

[TRANSCRIPT BEGINS]

Douglas J. Feith: O.K., what happened was, [General Richard] Myers [, former chairman of the Joint Chiefs of Staff,] and I were heading into this meeting with [former Secretary of Defense Donald] Rumsfeld, and Myers turned to me, and as I say, it was the first time when I really saw fire in his eyes. I think I said this in the op-ed piece in *The Wall Street Journal*—Myers turned to me and he said, “We have to support the Geneva Convention,” and he said something like “. . . if Rumsfeld doesn’t go along with this, I’m gonna contradict him in front of the President,” and several things struck me about that—that’s a very tough statement and, also, I mean, to make to me, right? Also he referred to him as “Rumsfeld,” which is *never*—normally we would say “the Secretary,” people are very respectful—and he was obviously agitated, and I shocked him by saying—I said “Dick, I’m on your side.”

Philippe Sands: This is early February 2002.

February 1st, or something, this was the last two days of January—the decision was made in fact on February 2nd, and published on February 4th. So I said, “Dick, I’m entirely on your side,” and he was taken aback, and he said, “You are!”—and I said, “Yeah.” So what happened was we went into this meeting, and I remember we were standing up, because Rumsfeld always stood up, and if he wanted to have a short meeting he didn’t sit down. I remember, the three of us were just standing there. Nobody else was in the office.

This is in his office?

In Rumsfeld’s office. And, near the door—he didn’t let us get deeply into his office, he was in a hurry, he had other stuff to do—and Myers starts in on, you know, we’ve gotta uphold the Geneva Convention—I deferred, the Chairman of the Joint Chiefs, I let him talk first, and he’s making this point that, we’re going into this meeting and we gotta uphold the Geneva Convention. The Secretary—I don’t remember exactly how it went, the Secretary starts grilling him about the Geneva Convention. The Secretary doesn’t know—the Secretary wasn’t taking a position—he was just asking questions—and the Secretary is more of a lawyer than most lawyers when it comes to precision and questions.

A very smart . . . guy.

He has a lawyerlike way of speaking. And so he’s quickly getting to levels of expertise that Myers, as a general, and not a lawyer, didn’t have. And so I jumped in—this was really, like, Rumsfeld’s firing bullets, and I jumped in front of Myers. . . . [Laughter] . . . and I gave a little speech—I remember—I often don’t remember what I said in meetings, but this I remembered. This was an interesting moment. It was an interesting part of my early relationship with Rumsfeld, too. And I gave the following speech—I said: “There is no country in the world that has a larger interest in promoting respect for the Geneva Conventions as law than the United States, and there is no

institution in the U.S. government that has a stronger interest than the Pentagon.” And then I said something else which was kind of interesting to them, and I said: “Obeying the Geneva Convention is not optional.” This was a big deal with Rumsfeld. Rumsfeld is a stickler for the law—with Rumsfeld he is constantly invoking the Constitution and statutes, and he considers that a triumph.

What about international law, what’s his view generally? Characterise it generally. How would you characterize it?

I don’t know. If it’s the law—here’s the point that I made to him. I said, “The U.S. Constitution says there are two things that are the supreme law of the land—statutes and treaties.” And he said, “Yeah.” And I said, “The Geneva Convention is a treaty in force. It is as much part of the supreme law of the United States as a statute.” You could see that that put a completely different color on it. In other words, to say to Rumsfeld, “This is the law”—that ends the conversation. Rumsfeld obeys the laws.

But of course, the outcome is . . .

No—hang on one second—let me just tell you the story. O.K. So those were the two main points that I made. It is the law, so obedience is not optional; and secondly, to the extent that it’s optional—and we said “It’s not,”—I said, but if it were optional, the fact is we have a policy interest in upholding . . . and I specifically made this argument which tied in directly to that 1985 or whatever article that you read. What I said is, “We have an interest in people respecting the Geneva Convention. How do the bad guys around the world try to worm out of the Geneva Conventions?” What the Vietnamese did to us is, they said, “Well, you know, we’re criminals, we’re not a real government”—in other words, I said, “If you make the applicability of the Geneva Convention hinge on subjective judgments about the quality of your enemy, nobody will ever reply to the Geneva Conventions—we’ll never get the protection of them anywhere.” This is the bullshit that Protocol 1 introduced, saying that the applicability of the Geneva Conventions hinges on whether you call somebody alien, racist, or colonial. I said, “[President Ronald] Reagan rejected Protocol 1 because introducing subjective political nasty language like that into a treaty undermines the status of the treaty as law.”

But, cut to the chase, the decision was taken.

But it was the right—let me tell you. O.K., so, what I did . . .

The big decision is crucial for what happened . . .

Bear with me and let me tell you the story. You know your story from one angle—let me tell you the story from my angle. I mean, the whole story has to be put together from lots of angles, but one of them is mine. This was something I played a major role in. I didn’t play a major role in the later stuff, but this I played a major role in. So I gave that speech to Rumsfeld, and Myers could not have been happier. Myers then chimed in and added his point. He said, “I agree completely with what Doug said, and furthermore, it is our military culture,” he said, “we train our people to obey the

Geneva Conventions,” and he said, “it’s not even a matter of whether it is reciprocated—it’s a matter of who we are.” In other words, he’s not saying that our interest is because we want to get those protections.

I have heard that from all the military I have spoken with. I’ve been hugely impressed by the military.

There is no question. Myers and I became friends as a result of this. This was a major moment. I remember it was the first time he called me at home to coordinate with me. This was a big deal, and he was so happy because basically Rumsfeld was firing these machine-gun bullets at him again, not out of opposition of what he was saying, but just probing questions, and I stepped in to field them and took an extremely strong line, and Rumsfeld knew that I’m not, you know, a standard State Department guy, so he was really taken aback by this. So then what I did is I wrote up what I just said—it was that speech.

That’s the memo that was published. . . .

That’s the memo. And that memo was the talking-point memo for Rumsfeld to use at the N.S.C. [National Security Council] meeting, and what Rumsfeld did, because he was so impressed with the speech, is he said to me, “You have to come with me to the N.S.C. meeting”—at that time I went to some N.S.C. meetings, but [former deputy secretary of defense Paul] Wolfowitz went to a lot. Later on I went to almost all of them, but Wolfowitz went to a lot, but this one, he said, because it’s ‘principals plus one,’ so he said, “You are gonna be the ‘plus one’”—although [William J. (Jim) Haynes [II, former Pentagon general counsel,] also came. The way it worked . . .

How well did you know Haynes? Did you deal with him a lot?

I dealt with him a lot, but I didn’t know him that well. I mean, from before I didn’t know him at all. I got to know him just by working with him at the Pentagon.

Can you rate him as a lawyer?

I tried not to rate him as a lawyer, because I’m not, I wasn’t supposed to be there as a lawyer—I was there as a policy guy, and as a matter of fact, I needed to promise, when I got confirmed by the Senate, [Senator] Carl Levin hated this. Because he was pro-ABM treaty.

But you could form a view of—one forms a view quickly as to peoples’ notabilities.

I didn’t. I just—he had his business, I had mine. I wasn’t grading his work. Um, the . . .

If it is ‘principals plus 1,’ on what basis did he come?

It turns out, I guess, it wasn’t ‘principals plus 1,’ this was so obviously a policy and law thing, so I guess it was ‘principals plus 2.’ In any event, the point that I am making is, the slot that Wolfowitz might have had, the Secretary insisted that I be with him. . . but he said something else, he said: “and I want you explaining that to the President.” Normally Rumsfeld would absorb whatever briefing I gave him and then he would present it to the President. It was an interesting moment for me. This was the first time he asked me to brief the President on something. So the argument that I

made in this memo was that the key question, as far as I was concerned, was we needed to say that the Geneva Convention applied as a matter of law to the conflict with the Taliban. I, by the way, put a fallback in there just in case the lawyers would say that it doesn't apply as a matter of law; I said a second-best position, but clearly second-best, is that we are going to apply it as a matter of policy. But I said, the first-best position is that it applies as a matter of law. In any event I said we should not be worming out, you know, wiggling out, of the applicability of the Geneva Convention to the conflict. Then I said, what I thought was equally important—I don't know about *equally* important, but also important, let's put it that way—I don't think I said in the memo "equally," but I said, also important is [that] the Taliban fighters are not entitled to P.O.W. status under the Geneva Convention. And I explained that the Geneva Convention authors wisely built an incentive system into the Geneva Conventions, and the reason they built that incentive system in is because the greatest solicitude went to non-combatants. The next level went to fighters who obeyed the rules, and the lowest level went to fighters who don't obey the rules. And, in order to create an incentive for fighters to obey the rules, they created combatant and P.O.W. status for them, and I said, if we promiscuously hand out P.O.W. status to fighters who don't obey the rules, you are undermining the incentive system that was wisely built into the Geneva Conventions. Which, by the way, was precisely what that article in 1985 said.

I appreciate that.

And so I knew something about this from my previous life, and I made those arguments. So the argument was, "it applies as matter of law but they are not entitled to P.O.W. status." That's what the President decided. And so as far as I was concerned. . .

. . . it was a success. . .

. . . that was a success, and my memo specifically addressed those two points and the President agreed with us on both points.

I am very interested—it's fascinating for me who has only seen this from the outside, to understand how these things work from the inside. But these decisions became absolutely crucial.

From that point forward, then what happened, then you got into this question of—you get into the interrogation techniques question—I can talk to you about that, I know a little bit about that, I had something to do with it. I wasn't as, I mean, here I was really a player. This was a moment.

At the time those issues were discussed, was it ever considered that this would have implications for the interrogation of people who were caught?

Oh yes, sure.

So the fact that they were outside the Geneva Conventions . . .

Absolutely. Hold on a second—you said outside the . . .

Sorry—they are not entitled to prisoner-of-war status?

That's a big difference.

So let's stick to your distinction, which I recognize. They are not prisoners of war, therefore, they are not entitled to the protections . . .

. . . of prisoners of war.

Which precludes protections against forms of interrogation?

Under the Geneva Convention they are not entitled—that's the point. I didn't want anybody saying the Geneva Conventions don't apply. There is an interesting coincidence here, which is, what do the Al Qaeda people get, since they're not covered, their conflict is not covered by the Geneva Conventions, and all the President said, 'humane treatment,' and I thought that was O.K., that's a perfectly fine phrase, it needs to be fleshed out, but it's a fine phrase—humane treatment. Then you get into this very interesting question which is a lacuna in the Geneva Convention. The Geneva Convention says, you get combatant slash P.O.W. status if you obey the four rules—uniform, insignia, carrying arms openly, chain of command, obey the rules. If you do those four things you get combatant status, and if you get caught you get P.O.W. status. The Geneva Conventions are silent on 'what if you don't,' and people have accused us of making up the term "unlawful combatant" . . .

I am one of those people.

You're just wrong.

There is a big debate about it, there is a review of my book in the latest *American Journal of International Law*, and I was told I was wrong, by a very decent friend of mine—Steve Ratner—who I respect . . .

It is so obvious that you are wrong—because what the Convention . . .

I am happy to be told I am wrong . . .

I will tell you when you are right, and I will tell you when I think you are wrong.

There are very few things that I speak as categorically about as this—I know this.

But the consequence of this is crucial—either you are an individual to whom the Geneva Convention doesn't apply, or you are an individual to whom the Geneva Convention applies, but you are not entitled to P.O.W. status. What is the difference in the purpose of interrogation?

It turns out, none. But that's the point. That's a coincidence. The point is that the Al Qaeda people were not entitled to have the Convention applied at all, period. Obvious. I don't see a lawyer that could make an argument to the contrary. Although our Supreme Court kind of got close to that in the Hamdan case—but that's another story. It is clear from the high contracting party language that Al Qaeda is not a high contracting party.

Who were your allies on this argument—where was someone like John Yoo?

I didn't even know John Yoo, I didn't know he existed.

He was junior . . .

The Chairman of the Joint Chiefs of Staff and I were a successful axis on this, and the rest of the administration had a kind of—it was more presidentialist than anything else view. The

presidentialists, and as I said, this is not ideological—all the damn lawyers of the executive branch—the presidentialists don't like to be told that the President is subject to anything—it just drives you crazy.

You're approaching it from a different perspective? Or it may be that some of your conclusions are coincidental?

Yes, of course.

Can I just pause and ask a question? I'm leading an arbitration starting tomorrow—I didn't assume we would get as much time as this, which I am very grateful for.

Actually, we need to break.

I am just wondering, I am in D.C. for two and a half weeks—I have really appreciated this conversation—would there be any point in the next two and a half weeks when we could actually sit down slightly more relaxed, not at the end of the day, and just talk through, probably for two hours?

No, I absolutely cannot—this is a really rare case. I've got to write my book.

Then I'm in a bind, because we are not going to have time to get onto the issues I want to talk about. Can you give me another 45 minutes at some point between now and the 20th of December?

Can we talk right now?

Sure—absolutely.

Let's talk right now for a bit, and focus me on what you . . .

I am interested in what happened over the summer. The story that emerges is that individuals are detained at Guantánamo, they are either individuals to whom the Conventions don't apply, or they are individuals who are not entitled to prisoner of war status. Then the question arises, there are individuals.

What treatment are they entitled to? And the answer is, humane treatment, and then that needed to be fleshed out.

Where some of these individuals are clearly perceived to be threatening individuals, and I'm thinking of al-Qahtani in particular. And again, from the outside you don't—it's very helpful to talk to people, you get a much better impression speaking to [Major General Michael E.] Dunlavey [, the former Guantanamo commander,] and [Lieutenant Colonel Diane] Beaver, [the former Guantanamo staff judge advocate,] of what was going on, who these individuals were. My sense has been, much help. June 2002, a perception is reached that there is at least one individual, Al Qahtani, who is someone who may have . . .

I'm not even sure I knew that he existed. I had nothing to do with that.

And a process, is then determined as you said, to flesh out the rules, what can be done. At what point did you become involved in that process, because . . .

My recollection is this, that I didn't know anything about it until—and I'm not sure that I ever even got briefed on any of this. There may have been people—I had an organization of 1,500 people,

and we were really busy, and so I can't say that there weren't people in my organization doing something, but . . .

Because if that's all I've seen . . .

It was when this memo came up that I believe I first got back—on the interrogation—you see the other thing is this—I didn't work on intel issues so much, the intel issues were mainly Haynes and [Stephen] Cambone [, the former principal deputy undersecretary of defense for policy and the former director for program analysis and evaluation]. And, so, interrogations and stuff like that, I didn't know the names of the people at Gitmo, I didn't see their interrogation reports, I was not asked about their interrogation techniques. I just didn't know. . .

You went to Gitmo?

Much later. I went to Gitmo, I think after the Abu Ghraib thing.

And did you ever meet Mike Dunlavey, because he came up—he told me he came up.

Yes, I met Dunlavey when he came through.

He's an impressive character.

Yes, I didn't have much of an impression of him—I think I met him once or twice. My recollection is that I became aware of the interrogation issue for the first time when this memo came to the Secretary. And I remember there was a roundtable—you see this is me, that's Myers, that's me—and shows a cc—and I think that's when I first learned of this issue.

What it says is, "I've discussed this with dot dot dot Doug Feith, Deputy, and General Myers."

It's pronounced "Fythe," by the way.

So what's that discussion about, because that discussion presumably must touch on issues of . . .

I'll tell you what my thoughts were, O.K.? I saw this as from, again, you gotta . . . in a bureaucracy you have your responsibilities, you've got to discharge your responsibilities, and you can't be doing other peoples' work, I mean, that gets you in trouble, right?

Like any organization.

Right, there's a lawyer, and he's responsible for the law, and then the intelligence people—I asked myself when this thing came up, what are the policy, to use the bureaucratic word, what are the policy equities, as they say? What are the interests in this case that relate to my job? I saw two. One is we have a policy interest in effective interrogation; and we have a policy interest in obeying the law. In other words, the position that I took.

Exactly the same position, a consistent, coherent position.

Right. And I wanted to make sure that we were not being disrespectful of the law in a way that a policy person would say, we've a policy in favor of obeying the law.

So what steps would you have taken when . . .

So, what I said is, I would like to know, does anybody think that these proposals are not serving our intelligence interests? Question one. And, secondly, are the people who are responsible for

legal judgments satisfied that what we are doing is lawful? You see, in other words, I considered my proper role, if this thing had come up and people got in front of the Secretary and said “We have extremely important intelligence interest in doing this,” right, and had the Secretary, which is not his way anyway . . .

. . .based on what I’ve heard was that there was such an interest.

Oh, sure, no question about it, and without a doubt, but here’s the thing. Had the Secretary—the Secretary would never make this mistake, but I’m just giving to you in theory—had the Secretary been ready to make a decision on this, simply on the basis of being briefed by intel people, and had he not said ‘What are the lawyers saying?’, I would have said that my job as the policy adviser would be to say ‘Mr. Secretary, you cannot make this decision without talking to the lawyers.’ I didn’t have to say that, because he knows that.

Who were the lawyers?

Hang on one second. I want to make it clear, had the lawyers made an argument with no intel considerations, or the intel people made an argument with no legal considerations, I decided that my job was to make sure that as a matter of policy, both of those major policy interests were factored into the decision. But once I made sure—I didn’t have to make sure—once I decided that the intel people were essentially at the table, and the lawyers were at the table, at that point I was not going to second-guess the intel people on their judgments or the lawyers on their judgments, so that’s why I had a very minor role in this.

Your role is essentially to satisfy yourself.

That the two main relevant considerations were in front of the Secretary.

And that was a matter of institutional protection and protection of the Secretary?

Correct.

Because . . .

And I said, ‘What’s our policy interest as a department?’ And our policy interest is to make sure that we do everything right legally and we do everything right as a matter of serving our intelligence.

So as far as you know, who were the lawyers?

Well, all I knew is that Jim Haynes was representing whoever the relevant lawyers were, and he brought this up. There was not a team of lawyers in the room, but he’s the general counsel, and what I wanted to know is, have the lawyers looked at this?

What answer did you get?

Absolutely, the lawyers worked this.

Because the only formal written legal opinion—this is where it gets curious to me—is this very junior lawyer, Diane Beaver, who now feels she’s just been dumped in the poo.

O.K., maybe, look—the thing is, you don’t understand, I’m not gonna sit there and say—if the general counsel says this has gotten proper legal review—do you know how many decisions we work

on in a given day?—if somebody says this has gotten proper review, you don't say to them, "Stop. I want to know what you consider to be proper legal review, and I want to know who worked on it"—you don't do that.

From your perspective proper legal review—because General [James T.] Hill [, the former head of U.S. Southern Command,] told me—he's a pretty impressive character—he told me that he was very concerned that there should be proper legal review by D.O.D. lawyers and Justice Department lawyers.

Whatever. I think—the general counsel of the department represents that—and if he says it got. . .

To the best of your recollection, was it both Justice and D.O.D.—did that ever come up in your conversation with them?

What came up a lot, you see, the whole idea of military commissions came out of the White House, so it was clear this was not a matter that was being done by D.O.D. lawyers without interagency work. This was a thoroughly interagency piece of work for the lawyers, as far as I understood, from day one.

That's my understanding, and I have been told that the Justice Department lawyers connected through, as I was told, Jim Haynes—that that was the person.

Yes, it could be, that's the impression that I had. But again, if the D.O.D. general counsel says to the Secretary 'the lawyers who need to review this have reviewed this,' it's not for me to say 'explain yourself.' He doesn't work for me, he works for the Secretary, and we're colleagues.

That's totally logical.

And I have no reason to doubt—if I had reason to believe that Jim Haynes was off on a frolic and detour and leaving everybody else behind, then I would come forward and say, "Jim, I got some disturbing reports that you are not coordinating with the right people." I didn't have any such basis for questioning—so he brings this thing forward, explains it, I say to myself, I was asking myself this kind of question in meetings over and over again for years, "What's my role? What am I supposed to be commenting on here?" O.K.? You get a very strong sense—I am not the Secretary of Defense—I am not the President of the United States—I am the Undersecretary of Defense for Policy—you don't want to be a silly small-minded bureaucrat, sticking stupidly to your lane and missing the big picture; you could err too much on that side, too. I'm not giving you a stupid narrow bureaucrat point. In fact, if you read the nonsense written about me, the argument is I got involved in too many other people's business rather than—I clearly didn't have the . . .

. . . I'm not.

I understand—largely bullshit. I'm just giving you the impression, I'm not taking a silly little, I stick to my lane. . .

Let's try to recap—you formed the view, obviously, that Jim Haynes helped you form the view that

this has got legal signoff.

This has got legal signoff from whoever was supposed to do it—and I had no indication, inkling, basis for challenging him on that. Now, what happened then is this: A few weeks later, two, three weeks later—and this is the story that I tell in the piece I just wrote two, three weeks ago about Rumsfeld—Haynes shows up one day at roundtable; if I recall correctly, roundtable was the morning staff meeting. Haynes shows up one day at roundtable and says something like “Mr. Secretary, I’ve got a problem.” Now that was good for the Secretary. The Secretary loved when you brought problems, because that meant you were not concealing them, you were not sitting on them. Right. He would blast you if, as he put it—I put this in that article about him; he had a standard, a lot of standard lines, and one standard line was, “Bad news does not get better with time.” So if you had bad news, you had better bring it to him before he heard it from anybody else. If he ever heard bad news and then talked to you and said, “When did you hear it?” and it was several days before, and you hadn’t brought it to him, he’d chew your head off. So a very good way to get his attention and score points and do the right thing was, as soon as you heard bad news, you brought it to him. So Haynes said “bad news,” and the bad news was, “You just signed that memo, you remember it?” “Yes.” “There are lawyers in the services,” if I recall correctly, he said something like that. “There are lawyers in the services who are raising legal questions about the new interrogation techniques.” And what I remember is, with what struck me as impressive promptness, Rumsfeld did not say, “Who are those bastards?” or “Screw them” or “Didn’t we make this review?”—he didn’t say any of those things, he wasn’t defensive, he wasn’t offensive against the guys raising the question. What he said was, “Stop what we’re doing, stop any new thing that we’re doing, get all the relevant lawyers together, get this thing reviewed, and we will not use any new techniques until it gets reviewed again with the lawyers who are raising problems in the process.” And I sat there and said, “Boy, I’m proud to be associated with this.” That was—and I said in this op-ed, it wasn’t an op-ed, it was a commentary article that I wrote about Rumsfeld, I said, “I believe that if the leading civil libertarians in America watched that meeting they would have had no problem with either Haynes or Rumsfeld.” That was done right, that was good government.

Did you know Alberto Mora at all?

No.

He was the General Counsel.

He was the guy who raised the problem in the Navy Department.

He’s a pretty interesting guy, he now works for Walmart—I went to spend a couple of days with him.

He works for whom?

He’s the general counsel of Walmart International. I went to spend time with him . . .

I didn’t know him, but I watched that, that was one of those cases where I said ‘this is good

government.'

Did you ask yourself—you saw the memo presumably and saw the list of techniques—did you . . .

No, wait a second, I don't think there was a list of techniques at this point.

It came with various attachments—a list of 18 techniques.

At this point, or was it later? What I remember. . . .

It came with—this is what it came with. I'm just interested at a personal level—what was your reaction to these types of techniques? Obviously yelling and stuff is one thing, but were there any of them that made you feel . . .

Part of the thing is, nobody ever walked me through and actually explained—my attitude towards this was, I didn't get involved in military operations; I didn't get involved in intelligence operations; I didn't get involved—I didn't tell military people how to point their guns, or how to do things; I'm not going to tell interrogators how to do things, that's an operational thing. Policy people don't tell operational people what to do. We don't have the skills to do that.

But there were no alarm bells went for you? General Hill's covering memo has alarm bells.

To tell you the truth, I'm not sure I remember seeing this before I got into the Secretary's office—this was not something that I remember staffing personally. I don't know if anybody in my office staffed it.

Did you know [former Justice Department lawyer] John Yoo or David Addington [, former counsel to Vice-President Cheney and his current chief of staff]?

Addington I knew slightly, Yoo I'm not sure I ever met. I'm not sure I've ever met him to this day.

Were you . . .

I think I was in some meetings with him.

Were you surprised by the quality of the advice? Have you ever looked at that advice?

The thing that I looked at after, I think, Abu Ghraib broke, there was a memo, and I think it was Yoo's but I'm not sure, there was a memo that said something like, "Even if Congress passes a statute prohibiting the President from torturing people, he could torture people as commander in chief, no matter what the statute says," and I read that and I said, "Boy, if ever there's a presidentialist's view of exactly the type that I was arguing against in this memo, that's it." The idea that the President, who signs statutes, after all. . . .

That was the person who is drafting the advice that is informing Jim Haynes.

I didn't know that until years later—I learned that after Abu Ghraib broke.

So then the question is, what went wrong? Because obviously no one now feels the quality of that advice was adequate. So what went wrong in the process that allowed Jim Haynes to rely on that quality of legal advice?

You're jumping to the idea that it is absolutely wrong and it's foolish and it's low quality and

everything else, and that's not what I'm saying. What I'm saying is, there is a school of thought that I happen not to subscribe to, but it is a widespread school of thought that says that the President has these enormous powers as President that are constitutional, and that are not subject to restriction by statute, and I am not a constitutional scholar. I think a lot of these people are smarter than I am and are more learned than I am when it comes to this constitutional stuff. I know that my instinct is not to agree with that, but I'm not sure that I could win a debate with these guys. They have thought about it more than I have, they've researched it more than I have. And so this idea that it was necessarily wrong, or stupid, or poor quality, I'm not saying that, I don't know enough to say that. What I know is that if I were plunging into legal research on this subject, I would have a different hypothesis. My hypothesis would be, the President can't violate a statute.

What about a treaty like the torture convention?

If it's the law of the land, it's the law of the land.

But if it has been signed with reservations . . .

Again, I'd have to study it.

Fair enough.

The point here is, what bothers me about a lot of this debate, and you are an interesting character—to tell you what my impression is of you, just from this conversation—I have a sense that you have a lot of integrity, because when I'm raising these considerations you're immediately seeing that, the distinctions that I'm drawing, and it's clear to me that you're trying to think about this in a careful, scholarly way. At the same time, you're approaching this with an enormous amount of baggage.

Absolutely, quite right.

And so your initial comments are prejudiced rather than careful, and your second reaction is careful.

That's not an unfair observation.

And so I happen to think you're actually a terrific guy to do this, because if you can discipline yourself in the course of writing what you are writing, to have your second reaction, a careful reaction, rather than the initial prejudiced reaction, you may produce a book that, with your background and credentials, has an enormous amount of credibility and can actually present a truer picture of what was going on here.

I've got no agenda actually, to be frank.

I believe you.

I've changed my mind about Dunlavey and Beaver completely.

It's clear to me that you are trying to approach this in a scholarly way, which is the reason I'm giving you the time. And what I want to get across is . . .

Here's what my baggage is: my baggage is a prejudice in favor of international rule. I start as

an internationalist rather than as a domestic constitutional type of person, and I appreciate that is a baggage. That's something that I have to—and I need to be pretty honest with myself about that. That is my starting point.

It's funny—as I said, I start with the idea that it would be nice if international rules—the way I look at it is this: In the world there are countries that have a concept of law similar to ours; that law constrains power, and that's the greatest achievement of man. And there are other countries that share that view—rule of law, right? Among those countries, so-called international law is like law.

Up to a point.

Up to a point. It's like law—it's much more like law than it is when you are dealing with lawless countries who use law simply as a tool of power, and my view is, you don't have an international community, but there are communities of countries—the democratic countries are like a community because they have rule of law, and they can respect law, and so international law can have a lot more real effect in the world among law-abiding countries. The problem you get into . . .

So let me raise the other . . .

So what I'm trying to say is, I have a prejudice in favor of international law too, in the sense that I think the world would be a better place.

I see that. So here's the other part of my story that I didn't finish telling you about that's been problematic for me. So I come to the Nuremberg side of things—I didn't take you through that whole story—there were just 12 cases. And what I was interested in knowing was, to what extent would the arguments in favor of actions—they're completely different—it's not comparing like for like, I'm going to have to find some way to make that absolutely . . .

I've got a call . . . [*Answers phone call*]

So here was the experience that I had—I read into these Nuremberg cases, there were just 12 lawyers; what I was fascinated in is, what does the lawyer do when faced with an order to do something? And the Nuremberg process, as it turned out, is pretty flawed; you look carefully at the judgments, they are problematic. I focused on one particular case, to get a head start—a guy called Josef Altstotter, who was essentially the equivalent of the O.L.C. [Office of Legal Counsel], head of the O.L.C., the civil division, in Berlin . . .

These were Nazi lawyers you are talking about.

These are Nazi lawyers, but university academics, doctorates, seriously smart people, O.K., who got themselves into positions of power and then found themselves in situations where they are asked, in the case of Altstotter—he was acquitted of crimes of humanity as a lawyer, acquitted of crimes of war as a lawyer, but convicted of membership of an illegal organization with knowledge of what had happened. So I wanted to hone in on the knowledge of what had happened. What exactly had he done? And it turned out that his conviction was based on three letters. One letter, which was allegedly one in which he described [Heinrich] Himmler as a mild and trusted friend, and two other letters in

which he acceded to a request from the head of the security division of the S.S. to take certain steps which I will come on to in a moment. I tracked down his son, and I went and spent a day with him in Nuremberg.

Was he executed?

He was not, he spent five years in prison and was then out and about. Others were executed. I tracked down the son, who is a 78-year-old retired lawyer, he's a real mensch, twinkle in his eye, surprised that I had got in touch with him, he has never spoken to anyone, but he has got all of his dad's papers. I go with a young German doctoral student from Düsseldorf, because my German is useless, again feeling a little weirded out about the situation; and in the end we focus in on two letters, and the letters go to the question of his knowledge of what happened. And one of the letters is a request from—this is where it gets personal—from the head of the security division at the S.S. in Vienna, saying, “We're getting requests from the head of the highest supreme court in Vienna, the *Oberlandesgericht*, the President, to bring before the court Jews who have invoked a law that enables them as non-Jews to prove that they are not Jews for the purposes of not being subject to the racial laws.” The difficulty is these people have been evacuated to Theresienstadt and to the east. I had no idea of that. Because that's not in the law reports. So it becomes, at this point, a little personal to me. I'm sitting with this guy whose dad has basically been—”Could you please write to the president of the Tribunal and tell him to stop issuing these orders, it's very inconvenient, transportation difficulties, can't get them back, blah blah blah”—and the letter back from Josef Altstotter is, “Absolutely,” he writes to the President of the *Oberlandesgericht* and tells him to stop issuing these orders, it's inconvenient for the war effort, they have been shunted out to Theresienstadt and to the east, blah blah blah—and what I ask myself as I read this stuff: here is a highly educated man, Josef Altstotter, by all accounts.

I must say, I'm fascinated by this. I wrote a big paper in college on Hannah Arendt's *Eichmann in Jerusalem* and the books that were written against her, called *Justice in Jerusalem* by Gideon Hausner and these other guys—I don't know if you are familiar with that literature.

Totally.

And I am fascinated by that history, and it's all very interesting; to tell you the truth, it is so off.

Well, that's what I'm trying to understand.

It's so off, anything that we're dealing with here. What we're dealing with here.

I'm agreeing with you that it's off—I hope you've picked up, I have a real hesitation in even making the—I'm trying to deal with a different issue.

First of all, dealing with inner regime.

But I'm dealing with a different issue, I'm dealing—I'm not comparing atrocity, it's absurd—I sit looking at this stuff—I even feel slightly qualmy and embarrassed in myself looking at it—but I'm interested in this related issue. What happens when a lawyer is called upon to give advice on those

types of issues? And some of the lawyers . . .

The answer is, you've got to be decent, you've got to be humane, you've got to be intelligent, you've got to have integrity.

But the difficulty, Doug, is that there is an analogy in the legal reasoning. If you compare the memoranda that were written, the legal reasoning is essentially the same: we defer to the domestic constitution, international law isn't really law. Did you know there was a memo from that period?

The difference between the domestic constitution of the Nazi government, which was a lawless government . . .

Absolutely.

. . . and the U.S. constitution. There's failure of perspective here that's really serious.

You're pushing at an open door—I'm not disagreeing with you—I'm talking about analogous principles of legal reasoning. And, you can't simply say . . .

I don't think they're analogous, I think you are wrong.

What's the difference between a lawyer in the Justice Department who says 'the President can do anything he wants, he can commit torture, he can carry out a genocide . . .'

He did not say he can carry out a genocide.

He didn't say that in the memo, but he said it orally to Alberto Mora.

Well, that's a stupid thing to say.

Tell me what the difference is.

The difference is the entire context, O.K. You're dealing with a democratic government in a country founded on respect for individual rights. We are under . . .

I agree with you one hundred percent. I want you to articulate this because I will faithfully reproduce it.

I'm a little reluctant. I'm giving it to you off the top of my head, rather than a well-considered answer.

But you can edit it.

But the point is—and also I don't like the idea of giving you an answer that is going to be—if you are planning to do something that says . . .

No no, I'm not, that's the point.

. . . "I wanted to ask Doug Feith why these people are not Nazis, and here's Doug Feith's defense of them that they are not Nazis," I wouldn't dignify that with an answer.

The narrative that I'm telling you is I had a starting point, and I have departed from the starting point.

I understand, but if you plan to put in your book.

Don't worry, don't worry.

I'm just saying, I would object to any comment of mine being in your book, if you plan to start

your book with this as the analogy, and then you're asking me to explain.

No, no, no, Doug, I have a reputation. I'm just raising issues that I get asked—I'm raising issues that I have come to from my own position, because I read, frankly, some of the legal opinions, and I ask myself, O.K., a legal opinion from a sensible U.S. lawyer . . .

Let me give you a different angle on it. I don't know Yoo, O.K.—not you, Y-O-O—I don't know John Yoo, and I didn't know him, and I think I must have been in a meeting with him once or twice, but I don't really know the guy, and I certainly didn't know him at the time. I didn't know who he was. But let me just give you a picture of the people working on these kinds of things, including specifically people with whom I disagree, and people whose inclinations are different from mine. I wouldn't dignify my own position by saying I disagree with them, because, as I said, some of these people are very knowledgeable, scholarly, constitutional experts, and I'm not. But let me just give you the picture of who's around the table working on these things as I see it, and what attitudes people bring to this. I have the sense that everybody around the table loves the Constitution, respects the founding fathers, gets teary-eyed at the principles on which our revolution was fought, believes in the dignity of man and the individual rights that, you know, underlie all the principles on which our government was built, because they're all deeply rooted in philosophical ideas about man's relation to God, man's relation to the State, and man's relation to other men, and these are deep, important things. Nobody around the table was a totalitarian, nobody around the table is a Jihadist, nobody around the table is a murderer and a racial superior—nobody is pushing Aryan superiority or any kind of other racial theory. These are good Americans that, as I ever saw them, interested in human rights and individual rights and constitution principles and everything else. There was no anti-constitutional party represented, as far as I heard.

Do you think something went wrong?

No, hang on, hang on. Now, so you start off with the idea that you are not dealing with Nazis. It's a big difference whether you are dealing with Nazis, O.K.?

Let me be more even more prosaic about it. The difference is you and I having this conversation, the difference is Alberto Mora could do what he did, the difference is the Supreme Court did what it did . . .

And the system works in a way.

That's the point.

But here we are, we've been attacked, we're concerned about the next attack. The only way to fight this war is to get the intelligence about what the enemy is doing. During the Cold War we could get that from satellites looking at armored formations. In this war the intelligence is all in peoples' heads. So interrogation is as important as our eyes in the skies during the Cold War. You cannot overstate—you appreciate that, you were saying it—you cannot overstate the importance of the interrogations because the intelligence that we need to fight this war, defend the country, protect

possibly millions of people from attacks by smallpox or anthrax, that intelligence is in the heads of these people. We need to extract it.

How far are we entitled to go to do that?

Well, I don't know. Again, I haven't made a whole study of this thing. What I know is, whatever we're doing we have to have two—as I said, I decided we have to have two main thoughts. One is, make the maximum reasonable legal effort—intelligent, focused, intense, to get the intelligence we need to defend the country. The other is, make sure you're doing it—we are a country of laws—make sure you're doing it lawfully. O.K.? Now lawfully, as I made the case, means all relevant laws, whether they are treaties or statutes—O.K.? I don't say the law means just treaties and not—I mean just statutes and not treaties—on the contrary, I told you I specifically made the argument, and I wrote it down for Rumsfeld that the Geneva Convention is . . .

Let me put the question in a different way. The question I put to James Hill—I've been very impressed with everyone that I've met and I have to say, I take my hat off because it wouldn't even happen in my country that you could have a conversation with people at this level of seniority, or have been in this position—it's a remarkable thing about the United States. I put this question to him: Would you be happy—obviously you wouldn't be happy—but what would be your reaction to these same techniques being used on Americans or Brits who are captured by them?

Well, O.K., the answer to that is this. When you say “them”—we wear uniforms, carry arms openly, are in a chain of command, and obey the laws of war. So we do what entitles us to P.O.W. treatment.

But we know that some of us don't, because you and I have friends who operate in ways for our services who don't do those things—can they be treated . . .

Sure, that's the whole point.

That's the logic.

It's absolutely understood that they are not entitled to P.O.W. treatment if they get caught. By the way, we have memos that say that.

And they can be interrogated in accordance with the techniques that were signed off on in . . .

First of all, as a matter of law . . .

That's where I get a bit queasy.

As a matter of law, that's the risk they take; they could be shot. We know that. And by the way, we get memos when we have to approve people doing things like out of uniform; the memos warn that these people are not entitled to the protections that people in uniforms are entitled to. We know that. Those are the, I don't make those decisions, but the Secretary was making these decisions every day. And that's point one; point two is, especially in this war, we're fighting enemies who wouldn't give us protections like that anyway; this is extremely theoretical. You are not really in the same world as the rest of us if you are worried about the reciprocity from Al Qaeda.

Does moral authority mean anything?

Of course it does. I'll tell you what the problem with moral authority is. The problem with moral authority, with all due respect, is people who should know better, like yourself, siding with the assholes, to put it crudely.

Well, you make an assumption; I don't think of myself . . .

But I'm saying—instead of people saying—these Americans are people of good faith, dealing with a really difficult problem. They've been attacked; they are trying to head off the next attack; they are trying to fight vigorously, effectively, successfully, and decently; and they are grappling with hard issues, and they are grappling with issues that directly relate to this conflict, and they are grappling with gigantic, large, constitutional issues that are a brooding omnipresence over this whole subject.

And that's where there's a big cultural difference, because for a Brit, of course, who grew up in the time—I'm not again comparing like for like, but the IRA and so on and so forth—there was the instinct to go that way, and in fact it did, as you know, historically, it did partly go that way, and things were done that in the end—the conventional wisdom now is prolonged conflict, so it's not that we don't share the same values and the same, what I say . . .

The point that I would get across is this. When you talk about moral authority, I make the distinction between whether we're entitled to it, and whether we have it. We're entitled to it. All the people involved in this, even the people that I disagreed with, even these presidentialists whose views are, as I said, not my inclination—although, as I said, I doubt my ability to debate them because I think they are more knowledgeable than I am—but my inclinations are very much not theirs. I never for a minute think that they are immoral. They are serious people dealing with serious problems. I disagree with them by inclination, but to say that they lack the moral authority that a decent official is entitled to . . .

Or to suggest that they've crossed the line into criminality?

Or to suggest that they've crossed the line into criminality. The irony is to make charges like that, is to attack the moral authority of one of the few governments that actually is entitled to moral authority. So what happens when you do that? Do you raise the moral level of the world? No. Because the Al Qaeda guys are at their moral level; you're not raising them, all you're doing is you're taking an actual model of proper government dealing with difficult questions with serious ethical dilemmas involved, serious legal judgments involved, constitutional judgments, operational judgments, and you're taking a simple outsider's critical, critic's position, crapping on all of them from a position of non-responsibility and moral superiority; and the overall effect is to persuade people that nobody respects the law, not even these Americans; the law is shit in everybody's view. What's the interest served by that?

And what has ended up happening is you say the system works, it has self-correcting . . .

But not because of overstatement in criticism.

These things are very complex. We don't know what—it doesn't in a sense matter why it got to that; the bottom line is, the system works.

But it does matter. No, no, if one writes a book that says the system works, people made arguments here that ultimately didn't prevail and shouldn't prevail, but the people who made those arguments were not bad people, they do not deserve even to be distinguished from Nazis—that's the thing that really galls me.

I'm very happy that you're saying this. Don't worry. Keep saying . . .

The issue is not—I would not consider it a triumph that you've compared them to Nazis and distinguished them. It is outrageous to even . . . I understand the mind is an interesting beast, and I understand what launches you, and you could be launched from something that's a completely inappropriate analogy, but once you're launched . . .

It's not my analogy. I want to be very clear about that. I went back

I understand you. I'm beginning to formulate your view.

It's not even a view—I went back to a case that was invented by the Americans that said, for the first time, a lawyer in giving legal advice can incur criminal responsibility, that's all I'm interested in. That's it. The stories are completely different.

I would at that point leave it behind and not even refer to it, because it is deeply offensive.

I appreciated that. You're not the first person—I'm struggling with . . .

You're struggling because you think it's cute, and it's also personal to you.

No, no, no, don't say that. That's not fair.

O.K., maybe it's not.

There's a bigger issue which we don't have time to—you have to go and sort out your food with your kids. You shouldn't make assumptions about where I come from. It should be fairly clear.

Fine, look, you strike me as a serious person. I hope you deal with this seriously. And the service that you could do, it seems to me, what's the most powerful thing you can say in my view, the most powerful thing you can say to make a point of this kind is, "I have looked at what these lawyers have done, and I think it's incorrect." That's the most powerful thing you can say, and if you can say "I don't believe they're criminals, I don't believe they're stupid, I don't believe they're ill-motivated, I don't believe they're unpatriotic, I don't think they are totalitarian, I don't think they are brutal and inhumane—I simply think that they made an incorrect judgment"—and . . .

I may well come to that.

And if you then say, and the American system ultimately decided it was incorrect—it went through a process—but it was—what is evident is, you had a whole bunch of people all of whom agreed on basic admirable humane principles, the principles embodied in the U.S. Constitution, and they were all grappling with this extremely difficult problem of how do you defend the system

against enemies of this kind, and some people came up with some ideas that were a little over-enthusiastic, and some of these ideas have nothing to do with the war on terrorism, they have everything to do with these broader points about presidentialists, power, and all the rest of it, and at the end of the day it got sorted out.

That's the crucial thing. It got sorted out relatively quickly.

It got sorted out relatively quickly. And these were good-faith discussions about really difficult issues.

What's interesting for me is that the process of sitting and talking to people that is so important—you don't get it—you see the piece of paper, O.K., and you don't know the individual, you don't know the processes.

I agree.

What I've said to you is, yes, right at the beginning I thought, if I meet Diane Beaver, I'd begin with the assumption that she's evil incarnate; I sit down and I spend three hours with her and actually it's a lot more complicated than that—that's what I'm saying—that's essentially what this book is going to be about.

If you write a book like that, it's profound.

That's what I'm trying to get to, and that's why I'm very grateful to you for giving me time, and it's why I undertake faithfully to reproduce the exchange of views in relation to each person, because I'm not interested in trashing anybody . . .

I saw here arguments being made that I didn't subscribe to, but I never got the impression that the people making these arguments were bad people.

I hear that very, very loudly.