Douglas J. Feith

October 6, 2008

Chairman Jerrold Nadler
Subcommittee on the Constitution, Civil Rights and Civil Liberties
House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515
Attention: Sam Sokol

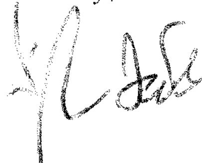
Subject: War-on-Terrorism Detainee Interrogation Rules

Dear Mr. Chairman:

Attached are my answers to the additional questions you sent me regarding the July 15, 2008 hearing on Administration Lawyers and Administration Interrogation Rules. I appreciate that Mr. Sam Sokol of your staff told me by telephone last week that your deadline for my answers was extended to today.

As I stated in my August 13, 2008 letter to you, Mr. Sands based his accusations against me on his account of my one interview with him, on December 6, 2006. As a result of your Subcommittee's hearings, Mr. Sands was compelled to release the transcript of that interview. So now it is clear that he grossly misrepresented my statements and my role in the detainee interrogation matter. I here reiterate my request that the Subcommittee 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.

Yours truly,



Douglas J. Feith

October 6, 2008

ANSWERS TO QUESTIONS FOR THE RECORD FOR DOUGLAS FEITH FOLLOWING HEARING HELD ON JULY 15, 2008

<u>Question 1: Preface</u>

You testified that you, and your office, championed application of Common Article 3 of the Geneva Convention ("Common Article 3") to Taliban and al Qaeda detainees before and after the President's February 7, 2002 memorandum indicating that Common Art. 3 would not be applied.

You stated further that various Administration lawyers were responsible for deciding that Common Article 3 was not applicable as a matter of law (because it applies only to non-international conflicts) and also responsible for deciding that it should not apply as a matter of policy.

Correction: I did *not* testify that my office and I "championed application of Common Article 3 of the Geneva Convention ('Common Article 3') to Taliban and al Qaeda detainees before and after the President's February 7, 2002 memorandum indicating that Common Art. 3 would not be applied."

There is a distinction between the "before" and the "after" period. *Before* the President's February 7, 2002 decision on Article 3, I had not taken a position on Article 3. I recall that, in informal conversations with Defense Department lawyers, I put a question or two on the Geneva issue. As I said in my July 15, 2008 written testimony for the Subcommittee:

> 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.

Whether such provisions as Article 3 and Article 5 applied were *legal* questions, as opposed to policy questions. As far as I recall, policy officials did not debate these legal questions at the time. I don't believe they even came up in the February 4, 2002 National Security Council meeting on Geneva, which I attended. I was open to affording

the detainees such protections, but I wouldn't say I championed their application at that time. I don't believe I said anything to the contrary in my testimony to the Subcommittee.

Later, however – 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, even if Article 3 did not apply as a matter of law (because it applied only to non-international conflicts), *the United States nonetheless could apply Article 3 standards as a matter of policy*. The administration lawyers did not accept that proposal, however, and their views (which I have no reason to doubt were put forward in good faith) prevailed.

Question 1.a

Who was responsible for these decisions?

The President took responsibility by declaring on February 7, 2002 that he accepted "the *legal* conclusion of the *Department of 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'" (emphasis added).

Question 1.b

Did you or anyone else object to the legal position that Common Article 3 should not apply to detainees? Who else was present during any such conversations and when did they occur? Were these conversation memorialized in any way, including through written memoranda or notes?

I served as a *policy* official, not a lawyer rendering legal judgments. Accordingly, although I raised a question about Article 3, I did not oppose the legal conclusion of the Justice Department on the matter.

The distinction between a policy role and a legal role was highlighted for me by Chairman Carl Levin of the Senate Armed Services Committee. In the spring of 2001, during my confirmation process, Senator Levin made a special point that, as Under Secretary, I must function as a policy official and not as a lawyer. In any event, I didn't know enough about the Article 3 issue's legal technicalities to have a definite opinion of my own. As I stated in my July 15 written testimony:

> I don't believe I even attended any of the early 2002 meetings where the lawyers debated common Article 3.…

> 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.

Not having participated in any debate about common Article 3, I don't know who was present when the administration lawy
ers discussed the matter or when those discussions occurred or whether the discussions were memorialized. I don't know if anyone else objected to the legal position of the Department of Justice that Article 3 did not apply.

Question 1.c

Did you or anyone else object to the legal argument that Common Article 3 does not apply because it applies only to non-international conflicts? To your knowledge, has the United States previously advanced this interpretation of Common Article 3? If so, when and under what circumstances?

On the question about objecting to the Justice Department's legal position on Article 3, see my answer to Question 1.b. I don't know if the United States previously advanced such an interpretation of Article 3. You might consider consulting with the Office of Legal Counsel at the Justice Department and the State Department's Office of the Legal Adviser for an answer.

Question 1.d

Did you or anyone else object to the policy decision not to apply Common Article 3? Why were Administration lawyers making the decision regarding its non-application as a matter of policy (as well as of law) rather than you, as Under Secretary of Defense for Policy? Did you raise any policy objections to this decision? If so, what were they, when did you make them, who was present, and were these conversations memorialized in any way?

In early 2002, there was no policy decision, as such, not to apply Article 3 – other than the President's February 7, 2002 acceptance of the Justice Department's conclusion on the subject. Article 3's applicability was a question answered by administration lawyers. In the run up to the February 4, 2002 NSC meeting, as I recall, the White House didn't hold meetings of policy officials to discuss the matter, nor did the lawyers who met on the subject invite policy officials to participate.

The February 3, 2002 draft memo I wrote, entitled "Points for 2/4/02 NSC Meeting on Geneva Convention," did not mention Article 3 because I didn't know the matter was then before the President. And, as noted above, I don't think there was a discussion of Article 3 at the February 4, 2002 NSC meeting.

If I recall correctly, it was only *after* the President formally accepted the Justice Department's conclusion that Article 3 did not apply that I learned that the issue had been brought to the President. When DOD lawyers explained to me that Justice Department lawyers had reached the legal conclusion that the plain language of Article 3 limited its application to non-international conflicts, I thought their argument had merit.

Question 1.e

If Common Article 3 was not being applied, either as a matter of law or of policy, how was "humane" treatment defined by the Administration and how did that definition differ from the definition contained in Common Article 3 of the Geneva Conventions?

The President decided that the standard for all the detainees was "humane treatment." Officials with operational responsibility would develop the more detailed definition of that standard, subject to review by administration lawyers. My recollection is that it was not until after the Abu Ghraib scandal became public in April 2004 that the definition of "humane treatment" was brought up at interagency meetings of policy officials – and even then, those meetings were mainly discussions among lawyers. The President evidently considered this issue, in essence, a legal matter.

If the Subcommittee wants to know how the "humane treatment" standard differed from Article 3, it would be best to pose the question to the lawyers who worked on this issue.

Question 1.f

What is your understanding of why Administration lawyers did not want Common Article 3 to apply? Please explain the significance for its non-application both as a matter of law and as a matter of policy.

The issue was not whether administration lawyers *wanted* Common Article 3 to apply. Rather, as a matter of legal analysis, administration lawyers concluded that Article 3 did not apply to our conflicts with the Taliban and with al Qaida because the article itself says that it applies only to "armed conflict not of an international character."

As for why, under those circumstances, a policy maker might be reluctant to use the language of Article 3 to define "humane treatment" as the President used that phrase, the argument that stands out in my memory is that Article 3 contained words and phrases that were wide open to interpretation – for example, "outrages upon personal dignity." Lawyers were uncertain about the degree to which foreign courts and foreign scholars had asserted interpretations of those terms that could be invoked against U.S. military personnel not schooled or trained in those interpretations. Administration lawyers favored defining the concept of humane treatment in language from the

American legal tradition which would be easier for U.S. officials to implement with confidence.

I remember hearing that the U.S. Senate had similar thoughts when it approved ratification of the anti-torture treaty: The Senate said it would interpret the terms in that treaty not based on the phrasing of the treaty itself, but based on the familiar U.S. constitutional phrase “cruel and unusual punishment.”

Question 2

If you were taking the position that Common Article 3 should apply, or at least should be used to define "humane" treatment of detainees, why is that not reflected in the February 2002 memo that you provided to the Committee? Is your position reflected anywhere?

As noted above, I did not in early 2002 take a position on whether Article 3 applied. I simply posed informal questions to Defense Department lawyers as to whether that article applied. My February 2002 memo did not mention Article 3 because I didn’t know it was then an issue for the President. I learned it was brought to the President only after he made his decision on February 7, 2002.

I don’t recall if I raised the Article 3 issue in writing in the period leading up to that decision. I may have, but I would have to review additional files to confirm this.

Question 3

During any discussions regarding the Administration's position that Common Article 3 would be interpreted in a manner that meant it would not apply to Taliban or al Qaeda detainees, did anyone raise concerns that the courts might disagree with this interpretation?

A. Who raised these concerns and when? How (verbally and/or in writing) were they raised, and who was involved in those conversations?

B. Was there a discussion regarding who might be liable if a court disagreed and found that Common Article 3 applies and that approved techniques, such as those contained in Category II that you recommended in the Fall of 2002, violate the Geneva Conventions?

C. If so, what was the conclusion and who was involved in this discussion?

I don’t know the answer to these questions. I didn’t participate in the interagency discussions on Article 3 and didn’t discuss the matter at length with the DOD, Justice Department or White House lawyers. I don’t recall ever hearing administration lawyers

voice concerns that the courts would disagree with the administration's position that Article 3 applied only to "armed conflict not of an international character."

Question 4: Preface

During the discussion of various interrogation techniques that you recommended for Secretary Rumsfeld's approval in the Fall of 2002, you acknowledged that you recommended blanket approval of certain techniques, including stress positions, 20-hour interrogations, hooding, and the use of individual phobias (such as dogs) to induce stress (i.e., the "Category II" techniques). You acknowledged that these techniques go beyond what is permitted under the Army Field Manual and that, depending on how these techniques were used, they could be either humane or inhumane.

I did not recommend blanket approval of the referenced techniques. As Jim Haynes's memo made clear, he was recommending some of the techniques raised by SOUTHCOM and not recommending others. I understood that all those techniques recommended for approval were legal and could be used humanely. I also understood that Secretary Rumsfeld's approval of the techniques would *not* authorize anyone to use those techniques in ways that were inhumane.

Question 4.a

Please explain how you define "humane" treatment for purposes of your answer and how that differs from the definition contained in Common Article 3 of the Geneva Conventions.

I did not then (or since) elaborate a definition of the term. And I did not produce an analysis of the difference between the humane-treatment standard and an Article 3 standard.

I said in my July 15, 2008 testimony that the President had set two rules for U.S. officials responsible for the detainees: (1) Everyone had to comply with all applicable laws and (2) everyone had to treat all the detainees humanely. Those were the overarching rules when Secretary Rumsfeld approved the additional interrogation techniques. As noted above, I understood that the officials with operational responsibility would develop the more detailed concept of "humane treatment," subject to review by administration lawyers. When Secretary Rumsfeld approved the additional techniques, he did not formulate his own definition, nor did I.

Question 4.b.I

Was "forced nudity" ever an approved technique? If not, was its use unlawful? Please explain the basis for your conclusion.

I don't recall if I actually made a recommendation about the additional techniques that SOUTHCOM brought forward. The Haynes memo said: "I have discussed this with the deputy, with Doug Feith, and General Myers. I believe that all join in my recommendation." I know I didn't object to Mr. Haynes' recommendation, but I don't think that Mr. Haynes put his recommendation through my office for review and formal coordination. I think he talked about it briefly with me (and, as he says, with Mr. Wolfowitz and General Myers). As his memo says, Mr. Haynes thought we joined in his recommendation. I was not asked to sign his memo to Secretary Rumsfeld. When I formally reviewed a matter and gave a formal concurrence from my office, that concurrence was usually signified by my handwritten initials on a "coordination" line. This interrogation technique matter appears to have been handled within Pentagon almost entirely in legal channels until it got to the department's top level. It was not staffed through my office or (as I understand it) through the Joint Staff.

As for whether "forced nudity" was an approved technique: I'm not aware that the issue ever arose at the time that Secretary Rumsfeld approved the Haynes memo recommendations. No one spoke about forced nudity or recommended it. I understood the phrase "removal of clothing" as part of the general technique of making interrogation subjects sometimes feel detached from people and things (including special articles of clothing such as head coverings) that gave them comfort. I cannot offer an opinion about lawfulness; my office did not do legal analyses of these issues.

Question 4.b.II

If "forced nudity" was not an approved technique, who bears responsibility for the apparent confusion between "removal of clothing" - a technique that you recommended and that was approved - and nudity?

I did not develop or make the recommendation on removal of clothing (or on the other particular techniques). The Subcommittee should be able to find the answer to this question in the numerous investigations and studies done by internal and external experts who were asked to assess the complex questions of responsibility for errors, shortcomings and misunderstandings relating to detainee operations.

Question 4.b.III

Given your testimony that the approved techniques could be either humane or inhumane depending on how they were applied, please explain how interrogators were informed of the difference between humane/inhumane application and provide copies of

any guidance they were given on this issue.

This question deals with chain-of-command issues within SOUTHCOM, which was not within the purview of the Office of the Under Secretary of Defense for Policy. I cannot explain how the interrogators were informed. I don't have copies of their guidance.

Question 4.b.IV

What were the consequences for interrogators who failed to apply an approved technique in a "humane" fashion? Were they informed of these consequences and how were they so informed?

My understanding is that officials who violated rules regarding the treatment of detainees were investigated, charged, and punished. I believe the Subcommittee should have ready access to the facts of the individual cases.

Question 5

In discussing the use of the approved interrogation techniques in combination (e.g., forced removal of clothing during 20-hour interrogations, with the use of dogs to induce stress), you testified that the "memo" limited the use of multiple techniques by requiring that they be used only in a "carefully coordinated manner." That guidance appears to be provided for techniques contained in Category III.

Question 5.a

Were Category II techniques ever used in combination?

Question 5.b

What, if any, guidance was provided regarding the use of multiple Category II techniques in combination?

Answer to Questions 5.a and 5.b. I don't know the operational details of the interrogations. It isn't the military's practice to report such details to officials outside their chain of command (such as the Under Secretary of Defense for Policy).

Question 6

Appearing before the Senate Committee on the Judiciary on June l0th, DOJ Inspector General Glenn Fine testified that techniques that were used at Guantanamo - with the examples being given being short-shackling (meaning that a detainee's hands were shackled close to his feet) to prevent standing or sitting, the use

of extreme temperatures - were approved and authorized by Secretary Rumsfeld, at least for "periods of time."

You joined the recommendation for approving these techniques in November 2002.

Question 6.a

Do you think you bear any responsibility for the actual use of those techniques on detainees?

Question 6.b

Who, if anyone, else bears or shares that responsibility?

Answer to Questions 6.a and 6 b. The November 2002 Haynes memo to Secretary Rumsfeld appeared reasonable, especially given the general sense of urgency throughout the government about getting information from detainees that might allow us to head off additional catastrophic terrorist attacks. It is now clear, however, that the memo was not as good as it should have been.

The guidance the memo recommended the Secretary to provide to SOUTHCOM, for example, lacked useful detail. This became clear to the Secretary (and to me and others) a few weeks after he approved the Haynes memo, when Mr. Haynes reported that other lawyers in DOD were uncomfortable with the new interrogation techniques. The Secretary then suspended all the controversial techniques and asked that a task force be created to bring together all the DOD lawyers interested in this matter. In April 2003, the task force recommended a revised set of additional interrogation techniques, together with a more detailed set of safeguards. I believe the task force recommendation was a better product than the November 2002 memo. I also believe that the effort that Mr. Haynes and Secretary Rumsfeld made to take the DOD lawyers' criticism into account and to suspend the new interrogation techniques was a clear demonstration of the good faith of DOD's leadership.

Question 7

In your testimony, you acknowledged that you were present during National Security Council discussions regarding OLC legal opinions on interrogations. Please provide information regarding when those discussions occurred, what legal opinions were discussed, who was present during those discussions, and whether anyone objected to the legal opinions being expressed and, if so, why they objected (i.e., the basis of their objection).

As I've previously testified, Justice Department legal opinions may have been referred to at an NSC meeting I attended, but I don't believe that specific interrogation techniques were discussed.

Question 8

State exactly your knowledge of the following relating to the October 27, 2003 Memorandum from you to Senate Intelligence Committee Chairman Pat Roberts and Vice Chairman Jay Rockefeller addressing the relationship between al Qaeda and Saddam Hussein:

Question 8.a

How did the Memorandum come to be written? Who tasked you with its preparation?

I believe the October 27, 2003 memo you refer to was not a memo at all, but a classified annex to a written answer I sent in response to a written question for the record from the Senate Intelligence Committee. I was not "tasked" to prepare the annex; I had it prepared for me so I could send it to the Committee.

Question 8.b

Who reviewed this Memorandum prior to its submission to the Senate Intelligence Committee? Did the Vice President or his staff?

I believe the annex was produced entirely by people in the Office of the Under Secretary of Defense for Policy. I didn't provide the annex to the Vice President's office before I sent it to the Committee nor am I aware that anyone in the Vice President's office reviewed the annex before I sent it to the Committee. The annex was provided to the CIA for review of "ORCON" material.

Question 8.c

Who was responsible for classifying this memorandum? What was its security classification?

I don't recall who classified the annex. I think it was highly classified: Top Secret Codeword.

Question 8.d

How did this memorandum come to be provided to the Weekly Standard?

I don't know who purported to leak it to the Weekly Standard. I say "purported" because I don't think the government has ever confirmed that what the Weekly Standard published was an accurate account of that highly classified annex. I helped draft DOD's public statement when the Weekly Standard story on the annex first appeared on the Internet. That statement said it was reprehensible that anyone should purport to leak so sensitive a document. I strongly believe that.

Question 8.e

Did the White House or Office of Vice President approve the leaking of this memorandum?

I know of no basis whatsoever for believing that the White House or the Office of the Vice President approved any leak of the annex. I don't remember the details, but I recall that various Pentagon officials thought that the Weekly Standard's source was someone on the Senate Intelligence Committee. That idea was based on descriptions of the annex contained in the Weekly Standard article.

Question 8.f

Was the Memorandum officially declassified prior to its being leaked? If so, by who and what form did the declassification take?

The annex remained highly classified when the Weekly Standard account of it was published.

Questions 9.a and 9.b.I through 9.b.IX

In December of 2003, the Telegraph reported on a memorandum that it had been provided by Iraqi intelligence, that it described as follows:

> *The handwritten memo, a copy of which has been obtained exclusively by the Telegraph, is dated July 1, 2001 and provides a short resume of a three-day "work programme" Atta had undertaken at Abu Nidal's base in Baghdad.*
>
> *In the memo, Habbush reports that Atta "displayed extraordinary effort" and demonstrated his ability to lead the team that would be "responsible for attacking the targets that we have agreed to destroy".*

> *The second part of the memo, which is headed "Niger Shipment", contains a report about an unspecified shipment - believed to be uranium - that it says has been transported to Iraq via Libya and Syria.*
>
> *Although Iraqi officials refused to disclose how and where they had obtained the document, Dr Ayad Allawi, a member of Iraq's ruling seven-man Presidential Committee, said the document was genuine.*
>
> *"We are uncovering evidence all the time of Saddam's involvement with al-Qaeda," he said. "But this is the most compelling piece of evidence that we have found so far. It shows that not only did Saddam have contacts with al-Qaeda, he had contact with those responsible for the September 11 attacks."*[1]

The American Conservative has reported the following concerning the creation of a forged letter:

> *[D]ick Cheney, who was behind the forgery, hated and mistrusted the [Central Intelligence] Agency and would not have used it for such a sensitive assignment. Instead, he went to Doug Feith's Office of Special Plans and asked them to do the job. The Pentagon has its own false documents center, primarily used to produce fake papers for Delta Force and other special ops officers traveling under cover as businessmen. It was Feith's office that produced the letter and then surfaced it to the media in Iraq.*[2]

Question 9.a

Do you agree or deny that you were involved, directly or indirectly, in the preparation of the document?

Question 9.b

Describe all facts and circumstances associated with the preparation of the document, including:

Question 9.b.I

Who instructed you to prepare the document?

---

[1] C. Coughlin, "Terrorist Behind September 11 Strike was Trained by Saddam," *The Telegraph*, Dec. 13, 2003, available at http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/1449442/Terrorist-behind-September-ll-strike-was-trained-by-Saddam.html.
[2] P. Giraldi, "Suskind Revisited," *American Conservative*, Aug. 7, 2008, available at *http://www.amconmag.com/blog/2008/08/07/*suskind-revisited/.

Question 9.b.II

How were the instructions provided?

Question 9.b.III

Whose idea was it that the document include a supposed connection between Iraqi intelligence and Mohammed Atta?

Question 9.b.IV

Whose idea was it that the document include a supposed the shipment of uranium from Niger to Iraq?

Question 9.b.V

What was the purpose of this document?

Question 9.b.VI

Who reviewed it after it was prepared?

Question 9.b.VII

How was it disseminated?

Question 9.b.VIII

Who, to your knowledge, communicated with Dr. Ayad Allawi to obtain his cooperation in disseminating this document?

Question 9.b.IX

What was the reaction of Vice President Cheney or anyone on his staff when the document was quickly reported to be a forgery?

Answer to Question 9.a and Questions 9.b.I through 9.b.IX.

I had no involvement in the December 2003 Telegraph report you cite. And the material you quote about my former Pentagon office from the American Conservative is a groundless lie, which the author attributed to an anonymous source. Neither my office nor I was ever asked to produce the alleged letter. Nor did we ever produce such a letter.

Question 9.b.X

Are you aware of any involvement by the Office of Special Plans, or by any other unit under your Office, in any effort in 2003 to have Mr. Habbush write a letter or memo of this type backdated to before the start of the US invasion of Iraq, or to fabricate one as if it were prepared by him? This includes any activity that you were aware of even if you were not directly involved in its authorization or execution. Please state all such facts and circumstances of which you were aware.

Question 9.b.XI

Are you aware of any involvement by any other civilian or military office or component of the Department of Defense, or by the Central Intelligence Agency, in the preparation, or placement, or such a document? Please state all such facts and circumstances of which you were aware.

Answer to Question 9.b.X and Question 9.b.XI.

I'm not aware of any such involvement by the Office of Special Plans or by any other unit under my Office – or by any other civilian or military office or component of the Department of Defense, or by the CIA. As far as I know, the forgery allegation is totally false, so there are no facts and circumstances about it of which I am aware.

Question 9.c

Please provide any further information you possess about the origin, creation, use, or validity of this document.

See preceding answer.

ANSWERS TO QUESTIONS FOR THE RECORD SUBMITTED BY RANKING MEMBER TRENT FRANKS FOR THE JULY 15, 2008 CONSTITUTION SUBCOMMITTEE HEARING

Question 1

I understand Subcommittee Chairman Nadler was quoted by The Washington Independent on June 16, 2008 as saying: "The most revealing thing, from my perspective, [that Feith said] is that on the Category II issue, everyone says that Category II techniques are cruel and inhumane treatment," Nadler said. "But he said that done right, it isn't torture. How?" Do you have an answer to Chairman Nadler's question?

It is not true that “everyone” says that Category II techniques are necessarily cruel and inhumane treatment.

As I said above, the Haynes memo did not propose the more detailed guidelines that were eventually recommended by the task force in April 2003 – and the more detailed guidelines were clearly the better approach. But the SOUTHCOM list of Category II techniques did reflect concern about legality and about humane treatment. For example, it clarified that the kind of stress positions that were contemplated were “like standing” and it limited them to a maximum of four hours. It limited the use of isolation to a maximum of 30 days, with extensions requiring approval of the Commanding General. It limited hooding in a number of ways: during transportation and questioning, no restriction on breathing in any way and detainee must be kept under direct observation at the time. Any of the Category II techniques, if extended unduly or taken to extremes, could become inhumane, but the SOUTHCOM request showed that its authors were aware that the techniques had to be limited in their application and kept lawful and humane. The SOUTHCOM request stressed the importance of compliance with the law. It was accompanied by a legal memorandum and General Hill, in his cover note to Secretary Rumsfeld, specifically called into question the legality of some of the Category III techniques and requested further legal analysis.

That is why I said they could be applied in a humane way or in an inhumane way – and SOUTHCOM’s memo, as transmitted by Haynes, showed that the command understood the requirement that everything they did had to be legal and humane. The emphasis on legality meant that it was clear that torture could not be used, because torture was illegal.

Question 2

You cited more than half a dozen errors and distortions in Mr. Sands's book, Torture Team. Please provide page citations for the errors and distortions to which you were referring.

The page citations for the errors and distortions are in my August 13, 2008 letter to Chairman Nadler, a copy of which is attached at Appendix A.

Question 3

You have complained about Mr. Sands's misquotation of you. Please identify the misquotations.

As I stated in my August 13, 2008 letter to Chairman Nadler:

> 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 [from our one interview, in December 2006] 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.

In that August 13 letter, I identify not only the particular misquotations, but also other important distortions and errors by Mr. Sands. I show that Mr. Sands's legal accusation against me regarding the Geneva Convention is based entirely on error. The foundation of that accusation is Mr. Sands's incorrect assertion that I helped persuade the President not to apply Article 3 to the Guantanamo detainees. I never made any such argument to the President directly or indirectly, however. Where did Mr. Sands get the idea that I did make such an argument? He says he got it from our interview, but that is patently untrue. Now that Mr. Sands has been compelled to publish the transcript of that interview, it is clear that the issue of Article 3 never came up when we talked. Mr. Sands did not ask me a single question about Article 3 and I made no reference to Article 3 expressly or by implication.

I urge interested Subcommittee members to read my August 13 letter to see how shabbily Mr. Sands has operated here in manufacturing out of whole cloth his accusation that I am implicated in a war crime. The transcript of our interview exposes Mr. Sands's case as a flat-out error. He should retract his accusation. In my August 13 letter, I requested that the Subcommittee "acknowledge formally that Mr. Sands gave an untrue account of that interview [between Sands and me on December 6, 2006], an account on which he built a false accusation against me of a war crime."

<u>Question 4</u>

Committee Chairman Conyers commented on the diffuse allocation of responsibilities within the Defense Department for detainee matters. Could you please set them forth for the record.

When Chairman Conyers and I were discussing the diffuse allocation of responsibilities for detainee matters within the Defense Department, I was citing information from a memo that my staff drafted in the summer of 2004 to prepare me for testimony before the House Permanent Subcommittee on Intelligence. The relevant portion of that memo is reproduced as Appendix B, attached.

<u>Question 5</u>

During the Subcommittee's July 15, 2008 heating, I understood Professor Sands and Ms. Pearlstein to say that the scope of permissible interrogation techniques should be the same for POWs and the al-Qaeda and Taliban detainees in U.S. custody. Indicate, with explanation, whether you agree or disagree.

I think Professor Sands and Professor Pearlstein were incorrect in arguing that the scope of permissible interrogation techniques is unaffected by whether the subject is a POW or whether he is simply covered by Article 3. They both made clear at the July 15, 2008 hearing that they agreed with my conclusion that the al Qaida detainees at Guantanamo were *not* entitled to POW status. They both argued, however, that the POW issue was "irrelevant" because the interrogation-related protections for POWs and for detainees protected by Article 3 are the same.[i] But a comparison of Article 3 with Article 17, which governs interrogation of POWs, shows that those protections are *not* the same.

Article 17 prohibits *any penalties at all* for a detainee who refuses to answer a question.[ii] As I explained in my August 13, 2008 letter to Chairman Nadler:

> 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.

---

[i] 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.

[ii] Article 17 of the Geneva Convention states:

> 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.*

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.

APPENDICES

Appendix A

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.

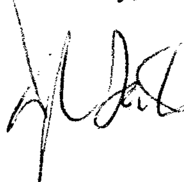
Any Subcommittee member – and anyone else – who reads the transcript of my interview with Mr. Sands and compares it to his book will plainly see Mr. Sands's lack of scholarship and the groundlessness of his allegations against me. Mr. Sands's work shows that the foundation of the "torture narrative" 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.

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.

Appendix B

[July 2004?]

OUTLINE OF KEY ISSUES FOR HPSCI HEARING ON INTERROGATION OF DETAINEES

What are Policy's responsibilities in general for detainees and interrogations?

- DoD Program for Enemy Prisoners of War and other Detainees (DoD Directive 2310.1, 18 August 1994) (Tab B).
  - USD(P) has "primary staff responsibility" and ensures that ASD(ISA) "shall provide for overall development, coordination, approval, and promulgation of major DoD policies and plans, including final coordination of such proposed plans, policies, and new courses of action with the DoD Components and other Federal Departments and Agencies, as necessary."
    - NB: By memo of 17 January 2002, USD(P) transferred these responsibilities to ASD(SO/LIC) in regard to persons detained in association with the GWOT (Tab C).
  - **BUT**
    - SecArmy is DoD Executive Agent for administration of the Program (Tab B, 4.2).
    - Secretaries of Military Departments ensure appropriate training, and prompt reporting of suspected or alleged violations (4.3).
    - Combatant Commanders provide for proper treatment, classification, administrative processing and custody of detainees, and ensure prompt reporting of suspected or alleged violations (4.4).
    - CJCS reviews plans, policies and programs of Combatant Commanders to ensure conformance with the Directive (4.5).

- DoD Law of War Program (DoD Directive 5100.77, 9 December 1998) (Tab D).

  - USD(P) has "primary staff responsibility" and ensures that ASD(ISA) "shall provide for overall development, coordination, approval, and promulgation of major DoD policies and plans, including final coordination of such proposed policies and plans with the DoD Components and other Federal Departments and Agencies as necessary, and final coordination of DoD positions on international negotiations on the law of war and U.S. signature or ratification of law of war treaties."

  - **BUT**

    - Heads of DoD Components ensure that their members comply with law of war during all conflicts (Tab D, 5.3).

    - Secretaries of Military Departments ensure implementation of programs to prevent violations of laws of war (5.5).

    - SecArmy is Executive Agent for the SecDef for supervising investigation of reportable incidents (5.6).

    - CJCS issues and reviews plans, policies, directives and rules of engagement, ensuring their consistency with the law of war, and ensures that plans, policies, directives and rules of engagement issued by Combatant Commanders are consistent with the law of war (5.7).

    - Combatant Commanders institute programs to prevent violations of law of war and ensure prompt reporting of reportable incidents (5.8).

- SO/LIC and its special operations responsibilities.

  - Title 10 responsibilities: Principal duty is overall supervision (including policy and resources) of special operations and low intensity conflict activities (Tab E).

ASD for SO/LIC (DoD Directive 5111.10, 22 March 1995) (Tab F):

- Overseas implementation of policy for special operations.
- Overseas SO plans, programs and resources to ensure adherence to approved policy and planning guidance.
- Overseas DoD Component plans and policies for training and education in the law of war.
- **BUT**
  - Nothing in the Directive "shall be interpreted to interpose the ASD(SO/LIC) in the operational chain of command …, or to subsume and replace the functions and responsibilities of" CJCS or Combatant Commanders prescribed by law or DoD guidance (Tab F, 5.4).