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Will Bush be tried for War Crimes: The Green Light

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In-depth Report: Prosecute Bush/Cheney

The abuse, rising to the level of torture, of those captured and detained in the war on terror is a defining feature of the presidency of George W. Bush. Its military beginnings, however, lie not in Abu Ghraib, as is commonly thought, or in the "rendition" of prisoners to other countries for questioning, but in the treatment of the very first prisoners at Guantánamo. Starting in late 2002 a detainee bearing the number 063 was tortured over a period of more than seven weeks. In his story lies the answer to a crucial question: How was the decision made to let the U.S. military start using coercive interrogations at Guantánamo?

The Bush administration has always taken refuge behind a "trickle up" explanation: that is, the decision was generated by military commanders and interrogators on the ground. This explanation is false. The origins lie in actions taken at the very highest levels of the administration?by some of the most senior perssonal advisers to the president, the vice president, and the secretary of defense. At the heart of the matter stand several political appointees?lawyerss?who, it can be argued, broke their ethical codes of conduct and took themselves into a zone of international criminality, where formal investigation is now a very real option. This is the story of how the torture at Guantánamo began, and how it spread.

"Crying. Angry. Yelled for Allah."

One day last summer I sat in a garden in London with Dr. Abigail Seltzer, a psychiatrist who specializes in trauma victims. She divides her time between Great Britain's National Health Service, where she works extensively with asylum seekers and other refugees, and the Medical Foundation for the Care of Victims of Torture. It was uncharacteristically warm, and we took refuge in the shade of some birches. On a table before us were three documents. The first was a November 2002 "action memo" written by William J. (Jim) Haynes II, the general counsel of the U.S. Department of Defense, to his boss, Donald Rumsfeld; the document is sometimes referred to as the Haynes Memo. Haynes recommended that Rumsfeld give "blanket approval" to 15 out of 18 proposed techniques of aggressive interrogation. Rumsfeld duly did so, on December 2, 2002, signing his name firmly next to the word "Approved." Under his signature he also scrawled a few words that refer to the length of time a detainee can be forced to stand during interrogation: "I stand for 8?10 hours a dayy. Why is standing limited to 4 hours?"

The second document on the table listed the 18 proposed techniques of interrogation, all of which went against long-standing U.S. military practice as presented in the Army Field Manual. The 15 approved techniques included certain forms of physical contact and also techniques intended to humiliate and to impose sensory deprivation. They permitted the use of stress positions, isolation, hooding, 20-hour interrogations, and nudity. Haynes and Rumsfeld explicitly did not rule out the future use of three other techniques, one of which was waterboarding, the application of a wet towel and water to induce the perception of

drowning.

The third document was an internal log that detailed the interrogation at Guantánamo of a man identified only as Detainee 063, whom we now know to be Mohammed al-Qahtani, allegedly a member of the 9/11 conspiracy and the so-called 20th hijacker. According to this log, the interrogation commenced on November 23, 2002, and continued until well into January. The techniques described by the log as having been used in the interrogation of Detainee 063 include all 15 approved by Rumsfeld.

“Was the detainee abused? Was he tortured?,” I asked Seltzer. Cruelty, humiliation, and the use of torture on detainees have long been prohibited by international law, including the Geneva Conventions and their Common Article 3. This total ban was reinforced in 1984 with the adoption of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which criminalizes torture and complicity in torture.

A careful and fastidious practitioner, Seltzer declined to give a straight yes or no answer. In her view the definition of torture is essentially a legal matter, which will turn on a particular set of facts. She explained that there is no such thing as a medical definition of torture, and that a doctor must look for pathology, the abnormal functioning of the body or the mind. We reviewed the definition of torture, as set out in the 1984 Convention, which is binding on 145 countries, including the United States. Torture includes “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person.”

Seltzer had gone through the interrogation log, making notations. She used four different colors to highlight moments that struck her as noteworthy, and the grim document now looked bizarrely festive. Yellow indicated episodes of abusive treatment. Pink showed where the detainee’s rights were respected?wheree he was fed or given a break, or allowed to sleep. Green indicated the many instances of medical involvement, where al-Qahtani was given an enema or was hospitalized suffering from hypothermia. Finally, blue identified what Seltzer termed “expressions of distress.”

We talked about the methods of interrogation. “In terms of their effects,” she said, “I suspect that the individual techniques are less important than the fact that they were used over an extended period of time, and that several appear to be used together: in other words, the cumulative effect.” Detainee 063 was subjected to systematic sleep deprivation. He was shackled and cuffed; at times, head restraints were used. He was compelled to listen to threats to his family. The interrogation leveraged his sensitivities as a Muslim: he was shown pictures of scantily clad models, was touched by a female interrogator, was made to stand naked, and was forcibly shaved. He was denied the right to pray. A psychiatrist who witnessed the interrogation of Detainee 063 reported the use of dogs, intended to intimidate “by getting the dogs close to him and then having the dogs bark or act aggressively on command.” The temperature was changed, and 063 was subjected to extreme cold. Intravenous tubes were forced into his body, to provide nourishment when he would not eat or drink.

We went through the marked-up document slowly, pausing at each blue mark. Detainee 063’s reactions were recorded with regularity. I’ll string some of them together to convey the impression:

Detainee began to cry. Visibly shaken. Very emotional. Detainee cried. Disturbed. Detainee began to cry. Detainee bit the IV tube completely in two. Started moaning. Uncomfortable.

Moaning. Began crying hard spontaneously. Crying and praying. Very agitated. Yelled. Agitated and violent. Detainee spat. Detainee proclaimed his innocence. Whining. Dizzy. Forgetting things. Angry. Upset. Yelled for Allah.

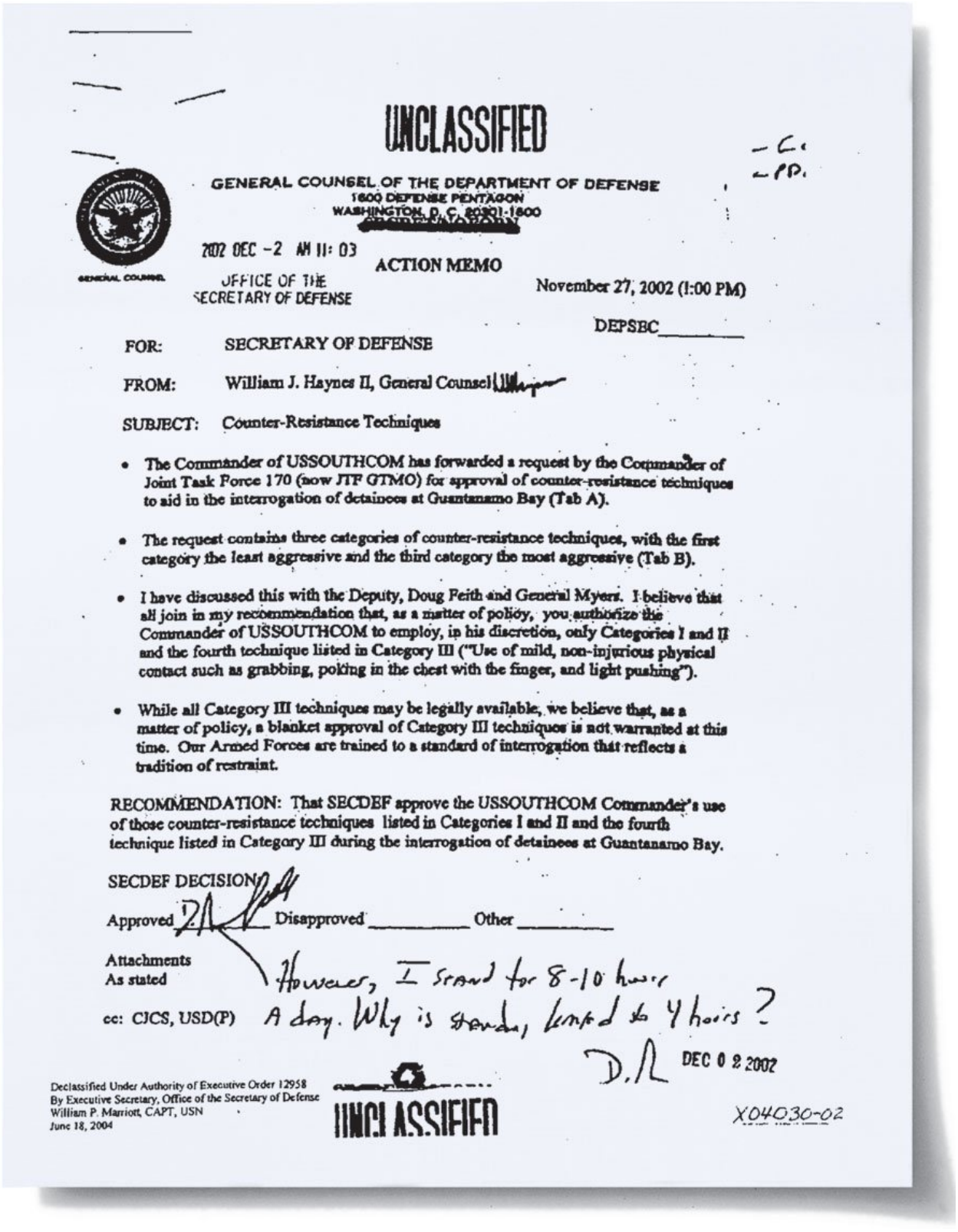
The blue highlights went on and on.

Urinated on himself. Began to cry. Asked God for forgiveness. Cried. Cried. Became violent. Began to cry. Broke down and cried. Began to pray and openly cried. Cried out to Allah several times. Trembled uncontrollably.

Was Detainee 063 subjected to severe mental pain or suffering? Torture is not a medical concept, Seltzer reminded me. “That said,” she went on, “over the period of 54 days there is enough evidence of distress to indicate that it would be very surprising indeed if it had not reached the threshold of severe mental pain.” She thought about the matter a little more and then presented it a different way: “If you put 12 clinicians in a room and asked them about this interrogation log, you might get different views about the effect and long-term consequences of these interrogation techniques. But I doubt that any one of them would claim that this individual had not suffered severe mental distress at the time of his interrogation, and possibly also severe physical distress.”

The Authorized Version

The story of the Bush administration’s descent down this path began to emerge on June 22, 2004. The administration was struggling to respond to the Abu Ghraib scandal, which had broken a couple of months earlier with the broadcast of photographs that revealed sickening abuse at the prison outside Baghdad. The big legal guns were wheeled out. Alberto Gonzales and Jim Haynes stepped into a conference room at the Eisenhower Executive Office Building, next to the White House. Gonzales was President Bush’s White House counsel and would eventually become attorney general. Haynes, as Rumsfeld’s general counsel, was the most senior lawyer in the Pentagon, a position he would retain until a month ago, when he resigned?“returning to private liife,” as a press release stated. Gonzales and Haynes were joined by a third lawyer, Daniel Dell’Orto, a career official at the Pentagon. Their task was to steady the beat and make it clear that the events at Abu Ghraib were the actions of a few bad eggs and had nothing to do with the broader policies of the administration.



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GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-1600

2002 DEC -2 AM 11:03

OFFICE OF THE SECRETARY OF DEFENSE

ACTION MEMO

November 27, 2002 (1:00 PM)

DEPSEC_____

FOR: SECRETARY OF DEFENSE

FROM: William J. Haynes II, General Counsel

SUBJECT: Counter-Resistance Techniques

- The Commander of USSOUTHCOM has forwarded a request by the Commander of Joint Task Force 170 (now JTF GTMO) for approval of counter-resistance techniques to aid in the interrogation of detainees at Guantanamo Bay (Tab A).
- The request contains three categories of counter-resistance techniques, with the first category the least aggressive and the third category the most aggressive (Tab B).
- I have discussed this with the Deputy, Doug Feith and General Myers. 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").
- While all Category III techniques may be legally available, we believe that, as a matter of policy, a blanket approval of Category III techniques is not warranted at this time. Our Armed Forces are trained to a standard of interrogation that reflects a tradition of restraint.

RECOMMENDATION: That SECDEF approve the USSOUTHCOM Commander's use of those counter-resistance techniques listed in Categories I and II and the fourth technique listed in Category III during the interrogation of detainees at Guantanamo Bay.

SECDEF DECISION

Approved D.R. Disapproved _____ Other _____

Attachments
As stated

cc: CJCS, USD(P)

However, I stand for 8-10 hours a day. Why is standard limited to 4 hours?

D.R. DEC 0 2 2002

Declassified Under Authority of Executive Order 12958
By Executive Secretary, Office of the Secretary of Defense
William P. Marriott, CAPT, USN
June 18, 2004

UNCLASSIFIED

X04030-02

The famous Haynes Memo, recommending enhanced "counter-resistance" techniques, as signed and annotated with a jocular comment by Rumsfeld.

Gonzales and Haynes spoke from a carefully prepared script. They released a thick folder of documents, segmented by lawyerly tabs. These documents were being made public for the first time, a clear indication of the gravity of the political crisis. Among the documents were the Haynes Memo and the list of 18 techniques that Seltzer and I would later review. The log detailing the interrogation of Detainee 063 was not released; it would be leaked to the press two years later.

For two hours Gonzales and Haynes laid out the administration's narrative. Al-Qaeda was a different kind of enemy, deadly and shadowy. It targeted civilians and didn't follow the Geneva Conventions or any other international rules. Nevertheless, the officials explained, the administration had acted judiciously, even as it moved away from a purely law-enforcement strategy to one that marshaled "all elements of national power." The authorized version had four basic parts.

First, the administration had moved reasonably?with care and deliberation, and always within the limits of the law. In February 2002 the president had determined, in accordance with established legal principles, that none of the detainees at Guantánamo could rely on any of the protections granted by Geneva, even Common Article 3. This presidential order was the lead document, at Tab A. The administration's point was this: agree with it or not, the decision on Geneva concealed no hidden agenda; rather, it simply reflected a clear-eyed reading of the actual provisions. The administration, in other words, was doing nothing more than trying to proceed by the book. The law was the law.

Relating to this was a second document, one that had been the subject of media speculation for some weeks. The authors of this document, a legal opinion dated August 1, 2002, were two lawyers in the Justice Department's Office of Legal Counsel: Jay Bybee, who is now a federal judge, and John Yoo, who now teaches law at Berkeley. Later it would become known that they were assisted in the drafting by David Addington, then the vice president's lawyer and now his chief of staff. The Yoo-Bybee Memo declared that physical torture occurred only when the pain was "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death," and that mental torture required "suffering not just at the moment of infliction but ? lasting psychological harm.." Interrogations that did not reach these thresholds?far less stringennt than those set by international law?were allowed. Although findings that issue from the Office of Legal Counsel at Justice typically carry great weight, at the press conference Gonzales went out of his way to decouple the Yoo-Bybee Memo from anything that might have taken place at Guantánamo. The two lawyers had been asked, in effect, to stargaze, he said. Their memo simply explored "the limits of the legal landscape." It included "irrelevant and unnecessary" discussion and never made it into the hands of the president or of soldiers in the field. The memo did not, said Gonzales, "reflect the policies that the administration ultimately adopted."

The second element of the administration's narrative dealt with the specific source of the new interrogation techniques. Where had the initiative come from? The administration pointed to the military commander at Guantánamo, Major General Michael E. Dunlavey. Haynes would later describe him to the Senate Judiciary Committee, during his failed confirmation hearings for a judgeship in 2006, as "an aggressive major general." The techniques were not imposed or encouraged by Washington, which had merely reacted to a request from below. They came as a result of the identification locally of "key people" at Guantánamo, including "a guy named al-Qahtani." This man, Detainee 063, had proved able to resist the traditional non-coercive techniques of interrogation spelled out in the Army Field Manual, and as the first anniversary of 9/11 approached, an intelligence spike pointed to the possibility of new attacks. "And so it is concluded at Guantánamo," Dell'Orto emphasized, reconstructing the event, "that it may be time to inquire as to whether there may be more flexibility in the type of techniques we use on him." A request was sent from Guantánamo on October 11, 2002, to the head of the U.S. Southern Command (SouthCom), General James T. Hill. Hill in turn forwarded Dunlavey's request to General Richard Myers,

the chairman of the Joint Chiefs of Staff. Ultimately, Rumsfeld approved “all but three of the requested techniques.” The official version was clear: Haynes and Rumsfeld were just processing a request coming up the chain from Guantánamo.

The third element of the administration’s account concerned the legal justification for the new interrogation techniques. This, too, the administration said, had originated in Guantánamo. It was not the result of legal positions taken by politically appointed lawyers in the upper echelons of the administration, and certainly not the Justice Department. The relevant document, also dated October 11, was in the bundle released by Gonzales, a legal memo prepared by Lieutenant Colonel Diane Beaver, the staff judge advocate at Guantánamo. That document?describedd pointedly by Dell’Orto as a “multi-page, single-spaced legal review”?sought to provide legal authority for all the interrrogation techniques. No other legal memo was cited as bearing on aggressive interrogations. The finger of responsibility was intended to point at Diane Beaver.

The fourth and final element of the administration’s official narrative was to make clear that decisions relating to Guantánamo had no bearing on events at Abu Ghraib and elsewhere. Gonzales wanted to “set the record straight” about this. The administration’s actions were inconsistent with torture. The abuses at Abu Ghraib were unauthorized and unconnected to the administration’s policies.

Gonzales and Haynes laid out their case with considerable care. The only flaw was that every element of the argument contained untruths.

The real story, pieced together from many hours of interviews with most of the people involved in the decisions about interrogation, goes something like this: The Geneva decision was not a case of following the logic of the law but rather was designed to give effect to a prior decision to take the gloves off and allow coercive interrogation; it deliberately created a legal black hole into which the detainees were meant to fall. The new interrogation techniques did not arise spontaneously from the field but came about as a direct result of intense pressure and input from Rumsfeld’s office. The Yoo-Bybee Memo was not simply some theoretical document, an academic exercise in blue-sky hypothesizing, but rather played a crucial role in giving those at the top the confidence to put pressure on those at the bottom. And the practices employed at Guantánamo led to abuses at Abu Ghraib.

The fingerprints of the most senior lawyers in the administration were all over the design and implementation of the abusive interrogation policies. Addington, Bybee, Gonzales, Haynes, and Yoo became, in effect, a torture team of lawyers, freeing the administration from the constraints of all international rules prohibiting abuse.

Killing Geneva In the early days of 2002, as the number of al-Qaeda and Taliban fighters captured in Afghanistan began to swell, the No. 3 official at the Pentagon was Douglas J. Feith. As undersecretary of defense for policy, he stood directly below Paul Wolfowitz and Donald Rumsfeld. Feith’s job was to provide advice across a wide range of issues, and the issues came to include advice on the Geneva Conventions and the conduct of military interrogations.

I sat down with Feith not long after he left the government. He was teaching at the school of foreign service at Georgetown University, occupying a small, eighth-floor office lined with books on international law. He greeted me with a smile, his impish face supporting a mop of graying hair that seemed somehow at odds with his 54 years. Over the course of his career

Feith has elicited a range of reactions. General Tommy Franks, who led the invasion of Iraq, once called Feith “the fucking stupidest guy on the face of the earth.” Rumsfeld, in contrast, saw him as an “intellectual engine.” In manner he is the Energizer Bunny, making it hard to get a word in edgewise. After many false starts Feith provided an account of the president’s decision on Geneva, including his own contribution as one of its principal architects.

“This was something I played a major role in,” he began, in a tone of evident pride. With the war in Afghanistan under way, lawyers in Washington understood that they needed a uniform view on the constraints, if any, imposed by Geneva. Addington, Haynes, and Gonzales all objected to Geneva. Indeed, Haynes in December 2001 told the CentCom admiral in charge of detainees in Afghanistan “to ‘take the gloves off’ and ask whatever he wanted” in the questioning of John Walker Lindh. (Lindh, a young American who had become a Muslim and had recently been captured in northern Afghanistan, bore the designation Detainee 001.)

A month later, the administration was struggling to adopt a position. On January 9, John Yoo and Robert Delahunty, at the Justice Department, prepared an opinion for Haynes. They concluded that the president wasn’t bound by traditional international-law prohibitions. This encountered strong opposition from Colin Powell and his counsel, William H. Taft IV, at the State Department, as well as from the Tjags?the military lawyers in the office of the judge advocate general?who wanted to maintain a strong U.S. commitment to Geneva and the rules that were part of customary law. On January 25, Alberto Gonzales put his name to a memo to the president supporting Haynes and Rumsfeld over Powell and Taft. This memo, which is believed to have been written by Addington, presented a “new paradigm” and described Geneva’s “strict limitations on questioning of enemy prisoners” as “obsolete.” Addington was particularly distrustful of the military lawyers. “Don’t bring the Tjags into the process?they aren’t reliable,” he was once overheard to say.

Feith took up the story. He had gone to see Rumsfeld about the issue, accompanied by Myers. As they reached Rumsfeld’s office, Myers turned to Feith and said, “We have to support the Geneva Conventions If Rumsfeld doesn’t go along with this, I’m going to contradict them in front of the president.” Feith was surprised by this uncharacteristically robust statement, and by the way Myers referred to the secretary bluntly as “Rumsfeld.”

Douglas Feith had a long-standing intellectual interest in Geneva, and for many years had opposed legal protections for terrorists under international law. He referred me to an article he had written in 1985, in The National Interest, setting out his basic view. Geneva provided incentives to play by the rules; those who chose not to follow the rules, he argued, shouldn’t be allowed to rely on them, or else the whole Geneva structure would collapse. The only way to protect Geneva, in other words, was sometimes to limit its scope. To uphold Geneva’s protections, you might have to cast them aside.

But that way of thinking didn’t square with the Geneva system itself, which was based on two principles: combatants who behaved according to its standards received P.O.W. status and special protections, and everyone else received the more limited but still significant protections of Common Article 3. Feith described how, as he and Myers spoke with Rumsfeld, he jumped protectively in front of the general. He reprised his “little speech” for me. “There is no country in the world that has a larger interest in promoting respect for the Geneva Conventions as law than the United States,” he told Rumsfeld, according to his own account, “and there is no institution in the U.S. government that has a stronger interest than the Pentagon.” So Geneva had to be followed? “Obeying the Geneva Conventions is not

optional," Feith replied. "The Geneva Convention is a treaty in force. It is as much part of the supreme law of the United States as a statute." Myers jumped in. "I agree completely with what Doug said and furthermore it is our military culture It's not even a matter of whether it is reciprocated?it's a matter of who we are."

Feith was animated as he relived this moment. I remained puzzled. How had the administration gone from a commitment to Geneva, as suggested by the meeting with Rumsfeld, to the president's declaration that none of the detainees had any rights under Geneva? It all turns on what you mean by "promoting respect" for Geneva, Feith explained. Geneva didn't apply at all to al-Qaeda fighters, because they weren't part of a state and therefore couldn't claim rights under a treaty that was binding only on states. Geneva did apply to the Taliban, but by Geneva's own terms Taliban fighters weren't entitled to P.O.W. status, because they hadn't worn uniforms or insignia. That would still leave the safety net provided by the rules reflected in Common Article 3? but detainees could not rely onn this either, on the theory that its provisions applied only to "armed conflict not of an international character," which the administration interpreted to mean civil war. This was new. In reaching this conclusion, the Bush administration simply abandoned all legal and customary precedent that regards Common Article 3 as a minimal bill of rights for everyone.

In the administration's account there was no connection between the decision on Geneva and the new interrogation rules later approved by Rumsfeld for Detainee 063; its position on Geneva was dictated purely by the law itself. I asked Feith, just to be clear: Didn't the administration's approach mean that Geneva's constraints on interrogation couldn't be invoked by anyone at Guantánamo? "Oh yes, sure," he shot back. Was that the intended result?, I asked. "Absolutely," he replied. I asked again: Under the Geneva Conventions, no one at Guantánamo was entitled to any protection? "That's the point," Feith reiterated. As he saw it, either you were a detainee to whom Geneva didn't apply or you were a detainee to whom Geneva applied but whose rights you couldn't invoke. What was the difference for the purpose of interrogation?, I asked. Feith answered with a certain satisfaction, "It turns out, none. But that's the point."

That indeed was the point. The principled legal arguments were a fig leaf. The real reason for the Geneva decision, as Feith now made explicit, was the desire to interrogate these detainees with as few constraints as possible. Feith thought he'd found a clever way to do this, which on the one hand upheld Geneva as a matter of law?the speech he made to Myers and Rumsfeld?and on the other pulled the rugg out from under it as a matter of reality. Feith's argument was so clever that Myers continued to believe Geneva's protections remained in force?he was "well and truly hoodwinked," one seasonned observer of military affairs later told me.

Feith's argument prevailed. On February 7, 2002, President Bush signed a memorandum that turned Guantánamo into a Geneva-free zone. As a matter of policy, the detainees would be handled humanely, but only to the extent appropriate and consistent with military necessity. "The president said 'humane treatment,'?" Feith told me, inflecting the term sourly, "and I thought that was O.K. Perfectly fine phrase that needs to be fleshed out, but it's a fine phrase?'humane treatment.'?" The Common Article 3 restrictions on torture or "outrages upon personal dignity" were gone.

"This year I was really a player," Feith said, thinking back on 2002 and relishing the memory. I asked him whether, in the end, he was at all concerned that the Geneva decision

might have diminished America's moral authority. He was not. "The problem with moral authority," he said, was "people who should know better, like yourself, siding with the assholes, to put it crudely."

"I Was on a Timeline" As the traditional constraints on aggressive interrogation were removed, Rumsfeld wanted the right man to take charge of Joint Task Force 170, which oversaw military interrogations at Guantánamo. Two weeks after the decision on Geneva he found that man in Michael Dunlavey. Dunlavey was a judge in the Court of Common Pleas in Erie, Pennsylvania, a Vietnam veteran, and a major general in the reserves with a strong background in intelligence.

Dunlavey met one-on-one with Rumsfeld at the end of February. They both liked what they saw. When I met Dunlavey, now back at his office in Erie, he described that initial meeting: "He evaluated me. He wanted to know who I was. He was very focused on the need to get intelligence. He wanted to make sure that the moment was not lost." Dunlavey was a strong and abrasive personality ("a tyrant," one former jag told me), but he was also a cautious man, alert to the nuances of instruction from above. Succinctly, Dunlavey described the mission Rumsfeld had given him. "He wanted me to 'maximize the intelligence production.' No one ever said to me, 'The gloves are off.' But I didn't need to talk about the Geneva Conventions. It was clear that they didn't apply." Rumsfeld told Dunlavey to report directly to him. To the suggestion that Dunlavey report to SouthCom, Dunlavey heard Rumsfeld say, "I don't care who he is under. He works for me."

He arrived at Guantánamo at the beginning of March. Planeloads of detainees were being delivered on a daily basis, though Dunlavey soon concluded that half of them had no intelligence value. He reported this to Rumsfeld, who referred the matter to Feith. Feith, Dunlavey said, resisted the idea of repatriating any detainees whatsoever. (Feith says he made a series of interagency proposals to repatriate detainees.)

Dunlavey described Feith to me as one of his main points of contact. Feith, for his part, had told me that he knew nothing about any specific interrogation issues until the Haynes Memo suddenly landed on his desk. But that couldn't be right?in the memo itself Haynes hhad written, "I have discussed this with the Deputy, Doug Feith and General Myers." I read the sentence aloud. Feith looked at me. His only response was to tell me that I had mispronounced his name. "It's Fythe," he said. "Not Faith."

In June, the focus settled on Detainee 063, Mohammed al-Qahtani, a Saudi national who had been refused entry to the United States just before 9/11 and was captured a few months later in Afghanistan. Dunlavey described to me the enormous pressure he came under?from Washington,, from the top?to find out what al-Qahtani knew. Thhe message, he said, was: "Are you doing everything humanly possible to get this information?" He received a famous Rumsfeld "snowflake," a memo designed to prod the recipient into action. "I've got a short fuse on this to get it up the chain," Dunlavey told me, "I was on a timeline." Dunlavey held eye contact for more than a comfortable moment. He said, "This guy may have been the key to the survival of the U.S."

The interrogation of al-Qahtani relied at first on long-established F.B.I. and military techniques, procedures sanctioned by the Field Manual and based largely on building rapport. This yielded nothing. On August 8, al-Qahtani was placed in an isolation facility to separate him from the general detainee population. Pressure from Washington continued to mount. How high up did it go?, I asked Dunlavey. "It must have been all the way to the

White House," he replied.

Meanwhile, unbeknownst to Dunlavey and the others at Guantánamo, interrogation issues had arisen in other quarters. In March 2002 a man named Abu Zubaydah, a high-ranking al-Qaeda official, was captured in Pakistan. C.I.A. director George Tenet wanted to interrogate him aggressively but worried about the risk of criminal prosecution. He had to await the completion of legal opinions by the Justice Department, a task that had been entrusted by Alberto Gonzales to Jay Bybee and John Yoo. "It took until August to get clear guidance on what Agency officers could legally do," Tenet later wrote. The "clear guidance" came on August 1, 2002, in memos written by Bybee and Yoo, with input from Addington. The first memo was addressed to Gonzales, redefining torture and abandoning the definition set by the 1984 torture convention. This was the Yoo-Bybee Memo made public by Gonzales nearly two years later, in the wake of Abu Ghraib. Nothing in the memo suggested that its use was limited to the C.I.A.; it referred broadly to "the conduct of interrogations outside of the United States." Gonzales would later contend that this policy memo did "not reflect the policies the administration ultimately adopted," but in fact it gave carte blanche to all the interrogation techniques later recommended by Haynes and approved by Rumsfeld. The second memo, requested by John Rizzo, a senior lawyer at the C.I.A., has never been made public. It spells out the specific techniques in detail. Dunlavey and his subordinates at Guantánamo never saw these memos and were not aware of their contents.

The lawyers in Washington were playing a double game. They wanted maximum pressure applied during interrogations, but didn't want to be seen as the ones applying it?they wanted distance and deniability. They also wanted legal cover for themselves. A key question is whether Haynes and Rumsfeld had knowledge of the content of these memos before they approved the new interrogation techniques for al-Qahtani. If they did, then the administration's official narrative?that the pressure for neew techniques, and the legal support for them, originated on the ground at Guantánamo, from the "aggressive major general" and his staff lawyer?becomes difficult to sustain. More crucially, that knowwledge is a link in the causal chain that connects the keyboards of Feith and Yoo to the interrogations of Guantánamo.

When did Haynes learn that the Justice Department had signed off on aggressive interrogation? All indications are that well before Haynes wrote his memo he knew what the Justice Department had advised the C.I.A. on interrogations and believed that he had legal cover to do what he wanted. Everyone in the upper echelons of the chain of decision-making that I spoke with, including Feith, General Myers, and General Tom Hill (the commander of SouthCom), confirmed to me that they believed at the time that Haynes had consulted Justice Department lawyers. Moreover, Haynes was a close friend of Bybee's. "Jim was tied at the hip with Jay Bybee," Thomas Romig, the army's former judge advocate general, told me. "He would quote him the whole time." Later, when asked during Senate hearings about his knowledge of the Yoo-Bybee Memo, Haynes would variously testify that he had not sought the memo, had not shaped its content, and did not possess a copy of it?but he carefully refrainedd from saying that he was unaware of its contents. Haynes, with whom I met on two occasions, will not speak on the record about this subject.

The Glassy-Eyed Men As the first anniversary of 9/11 approached, Joint Task Force 170 was on notice to deliver results. But the task force was not the only actor at Guantánamo. The C.I.A. had people there looking for recruits among the detainees. The Defense Intelligence Agency (D.I.A.) was interrogating detainees through its humint (human intelligence) Augmentation Teams. The F.B.I. was carrying out its own traditional non-aggressive

interrogations.

The source of the various new techniques has been the stuff of speculation. In the administration's official account, as noted, everything trickled up from the ground at Guantánamo. When I suggested to Mike Dunlavey that the administration's trickle-up line was counter-intuitive, he didn't disabuse me. "It's possible," he said, in a tone at once mischievous and unforthcoming, "that someone was sent to my task force and came up with these great ideas." One F.B.I. special agent remembers an occasion, before any new techniques had been officially sanctioned, when military interrogators set out to question al-Qahtani for 24 hours straight?employing a variation on a method that would later apppear in the Haynes Memo. When the agent objected, he said he was told that the plan had been approved by "the secretary," meaning Rumsfeld.

Diane Beaver, Dunlavey's staff judge advocate, was the lawyer who would later be asked to sign off on the new interrogation techniques. When the administration made public the list, it was Beaver's legal advice the administration invoked. Diane Beaver gave me the fullest account of the process by which the new interrogation techniques emerged. In our lengthy conversations, which began in the autumn of 2006, she seemed coiled up?mistreated, hung out to dry. Before becoming a military lawyer Beaver had been a military police officer; once, while stationed in Germany, she had visited the courtroom where the Nuremberg trials took place. She was working as a lawyer for the Pentagon when the hijacked airplane hit on 9/11, and decided to remain in the army to help as she could. That decision landed her in Guantánamo.

It was clear to me that Beaver believed Washington was directly involved in the interrogations. Her account confirmed what Dunlavey had intimated, and what others have told me?that Washington's views were being fed into the process by people physically present at Guantánamo. D.I.A. personnel were among them. Later allegations would suggest a role for three C.I.A. psychologists.

During September a series of brainstorming meetings were held at Guantánamo to discuss new techniques. Some of the meetings were led by Beaver. "I kept minutes. I got everyone together. I invited. I facilitated," she told me. The sessions included representatives of the D.I.A. and the C.I.A. Ideas came from all over. Some derived from personal training experiences, including a military program known as sere (Survival, Evasion, Resistance, and Escape), designed to help soldiers persevere in the event of capture. Had sere been, in effect, reverse-engineered to provide some of the 18 techniques? Both Dunlavey and Beaver told me that sere provided inspiration, contradicting the administration's denials that it had. Indeed, several Guantánamo personnel, including a psychologist and a psychiatrist, traveled to Fort Bragg, sere's home, for a briefing.

Ideas arose from other sources. The first year of Fox TV's dramatic series 24 came to a conclusion in spring 2002, and the second year of the series began that fall. An inescapable message of the program is that torture works. "We saw it on cable," Beaver recalled. "People had already seen the first series. It was hugely popular." Jack Bauer had many friends at Guantánamo, Beaver added. "He gave people lots of ideas."

The brainstorming meetings inspired animated discussion. "Who has the glassy eyes?," Beaver asked herself as she surveyed the men around the room, 30 or more of them. She was invariably the only woman present?as she saw it, keeping control of the boys. The younger men would get particularly agitated, excited even. "You could almost see their

dicks getting hard as they got new ideas," Beaver recalled, a wan smile flickering on her face. "And I said to myself, You know what? I don't have a dick to get hard?I can stay detached."

Not everyone at Guantánamo was enthusiastic. The F.B.I. and the Naval Criminal Investigative Service refused to be associated with aggressive interrogation. They opposed the techniques. One of the N.C.I.S. psychologists, Mike Gelles, knew about the brainstorming sessions but stayed away. He was dismissive of the administration's contention that the techniques trickled up on their own from Guantánamo. "That's not accurate," he said flatly. "This was not done by a bunch of people down in Gitmo?no way."

That view is buttressed by a key event that has received virtually no attention. On September 25, as the process of elaborating new interrogation techniques reached a critical point, a delegation of the administration's most senior lawyers arrived at Guantánamo. The group included the president's lawyer, Alberto Gonzales, who had by then received the Yoo-Bybee Memo; Vice President Cheney's lawyer, David Addington, who had contributed to the writing of that memo; the C.I.A.'s John Rizzo, who had asked for a Justice Department sign-off on individual techniques, including waterboarding, and received the second (and still secret) Yoo-Bybee Memo; and Jim Haynes, Rumsfeld's counsel. They were all well aware of al-Qahtani. "They wanted to know what we were doing to get to this guy," Dunlavey told me, "and Addington was interested in how we were managing it." I asked what they had to say. "They brought ideas with them which had been given from sources in D.C.," Dunlavey said. "They came down to observe and talk." Throughout this whole period, Dunlavey went on, Rumsfeld was "directly and regularly involved."

Beaver confirmed the account of the visit. Addington talked a great deal, and it was obvious to her that he was a "very powerful man" and "definitely the guy in charge," with a booming voice and confident style. Gonzales was quiet. Haynes, a friend and protégé of Addington's, seemed especially interested in the military commissions, which were to decide the fate of individual detainees. They met with the intelligence people and talked about new interrogation methods. They also witnessed some interrogations. Beaver spent time with the group. Talking about the episode even long afterward made her visibly anxious. Her hand tapped and she moved restlessly in her chair. She recalled the message they had received from the visitors: Do "whatever needed to be done." That was a green light from the very top?the lawyers for Bush, Cheney, Rumsfeld, and the C.I.A. The administration's version of events?that it became involved in the Guant?ánamo interrogations only in November, after receiving a list of techniques out of the blue from the "aggressive major general"?was demonsttrably false.

"A Dunk in the Water" Two weeks after this unpublicized visit the process of compiling the list of new techniques was completed. The list was set out in a three-page memorandum from Lieutenant Colonel Jerald Phifer, dated October 11 and addressed to Dunlavey.

The Phifer Memo identified the problem: "current guidelines" prohibited the use of "physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation." The prohibition dated back to 1863 and a general order issued by Abraham Lincoln.

The list of new interrogation techniques turned its back on this tradition. The 18 techniques were divided into three categories and came with only rudimentary guidance. No limits were placed on how many methods could be used at once, or for how many days in succession.

The detainee was to be provided with a chair. The environment should be generally comfortable. If the detainee was uncooperative, you went to Category I. This comprised two techniques, yelling and deception.

If Category I produced no results, then the military interrogator could move to Category II. Category II included 12 techniques aimed at humiliation and sensory deprivation: for instance, the use of stress positions, such as standing; isolation for up to 30 days; deprivation of light and sound; 20-hour interrogations; removal of religious items; removal of clothing; forcible grooming, such as the shaving of facial hair; and the use of individual phobias, such as the fear of dogs, to induce stress.

Finally came Category III, for the most exceptionally resistant. Category III included four techniques: the use of "mild, non-injurious physical contact," such as grabbing, poking, and light pushing; the use of scenarios designed to convince the detainee that death or severely painful consequences were imminent for him or his family; exposure to cold weather or water; and waterboarding. This last technique, which powerfully mimics the experience of drowning, was later described by Vice President Cheney as a "dunk in the water."

By the time the memo was completed al-Qahtani had already been separated from all other detainees for 64 days, in a cell that was "always flooded with light." An F.B.I. agent described his condition the following month, just as the new interrogation techniques were first being directed against him: the detainee, a 2004 memo stated, "was talking to non-existent people, reporting hearing voices, [and] crouching in a corner of the cell covered with a sheet for hours on end."

Ends and Means Diane Beaver was insistent that the decision to implement new interrogation techniques had to be properly written up and that it needed a paper trail leading to authorization from the top, not from "the dirt on the ground," as she self-deprecatingly described herself. "I just wasn't comfortable giving oral advice," she explained, as she had been requested to do. "I wanted to get something in writing. That was my game plan. I had four days. Dunlavey gave me just four days." She says she believed that senior lawyers in Washington would review her written advice and override it if necessary. It never occurred to her that on so important an issue she would be the one to provide the legal assessment on which the entire matter would appear to rest?that her word would be the last word. As far as she was concernned, getting the proposal "up the command" was victory enough. She didn't know that people much higher up had already made their decisions, had the security of secret legal cover from the Justice Department, and, although confident of their own legal protection, had no intention of soiling their hands by weighing in on the unpleasant details of interrogation.

Marooned in Guantánamo, Beaver had limited access to books and other documents, although there was Internet access to certain legal materials. She tried getting help from more experienced lawyers?at SouthCom, the Joiint Chiefs, the D.I.A., the jag School?but to no avail.

In the end she worked on her own, completing the task just before the Columbus Day weekend. Her memo was entitled "Legal Review of Aggressive Interrogation Techniques." The key fact was that none of the detainees were protected by Geneva, owing to Douglas Feith's handiwork and the president's decision in February. She also concluded that the torture convention and other international laws did not apply, conclusions that a person more fully schooled in the relevant law might well have questioned: "It was not my job to

second-guess the president," she told me. Beaver ignored customary international law altogether. All that was left was American law, which is what she turned to.

Given the circumstances in which she found herself, the memo has a certain desperate, heroic quality. She proceeded methodically through the 18 techniques, testing each against the standards set by U.S. law, including the Eighth Amendment to the Constitution (which prohibits "cruel and unusual punishment"), the federal torture statute, and the Uniform Code of Military Justice. The common theme was that the techniques were fine "so long as the force used could plausibly have been thought necessary in a particular situation to achieve a legitimate government objective, and it was applied in a good faith effort and not maliciously or sadistically for the very purpose of causing harm." That is to say, the techniques are legal if the motivation is pure. National security justifies anything.

Beaver did enter some important caveats. The interrogators had to be properly trained. Since the law required "examination of all facts under a totality of circumstances test," all proposed interrogations involving Category II and III methods had to "undergo a legal, medical, behavioral science, and intelligence review prior to their commencement." This suggested concerns about these new techniques, including whether they would be effective. But in the end she concluded, I "agree that the proposed strategies do not violate applicable federal law." The word "agree" stands out?shhe seems to be confirming a policy decision that she knows has already been made.

Time and distance do not improve the quality of the advice. I thought it was awful when I first read it, and awful when I reread it. Nevertheless, I was now aware of the circumstances in which Beaver had been asked to provide her advice. Refusal would have caused difficulty. It was also reasonable to expect a more senior review of her draft. Beaver struck me as honest, loyal, and decent. Personally, she was prepared to take a hard line on many detainees. She once described them to me as "psychopaths. Skinny, runty, dangerous, lying psychopaths." But there was a basic integrity to her approach. She could not have anticipated that there would be no other piece of written legal advice bearing on the Guantánamo interrogations. She could not have anticipated that she would be made the scapegoat.

Once, after returning to a job at the Pentagon, Beaver passed David Addington in a hallway?the first time she had seen him sinnce his visit to Guantánamo. He recognized her immediately, smiled, and said, "Great minds think alike."

The "voco" On October 11, Dunlavey sent his request for approval of new techniques, together with Diane Beaver's legal memo, to General Tom Hill, the commander of SouthCom. Two weeks later, on October 25, Hill forwarded everything to General Myers, the chairman of the Joint Chiefs, in Washington. Hill's cover letter contains a sentence?"Our respective staffs, thee Office of the Secretary of Defense, and Joint Task Force 170 have been trying to identify counter-resistant techniques that we can lawfully employ"?whhich again makes it clear that the list of techniques was no surprise to Rumsfeld's office, whatever its later claims. Hill also expressed serious reservations. He wanted Pentagon lawyers to weigh in, and he explicitly requested that "Department of Justice lawyers review the third category of techniques."

At the level of the Joint Chiefs the memo should have been subject to a detailed review, including close legal scrutiny by Myers's own counsel, Jane Dalton, but that never happened. It seems that Jim Haynes short-circuited the approval process. Alberto Mora, the general

counsel of the navy, says he remembers Dalton telling him, “Jim pulled this away. We never had a chance to complete the assessment.”

When we spoke, Myers confessed to being troubled that normal procedures had been circumvented. He held the Haynes Memo in his hands, looking carefully at the sheet of paper as if seeing it clearly for the first time. He pointed: “You don’t see my initials on this.” Normally he would have initialed a memo to indicate approval, but there was no confirmation that Myers had seen the memo or formally signed off on it before it went to Rumsfeld. “You just see I’ve ‘discussed’ it,” he said, noting a sentence to that effect in the memo itself. “This was not the way this should have come about.” Thinking back, he recalled the “intrigue” that was going on, intrigue “that I wasn’t aware of, and Jane wasn’t aware of, that was probably occurring between Jim Haynes, White House general counsel, and Justice.”

Further confirmation that the Haynes Memo got special handling comes from a former Pentagon official, who told me that Lieutenant General Bantz Craddock, Rumsfeld’s senior military assistant, noticed that it was missing a buck slip, an essential component that shows a document’s circulation path, and which everyone was supposed to initial. The Haynes Memo had no “legal chop,” or signature, from the general counsel’s office. It went back to Haynes, who later signed off with a note that said simply, “Good to go.”

Events moved fast as the process was cut short. On November 4, Dunlavey was replaced as commander at Guantánamo by Major General Geoffrey Miller. On November 12 a detailed interrogation plan was approved for al-Qahtani, based on the new interrogation techniques. The plan was sent to Rumsfeld for his personal approval, General Hill told me.

Ten days later an alternative plan, prepared by Mike Gelles and others at the N.C.I.S. and elsewhere, using traditional non-aggressive techniques, was rejected. By then the F.B.I. had communicated its concerns to Haynes’s office about developments at Guantánamo. On November 23, well before Rumsfeld gave formal written approval to the Haynes Memo, General Miller received a “voco“?a vocal command?authorizing an im immediate start to the aggressive interrogation of al-Qahtani. No one I spoke with, including Beaver, Hill, and Myers, could recall who had initiated the voco, but an army investigation would state that it was likely Rumsfeld, and he would not have acted without Haynes’s endorsement.

Al-Qahtani’s interrogation log for Saturday, November 23, registers the immediate consequence of the decision to move ahead. “The detainee arrives at the interrogation booth His hood is removed and he is bolted to the floor.”

Reversal Four days after the voco, Haynes formally signed off on his memo. He recommended, as a matter of policy, approval of 15 of the 18 techniques. Of the four techniques listed in Category III, however, Haynes proposed blanket approval of just one: mild non-injurious physical contact. He would later tell the Senate that he had “recommended against the proposed use of a wet towel”?that is, against waterboarding?but to the contrary, in his memo he sstated that “all Category III techniques may be legally available.” Rumsfeld placed his name next to the word “Approved” and wrote the jocular comment that may well expose him to difficulties in the witness stand at some future time.

As the memo was being approved, the F.B.I. communicated serious concerns directly to Haynes’s office. Then, on December 17, Dave Brant, of the N.C.I.S., paid a surprise visit to Alberto Mora, the general counsel of the navy. Brant told him that N.C.I.S. agents had

information that abusive actions at Guantánamo had been authorized at a “high level” in Washington. The following day Mora met again with Brant. Mike Gelles joined them and told Mora that the interrogators were under extraordinary pressure to achieve results. Gelles described the phenomenon of “force drift,” where interrogators using coercion come to believe that if some force is good, then more must be better. As recounted in his official “Memorandum for Inspector General, Department of the Navy,” Mora visited Steve Morello, the army’s general counsel, and Tom Taylor, his deputy, who showed him a copy of the Haynes Memo with its attachments. The memorandum describes them as demonstrating “great concern.” In the course of a long interview Mora recalled Morello “with a furtive air” saying, “Look at this. Don’t tell anyone where you got it.” Mora was horrified by what he read. “I was astounded that the secretary of defense would get within 100 miles of this issue,” he said. (Notwithstanding the report to the inspector general, Morello denies showing Mora a copy of the Haynes Memo.)

On December 20, Mora met with Haynes, who listened attentively and said he would consider Mora’s concerns. Mora went away on vacation, expecting everything to be sorted out. It wasn’t: Brant soon called to say the detainee mistreatment hadn’t stopped. On January 9, 2003, Mora met Haynes for a second time, expressing surprise that the techniques hadn’t been stopped. Haynes said little in response, and Mora felt he had made no headway. The following day, however, Haynes called to say that he had briefed Rumsfeld and that changes were in the offing. But over the next several days no news came.

On the morning of Wednesday, January 15, Mora awoke determined to act. He would put his concerns in writing in a draft memorandum for Haynes and Dalton. He made three simple points. One: the majority of the Category II and III techniques violated domestic and international law and constituted, at a minimum, cruel and unusual treatment and, at worst, torture. Two: the legal analysis by Diane Beaver had to be rejected. Three: he “strongly non-concurred” with these interrogation techniques. He delivered the draft memo to Haynes’s office. Two hours later, at about five p.m. on January 15, Haynes called Mora. “I’m pleased to tell you the secretary has rescinded the authorization,” he said.

The abusive interrogation of al-Qahtani lasted a total of 54 days. It ended not on January 12, as the press was told in June 2004, but three days later, on January 15. In those final three days, knowing that the anything-goes legal regime might disappear at any moment, the interrogators made one last desperate push to get something useful out of al-Qahtani. They never did. By the end of the interrogation al-Qahtani, according to an army investigator, had “black coals for eyes.”

The Great Migration Mike Gelles, of the N.C.I.S., had shared with me his fear that the al-Qahtani techniques would not simply fade into history?that they would turn out to have been horribly contagious. TThis “migration” theory was controversial, because it potentially extended the responsibility of those who authorized the Guantánamo techniques to abusive practices elsewhere. John Yoo has described the migration theory as “an exercise in hyperbole and partisan smear.”

But is it? In August 2003, Major General Miller traveled from Guantánamo to Baghdad, accompanied by Diane Beaver. They visited Abu Ghraib and found shocking conditions of near lawlessness. Miller made recommendations to Lieutenant General Ricardo Sanchez, the commander of coalition forces in Iraq. On September 14, General Sanchez authorized an array of new interrogation techniques. These were vetted by his staff judge advocate, who later told the Senate Armed Services Committee that operating procedures and policies “in

use in Guantánamo Bay" had been taken into account. Despite the fact that Geneva applied in Iraq, General Sanchez authorized several techniques that were not sanctioned by the Field Manual?but were listed in the Haynes Memo. The abuses for which Abu Ghraib became infamous began one month later.

Three different official investigations in the space of three years have confirmed the migration theory. The August 2006 report of the Pentagon's inspector general concluded unequivocally that techniques from Guantánamo had indeed found their way to Iraq. An investigation overseen by former secretary of defense James R. Schlesinger determined that "augmented techniques for Guantanamo migrated to Afghanistan and Iraq where they were neither limited nor safeguarded."

Jim Haynes and Donald Rumsfeld may have reversed themselves about al-Qahtani in January 2003, but the death blow to the administration's outlook did not occur for three more years. It came on June 29, 2006, with the U.S. Supreme Court's ruling in Hamdan v. Rumsfeld, holding that Guantánamo detainees were entitled to the protections provided under Geneva's Common Article 3. The Court invoked the legal precedents that had been sidestepped by Douglas Feith and John Yoo, and laid bare the blatant illegality of al-Qahtani's interrogation. A colleague having lunch with Haynes that day described him as looking "shocked" when the news arrived, adding, "He just went pale." Justice Anthony Kennedy, joining the majority, pointedly observed that "violations of Common Article 3 are considered 'war crimes.'?"

Jim Haynes appears to remain a die-hard supporter of aggressive interrogation. Shortly after the Supreme Court decision, when he appeared before the Senate Judiciary Committee, Senator Patrick Leahy reminded him that in 2003 Haynes had said there was "no way" that Geneva could apply to the Afghan conflict and the war on terror. "Do you now accept that you were mistaken in your legal and policy determinations?," Leahy asked. Haynes would say only that he was bound by the Supreme Court's decision.

As the consequences of Hamdan sank in, the instinct for self-preservation asserted itself. The lawyers got busy. Within four months President Bush signed into law the Military Commissions Act. This created a new legal defense against lawsuits for misconduct arising from the "detention and interrogation of aliens" between September 11, 2001, and December 30, 2005. That covered the interrogation of al-Qahtani, and no doubt much else. Signing the bill on October 17, 2006, President Bush explained that it provided "legal protections that ensure our military and intelligence personnel will not have to fear lawsuits filed by terrorists simply for doing their jobs."

In a word, the interrogators and their superiors were granted immunity from prosecution. Some of the lawyers who contributed to this legislation were immunizing themselves. The hitch, and it is a big one, is that the immunity is good only within the borders of the United States.

A Tap on the Shoulder The table in the conference room held five stacks of files and papers, neatly arranged and yellow and crisp with age. Behind them sat an elderly gentleman named Ludwig Altstötter, rosy-cheeked and cherubic. Ludwig is the son of Josef Altstötter, the lead defendant in the 1947 case United States of America v. Josef Altstoetter et al., which was tried in Germany before a U.S. military tribunal. The case is famous because it appears to be the only one in which lawyers have ever been charged and convicted for committing international crimes through the performance of their legal functions. It served

as the inspiration for the Oscar-winning 1961 movie Judgment at Nuremberg, whose themes are alluded to in Marcel Ophuls's classic 1976 film on wartime atrocities, The Memory of Justice, which should be required viewing but has been lost to a broader audience. Nuremberg was, in fact, where Ludwig and I were meeting.

The Altstötter case had been prosecuted by the Allies to establish the principle that lawyers and judges in the Nazi regime bore a particular responsibility for the regime's crimes. Sixteen lawyers appeared as defendants. The scale of the Nazi atrocities makes any factual comparison with Guantánamo absurd, a point made to me by Douglas Feith, and with which I agree. But I wasn't interested in drawing a facile comparison between historical episodes. I wanted to know more about the underlying principle.

Josef Altstötter had the misfortune, because of his name, to be the first defendant listed among the 16. He was not the most important or the worst, although he was one of the 10 who were in fact convicted (4 were acquitted, one committed suicide, and there was one mistrial). He was a well-regarded member of society and a high-ranking lawyer. In 1943 he joined the Reich Ministry of Justice in Berlin, where he served as a Ministerialdirektor, the chief of the civil-law-and-procedure division. He became a member of the SS in 1937. The U.S. Military Tribunal found him guilty of membership in that criminal organization?with knowledge of its crimiinal acts?and sentenced him to five years in prison, which he served in full. He returned to legal practice in Nuremberg and died in 1979. Ludwig Altstötter had all the relevant documents, and he generously invited me to go over them with him in Nuremberg.

I took Ludwig to the most striking passage in the tribunal's judgment. "He gave his name as a soldier and a jurist of note and so helped to cloak the shameful deeds of that organisation from the eyes of the German people." The tribunal convicted Altstötter largely on the basis of two letters. Ludwig went to the piles on the table and pulled out fading copies of the originals. The first, dated May 3, 1944, was from the chief of the SS intelligence service to Ludwig's father, asking him to intervene with the regional court of Vienna and stop it from ordering the transfer of Jews from the concentration camp at Theresienstadt back to Vienna to appear as witnesses in court hearings. The second letter was Altstötter's response, a month later, to the president of the court in Vienna. "For security reasons," he wrote, "these requests cannot be granted." The U.S. Military Tribunal proceeded on the basis that Altstötter would have known what the concentration camps were for.

The words "security reasons" reminded me of remarks by Jim Haynes at the press conference with Gonzales: "Military necessity can sometimes allow ? warrfare to be conducted in ways that might infringe on the otherwise applicable articles of the Convention." Haynes provided no legal authority for that proposition, and none exists. The minimum rights of detainees guaranteed by Geneva and the torture convention can never be overridden by claims of security or other military necessity. That is their whole purpose.

Mohammed al-Qahtani is among the first six detainees scheduled to go on trial for complicity in the 9/11 attacks; the Bush administration has announced that it will seek the death penalty. Last month, President Bush vetoed a bill that would have outlawed the use by the C.I.A. of the techniques set out in the Haynes Memo and used on al-Qahtani. Whatever he may have done, Mohammed al-Qahtani was entitled to the protections afforded by international law, including Geneva and the torture convention. His interrogation violated those conventions. There can be no doubt that he was treated cruelly and degraded, that the standards of Common Article 3 were violated, and that his treatment

amounts to a war crime. If he suffered the degree of severe mental distress prohibited by the torture convention, then his treatment crosses the line into outright torture. These acts resulted from a policy decision made right at the top, not simply from ground-level requests in Guantánamo, and they were supported by legal advice from the president's own circle.

Those responsible for the interrogation of Detainee 063 face a real risk of investigation if they set foot outside the United States. Article 4 of the torture convention criminalizes "complicity" or "participation" in torture, and the same principle governs violations of Common Article 3.

It would be wrong to consider the prospect of legal jeopardy unlikely. I remember sitting in the House of Lords during the landmark Pinochet case, back in 1999?iin which a prosecutor was seeking the extradition to Spain of the former Chilean head of state for torture and other international crimes?and being told by oone of his key advisers that they had never expected the torture convention to lead to the former president of Chile's loss of legal immunity. In my efforts to get to the heart of this story, and its possible consequences, I visited a judge and a prosecutor in a major European city, and guided them through all the materials pertaining to the Guantánamo case. The judge and prosecutor were particularly struck by the immunity from prosecution provided by the Military Commissions Act. "That is very stupid," said the prosecutor, explaining that it would make it much easier for investigators outside the United States to argue that possible war crimes would never be addressed by the justice system in the home country?one of the trip wires enabling fooreign courts to intervene. For some of those involved in the Guantánamo decisions, prudence may well dictate a more cautious approach to international travel. And for some the future may hold a tap on the shoulder.

"It's a matter of time," the judge observed. "These things take time." As I gathered my papers, he looked up and said, "And then something unexpected happens, when one of these lawyers travels to the wrong place."

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