

Douglas J. Feith

August 13, 2008

Chairman Jerrold Nadler
Subcommittee on the Constitution, Civil Rights and Civil Liberties
House Committee on the Judiciary
Rayburn House Office Building
Washington, DC

Subject: War-on-Terrorism Detainee Interrogation Rules

Dear Mr. Chairman:

In my July 15, 2008 testimony before your Subcommittee, I challenged Philippe Sands to release the full transcript of my one interview with him, on December 6, 2006.ⁱ As my testimony explained, Mr. Sands misrepresented the interview in both his book and his *Vanity Fair* article. The now-publicly-available transcript reveals the extent of Mr. Sands's misrepresentations.ⁱⁱ Accordingly, I am requesting the Subcommittee to acknowledge formally that Mr. Sands gave an untrue account of that interview, an account on which he built a false accusation against me of a war crime.

Mr. Sands focuses on Article 3 (often called Common Article 3) of the Geneva Convention ("Geneva") in his case against me.ⁱⁱⁱ Article 3 prohibits torture and inhumane treatment of detainees in conflicts "not of an international character occurring in the territory of one of the High Contracting Parties." The Sands book alleges that, in early 2002, when the President was considering the legal status of the Guantanamo detainees, I argued against giving the detainees Article 3 protections. In fact, I never made that argument – in any form whatsoever. I did not directly or indirectly urge the President to withhold Article 3 protections. Mr. Sands has not been able to cite any documents supporting his accusation, for no such documents exist. Instead, he bases his Article 3 accusation solely on our interview. But in that interview *there is not a single mention of Article 3, and I never even alluded to it.*

Sands's misrepresentations are more than a technicality. His untrue claims that I opposed the use of Article 3 and that it was "Feith's logic" that influenced the President on Article 3 are the heart and soul of his case against me.^{iv} They are essential elements of his book and are the foundation of his spurious allegation that I committed a war crime. Under the circumstances, it is amazing that *Mr. Sands did not during our interview ask me any questions at all about Article 3.*

Mr. Sands constructed his war crime allegation on the basis of nothing except his own preconception – or prejudice – that I was hostile to Geneva. The record, however, proves the opposite: that I supported Geneva and that I argued not only that the U.S. government should comply with Geneva, but should promote universal respect for it.

In my written statement to the Subcommittee, I described the Sands book as “a weave of inaccuracies and distortions” and said that the author “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.” With the interview transcript in hand, I can now show precisely where and how Mr. Sands distorted my words.

I told Mr. Sands that I had personally played a role in the discussions with the President on two points: first, that Geneva *did* apply to the U.S. conflict with the Taliban regime in Afghanistan; and, second, that the Taliban detainees nevertheless were *not* entitled to POW rights because they had failed to meet the Geneva conditions for POW status. Several times in the interview, I said that the Taliban detainees were entitled to Geneva protections, though not to POW status. According to the transcript provided by Mr. Sands (emphasis added):

[Feith] So the argument [I made to the president] was: “[Geneva] applies as a 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 ...

[Sands] It was a success ...

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

In asking about how POW status related to interrogations, Mr. Sands then began to restate the two points I had promoted with the President and I started to concur by saying “Absolutely.” But when I realized he was restating my points incorrectly – he said that the Guantanamo detainees were “outside the Geneva Convention” – I objected and demanded that Mr. Sands “Hold on a second.” Mr. Sands immediately corrected his misstatement: “Sorry—they are not entitled to *prisoner-of-war status*.” I said “That’s a big difference” because, though the Taliban detainees were *not* entitled to POW status, I believed they had *other* rights under Geneva, given that the Convention applied to the U.S. conflict with the Taliban. Mr. Sands agreed that I was making a proper distinction, as the transcript shows:

[Sands] So let’s stick to your distinction, which I recognize. They are not prisoners of war; therefore, they are not entitled to the protections ...

[Feith] ... of prisoners of war.

[Sands] Which precludes protections against forms of interrogation?

[Feith] Under the Geneva Convention they are not entitled—that's the point. I didn't want anybody saying the Geneva Conventions don't apply.

It is clear that the phrase "that's the point" refers to my statement that Geneva did not entitle the Taliban detainees to POW rights. I never said they had no other Geneva rights. In reiterating that "I didn't want anybody saying the Geneva Conventions don't apply," I was taking pains to reject the notion that those detainees had no Geneva rights at all. Yet the Sands book (on p. 35) applies my words "that's the point" to the proposition that, under Geneva, no one at Guantanamo "was entitled to any protection." *That is an obvious false use of my words.* It discredits Mr. Sands as a scholar, impeaching him as a commentator on this subject.

Also, Sands takes the word "Absolutely" out of the interview and applies it (on pp. 35 and 182) to his untrue assertion that I intended the President to give no Geneva interrogation protections at all to any Guantanamo detainees. I had no such intention and that's not what the word "absolutely" referred to in the interview. The transcript, quoted above, shows that Mr. Sands misrepresented what I said.

Furthermore, the Sands book cites my words "that's what the President decided," quoted (and italicized) above, and claims that I was referring to Geneva Article 3. Even from the interview snippet above, however, it is obvious that I was *not* referring to Article 3. In our interview, as already noted, there was no mention of Article 3 at all, either by me or by Mr. Sands.

There are other important errors and distortions in the Sands book. The eight I specified at the July 15 hearing were:

1. On p. 98, Mr. Sands says the Haynes 18-techniques memo "was completely silent on the use of multiple techniques."
 - That memo said, however, that, if multiple techniques were used, they would have to be used "in a carefully coordinated manner."
2. On p. 99, Mr. Sands says that I wanted the detainees to receive no protection at all under Geneva and that I worked to ensure that "none of the detainees could rely on Geneva."
 - On the contrary, I argued that Geneva applied to the conflict with the Taliban.

- What I said was that the detainees were not entitled to POW status
That's very different.
3. On p. 34, Mr. Sands says that if detainees do not get POW or Article 3 protections, then "no one at Guantanamo was entitled to protection under any of the rules reflected in Geneva."
- I have never believed that is true.
 - Other Geneva protections that might still have applied include:
 - Article 5 tribunals
 - Visits from the International Committee of the Red Cross
 - Repatriation after the conflict
4. On p. 43, Mr. Sands says "In Feith [Dunlavey] met solid resistance to the idea of returning any detainees ..."
- In fact, I favored returning detainees. Indeed, my office wrote the policy for doing so.
5. On p. 5, Mr. Sands says that Secretary of Defense Rumsfeld "did not reject" the Category III interrogation techniques in the October 2002 Southern Command proposal.
- But Secretary Rumsfeld *did* reject them. They were proposed and he did not authorize them; by any common definition of "reject" they were rejected.
6. On p. 97, Mr. Sands says I "hoodwinked" General Myers.
- In fact, General Myers and I agreed on Geneva and presented a united position to the President at the February 4, 2002 National Security Council meeting. I spoke to Gen. Myers on the day before the July 15, 2008 hearing and he reaffirmed that we had been in agreement about Geneva.
 - General Myers authorized me to tell the Subcommittee that the Sands book is wrong in its "hoodwinking" claim.
7. On p. 99, Mr. Sands accuses me of "circumventing" Geneva.
- But I never did that or advocated that – and Mr. Sands presents no evidence to support his claim that I did.

8. Throughout his book, Mr. Sands says I opposed giving any detainees at Guantanamo the protections of Geneva Article 3.
- In fact, however, I was open to affording them such protections.
 - I raised questions with the administration lawyers in charge of defining “humane treatment.” My questions included: Why not use Article 3? And why not use Article 5 tribunals to make individual judgments about each detainee’s POW status?
 - The lawyers answered that Article 3 says that it applies only to non-international conflicts and Article 5 tribunals are unnecessary because the President found that the Taliban detainees as a group did not meet the Geneva conditions for POW status. It was clear that reasonable people could differ on these matters of legal interpretation.
 - In 2004-05, when the issue of Article 3 came up again in interagency meetings, Matthew Waxman, the relevant deputy assistant secretary of defense, who worked for me, became a prominent voice for using Article 3. With my approval, he argued as my representative in those meetings that, if Article 3 did not apply as a matter of law (because it applied only to non-international conflicts), *the United States could nonetheless apply Article 3 standards as a matter of policy*. The administration lawyers did not accept that proposal, however, and their views (which I believe they put forward in good faith) prevailed.

Mr. Sands did not refute any of these eight points, even though the July 15 hearing went on for over three hours. He would have had ample time to do so, if he had any facts to support what he wrote. Regarding point 2, Mr. Sands tried to defend himself at the hearing by reading an excerpt from our interview. In that excerpt, however, I stated my understanding that *al Qaida* detainees had no right to rely on Geneva. I specified “*al Qaida*” because I believed that the *Taliban* detainees did indeed have rights under Geneva. I never said that “*none* of the detainees could rely on Geneva,” yet that is what Mr. Sands claimed I said – a claim he considered important enough to make *at least ten times* in his book.^v So Mr. Sands’s quotation from the transcript proved that his book was wrong – and that I was correct in denouncing him for misrepresenting our interview.

Regarding point 8, Mr. Sands now complains that, in that interview, he “did not pick up any hint of receptivity to Common Article 3” on my part.^{vi} This is a shameless posture for Mr. Sands to assume, given that my interview with him was lengthy, yet he chose not to ask me a single question about Article 3. Had he asked me about it, I would have told him my views. In the interview, I focused on matters in which I played a substantial role.

But I played a very small role regarding Article 3, especially in early 2002, so I had no reason to talk about it if Mr. Sands did not bother to raise it with me.

At the July 15 hearing, I contradicted the Sands book's claim that I wanted to undermine or circumvent Geneva. I explained that I argued for a wholehearted application of Geneva at Guantanamo. I also explained why it would not have been consistent with Geneva – and would not have served Geneva's humanitarian purposes – to give POW status to detainees who had failed to meet Geneva's specified conditions for that status. Those conditions are part of an incentive system, which the drafters of Geneva devised to encourage fighters to wear uniforms and otherwise respect the laws of war for the purpose, first and foremost, of protecting the interests of non-combatants. Giving POW status to fighters who have violated those conditions would undermine Geneva's incentive system and harm the interests of non-combatants.

At the July 15 hearing, Mr. Sands admitted: "I don't think Mr. Feith and I are in disagreement about the POW issue." Regarding the al Qaida detainees at Guantanamo, Ms. Pearlstein noted her agreement that they were not entitled to POW status. They both argued at the hearing, however, that the POW issue was "irrelevant." They suggested that the interrogation-related protections for POWs and for detainees protected by Article 3 are the same.^{vii} But that suggestion is wrong, as a comparison of Article 3 with Article 17, which governs interrogation of POWs, readily shows.

Article 17 prohibits *any penalties at all* for a detainee who refuses to answer a question:

Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information.

No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or *exposed to unpleasant or disadvantageous treatment of any kind.*^{viii}

I understand that U.S. military lawyers have traditionally interpreted Article 17 as meaning, for example, that an interrogator cannot tell a detainee: If you answer a question you'll be allowed to play soccer in the afternoon, but if you refuse you won't. That is, Article 17 prohibits even moderate, entirely humane pressure on POWs in interrogations. Article 3, on the other hand, has no such sweeping prohibition. It does *not* forbid penalties for detainees who refuse to answer questions. It does *not* forbid all

forms of interrogation pressure. What Article 3 prohibits is violent, cruel or inhumane treatment.

So there is a large practical difference between the interrogation-related restrictions applicable to a POW and those applicable under Article 3. A detainee with POW status could not be interrogated effectively unless he chose to cooperate with his interrogators entirely willingly. One has to suppose that such cooperation is highly unlikely for ideological extremists from al Qaida and other terrorist groups. Tough but humane interrogation under Article 3 has a better chance of producing important information – the kind that might allow U.S. officials to prevent additional terrorist attacks. Mr. Sands and Ms. Pearlstein misled the Subcommittee about the law when they dismissed the POW-status issue as “irrelevant” and denied the distinction between Article 17 and Article 3 protections.

It would require many more pages for me to highlight and correct all the errors, misquotations and distortions in Mr. Sands’s writings and in his testimony regarding my views and work. This letter should suffice to show that Mr. Sands is a thoroughly unreliable commentator on the subject. As I have demonstrated, he has systematically misrepresented the facts. He makes false allegations without any reasonable basis. He cuts and pastes quotations in a grossly inaccurate way that amounts to flagrant misquotation. And when I called him on these errors at the July 15 hearing, he was unable to defend the points on which I challenged him. He dug himself deeper into falsehood by sweepingly asserting that our interview transcript supports what he wrote, though it does not.

It bears noting that Mr. Sands agreed at the beginning of our December 2006 interview (in the talk that preceded the start of the audio recording and the transcript) that he would check with me before he used any of my statements in his book. I said I wanted to ensure that my statements were formulated accurately and unambiguously. In a February 12, 2007 email to me, Mr. Sands reiterated our agreement:

I am just beginning my writing up phase. Very grateful indeed for you giving me time. You were lucid and clear, provided terrific assistance. As agreed I will run any quotations by you.

But he did not show me the quotations before he published his book. Had he done so, I would have insisted he correct the misrepresentations. Evidently, he did not want to give me a chance to challenge his distortions before he published his book’s sensational charges against me. He has never explained why he violated our agreement.

Some journalists and other commentators, apparently predisposed to agree with Mr. Sands’s accusations, hold close-mindedly to the notion that the charges are true. So, when they write about the July 15 hearing, they describe my testimony as a “denial” of the accusations. But I did not simply deny them – I refuted them.

I am grateful to the Subcommittee for demanding that Mr. Sands release the transcript of my interview with him. Now that it is public, Mr. Sands has extraordinary brass in continuing to claim his book is accurate.^{ix} In fact, the transcript makes plain that Mr. Sands twisted my words and misrepresented my position on Geneva and my work on detainee policy.

Mr. Sands seems to be calculating that no one will actually read the transcript with enough care to see that it exposes fundamental flaws in his book. It shows that Mr. Sands was, at best, careless or ignorant. Actually, the transcript strongly suggests that he was dishonest, a suggestion reinforced by (1) his unwillingness to admit his errors even after I listed a number of them, (2) his brazen claim that the transcript supports the accusations in his book, when it clearly reveals them as untrue, and (3) the violation of his promise, which he had confirmed in writing, to check the accuracy of his quotations with me before he published them.

I concluded my written testimony for the Subcommittee as follows:

[Mr. Sands's] 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.

Any Subcommittee member – and anyone else – who reads the transcript of my interview with Mr. Sands and compares it to his book will plainly see Mr. Sands's lack of scholarship and the groundlessness of his allegations against me. Mr. Sands's work shows that the foundation of the "torture narrative" is not rigorously sifted evidence, but the determination of some critics of U.S. policy to preserve their antagonistic preconceptions despite the facts.

When Chairman Conyers invited me to testify, he cited the Sands book as a focus of attention. The Subcommittee's hearings – and the follow-up communications – have now clarified important errors in the Sands book and have shown that the book's accusations against me are untrue.

I respectfully urge the Subcommittee to acknowledge formally that Mr. Sands's testimony misrepresented my views and actions – and, in particular, was wrong in claiming that I opposed the use of Geneva Article 3 and that I opposed giving any Geneva protections to any of the Guantanamo detainees. I think the Subcommittee should help correct the record because your hearings gave widespread publicity to Mr. Sands's false allegation that I committed a war crime, an allegation that Mr. Sands grounded in the errors that are now finally exposed.

Chairman Jerrold Nadler
August 11, 2008
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Kindly include this letter in the published record relating to the July 15 hearing.

Yours truly,



cc: Representative John Conyers
Representative Lamar Smith
Representative Trent Franks

NOTES

ⁱ Neither in his book nor in the transcript of our interview does Mr. Sands specify the date of our interview. My calendar shows it as December 6, 2006.

ⁱⁱ The Vanity Fair magazine's website published the transcript at http://www.vanityfair.com/politics/features/2008/07/feith_transcript200807.

ⁱⁱⁱ In its entirety, Geneva Article 3 states:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, Article 3, available at <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68>.

^{iv} Philippe Sands, *Torture Team: Rumsfeld's Memo and the Betrayal of American Values* (New York: Palgrave Macmillan, 2008), p. 34.

^v See the following examples from Sands, *Torture Team*:

p. 33-4: "none of the detainees could rely on Common Article 3"

p. 34: "The upshot was that no one at Guantanamo was entitled to protection under any of the rules reflected in Geneva."

p. 35: "I observed to Feith that his memo to the President and the Geneva Convention meant that its constraints on interrogation didn't apply to anyone at Guantanamo."

p. 36: "None of the detainees had any rights under the Geneva Conventions."

p. 66: "Beaver began her memo with 'the facts': none of the detainees were protected by Geneva..."

p. 66: "She [Beaver] was stuck with the President's decision on Geneva, which required her to proceed on the basis that Geneva provided no rights for the detainees."

p. 89: "That wasn't what the President decided. The actual decision distinguished between the Taliban – to whom Geneva applied, although detainees could not invoke rights under it – and al-Qaeda, to whom it didn't apply at all. This was Feith's confusing formulation. The effect was that no Guantanamo detainee could rely on Geneva, even its Common Article 3."

p. 98: "Doug Feith was Undersecretary of Defense for Policy and Haynes knew him well. They had agreed on the approach to Geneva – that it shouldn't be available to any Guantanamo detainees – now they could focus on interrogation techniques."

p. 99: "He [Feith] was happy to talk at length about the February moment and his triumph in ensuring that none of the detainees could rely on Geneva."

p. 214: "Doug Feith told me that Hayes had agreed on his approach to Geneva, that it shouldn't be available to any Guantanamo detainees."

^{vi} See Philippe Sands letter to Chairman John Conyers, Jr. on "Hearing on Administration Lawyers and Administration Interrogation Rules, 15 July 2008," July 24, 2008, p. 2.

^{vii} See, e.g., the following statement at the July 15, 2008 hearing by Deborah Pearlstein:

The critical significance between declaring somebody a POW and declaring them any other detainee in U.S. custody is that a POW cannot be prosecuted for engaging in lawful acts of war. Our soldiers can't be criminally tried for engaging in lawful combat.

It is not a distinction between the treatment of POWs and the treatment of anybody else that common Article 3 and a host of basic protections for the humane treatment of detainees apply. They apply to POWs. They apply equally to everybody else.

There is nothing under law, in my judgment, to be gained, even if one believes that coercive interrogation is useful--and I believe it is not--*there is nothing to be gained under law by denying those POW protections. The same standards of treatment apply.*

See also the following statements at the July 15, 2008 hearing by Ms. Pearlstein and Mr. Sands:

[Pearlstein:] [T]he designation of al Qaeda detainees as POWs or not is not the issue. I think it, in many respects, is correct, unlike with respect to the Taliban, that al Qaeda are not entitled to the full panoply of POW protections. Having said that, *it is irrelevant*. What they are entitled to, among other things, at a minimum is the protection of Common Article 3, a provision of law that would prohibit the set of techniques that we are discussing here today.

[Sands:] *I think I would agree with that. The issue of POW status is a complete red herring. I don't think Mr. Feith and I are in disagreement about the POW issue.*

I think Professor Pearlstein is absolutely correct, *the issue of POWs is of total irrelevance*.

Testimony of Deborah Pearlstein and Philippe Sands before the Subcommittee on the Constitution, Civil Rights and Civil Liberties, House Committee on the Judiciary, at hearings "From the Department of Justice to Guantanamo Bay: Administration Lawyers and Interrogation Rules, Part IV," July 15, 2008 (emphasis added), video available at: <http://www.c-span.org/search.aspx?For=feith>.

^{viii} Article 17, Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949 (emphasis added), available at <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68>.

^{ix} See Philippe Sands letter to Chairman Conyers, July 24, 2008.