

## Torture Team: Abuse, Lawyers, and Criminal Responsibility

Philippe Sands\*

### I. TORTURE TEAM: ABUSE, LAWYERS, AND CRIMINAL RESPONSIBILITY<sup>+</sup>

I am delighted to be able to join you here today, especially to be able to meet Dean Tom Romig<sup>1</sup> and to visit Kansas for the first time.

Let me begin with a quotation from a closing scene of a film:

The principle of criminal law in every civilized society has this in common: Any person who sways another to commit murder, any person who furnishes the lethal weapon for the purpose of the crime, any person who's an accessory to the crime is guilty.

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How easily it can happen. There are those in our own country, too, who today speak of the protection of country, of survival. A decision must be made in the life of every Nation—at the very moment when the grasp of the enemy is at its throat. And then it seems that the only way to survive is to use the means of the enemy, to rest survival upon what is expedient, to look the other way.

Only, the answer to that is: Survival as what? A country isn't a rock. It's not an extension of one's self. It's what it stands for. It's what it stands for when standing for something is the most difficult. Before the people of the world, let it now be noted that here in our decision, this is what we stand for: justice, truth, and the value of a single human being.<sup>2</sup>

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+ This piece draws significantly from the author's book, *Torture Team*. See PHILIPPE SANDS, *TORTURE TEAM: RUMSFELD'S MEMO AND THE BETRAYAL OF AMERICAN VALUES* (2008).

1. For a short biography on Dean Romig, see Charlie Savage, *Takeover: Return of the Imperial Presidency*, 48 WASHBURN L.J. 299 n.1 (2009).

Some of you will recognize that as the closing scene from the 1961 Oscar-winning movie, *Judgment at Nuremberg*, starring Spencer Tracy as Judge Dan Haywood, handing down the judgment of the United States Military Tribunal in a trial against Nazi lawyers. The principle underlying the judgment in the movie was simple but significant: Any person who furnishes the lethal weapon for the purpose of the crime can be guilty of the crime itself. That can include the lawyer who furnishes the legal advice. In fact, the film was largely based on a series of real trials held in 1947 under the auspice of the U.S. Military Tribunal in Nuremberg. The cases were known as The Justice Cases, more formally known as *United States v. Joseph Altstotter and others*. Those cases inspired the film for which a chief consultant was Telford Taylor, a Chief Prosecutor at Nuremberg, and later Professor of Constitutional Law at Columbia Law School.

To be sure—and it is important to stress this—it would be wholly wrong to draw any sort of substantive analogy between what happened in Germany in the 1930s and the 1940s with what has happened more recently in the prosecution of the so-called “war on terror.” What is pertinent, however, is to consider the underlying principle. In what circumstances does a lawyer cross a line—a line that separates good and bad legal advice; or bad and unprofessional or unethical legal advice; or unprofessional legal advice and advice that may give rise to criminal responsibility?

Against the background of recent stories of detainee abuse at Guantanamo and elsewhere, watching the film *Judgment at Nuremberg* after a gap of many years prompted in my mind a number of questions. What had motivated Telford Taylor and his colleagues, ironically enough in the U.S. military, to go down the path of trying to make an example of the lawyers the U.S. military considered to be most responsible for some truly heinous crimes? And could the principle apply to the most senior lawyers in the administration of President Bush who had drawn up, approved, and overseen the application of new interrogation techniques which on their face violated numerous international laws?

In 2005, I published a book entitled *Lawless World*.<sup>3</sup> It described how the administration of President Bush, often assisted by the government of British Prime Minister Tony Blair, had systematically undermined a great many of the rules of international law. These were rules that the United States, more than any other country, had helped to put in place. One chapter of that book addressed Guantanamo, how the Administration had led the U.S. military into an embrace of cruelty in

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2. JUDGMENT AT NUREMBERG (MGM 1961).

3. PHILIPPE SANDS, LAWLESS WORLD: AMERICA AND THE MAKING AND BREAKING OF GLOBAL RULES FROM FDR'S ATLANTIC CHARTER TO GEORGE W. BUSH'S ILLEGAL WAR (2005).

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the name of military necessity. I do not need to remind my military colleagues in this room today, but in so acting, the Administration abandoned President Lincoln's notable determination, made in 1863, that military necessity does not admit cruelty in any circumstances.

This act of the Administration is reflected most clearly in a memorandum dated the 27th of November of 2002, written by William J. Haynes II, the General Counsel to the United States Secretary of Defense.<sup>4</sup> This memo was addressed to Mr. Rumsfeld, and was entitled "Counter-Resistance Techniques." Mr. Haynes recommended that the Secretary should authorize fifteen new techniques of interrogation.<sup>5</sup> A few days later, on the 2nd of December 2002, Mr. Rumsfeld approved that recommendation.<sup>6</sup> Alongside his signature, he wrote: "I stand for eight to ten hours a day. Why is standing limited to four hours?"<sup>7</sup> This scrawled response to one of the recommended interrogation techniques—the use of stress positions, standing for periods of up to four hours—has given the memo a certain notoriety.

My new book, *Torture Team*, tells what I believe to be a truer story behind that memo than that which was spun by the Administration. This afternoon I will address some of the key issues that the memo raises. What were the true circumstances in which it was prepared? What was the real role of the senior lawyers in the Administration? And what might be the true nature and extent of their responsibility for the abuse that followed?

After the Second World War, the United States led the world in creating a new system of international rules. A United Nations was created and, with it, new norms of international law to protect the fundamental rights of all persons. The Nuremberg Charter<sup>8</sup> contributed to the development of international criminal law. It was followed shortly by the progressive development of international humanitarian law, notably in the Geneva Conventions of 1949.<sup>9</sup> Common Article 3 of those Geneva Conventions, as many of you in this room know, outlaws the use of techniques of interrogation which might amount to cruelty, or which are outrages against human dignity, or which constitute torture.

In 1984, the United Nations, again led by the United States,

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4. Memorandum from William J. Haynes, II, General Counsel to the Secretary of Defense (Nov. 27, 2002), <http://f11.findlaw.com/news.findlaw.com/hdocs/docs/dod/gcrums1127120202mem.pdf> [hereinafter Haynes Memorandum].

5. *See id.*

6. *Id.* (approved by Secretary of Defense Donald Rumsfeld on Dec. 2, 2002).

7. *Id.*

8. *See* Charter of the International Military Tribunal Annexed to the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

9. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War art. 3(1)(d), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Common Article 3].

adopted a convention prohibiting torture.<sup>10</sup> It criminalized torture, and it also criminalized complicity and participation in torture. It put in place an elaborate system of universal criminal jurisdiction destined to snuff out any place of refuge that may be available to the torturer or his aides and accomplices. It was that 1984 Convention that caused the House of Lords, Britain's equivalent to your Supreme Court, to rule that Senator Pinochet was not entitled to claim immunity from the jurisdiction of the English courts in relation to alleged acts of torture which had been committed during his time as Head of State of Chile. That judgment, in March 1999, opened the door to the more widespread enforcement of international criminal laws.

This is an impressive body of international rules, one which had coalesced by the mid-1980s into an absolute prohibition on torture in all circumstances. As a matter of law, the situation is unambiguous. Torture can never be permitted as lawful.

Nevertheless, the events of September 11, 2001, seem to have undermined the broad acceptance of that general prohibition. They have opened the door to a new path, as reflected in the memo written by Mr. Haynes and signed by Mr. Rumsfeld. On their face, the techniques approved that day are plainly incompatible with Common Article 3 of the Geneva Conventions and with the Torture Convention. That gives rise to the possibility that war crimes have been committed.

The list of requested techniques was divided into three categories. Category one includes shouting. Category two includes nudity, forced grooming, and the use of dogs. Category three includes shoving and poking, and the use of water to create the misperception of suffocation. This is commonly known today as waterboarding.

These techniques had been, until that moment, prohibited by the U.S. Army Field Manual FM 34-52.<sup>11</sup> They were seen to be clearly in violation of the Geneva Conventions. And yet the Rumsfeld memo stated, speaking in the name of Mr. Haynes:

I have discussed this with the Deputy [Mr. Wolfowitz], Doug Feith [Undersecretary of Defense for Policy] and [with] General Myers [Chairman of the Joint Chiefs of Staff]. I believe that all join in my recommendation that, as a matter of policy, you authorize the Commander of USSOUTHCOM to employ, in his discretion, only categories I and II and the fourth technique listed in category III ("Use of mild, non-injurious physical contact such as grabbing, poking in the chest with the finger, and light pushing").<sup>12</sup>

The remaining three techniques of Category III were not rejected,

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10. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46 (June 26, 1987), available at [http://www.unhcr.ch/html/menu3/b/h\\_cat39.htm](http://www.unhcr.ch/html/menu3/b/h_cat39.htm).

11. See U.S. ARMY FIELD MANUAL FM 34-52 ch. 1 (1992).

12. See Haynes Memorandum, *supra* note 4.

including waterboarding. But they were not authorized for blanket use; they were left open for subsequent use on a case-by-case basis.

How on earth did this document emerge? It was first made public on the 22nd of June 2004. The context was the effort of the Administration to respond to the growing scandal that engulfed it following the publication of images of abuse at Abu Ghraib in Iraq, which were first broadcast by CBS' *60 Minutes*. The document was presented at a press conference that day by two of the most senior lawyers in the Administration, Jim Haynes and Alberto Gonzalez, at the time the White House Counsel to President Bush, later to become Attorney General of the United States.

Along with the Rumsfeld memo, a number of other documents were also released that day for the first time. The documents of significance can be grouped into three distinct categories. The first category constituted a set of documents originally attached to the Rumsfeld memo. Aside from the list of techniques, they comprised: a legal opinion from Guantanamo Staff Judge Advocate Diane Beaver, signing off on the new techniques;<sup>13</sup> a formal request from the Commander of Joint Task Force 170 at Guantanamo, Major General Mike Dunlavey, a Judge and a two-star Reserve Intelligence Officer who had been appointed by Mr. Rumsfeld to head the interrogations at Guantanamo,<sup>14</sup> and a document requesting further legal review of these techniques by the then-Commander of the United States Southern Command, General James T. Hill.<sup>15</sup>

The second category of documents included the full text of President Bush's decision of February 7, 2002, determining that none of the detainees at Guantanamo could claim any rights under any of the Geneva Conventions, including Common Article 3.<sup>16</sup>

And the third category of documents included the now-infamous torture memo, the legal opinion written on the 1st of August 2002, signed by Jay Bybee, then-Head of the Office of Legal Counsel at the Department of Justice, but as is now known, largely written by his Deputy, John Yoo, who was on leave from Berkeley Law School, with input also from Mr. Gonzales and from David Addington, counsel to Vice

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13. Memorandum from Diane Beaver to Commander, Joint Task Force 170, Legal Brief on Proposed Counter-Resistance Strategies (Oct. 11, 2002), *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 229 (Karen Greenberg and Joshua Dratel eds., 2005).

14. Memorandum from Michael Dunlavey to Commander, United States Southern Command, Counter-Resistance Strategies (Oct. 11, 2002), *reprinted in* THE TORTURE PAPERS, *supra* note 13, at 225.

15. Memorandum from James T. Hill, General U.S. Army Commander, to Chairman, Joint Chiefs of Staff, Counter-Resistance Techniques (Oct. 25, 2002), *available at* <http://news.findlaw.com/hdocs/docs/dod/hill102502mem.html>; *see also* THE TORTURE PAPERS, *supra* note 13, at 223.

16. Memorandum from George W. Bush to Vice President et al., Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002), *available at* <http://www.fidh.org/IMG/pdf/memo11.pdf>; *see also* THE TORTURE PAPERS, *supra* note 13, at 134.

President Dick Cheney.<sup>17</sup>

Haynes and Gonzales stood before the press on June 22, 2004, in the old executive office building next to the White House, and presented a narrative which described the circumstances in which the Administration had authorized these new techniques of interrogation. This narrative had four parts. First, the Administration had acted reasonably, they said, with care and with deliberation and always within the law. The second element concerned the sources of the new techniques of interrogation. Where had they come from, they asked. The Administration pointed directly to the Military Commander at Guantanamo, Major General Dunlavey, a man Mr. Haynes would later describe to the Senate Judiciary Committee as an “aggressive Major General.”<sup>18</sup> The implication was that the techniques were not imposed or encouraged by the Pentagon or by the Office of the Secretary of Defense. They came from the bottom up. That was the key message the Administration wanted to spin.

The third element of the Administration’s account concerned the legal justification for the new techniques of interrogation. This was not, said Mr. Gonzales, the result of legal positions taken by politically appointed lawyers in the upper echelons of the Administration, and certainly not by the lawyers in the Department of Justice. The legal advice on which the Administration had relied was that written by Diane Beaver on the 11th of October 2002. It had not relied on the Department of Justice’s memo of the 1st of August 2002, written by Mr. Bybee and Mr. Yoo, which was only, said Mr. Gonzales, something of a star-gazing exercise.

That document, of course, is infamous because it redefined physical torture to encompass only those acts which gave rise to pain equivalent to that felt with death or serious organ failure. But, said the Administration, that was not the legal advice on which it had relied.

The fourth and final element of the Administration’s official narrative was to make clear that the provisions relating to Guantanamo Bay had no bearing on events at Abu Ghraib or elsewhere. Indeed, Mr. Gonzales went out of his way to set the record straight. The abuses at Abu Ghraib, he said, were a result of a few bad eggs down at Abu Ghraib. They were totally unconnected to legal memoranda or decisions made by the Administration. The message was clear: Abu Ghraib had nothing to do with our policies or actions. We were acting as a pru-

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17. Memorandum from Jay S. Bybee to Alberto R. Gonzalez, Counsel to the President, Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002) [hereinafter *Torture Memo*], available at <http://fl1.findlaw.com/news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf>; see also *THE TORTURE PAPERS*, *supra* note 13, at 172.

18. *Confirmation Hearing on the Nomination of William James Haynes II to Be Circuit Judge for the Fourth Circuit Before the Senate Judiciary Committee*, 109th Cong. 49 (2006), available at <http://judiciary.senate.gov/resources/109transcripts.cfm>.

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dent, responsible government, responding to the needs of the military down at Guantanamo.

Now, you must remember that I am not only an academic. As a barrister, I litigate court cases in English courts and in international courts. I cross-examine. I look at evidence. I read documents carefully. I read the documents which were made public in June 2004 very, very carefully, essentially with the eye of a barrister. There was something that struck me as problematic about the narrative spun by the Administration. When I read for the first time the transcript of the press conference given by Mr. Haynes and Mr. Gonzales, it struck me that they were acting as advocates, speaking from a common and carefully prepared script, which articulated a particular narrative and set of messages, including the four points that I have just described.

I decided to adopt a different approach to the normal academic path. I decided I would try to track down and meet each of the individuals who were referred to in the documents and had been involved in the decision-making process. It was not an easy task, but I wanted to seek the truth—not on the basis of the documents, but on the basis of what the people who had been involved said had actually happened; not to just believe what the Administration was seeking to have us believe had happened.

Over a period of time, I did speak with almost all the key players involved in the decision-making process, right up to the top. It is a testimony to the nature of modern American society that an outsider like me can cold call someone like General Richard Myers, Chairman of the Joint Chiefs of Staff, and ask him to have a conversation with me; or meet with Doug Feith, who was the number three at the Pentagon; or track down Diane Beaver, the Guantanamo Bay lawyer who was one of the first individuals with whom I spoke; or, eventually, spend several hours with Jim Haynes himself. There is a wonderful, wonderful openness in American society. I doubt this would have happened in Britain.

One of the first people I met with was Doug Feith. Mr. Feith is a lawyer and better known in his role promoting the 2003 Iraq War. Yet it turned out he was rather deeply involved in the decision-making processes that led to the Rumsfeld memo—although the memoir he published in 2008<sup>19</sup> is surprisingly discrete on the subject; in fact, it does not mention his involvement at all.

I talked to him about the circumstances in which the Geneva Conventions had, in effect, been set aside. That, as you know, happened as early as February of 2002. It created the “legal black hole” into which the detainees were cast. From him I wanted to understand what had

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19. DOUGLAS FEITH, *WAR AND DECISION: INSIDE THE PENTAGON AT THE DAWN OF THE WAR ON TERRORISM* (2008).

really motivated that decision. Mr. Feith is a lawyer and he affects something of a lawyerly approach to these matters. On his account, he proceeded on the basis that advice had come from other lawyers in the Department of Justice, contrary to how the narrative was being spun by the Administration and the Department of Defense. But what I managed to elicit from him, which in my mind was the most significant thing, was that the decision to do away with Geneva as early as February of 2002 was intended to remove constraints on interrogations. In other words, as I understood it, this decision reflected a pre-existing policy decision as early as February 2002 to move to abusive interrogation. And that it was a decision taken by the upper echelons of the Administration itself, at the political level.

I also picked up from Mr. Feith something of the connections between the Rumsfeld memo and the Yoo/Bybee memo of the 1st of August 2002, at least in terms of the role of the lawyers in the Department of Justice and in authorizing, behind the scenes, those techniques of interrogation. That was a significant interview for me because it confirmed what many instinctively believed, but what the Administration had constantly denied; namely, that there was a relationship between the desire to remove constraints on interrogation, on the one hand, and the effectiveness of the Geneva Conventions, on the other.

At around the time that I first met with Doug Feith I also spoke and met with Diane Beaver. She was the Staff Judge Advocate at Guantanamo Bay in June 2002. She went to Guantanamo Bay at about the same time it was discovered the Detainee 063, Mohamed al-Kahtani, might be the twentieth September 11th hijacker. He sought entry into the U.S. in August 2001 shortly before the attacks of September 11th, but entry was denied and he was removed from the United States. He was caught a few months later in November of 2001 in Afghanistan and eventually transported to Guantanamo Bay at the end of January 2002. Six months later, in June 2002, the dots were joined up. He was discovered to be apparently the same man who had gained entry to the airport in Orlando in August 2001, allegedly at the very moment that one Mohamed Atta was seen on video camera waiting in the arrivals lounge for someone to arrive.

Now, Colonel Beaver had no real background in international humanitarian law or any apparent expertise in the Geneva Conventions or the law of interrogation. It seemed to me, on the basis of the conversations I had with her, that she had never previously given important advice on these kinds of issues. In fact, she had been brought to Guantanamo from the torts section of the Pentagon. Yet she was asked to sign off on this most important of decisions: the use of new techniques of interrogation.

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She described to me the circumstances in which she wrote her legal advice. No doubt the story she has given me is a partial story, and no doubt more will come out. Indeed, some has come out in some of the hearings that have taken place since my book was published, which tends to undermine some of the things that she said to me. Yet the essence of her story, I think, holds true. It is a significant story, indicating how, on her account, she was first told to provide advice and sign off verbally.

If that had happened, there would have been no paper trail. She described to me the circumstances in which she decided to protect herself in the expectation—reasonable in my view—that any written legal advice she gave would be subject to higher level review: she insisted on putting her legal advice in writing. Her game plan, as she put it to me, was to get her advice up the chain of command, recognizing her own limitations—rather honestly, I thought—in the hope that in the military legal structure someone higher up would eventually express a more informed, knowledgeable, or experienced view.

Ms. Beaver was given just four days to write her memo. She told me how she tried to get help from the General Counsel of the Joint Chiefs of Staff, from the lawyer at U.S. Southern Command in Miami, from the military lawyers' training school, and from various other lawyers. On her account, no one seemed willing to assist. And, also on her account, she said she was stuck with the presidential decision on the Geneva Conventions. As she described, when she went to the pages of the rule book on military interrogations, they were gone because, for Guantanamo, the pages had been torn out.

Who was she, a relatively junior lawyer, to second-guess the decision of the President to do away with Geneva in relation to these interrogations? That, she explained to me, would have been insubordination. As she told me the story when I met with her on several occasions, I began to understand a little more clearly the particular circumstances of the difficulty in which she found herself. I also recognized that the legal advice would or should have gone up the chain of command to more senior lawyers, who would eventually have an opportunity to review her work.

Her advice was awful. I thought it awful when I first read it, and I still think it is awful today. But I understand the circumstances in which she felt compelled to write it and in which she found herself. As she described to me, down at Guantanamo they were getting information of new intelligence spikes. They believed a new attack was coming. They considered that al-Kahtani, who until then had been interrogated unsuccessfully using the normal military techniques of interrogation through rapport building, had information that could help protect the United

States. I understood the context, even if it did not justify her advice.

But even more, I came to understand the real circumstances in which she wrote her advice when she described to me what had not, at the time I spoke with her, emerged into the public domain: namely, the visit of the most senior lawyers in the Administration to Guantanamo Bay in late September 2002, just a few days before she wrote her legal advice, was not public knowledge. On her account, Mr. Haynes, Mr. Gonzales, and David Addington, who then was the General Counsel to the Vice President, came down to Guantanamo, accompanied by John Rizzo, later to become the acting General Counsel of the CIA. Mr. Michael Chertoff, now of Homeland Security, also accompanied them.

So, you have here three or four of the most senior lawyers in the Administration: President Bush's lawyer, Dick Cheney's lawyer, and Donald Rumsfeld's lawyer. They fly down on an executive jet for one day, the 25th of September 2002. The message they leave with Colonel Beaver and Major General Dunlavey is: do what needs to be done. They watch an interrogation. There is talk about al-Kahtani. Put yourself in Diane Beaver's position for a moment. I tried to do that as I imagined the situation she was in, and I try to imagine the impression that is given when you are a lawyer of her limited experience and you receive a visit from these gentlemen.

Beaver's story was largely confirmed to me in my conversations with Dunlavey. He described how he had been hand picked for the job by Rumsfeld and Feith, among others, how he had been personally interviewed by Jim Haynes, and how his background in interrogation was essentially what caused him to be the right person for the job.

Aspects of both of Beaver's and Dunlavey's accounts were later confirmed to me when I met with General Hill, who is Commander of United States Southern Command. He is a thoughtful man who was obviously troubled by the adoption of these new techniques of interrogation. From him I learned more about the circumstances in which he had insisted that there be Department of Justice sign-off on these new techniques of interrogation. With him, too, I went through the list of techniques one by one. At some point, I asked him whether he would ever be comfortable with any of these techniques being used on any Americans. He replied emphatically, without pausing: "No, absolutely not."<sup>20</sup> So if they could not be used on Americans, I inquired, how is it that they could be used on others? That, he said, was a question I should put to General Myers, because it was up in Washington that all of these decisions were made.

So I tracked down General Myers, Chairman of the Joint Chiefs of

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20. See SANDS, *supra* note +, at 86.

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Staff from 2001 to 2005, and to my view as a British outsider, possibly the most powerful military man in the world apart from the President of the United States. I met with him at Georgetown Law School. I thought him a genial and decent man, but formed the impression that he had been somewhat out of his depth in the decision-making process. I do not intend to express any disrespect in using these words, which I have chosen carefully, but the fact is that from our conversation it became apparent that General Myers simply had not appreciated what had been decided in relation to the Geneva Conventions. He thought—wrongly—that it had been decided to apply the Geneva Contentions at Guantanamo Bay. He had not appreciated that the President's decision had precisely the opposite effect. And he thought—wrongly—that all the new techniques approved for use on al-Kahtani had come straight out of the United States Army Field Manual. So we went through the list of techniques one at a time. As we got to forced grooming, removal of clothing, use of dogs, he became visibly uncomfortable. I should speak with Jim Haynes, he said. Eventually I did.

In the meantime, it is worth recalling that the new techniques were approved for use even before the memo was written and signed off on. The Rumsfeld memo, the authorizing document, actually post-dated the beginning of their use. As Diane Beaver told me on the 23rd of November 2002, there was a *voco* (a vocal command). For some fifty-four days, al-Kahtani was subjected to the cumulative use of every single one of the fifteen new techniques of interrogation. His interrogation log is publicly available. I gave a copy of the log to Abigail Seltzer, a clinical psychiatrist in London who is a leading expert in my country on trauma and torture. She read the log very carefully over several days. We met on a couple of occasions. I wanted to know from her whether al-Kahtani's treatment constituted severe mental or physical pain and suffering, which is the test for torture in the 1984 Convention. I describe our conversation much more fully in my book. The sum of what she said was this: If you were to take twelve clinical psychiatrists and put them in a room, and give them this document, they would all conclude that his treatment crossed the threshold of torture. Most striking for Dr. Seltzer, was the use of cumulative techniques designed to humiliate and subjugate over an extended period of time.

What I discovered was that the new techniques were authorized in circumstances in which the traditional decision-making processes were simply bypassed. I picked up from one interview a nugget which suggested that once General Hill's request had reached General Myers in late October 2002, Mr. Haynes had intervened to short-circuit the usual decision-making process. I had spoken to some people off the record,

and that is what I was told.<sup>21</sup> This has now been confirmed in open testimony in congressional hearings in June 2008, after my book was published. This is what happened. When the document reached General Myers' office, he passed it on to his lawyer, Jane Dalton, who began the usual departmental-wide policy and legal review of the techniques, at which point more senior and experienced military lawyers became involved. Several immediately expressed a strongly negative view. As Jane Dalton had told me, and as she testified in Congress, she then passed on those strongly negative views in the first week of November to Mr. Haynes, or at least to his office.<sup>22</sup> She assumed he had read them.

What happened then? It seems Mr. Haynes intervened to short-circuit and stop the decision-making process. This is actually a most crucial fact. If one were putting forward a defense for Mr. Haynes, it would be based on an argument of having acted in good faith. The "good faith defense" collapses in the face of what appears to be, on the testimony of Jane Dalton, a clear desire on Mr. Haynes' part to avoid receiving any bad news from the military lawyers who actually know something about these techniques. I established without ambiguity that those who actually knew something about the international and U.S. federal rules, including the Geneva Conventions, whether in the military or in the Department of State or elsewhere, were simply cut out of the decision-making process.

I established another crucial point, without ambiguity: By the time Mr. Haynes intervened in early November 2002, he had no need to rely on Diane Beaver's legal advice, or anyone else's views on the law, because by then he already had knowledge of the legal advice written at the Department of Justice by Mr. Yoo and Mr. Bybee. Indeed, that knowledge came much earlier. When he accompanied Mr. Addington and Mr. Gonzales down to Guantanamo on the 25th of September 2002, he already knew the Department of Justice's Office of Legal Counsel (OLC) had signed off on these new techniques. In the U.S. system of government, he would have known that once the OLC has signed off, debate comes to an end. In those circumstances, Diane Beaver was a useful scapegoat.

In mid-December 2002, as al-Kahtani was being abused, word reached the Pentagon about what was going on. A number of people at Guantanamo in the military and in the Naval Criminal Investigation Service contacted Alberto Mora, the General Counsel of the Navy, in the Pentagon, working down the corridor from Jim Haynes. Mora's

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21. *Id.* at 92.

22. *See id.*; *see also* S. ARMED SERVICES COMM., 110TH CONG., INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY (2008), *available at* <http://levin.senate.gov/newsroom/supporting/2008/Detainees.121108.pdf>.

story has been widely reported. He intervened directly and regularly with Jim Haynes in circumstances which eventually led to the decision to stop the use of these techniques on al-Kahtani, on January 15, 2003.

What is the upshot of all these conversations and others described in the book? By speaking to people directly, I was able to reach a conclusion, rather clear in my view, that the narrative the Administration had spun in June 2004 was false—totally and intentionally false. First, the Administration did not move with care and deliberation. The decision at a policy level to move to harsh interrogation techniques, as well as torture, was made as early as December 2001. The law simply followed the policy of abuse that was already fixed.

Second, and most significantly, the process did not begin on the ground at Guantanamo. It came from the top—the very top. That, too, has now been confirmed as a result of hearings that took place after the publication of my book, establishing that Mr. Haynes himself was personally involved in starting the search for new techniques of interrogation, which was well underway by July 2002. This happened more than three months before Diane Beaver was called upon to give her legal advice.

Third, the legal justifications for the new techniques did not come from Guantanamo Bay or from Diane Beaver. It was the result of the legal positions that were taken by a small number of Department of Justice lawyers and, in particular, reliance on the two memoranda dated the 1st of August 2002.<sup>23</sup> I have mentioned that I had two meetings with Mr. Haynes. He was the last person with whom I spoke. Mr. Haynes was the only person who before then had said constantly “no” to my requests for an interview. A journalist friend suggested I write what she called “a Bob Woodward letter.”<sup>24</sup> Just three paragraphs containing, for example: paragraph 1, here is the list of all the people I have spoken with; paragraph 2, here are the three worst things they say about you; and paragraph 3, this is your very last opportunity to give me your account. I wrote the letter, and it worked, opening the doors to the Pentagon and Mr. Haynes’ office. I had two meetings with Mr. Haynes. The agreement was that the conversations would not be addressed in the book, would be off the record, but I could mention the fact of our meetings. I can therefore refer to the fact that we met, but not to what he and I talked about. What I can say, as I do say in the book, is that all of my conclusions both today and in the book take the fullest possible ac-

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23. Letter from John Yoo to Alberto Gonzales, Counsel to the President (Aug. 1, 2002), *reprinted in* THE TORTURE PAPERS, *supra* note 25, at 218.

24. A “Bob Woodward letter” refers to the journalist Bob Woodward, whose reporting assisted in uncovering the Watergate scandal, leading to President Nixon’s resignation. See About Bob Woodward, WASH. POST ONLINE, <http://www.washingtonpost.com/wp-dyn/content/linkset/2006/07/18/LI2006071800574.html> (last visited Jan. 18, 2009).

count of everything that Mr. Haynes said to me. An astute reader can form her own view as to the force of what he said to me on the key points.

Fourth, my account knocks on the head of the Administration's claim to deny any relationship between the events at Guantanamo and events at Abu Ghraib or elsewhere in Iraq or Afghanistan. Major General Dunlavey's successor, Major General Geoffrey Miller, and Colonel Beaver traveled to Iraq and Abu Ghraib in August 2003. Among others they met with General Sanchez, who on the 14th of September 2003, adopted new regulations on interrogations.<sup>25</sup> These included many of the same techniques that were authorized by the Rumsfeld memo: hooding, stress positions, removal of clothing, and use of dogs.<sup>26</sup> These are actions we associate with the pictures of abuse at Abu Ghraib a month later in October 2003, when the abuses began. The Inspector General of the Department of Defense, no less, has concluded in a thoroughly damning report published in 2006<sup>27</sup> that there was clear migration of these same techniques from Guantanamo to Abu Ghraib.

All of this raises a most fundamental question: How could the lawyers who were involved at every stage of the decision-making process have acted as they did? How could they have determined that the rules reflected in Common Article 3 of the Geneva Conventions were simply not applicable to all of the detainees at Guantanamo? How could they have been involved in the preparation of the techniques, and how could they have been directly involved in their authorization? My account has really not been challenged. In the end, real responsibility centers largely on a small group of politically appointed lawyers, as well as their political masters, who happen to adhere to a particular ideology as to America's place in the world and its relationship with norms of international law. The lawyers who knew the rules, who had lengthy experience on these issues, were circumvented. The uniform military lawyers were cut out of the process. The Department of State lawyers, Will Taft and his team, were cut out of the process. All normal checks and balances were avoided. That was done with care and deliberation.

What might be the consequences of all of this? Earlier this year, excerpts from my book were published by *Vanity Fair*, and I have

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25. Memorandum from Ricardo Sanchez to Commander, U.S. Central Command, CJTF-7 Interrogation and Counter-Resistance Policy (Sept. 14, 2003), <http://www.aclu.org/FilesPDFs/september%20sanchez%20memo.pdf>. These techniques were superseded by a new memorandum on October 12. Memorandum from Ricardo Sanchez to C2, Combined Joint Task Force Seven, C3, Combined Joint Task Force Seven, and Commander, 205th Military Intelligence Brigade, CJTF-7 Interrogation and Counter-Resistance Policy (Oct. 12, 2003), *reprinted in* THE TORTURE PAPERS, *supra* note 13, at 460.

26. Compare Sanchez, *supra* note 25, with Haynes Memorandum, *supra* note 4.

27. INSPECTOR GEN. FOR THE DEP'T OF DEFENSE REPORT NO 06-INTEL-10, REVIEW OF DoD—DIRECTED INVESTIGATIONS OF DETAINEE ABUSE 23 (2006).

learned a great deal more about the power of that publication.<sup>28</sup> Within a few days of the article coming out, in early April 2008, the Chairman of the House Judiciary Committee, Congressman John Conyers, announced a series of hearings to focus on the role of senior Administration lawyers. I have testified twice before the Committee and once before the Senate Judiciary Committee.<sup>29</sup> There have also been important hearings before the Senate Armed Services Committee. Around all of the hearings is a growing acceptance that something has gone wrong and that there exists a necessity to establish the facts and identify the people who were truly responsible for what has happened.<sup>30</sup>

More significantly, there is very broad recognition in the United States and outside that war crimes were committed in the interrogation of Mohamed al-Kahtani. You do not need to rely on my word for that. The Judge Advocates General of the Army, Navy, Air Force, and Marines have testified before the U.S. Congress, and when asked whether war crimes were committed in violation of Common Article 3, they unanimously assented to that view.<sup>31</sup> I respect those brave individuals who adopted that view. It was an extraordinarily admirable thing to have done.

You can also take the conclusion that war crimes were committed from an important judgment of the U.S. Supreme Court. It has already been referred to during the conference today. In June 2006, the Court ruled in *Hamdan v. Rumsfeld*<sup>32</sup> that the President and the Administration had simply got it wrong, that the Geneva Conventions did apply at Guantanamo, including Common Article 3. All of the detainees—al Qaeda, the Taliban, everyone—had minimal rights under that provision.<sup>33</sup> The ruling opened the door to war crimes allegations, a point that was raised powerfully by Justice Kennedy in his concurring but

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28. Philippe Sands, *The Green Light*, VANITY FAIR, May 2008, available at <http://www.vanityfair.com/politics/features/2008/05/guantanamo200805>.

29. *From the Department of Justice to Guantanamo Bay: Administration Lawyers and Administration Interrogation Rules, Part I, Before the Civil Rights and Civil Liberties Subcomm. of the H. Comm. on the Judiciary*, 110th Cong. (May 6, 2008); see also *Philippe Sands' Testimony on Torture Today and House Judiciary Committee*, <http://www.afterdowningstreet.org/node/33256> (last visited Jan. 18, 2009); *Philippe Sands: Guantanamo Bay and Interrogation Rules*, <http://uk.youtube.com/watch?v=kPAGNNSrwUw> (last visited Jan. 18, 2009); *From the Department of Justice to Guantanamo Bay: Administration Lawyers and Administration Interrogation Rules, Part IV, Before the Civil Rights and Civil Liberties Subcomm. of the H. Comm. on the Judiciary*, 110th Cong. (July 15, 2008); *Coercive Interrogation Techniques: Do They Work, Are They Reliable, and What Did the FBI Know About Them? Before the S. Judiciary Comm.*, 110th Cong. (June 10, 2008).

30. In fact, a month after I gave this lecture, the Senate Armed Services Committee adopted a unanimous report that effectively endorsed my account of what happened. See S. ARMED SERVICES COMM., *supra* note 22.

31. *Military Commission in Light of the Supreme Court Decision in Hamdan v. Rumsfeld, Evidence Presented Before the S. Comm. on Armed Services*, 109th Cong. 42 (July 13, 2006) (response to exchange between Senator Lindsey Graham and Major General Jack L. Rives, Judge Advocate General of the U.S. Air Force) (copy on file with author); see also Sands, *supra* note +, at 217.

32. 548 U.S. 557 (2006).

33. *Id.* at 631-32.

separate opinion.<sup>34</sup> It was no surprise then, that four months after the Administration received that judgment it pushed through Congress the Military Commissions Act of 2006.<sup>35</sup> Buried in the heart of that legislation is a provision purporting to grant immunity to persons associated with all these techniques of interrogation.<sup>36</sup>

There can be little doubt in relation to al-Kahtani, and no doubt perhaps of many others also, that war crimes have been committed. Who is responsible for these crimes? Can the lawyers bear some responsibility? These questions bring us back to the film, *Judgment at Nuremberg*, and the trials<sup>37</sup> which underpinned it. I thought it would be interesting to find out a bit more about what exactly it was that Joseph Altstotter, the lead defendant in the Justice Cases, had done. I did everything I could to get hold of as many of the documents in his case as possible, including the written pleadings and the oral arguments. I got great help from the archivist of the Holocaust Museum in Washington, D.C. and I did manage to track down a great deal of the material. But there were a number of basic documents I could not find. So I tried to track down some of the lawyers or their law firms or their successors who might have been involved in the case.

Using Google, I eventually managed to locate Ludwig Altstotter, the son of Joseph Altstotter. Ludwig is a retired lawyer living in Nuremberg, and he eventually agreed to meet with me. To this day, he believes that his father was wrongly convicted.<sup>38</sup> He describes his father as an ordinary and reputable lawyer who had been to the very best law schools in Germany. He was deeply religious and, according to his son, had simply been doing his job in the German governmental service. He was, said his son, as ordinary a person as you or me.

When I got to his law office in Nuremberg and went into the conference room, he had carefully set out all of the original documents from his father's trial. It was quite remarkable. He had kept absolutely everything. At the time in 1947, he had been a fifteen-year-old boy and he had never talked to anyone about what had happened. He now wanted to do so to get it off his chest.

What I was looking for were a couple of underlying documents that I could not find in Britain or in the United States, or anywhere else. I needed to understand the basis upon which Joseph Altstotter was acquitted of war crimes and crimes against humanity but convicted of

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34. *Id.* at 654-55 (Kennedy, J., concurring).

35. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. §§ 948a-950w and other sections of Titles 10, 18, 28, and 42).

36. *Id.* § 3a (codified at 10 U.S.C. § 948r).

37. TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL ORDER NO 10: NUERNBERG, OCT. 1946-APR. 1949, 3 (Vol. III 1951) (citing U.S. v. Altstotter, 3 T.W.C. 1 (1948)) [hereinafter Justice Trials].

38. See SANDS, *supra* note +, at 198.

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membership in an illegal organization with crucial knowledge of, and involvement in, its illegal acts.

The judgment in his case was important because it established, along with the other cases, apparently for the first time in proceedings such as this, the principle that lawyers and judges in a governmental regime bear a particular responsibility in certain circumstances. Mr. Altstotter had the misfortune, because of his name, to be the first named defendant listed among the sixteen. He certainly was not the most important or the worst, although he was one of ten (out of sixteen defendants) who were convicted. Four others were acquitted, one committed suicide, and in one case, there was a mistrial. He was a well-regarded member of society and a high-ranking lawyer. He had joined the Ministry of Justice in 1943 and he served as the Chief of the Civil Law and Procedure Division. It was his membership in the Nazi Party's Shield Squadron (SS), however, and his knowledge and involvement of its acts, which were his downfall.

The Tribunal convicted Joseph Altstotter largely on the basis of two letters that indicated his direct knowledge of and involvement in the crimes of the SS. I took Ludwig, the son, to a striking passage in the Tribunal's judgment in his case: "[H]e gave his name as a soldier and a jurist of note and so helped to cloak the shameful deeds of that organization from the eyes of the German people."<sup>39</sup>

I asked whether he had copies of the two letters that I was looking for. He did. He went to the neat pile on his desk and produced the copies of the originals. I still have them. The first letter was dated the 3rd of May 1944. It was from the Chief of the Intelligent Service of the SS to Joseph Altstotter in his capacity as a lawyer in government service, asking him to personally intervene with the Regional Court of Vienna to stop it from ordering the transfer of certain Jews from a camp at Theresienstadt back to Vienna, where they wanted to appear as witnesses in a Regional Court case. The second letter was Altstotter's response a month later to the President of the Court in Vienna. He wrote that for security reasons the judge's requests "cannot be granted."<sup>40</sup> On the basis of those two letters and the surrounding facts, he was convicted and served five years in prison.

It was the claim to security reasons which jumped off the page of that letter. Those are very familiar words. We lived with them in Britain in the 1970s in relation to the Irish Republican Army. You are living with them in the United States in relation to what is going on right now. But most strikingly, they were not dissimilar to the words used by Jim Haynes when he spoke at his press conference on June 22, 2004, to

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39. Justic Trials, *supra* note 37, at 1177.

40. See SANDS, *supra* note +, at 199.

explain the circumstances in which he wrote his memorandum to Mr. Rumsfeld. "Military necessity," he said, "can sometimes allow warfare to be conducted in ways which might otherwise infringe on the applicable articles of the Convention. . . ." <sup>41</sup> Mr. Haynes provided no legal authority for that proposition, and he cannot do so. Military necessity cannot be used to justify a departure from the standards reflected in Common Article 3 or, indeed, the obligations set forth in the Torture Convention.

Fully testing the proposition that the senior administration lawyers could, in theory, be criminally responsible for their actions in authorizing interrogation techniques that were international crimes obviously goes beyond the scope of what I can address today. So I will cut to the chase and share with you the conversation I had with a European judge and a European prosecutor. In the book, I go into some detail about this conversation. I have anonymized these two individuals for obvious reasons. I visited with them in the capital city of a European NATO member state. I laid out all of the materials that I had come across, everything I have talked about today, and a great deal more that I have written about in the book. And I asked them whether, in their system of criminal law, in accordance with the applicable international norms, there was any basis for investigating these lawyers for international crimes. We looked, in particular, at Article 4 of the Torture Convention, which criminalizes complicity or participation in torture. <sup>42</sup> Similar principles govern the acts of accessories to violations of the standards reflected in Common Article 3 of the Geneva Conventions. <sup>43</sup> The European judge and the European prosecutor were particularly struck by the provisions in the Military Commissions Act of 2006 to which I directed their attention, the purported immunity provisions. <sup>44</sup>

The prosecutor said the inclusion of such a provision in the Military Commission's Act was a "very stupid" <sup>45</sup> thing to do, because it would make it much easier for investigators outside the U.S. to justify their own investigations since it was plain that war crime allegations would not be investigated in the United States. President Bush may wish to reflect on this if he is of a mind to grant a pre-emptive pardon to those involved in this deplorable story, as is being rumored. Local investigation is one of the tripwires for enabling foreign prosecutors or foreign judges to intervene. It is a matter of time, the European judge said to me.

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41. Press Briefing, Alberto Gonzales et al. (June 22, 2004), available at <http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html>.

42. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 4, June 26, 1987, 1465 U.N.T.S. 85.

43. Common Article 3, *supra* note 9.

44. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. §§ 948a-950w and other sections of Titles 10, 18, 28, and 42).

45. SANDS, *supra* note +, at 208.

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These things take time and then something unexpected happens when one of these lawyers travels to the wrong place. This judge and this prosecutor, experienced in the prosecution of international crimes, had no doubt whatsoever that on the basis of the facts laid out before them, the clear involvement of senior administration lawyers in the decision-making process could give rise to investigation for accessory involvement in war crimes.

This brings me to my conclusions. In our system of government—in Britain, in the United States, in constitutional democracies around the world—lawyers are guardians of legality. Many of us act for governments, and I do so on a daily basis. Our clients may ask us to advise or sign off on things that may raise concerns. We must ask ourselves, what are the limits of what we can do? Our responsibility is not only to our client. It extends beyond that, to the system of justice and to the rule of law that underpins our system. That is who we are.

If we cross a line, if we rubber stamp a policy that has already been predetermined, or if we act on an invitation to give advice where it is known or likely that we will merely provide the advice our client wants, then we risk crossing the line that separates good advice from bad advice, bad advice from unprofessional advice, and unprofessional advice from advice that can allow a crime to occur.

On the basis of the materials that have already emerged, including those which have emerged in numerous congressional hearings over the course of this year, it seems to me there are strong grounds for further investigation. This is not because the actions of the lawyers discussed in *Torture Team* are in any way analogous to those associated with the defendant lawyers in the Justice Cases or in the film *Judgment at Nuremberg*, but rather because their actions associated them very directly with acts that amount to international crimes. These acts are in violation of the norms of international law that were put in place in the aftermath of the Second World War, and put in place largely at the insistence of this country which has led the world in a rule of law ethic that has a vital importance on that issue. These are norms that provided minimum rights for all detainees and admitted of no possible exceptions.

Even if those most responsible for these actions are placed at the political level, even at the very highest levels of the Administration, their lawyers were enablers. *The lawyers* furnished the legal weapons that allowed the acts to occur. But for the lawyers, the fifteen techniques used on Detainee 063 would never have seen the light of day.

What needs to happen now? That is a question that has been put to me on many occasions in the days since Senator Barack Obama won the recent presidential election. President Bush leaves the Obama Administration with some difficult decisions: looking back, how to address

a legacy of abuse, illegality, and global disrepute; and looking forward, what to do with present and future detainees. In my view, President Obama needs to say five things on day one, to America and to his global audience.

First, he should state that he will not use the phrase “war on terror”—words that tend to legitimize the struggle of those who seek to harm us. Second, he should announce that the U.S. will, as a matter of legal obligation, no longer use torture or cruel, inhuman, and degrading treatment, as defined by international law. Third, he should declare the closure of Guantánamo, with all detainees gone and the interrogation facility permanently shuttered by July 1, 2009. Of the 250 or so detainees who currently remain, the great majority are not thought to pose any real threat to the U.S. or anyone else. They should be returned to their home countries, with effective guarantees against ill-treatment.

Fourth, President Obama must address what will happen to the fifty or so detainees who will remain in the United States, some of whom are now subject to proceedings before military commissions under the Military Commissions Act of 2006. He should announce the immediate suspension of all such proceedings and the repeal of that Act, a stain on America’s reputation for justice and the honor of its military. Any detainee accused of committing crimes against the U.S. should be tried before courts established in accordance with Article III of the U.S. Constitution or, as provided for in the Uniform Code of Military Justice, by courts-martial or military commission.

Fifth, he should announce that the U.S. will honor and underscore its historic commitment to international efforts against impunity, so that past detainee abuses will not be forgotten. His Administration should establish a comprehensive investigation of alleged post-9/11 detainee abuse, to be undertaken by an independent, expert commission, with a mandate to establish the facts as to how the Administration embraced cruelty, and to make recommendations by the end of 2009.

With these five steps, Obama can go far in restoring the global reputation of the United States and its ability to lead and to inspire. In so doing, he might also recall the words of Spencer Tracy in the film *Judgment at Nuremberg*. “How easily it can happen,” said Judge Dan Haywood, foreseeing a time when even in the United States there would be those who would speak of the protection of country—of survival—to justify using the means of the enemy to rest survival upon what is expedient.<sup>46</sup>

Thank you very much for inviting me to join you today. I am deeply grateful to have had the opportunity and the privilege to speak

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46. JUDGMENT AT NUREMBERG (MGM 1961).

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with you.

## II. A NEW ADMINISTRATION: THE WAY FORWARD<sup>47</sup>

PROFESSOR SANDS: I just want to say by way of introduction that this is an important topic—not just for the United States, but for the rest of the world—because there is no other country in the world that is able to provide the leadership that might strengthen a rule-based system internationally. There has been so much unhappiness about what has happened over the past few years, largely because the diminution of the United States. In many countries people are ready to cut slack, to re-engage with the United States, and to allow the United States to resume the leading place that it has occupied in the period after the Second World War.

The system of rules that was put in place after the Second World War is largely a system of rules that reflects the values of the United States, and it is a system of rules that has served the United States well. Without those rules, the United States would not be where it is today; whether it is the humanitarian rules reflected in Geneva, the trade rules reflected now in the World Trade Organization, the intellectual property rules, or the foreign investment protection rules. Those rules have all contributed. My bet is that twenty years from now, the United States will have re-engaged very firmly, if only because it will have recognized that it needs a rules-based system to ensure that the new powers that are emerging—the Chinas of the world, the Indias of the world, the Brazils of the world—play within a level playing field.

What does the United States need to do? Let me identify three things. First, it has been said before: The so-called “global war on terror” is really a misnomer. It is not only misguided, but it has also been catastrophic. Why has it been catastrophic? The British came over on September 12th and told the Administration not to elevate the status of the people we are struggling to contain. By calling it a “global war on terror,” you transform individuals from criminals into warriors. And by making them into warriors, you legitimize their struggle in the eyes of a great number of people. I have testified on this now several times: Please stop using the words “global war on terror.”

The United States needs to re-engage strongly in what no country

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47. The following has been transcribed from Professor Sands' presentation on November 14, 2008, during a question and answer session at “The Rule of Law and the Global War on Terrorism: Detainees, Interrogations, and Military Commissions Symposium,” at the Washburn University School of Law. Professor Sands was part of a panel presentation which included panelists: Mary Ellen O’Connell, Robert and Marion Short Professor of Law, University of Notre Dame Law School; David E. Graham, Colonel (ret.), Executive Director, The Judge Advocate General’s Legal Center and School, U.S. Army; and as moderator, Thomas J. Romig, Dean and Professor of Law, Washburn University School of Law.

has been better at doing: emphasizing the rule of law and the dignity of every human person. That is what the United States is about. I do not need to repeat everything that has been said on how that is done. There are many ways to do that, irrespective of the political direction. I do not think it is a left/right issue, or Republican/Democrat issue, and many of the people I describe in the book have rather different political views from my own. I think they have achieved a certain heroic status. It is basically about values: who we are, why we do what we do, what inspires us. And the rest of the world, I think, is passionately ready to receive that message and to reengage.

Another thing the new president needs to do is say, no torture, no cruel and inhuman or degrading treatment under any circumstances. It is not who we are. That can be done, I think, very easily. It must go beyond what has already been done. There is no question that torture does not happen formally, certainly in the U.S. military, but the restriction needs to be extended to the CIA and to all other actors.

In relation to truth commissions: I have discussed this at length; in fact I was in Washington this week. I have had two meetings and dinner with the Chair of the House Judiciary Committee to discuss what is on his mind, what is on the mind of the Senate Judiciary Committee, what is on the mind of the Obama transition team, and what needs to be done. I think there is now an emerging consensus.

It is not about engaging in a witch hunt. It is not about committing to investigations or prosecution, although that may be something that comes later. What needs to be done now is the country needs to be able to move on. In order to be able to move on, it needs to come to terms with what has happened. That is best achieved, in my view, with some form of bipartisan committee chaired by people of unimpeachable authority who are able to establish the facts and who are given subpoena power to obtain everything that they need, and perhaps have the recommendation to go very far in terms of what happens next.

I think there is a growing consensus that this is something that can be done. I think we can all imagine individuals with unimpeachable characteristics, whether Democrat, Republican, or independent, who are able to assist in doing that. I do not think that should be put off for a year. I think that needs to happen quickly. I think part of the reason it needs to happen quickly is the longer it is delayed, the less quickly we will all move on to deal with the things we really need to deal with, which is how we deal with these challenges that we face. That is the real issue. But I do not think we can fully deal with that without coming to terms with what has happened.

What are the greatest challenges facing the Obama Administration? You must have some sympathy—irrespective of your views—for a

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President-elect coming into a country with an economy that is in a shocking state, with a raft of entry materials dealing with foreign relations that is overwhelming. Yet I think it provides an opportunity to do some remarkable things.

Plainly, the economy is item number one to be sorted out to restore a sense of well-being, to restore a sense of confidence in the direction that the country is going, to make people feel that they have a strong future. But the real challenge the President faces—and this is something that everyone in this room has to face—is that it is a different world situation. The legacy that President Bush has bequeathed to this country is that he has brought forward the moment at which the United States' writ in the world is diminished. It is a different world. What the United States has learned in the past eight years is, in a sense, what Britain learned in the 1920s and in the 1930s. The United States cannot impose its will on the rest of the world, whether in relation to the economy, in relation to military matters, or in relation to the struggle against terrorism. It requires allies. It requires cooperation. Cooperation requires rules. And that is going to require a different mindset.

It needs a president who can tell the people of this country, across the spectrum, that the United States is not able to impose the kind of changes on the world that it may want to impose—at least not on its own. I think that, in a sense, this is a big challenge, because people in this country have gotten used to being told that they are the best, they are the strongest, they are the most powerful economically, they are the most powerful militarily. Those days are over. It is a different world now. Other countries are coming up, and change requires cooperation. What the leadership of the United States can provide, like no other country, is a leadership by inspiration, by authority, by ideas, by creativity, by innovation, and by commitment to the values that have made it as strong and as powerful and as great as it has been in the last fifty years—and that is by a commitment to the rule of law. But that is a big challenge for the next President of the United States.

AUDIENCE MEMBER: As far as the issue of our adherence and sometimes reluctance to embrace international law, it is my contention that our primary founding document, as much as I love the Constitution and love interpreting the Constitution, is not the Constitution, but the Declaration of Independence. And in the Declaration of Independence we have the expression of certain inalienable rights that are endowed by a creator and are our natural rights, which really form the basis for customary international humanitarian law. It is expressed in that document as, of course, “life, liberty and the pursuit of happiness.” But that document kind of lays out a notion about international law and when certain people might have to rise up against a tyrannical form of gov-

ernment. I think that document contains perhaps one of the clearest articulations of an originalist's notion that we embrace international law and embraced a law of nations before it existed in a real sense. I am wondering if you think that this is perhaps something that we ought to be re-embracing as a driving force behind us saying, yes, we are committed to international law and international law norms such as customary international humanitarian law.

PROFESSOR SANDS: I am not an expert on the U.S. Constitution, but I want to address two points from a slightly different perspective. First, I see these writings and these legal theories as the last gasp of a dying empire. It is basically the same position that was put forth in the United Kingdom in the 1920s and the 1930s; this group of scholars and politicians who just tried to hold back the inevitable floodwaters of what was happening.

And the whole of the way of understanding this stream of scholarship is what in the United Kingdom we call the output of little Englanders; that we are somehow an island. We can somehow hold back all of this dreadful foreign stuff that is coming. But the reality is there is no country in the world that takes its international obligations more seriously than the United States or that complies with its obligations more fully and effectively than the United States. The idea that somehow the United States is a lawless country that does not engage with international rules is not accurate, at least in the round.

What has happened is that a distinction has been drawn by the Bush Administration between good international law and bad international law. The bad international law is that law which limits the ability to interrogate people in certain ways. The good international law is all the economic stuff. You find that articulated most clearly in a recent judgment of the United States Supreme Court, in the case of *Medellín v. Texas*,<sup>48</sup> which basically says that the Court will not listen to the International Court of Justice.<sup>49</sup>

I think the challenge for the Obama Administration, and for future administrations, is to persuade the American people that they have an interest in a safe, effective, and functioning international. That does not mean blindly ratifying every convention. I think whether the United States wants to ratify the International Criminal Court statute is a matter for the United States. But what it means is, once you ratify the Geneva Conventions, the Torture Convention, and other instruments, you are bound. You are free to leave, but so long as you are a party, you are bound.

AUDIENCE MEMBER: I would ask the panel if you feel that

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48. 128 S. Ct. 1346 (2008).

49. *Id.* at 1360-61.

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there is ever a time—and I am speaking of situations where the very continued existence of our country is at stake—when it would be appropriate to stray from international law; and if so, where is that cut off; what is the criteria?

PROFESSOR SANDS: I was involved in a case a few years back, in the International Court of Justice, which raised a less than ideal question: Are there any circumstances in which the legality of the use of nuclear weapons is lawful? And with such a question you got, not surprisingly, a less than ideal answer. It concluded its advisory opinion with a view that there may be circumstances, not entirely predictable, in which the very survival of a state is at stake, such as to justify the unthinkable. Not, I think, in legal terms, a particularly helpful approach to the analysis. Your question reminds me of the argument in relation to that situation.

To bring it down to something more direct, I think what you are getting at—and it is an important question—is the ticking time bomb theory. Are there circumstances in which we could justify the use of torture, let us say, or other coercive forms of interrogation, to obtain information in order to protect those we love who may be damaged on an unmentionably wide scale. I have thought a lot about that question.

I think the conclusion that I have come to, in relation to that narrow refinement of your question, is that there are no circumstances in which the use of torture is justified as a matter of law. There may be circumstances in which an individual is willing to take on the responsibility of engaging in certain acts, but should do so in the knowledge that the full weight of the law may come down on him or her in the event that he ever faces some sort of legal process.

It comes back to something I said earlier: In such circumstances, the individual has to bear that responsibility, and ultimately it becomes a question about sentencing. But more broadly, I do not think it is sensible or prudent to proceed on the basis that there are gaps in the law. It may be that the Geneva Conventions, or other norms of international law, are inadequate to deal with certain situations that we face. What you do in those circumstances is not what Alberto Gonzales did. You do not say that those words are quaint, so we are just going to get rid of them. What you do is you get together with your allies—and I think you would be pushing an open door—and say, “Right, this is a new situation that we face. Let us move collectively to put in place appropriate new rules.” But a law-based system tells you that until those new rules are put in place, you are stuck with the old rules. If you begin to dramatically change the old rules, you unilaterally get yourself into great difficulty.

AUDIENCE MEMBER: This last discussion ended with how the

international community and international law has developed over the years. I think, over the course of the twentieth century, it really looks like international law was very reactive, if you look at the developments from post-World War I, post-World War II, throughout the Cold War, throughout what happened after the Cold War with the International Criminal Tribunal for the former Yugoslavia, and the Rwanda issues. Moving from that to Dean Romig's question regarding how the administration should address it from here on out. It has been widely discussed, and is understood at this point, that some rollbacks need to be made; some changes need to be made to regain our place in the world as it was pre-9/11 and how the world viewed us.

My question then is two parts: One, what can this new Administration do to address the problems that made the United States a target on September 10th; and two, how can the international community and international law be changed to protect the United States from non-state actors that target the United States because of its unique position in the world? What can the international community and this Administration do to address those very broad issues?

PROFESSOR SANDS: To coin a phrase: tough on crime, tough on the causes of crime. Coming to your modest question, what does the U.S. do? I think there are two issues that have made the U.S. a target. The first is dependence on oil, and the second is the Israeli-Palestinian issue.

If President Obama really wants to address these issues, he needs to recognize that, in large part, U.S. foreign policy and military policy over the last three decades, since the early 1970s, has been driven by an excessive dependence on oil.<sup>50</sup> He should do the unthinkable. He should basically say that the U.S. will, within 10 years, cut its dependence on foreign oil, totally. Ten years from now the U.S. will not need to import a single barrel of oil from anywhere else in the world.

If that were to be achieved through the type of innovation and technological creativity that this country is well able to do, you would quickly and completely transform the circumstances. Think out of the box. Imagine what that means in terms of the United States' desire to impose a degree of stability in the Gulf. It becomes far less significant if you can find ways of meeting domestic energy needs, whether it is through nuclear energy, through renewables, or through other alternative sources of energy. It could be transformative. That sort of thinking leads you, essentially, to deal with the unthinkable. Imagine, for example, a United States without a single major carmaker. The lobby that

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50. See, e.g., *Obama Announces Plan to Fully Close the Enron Loophole, Crack Down on Excessive Energy Speculation*, June 22, 2008, [http://www.barackobama.com/2008/06/22/obama\\_announces\\_plan\\_to\\_fully.php](http://www.barackobama.com/2008/06/22/obama_announces_plan_to_fully.php).

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promotes foreign oil would soon collapse because the two are closely connected.

I am not saying that that is what should be done. But if you really want to address what is at the heart of the problem, the problem of fundamentalism and of terrorism is reactive to other concerns. It is about presence, it is about imposition of values, and it is about other things.

In relation to Israel and Palestine, it is clear what needs to be done. Although it is not a politically correct thing to say in this country, it is a politically correct thing to say in Britain, which is a close friend of Israel: Israel has to go back to the 1967 borders. It has to be given an absolute guarantee of security. But the situation of allowing any particular country to exceed its rights under international law is intolerable. I think if President Obama is brave, which I suspect on this issue will be difficult, he will say to the Israelis that the U.S. will continue to support them, and will strengthen its support for them, but will only do so if the Israelis go back to the 1967 borders. That would break the deadlock in those negotiations. I think in that scenario, with the strong push for an Israeli/Palestinian peace accord and with a Syria that would be willing to engage on this issue, as Jordan did and as Egypt did, I think you would transform the political process. Let us not forget those peace accords have now been maintained in the case of Egypt for nearly three decades, and in the case of Jordan for more than fifteen years. It requires some bright new thinking. But if you really want to address these issues, it is not going to be just about promoting the rule of law or returning to a system in which you do not torture. It is about addressing what are the root causes of the real challenges the United States faces. It is only once those issues are addressed that one gets to term on the resulting issues.

The experience of Britain in relation to the Irish Republican Army (IRA) teaches some powerful lessons. In 1970 and 1971, Britain moved to abuse and internment: Bloody Sunday.<sup>51</sup> On many people's accounts, that extended the conflict by between ten and fifteen years. It was only when they began to look at what the underlying causes of the conflict were—discrimination against the Catholic community in Northern Ireland and related issues—and they genuinely began to address those issues, that the political transformation took place.

Ultimately, it means, as happened with the IRA, that you are going to have to talk to those who seek to cause you harm. Let us call a spade a spade. We are going to have to talk to the terrorists. That is not a happy thing to say. But they exist, they are real, they are there, they

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51. "Bloody Sunday" refers to an incident in Derry, Northern Ireland on January 30, 1972, in which twenty-seven civil rights protesters were shot by members of the First Battalion of the British Parachute Regiment during a Northern Ireland Civil Rights Association march. See Remembering Bloody Sunday, <http://larkspirit.com/bloody sunday/> (last visited Jan. 18, 2009).

have demands.

Just as Britain said publicly: We will never engage with the IRA; we will never talk with the IRA.<sup>52</sup> Of course, what we learned with the passage of time was that at crucial moments there was, indeed, contact through informal channels. It does not mean a Prime Minister sitting down with Gerry Adams.<sup>53</sup> It does not mean a President Obama or a President Bush sitting down with someone on behalf of the terrorists. There are ways of having these conversations. It would not surprise me in the least if they are already underway.

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52. See Peter Taylor, *If We Talked to the IRA, Why Not Al-Qaeda?*, <http://www.telegraph.co.uk/comment/3631925/If-we-talked-to-the-IRA%2C-why-not-al-Qaeda.html> (last visited Jan. 18, 2009).

53. Gerry Adams is an Irish Republican politician and the president of Sinn Fein, the second largest political party in Northern Ireland and the fourth largest party in the Republic of Ireland. He is recognized as having played an important role in helping to end the fighting in Northern Ireland. See Profile: Gerry Adams, [http://news.bbc.co.uk/1/hi/northern\\_ireland/1287262.stm](http://news.bbc.co.uk/1/hi/northern_ireland/1287262.stm) (last visited Jan. 18, 2009).