayden, who has raised important questions regarding the rendition of subjects to foreign governments and the use of torture in foreign detention facilities in Afghanistan and in Iraq. And so I would welcome the views the distinguished colonel may have on any of these matters now and in the future.

Some reports indicate that have come to my attention when questions were raised about the proper legal analysis of these interrogation methods, those asking the questions were not always given a fair hearing or were even pushed out of the way; and these matters brought to my attention raise grave concerns about the management of the Department of Justice. And I hope perhaps Mr. Levin or others can help us shed light on these important and sensitive issues.

Mr. ISSA. Would the Chairman yield for a question?

Mr. CONYERS. I have always yielded to you.

Mr. NADLER. Without objection, the Chairman will have an additional minute.

Mr. ISSA. For a colloquy, thank you.

Mr. Chairman, as you know, the Administration has now admitted that tapes which would allow us to know more in detail about these extreme interrogation techniques were destroyed, and destroyed by the orders of a relatively small group within the CIA. Does the Chairman intend to, through Committee or Subcommittee, hold hearings or pursue an investigation within our jurisdiction on that subject since, to a certain extent, we are arguing about whether or not you know torture when you see it, and we have been denied the ability to see it?

Mr. CONYERS. I am interested in that. I share your concern. The Intelligence Committee has a similar interest. And, as a matter of fact, you are on the Intelligence Committee.

Mr. ISSA. I am, Mr. Chairman. But I do think in this case the destruction of material that would have been probative as to whether or not torture occurred is well within the jurisdiction of this Committee. It is no longer a secret once you know they destroyed it.

Mr. CONYERS. Thank you very much. I think that is something that we should take under consideration.

Mr. ISSA. Thank you, Mr. Chairman. And thank you for the additional time.

Mr. NADLER. Thank you.

I want to welcome our distinguished panel of witnesses today, and I will introduce them.

Daniel Levin is a partner at the firm of White & Case. He served with the National Security Council as the senior associate counsel to the President and legal adviser from February to October 2005. He had previously served at the National Security Council from 1988 to 1990. He has had a long career with the Department of Justice, serving as the Acting Assistant Attorney General in the Office of Legal Counsel from 2004 to 2005. Prior to that, he served

as counsel to the Attorney General and as Chief of Staff to Attorney General William Barr from 1991 to 1993. He is a graduate of Harvard College and University of Chicago Law School.

David Rivkin is no stranger to the Committee. Mr. Rivkin is a partner with the law firm of Baker Hostetler. In the administration of the first President Bush, he was Associate Executive Director of the President's Council on Competitiveness at the White House. While there, he was responsible for the review and analysis of legal issues related to the regulatory review conducted by the Council. He also served as the Special Assistant for Domestic Policy to then-Vice President Dan Quayle. He holds a J.D. from Columbia School of Law, a BSFS and M.A. in Soviet Affairs from Georgetown University.

Colonel Lawrence Wilkerson is the visiting Pamela C. Harriman Professor of Government and Public Policy at the College of William and Mary, and professorial lecturer in the university honors program at George Washington University. Colonel Wilkerson served as Chief of Staff to Secretary of State Colin Powell from 2002 to 2005, and prior to that he served for 31 years in the United States Army from 1966 to 1997.

We also expected to have with us today former Under Secretary of Defense Douglas Feith. Mr. Feith has important information about the approval of harsh interrogation policies for the U.S. military. He reportedly, along with Defense Department General Counsel Jim Haynes, recommended that Secretary Rumsfeld approve such techniques in November 2002. Mr. Feith has never explained that decision, and it is important to hear from him on this subject.

Despite his prior commitment to testify, this morning Mr. Feith informed the Committee through his counsel that he would not appear today because he is not willing to appear alongside one of our other witnesses. Needless to say, it is an extraordinary disappointment for this witness not to come here and to go back on his promise to the Committee to appear today. Individuals often must appear before congressional Committees alongside witnesses that they disagree with. Such concerns are no reason to decline to appear when you have said you will. We will reschedule a hearing which Mr. Feith will appear so that we can elucidate his testimony on this issue.

Before we begin, it is customary for the Committee to swear in its witnesses. If you would please stand and raise your right hands to take the oath.

[Witnesses sworn.]

Mr. NADLER. Without objection, your written statements will be made part of the record in their entirety.

We would ask each of you to summarize your testimony in 5 minutes. To help you keep time, there is a timing light at your table. When 1 minute remains, the light will switch from green to yellow, and then to red when the 5 minutes are up.

I will now recognize first Mr. Levin.

TESTIMONY OF DANIEL LEVIN, WHITE & CASE LLP

Mr. LEVIN. Thank you, Mr. Chairman. Thank you for inviting me to testify today. As you can tell, since leaving Government since 2005, I have avoided making any public statements on these mat-

ters; and, to be perfectly honest with you, I would rather keep that record intact. But I do believe that a public discussion and debate of the legal issues involved and the process by which legal opinions were issued and relied upon is important, and I will do my best to answer your questions within the limits of what the Justice Department has authorized me to talk about. I will avoid any substantive discussion in the opening remarks, but I would like to make briefly a couple of general points.

First, in my view, the legal issues we are going to discuss, in addition to being very important, are also extremely difficult. Issues involving core Presidential powers and the interplay between the President and Congress are among the most difficult I have ever tried to analyze. And although there have been some significant decisions by the Supreme Court in recent years, and indeed in recent days, at the time many of these issues were being addressed following the events of 9/11, there was very little case law to guide the analysis.

Arguments from the Framers' writings or historical practice are frequently murky at best. The stakes are high. You are often told that lives, and perhaps many, many lives, are at stake. And classification concerns often limit whom you can consult. And I will have a little more to say about that in a minute.

In short, they are just plain hard questions. And I think the debate would benefit, frankly, if people on both sides acknowledged that fact and also perhaps showed a little more humility in stating their opinions. Lawyers who say the answers to these questions are either obviously yes or clearly no are either a lot smarter than I am or oversimplifying things.

And I will start that process. I tried my very best to answer these questions correctly, but I will be the first to say that I may have gotten it wrong. And I will have more to say about the consequences of that if I did make mistakes at the end.

Second, in discussing these legal issues, we need to be very precise about what question is being asked. To take an obvious example, if the question is, is a certain technique torture, you first need to define exactly what the technique is. And I expect we may get into this more, but many words that are used to describe techniques do not have precise definitions, and they may, in fact, cover a wide range of conduct.

Just as a simple example, sleep deprivation can obviously vary significantly in duration. It can also vary significantly in how you keep the person awake. And those differences may very well affect the legal analysis. And the same is true of waterboarding, which is a term that is used to cover to a very wide range of conduct that may have significant differences in legal analysis.

It is also important, frankly, to be precise about what you mean by torture. There is a definition under U.S. law where Congress has defined the term, although using words that I believe are very hard to apply. There is a different definition, or, more accurately, definitions, under international law, the Convention against Torture being perhaps the most prominent. The definitions under U.S. law and under the Convention differ in significant respects, particularly when it comes to the nonphysical forms of torture.

There is also the colloquial use of the term, which I believe differs from all these definitions.

And let me apologize for any disruption my daughter causes, but I wanted to bring her along.

And there are the Geneva Conventions, which use different terms in addition to torture, but which certainly prohibit torture and much more.

This emphasis on precision in the terms and the questions asked may sound overly lawyerly, and I suppose in some sense it is, but we are talking here about legal questions that were being analyzed by lawyers getting legal advice. And I think that raises one of the most important issues in this area. I think it is critical to remember that the legal analysis should begin and not end the discussion of whether to do something. If something is illegal, then obviously it is not an option; you simply can't do it. But if it is legal, then it is only that, an option. And there should be a policy discussion about whether it is a good idea.

Philip Zelazo gave an interesting talk about this, and I agree with him that in this area in particular, too often the legal analysis replaces the policy analysis, and the question tended to become simply: Is it legal? And, if so, we will do it.

I think it may have been understandable in the immediate aftermath of 9/11, but as time went on, it became increasingly clear that many of the steps we were taking, even if legal, had significant costs, and costs which might well outweigh any benefits we were receiving. And this is just my personal view, but I think that we in the Government were sometimes too slow to recognize and adjust our policies accordingly.

Focusing on the legal analysis, I think there is a valuable process lesson to be learned from our experience in this area. The opinions I worked on benefited enormously from comments from other parts of the Justice Department and the Government. And, in particular, the opinion I wrote at the end of 2004 benefited from detailed comments from lawyers at the State Department and the Criminal Division of Justice, although it certainly bears repeating that any mistakes in that opinion are entirely my responsibility.

There is an incredible wealth of legal talent around the Government, and I believe it is a huge mistake not to take advantage of it. You won't always agree with what other lawyers have to say, but you almost always benefit from hearing it.

I don't know why, but my understanding is that some of the earlier opinions were very tightly held and were not circulated for comments. I don't think that was justified by any legitimate concerns about classification or leaks. Rather, I think it was a mistake; the opinions would have benefited from broader review, and I think we paid some price for that not having taken place.

I would like to make two final points. First, there has been reporting about certain steps I may have taken in working on opinions in this area, and some people have said some very flattering things; some have said not so flattering things as well. I am not authorized to discuss that matter, but I can say that while it is always nice to have nice things said about you, they are completely undeserved. And I don't say that out of any false sense of modesty, but the simple fact is I did nothing that thousands and thousands

of members of our military had not done during training. I simply took the steps that I felt I needed to take in order to do the work that I was privileged to be assigned, and I deserve no particular credit for that.

Finally, many people both at OLC and elsewhere in the Government contributed to the opinions I wrote. I will not name them because I do not want them dragged into the public discussion, but they know who they are, and I am eternally grateful to them. Anything useful in the opinions is almost certainly attributable to them.

That said, I alone am responsible for any errors and any opinions issued while I was in charge of OLC. I did my best to answer the questions correctly, and I hope I succeeded. But to the extent there are errors in them, I am the person, and the only person, who is responsible for that. And in particular, if anyone in the Government acts on the basis of any legal advice I gave, and that advice turns out to be mistaken, I am the one who should be held accountable, not some agent or officer or soldier acting in good-faith reliance on that advice. When someone in the Government does the right thing by seeking legal advice, they should not be punished if the advice turned out to be mistaken. It is an incredible privilege to be asked to work on these issues as a lawyer for the Government. We who have been privileged to serve as Government lawyers are responsible for the advice we give, and I unconditionally and absolutely accept that responsibility.

I would be happy to try to answer any questions you have, but if I could just add one point. As a witness sitting here in a hearing like this, I feel I have some obligation to say something about this. And I am very limited in what I think I can say; but if the Subcommittee has been informed that there was a total of 3 minutes of waterboarding, I would suggest the Subcommittee should go back and get that clarified because that, I don't believe, is an accurate statement.

Mr. NADLER. I thank you very much for your testimony.

[The prepared statement of Mr. Levin follows:]

PREPARED STATEMENT OF DANIEL LEVIN

Mr. Chairman and members of the Committee:

Thank you for inviting me to testify today. Since leaving government in 2005, I have avoided making any public statements on these matters. But I do believe that a public discussion and debate of the legal issues involved—and of the process by which legal opinions were issued and relied upon—is important. And I will do my best to answer your questions within the limits of what the Justice Department has authorized me to talk about.

I will avoid any substantive discussion of the issues in these opening remarks, but I would like to briefly make a couple of general points.

First, the legal issues we are going to discuss—in addition to being very important—are, in my view, also extremely difficult. Issues involving core presidential powers and the interplay between the President and Congress are among the most difficult I have ever tried to analyze. Although there have been significant decisions by the Supreme Court in recent years—and days—at the time many of these issues were being addressed following the horrific events of September 11, 2001, there was very little case law to guide the analysis. Arguments from the Framers' writings or historical practice are frequently murky at best. The stakes are high: you are often told that lives, and perhaps many lives, are at stake. And classification concerns often limit whom you can consult—a topic I'll address a little more in a moment. In short, they are just plain hard questions. And I think the debate would benefit if people on both sides acknowledged that fact and also perhaps showed a little more

humility in stating their opinions. Lawyers who say the answers to some of these questions are obviously yes or clearly no are either a lot smarter than me or are oversimplifying things. And let me start that process—I tried my very best to answer these questions correctly, but I will be the first to say I may have gotten it wrong. And I'll have a little more to say about the consequences of that at the end of these remarks.

Second, in discussing these legal issues we need to be very precise about what question is being asked. To take an obvious example, if the question is "Is a certain technique torture," you first need to define exactly what the technique is. I expect we'll get into this some, but many words that are used to describe techniques do not have precise definitions and may cover a wide range of conduct. For example, sleep deprivation can vary significantly in duration. It can also vary significantly in how a person is kept awake. Those differences may well affect the legal analysis. The same is true for "waterboarding"—it has been used to cover a very wide range of practices that may require differences in analysis.

And it is also important to be precise about what you mean by "torture." There is a definition under U.S. law, where Congress has defined the term, although using words that I believe are very hard to apply—something I assume we will get to during the questioning. There is a different definition, or more accurately definitions, under international law—the Convention Against Torture being perhaps the most prominent. The definitions under U.S. law and under the Convention differ in significant respects when it comes to non-physical forms of torture. There is also the colloquial use of the term, which I believe differs from all of these definitions. And there are the Geneva Conventions, which use different terms but which certainly prohibit torture and much more.

This emphasis on precision in the terms used and questions asked may sound overly lawyerly—and I suppose in some sense it is. But we are talking here about legal questions that were being analyzed by lawyers giving legal advice. And I think that raises one of the most important issues in this area.

I think it is critical to remember that the legal analysis should begin, not end, the discussion of whether to do something. If something is illegal, than obviously it is not an option. However, if it is legal than it is only that—an option—and there should be a policy discussion about whether it is a good idea. Philip Zelikow gave an interesting talk about this and I agree with him that in this area in particular too often the legal analysis replaced the policy analysis. The question tended to become simply is it legal and if so we'll do it. I think that may have been understandable in the immediate aftermath of 9/11. But as time went on it became increasingly clear that many of the steps we were taking—even if legal—had significant costs, costs which might well outweigh any benefits we were receiving. This is just my personal view, but I think we were too slow to recognize some of those costs and adjust some of our policies accordingly.

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First, there has been reporting about certain steps I may have taken in working on opinions in this area. And some people have said some very flattering things about me. I am not authorized to discuss that matter. But I can say that while it is always nice to have such things said about you they are completely undeserved. I don't say that out of any sense of false modesty—the simple fact is that I did nothing that thousands and thousands of members of our military have not done during training. I simply took the steps I felt I needed to take in order to do the work I was privileged to be assigned and I deserve no special credit for that.

Finally, many, many people both at OLC and elsewhere in the government contributed to the opinions I wrote. I will not name them because I don't want them dragged into the public discussion but they know who they are and I am eternally grateful to them. Anything useful in those opinions is almost certainly attributable

to them. That said, I alone am responsible for any errors in any opinions issued while I was in charge of OLC. I did my best to answer questions correctly—and hope I succeeded—but to the extent there are any errors I am the person—and the only person—responsible for them. And in particular, if anyone in the government acted on the basis of any legal advice I gave, and that advice turns out to be mistaken, I am the one who should be held accountable, not some agent or officer or soldier acting in good faith reliance on that advice. When someone in the government does the right thing by seeking legal advice, they should not then be punished if the advice turns out to be mistaken. It is an incredible privilege to be asked to work on these issues as a lawyer for the U.S. Government. We who have been privileged to serve as government lawyers are responsible for the advice we give, and I unconditionally and absolutely accept that responsibility.

I would be happy to try to answer any questions you may have.

Mr. NADLER. I now recognize Mr. Rivkin for 5 minutes.

TESTIMONY OF DAVID B. RIVKIN,
PARTNER, BAKER HOSTETLER

Mr. RIVKIN. Chairman Nadler, Chairman Conyers, Ranking Member Franks, Members of the Subcommittee, it is my pleasure to appear before you again to continue the dialogue about these very important issues.

I realize, of course, both from these hearings and other settings, but a number of Administration's legal positions have become publicly known have drawn considerable criticisms, and that is not surprising, to state the obvious. The question that Administration lawyers have sought to address, particularly issues dealing with procedures for interrogating captured enemy combatants, are uncomfortable ones. They certainly don't sit well with us or most people who have 21st century sensibilities. Many of the legal conclusions that have been reached strike people, many people, as being excessively harsh. I should point out, of course, that some of these conclusions have been watered down, and as a result of internal debates and various pressures have been brought to bear upon the Administration.

But the important thing I want to emphasize, at least speaking for myself, is while I would not defend each and every aspect of the Administration's post-September 11 wartime policies, and with all due regard, and I agree entirely with my good friend Dan Levin, I would in general vigorously defend the overall exercise of asking difficult questions and trying to work through them. And I think it would be regrettable if the very exercise of asking these questions gets stigmatized.

I am not surprised by evidence of vigorous internal debates. I have had the privilege of working approximately 9 years in the Government, and dealt with issues, frankly speaking, that were a lot less contentious and less momentous than the ones that have arisen since 9/11. And I can tell you, on these issues you always had vigorous debate. And I think that, at least in my view, and based upon everything I have heard and seen and read, the people involved on all sides of those debates are people in all good faith, they are all patriots. I certainly would not want to impugn the integrity of either side and suggest that there were villains or angels in the debate.

To me, the fact that this debate was undertaken at all and was done in such a thorough fashion with lots of ebbs and flows over a period of years attests to the vigor and strength of our democracy

and the Administration's commitment to a rule of law even under the most serious of circumstances. I know I have made this point before, but I want to make it again. I don't know many examples of even the most democratic of our allies who have ever engaged in such a probing and searching legal exercise in wartime. And I certainly strongly defend the overarching legal framework chosen by the Administration of which the interrogation procedures are but a subset. In fact, I believe that many criticisms that seem to dwell on the interrogation-related issues really amount to the rejection of a legal framework rooted in laws of war that the Administration has chosen.

And I think that behind the inquiry the Administration has undertaken lies a very stark fact. In this war on terror, the Administration, the U.S., has an obligation not only to defeat enemy forces; it must anticipate and prevent deliberate attacks on its civilian populations, which is al Qaeda's preferred target. And I think we all agree that obtaining intelligence is both vital and difficult in this war.

I think despite some arguments to the contrary, there is ample evidence that the conventional interrogation techniques have not produced desired results in part—some of the reasons that Ranking Member Franks used—in part because of an inability of our interrogators to use sufficient pressure points being sufficiently in tune to some of the cultural and other traditions of the people involved. But I don't think anybody can seriously argue that harsh interrogation was used as a matter of carelessness or designed to have shortcuts.

I think that the conventional interrogation techniques have not worked. I know this is a matter that is being contested. It certainly was contested in the last hearing I attended as to whether or not the harsh techniques have produced good answers. But I think it is a copout, because if it didn't, there would be really nothing to debate.

Let me stop here and say I look forward to your questions. Thank you.

Mr. NADLER. I thank you.

[The prepared statement of Mr. Rivkin follows:]

PREPARED STATEMENT OF DAVID B. RIVKIN, JR.

Lynching lawyers, as Shakespeare once suggested, has never appealed much to the legal profession itself—literally or figuratively. But an exception apparently will be made for a group of attorneys who advised President Bush and his national security staff in the aftermath of 9/11. They've been subject to an increasingly determined campaign of public obloquy by law professors, activist lawyers and pundits.

Their legal competence and ethics have been questioned. Suggestions have even been made that they can and should be held criminally responsible for "war crimes," because their legal advice supposedly led to detainee abuses at Abu Ghraib and elsewhere.

The targets of this witch hunt include some of the country's finest legal minds—such as law Prof. John Yoo of the University of California at Berkeley, Judge Jay Bybee of the Ninth Circuit Court of Appeals, and William J. (Jim) Haynes II, former Pentagon general counsel. Others frequently mentioned include former White House Counsel Harriet Miers, former Attorney General Alberto Gonzales, and former Undersecretary of Defense Douglas Feith.

Many positions taken by these attorneys, laying the fundamental legal architecture of the war on terror, outrage international activists and legal specialists. Nevertheless, in a series of cases beginning with Hamdi v. Rumsfeld (2004), the U.S. Supreme Court has upheld many of their key positions: that the country is engaged

in an armed conflict; that captured enemy combatants can be detained without criminal trial during these hostilities; and that (when the time comes) they may be punished through the military, rather than the civilian, justice system.

The Court has also required that detainees be given an administrative hearing to challenge their enemy-combatant classification, ruled that Congress (not the president alone) must establish any military commission system, and made clear that it will in the future exercise some level of judicial scrutiny over the treatment of detainees held at Guantanamo Bay—although the extent of this role is still being litigated. Overall, the administration has won the critical points necessary to continue the war against al Qaeda.

Most controversial, of course, was the Bush administration's insistence that the Geneva Conventions have limited, if any, application to al Qaeda and its allies (who themselves reject the "Western" concepts behind those treaties); and the administration's authorization of aggressive interrogation methods, including, in at least three cases, waterboarding or simulated drowning.

Several legal memoranda, particularly 2002 and 2003 opinions written by Mr. Yoo as deputy assistant attorney general for the Office of Legal Counsel, considered whether such methods can lawfully be used. These memoranda, some of which remain classified, explore the limits imposed on the United States by statute, treaties, and customary international law. The goal clearly was to find a legal means to give U.S. interrogators the maximum flexibility, while defining the point at which lawful interrogation ended and unlawful torture began.

I realize that a number of the Administration's legal positions, as they become publicly known, whether as a result of leaks to the media or the declassification of the relevant legal documents, have attracted considerable criticism. The questions that the Administration's lawyers have sought to address, particularly those dealing with the interrogation of captured enemy combatants, are uncomfortable ones that do not sit well with our 21st Century sensibilities. Many of the legal conclusions reached have struck critics as being excessively harsh. Some have since been watered down as a result of internal debates and political and public pressure brought to bear upon the Administration.

Though I would not defend each and every aspect of the Administration's post-September 11 wartime policies, I would vigorously defend the overall exercise of asking difficult legal questions and trying to work through them. To me, the fact that this exercise was undertaken so thoroughly attests to the vigor and strength of our democracy and of the Administration's commitment to the rule of law, even in the most serious of circumstances. In this regard, I point out that few of our democratic allies have ever engaged in so probing and searching a legal exegesis in wartime. I also strongly defend the overarching legal framework chosen by the Administration. I believe that it is the critics' rejection of this overall legal framework that underlies most of their criticisms of the Administration's specific legal decisions.

Behind this inquiry is a stark fact. In this war on terror, the U.S. must not only attack and defeat enemy forces. It must also anticipate and prevent their deliberate attacks on its civilian population—al Qaeda's preferred target. International law gives the civilian population an indisputable right to that protection.

Lawyers can and do disagree over the administration's conclusions. However, it's now being claimed that the administration's legal advisers can be held responsible for detainee abuses.

This is madness. The lawyers were not in any chain of command, and had no theoretical or practical authority to direct the actions of anyone who engaged in abusive conduct. Those who mouth this argument are engaged in a kind of free association which, if applied across the board, would make legal counsel infinitely culpable.

In truth, the critics' fundamental complaint is that the Bush administration's lawyers measured international law against the U.S. Constitution and domestic statutes. They interpreted the Geneva Conventions, the U.N. Convention forbidding torture, and customary international law, in ways that were often at odds with the prevailing view of international law professors and various activist groups. In doing so, however, they did no more than assert the right of this nation—as is the right of any sovereign nation—to interpret its own international obligations. But that right is exactly what is denied by many international lawyers inside and outside the academy.

To the extent that international law can be made, it is made through actual state practice—whether in the form of custom, or in the manner states implement treaty obligations. In the areas relevant to the war on terror, there is precious little state practice against the U.S. position, but a very great deal of academic orthodoxy.

For more than 40 years, as part of the post World War II decolonization process, a legal orthodoxy has arisen that supports limiting the ability of nations to use ro-

bust armed force against irregular or guerilla fighters. It has also attempted to privilege such guerillas with the rights traditionally reserved to sovereign states. The U.S. has always been skeptical of these notions, and at critical points has flatly refused to be bound by these new rules. Most especially, it refused to join the 1977 Protocol I Additional to the Geneva Conventions, involving the treatment of guerillas, from which many of the "norms" the U.S. has supposedly violated, are drawn.

The Bush administration acted on this skepticism—insisting on the right of a sovereign nation to determine for itself what international law means. This is at bottom the sin for which its legal advisers will never be forgiven. To the extent they can be punished—or at least harassed—perhaps their successors in government office will be deterred from again challenging the prevailing view, even at the cost of the national interest.

That is why these administration attorneys have become the particular subjects of attack.

I look forward to your questions.

Mr. NADLER. The Chair now recognizes Colonel Wilkerson for 5 minutes.

TESTIMONY OF COLONEL LAWRENCE B. WILKERSON, USA (RETIRED), PROFESSOR, COLLEGE OF WILLIAM AND MARY

Colonel WILKERSON. Thank you, Chairman Nadler, Ranking Member Franks, Members of the Subcommittee. Thank you for the opportunity to be here to talk on these important matters today.

From the outset, let me say I am not a lawyer; I am a soldier and a citizen and an academic specializing in national security affairs, and particularly in national security decisionmaking since Harry Truman saw fit to sign the 1947 National Security Act. As I was also serving after my 31 years in the military at the State Department, I was a sometime diplomat, I guess, although sometimes I think I actually did more diplomacy as a member of the Department of Defense than I did at the State Department.

As I was serving in the latter capacity at the State Department as Chief of Staff, in April 2004, Colin Powell came through the door that adjoined our offices, and I knew by the look on his face that he had a serious matter, and I had better just be quiet and listen to him. And he indeed began to speak, and he said something like this:

There is going to be a news story about prisoner abuse at a facility in Iraq. There will be very damaging photographs, some of which will be published. I have put Will Taft—William H. Taft, IV, himself a former Deputy Secretary of Defense, was Powell's legal adviser. I put Will Taft on the legal aspects of this, and I want you to work the other aspects, how we got to where we are, who did what to whom, a time line, if you will, and any other relevant facts that you come up with. I want you to work very closely with Will, and quickly.

From that moment until sometime in the early fall, I labored to put together a dossier really of classified, sensitive, and open-source information that would help me and the Secretary of State understand how Abu Ghraib happened. Now, let me tell you that this was a particularly important thing, I think, for both Secretary Powell and myself, because, as you know, we both were/are soldiers. We are both veterans of the conflict in Vietnam. We are both students of military history. We both know how soldiers go astray in the heat of battle with buddies falling all around them, particu-

larly in wars and conflicts that seem to have no end, no light at the end of the tunnel for the soldier or the marine.

In Vietnam, as a first lieutenant and a captain of infantry, on several occasions I had to restrain my soldiers, even one or two of my officers. When higher authorities took such actions as declaring free-fire zones—that is a zone in which you can engage and kill anything—oftentimes it would be difficult to decide what to do. For example, if you encountered a 12-year-old girl walking down the lane in the jungle, as I did once, you are going to break the rules; you are not going to shoot her.

In all cases, I always had to set the example. I had to personally either break the rules, as I just demonstrated in the free-fire zone, or, more often, follow the rules. I had to follow the rules also that had been ingrained by my parents, by my schools, by my church, and by the United States Army in classes about the Geneva Convention and what we call the law of land warfare.

I had been taught, and I firmly believed when I took the oath of an officer, to support and defend the Constitution, that American soldiers were different, and that much of their fighting strength and spirit came from that difference, and that much of that difference was wrapped up in our humaneness and our respect for the rights of all. So, Mr. Chairman, when I saw the first photographs from the prison at Abu Ghraib, I had two immediate reactions. First, I knew such things could happen. Second, I knew such things were wrong, and I knew that they represented a failure of leadership. What I didn't know was at what level that leadership failed. So I set out to find the answer, and I think I did.

Secretary Powell and I also knew what extreme danger to America's real power in the world could be done by such a failure. America, as you well know, is an idea as much as it is concrete buildings, sweeping prairies, stock markets, and land from one ocean to another. Infect that idea, corrode that idea, tarnish that idea, and you don't just diminish perceived power, you diminish our real power. You, in fact, do the terrorists' job for them.

So we knew that this was a serious issue, perhaps one of the most serious issues our Nation would face in the opening days of this new century. We hoped—as Secretary Powell said over and over again as he went out the C Street entrance with foreign minister after foreign minister, and the first questions asked him were not about the foreign minister's country, but about torture and abuse—we hoped that, as Secretary Powell said, we would air our dirty laundry, so to speak; the world would see a democracy work; there would be accountability.

In my prepared statement, which you have and I ask that you make a part of the record, I have summarized what I found about that failure of leadership and other items that might be of interest to you, and I would be pleased to answer any questions about that statement. Thank you.

Mr. NADLER. Thank you very much.

[The prepared statement of Colonel Wilkerson follows:]

PREPARED STATEMENT OF LAWRENCE B. WILKERSON[1]

Chairman Nadler, Ranking Minority Member Franks, members of the subcommittee, thank you for giving me the opportunity to testify with regard to what I know and strongly suspect about administration principals, lawyers, interrogation rules, and the abuse of detainees by U.S. personnel in the so-called Global War on Terror (GWOT), particularly during the period 2002–2005.

From the outset, let me say that I am not a lawyer nor do I make any pretense to interpret the law as a lawyer might. I am a soldier and a citizen, an academic specializing in national security affairs—particularly national security decision-making, and a four-year diplomat with the U.S. Department of State, having served on its policy planning staff and as its chief of staff.

As I was serving in that latter capacity, in April 2004, Secretary of State Colin Powell came through the adjoining door to our offices on the 7th floor of the Harry S Truman building and startled me with words to the effect of:

There is going to be a news story about prisoner abuse at a facility in Iraq. There will be very damaging photographs, some of which will be published. I've put Will Taft [Legal Advisor to the Secretary of State] *on the legal aspects of this and I want you to work the other aspects—how we got to where we are, who did what to whom, a timeline—a chronology—and any other relevant facts you come up with. It's important you do this as quickly as possible and that you work closely with Will.*

From that moment to some time in the early fall, I labored to put together a dossier of classified, sensitive, and open source information that would help me and the Secretary understand how Abu Ghraib happened.

Almost immediately, I opened a channel to Admiral Church in the Pentagon because the Secretary alerted me to an effort by his fellow cabinet official, Donald Rumsfeld, also to get to the bottom of this issue and Admiral Church had been appointed to head that effort. I must say that after that initial telephone conversation with the Admiral and an agreement to exchange any information that we each developed, I never heard from him or any of his people again. I did ensure that whatever relevant documents I found at the State Department were sent to the Defense Department, and Will Taft did the same. I never received a single document in return. The Defense Department documents I did manage to get my hands on I had to scrounge.

I also discovered—as I had many other times in my then 34-year career in government—that open source material afforded me a more complete picture of what had happened than classified material. I learned that people such as Jane Mayer at *The New Yorker Magazine*, Tim Golden at the *New York Times*, and a host of others had done yeoman service for the American people through some of the best investigative journalism I have encountered. It was through Mr. Golden's research and writings, for example, that I learned that one of the first prison homicides had occurred—and its investigation slowed and obscured at numerous intervals and levels of command of the U.S. Army—in Afghanistan as early as December 2002. That homicide has been thoroughly examined in an award-winning documentary by Alex Gibney, entitled "Taxi to the Dark Side."

Mr. Chairman, let me back up for a moment and tell you why this was a particularly important effort for me and I believe for Secretary Powell as well. Clearly, we were—we are—both soldiers. Moreover, we are both veterans of the war in Vietnam and we are both students of military history. We both know how soldiers go astray in the heat of battle, with buddies being killed and wounded all around—particularly in wars that seem to have no end, no light at the end of the tunnel.

In Vietnam, as a first lieutenant and a captain of Infantry, on several occasions I had to restrain my soldiers, even one or two of my officers. When higher authorities took such actions as declaring free fire zones—meaning that anything that moved in that zone could be killed—and you came upon a 12-year old girl on a jungle path in that zone, it was clear you were not going to follow orders. But some situations were not so black and white and you had to be always on guard against your soldiers slipping over the edge. As their leader, it was incumbent upon me to set the example—and that meant sometimes reprimanding or punishing a soldier who broke the rules. In all cases, it meant that I personally followed the rules and not just by "breaking" the so-called rules of engagement, as in the designated free fire zone, but by following the rules that had been ingrained in me by my parents,

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by my schools, by my church, and by the U.S. Army in classes about the Geneva Conventions and what we called the law of land warfare. I had been taught and I firmly believed when I took the oath of an officer and swore to support and defend the Constitution, that American soldiers were different and that much of their fighting strength and spirit came from that difference and that much of that difference was wrapped up in our humaneness and our respect for the rights of all.

So, Mr. Chairman, when I saw the first photographs from the prison at Abu Ghraib, I had two immediate reactions. First, I knew such things could happen. Second, I knew such things were wrong and I knew that leadership had failed. What I did not know, was on what level that leadership had failed. So I set out to find the answer.

In the months that followed, right up to the election in November 2004, I collected documents like a pack rat. I had several stacks in the corner of my office almost five-feet tall, and I had classified documents crammed into my safe. I also listened to every one who would talk to me, from throughout the government and elsewhere.

I had an open door policy at State. I was in my office by 5:30 or 6AM every morning and rarely left before 8 or 9PM in the evening. I was there on weekends. Under secretaries, assistant secretaries, ambassadors, office directors, members of the policy planning staff, foreign service officers, civil service officers, military men and women, Iraqis, Afghans, and a host of others flocked to my office to tell me their complaints or give me their counsel. I had built up quite an extensive network. The Secretary had asked me to guard his rear and his flanks and I knew that such a network was one of the best ways to do that.

As you may surmise, Mr. Chairman, people were attracted to my office also because of their knowledge that when they spoke with me, their concerns had a reasonable chance of reaching the Secretary.

Moreover, when I left government in January 2005, I became immediately involved in lecturing to the nation's war colleges and listening to the military men and women at those institutions, and to the interagency personnel who were scattered amongst them.

I also continued my extensive research. I joined an effort of some 25–30 flag officers and similar rank civilians who were linked with the Human Rights First organization. On 7–8 December 2005, at the Ritz Carlton in Crystal City, we met for the first time and I'll never forget what one flag officer said to me. He said he could not believe that in his lifetime—no, he corrected himself, in his country's history—that anyone would be discussing the topic we were to discuss, torture and abuse encouraged at the highest levels of the U.S. Government.

We talked about the so-called Bybee memo. We were astonished that what appeared to be a legalistic argument not unlike the debate as to how many angels can sit on the head of a pin, pertained to one of the most serious matters imaginable—torture of another human being.

The Bybee memo had been furnished in a four-inch binder distributed to each of us at that first meeting. As I flipped through my binder to find the documents enclosed, I was stunned.

In that binder were:

1) Memorandum for Alberto R. Gonzales, Counsel to the President, from: Jay S. Bybee, Assistant Attorney General, *Re: Legal Standards Applicable Under 18 U.S.C. 2340–2340A* (Aug 1, 2002);
2) Secretary of Defense Rumsfeld Memo Re: Guantanamo Interrogation Policy, Dec 2, 2002;
3) Declaration of Vice Admiral Lowell E. Jacoby, USN, Director of the Defense Intelligence Agency, Jan 9, 2003 (Rumsfeld vs. Padilla J.A. 55–63);
4) Secretary of Defense Rumsfeld Memo Re: Guantanamo Interrogation Policy, April 16, 2003;
5) LTG Ricardo Sanchez Memo Re: CJTF-7 Interrogation and Counter-Resistance Policy, Sept 14, 2003;
6) Guantanamo Bay: Approved Interrogation Techniques—from White House briefing, June 22, 2004;
7) Memorandum for Deputy Attorney General James B. Coney, from Daniel Levin, Acting Assistant Attorney General, Re: Legal Standards Applicable Under U.S.C. 18 2340–2340A (Dec 30, 2004) [superseded the Aug 1, 2002 memo];
8) Pentagon Detention Policy, Nov 3, 2005.

There was much more as well; the four-inch binder was in fact bulging.

The one memorandum I did not find, that I had had when I was at State, was the President's memorandum of February 7, 2002, "Humane Treatment of al Qaeda and Taliban Detainees." I would get that memo in my hands once again a few days later from one of the producers of *CNN's Sixty Minutes*, who faxed it to me. It had been declassified of course.

This meeting in Crystal City coincided with Senator McCain's efforts in the Senate to secure passage of the Detainee Treatment Act and so we fed our thoughts into the Senator's staff and his staff fed their thoughts into our meeting.

After that meeting, I did not relax my efforts to discover more. I met Joseph Margulies who had written the book, *Guantánamo and the Abuse of Presidential Power*, and I marveled at his ability to piece together essentially the same conclusions that I had come to preliminarily as I left the State Department in early 2005. Judging from his footnotes, he, too, had apparently been able to get his hands on many documents. The one additional piece of the puzzle I gained from reading his book and talking with him was about the SERE[2] techniques that formed a basis for some of the harsh interrogation methods that were used in Afghanistan, in Iraq, and at Guantánamo Bay. I had harbored some suspicions to that effect but did not have access to some of the documents and research that Margulies did and, indeed, that he was to expand.

As a professor of government and public policy on two campuses, I made a National Security Council (NSC) Exercise a part of my curriculum. The decision before the mock NSC was "How to manage and treat those personnel detained in the Global War on Terror." Law students from the George Washington University Law School and from the College of William and Mary School of Law acted in the capacities of Attorney General, counselors to the President and Vice President, Legal Advisor to the Secretary of State, and OSD General Counsel. From these exercises, I gained additional insights into the receptivity of the American people to harsh interrogation, as well as into the human dynamics of such decision-making.

One of the thoughts that resonated with the students was expressed eloquently by Senator John McCain when he remarked that, when questions arise about breaking the rules, it isn't about the enemy, it's about us. Whether our enemy is German SS troops in the snows of the Battle of the Bulge in 1944–45, north Korean soldiers at the Chosin Reservoir, or north Vietnamese troops in the Parrot's Beak, it is not about how they treat us in war. It is about how we treat them. It is about us, as Americans.

When you break the rules, you damage America's power. You not only put your own potential prisoners of war in jeopardy, you actually damage American prestige and that diminishes our real power in the world.

A month or so after some of the Abu Ghraib photos had actually been revealed, the door to my office at the State Department was slightly open and I could hear Secretary Powell on the telephone with Secretary Rumsfeld. His voice was louder than usual. He was remonstrating with his fellow cabinet member. He was asking him if he understood what GITMO was doing to America's reputation in the world, to our standing in the eyes of our friends and allies. I've no idea what Secretary Rumsfeld's response was but I know I had rarely heard Powell raise his voice to that degree. Of course, the photos from Abu Ghraib had served to confirm in the eyes of many of our friends and allies, as well as our enemies, that what they had suspected all along about the Cuban prison, was true.

As I said before, Powell is a soldier. Soldiers hurt when soldiers break the rules. But what I discovered in my efforts for Powell and confirmed even more in my subsequent efforts on my own, was that soldiers were not entirely responsible for what happened to America's power and prestige in the world because soldiers were not alone responsible for what happened at GITMO, at Bagram and elsewhere in Afghanistan, and at Abu Ghraib and elsewhere in Iraq.

Mr. Chairman, I earlier posed the question: At what level did American leadership fail?

I believe it failed at the highest levels of the Pentagon, in the Vice President's office, and perhaps even in the Oval Office, though the Memorandum of February 7, 2002, which I cited earlier, tends to make me think the President may have been ignorant of the worst parts of the failure.

As I compiled my dossier for Secretary Powell, as I did further research, and as my views grew firmer and firmer, I needed frequently to reread that memo. I needed to balance, in my own mind, the overwhelming evidence that my own govern-

[2] Survival, Evasion, Resistance and Escape—referring to the type of training afforded in all the Armed Services and in special schools such as Ranger School in the US Army aimed at giving the trainee a very brief idea and feeling of what it is like to be a prisoner of war, among other things.

ment had sanctioned abuse and torture which, at its worst, had led to the murder of 25 detainees in a total of at least a 100 detainee deaths. Death, Mr. Chairman, seems to me to be the ultimate torture, indisputable and final. We had murdered 25 or more people in detention; that was the clear low point of the evidence.

The President's February 2002 memo seemed to me, a student of national security decision-making from the passage of the 1947 National Security Act to the present, to constitute the same sort of compromise that I had discovered so often in that more than a half century of decision-making.

President Bush, it seemed to me, had tried to walk down the middle of the road when confronted with the challenge of reconciling the needs of our security with the needs of our democratic republic—he had tried to safeguard our soul without losing our security, as diplomatic historian Michael Hogan phrases it. The President's February 2002 memo expressed such a compromise—the same compromise that from time to time presidents such as Eisenhower, Johnson, Nixon, Reagan, and others had had to make also.

But it seemed to me that beneath the compromise that President George W. Bush had made in his February 2002 memo, others had moved out smartly to deviate.

They had a model to match that deviation against, in my view—though I cannot substantiate this.

After all my research, I believe the President did more than sign that February 2002 memo. I believe that like several presidents before him during the Cold War, he signed a highly-classified *Finding*.

That Finding directed, most likely, the head of the CIA, Mr. Tenet, to establish a very small, highly-qualified group of interrogators at the CIA who would, if the need arose, interrogate high value targets. They would use a number of methods, including waterboarding—which has been considered torture since at least the Spanish Inquisition—to interrogate these high value targets, when and if the President approved.

I emphasize that this was likely a very highly-compartmented program with minimum knowledge of it in the bureaucracy. I believe that this program is what the recent revelations by ABC TV's investigative team were about, though ABC TV had no way of knowing the particulars. You will recall that their revelations included transcripts, apparently, of principals' meetings wherein the participants discussed harsh interrogation methods, participants including Dr. Rice, then National Security Advisor, Attorney General Ashcroft, and Secretaries Powell and Rumsfeld and, by the President's own subsequent statement, the President himself.

I believe this is clear evidence that my speculation about a presidential Finding is on the mark.

But that would have been a highly-controlled, extremely selective program, however some might find it reprehensible. How did what was done there, in that program, migrate out to the Armed Forces and become so widespread?

After the tragic events of September 11, 2001, Secretary Rumsfeld and certain of his subordinates wanted the war that was coming to be a broad, global one, not just against al-Qa'ida. Read Mr. Feith's book, *War and Decision*, and he will tell you in that book how seriously he and Mr. Rumsfeld wanted to broaden the war. He will also tell you that he and Mr. Rumsfeld believed the fight was not simply against al-Qa'ida but against every terrorist who might raise his head, from the criminal thugs in the Philippines called *Abu Sayyaf*, to the al Qa'ida derivatives in Southeast Asia known as *Jemaah Islamiyah*. From the tone in the book, one gets the impression that Mr. Feith would have dearly loved to throw *Hamas* and *Hezbollah into the mix as well.*

To get into the fight all across the globe meant first and foremost disbursing Special Operations Forces (SOF) as widely as possible in areas of medium to high threat. It also meant—and this was utterly crucial—*actionable intelligence*. Otherwise those SOF would be spinning their wheels, unable to take direct action against or capture any terrorists at all.

As a military man for 31 years, I know how most people in the Defense Department viewed the CIA. I was special assistant to Chairman of the Joint Chiefs of Staff, General Colin Powell, in the first Gulf War. I know how he and General Norman Schwarzkopf railed at the CIA.

I have to believe that Secretary Rumsfeld felt similarly. All the evidence indicated he did. In March 2003, he made one of his closest subordinates, Stephen Cambone, the first Under Secretary of Defense for Intelligence—clearly indicating that he was going to take the some 80% of the approximately $40B intelligence budget that was his and use it to his purpose.

He also set up a sort of intelligence "red team" in the office of his Undersecretary for Policy, Mr. Feith. This team vetted the intelligence community's raw materials, analysis and findings.

So, twin pressures were thus unleashed almost immediately in early 2002. First, the need for actionable intelligence was uppermost and urgent and this need was conveyed to the field down the chain of command. Second, echoing the President and the Vice President's own words, the word went out that the gloves were off, and we were going to have to work "sort of the dark side". That same day at Camp David, September 16, 2001, when the Vice President referred to the dark side, he also told Tim Russert: ". . . it's going to be vital for us to use any means at our disposal, basically, to achieve our objective."

These words reminded me of what Undersecretary of Defense Robert Lovett had argued as the Cold War was heating up, after the Soviets had developed and tested a nuclear weapon in 1949. Lovett argued in 1950 that the nation was "in a war worse than any we have ever experienced" and that this meant doing away with the "sharp line between democratic principles and immoral actions. . . ." Lovett considered such distinctions as a "dangerous and unnecessary handicap" in the struggle with communism. He said he wanted to fight the Soviets "with no holds barred. . . .". In my view, it was fortunate for the nation that Truman did not follow Lovett's advice.

But many in the Pentagon, and eventually the armed forces, did seem to follow the advice, however implicit, of Lovett's reincarnation in 2001, Vice President Cheney.

In short, the Pentagon needed intelligence; people should go out and get it. And the usual rules were not going to apply; new rules would be forthcoming. Even as a result of my early investigations at the State Department, this overriding reality was clear. But somewhere in that early part of 2002, some of the principals also began to worry about legalities. It was likely earlier even but I could find nothing in late 2001. Perhaps someday others will.

These concerns derived from knowledge of the Church Committee and the damage it had done with regard to the clandestine service in particular but to the CIA in general, as well as from a sure knowledge among the selected intelligence personnel and their leaders that they were being asked to depart from the realm of what they considered legal activities.

This concern, I believe, generated the legal discussions that would began to develop among David Addington in OVP, John Yoo and Jay Bybee at Justice, Alberto Gonzales in the White House and, eventually, expand to include the inputs from USD (P) Douglas Feith and OSD General Counsel Jim Haynes.

In effect, the most direct way for the Defense Department to create a legal screen for its own activities was to adapt the work that was in progress for the legal opinions backing the presidential finding to the needs of the DOD.

But let's backtrack for a moment and shed more light on what in my view had transpired to this point.

It's my strong view that the legal proceedings were led by David Addington, who turned to Jay Bybee and John Yoo at the Department of Justice, and Alberto Gonzales in the White House, then counselor to the President.

These were the lawyers who set the legal background against which other-than-standard interrogation methods would be explained away as "in accord with the Geneva Conventions", "not constituting torture", "fully within the Article II powers of the Commander-in Chief", and so forth. At Defense, Jim Haynes and Douglas Feith would adapt these views to their needs at the Pentagon. Indeed, in the recent book *Torture Team* by English barrister Philippe Sands, in extended interviews Mr. Feith appears to express no small degree of pride in having helped make the Geneva Conventions adaptable to the needs of the new interrogation regime. In my view, this was done largely through artifice not unlike the angels sitting on the pinhead. Such artifice may appeal to certain lawyers but I assure you soldiers have no use for it for they know how dangerous such arguments are when put to the hard act of execution in the field.

Meanwhile, the operational end of this affair was orchestrated by the Secretary of Defense and his subordinates, Haynes, Feith, Stephen Cambone and I'm quite certain others. Certain of these individuals, including Addington, even visited the prison at Guantánamo Bay in September 2002 to get a better grip on what was happening to acquire actionable intelligence and to inform their own views about what was possible.

There has been an argument that U.S. Southern Command queried the Defense Department with respect to interrogation procedures for GITMO, and thus the impetus for the new procedures came from the field. There is a paper trail that seems to have been laid down to support that. What I found, however, was that Southern Command's query was expected (set up perhaps?) and that OSD General Counsel, in league with the others in the legal group, had already worked up what the legal position was going to be. In short, there were people in DOD at the highest level

who knew what they wanted: actionable intelligence. They also knew, or thought they knew, that the only way they were going to get it from battle-hardened al Qa'ida operatives was to use harsh interrogation methods. And that's the bottom line.

Depressingly to me, these men also seemed to have the cavalier disregard for any innocents who might be caught up in this process that one often finds in men safely to the rear of the real action. Soldiers call such men "REMFs". I won't elaborate on that acronym.

Mr. Chairman, I have given much thought to the idea of malice aforethought in these matters. That is, did any of these men clearly realize what they were setting in motion? Did they realize for example that a significant proportion of the detainees in all their prisons were innocent of any wrongdoing, they were simply swept up in military operations and, due to a debilitating shortage of troops, vetting in the field was poorly done? This was particularly true in Afghanistan and, later, in Iraq. Did they realize that hooding and shackling and keeping such people in isolation was cruel and unusual punishment? Did they realize that what they had put in motion would spread and grow? That units from Afghanistan would bring methods to Iraq? That methods used at GITMO would migrate to Iraq via Major General Miller? That in Iraq the shortage of troops would be an enormous deficiency, complicating almost every activity including prisoner control? That at the end of the day their twin down-flowing pressures of getting intelligence and, if necessary, using "other means", would create a disaster in the Armed Forces—so much so that a U.S. Senator would have to bring legislation to the floor of the Senate to get the Armed Forces back where they should be, adhering to the established rules of warfare?

In that regard, I have read and reread Secretary Rumsfeld's memo of November 27, 2002 (1:00 PM), "Counter-Resistance Techniques". This is the memo with the now infamous hand-written postscript: "However, I stand for 8–10 hours a day. Why is standing limited to four hours? D. R."

I believe that more than any other single document this one demonstrates both the arrogance and the ignorance—and I use that latter term with great precision and not in a pejorative sense—of the signer. What is exhibited here is the sheer lack of understanding of a man who has never been in what I call the crucible of combat, the fiery furnace that soldiers call home from time to time, however reluctantly. And who works beneath a Vice President, a long-time colleague, who believes like Robert Lovett that any evil is justified in the name of security.

Moreover, this was a man—and these were men—who could not bring the challenge he thought he was confronting to the legislative branch and ask for relief. To come to the people's representatives, and through them to the people, was beneath this group. They would not deign to ask the legislature to change the rules for the Armed Forces—a legislature vested by our Constitution with the power to "make Rules concerning Captures on land and water" and "To make Rules for the Government and Regulation of the land and naval Forces."

Instead, they made the rules all by themselves in secret.

I expect that at the end of the day they calculated the legislature would not let them do what they wanted to do and that this calculation influenced heavily their decision to operate in secret. By my research and evidence, they even decided to keep the Chairman of the Joint Chiefs of Staff, the other Joint Chiefs, the Joint Staff, and the Service JAGs out of their secret deliberations and actions as well.

Mr. Chairman, the hard core of Secretary Rumsfeld's memos authorized as many as 30 techniques by my calculations ("a" through "dd" on one memo). As U.S. Navy Captain and JAG officer Alberto Mora has pointed out, no one seems to have considered the possibilities of an interrogator employing eight or ten of the "authorized" techniques at the same time, over extended periods, in near-hypothermic temperatures, in darkness and in isolation, and the final results. Some would say—indeed experts have said—the results would be worse than actual physical torture. No one at the highest levels of the Department of Defense, including its Secretary, seems to have considered this, even for a moment.

Likewise, no one seems to have considered what I call the basic soldier test (how could they?—none of them were soldiers and they had removed the real soldiers from their deliberations).

What I mean by this is, for example, if you tell a soldier under pressure to produce actionable intelligence that he can use a muzzled dog, he will do it faithfully. And when that doesn't work—and it isn't likely to—the soldier will remove the muzzle. And when that doesn't work, he will let the dog take a bite.

That is the basic soldier test which should be applied to all such finely-tuned deliberations.

Similarly, when you slap on the Abu Ghraib prison wall as many as three different checklists in a 30-day period, checklists that tell the interrogators what they

can do, you are asking for trouble. Mastering one checklist is about all you can expect of a soldier under the sorry conditions that existed at that prison. And when the prison guards are encouraged to "prep" their charges (this, too, is against the rules of course, ordering the soldiers guarding the detainees to "prep" them), you are asking for more trouble. Send an aggressive two-star general into the fray, just arrived from GITMO where the gloves are off and things are happening, and your trouble reaches the sort of levels of which the world saw visual evidence in the photographs from Abu Ghraib.

It is nothing new that uniformed military personnel, trying to accommodate the twin pressures of actionable intelligence and "the gloves are off", plus being under the immediate pressure to take actions that will keep their buddies alive, will violate the rules. Some of them will even do so with gusto if they perceive their officers to be in the game with them. And too many of the officers will be in the game with them if they perceive that all the way up the chain of command, as far as they can see, the leadership approves.

Mr. Chairman, as you no doubt realize there is much, much more that I have not delved into. There is bad leadership enough to sink a battleship, poor decision-making, a dysfunctional bureaucracy, and a President too removed from the day-to-day details of a war he essentially declared himself, with the help of a Congress acting largely as a rubber stamp.

As a student and teacher of every president's decision-making since Truman, I find the present circumstances rich ground to plow. There are unique insights available with every president, but none so full of such insights into failure as the current one.

But as a soldier and a citizen I do not find this rich ground for an academic very uplifting. Instead I find it dangerous.

We have damaged our reputation in the world and thus reduced our power. We were once seen as the paragon of law; we are now in many corners of the globe the laughing stock of the law.

What has brought about this change is Abu Ghraib, Guantánamo, secret renditions, what much of the world perceives as an unlawful war in Iraq, and, more than all of these, a refusal to recognize and acknowledge any of this and do something about it.

I hope this subcommittee's efforts to deal with this failure will prove successful. I also hope that a new president in 2009, whether it is John McCain or Barak Obama, will move swiftly to tell the world that America—the real America—is back. In the realm of foreign policy, that will mean at a minimum closing Guantánamo, repudiating torture and abuse, and realigning our strategy in the Middle East.

Thank you and I look forward to your questions.

Mr. NADLER. And we will now go through the questions of the witnesses. As we ask questions of our witnesses, the Chair will recognize Members in the order of their seniority on the Subcommittee, alternating between Majority and Minority, and provided the Member is present when his or her turn arrives. Members who are not present when their turn begins will be recognized after the other Members have had the opportunity to ask their questions. The Chair reserves the right to accommodate if a Member is unavoidably late or only able to be with us for a short time.

I will begin by recognizing myself for 5 minutes to question the witnesses.

First, Mr. Levin, a series of questions for you. ABC News reported that after issuing the December 2004 memo, you were working on another, more specific interrogation memo imposing tighter controls on interrogation techniques. The report states that you never finished this memo and instead were, "forced out of the Justice Department when Alberto Gonzales became Attorney General."

Was your departure from OLC voluntary?

Mr. LEVIN. I would preferred to have stayed. I guess that is the best way to answer.

Mr. NADLER. And is it true that you did not finish a follow-up memorandum because of your removal at that point?

Mr. LEVIN. That is correct.

Mr. NADLER. And is the ABC report accurate that you were removed because your follow-up memo would have imposed limits on waterboarding or other interrogation techniques?

Mr. LEVIN. I don't know the reason for why I was removed. I don't know the answer to that, sir, why that decision was made.

Mr. NADLER. So you can't say yes or no to that question?

Mr. LEVIN. I can't. I was not told a reason.

Mr. NADLER. And so you do not know if your views on imposing tighter controls on interrogations were related to the decision to have you removed from that position?

Mr. LEVIN. I do not. No, sir.

Mr. NADLER. Now, Newsweek reported, referring to you, that battles at the White House took their toll on your political future.

Is that statement accurate, or is that speculative?

Mr. LEVIN. Again, sir, I don't know the answer to that.

Mr. NADLER. Now, John Yoo has written that the December 2004 replacement opinion you drafted was done for appearance's sake, in quotes, and that, "no policies or interrogation techniques changed as a result of the withdrawal of the torture memo." Mr. Yoo has also said that, "the OLC's reversal was pure politics."

Do you agree that nothing changed as a result of your 2004 memo? Do you agree that the 2004 memo you authored was pure politics?

Mr. LEVIN. I certainly don't agree that it was pure politics, and I don't think it is accurate that nothing changed as a result of the change in legal analysis.

Mr. NADLER. What do you think was the change? How would you characterize the change?

Mr. LEVIN. Well, I unfortunately am not authorized to discuss certain matters, but I believe it is the case that there were certain changes in practices as a result of the change in legal analysis.

Mr. NADLER. So as a result of the change in your memo, you think there were changes in practices. That means required changes in interrogation policies?

Mr. LEVIN. I believe that is the case. Yes, sir.

Mr. NADLER. Now, John Yoo told the Washington Post that the interrogation memos that he authored were, "near boilerplate." Do you agree with that assessment?

Mr. LEVIN. No, I don't, sir.

Mr. NADLER. You think they were more significant than not boilerplate?

Mr. LEVIN. Well, I don't exactly know what he means by boilerplate, but there were statements in them that I think were not—if, again, boilerplate means commonplace and accepted, there were statements in there that I do not think were commonplace or accepted.

Mr. NADLER. And do you believe that those memos represent responsible scholarship consistent with the traditions of the Office of Legal Counsel?

Mr. LEVIN. Well, I am reluctant to criticize John. I think that there were aspects of those memos that I would not have written that way.

Mr. NADLER. Okay. And, finally, in a debate in 2005, Mr. Yoo was asked if the President could torture a suspect's child if he believed that was necessary in time of war. The specific—I am not going to go into the specific example. It was rather gruesome of what you might do to the suspect's child.

Mr. Yoo answered: I think it depends on why the President thinks he needs to do that.

Do you agree with John Yoo that the President, as Commander in Chief, that his power as Commander in Chief would allow him to order a detainee's child to be abused if he believed it was necessary for the national defense?

Mr. LEVIN. I can't imagine a situation where that would be the case, sir.

Mr. NADLER. Thank you.

Colonel Wilkerson, in your prepared testimony you write that: As I compiled my dossier for Secretary Powell, and as I did further research, and as my views grew firmer and firmer, I needed frequently to reread that memo; that is to say, the memorandum of February 7, 2002. I need to balance in my own mind the overwhelming evidence that my own Government has sanctioned abuse and torture, which, at its worst, has led to the murder of 25 detainees and a total of at least 100 detainee deaths. We had murdered 25 or more people in detention. That was the clear low point of the evidence.

So your testimony is that 100 detainees have died in detention, and that you believe 25 of those were, in effect, murdered?

Colonel WILKERSON. Mr. Chairman, I think the number is actually higher than that now. The last time I checked, there was about 108. And the total number that were declared homicides by the military services or by the CIA or others doing investigation, CID and so forth, was 25, 26, 27.

Mr. NADLER. Were declared homicide?

Colonel WILKERSON. Correct. Starting as early as December in Afghanistan.

Mr. NADLER. And these are homicides committed by people engaged in an interrogation?

Colonel WILKERSON. Or in guarding prisoners or something like that. People who were in detention.

Mr. NADLER. So these weren't people trying to escape or something. They were declared homicides by our own authorities?

Colonel WILKERSON. Right.

Mr. NADLER. Do you know if any were prosecuted?

Colonel WILKERSON. As far as I know, several were. And they have come to different conclusions.

As an experienced military officer, one of the things that indicated to me early on as I examined the result of some of these courts-martial was that the punishment being rendered to these people, especially the lower-ranking people, didn't match the crime. And quickly, for a military officer, I know how that works: We have an extremely fair system in the military, the Uniform Code of Military Justice. If I were going to be tried, I would much rather be tried under it than I would in a civilian court.

So what was happening was a jury of their peers, if you will, officers and NCOs and enlisted personnel, knew that these people had

performed under great tension and stress, and so it is my view that they were rendering verdicts of reduced to private first class, 2 months of pay, Article 15-type punishment, for example, rather than the kind of punishment that would have matched the crime.

That was one of the insights I early gained into this as I looked at my Army in particular taking this action. And I said, now, why are these people not being given sentences appropriate to the crime, or at least what would appear to be?

Mr. NADLER. And your supposition is?

Colonel WILKERSON. And my supposition is the people on the jury of your peers, the colonels and the NCOs and so forth, and the military judges, they knew the background.

Mr. NADLER. I will get to you more in the second round of questioning, but I have one question to follow up on this, and that is, your judgment as a career military officer is that these prosecutions were handled in a way that would lead you to suspect that the conduct that resulted in these homicides were tolerated or sanctioned from higher authority?

Colonel WILKERSON. I think it was fairly common knowledge throughout the very small Army that we have now that individuals in both the military police, military intelligence, interrogators, and so forth were under enormous pressure to produce intelligence. And they were also being given guidance that they could do things that weren't necessarily in consonance with the law of the land warfare, certainly not in consonance with Common Article 3 of the Geneva Convention or even the conventions themselves. And so that made people be more lenient.

Mr. NADLER. Thank you. My time has expired.

I will now recognize the distinguished Ranking Minority Member of the Committee, Mr. Franks.

Mr. FRANKS. Thank you, Mr. Chairman.

Colonel Wilkerson, I always appreciate anyone who has put themselves on the line for the cause of freedom. I did want to ask you something that kind of struck me. You cited as a comparative a circumstance where you were in a combat zone, and you were in a free-fire zone, and that a 12-year-old girl walked up the road, and that you broke the rules and chose not to shoot her.

Were you under rules that would require you to shoot a 12-year-old girl, or was this something that would have been up to you, but would have required you to break the rules to keep from shooting a 12-year-old girl?

Colonel WILKERSON. I can't tell you how many radio conversations on Fox Mike that I had with——

Mr. FRANKS. But that is a yes or no question. Were you breaking the rules by not shooting her?

Colonel WILKERSON. May I answer the question?

Mr. FRANKS. Sure.

Colonel WILKERSON. I had conversations with higher officers in Vietnam who, when anything was encountered in a free-fire zone, essentially said you are free to engage it. Then it was up to my discretion as to whether I didn't or not. And clearly, as I indicated, in this case I wouldn't.

Now, it is not even as black and white as that. Had she had an AK-47 and been shooting back at me, indeed I might have. But it would have taken that kind of evidence for me to engage.

Mr. FRANKS. I understand. But your testimony was that you broke the rules and chose not to shoot her. That—I understand that you had the option. But I don't think you—I mean, it just seems astonishing to me that you would have been under a rule that would have required you to shoot her. And I just wanted to point that out, it just struck me wrong. Forgive me if I misunderstood it.

Mr. Rivkin, Colonel Wilkerson states in his written testimony the following: No one seems to have considered what I call the basic soldier test. What I mean by this is, for example, if you tell a soldier under pressure to produce actionable intelligence that he can use a muzzled dog, he will do it faithfully. And when that doesn't work, and it isn't likely to, the soldier will remove the muzzle. And when that doesn't work, he will let the dog take a bite.

What do you make of that statement?

Mr. RIVKIN. Thank you, Congressman Franks.

With all due humility, since, unlike Colonel Wilkerson, I have never served in combat, but I fancy myself a bit of a student in military history, I would strongly disagree with the statement. I would say that a well-disciplined military, particularly American military, is probably the best institution among any other set of public institutions that is capable of very nuanced behavior, operating in very different environments with different rules of engagement. For example, you have military units, knowing the difference between operating with live ammunition, using nonlethal munitions, versus using lethal munitions. The military is able to operate in different drills and all sorts of different environments.

Now, I understand the dilemma of having ambiguous orders, but if you tell people that the dividing line is, again in his testimony, to muzzle dogs, by golly, you don't take off a muzzle. If you do, it is a serious failure of leadership at their officer corps level. And if you tell them you can take the muzzle off, but there should be no biting, by golly there should be no biting. I don't understand that logic at all, and it certainly would not seem to be the modus operandi in any law- and rule-complying military.

Mr. FRANKS. Obviously I would agree with your assessment, that being able to precisely follow orders is not only a good idea, but in many circumstances is absolutely critical to the survival of a particular unit or battle.

Mr. Rivkin, as you reviewed the written testimony of some of the other witnesses here today, I have been asked many times of witnesses, tell us what should be the appropriate anti-terrorism policy for interrogation. Did you find the materials here that you reviewed related to the other witnesses' testimony here today helpful in determining the contours of an appropriate anti-terrorism policy, or were they lacking in significant ways? And could you elaborate?

Mr. RIVKIN. Thank you, Congressman. I hate to put myself in the position of being a bit of a schoolmaster, and these are difficult issues, but I would at least suggest a couple things. And, again, not to pick on Colonel Wilkerson, with all due respect, about the hundred deaths, it is very important not to paint things with a broad

brush. You really need to drill down on what caused these deaths. If these deaths were primarily caused in the context of interrogation, that is very troubling. If these deaths were caused by guards overstepping their authority or some other reasons, that would not necessarily be terribly relevant to the question of interrogation routines.

And another thing I would say, and I will draw on my own experience back in my Department of Justice days, I had an opportunity to look at, shall we say, some problems involving the Bureau of Prisons. Let's be honest, abuses by inmates against inmates and guards sometimes acting in good faith and sometimes acting sadistically without any justification are endemic in prison systems, civilian and military, Federal and State. You always have to ask yourselves a question as a citizen, particularly as a lawyer: What is your current baseline? I mean, that is true whether investigating corporations for abuses of worker safety or something else. Is the current behavior dramatically divergent from the past historical baseline? If the answer is no, it doesn't mean you rest on your laurels; you try to drive the misconduct down to zero. But you certainly don't stagger about in dramatic indignation.

You have to look very carefully at what is the baseline of prisoner-related abuse in World War I, World War II, Korea, Vietnam, Spanish-American War. And I am sure the Defense Department has these statistics.

The anecdotal evidence that I have heard from people who have actually served in the military, particularly in the time of Vietnam, is that the behavior of American troops is dramatically better measured—and, again, statistics is a difficult matter, but in terms of percentage or relative to, let's say, 100 detainees or 1,000 troops in the field is dramatically better than in Vietnam and Korea and even World War II. Again, that doesn't mean that it is wonderful, but that is a fact. And I have not seen this nuanced.

Another thing that bothers me very deeply is, let's be clear, I never supported waterboarding. I tend to think that waterboarding by and large is not torture and certainly CID. But why can't we have a serious discussion about things other than waterboarding? Why can't we have a serious discussion about stress interrogation techniques that aren't pleasant, but don't rise to that level? But everything 99 percent of the time gets pivoted off waterboarding? And that—I mean, we should be able as a society to have nuanced rules that rules out some levels of coercion, but allows some levels of coercion in. And it is very difficult to have a serious debate because everything is portrayed in the same light.

Thank you.

Mr. FRANKS. Thank you, Mr. Chairman. My time has expired.

Mr. NADLER. I now recognize for the purposes of questioning the witnesses the distinguished Chairman of the Judiciary Committee, the gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Chairman Nadler.

Good to see you again here, Mr. Rivkin.

Colonel Wilkerson, did you believe that the President personally approved the use of these tactics by the military?

Colonel WILKERSON. When I read the President's 7 February memo, I saw it both as an academic and a person looking at the

charts the Secretary had written me. I saw it as a decision in the post-1945 country we live in. That is to say, we tried to reconcile our liberties with our security.

That memo to me does not constitute the kind of order that others have interpreted it to constitute. It constitutes a compromise. The one thing that critics of my view have said is that it gives an escape clause; the escape clause is consistent with military necessity. And I point out to them that Presidents in the past, when they wanted escape clauses, said things like "consistent with national security" or "consistent with the dictates of the global war on terror," something far more sweeping.

Military necessity to me as a military man means if I have to butt-stroke someone in order to save a life, I can do it. It doesn't mean that I can hang someone from metal screens at Bagram in Afghanistan and then beat him until he dies, as they did to Dilawar on 10 December, 2002.

So there is a real distinction, I think, between what the President authorized in that compromise and what actually happened as it got interpreted through the DOD principally and the Vice President's office and went down to the field.

Mr. CONYERS. When you had discussions with Secretary Colin Powell about whether he believed that the President personally approved aggressive techniques, what opinion did you form from those discussions?

Colonel WILKERSON. Those were torturous discussions, if you will pardon the play. The Secretary was of a mind that the President was fully complicit in everything that had happened. But I must add that at that time, neither of us was really confident that we knew exactly what had happened. So I qualify it with that.

Mr. CONYERS. And Secretary Powell, didn't at one point he suggested that he believed that Vice President Cheney obtained the President's personal approval for these boundaries on interrogations at Guantanamo?

Colonel WILKERSON. Again, I don't know if he knew the full story at that time. I am quite sure that I didn't. And the remarks that he made were offhand, and they were something more general than that. They were like: You can bet that if Cheney did it, he walked in the Oval Office and got the last bite at the apple before he did it.

Mr. CONYERS. Did you conclude that anyone in the Office of the Vice President played a significant role in the development of Administration interrogation policy?

Colonel WILKERSON. It is my strong view that Mr. Addington had a very significant role in it.

Mr. CONYERS. And was he part of what sometimes was termed an "unholy alliance" of the Office of the Vice President, the Secretary, or Rumsfeld, and the Office of the Legal Counsel bringing pressure to bear on the military to use aggressive interrogation techniques?

Colonel WILKERSON. I think you actually had a collusion of six people. You had John Yoo and Jay Bybee at OLC. You had Jim Haynes and Doug Feith at the Defense Department and had Addington in the Vice President's Office and Gonzales then as Counsel to the President.

I think they all participated initially in developing this legal opinion for a finding that the President had probably signed with regard to the CIA; and it gravitated over—migrated over, if you will—to the Defense Department.

Mr. CONYERS. Then it would be fair to say that these tactics were essentially pushed from the top down?

Colonel WILKERSON. That is my view.

Mr. CONYERS. And that leaves us in a difficult—we are just trying to flesh this out, and everyone brings their opinion; but we have to—as an investigating Committee, have to bring this to even finer detail. We may have to invite some of these persons in.

As a matter of fact, some have already been invited in. And to my pleasant surprise, some have agreed to come in.

So I thank you for your testimony.

Mr. NADLER. Thank you.

The gentleman from California is now recognized for 5 minutes to question the witnesses.

Mr. ISSA. Thank you, Mr. Chairman.

Mr. Rivkin, the question of whether someone is tortured, does it hinge on whether it is effective?

Mr. RIVKIN. I do not think so. I think it is a very unfortunate observation that has been read about, the effectiveness.

Mr. ISSA. So just to set the record straight, whether or not torture yields vital or important information should have no bearing on whether it is torture.

Even if torture is effective, it is wrong; is that right?

Mr. RIVKIN. That is true of torture, I would say, Congressman.

I would say in the case of lesser levels of coercion, I still prescribe cruel, inhumane and degrading treatment when you look at what shocks the public conscience, the circumstances, the imperative for intelligence and effectiveness. But torture to me is a pretty absolute prohibition.

Mr. ISSA. Well—and, look, I served in the Army. If I knew there was an ambush a quarter of a mile ahead and I had a prisoner and I had to decide whether my unit got ambushed or whether we got out alive and the only way to get out was straight ahead, I might ask later for forgiveness or a minimum punishment for what I would do in order to get that information in a timely fashion.

But that is sort of what we try to protect ourselves against, the actions of individuals when they have complete control over somebody; isn't that true?

Mr. RIVKIN. It is true. And you can have circumstances that, you know, bring out these types of reactions.

I certainly would not suggest legalizing it, but it is one——

Mr. ISSA. Okay.

Let us go to waterboarding. I know you said you didn't want to, but waterboarding is another name for drowning with a doctor present, isn't it?

Mr. RIVKIN. As I understand, it is a pretty capacious term. But, yes, it does involve—I don't know even know if waterboarding always involves drowning. It may involve forms of noninundation that induces some feeling of asphyxiation where, let us say, you are strapped to a board and there is some kind of water that gets poured over your face. It may not be drowning——

Mr. ISSA. Take my word for it, waterboarding is either drowning the person or making him think he is going to be drowned. And you said you don't think that is torture?

Mr. RIVKIN. No. On the contrary.

I said, in my view in almost all conceivable circumstances, waterboarding would be torture.

Mr. ISSA. Okay. So this Administration, recognizing that it had a multitude of tools, including sleep deprivation and so on that had a lot of history, chose to condone on three occasions the use of this near-drowning technique called waterboarding, right?

Mr. RIVKIN. It appears to be the case.

Mr. ISSA. Okay.

Mr. Wilkerson, you and I both went through some of the same training. You went through more of it. Thank you for your service.

We were told about the other side torturing. Some things like waterboarding were part of the training that we expected we would be tortured by the enemy, right?

Colonel WILKERSON. Right.

Mr. ISSA. Okay. And when you and I went through and were commissioned as Army officers, we were told we don't do that, right?

Colonel WILKERSON. Right.

Mr. ISSA. And the U.S. Army Manual says we don't do that?

Colonel WILKERSON. Right.

Mr. ISSA. If I watched MASH, the CIA guys would go in and out, and we would assume they would have different standards, right?

Colonel WILKERSON. Probably, knowing the CIA's history.

Mr. ISSA. And those standards would be, in fact, secrets, right?

Colonel WILKERSON. Yes.

Mr. ISSA. And——

Colonel WILKERSON. Usually very highly classified.

Mr. ISSA. And so the use of waterboarding and, if you will, the whole handling of how we dealt with a number of incidents, has created a situation in which the CIA's techniques are at least for now public, right?

Colonel WILKERSON. At least to that extent, yes, waterboarding.

Mr. ISSA. I don't condone torture. When I was on the Intelligence Committee and was told of what waterboarding was before it became, quote, "unclassified," I thought it was wrong, just as Senator McCain thought. And I will tell you today I still think it is wrong. And I think that, in fact, this hearing is valuable because, in fact, it has—it causes us to reflect on whether or not going too far creates a situation in which the legitimate effectiveness of our Secret Service is compromised.

I want to just follow up with one question, though, because I do have to hold you to a high standard, too. You used the term Article 15 when you were talking about punishment. I think you said Article 15 like punishment.

You are not implying that anyone gets nonjudicial punishment for killing somebody?

Colonel WILKERSON. No, no, no.

Mr. ISSA. And just for the record, the commanding general who was in charge of Abu Ghraib, where is she today?

Colonel WILKERSON. I don't know.

Mr. ISSA. Wasn't she court-martialed?

Colonel WILKERSON. I don't know if she was court-martialed. I know she was—at least I believe she was reduced in rank.

Mr. ISSA. I know she was reduced to colonel. I apologize. I thought she was. And in the case of the murder that you alleged—or not alleged, but you referenced—pronounce it correctly. Dilawon?

Colonel WILKERSON. Dilawar.

Mr. ISSA. Dilawar.

What was the punishment that was issued there in the case of that murder?

Colonel WILKERSON. I would actually have to go back and look, but I don't recall its being the kind of thing you would say, just as a citizen or a soldier that it was commensurate with what happened.

Mr. ISSA. Mr. Chairman, I would ask, are those records something that could be made available to this Committee?

Colonel WILKERSON. They should be, yes.

Mr. ISSA. I would appreciate it if you could follow up with us on that. And thank you.

I yield back.

[The information referred to follows:]

Austin American-Statesman
statesman.com

A look at Afghanistan abuse cases

The Associated Press

A look at the cases against 15 soldiers accused of abusing Afghan detainees, including two who later died. The trials have been held at Fort Bliss, Texas.

_ Sgt. James P. Boland, of the reserve 377th Military Police Company in Cincinnati, was initially charged with maltreatment, dereliction of duty and assault. All charges were dropped and he was given a letter of reprimand for dereliction of duty. He has since left the Army.

_ Spc. Brian Cammack, of the 377th MP, pleaded guilty to assault and two counts of making a false official statement. He was sentenced to three months in prison, reduced in rank to private, and given a bad-conduct discharge.

_ Pfc. Willie V. Brand, of the 377th MP, was convicted of assault, maiming, maltreatment and making a false official statement. He was reduced in rank to private.

_ Sgt. Anthony Morden, of the 377th MP, pleaded guilty to one count of assault and two counts of dereliction of duty. He was sentenced to 75 days in prison, reduced in rank to private, and given a bad-conduct discharge.

_ Sgt. Christopher W. Greatorex, of the 377th MP, was acquitted of charges of assault, maltreatment and making a false official statement.

_ Sgt. Darin M. Broady, of the 377th MP, was acquitted of charges of assault, maltreatment and making a false official statement.

_ Capt. Christopher M. Beiring, commander of the 377th MP, has been charged with dereliction of duty and making a false official statement. A military investigator recommended that all charges be dropped.

_ Staff Sgt. Brian L. Doyle, of the 377th MP, has been charged with dereliction of duty and maltreatment. He was acquitted in a summary court-martial.

_ Sgt. Duane M. Grubb, of the 377th MP, was acquitted of charges of assault, maltreatment and making a false official statement.

_ Sgt. Alan J. Driver, of the 377th MP, has been charged with assault and maltreatment. He is scheduled

to stand trial Feb. 6.

_ Spc. Nathan Adam Jones, of the 377th MP, was charged with assault, maltreatment and making a false official statement. All charges have been dropped, though he is likely to receive a letter of reprimand.

_ Spc. Glendale C. Walls, of the 519th Military Intelligence Battalion from Fort Bragg, N.C., pleaded guilty to charges of dereliction of duty and assault. He was sentenced to two months in prison, reduced in rank to private and given a bad-conduct discharge.

_ Sgt. Selena M. Saloedo, of the 519th MI Battalion, pleaded guilty to dereliction of duty and assault. She was reduced in rank to specialist or corporal, fined $250 a month for four months and given a letter of reprimand.

_ Sgt. Joshua Claus, of the 519th MI Battalion, pleaded guilty Wednesday to charges of maltreatment and assault and was sentenced to five months in prison.

_ Pfc. Damien M. Corsetti, of the 519th MI Battalion, was charged with dereliction of duty, maltreatment, assault, wrongful use of hashish, and performing an indecent act with another person. A trial date has not been set.

December 30, 2005 - 12:49 p.m. CST

Mr. NADLER. I thank the gentleman.

The gentleman from Alabama is recognized for 5 minutes.

Mr. DAVIS. Thank you, Mr. Chairman.

Gentlemen, welcome to the Committee.

Mr. Levin, let me begin with you and Mr. Wilkerson, and put frankly everything I have heard today in some context. And I want to pull out two particular events. The first one is the circumstances of your not being at the Department. I know that you were very careful in your answers to Chairman Nadler earlier. But let me make sure I understand you.

You didn't voluntarily leave the Department; is that correct?

Mr. LEVIN. I would have preferred to have stayed. I mean, when I was told I wasn't going to stay, I voluntarily left.

Mr. DAVIS. That tends to be what happens; when people who are over you tell you to go, you go. That is what in the real world is called being fired. And as to the reasons, I think Chairman Nadler asked you if the reason had something to do with opinions that you issued regarding torture. And you indicated that you didn't wish to wade into that.

Let me use a little bit of common sense for a moment. Was your performance deficient in any way that you knew of, Mr. Levin?

Mr. LEVIN. Not that I was aware of.

Mr. DAVIS. Your task of assembling scholarly, reasoned opinions for the Department of Justice, did you fail in any way that you knew of in preparing scholarly, reasoned opinions for the Department of Justice?

Mr. LEVIN. I hope I did not fail. I don't believe I did.

Mr. DAVIS. Had you received any mark in your files or any negative evaluation regarding the competence of your performance?

Mr. LEVIN. No.

Mr. DAVIS. Did anyone give you any reason for your termination?

Mr. LEVIN. No.

Mr. DAVIS. So, Mr. Levin, a lot of us listening to that would reasonably conclude, using our common sense, that you were asked to go because you were at odds with the Administration's policies, which would put you in the same category with General Shinseki, who was the first person to correctly tell the United States Congress that the war in Iraq would not be a limited-term adventure, but would require a significant commitment of forces. He was candid in telling the Congress that before the war, was asked to go on.

Mr. Wilkerson, do you recall that your former boss, General Powell, frankly indicated his willingness to the Bush administration to remain for a second term? He was not given a chance to re-up, if you will. And I think there is a pattern here, gentlemen.

A lot of the people who got it right have been asked to leave by this Administration, whereas a lot of the people who got it wrong have never been asked to leave and have formulated policies that have taken us to places we don't want to go.

The second context, Mr. Levin, is this one. I am trying to look at this Administration's capacity for legal analysis, and I am trying to put this in some perspective. Let's go through it for a moment.

This Administration initially believed that there was an extra constitutional authority for the President to supersede FISA. While no court has ever squarely addressed that issue, I don't even know

of a senior Republican in Congress who holds that opinion today. That is an opinion that has been widely ridiculed. That is why we have had subsequent acts that amend FISA and why we have the Protect America Act now.

The Administration initially believed the Geneva Convention wasn't applicable to treatment of detainees. That position was squarely rejected by the Supreme Court. The Administration believed that habeas corpus wasn't applicable to detainees. The Supreme Court rejected that position last week.

Mr. Levin, Mr. Wilkerson, do either of you know of any Administration that has so consistently found itself at odds with courts and mainstream opinion regarding the scope of its power? Mr. Wilkerson, does any come to mind?

Colonel WILKERSON. Well, there have been a few. I mean, President Truman certainly had a real problem when he tried to take on the steel industry.

Mr. DAVIS. He had one-time—this Administration has had a number. There is a pervasiveness to it.

Colonel WILKERSON. I don't disagree with you. I think history is—and I was part of this Administration for 4 years. I think history is probably going to judge this as one of the most inept Administrations in American history.

Mr. DAVIS. Mr. Levin, would you speak to that? You are a knowledgeable, trained, constitutional scholar. Do you know of any Administration that has so consistently advanced positions that are at odds with mainstream legal/judicial opinion regarding the scope of its power?

Mr. LEVIN. I don't. And I can't claim to have exhaustively studied the issue.

Mr. DAVIS. But none come mind?

Mr. LEVIN. But I don't.

Mr. DAVIS. Final observation in the time that I have: Mr. Wilkerson, would you please end this—actually, Mr. Levin, frankly, you would be the better person to pose this.

Every now and then we have these hearings. It is usually someone to my left, the Committee's right, who will advance the argument that, well, all of these liberal Democrats are worried about torture and all these liberal Democrats are worried about our being too tough and too mean on these bad guys around the world.

Will you, Mr. Levin, conclusively disabuse us of the idea, if you oppose torture, you are sympathetic to al Qaeda?

Mr. LEVIN. Yes. Torture is obviously abhorrent and against anything that this country stands for. I don't know anybody who supports torture or—in the Government who——

Mr. DAVIS. Mr. Wilkerson, will you, as my time runs out, just speak to that idea and disabuse us once and for all of the idea that if you oppose torture that you are sympathetic to al Qaeda?

Colonel WILKERSON. I think it is nonsense. I think it is right there with dissent is in some way cowardly or something. I think dissent is the highest form of patriotism.

Mr. DAVIS. Thank you, gentlemen.

Mr. NADLER. Thank you.

I now recognize for 5 minutes the gentleman from Ohio.

Mr. KING. Or Iowa. And I appreciate that.

Mr. NADLER. Sorry, from Iowa. One of those Midwest States that are flat, you know.

Mr. KING. We are the one under water, and I happen to be—I also wanted to point out, Mr. Chairman—and to the gentleman from Alabama, I am not to your left, regardless of the logistics here, but thank you.

Mr. DAVIS. That is why I said my left, the Committee's right—my physical left, the Committee's right.

Mr. KING. You are an attorney, and I do appreciate the accuracy of your original statement. I couldn't resist commenting.

I would like to turn first to Mr. Levin and the discussion that was brought up by Mr. Davis of Alabama with regard to the habeas case that we heard the decision on last week. I call it the GITMO case. And I would ask you as a constitutional scholar if you could advise this Constitution Subcommittee how Congress might enforce Article 3, Section 2, whenever we might decide to pass that legislation which in those cases are legion, how do we enforce that when the court defies the directive of Congress?

Mr. LEVIN. I would have to study that a lot more closely, sir. I am sorry. It is just not something I am prepared to address now. I understand——

Mr. NADLER. Would the gentleman yield for a second?

Mr. KING. I would.

Mr. NADLER. When you are asking a question about Article 3, Section 2, could you simply mention what article that is?

Mr. KING. I would be happy to. And reclaiming my time, it is the section of the Constitution that grants to the legislature, to the Congress the authority to strip the court of jurisdiction to hear particular cases under such conditions as the Congress shall set. And we have done so in a series of cases that have to do with the Detainee Treatment Act and the Hamdan decision and the list goes on, setting up a military tribunal.

So—and we directed the appeals to be exclusive within the authority of the D.C. Circuit Court—Court of Appeals. And the Supreme Court chose to hear a couple of these cases, maybe more of them. The Congress sits here now, having danced at the end of the Supreme Court's string. We tried to accommodate them; we passed legislation on two occasions to do that. And now they have moved the ball, so to speak, and Lucy has pulled the football away from the Charlie Brown Congress.

Now that I have expressed myself on that, would you care to comment, Mr. Levin?

Mr. LEVIN. Again, I would have to study it more closely. I do understand that the—in general, the Court has taken a very restrictive approach toward legislation that attempts to limit jurisdiction. In this particular case, I actually thought that they concluded that Congress had stripped statutory jurisdiction, but that there was still a constitutional level or constitutional basis for habeas corpus that Congress could not remove.

Mr. KING. That may well be their conclusion, which I would disagree with, Mr. Levin. But I think it is an astute observation.

And I turn to another astute attorney, Mr. Rivkin, and ask what your comment might be about how Congress can restrain an oligarchical court that seems to have been moving—changing—moving

the ball on us, so to speak. And how do we enforce that, and what is the bottom line on this?

If we keep trying to catch up with the Supreme Court, they will become the people that run this country, rather than the people.

Mr. RIVKIN. There is tremendous uncertainty. I cannot say enough critical things about this opinion. I think it is one of the two or three worst opinions in Court history—Foley and Barr, Dred Scott and Plessy—not because of its implications, but because of its overarching constitutional arrogance.

And this opinion, with all due respect to Congressman Davis, is not a poke at the Bush administration. It is a poke at both political branches, all of you, where the Court basically, leaving aside the question of whether or not the Constitution applies overseas and leave the Constitution habeas overseas. They have taken a look at perfectly adequate procedures. There is a whole line of cases, *Swain v. Pressley, INS v. St. Cyr,* which deals with so-called adequate substitutes. And the majority opinion written by Justice Kennedy just blew right past those cases, very cursory matters.

My honest opinion is, there is absolutely no certainty, if you ask me to draft legislation, that anything you would pass that would deviate in the slightest from the baseline Federal habeas, codified at section 2241, would pass their muster. I don't know, if you decided to anoint one district court in the District of Columbia as an exclusive repository for all habeas petitions if nothing else. I don't know if that would pass muster because this is an opinion that is utterly willful, inconsistent with precedent and inconsistent with the Constitution.

So you need to see what they will say next time.

Mr. KING. And, Mr. Rivkin, I would submit that there is precedent for Congress abolishing judicial districts. And whatever the Congress gives, we can take away, at least constitutionally; and all of the Federal courts, with the exception of the Supreme Court, are the creation of Congress.

And so we do have the authority; we do not have the will. And the bottom-line: We don't have the will.

Mr. RIVKIN. It is funny you say that. I was speaking to a colleague of mine, and he remarked upon the fact that, theoretically, you are absolutely right, you have a power to abolish all the lower courts.

But I am not sure, under the logic of Justice Kennedy's opinion, you can do that because that would impermissibly impede the ability of detainees to bring the habeas petition. So maybe you cannot do that either anymore.

Mr. KING. So perhaps we can reduce the Supreme Court down to Chief Justice Roberts with his own card table and his own candle, and they might get the message.

I thank you, Mr. Rivkin. I appreciate your testimony and everyone else's.

Mr. Chairman, I yield back the balance of my time.

Mr. NADLER. Thank the gentleman.

And I recognize the distinguished gentlewoman from Florida.

Ms. WASSERMAN SCHULTZ. Thank you, Mr. Chairman. And I might note for Mr. King that of the five Justices in the majority

in last week's opinion, three of them were appointed by Republican Presidents.

Mr. Wilkerson, I would like to ask you a couple of questions just about some—if you can comment on some things that you have said recently for clarification.

Recently you were quoted as stating, "Haynes, Feith, Yoo, Bybee, Gonzales and—at the apex—Addington, should never travel outside the U.S." You continued, "They broke the law; they violated their professional ethical code. In future, some government may build the case necessary to prosecute them in a foreign court, or in an international court."

Why do you describe Mr. Addington as at the apex of this group, and what prompted you to make that statement?

Colonel WILKERSON. Because it is my view that Mr. Addington's very astute brain was integral to the development of not just the legal position to back the CIA's findings program, but also to back, ultimately, the program that DOD generated for the Armed Forces.

Ms. WASSERMAN SCHULTZ. In terms of the legal memorandum that was written by John Yoo, did you ever see those memoranda and what was your reaction?

Colonel WILKERSON. I saw some of them; I didn't see all of them.

In fact, as I listened to Senator Levin yesterday, I was stunned. I knew Senator Levin was sitting on a lot of material that I had not seen, but that I had heard of, but I had no idea that he had gotten almost all of it, apparently, with a few exceptions.

The memos that I saw gave me the impression that lawyers were sitting in the room—you will pardon my soldier's view of this—trying to count how many angels could sit on the head of a pin with regard to something that was, to me as a soldier, quite serious—torture, abuse and so forth.

Ms. WASSERMAN SCHULTZ. That leads me to ask you about some notes that were released from a meeting in Guantanamo Bay in October of 2002 that was reviewed yesterday in the Senate Armed Services Committee about interrogation methods.

In that meeting, a CIA lawyer named Jon Fredman described the legal guidance that the CIA had received from the Department of Justice. Mr. Fredman said that according to the Justice Department, whether something is torture is basically subject to perception. And he also wrote, if the detainee dies, then you are doing it wrong.

In terms of demonstrating that rules for covert operations eventually spilled over into standard military procedures, can you describe your "discomfort"—I guess is probably an understatement—between the significant difference between Army Field Manual procedures and CIA intelligence gathering techniques and where your discomfort lies?

Colonel WILKERSON. I have some familiarity with what some of the CIA teams did in Vietnam, for example, that the military took, at least the military I was a part of, took some great umbrage at. So I do have some historical familiarity with what the CIA can do in the field, has done in the field, as opposed to what the military can do in the field.

In this case, I think there was this double effort. The CIA would do a highly—a highly classified, compartmented program that was,

as pointed out earlier, only affect high-value targets, and they could do certain things against those high-value targets.

I think what happened on the other side of the river, so to speak, was that the Pentagon wanted to wage this conflict on a very wide-scale basis. They wanted to go after everyone from Abu Sayyaf in the Philippines to Jemaah Islamiyah to al Qaeda, every terrorist that could possibly come against us. Mr. Feith writes about this quite extensively in his book, War and Decision. And as a consequence, they needed actionable intelligence too.

They immediately put the Special Operations Command into the mix here, so much so that we actually had ambassadors calling in from the field at the State Department and saying to the Secretary, Who are these 6'4", 19-inch-bicep male Caucasians walking around in our capital, moaned to everyone—of course, the ambassador knew exactly who they were—and we had to ask Mr. Rumsfeld what was going on. And he had to eventually fess up that he was putting these people in capital cities around the world and other places.

So they needed actionable intelligence for these people to take direct action or to capture terrorists in their areas. And that is what caused, I think, the gravitation over to the DOD of the legal philosophy that backed the CIA program; and some of the same techniques that Secretary Rumsfeld admittedly, very painstakingly, went through and tried to identify those that would not constitute torture, but would bring results.

And then——

Ms. WASSERMAN SCHULTZ. As my time expires, I—so basically, is it your opinion that DOJ crafted legal advice really intended for the CIA, so that it would be applicable and utilized by the military in intelligence and interrogation-gathering techniques?

Colonel WILKERSON. I don't know if that was the Justice's intent, but I know that is what—I am 99 percent sure that is what happened.

Ms. WASSERMAN SCHULTZ. Whether it was intentional or not, it is still illegal?

Colonel WILKERSON. That has what we are arguing about.

Ms. WASSERMAN SCHULTZ. I yield the balance of my time.

Mr. NADLER. I thank the gentlelady.

I now recognize for 5 minutes for the purpose of questioning the witnesses the gentleman from Minnesota.

Mr. ELLISON. Mr. Levin, we had a lot of conversation about the so-called "torture memo," not the one that was revised, but the one that wasn't; the one that you, I think, revised—that one.

I think that it is fair to say that the people who participated in drafting that memo, led by David Addington—and there were several others that have been mentioned—what I would like to focus your attention on is, what dialogue are you aware of that may have occurred before the drafting of the memo and who participated?

For example, was Vice President Cheney involved in any preliminary discussions before the torture memo was actually written?

Mr. LEVIN. If you were asking about the August 2002 memo——

Mr. ELLISON. That is the one.

Mr. LEVIN. I just don't know, sir. I am sorry. I was actually Chief of Staff of the FBI at the time. And that was written—I just had no involvement in those issues, so I don't know.

Mr. ELLISON. Yeah. But I was just assuming that given that you did come into the role that you did, and you must have—you walked those halls every day, you sat down with people, you discussed things.

I mean, do you know if the Vice President was personally involved in any preliminary discussions to the drafting of that memo?

Mr. LEVIN. I don't know, sir. I am sorry.

Mr. ELLISON. For the record, do you know if the President was involved in the drafting of the memo?

Mr. LEVIN. I don't know.

Mr. ELLISON. Now, when you drafted your memo, why—this may seem a simple question, but what made you redraft the memo?

Mr. LEVIN. When I arrived at OLC, that process was really sort of already under way. Questions had been raised about the previous memo—frankly, I think, both internally and externally—and I think the assessment of Jack Goldsmith, who was head of OLC and others, including Deputy Attorney General Jim Comey, was that the previous memo was not really an appropriate memorandum to have out there, that it should be replaced with a new memo.

And that is what I worked on when I got there. Jack had already really kind of started that process.

Mr. ELLISON. Whom did you talk to in the redrafting?

Mr. LEVIN. I talked to a lot of people. As I mentioned in my opening remarks, I think one of the problems with the earlier memo was, it was not the subject of sufficiently broad collaboration and discussion.

I talked, in addition to everybody in the Office of Legal Counsel virtually, people at the Criminal Division, various other people in the Department, people at the State Department.

Mr. ELLISON. Did you talk to anybody in the Vice President's Office?

Mr. LEVIN. I don't believe I did talk to anybody in the Vice President's Office. I did submit drafts to the White House Counsel's Office, and whom they circulated it to in the White House, I don't know.

Mr. ELLISON. Okay.

Do you know if—did Mr. Addington have any input into your redraft?

Mr. LEVIN. Not directly to me. Whether he did so indirectly, I am not sure. He may have provided comments to White House Counsel that were then communicated to me as their comments.

I was not ever told anything that were his comments, and he never spoke to me about it directly.

Mr. ELLISON. Could you put your finger on exactly what the parts of the memo were that needed changing?

Mr. LEVIN. There were—there really were two parts of it, or from the big picture, there were aspects of the actual analysis of the torture statute that I concluded were incorrect, I disagreed with.

Maybe I am wrong and they are right, but I disagreed with the actual analysis of the statute.

There was then a very large part of the opinion that went beyond the statute to a variety of other analysis of the President's ability to override the statute, self-defense, necessity defenses to the statute; and in my, view and I think the view of others, that was simply inappropriate to even include in the memo.

The President's clear direction was, we are not going to engage in torture. So there was no reason to look for ways that you might be able to get around the statute or violate the statute.

Mr. ELLISON. Do you believe that the earlier memo gave license to people following its direction to engage in illegal techniques, interrogation techniques?

Mr. LEVIN. Well, it included a definition of torture that I frankly disagreed with and which would have, I think, allowed techniques that I would have concluded violated the statute. And it included this discussion of ways that you could overcome the statute, even if it applied and otherwise would have been violated.

Mr. ELLISON. So if somebody were to rely on that memo, the earlier memo, they would have been violating the law intentionally?

Mr. LEVIN. If somebody relied on the first part of that memo and went up to the limits of what it allowed, in my view they would be violating the law.

Now, again, maybe I am wrong and the earlier memo is correct. If somebody relied on the other constitutional overrides of these defenses, in my view they might well have been violating the law. It obviously would depend on the circumstances.

Mr. ELLISON. Did that ever happen?

Mr. LEVIN. I don't know. I don't know.

I know there have been lots of investigations into sort of how things ended up happening and who was relying on what. My understanding was that that memo was very—was not broadly circulated. And so I don't know whether people who were engaging in any conduct were even aware of the memo, let alone relying on it.

Mr. NADLER. Thank you. The time of the gentleman has expired.

There are six votes on the House floor. There are 12 minutes left to vote. We have two people left to ask questions. We are going to try to finish it, because otherwise we will have to ask the witnesses to stay an hour or so. So I am going to have to be strict now with the timing.

The gentleman from Virginia is recognized.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Levin, is there an internationally accepted definition of torture? I mean, if you went to the United Nations, would there be a lot of confusion about when it is torture and when it is not torture?

Mr. LEVIN. I think, as a general matter, the Convention against Torture is probably the internationally accepted definition. Applying it in particular circumstances may be difficult, but the actual definition I think is—most people would accept that as the definition.

Mr. SCOTT. Well, I mean, does it become okay if you, instead of calling it "torture," call it "aggressive interrogation techniques"? Does that make it okay?

Mr. LEVIN. No. If it violated either the Convention or the statute, it doesn't matter what you call it.

Mr. SCOTT. And the rules, do they apply if you are under United States control, but not technically on United States jurisdiction?

Mr. LEVIN. The statute actually—the Federal statute only applies if you are outside of the United States, and so it would only apply in the situation where you were outside the United States.

If you were inside the United States, various other statutes——

Mr. SCOTT. So it would apply at Guantanamo Bay and Abu Ghraib prison?

Mr. LEVIN. Yes, I think that is correct. I don't think anybody ever suggested that the statute did not apply.

Mr. SCOTT. Okay. If the torture—if the normal interrogation techniques do not work, does that justify torture?

Mr. LEVIN. Under the statute, nothing justifies torture. If it is torture, it is not allowed, regardless of the reason.

Mr. SCOTT. If it worked, does it justify the torture?

Mr. LEVIN. No. Under the statute, it doesn't. There is no—there is nothing that says you can do it if it is successful. It doesn't matter whether it is successful or not.

Mr. SCOTT. Does it become okay if the Administration says it is okay?

Mr. LEVIN. No. If it violates the statute, it violates the statute.

Mr. SCOTT. So the—you can't just write a little memo saying it is okay and that gives everybody the green light to go forward; is that right?

Mr. LEVIN. No.

I mean, obviously you would have to analyze the statute as best you could to make sure you were complying with it and not violating it.

Mr. SCOTT. And this thing called "rendition," does that—if you hand somebody over to someone who is not restrained, knowing or at least suspecting they are going to torture somebody, does that make you complicit?

Mr. LEVIN. Well, it would violate the Convention against Torture, which has a prohibition against just that. Whether it would constitute a conspiracy to violate the U.S. statute, I think, is not something I have ever analyzed, so I don't know.

But it would certainly violate the Convention against Torture.

Mr. SCOTT. Following up on one of the questions that the gentleman from Minnesota asked, in your 2004 memo, you had a footnote in there that said, "We have reviewed this officer's prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum."

ABC News reported that the White House insisted that that footnote be included; is that true?

Mr. LEVIN. I don't—I am not allowed to discuss that. I am sorry, sir.

Mr. SCOTT. Do you deny the ABC report?

Mr. LEVIN. I think if I answer that question, I would be giving an answer to the question I am not allowed to answer.

So I am sorry. I am simply not authorized to discuss that.

Mr. SCOTT. What is the meaning of that footnote?

Mr. LEVIN. I can tell you what it meant to say. And to the extent people have interpreted it differently, it is my fault for not being clearer on it.

But what I meant was, if you took the other opinions the office had written analyzing particular techniques, and you took out the statutory analysis there and put in the new statutory analysis, in my view, the people writing those opinions would not have come to a different conclusion. Because, for instance, they never said this pain is really, really extreme, and it is just up to the line of body—organ failure, but it is not quite there.

They never—those opinions never thought they were close to the line. It did not mean, as some have interpreted—and again this is my fault, no doubt, in drafting—that we had concluded that we would have reached the same conclusions as those earlier opinions did. We were, in fact, analyzing that at the time, and we never completed that analysis.

Mr. SCOTT. Just to be clear on the White House asking you to do this, without revealing the contents of the discussion, did you discuss the footnote with the White House?

Mr. LEVIN. Yes.

Mr. SCOTT. I yield back, Mr. Chairman.

Mr. NADLER. And the gentleman from North Carolina is recognized for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman.

Mr. Wilkerson, I just want to zero in on one question and that is the levels at which leadership failed. You have got this sentence in here, At what level did American leadership fail? I believe it failed at the highest levels of the Pentagon, in the Vice President's Office and perhaps even in the Oval Office.

I am going to set aside the Oval Office because you are conjecturing there. You seem to be conjecturing there, and excusing the President for relying on the February 7, 2002, memo that he received. But there is no conjecture in the early part of that sentence it seems to me. Maybe you intended for there to be.

What was it that led you to believe that leadership failed at the Vice Presidential level?

Colonel WILKERSON. Well, reasonable people can argue and have argued, and probably will forever as long as the CIA exists, about the CIA doing what was essentially attempted to be verified legally.

My problem is with the military, and that is what I am talking about with regard to failed leadership. But I actually think that in addition to Jim Haynes and Douglas Feith, that the Defense Department—and, ultimately, the blame goes to the Secretary of Defense, Donald Rumsfeld—there was a sharing of information from the Vice President's Office through David Addington, John Yoo, Jay Bybee and others that allowed the Defense Department to rapidly build a legal argument with regard to what it was going to do with the military forces; and that that legal argument ultimately wound up, in my view, causing some of the problems that we saw, for example, most dramatically, with Abu Ghraib.

Mr. WATT. So when you are referring to a failure of leadership in the Vice President's Office, you are talking about who?

Colonel WILKERSON. I am talking about David Addington.

Mr. WATT. In the Office of Legal Counsel?

Colonel WILKERSON. No. David Addington was in the Vice President's Office.

Mr. WATT. And what role was he playing?

Colonel WILKERSON. As I understand it, he was—at that time, he was Counselor to the Vice President.

Mr. WATT. And were you able to determine whether he was acting with the authority of the Vice President or without the authority?

Colonel WILKERSON. I have no idea. David has been with Mr. Cheney for a long time. He was in the Pentagon when I was working for Chairman Powell—when General Powell was Chairman of the Joint Chiefs of Staff. And we in the military had some strange terms to refer to David. I don't believe that David would do anything that the Vice President was not aware of.

Mr. WATT. Mr. Chairman, I have more time, but we have one more person here and it would deprive her of the opportunity if you want to not come back after the six votes.

Mr. NADLER. By unanimous consent, we will give 2 minutes to the gentlelady from Texas, who is a Member of Committee, but not the Subcommittee.

Ms. JACKSON LEE. Let me thank my good friend from North Carolina, the Chairman, and of course the Ranking Member.

Let me quickly just ask, in light of the Supreme Court decision, to the gentleman there—let me thank you for your service—can anyone affirm the midnight venture to then-Attorney General Ashcroft? Was it your understanding that a trip to his office by the then-Attorney General—or to the hospital bed—that had to do with torture and signing off on the fact that torture could be utilized?

Was that ever gleaned as fact?

Mr. LEVIN. My understanding, based in part on Deputy Attorney General's Comey's testimony, is that that related to a different matter, not to interrogation techniques.

Ms. JACKSON LEE. And as you have just—the three of you, as you perceive some of the actions that occurred with respect to the writing of the memo, the issues that—not presented to Congress, would you consider any of those patent violation of constitutional law as it relates to how the torture memo was written or how it was ultimately utilized?

Mr. Levin? If I could get all three of you to answer.

Mr. LEVIN. Yes. I concluded that the statutory analysis in the original memo was incorrect in some respects.

Again, they may be right and I may be wrong, but I concluded it was incorrect as a matter of statutory analysis. There was a lot of constitutional analysis in there that we concluded was completely unnecessary.

So I never—I have not really gone through kind of line by line. There are parts I don't agree with, but I—you know, I haven't really kind of gone through it line by line.

Ms. JACKSON LEE. But it had constitutional weaknesses.

The other gentlemen, if you could answer that question as my time ends.

Mr. RIVKIN. I am in substantial accord with Dan. I am not a big fan of that memo, but I don't think anything in there rises to the level of malfeasance or bad faith or violations of law.

Ms. JACKSON LEE. Mr. Wilkerson?

Colonel WILKERSON. I am not a lawyer, so I don't feel competent to comment on that. But I will tell you that Secretary Powell and I had opportunity to share our views once or twice on what things that were happening in the world, particularly Guantanamo, Abu Ghraib and other revelations that were coming out.

We are doing a remarkable job of diminishing our influence in the world and our real power in the world.

Mr. NADLER. I thank the gentlemen.

The time of the gentlelady has expired.

Ms. JACKSON LEE. Thank you very much.

Mr. NADLER. I thank the witnesses. Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions to the witnesses, which we will forward and ask the witnesses to respond to as promptly as you can so that their answers may be made part of the record. Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record.

There is now 1 minute left for us to get to the floor and vote.

I thank the witnesses again. And with that, the hearing is adjourned.

[Whereupon, at 3:49 p.m., the Subcommittee was adjourned.]

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