

**STATEMENT BY DOUGLAS J. FEITH
BEFORE THE
CONSTITUTION, CIVIL RIGHTS AND CIVIL LIBERTIES
SUBCOMMITTEE
OF THE
HOUSE COMMITTEE ON THE JUDICIARY
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Mr. Chairman, I'm pleased to have a chance to testify today. I think it's important to help counter some widely held false beliefs about the administration's policies on detainee interrogation.

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

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

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

opportunity to check the record – and the record refutes the “torture narrative”.

The book by Phillippe Sands¹ is an important prop for that false narrative. Central to the book is its story about me and my work on the Geneva Convention. Though I’m not an authority on many points in Sands’s book, I do know that what he writes about me is fundamentally inaccurate – false not just in its detail, but in its essence. Sands builds that story, first, on the accusation that I was hostile to Geneva and, second, on the assertion that I devised the argument that detainees at GTMO should not receive any protections under Geneva – in particular, any protections under common Article 3. But the facts are (1) that I strongly championed a policy of respect for Geneva and (2) that I did not recommend that the President set aside common Article 3.

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

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

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

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

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

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

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

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

The memo I drafted and then cleared with General Myers³ stressed that Geneva is crucial for our own armed forces. It said that it is “important that the President appreciate DOD’s interest in the Convention.” I described Geneva as a “good treaty” that “requires its parties to treat prisoners of war the way we want our captured military personnel treated.” I noted that “US armed forces are trained to treat captured enemy forces according to the Convention” and this training is “an essential element of US military culture.” I wrote that Geneva is “morally important, crucial to US morale” and it is also “practically important, for it makes US forces the gold standard in the world, facilitating our winning cooperation from other countries.”

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

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

³ See attached.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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