

**HEARING TO CONTINUE TO RECEIVE TESTI-  
MONY ON THE ORIGINS OF AGGRESSIVE IN-  
TERROGATION TECHNIQUES: PART I OF  
THE COMMITTEE'S INQUIRY INTO THE  
TREATMENT OF DETAINEES IN U.S. CUS-  
TODY (P.M. SESSION)**

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**Tuesday, June 17, 2008**

U.S. SENATE  
COMMITTEE ON ARMED SERVICES  
*Washington, DC.*

The committee met, pursuant to notice, at 3:09 p.m. in Room SD-106, Dirksen Senate Office Building, Hon. Carl Levin, chairman of the committee, presiding.

Committee Members Present: Senators Levin [presiding], Lieberman, Reed, Akaka, Bill Nelson, Ben Nelson, Pryor, Webb, McCaskill, Warner, Inhofe, Sessions, Collins, Chambliss, Graham, Dole, Cornyn, Thune, and Martinez.

Committee staff members present: Richard D. DeBobes, Staff Director, and Leah C. Brewer, Nominations and Hearings Clerk.

Majority staff members present: Joseph M. Bryan, Professional Staff Member, Ilona R. Cohen, Counsel, Mark R. Jacobson, Professional Staff Member, Gerald J. Leeling, Counsel, Peter K. Levine, General Counsel, William G. P. Monahan, Counsel, and Michael J. Noblet, Professional Staff Member.

Minority staff members present: Michael V. Kostiw, Republican Staff Director, William M. Caniano, Professional Staff Member, David G. Collins, Research assistant, David M. Morriss, Minority Counsel, and Dana W. White, Professional Staff Member.

Staff assistants present: Kevin A. Cronin, Jessica L. Kingston, Ali Z. Pasha, Benjamin L. Rubin, Brian F. Sebold, and Breon N. Wells.

Committee members' assistants present: Jay Maroney, assistant to Senator Kennedy, James Tuite, assistant to Senator Byrd, Frederick M. Downey, assistant to Senator Lieberman, Elizabeth King, assistant to Senator Reed, Bonni Berge, assistant to Senator Akaka, Darcie Tokioka, assistant to Senator Akaka, Christopher Caple, assistant to Senator Bill Nelson, Andrew R. Vanlandingham, assistant to Senator Ben Nelson, Jon Davey, assistant to Senator Bayh, M. Bradford Foley, assistant to Senator Pryor, Gordon I. Peterson, assistant to Senator Webb, Peg Gustafson, assistant to Senator McCaskill, Sandra Luff, assistant to Senator Warner, Anthony J. Lazarski, assistant to Senator Inhofe, Na-

than Reese, assistant to Senator Inhofe, Mark J. Winter, assistant to Senator Collins, Clyde A. Taylor IV, assistant to Senator Chambliss, Jennifer Olson, assistant to Senator Graham, Lindsey Neas, assistant to Senator Dole, David Hanke, assistant to Senator Cornyn, Jason Van Beek, assistant to Senator Thune, and Erskine W. Wells III, assistant to Senator Wicker.

**OPENING STATEMENT OF HON. CARL LEVIN, U.S. SENATOR  
FROM MICHIGAN**

Chairman LEVIN. The committee will come back into session.

And our third and final panel is Jim Haynes, who is the former general counsel of the Department of Defense.

We welcome you, Mr. Haynes. And if you have an opening statement, we'd be happy to hear from you now.

**STATEMENT OF WILLIAM J. HAYNES II, FORMER GENERAL  
COUNSEL, DEPARTMENT OF DEFENSE**

Mr. Haynes: Thank you, Mr. Chairman. I—

Chairman LEVIN. Put your mike on.

Mr. Haynes: Thank you, Mr. Chairman.

I don't have a formal opening statement, except to observe that this hearing today is part of a process that's been going on for some time now and will continue for many years to come, I'm sure. How our country deals with this unprecedented threat is the subject of discussion among members of Congress, the executive and the judiciary, the media, and many politically active citizens. This is as it should be.

Ultimately, however, the end of these discussions can only come with history's larger judgment of how well our leaders in the various branches of government performed in work—in the work of protecting Americans after an attack, and, of course, how well the country remains equipped to deal with this threat in the future.

So, I just want to say, I think this hearing today can serve a larger purpose and a most useful purpose. We all rightly fear another assault on our country, one perhaps even more horrific than the last. We know that America's enemies, while thwarted, are unrelenting. Indeed, some of those who have been released from Guantanamo have already shown their recidivism, committing acts of terrorism that have left innocent people maimed or killed.

So, along with members of this committee and many other Americans, I look forward, in the years ahead, to watching our Nation's leaders advance the cause of America's security and freedom.

And finally, Mr. Chairman, I'd like to acknowledge my appreciation of all the members of the previous two panels for their service, their good faith, their hard work in trying to deal with a very difficult issue.

I'm ready for your questions.

Chairman LEVIN. Thank you very much, Mr. Haynes.

In July of 2002, your deputy general counsel, Mr. Shiffrin, contacted the Joint Personnel Recovery Agency, as we heard earlier, the JPRA, and asked for information about SERE techniques. Did you ask Mr. Shiffrin to obtain information on SERE techniques?

Mr. Haynes: Mr. Chairman, the summer of 2002 was 6 years ago, and my memory is not perfect. My memory is not perfect even in more recent times, but 6 years ago is surely the case.

What I remember in the summer of 2002 is a governmentwide concern about the possibility of another terrorist attack as the anniversary of 9/11 approached. I also remember a widespread belief that the people that the United States had captured in the war on terror were not producing as much information as we believed they had. Similarly, there was widespread frustration that the existing doctrine was inadequate and that the country's capabilities were inadequate to the task. So, as the chief legal officer of the Department of Defense, I was interested in that and concerned about it.

I remember inquiring generally about where the sources of information and expertise in the government might be, as the senior leader of the Department of Defense and a potential advisor on different matters. And Richard Shiffrin would have been the person I would have asked, for that kind of information.

Chairman LEVIN. Okay. Do you remember asking Mr. Shiffrin to obtain information specifically on SERE techniques?

Mr. Haynes: I don't remember that, specifically. What I do remember is what I've said, asking generally about that, and I do also remember, sometime in the late summer—and this is a recollection somewhat refreshed from a recent review of some documents—that I did get some information from the Joint Personnel Recovery Agency.

Chairman LEVIN. But, you don't remember requesting it.

Mr. Haynes: Well, I don't remember requesting, and I—but, I do remember being interested in it, and I would have requested it through Richard.

Chairman LEVIN. If you requested it.

Mr. Haynes: Yes, sir.

Chairman LEVIN. But, again, just to be very precise, you don't remember requesting information on SERE techniques.

Mr. Haynes: I don't remember that, specifically—

Chairman LEVIN. All right.

Mr. Haynes:—sir.

Chairman LEVIN. Now, you met regularly with a small group of senior administration lawyers, including Mr. Gonzales, the President's counsel, Mr. Addington, the Vice President's counsel, Mr. Rizzo, the acting CIA general counsel, and the Department of Justice Office of Legal Counsel attorneys, Mr. Yoo and Patrick Philbin, to discuss legal matters relating to the war. Did this request to Mr. Shiffrin for the information that you've described you did request, did that come from that group? Was it a result of discussions with that group?

Mr. Haynes: Well, Senator, again, 6 years ago is a long time. I had probably ten meetings a day during the course of my time as general counsel. I met with many people, many groups. I met with subsets of that group, I met with larger sets of lawyers. There were interagency meetings of all types throughout my tenure as general counsel. So, to key into a—one particular meeting with a particular group of people with a specific request is very difficult for me to do.

Chairman LEVIN. I wasn't asking you for that. Do you remember whether your request to Mr. Shiffrin was the result of discussions with that group?

Mr. Haynes: No, sir, I don't.

Chairman LEVIN. Now, tab 2, if you'll take a look at it, is a July 26th, 2002, memo from Lieutenant Colonel Baumgartner to your office, and it relates to JPRA memorandum dated July 25th and about SERE training programs. Do you remember—

Mr. Haynes: Sir, this—

Chairman LEVIN.—seeing—

Mr. Haynes:—this—I'm sorry to interrupt—this says December— or, July 26th.

Chairman LEVIN. All right. Did I miss—did I say July 25th?

Mr. Haynes: I thought you did.

Chairman LEVIN. The reference was to a July 25th—

Mr. Haynes: Oh.

Chairman LEVIN.—JPRA memorandum. You see that? Where it says "reference"?

Mr. Haynes: Yes—

Chairman LEVIN. Third line down.

Mr. Haynes:—I do, uh-huh.

Chairman LEVIN. Do you remember seeing this memo at the time?

Mr. Haynes: No, sir, I don't remember it at the time, but I've seen it before; and I've seen it a long time ago, not just recently.

Chairman LEVIN. All right, but you don't remember seeing that at the time it was sent.

Mr. Haynes: No, sir, I don't.

Chairman LEVIN. Is it possible you did see it then?

Mr. Haynes: It's possible I did see it. In—the addressee is the Office of the Secretary of Defense General Counsel, which is not my precise title, or was not my precise title, but if it was so addressed, I would have seen it, probably.

Chairman LEVIN. Now, tab 3 is an attachment to the July 26th memo, if you could take a look at that. It's a list of physical and psychological pressures used in SERE training, including stress positions, walling, degradation, sensory deprivation, exposure to bright flashing lights, sleep disruption, and water boarding. Did you see this document at the time?

Mr. Haynes: Was this an attachment to the other—

Chairman LEVIN. Yes.

Mr. Haynes:—one? Sir?

Chairman LEVIN. Yes.

Mr. Haynes: Well, if I had seen the other one, I—and if it—if it was attached, I would have seen it.

Chairman LEVIN. But, do you remember specifically whether you saw this attachment at the time?

Mr. Haynes: I don't remember specifically when I saw this.

Chairman LEVIN. All right. Now, there's another attachment to Lieutenant Colonel Baumgartner's July 26th memo.

Mr. Haynes: Is that number 4?

Chairman LEVIN. Tab number 4, on the long-term effects of resistance training on SERE school students, and it was written by Dr. Ogrisseg, who is the witness on our first panel, as you heard,

and it includes a psychological assessment of the techniques used at the Air Force SERE School and one technique used at the Navy SERE School: water boarding. Did you ask Mr. Shiffrin to obtain information on the psychological effects of SERE resistance training?

Mr. Haynes: I may have.

Chairman LEVIN. Did you see Dr. Ogrisseg's memo at the time?

Mr. Haynes: We're now—this is an attachment to the other—

Chairman LEVIN. Yes.

Mr. Haynes:—one, you said? Well, if I had seen the first one and it was attached, I—

Chairman LEVIN. But, do you remember specifically whether you saw this memo at the time, this attachment?

Mr. Haynes: I don't specifically remember when I saw this.

Chairman LEVIN. All right. Now, did—when you got—do you remember receiving this—what would you have done with this information when you got it? Do you remember doing something with this information?

Mr. Haynes: I don't remember doing something with this information. What I remember, Senator—and I'm sorry about—

Chairman LEVIN. It's all right. If you—

Mr. Haynes:—my—

Chairman LEVIN.—don't remember, that's okay.

Mr. Haynes:—my recollection—what I recall was the environment that I described earlier.

Chairman LEVIN. I understand.

Mr. Haynes: And I've forgotten what prompted my interest, other than the general concerns; there may have been some other catalyst. But, I—and I can't be more specific.

Chairman LEVIN. Did you ever discuss SERE techniques with Mr.—Messrs. Gonzales, Addington, Rizzo, Yoo, or any other senior lawyers with whom you met regularly?

Mr. Haynes: I believe I did discuss SERE techniques with other people in the administration.

Chairman LEVIN. Prior to the December 2 memo signed by the Secretary of Defense?

Mr. Haynes: Yes.

Chairman LEVIN. And would that have happened on more than one occasion?

Mr. Haynes: I can't remember.

Chairman LEVIN. What was the gist of those conversations?

Mr. Haynes: Well, I think that—first off, my memory is not great, but if I—if I were to discuss anything further, I think I would have to talk about classified information.

Chairman LEVIN. But, would you remember it better if this were a classified setting?

Mr. Haynes: Well, I wouldn't be able to discuss it.

Chairman LEVIN. Well, I understand that, but you say your memory's not great, and then you say, well, you want to talk in classified setting.

Mr. Haynes: No, sir. What I—well, I don't know what I—I don't know what the transcript might say, but what I'm trying to respond to—your question is, Did I ever discuss SERE techniques

with others in the administration? The answer is yes. And if—and maybe that’s—maybe that’s the answer to your question.

Chairman LEVIN. No, you answered that clearly. The other one was, What was the gist of those conversations?

Mr. Haynes: I could not—I could not tell you the gist of those conversations without going into classified information.

Chairman LEVIN. But, you do remember them.

Mr. Haynes: I don’t remember them any more clearly than what I’ve just said, that I have seen information of this nature before. I don’t know precisely when, and I cannot discuss it further without getting into classified information.

Chairman LEVIN. I really—you say you don’t remember it any more clearly than what you’ve said. Therefore, going into classified session isn’t going to give us any more information than what you’ve said, which is, you had conversations, but have—your memory is bad. That’s all you’ve said.

Mr. Haynes: Correct.

Chairman LEVIN. That’s all you remember.

Mr. Haynes: Correct.

Chairman LEVIN. I don’t know what going into classified session would add to it, then.

Mr. Haynes: Okay.

Chairman LEVIN. Senator Graham?

Senator GRAHAM. Thank you, Mr. Haynes. And I appreciate 6 years ago is a very long time. Try to put—try to put this in context of this puzzle, so to speak, at least from my point of view. The goal was to get better information from people at Guantanamo Bay. That was the desire of this whole project. We were afraid we were going to be attacked again. We weren’t getting the information we were—hoped to obtain, so we’re going to try to come up with a new program to get better information. That was sort of the task at hand?

Mr. Haynes: I think the goal was broader than—well, the goal was not Guantanamo Bay.

Senator GRAHAM. Okay. Well, the goal was to get better information.

Mr. Haynes: The goal was to understand what capabilities the country had to elicit information from terrorists who had attacked, and might attack, the country.

Senator GRAHAM. Now, I totally understand that. I’m not saying—that’s not a bad goal. I just want to know—there’s a reason for everything. The reason this project and all this talk about interrogation techniques and what we can and can’t do was a result of trying to get better information from high-value targets.

Mr. Haynes: Well, that would be an objective of people who were involved in interrogation, yes, sir.

Senator GRAHAM. Okay. So, you and others were tasked with the job of trying to come up with new programs, that were not on the books at that time, that would allow to get better information. Is that not what started all this?

Mr. Haynes: No, sir, I wasn’t tasked with such a project. I was a senior lawyer, the senior lawyer in the Defense Department, and one of the missions that our department had was the detention and questioning of terrorists captured in the war on terror.

Senator GRAHAM. Right.

Mr. Haynes: As the senior lawyer, I had to be—or felt I needed to be aware of what my client was up to. I was also a senior member of the administration—

Senator GRAHAM. Right.

Mr. Haynes:—involved in interagency—

Senator GRAHAM. Right. I mean, I—

Mr. Haynes:—activities.

Senator GRAHAM. Right. I mean, there's nothing wrong with doing this. I mean, I'm not trying to say anybody did anything wrong. It makes perfect sense that we're going to try—if we don't have adequate information, then let's look for a way to get better information. And the Bybee memo—are you familiar with the Bybee memo, the legal analysis about the Convention Against Torture and other statutes and treaties?

Mr. Haynes: I believe I am, yes, sir. I think that there have been a lot of labels and names associated with—

Senator GRAHAM. Yeah.

Mr. Haynes:—with a memo that I understand to be in August of—

Senator GRAHAM. Were you aware that it was the opinion of the Department of Justice Office of Legal Counsel that unless there was major organ failure involved, it would not be a violation of the Convention Against Torture?

Mr. Haynes: Yes, sir.

Senator GRAHAM. Okay. So, there is a line of legal reasoning that you're aware of that was pretty aggressive when it came to existing laws, in terms of—well, I would argue that something short of major organ failure not being torture is a pretty aggressive point of view.

Now, were you aware of that before Secretary Rumsfeld approved the interrogation techniques?

Mr. Haynes: I don't—I don't know when I became aware of that, Senator.

Senator GRAHAM. Okay, fair enough. Now, these interrogation—

Mr. Haynes: I don't—I don't remember that.

Senator GRAHAM. I understand. These interrogation techniques that Secretary Rumsfeld initially signed off on, the three categories—I think that there were 35, is that correct?

Mr. Haynes: No, sir, I think there's a lot of confusion in—

Senator GRAHAM. Okay.

Mr. Haynes:—out there, and—

Senator GRAHAM. Okay.

Mr. Haynes:—perhaps in this room. When you talk about 35 techniques, what I think about is a product of the working group, which operated from January of 2003 until sometime in the end of March 2003. When you talk about what Secretary Rumsfeld approved for the interrogation of Mohammad al Qahtani, the 20th hijacker, you're talking about a decision in November of 2002. There were not 35 techniques, that I know of, associated—

Senator GRAHAM. Right.

Mr. Haynes:—with that analysis—

Senator GRAHAM. Right. No, I—

Mr. Haynes:—in 2002.

Senator GRAHAM. No, I understand. So—well, that’s a good point. The interrogation of the 20th hijacker, al Qahtani, if I’ve got his name right, Qahtani, is that—

Mr. Haynes: Well, I—

Senator GRAHAM. We know who we’re talking about.

Mr. Haynes:—I think it’s al Qahtani.

Senator GRAHAM. Okay.

Mr. Haynes: Yes, sir.

Senator GRAHAM. That involved the use of dogs and having him stripped naked in front of female personnel. Was that correct? That’s what this report found?

Mr. Haynes: Which report are you referring to?

Senator GRAHAM. The Schmid-Furlow report.

Mr. Haynes: Okay. Well, Senator, let me try to untangle that, because I think there’s a—there are—there’s some conflation there.

I sat through the earlier testimony of the earlier panels, and, frankly, was enlightened from some things I don’t think I ever knew and some things that I had forgotten. But, the immediate previous panel went into great detail about what was approved by the Secretary of Defense in December of 2002 for use with al Qahtani, the 20th hijacker. And two of the items in category 2, as I recall—and I don’t know if those documents are in here that I can look at or not; if it’s important, you can point ’em to me—involved clothing and use of phobia.

Senator GRAHAM. Right.

Mr. Haynes: And Captain Dalton and Colonel Beaver—or, excuse me, Admiral Dalton, I should say—Admiral Dalton and Colonel Beaver testified at great length before this panel about what was approved by the Secretary of Defense and what was not approved by the Secretary of Defense. And I think they were very clear that the very widely-held understanding among people who were knowledgeable about what was approved in each of those two categories is not as you’ve described it. The use of dogs was not intended to be, or authorized to be, dogs in an interrogation room with the detainee; it was to be muzzled dogs walking perimeter.

Senator GRAHAM. Okay. Well, the—

Mr. Haynes: The—

Senator GRAHAM.—the report—the report found that it was a muzzled dog in a room.

Mr. Haynes: Well, let me get to that in a minute. And the other thing that was authorized and widely understood by people knowledgeable about the decision was that “removal of clothing” was not nudity.

Senator GRAHAM. Okay. Well—

Mr. Haynes: So, that’s what was approved. Now, let me—

Senator GRAHAM. I’ve got—okay.

Mr. Haynes: Sir, but I haven’t responded—

Senator GRAHAM. Right.

Mr. Haynes:—to your question.

Senator GRAHAM. Right. Right.

Mr. Haynes: You then jumped to say that it involved use of dogs in a room and naked people.

Senator GRAHAM. Well—

Mr. Haynes: And what—

Senator GRAHAM. Right.

Mr. Haynes: And what I think you're referring to—and I have looked at it since this exchange that you had—was a—an investigation by a Lieutenant General Schmidt—

Senator GRAHAM. Right.

Mr. Haynes:—in conjunction with a General or Admiral Furlow, years after the fact—

Senator GRAHAM. Right.

Mr. Haynes:—looking into some belatedly disclosed e-mails that came to light at the headquarters level, 2 years after the fact. And General Schmidt investigated some 24,000 interrogations conducted between—

Senator GRAHAM. Right.

Mr. Haynes:—early 2002 and early 2005, when he issued his report, and identified less than a handful of problematic interrogations—

Senator GRAHAM. Right.

Mr. Haynes:—two of which you've identified.

Senator GRAHAM. Right.

Mr. Haynes: One was when somebody walked into a room with a dog.

Senator GRAHAM. Right.

Mr. Haynes: And I've got the pages here—

Senator GRAHAM. Your—

Mr. Haynes:—his report.

Senator GRAHAM.—testimony is that they were never authorized. If it happened, it was unauthorized.

Mr. Haynes: That is—

Senator GRAHAM. Is that—

Mr. Haynes: That is. But, I'd just refer you to pages 15 and pages—

Senator GRAHAM. Okay.

Mr. Haynes:—and page 19—

Senator GRAHAM. Right.

Mr. Haynes:—of that report.

Senator GRAHAM. Right. But, that's my point. I mean, you agree that if it did happen, it was never authorized by you or Secretary Rumsfeld in the fashion described.

Mr. Haynes: Yes, sir.

Senator GRAHAM. Okay, fair enough. Now, these techniques that we're talking about, that were approved in December and later modified, mirror the SERE program in an uncanny way.

Mr. Haynes: Well, I can't speak to that, Senator. This—

Senator GRAHAM. Well, where did they come from? I mean, somebody somewhere had to sit down and make a list of—these are the three categories, these are the things that you can use in different combinations. Somebody somewhere had to sit down and write this stuff down. Who was that somebody, and where did they get this information from?

Mr. Haynes: Well, I think the last panel talked to that, and I would just refer you to the people who were involved closer to Guantanamo than I was.

I'd also say, unless—I don't know if you can point me to something else, I've not seen any other documents or any other cat-

egorization of interrogation techniques like that which came up from Guantanamo—1, 2, and 3—with those particular groupings. There are a couple—as I recall, a couple of itemizations in that list that fall in some categories, like the—

Senator GRAHAM. Who made up—

Mr. Haynes:—Army Field Manual.

Senator GRAHAM.—the list? Who made up the list?

Mr. Haynes: I don't have firsthand knowledge of who made up the list, but Colonel Beaver testified as to—

Senator GRAHAM. Okay.

Mr. Haynes:—how it came about.

Senator GRAHAM. Okay.

Mr. Haynes: I think there's also, if I may, Senator—

Senator GRAHAM. I think—

Mr. Haynes:—some documentation that the Defense Department has provided to the committee that—I can refer you to the Bates stamp—that talked about how they came up with their list. And the Bates-stamp numbers are 008771 and 008779.

Senator GRAHAM. Yeah, I—right. I know my time's up, but this list that somebody came up with, your client approved, right? Secretary Rumsfeld.

Mr. Haynes: Secretary Rumsfeld approved a subset of the list that was proposed by Guantanamo and by General Hill.

Senator GRAHAM. Okay. And you had knowledge of that list.

Mr. Haynes: Oh, yes, sir.

Senator GRAHAM. Okay, thank you.

Chairman LEVIN. Thank you.

Senator McCaskill?

Senator MCCASKILL. You have just said, Mr. Haynes, that you were the senior lawyer for the Department of Defense, correct?

Mr. Haynes: Yes, ma'am, that's correct.

Senator MCCASKILL. And so, you had a lot of lawyers under you?

Mr. Haynes: Well, I'll put it this way, there are over 10,000 lawyers in the Department of Defense.

Senator MCCASKILL. You know, a year and a half ago, that would have shocked me. It doesn't surprise me today. I'm not sure that's a good thing.

You have 10,000 lawyers there, and you had received information about this request for more aggressive interrogation techniques. You had received legal input about this prior to you presenting this document for approval by Secretary Rumsfeld, correct? You had received the information from the various lawyers in the services and other lawyers, Criminal Investigation Task Force. You had received information from a number of lawyers that were asking questions about these techniques, legal questions about these techniques.

Mr. Haynes: Well, let me try to make sure I understand your question. This is, again, 6 years ago, so my memory is not perfect, but I do not recall seeing the memoranda that I think were referenced in the earlier panel's testimony. That's not to say I wasn't aware that there was a lot of anxiety about how the Defense Department would question terrorists. That concern was present from the moment the war began, and it remains a very interesting and difficult issue. And it tends to be fueled by two different approaches. It tends to be fueled, on the one hand, by law-enforce-

ment-minded people, people of good faith, intelligent, with great intentions, who come at a problem with a law-enforcement mind; and, from the other perspective, people interested in the collection of intelligence during the conduct of warfare, who are less concerned about preserving a record for ultimate criminal trial.

Senator MCCASKILL. Okay, let me go down that path. And I don't mean to interrupt you, but I don't have a lot of time, and I have to go preside, so I apologize if it—I appear to be rude.

You know, you have said that you relied on the legal analysis of Lieutenant Colonel Beaver. Is that correct?

Mr. Haynes: I read her opinion, and I made my own decision, based on my own analysis, which would have included considering her memorandum.

Senator MCCASKILL. Did you have a legal analysis that you performed? Do you have any legal memorandum that you prepared that would have augmented her legal opinion?

Mr. Haynes: My decision and advice is reflected in the memo that you have, which is a 1-page memorandum.

Senator MCCASKILL. The 1-page memorandum that does not—

Mr. Haynes: Yes.

Senator MCCASKILL.—cite any legal precedent whatsoever.

Mr. Haynes: That's correct.

Senator MCCASKILL. In fact, it doesn't even talk about legal precedent or Geneva or—

Mr. Haynes: That's correct.

Senator MCCASKILL.—or Constitution or the laws against cruel and unusual punishment.

Mr. Haynes: That's correct.

Senator MCCASKILL. Is there any legal document that you relied on that you can refer to today, other than the memo written by Lieutenant Colonel Beaver?

Mr. Haynes: Well, there was the package that came up with it. But, let me—

Senator MCCASKILL. Well, wait, wait, wait. There was no legal opinion in that package, other than her legal opinion. Was there any other legal opinion you relied on? Of those 10,000 lawyers in the Department of Defense, was there any legal opinion, written legal opinion, written analysis that lawyers do, based on law and precedent, that you relied on, other than Lieutenant Colonel Beaver's legal opinion?

Mr. Haynes: I'd like to respond to your question—

Senator MCCASKILL. Okay.

Mr. Haynes:—Senator. It's—because it's important that you understand how the Defense Department works.

DOD has got 2 and a half million employees, 700-and- some-odd-billion-dollar budget, worldwide operations, and I was the chief legal officer of the Defense Department. When I would put my initials on a document that was passing on its way to the Secretary of Defense, that was an indication that I had reviewed it and I found it legally sufficient. I didn't have time, and it wasn't my practice—in fact, that memorandum that you have is one of the longer reflections of something that I would have done personally. I typed that memo myself.

Senator MCCASKILL. Okay.

Mr. Haynes: And so, if I may, Senator, the package is important, because it reflects not only where it comes from, who's empowered if it's approved to do what's in there, but also an understanding of the pattern and practice and standard operating procedures and judgment employed by the people who are proposing it and sent down. Because the Secretary has even less time than the general counsel does. Same thing with the Chairman of the Joint Chiefs of Staff. The Chairman doesn't write long memoranda; he initials things. And so, the fact that there's not a detailed legal memorandum associated with that was not unusual.

Senator McCASKILL. I'm not saying it was unusual, sir. I am just trying to get to the bottom of whether or not the legal analysis that you were supposed to be performing as your job, whether you relied—we have a lot of lawyers that were experts in military law, that have been saying, “Red light, red light, problem, problem.” The only analysis I can find in all of the material I've reviewed, and I've reviewed a lot of it, that really legally try to lay down a premise supporting this was, in fact, Lieutenant Colonel Beaver's analysis. And I am trying to get you to acknowledge that that is, in fact, what you used.

Mr. Haynes: Well, there was that. There was also the endorsement by General Dunlavey, the commander of Joint Task Force 180, I think—or 170—at the time, who expressed his opinion. He didn't write his opinion as a—

Senator McCASKILL. Well, I think he referred to her opinion, didn't he?

Mr. Haynes: You can look at it. I don't—

Senator McCASKILL. I think he did.

Mr. Haynes:—have it in front of me.

Senator McCASKILL. I think what he said in his is—

Mr. Haynes: May I—

Senator McCASKILL.—“I'm relying on the—Lieutenant Colonel Beaver's opinion.”

Mr. Haynes: May I finish?

Senator McCASKILL. Yes, you may.

Mr. Haynes: I think he also said, “I believe these are legal.” General Hill, who was the next layer of command, made a similar assertion. He made the assertion, as I recall—and I don't know if it's in these documents or not—that he believed all of category 1 and category 2 were legal, and he had some questions about category 3. So, those three layers coming up, together with my understanding of the package, my discussions with my staff and Captain Dalton and her staff, to the extent that there was one—I mean, there was a very close working relationship between our two offices—led me to make the conclusion that I did.

Senator McCASKILL. Okay. And I don't believe—

Mr. Haynes: And that—

Senator McCASKILL. I don't believe—

Mr. Haynes:—and it's my decision.

Senator McCASKILL.—General Hill was a lawyer. Is he?

Mr. Haynes: No, sir—no, ma'am—

Senator McCASKILL. And—

Mr. Haynes:—he's not.

Senator MCCASKILL. And I don't believe Major Dunlavey was a lawyer. Is he?

Mr. Haynes: He's a judge.

Senator MCCASKILL. He's a judge. Okay.

Mr. Haynes: And General Hill has a lawyer. Now, I also heard the earlier—or had a lawyer. He was the combatant commander; he had a legal staff—a staff judge advocate with a legal staff, and he wrote the memorandum, as is reflected in your files, and you can read it. But, I heard the exchange on the earlier panel about—

Senator MCCASKILL. Immunity—

Mr. Haynes:—Lieutenant Colonel Beaver's—

Senator MCCASKILL.—in advance?

Mr. Haynes: No, Lieutenant Colonel Beaver's difficulties with the staff judge advocate at the next- higher level, which was news to me.

Senator MCCASKILL. Okay. A minute ago, you talked about the two approaches, and you said there's the people from law enforcement, and then there's the people that are in a time of war and they're trying to get intelligence. You know, the idea of getting intelligence is getting reliable information. And it appears to me that the most experienced people in our country at getting reliable information from people who are wanting to harm other people are, in fact, law enforcement. That's what they do.

Mr. Haynes: Senator—

Senator MCCASKILL. They understand interrogation techniques much better, and that's what their profession embraces, is interrogation techniques. And I can assure you that there are many instances of tough, tough interrogation techniques within the framework of criminal interrogations within the constitutional framework of our country, but, nonetheless, we have to get really solid, good information in order to keep people from dying, in order to keep people from being hurt, on a constant, ongoing basis. I'm trying to figure out why there should be two sets of laws associated with that—if the goal is to get good information, why there would be two different sets of rules.

Mr. Haynes: Well, that's a very interesting proposition with a lot of pieces, and let me try to address that.

First, let me tell you that I have only the highest regard for the law enforcement community. I agree with you that they're skilled, professional, well-intentioned people, who do great work in a particular environment. And, oh, by the way, there were lots of law enforcement people at Guantanamo who were equally frustrated, including the FBI. So, I don't mean, for a minute, in trying to describe the environment that the country faced at the time—and still faces, frankly—as favoring one over another; I'm just describing the existence of a set of conflicting philosophical approaches that are fueled by very different purposes.

The law enforcement community, to be sure, as you say, is there to protect us. It's there to enforce the laws and to protect us, and, ultimately, to develop a record to prosecute and punish wrongdoers. Because of our constitutional system and our fantastic system of criminal justice in our country, we have a very generous set of procedural underpinnings to—that the law enforcement community has to be mindful of in the way it interrogates people.

Senator MCCASKILL. I'm not talking about that, sir. I'm talking about what works. I'm talking about what's effective. I'm talking about how you get good information. I—you know, what has been talked about over and over and over again in the Senate, in this room, in other rooms like this throughout this Capitol, is not—it's not just a matter of legal analysis, it's also what works.

Mr. Haynes: Oh, I agree.

Senator MCCASKILL. People will tell you what they want to—what you want to hear. If you're torturing them, they'll tell you what you want to hear.

Mr. Haynes: Well, in—

Senator MCCASKILL. It's not an effective way to get good information, and law enforcement knows that. And, you know, frankly, I—I wish I didn't have to go preside, but I know my time is up, Mr. Chairman.

Mr. Haynes: But, Senator, I need to respond to that, because nobody has advocated torture, period. I don't advocate torture. I don't question your appreciation that effective interrogation is what we're after. I agree with that. I'm not an interrogator. I'm not an intelligence officer. I'm not an FBI person. I'm a lawyer. And my job in this exercise that we're probably going to get into at this point is to talk about, What does the law permit, and what does the law prohibit? And it's important to understand those two conflicting approaches from the experts, of which I am not. In trying to—in appreciating how I can respond to your question, Did I know that there were people who had problems with the approaches? Absolutely. And I believe, and I believed at the time, that it sprang from those things, because I saw it repeatedly, and I see it now.

And the effectiveness of interrogation approaches is something that we all want. But, many—in my experience as an observer, a reluctant observer over the last 6 years, as general counsel in doing some of these kinds of things that I had no, you know, idea I was going to get into when I took the job, is that it is case by case, person by person, situation by situation, and type of information by type of information, as to what is the best and what is the most appropriate approach.

Chairman LEVIN. Thank you, Senator McCaskill.

Senator Inhofe?

Senator INHOFE. Thank you, Mr. Chairman.

Mr.—there we go, we've got it working—Mr. Haynes, how are you? I appreciate your being here today.

We can all remember, right after 9/11, all the—everyone was expecting something else to happen, and I think we have documentation now that there were a lot of plans out there that we successfully were able to stop, to thwart, in one way or another—the Fort Dix plot, the JFK Airport plot, the liquid-explosives plot. And the media had quite a few things for the Washington Post, “The U.S. has thwarted the dirty-bomb terrorist plot a year after”—this is the one that was in the L.A. Times by Josh Meyer—signals high risk on new attacks, terrorism alerts, and all of that.

Now, I would assume that a number of things led to and prompted the use of new techniques, and I assume that that's part of what led to the new techniques. Would you, kind of, tell us, How does

DOD change techniques, and where do the new techniques come from?

Mr. Haynes: I'll try to answer that, Senator, but let me respond to your opening.

You're absolutely right that the context is very important. You've listed a number of incidents that I had forgotten about, frankly. But, at the time that this particular proposal that we're talking about today came up, the fall of 2002, the Defense Department had discovered, months after he had arrived, that a person named Mohammad al Qahtani was likely the 20th hijacker that would have been the pilot on the plane that went down in Pennsylvania.

Now, in the fall of 2002, we had just passed the anniversary of 9/11, and our intelligence people tell us that anniversary dates are important to the al Qaeda. The Bali bombings, which killed hundreds of innocent people, happened on October 12th, 2002. The D.C. snipers, which terrorized this city, had just been captured, and people weren't certain where they were from, whether they were associated with the external threat or whether they were what they turned out to be. The anthrax cases of a year earlier had still not been solved. Zawahiri, who was bin Laden's number-two, issued a video threat on October 8th, 2002, saying, quote, "God willing, we will continue targeting the keys to the American economy." In—early in the summer of 2002, there were deadly attacks in Pakistan and Tunisia. There was a capture earlier that year of an America citizen who was suspected of being involved in a dirty-bomb plot. And plenty of other still-classified threat information.

One of the things that—one of the things that the intelligence community was concerned about was that al Qahtani, who is the person who came into Orlando Airport in August of 2001, a month before 9/11, to be met by Mohamed Atta, the pilot—the ringleader of the 9/11 attacks, and had been turned away, whether he had a companion on that plane, because there—other hijackers had come into the country in pairs, and there were people roaming around the country, and whether al Qahtani had information about other plots. So, there was a high degree of urgency to deal with this.

Now, your question, How do they come up with other interrogation techniques? Again, I would refer, in this case, to the previous panel that talked about that, and to the Bates-stamped documents that I told you. But, the bottom-line understanding that I have, Senator, is that the intelligence community didn't know how to deal with this, nor did the law enforcement community know how to deal with this. For al Qahtani himself, nobody had been able to get him to talk. He claimed to be a—

Senator INHOFE. Yeah, I think that's very significant. So, we're dealing with something here that no one had dealt with before. This was all—this was new to us.

Now, on the resistance portion of the SERE program, do other countries train their people—what about Israel, Great Britain, and some of the others—do they train them—have a similar type of program?

Mr. Haynes: Senator, I suspect that they do, because they're a sophisticated—they have sophisticated militaries, but I am not an expert in that.

Senator INHOFE. Are you familiar with the Manchester document that was found in Manchester, England?

Mr. Haynes: I am. I've seen it. It's widely reported and available, and it talks about, among other things, training for al Qaeda—

Senator INHOFE. Resistance—

Mr. Haynes:—members who may be captured, how to resist interrogation and what things they should claim, such as torture; whenever they're questioned, they should claim that they're being tortured.

Senator INHOFE. Now, how does an interrogator—maybe you don't know this, because it may not have been a—but, I'm wondering how an interrogator determines whether or not resistance techniques are being used by a detainee.

Mr. Haynes: I don't know.

Senator INHOFE. Okay, that's fine.

Mr. Haynes: I assume that they don't talk, for one thing, if—

Senator INHOFE. Okay.

Mr. Haynes:—they know they information.

Senator INHOFE. The—in a Frontline interview with Mark Jacobson, you answered several questions, probing questions, that—about the Field Manual 34–52, and the new techniques that Secretary Rumsfeld approved. Did you agree with all of the new techniques that were approved by Secretary Rumsfeld in, I think it was, December of '02?

Mr. Haynes: Oh, yes, sir, the ones that he approved in December '02, I did agree with.

Senator INHOFE. All right. In the same interview, you talk about tiers and percentages relating to the different interrogation techniques, and detainees that they were used against, respectively. Can you explain to the committee which of these tiers, and what percentage of detainees they were used against, that resulted from the 2002 memo?

Mr. Haynes: Senator, I'm not sure I know what you're talking about.

Senator INHOFE. Okay. Well, the—I'm talking about the tiers and the percentages of detainees that had used these. Let me rephrase that.

What rules and regulations or guidance was in place with regards to the use of these techniques at that time?

Mr. Haynes: Well, the—I believe, before the Secretary approved the techniques listed in that proposal from Southern Command, I believe what the Command was using was existing doctrine, which was the old Army Field Manual—

Senator INHOFE. Oh—

Mr. Haynes:—and then whatever the law enforcement community—

Senator INHOFE. Okay.

Mr. Haynes:—used.

Senator INHOFE. We hear a lot about the category–3 techniques. Are you—were these ever used at GTMO, or do you know? Category 3?

Mr. Haynes: Okay, if you're referring to the proposal from Guantanamo in the fall of 2002, there were, I believe, four category–3

techniques. Only one of those was approved by the Secretary, and I'm told that that was not used at all.

Senator INHOFE. I—

Mr. Haynes: So, if they did what they were authorized to do, none of the category-3 techniques would have been used.

Senator INHOFE. Yeah. Mr. Haynes, let me just tell you, one of the concerns I have, and several of us have, about all the hearings that we've had are the—how they can be used politically. I saw a 1-hour—it's supposedly a documentary—I understand that this documentary is going to be shown sometime prior to the election. It was called "Taxi to the Dark Side." You watch this for an hour, you get the impression that the leadership of the country was encouraging torture, that our troops—it's a real slam at them—are using it on a regular basis. I remember so vividly, the last scene of this movie was someone being hung up by his arms, with his shirt off, being stabbed with electric probes in the chest, and screaming, and all of that. Now, that was actually just a Hollywood set, just like a Rambo movie, but you're led to believe that this is something that is going on.

So, I want you to know that a lot of us are very much concerned that there is a lot of political use of this that I don't really think is very appropriate.

I would like to have you comment on the abuses at Abu Ghraib. Was this sort of thing happening everywhere, to your knowledge? And in your former capacity as DOD general counsel, were the techniques that were used at Abu Ghraib in any way encouraged, approved, endorsed by Secretary Rumsfeld or anyone else in DOD, to your knowledge?

Mr. Haynes: Well, there are a few things in that to—first off, to my knowledge, no, they were—they were not endorsed or approved or even reviewed by anyone above the Central Command level. But, I think it's also very important to point out that what most people think about when they think about Abu Ghraib is the abuses that occurred that were not even interrogation at all. And I should add that these incidents have been investigated to a degree probably greater than any other incident in the Defense Department history, so there is a lot of data about what did happen and what didn't happen. And I think it's consistently determined that the photographs that were so widely broadcast in 2003, and even to this day, reflect nothing that was approved interrogation. It was just flat-out abuse by people who were not being supervised.

Senator INHOFE. Thank you very much. And I—that's my feelings exactly, but I would also add that prior to the time we had our very first hearing on Abu Ghraib, the Army had started conducting its own investigation, and it had already taken some steps to disciplinary action. That was my memory.

Thank you very much, Mr. Haynes.

Mr. Haynes: Thank you, Senator.

Chairman LEVIN. Thank you, Senator Inhofe.

Senator Reed?

Senator REED. Thank you very much, Mr. Chairman.

Mr. Haynes, you're aware of the memorandum that were prepared by JAG officers in the service branches which expressed significant concerns about most, if not all, of these techniques?

Mr. Haynes: Well, Senator, I—you're referring to something—

Senator REED. I'm referring to—

Mr. Haynes:—that's—

Senator REED.—memorandums, what the chief—that the Chairman of the Joint Chiefs of Staff solicited through Admiral Dalton.

Mr. Haynes: Well, let me, if I may, try to—

Senator REED. Yes, sir.

Mr. Haynes:—try to get some clarity.

You're referring to a group of memoranda that I do not recall seeing at the time. I believe I was shown a couple of them when I appeared before your committee in closed session about a month ago, and that's the first time I recall seeing those memoranda. But, as I was—

Senator REED. Uh—

Mr. Haynes: Sir—

Senator REED. Yes, sir.

Mr. Haynes: Pardon me. But, as I was trying to describe to Senator McCaskill, I don't want anyone to walk away from my statement about that to suggest that I don't—or didn't know that there were concerns about how the Defense Department should interrogate prisoners. That's what I was—you probably missed it, but we had a long exchange about this chronic debate about how to interrogate.

Senator REED. Well, I'm less concerned about this chronic debate, but the senior counsel for the Chairman of the Joint Chiefs of Staff deliberately tasked the representatives of the services to comment on the specific memorandum that Colonel Beaver prepared that was the substance, the foundation of your recommendations, that they prepared written statements expressing significant concerns about all of these techniques. And this is the opinion of at least four uniformed officers and some law enforcement personnel who've spent their careers in the uniform of the United States, both as lawyers and as military personnel. And you were aware of those, but you weren't curious enough to ask them to be given to you so you could read?

Mr. Haynes: Well, I don't know that I was aware of those—

Senator REED. Well, you either—

Mr. Haynes:—specifically, as—

Senator REED.—were or you were not.

Mr. Haynes: Well, I don't recall being aware of any particular memoranda—

Senator REED. No, but let me—so, you're trying to make a judgment about—a very sophisticated legal judgment about the Geneva Convention, Law of Torture, UCMJ, and you're aware of a debate going on within the services, which express significant concerns, but you have no—forget legal obligation—no intellectual curiosity to ask people specifically, "What's the problem?"

Mr. Haynes: Oh, Senator—

Senator REED. Is that just—

Mr. Haynes:—I've got lots of curiosity, and I—and I take my responsibilities, and took my responsibilities, very seriously. This was a very serious issue.

Senator REED. All right.

Mr. Haynes: Absolutely, there was—there were a lot of factors involved, very important questions, including the safety of the country and the urgency of the circumstances to try to get information from this individual, who we knew—

Senator REED. No, no. No, no.

Mr. Haynes:—who we knew was to be a hijacker on the 20th plane, who continued to claim he was a falconer.

Senator REED. Your fundamental responsibility was to render a legal opinion to the Secretary of Defense.

Mr. Haynes: It was, and it—

Senator REED. His responsibilities included many of the things you referred to, the overall danger of the country. In fact, you could very have—certainly have given him an opinion that, in your view, that there were certain matters which would not be consistent, and he could have overruled you. But, your obligation, I think, was to give him the best legal opinion. So, let's just stick to that.

And the other factor here is, where in your memorandum is there a reference to, "This is restricted to the Qahtani case only"?

Mr. Haynes: Well, you can read my memorandum.

Senator REED. I did. And there's no such reference. In fact, category 1 and category 2 are given a blanket approval by the Secretary, at the discretion of General Hill, at the time. The only reservation in category 3 is not that it's illegal—you claim they're all legal—it's just, as a matter of policy, we won't do a blanket. There's nothing here referencing Qahtani.

Mr. Haynes: And—

Senator REED. And you're continually referencing, that the only thing you were concerned about was Qahtani, is not substantiated by the memo. Oh, and by the way, everyone can kibbitz about good lawyering, but it's—if the case was Qahtani, I would think your memo would have said, "In the case of Qahtani, you can do this, this, and this."

Mr. Haynes: Well, Senator, I was there, and that was the catalyst, and that was the purpose, and that was what everyone—

Senator REED. But, that's not—

Mr. Haynes:—under—

Senator REED.—that's not—

Mr. Haynes:—and that's what—

Senator REED.—the opinion you rendered.

Mr. Haynes:—that's what every—well, Senator, I mean, we don't do these things in a vacuum. And you missed my exchange with—

Senator REED. Well—excuse me, Mr. Haynes, but I think you did it in a vacuum. You knew there was debate going on among the military legal officers, great concerns, yet you did not ask for their written memorandum. In fact, under Admiral Dalton's testimony, you communicated, through General Myers, that she should cease her formal analysis in response to these concerns. Is that accurate?

Mr. Haynes: Well, I have the highest regard for Admiral Dalton, and I—you know, I'm sure whatever she said is accurate, to the

best of her recollection. I don't have perfect recollection of that time, but I accept her word.

Senator REED. Well, let me—

Mr. Haynes: There's no question about it.

Senator REED. But—

Mr. Haynes: Let me finish, Senator, because you say I acted in a vacuum; that's absolutely not true. I looked at this, hard. There were—there was a—there was a—you know the Defense Department. You're a West Point graduate, you're a Harvard-trained lawyer, you're a fantastic Senator; I have the highest regard for you. But, you know how that place works. I mean, there are—there are thousands and thousands and thousands of decisions made every day. This was one. It was an important one, but it was one, and it came in the context that I described a moment ago, with an extraordinary degree of urgency. My client—my boss, the Secretary of Defense, needed a recommendation. It had been—it had been sitting in the headquarters for a month, when he—the Secretary of Defense said, "I need a recommendation" to his senior—to his senior advisors—me, the Chairman of the Joint Chiefs, the Deputy Secretary of Defense, the Under Secretary for Policy, and others who met with him every day—"I need a recommendation." I took it. I looked at it. I looked at the package. I looked at the circumstances. I made a legal judgment. I consulted with Captain Dalton during that time. She—her testimony reminds me of the care with which we dealt with it. And I rendered my opinion—

Senator REED. But, it doesn't remind you of whether or not you told her to cease her formal analysis.

Mr. Haynes: I don't remember that, specifically. But, Senator, let me say, it makes sense to me, even in this remote time, because the—there are 10,000 lawyers in the Defense Department. There has been a portrayal of this event in the press, and in today's hearing by some people, as if the military lawyers all objected and the civilians or somebody just ignored them. There were—there were military lawyers whose job it was to advise those people in that chain of command—the commander at GTMO, commander of Southern Command, the Chairman's lawyer, and then me, for the Secretary of Defense. And I—you know, the testimony earlier mentioned that the Central—or the Southern Command lawyer was perhaps not as involved as he might have been, but the—but the other three people in the chain of command whose job it was to advise those leaders looked at it carefully, looked at it under the circumstances. There is a paucity of law that was applicable at the time, and my job, as the lawyer, is not just to say no, but to say, "Where is the area of discretion available to the client?"—in this case, the Secretary of Defense. And that was my determination, and I stand by it.

Senator REED. What did you rely upon? What legal analysis, specifically? Not your just thinking internally about these great issues, but—

Mr. Haynes: Well, I'll try to go through it with you right now. The U.S. Constitution, we believed, under the Eisentrager case, did not apply at Guantanamo. The President had already determined that the Geneva Conventions did not apply to the al Qaeda detainees or the Taliban detainees. The Convention Against Torture

would apply, but it's a non-self-executing treaty. The implementation of that was the statute passed by the Congress of the United States and signed by the President, so the prohibition against torture reflected in that statute applied. And the—Article 16 of the Convention Against Torture prohibiting—or imposing on the United States and undertaking to prohibit cruel, inhumane, and degrading treatment, was applicable. The President's order to treat detainees humanely was a restriction. And the application—and the Uniform Code of Military Justice, to some degree, would apply, as well—and the application of those strictures to this circumstance under the operating procedures that all of the decision-makers and advisors understood to be applicable led me to believe that the Secretary had the discretion to authorize the techniques that we recommended.

Senator REED. If the Uniform Code of Military Justice applied, do you agree with Colonel Beaver's analysis that it would be a per se violation of 128—Article 128 to engage in the poking and light pushing?

Mr. Haynes: I did not think so.

Senator REED. Did you make that—any clarification why she didn't agree with you?

Mr. Haynes: Well, I didn't write a memorandum to that effect. I—

Senator REED. Did you write any memorandums to this effect?

Mr. Haynes: I wrote the memorandum that you have in front of you, and—

Senator REED. Yeah.

Mr. Haynes:—that's—

Senator REED. All right.

Mr. Haynes:—and that was the—that was actually more expansive than the general counsel of the Department of Defense usually does in decisionmaking for packages going to the Secretary of Defense.

Senator REED. How did you communicate this decision to SOUTHCOM and to Guantanamo?

Mr. Haynes: I—

Senator REED. Did you send them a copy of the memorandum?

Mr. Haynes: I did not. And I—I think it's important also to note, Senator—and I'm sure you'll appreciate this—as the lawyer, I was not the decisionmaker. I was an advisor. The Secretary of Defense made the decision, based, in part, on my advice, as well as the Chairman of the Joint Chiefs' advice. And the normal transmittal of a decision of that nature would be through the Joint Staff. And I would assume that's how it was passed.

Senator REED. So, once this—once the Secretary signed off in it, you had no followup on this at all. You don't know how it was communicated.

Mr. Haynes: Well, I would think it was communicated in the normal fashion.

Senator REED. Was this memorandum sent down to—

Mr. Haynes: I—Senator, I don't—I mean—

Senator REED. You don't know.

Mr. Haynes:—I don't—that's—

Senator REED. Admiral Dalton—

Mr. Haynes:—not part of my job to do.

Senator REED.—went to great length to say that her recommendation to you, her concurrence was based upon the conditions that would govern the use of these techniques. Can you point to the conditions that—how were these conditions communicated by the Secretary of Defense, and where are they reflected in your memo?

Mr. Haynes: Well, they're not in my memo. But, as I told you, most decision documents that would go to the Secretary of Defense would—you know, I wouldn't write, nor would most of the other staff people who would sign a—on a block, would not write extensive—

Senator REED. But, if those—

Mr. Haynes:—“Don't do this”—

Senator REED.—conditions were—

Mr. Haynes:—“don't do that.”

Mr. Haynes: If those conditions were central to the legality of your advice, wouldn't you have a legal obligation to make the Secretary aware of them? And this goes to a more fundamental—

Mr. Haynes: Can I—

Senator REED. Did you—

Mr. Haynes:—answer, or—

Senator REED. Did you tell the Secretary how difficult and close a call this was—

Mr. Haynes: Oh—

Senator REED.—and how that there was significant adverse conclusions by subordinates, and that his—if you follow Admiral Dalton's logic, that his concurrence would require significant conditions that he also must approve, or at least be aware of?

Mr. Haynes: Well, Senator, what—you're assuming something that's not so. You're assuming that there were no understood conditions.

Senator REED. But, understood—

Mr. Haynes: That—

Senator REED.—by who?

Mr. Haynes: Understood by everybody involved in the process. People who were knowledgeable about the proposal and how it would be applied all understood what was meant by the proposal. Captain Dalton talked at length about that in the earlier panel, and I don't know if you were here to hear that—

Senator REED. I was here.

Mr. Haynes:—to listen to it. But—

Senator REED. Could you list the conditions—

Mr. Haynes:—as—sir, as well as—

Senator REED.—that were applicable? Could you list the conditions that an interrogator had to follow?

Mr. Haynes: Could I list them?

Senator REED. Yes.

Mr. Haynes: Well—

Senator REED. Everyone understood them.

Mr. Haynes: Well—

Senator REED. They were clear to the interrogators, clear to everyone else.

Mr. Haynes: You—Senator, you’ve probably got access to more documents than I—

Senator REED. No, no, I’m asking you—

Mr. Haynes: Let me finish.

Senator REED.—Can you list the conditions?

Mr. Haynes: If I may—

Senator REED. No, I’d like you to answer the question.

Mr. Haynes: If you’d let me finish, I’d say you’ve got more documents than I’ve ever seen on this, and you will have, in the documents that you’ve got, the standard operating procedures, the people assigned to monitor. You had testimony earlier. There were—the—there were interrogation plans that were supposed to be designed for each individual detainee who was to be interrogated. That would involve a psychological review. There had to be medical care associated with it. There had to be a legal review. There had to be substantial command monitoring. There was a step process that they were supposed to go through. There were—they were supposed to stop if anything came up. There were all sorts of conditions. And not to mention, Senator—

Senator REED. Where in this—memorandum is the reference to—

Mr. Haynes: Sir—

Senator REED.—those conditions?

Mr. Haynes: Not to mention, as you know, the training and the quality of the soldiers that I think these questions malign.

Senator REED. I object strenuously to that. You did a disservice to the soldiers of this Nation. You empowered them to violate basic conditions which every soldier respects, the Uniform Code of Military Justice, the Geneva Convention. Here’s what soldiers do. You said the Geneva Convention doesn’t apply, and they honestly asked, “What does apply?” And the only thing you sent them was, “These techniques apply.” No conditions, nothing. So, don’t go around with this attitude of you’re protecting the integrity of the military. You degraded the integrity of the United States military.

And I have finished my questions.

Mr. Haynes: Well, Senator, I object to that, and I disagree with that. And I would also point out that the President of the United States, with the advice of the entire Cabinet, made the determination about the applicability of the Geneva Conventions.

Chairman LEVIN. Senator Sessions?

Senator SESSIONS. Thank you, Mr. Haynes. And thank you for your service. You’ve been—you’ve served your country in uniform. I know your son is in ROTC now, and seeking to be a military officer, and I know you love and respect the military, and I know that you care about getting this matter right.

But, I would just ask you this question, because, despite what the accusations have been made here today, and criticisms and second-guessings, I think the evidence shows that it was intensely legal studied all throughout this process. And I believe Mr. Goldsmith, who thought that President Bush was too aggressive in some of these matters, and, after he left the Department of Justice, wrote a book—and I’ll ask you if you agree with him—“Many people believe the Bush administration had been indifferent to these legal constraints in the fight against terrorism. In my experience

the opposite is true; the administration has paid scrupulous attendance to law,” close quote.

Do you think y’all paid scrupulous attention to law in trying to get this right?

Mr. Haynes: Every time I acted, I understood that the—the enormous responsibilities of my job, and I tried to do that.

Senator SESSIONS. And he also wrote, quote, “Many people think the Bush administration has been indifferent to wartime legal constraints, but the opposite is true; the administration has been strangled by law, and, since September 11th, 2001, this law has been lawyered to death,” close quote. Is there some truth in that, in your opinion?

Mr. Haynes: Oh, yes, sir, I think so.

Senator SESSIONS. And with regard to these techniques that were discussed and approved, did you say that Major General—two-star General Dunlavey, who headed the Guantanamo Joint Task Force, was a judge?

Mr. Haynes: He’s a judge in civilian life.

Senator SESSIONS. And so, this is a lawyer and a judge, and he has the advice of a Judge Advocate General attorney on his staff, and they concluded that they had a high-value individual there who claimed to be a falconer, but who had met with Mohammad Atta and been rearrested in—was it Iraq or Afghanistan?

Mr. Haynes: I think he was captured in Afghanistan.

Senator SESSIONS. In Afghanistan. And they—the normal interrogation techniques had not worked, and they submitted a request to do enhanced techniques. Is that right?

Mr. Haynes: Yes, sir.

Senator SESSIONS. And that came up through General Hill, and he’s the SOUTHCOM Commander, a four-star general.

Mr. Haynes: Yes, sir.

Senator SESSIONS. And you evaluated the categories and the requested techniques, and you had to make a recommendation to the Secretary of Defense. You were his lawyer, and you had to recommend that.

Mr. Haynes: Yes, sir.

Senator SESSIONS. Now, you had other things on your plate at this time, too, did you not?

Mr. Haynes: I did.

Senator SESSIONS. And—but, you evaluated—did you rubberstamp what they asked you, or did you pare back in any way the requests that they had made?

Mr. Haynes: Did not rubberstamp. Indeed, I recommended that only a subset of the requested techniques be applied.

Senator SESSIONS. Well, you say a “subset,” but you rejected the category-4 techniques and the category-3 techniques, so it all—I think, all of those—is that correct?

Mr. Haynes: There were three category-3 techniques that I recommended not be used.

Senator SESSIONS. And so, that was your recommendation to the Secretary of Defense. And he approved that.

Mr. Haynes: Yes, sir.

Senator SESSIONS. Now, after that, is it not so that other JAG officers raised questions about this and the wisdom of some of these techniques, and a working group came together?

Mr. Haynes: Well, sir, the—that requires some explanation. As I've said in response to some other questions, the difficulty of these issues never abated. And after the Secretary approved—so, in other words, there was a difficult decision leading up to the one that the Secretary made, and then, after that decision, that continued, including in my own—I mean, these are not easy questions. This is not something that I did, as you say, as a rubber stamp or did lightly. I continued to stew on that, frankly. And I talked with people, and I heard from Mr. Mora, you know, made sure that I alerted the Secretary. I had daily meetings with the Secretary and the Chairman, and so forth, and I made sure they were aware of this continuing concern.

Over time, I went back, from time to time, to the Secretary and ultimately convinced him that we needed to take another look at what he had recommended, or what he had approved—what I had recommended, what he had approved—and convinced him that he should rescind his approval, which he did on the 12th of January, as I recall. I believe it was a Sunday, because I had a—I got a call from General Hill. That decision was memorialized on the 15th of January.

In preparing that rescission document for the Secretary, I recommended that he instruct me to set up a working group to look at this more thoroughly, which I did. And I don't want to take up all of your time, but the point is that there was a very, very thorough, broad-gauged, multidisciplinary look at how we, the Department of Defense, should deal with this problem, going forward.

Senator SESSIONS. Do you think you were aware of the tensions between too much aggressiveness and the need to get information and the legality and the treaties and the law and the policies of the United States? Do you feel like you were wrestling with all those issues as you made these decisions in a fair and objective way?

Mr. Haynes: Well, sir, let me point out again, the decision to employ particular techniques was not mine to make, but, in the course of trying to come up with recommendations for the Secretary, all of those things that you've described were in the mix, so to speak. There was—

Senator SESSIONS. You concluded they were lawful.

Mr. Haynes: Well, yes, sir, but the “they” that you're talking about now, when you're talking about the working group, is a different set of interrogation techniques that the Secretary of Defense approved in April of 2003.

Senator SESSIONS. Okay. Well, let's get that straight. So, you—after the first approval, or disapproval of a number of the requested techniques, and you approved a certain number, you continued to look at that, and you recommended to the Secretary of Defense that some of those not be approved in the future and to be taken off the approved list, and you restricted further the request of the Guantanamo Task Force for approval of techniques.

Mr. Haynes: Yes, sir, that's generally correct. There were other people involved in that, but that was—that was my view.

Senator SESSIONS. And—now, persons—are the—explain—take a moment and explain what you meant when you—Senator Reed and you discussed the question of medical review being—the people being interrogated being monitored for medical review or psychological review, that there be a command review, and—of these conditions; and what role of approval did General Hill, the four-star Commander of SOUTHCOM—what role did he play in having to approve the utilization of extraordinary techniques?

Mr. Haynes: Well, there is a—there is a document that lays that out that was embodied with the Secretary of Defense's decision in April of 2003, that lays out those approval levels. Some things could be delegated—some decisions about interrogation approaches could be delegated below General Hill, but some decisions needed to be approved by the combatant commander—General Hill, in that case.

Senator SESSIONS. Did the interrogators—what did they—requirements did they have on them with regard to observing the physical condition of a individual being interrogated or—

Mr. Haynes: Well, the—

Senator SESSIONS. Did they have to watch out for their health? What—

Mr. Haynes: Oh, yes, sir.

Senator SESSIONS.—requirements were placed on that?

Mr. Haynes: Well, that was a fundamental requirement. There is an obligation to safeguard the people who had been captured, and to keep them healthy and safe and secure. And so, there was the fundamental humane-treatment requirement that the President had demanded of the Armed Forces from the beginning of the war, but, even during the interrogations, of course, there was particular attention required of those people who were involved in the interrogations, including medical care and psychological care, as well as the interrogator and legal oversight.

Senator SESSIONS. And failure to do that would have been in violation of military standards.

Mr. Haynes: And of the direct order.

Senator SESSIONS. Now, just to sort of wrap that up, there was the Bybee memo by the Department of Justice, not the Department of Defense, and that memo has been criticized, and that's the one that was withdrawn, is that not correct, as going too far?

Mr. Haynes: I believe you're referring to a memorandum interpreting the United States Code Provision on Torture, prohibiting torture. And I—if I recall correctly, that memorandum—that legal opinion was rescinded by the Department of Justice in the middle part of 2004 and replaced with a different opinion at the end of 2004.

Senator SESSIONS. Well, let me just point out, category-2 techniques in your—that you approved—stress position; maximum 4 hours standing; falsified documents—presumably, you could present falsified documents to encourage discussion or admissions; isolation for up to 30 days only—Federal prisoners are often kept in isolation longer than that; nonstandard interrogation environments, hooding, 20-hour interrogation periods, and so forth. But, the Torture Statute that Congress passed in 1994, 92 to 8, prohibits severe physical or mental pain or suffering—"severe." And I

just don't think the things that are mentioned in there are in violation of the congressional definition of torture. I think that's what Attorney General Ashcroft said at a Judiciary Committee lunch, "I didn't define 'torture,' Senators, you defined it." So, Congress defined "torture," did it not?

Mr. Haynes: Yes, sir, and they used the words that you described.

Senator SESSIONS. Severe physical or—pain or suffering.

Thank you, Mr. Chairman. I just would conclude and say, I'm not sure we got it right. I know President Bush was concerned about America. I know he was determined to get better intelligence, as we all were. I'm not sure we've yet figured it out precisely. But, I object strenuously to the suggestion that the Department of Defense went out with a policy of reckless disregard for law and we're systematically abusing prisoners. Indeed, those in Abu Ghraib who were not part of an interrogation, but were really abused prisoners—those people—many of them went to jail. They were tried and convicted in the military court-martial. So, I just want to emphasize that it's never been our policy to torture people, and then, the definition of what's permissible, I guess we can all agree or disagree.

Thank you, Mr. Chairman.

Chairman LEVIN. Thank you, Senator Sessions.

Senator Graham?

Senator GRAHAM. As we conclude, here—at least my part of it will be concluded—I'd like to go through some scenarios, here, and make sure I understand what your testimony is.

According to the FBI, in the October-November timeframe 2002, before the Rumsfeld memo was approved, FBI agents indicated they witnessed interrogation techniques against the 20th hijacker that included making him pray to a—to an idol shrine; abusive conduct, including having a dog used in interrogation. That's what the Schmidt-Furlow report revealed. Is it your testimony that Secretary Rumsfeld—neither Secretary Rumsfeld or yourself ever approved any such techniques for the 20th hijacker?

Mr. Haynes: That—well, I tell you today that, to my knowledge, the Secretary of Defense had no knowledge of that, did—

Senator GRAHAM. Okay. No, well, that—

Mr. Haynes:—nor—

Senator GRAHAM.—that's all I'm asking.

Mr. Haynes:—nor did I.

Senator GRAHAM. That's all I'm asking.

Mr. Haynes: And I think that's what General Schmidt concluded—

Senator GRAHAM. Okay.

Mr. Haynes:—in his report.

Senator GRAHAM. That's all I'm asking. I just wanted to get that right.

All right. Now, the general counsel for the Navy came to you with concerns before the memo was signed in December, is that correct? Or after?

Mr. Haynes: After.

Senator GRAHAM. Okay. Did he threaten that, "If you do not revisit this, I will draft up a memo, and I will go public about this?"

Mr. Haynes: Well, I've heard—I think I heard him say that today, and I've seen accounts of that. I don't remember that exchange. I remember him coming in at least twice, very passionately and understandably concerned, because he had been hearing things. And in each case—my recollection—in each case, I listened to him, I reported up the chain, and I asked—

Senator GRAHAM. So, it's your—

Mr. Haynes:—Captain Dalton to—

Senator GRAHAM. Okay. Right.

Mr. Haynes:—to look into it, to see whether there was anything untoward going on.

Senator GRAHAM. So, it's your testimony that his—he's saying today, and other days, that he had to threaten the release of an opinion—his opinion about these interrogation techniques to the public at large, and it would look bad for the administration, that he felt compelled to go on the record, so to speak, about this, that had nothing to do with you revisiting the December memo?

Mr. Haynes: Well, there's an assumption in that question that I don't—that I'm not rejecting, I'm not accepting it. I don't remember that particular edge to the discussions.

Senator GRAHAM. Well—

Mr. Haynes: But—

Senator GRAHAM.—Mr. Haynes, from December to January, I believe it is—when was the memo repealed and replaced?

Mr. Haynes: There are two significant dates: the 12th of January, when there was an oral rescission—

Senator GRAHAM. Okay.

Mr. Haynes:—and the 15th of January, when there was a writing.

Senator GRAHAM. I got you. From December the 2nd, I think was when he approved this memo—

Mr. Haynes: Right.

Senator GRAHAM.—until January the 12th, what happened in that intervening period to make you recommend to him, “We need to take this thing off the table”?

Mr. Haynes: Well, I think I said, earlier today, that from—you know, all through this period, I had my own misgivings. So, it's hard to identify a single thing.

Senator GRAHAM. But, your—

Mr. Haynes: But—

Senator GRAHAM. Right, your testimony is that certainly you don't recall that it was the threat that Mr. Mora made about going public if nothing was done.

Mr. Haynes: I don't recall him doing that. I do recall him being very passionate about his—

Senator GRAHAM. Okay.

Mr. Haynes:—his objection to what was approved. But, I—sir, let—I want to be—

Senator GRAHAM. Yes, please.

Mr. Haynes:—I want to be responsive. I also heard—

Senator GRAHAM. That's a pretty quick turnaround, from December the 2nd to January 12th. Something had to happen that was fairly earthshattering, I would think—

Mr. Haynes: No, sir—

Senator GRAHAM.—to create a policy for the Department of Defense and have it rescinded, you know, 6 weeks later.

Mr. Haynes: No, sir, because—I mean, I've tried to—I've tried to impart the chronic and very intense passion about how one goes about doing this. And it's one of the reasons that I felt very strongly that the Secretary ought to get this working group with all the players involved, because there were so many competing concerns.

Senator GRAHAM. You felt—okay, that's right. Now, did the working group that was formed ever review the final product that was later approved?

Mr. Haynes: Well, we've had—you and I have had a discussion about this in another context, where I think we were talking past each other. So, I—I can tell you great detail about that, but let me just tell you what my recollection was, briefly. And the answer was—

Senator GRAHAM. You know—no, we're not going to do it that way. I'm tired of doing it that way. Here's what we're going to do.

Mr. Haynes: Okay.

Senator GRAHAM. We're going to get to the bottom of this.

Mr. Haynes: Okay.

Senator GRAHAM. The point of the matter is that other people have testified that they were assembled as part of a working group, giving input; a memo was issued that they never saw, and they didn't find out about it until a year later. Are they correct when they say that?

Mr. Haynes: I don't have firsthand knowledge about that. My understanding then was that they saw—

Senator GRAHAM. If there's so much—

Mr. Haynes:—the final report.

Senator GRAHAM.—passion about this, and everybody's so upset, you can't verify the fact that the working group got to look at the final product?

Mr. Haynes: Well, I thought they did. I thought they did.

Senator GRAHAM. Well, they say they didn't.

Mr. Haynes: Well—and I wrote a letter that—

Senator GRAHAM. Where did all—

Mr. Haynes:—explained my view of that.

Senator GRAHAM.—the passion go?

Mr. Haynes: Well, I don't know how to answer that, Senator.

Senator GRAHAM. Well, I mean, where did your passion go?

Mr. Haynes: Well, my passion was to try to get the Secretary some good counsel. And what this working group did, which I think was a great exercise of government, frankly—

Senator GRAHAM. What—well, from—their—

Mr. Haynes:—was—

Senator GRAHAM.—point of view is that they were assembled to give input; and they read about, in the paper, what the final product was. Now, that's what they've testified, under oath, that these guys had no clue, and gals had no clue, about what the final product was. They were taught—they were brought in to be part of a working group, and they read in the paper, a year later, that you found out a new way of doing this, and they looked at it and still had concerns.

Mr. Haynes: Well, I wasn't running the working group.

Senator GRAHAM. Okay.

Mr. Haynes: But, I will tell you that the entire leadership of the Department of Defense felt like that the work of the working group led to a very good result. And when I talk about—when I say that, I'm talking about, not just the Secretary, not just the Chairman of the Chiefs and the service Secretaries who advised—

Senator GRAHAM. Well, all due respect, Mr. Haynes—and I know you had a very difficult job, and a lot of this is uncertain. I mean, I'm just worried about the process. The process here, to me, is clear. I mean, just my two cents worth is that the working group was formed because you got criticism from Mora, and we had to—you had to deal with that criticism, and you did rescind the memo. To your credit—to your credit, you did that. But, the working group never really got to see the final product, and I'm not so sure that's much of a working group.

Now, let's go back to the December 2nd memo. One of the techniques, the category-3 techniques that were never used, was water boarding. Is that correct? Water boarding was a category-3 technique?

Mr. Haynes: I think it was described as a cloth with water dripped on it, not—you know, I've never really understood—

Senator GRAHAM. All right.

Mr. Haynes:—what that—

Senator GRAHAM. Right.

Mr. Haynes:—technique was, but—

Senator GRAHAM. Right. Right. I—

Mr. Haynes:—but, it was listed—

Senator GRAHAM.—I understand.

Mr. Haynes:—and it was not approved.

Senator GRAHAM. Now, do you think that's legal? Would that violate the UCMJ? Would it violate the UCMJ for one of our—a couple of our military personnel to grab somebody, hold 'em down, put a cloth over their face, and simulate drowning?

Mr. Haynes: As we sit here today, absolutely yes, it would be illegal.

Senator GRAHAM. Okay.

Mr. Haynes: At the time? I don't know.

Senator GRAHAM. Okay.

Mr. Haynes: But, the law is very clear now.

Senator GRAHAM. Yeah. You don't think it was clear then that water-boarding a prisoner was a violation of Article 90—Article 128 in—the Maltreatment of Prisoner Article?

Mr. Haynes: I didn't reach that question—

Senator GRAHAM. Okay.

Mr. Haynes:—Senator.

Senator GRAHAM. Thank you for your service. I know you were dealt a difficult hand.

And, Mr. Chairman, I appreciate this hearing.

And I guess the thing that I'm left with is that there certainly was an attitude that we may be attacked again, and people were rightly concerned. And the law took on the view of being an impediment to our safety, not our strength. And I think what got us to this problem—got us in this mess was that a lot of people saw the laws that regulated conduct were a—made us more at risk, not

safe. And I guess we've learned—if we've learned anything from this, that when the law in this war—the rule of law in this war is a strength, not a weakness. And now I'm—I think we've got it right, and I appreciate those who were trying to do this early on after 9/11.

But, it is clear to me, Mr. Chairman, the memo was never limited to one person. It is clear to me that these techniques do encompass techniques that we were defending against, and it became an offensive weapon. It is clear to me they migrated all over the military. And it is clear to me that we created confusion for those serving this country, and it was a—one of the great tragedies of—after 9/11, that we allowed our enemy to take advantage of this situation, because they surely have. In an effort to make us safe and to conquer our enemy, I think, for a period of time, we could not have done more to help them by creating this confusion and this mess. And in that regard, these hearings have been helpful.

Chairman LEVIN. Thank you, Senator Graham.

Mr. Haynes, I want to go back now to October 2002. This is when the Guantanamo request was forwarded by General Hill to the Joint Chiefs. On October 30th, General Myers, Chairman of the Joint Chiefs, circulated that request from GTMO to the military services for comment. I want to go through those military services comments with you.

Tab 12, that's a November 7th, 2002, memorandum from the Army. Paragraph 2, the memorandum says, "The Army interposes significant legal, policy, and practical concerns regarding most of category-2 and all of category-3 techniques." Were you aware that the Army had concerns with those techniques?

Mr. Haynes: Senator, I—I think I've testified to this—I don't recall seeing this memorandum before. I mean, I'm not even sure this is one I've seen before, but you—

Chairman LEVIN. I mean at the time. Were you aware, at the time—

Mr. Haynes: I don't recall seeing—

Chairman LEVIN. All right.

Mr. Haynes:—memorandum, and I don't recall specific objections of this nature.

Chairman LEVIN. The next page on that tab 12 is a memo from the chief of the Army's International Operational Law Division. It says, "Stress positions, deprivation of light and auditory stimuli, the use of phobias to induce stress crosses the line of humane treatment and would likely be considered maltreatment under the Uniform Code of Military Justice, and may violate the Torture Statute." Were you aware of the Army's International Operational Law Division, that they had concerns with these techniques?

Mr. Haynes: You—I'm sorry, I was—I lost you. Is this the third—there are three—

Chairman LEVIN. Memo from the chief of the Army's International Operational Law Division.

Mr. Haynes: Is that the one that has "IO" at the top?

Chairman LEVIN. Yeah, it's tab 12.

Mr. Haynes: All right, the third one at tab 12. I'm sorry, and your question is, Was I aware of this—

Chairman LEVIN. Were you aware of that?

Mr. Haynes:—memorandum? I don't recall seeing this memorandum.

Chairman LEVIN. All right. Tab 11 is a memo from the chief legal advisor to the Criminal Investigative Task Force at GTMO. It says category-3 techniques and certain category-2 techniques, quote, "may subject servicemembers to punitive articles of the UCMJ," close quote, called the, quote, "utility and legality of applying certain techniques questionable." That's tab 11. Were you aware that the Criminal Investigative Task Force had concerns with those techniques?

Mr. Haynes: This is the—

Chairman LEVIN. Tab 11.

Mr. Haynes:—unsigned thing at tab 11, with—is that the 3-page document?

Chairman LEVIN. Tab 11.

Mr. Haynes: I—

Chairman LEVIN. The memo from—

Mr. Haynes: I'm at tab 11, but you've read a bunch of things that I can't find, so—so, am I looking—

Chairman LEVIN. Yeah.

Mr. Haynes:—at the right document?

Chairman LEVIN. You're looking at the right document.

Mr. Haynes: Well, I don't recall seeing this document—

Chairman LEVIN. All right, thank you.

Next, tab 10—it's the Air Force's memo. It says, "The Air Force has serious concerns regarding the legality of the proposed techniques"—that's in quotes—states that the techniques described may be subject to challenges failing to meet the requirements outlined in the military order to treat detainees humanely. Were you aware that the Air Force had those concerns with those techniques?

Mr. Haynes: I don't recall seeing this memorandum, either.

Chairman LEVIN. Were you aware of their concerns?

Mr. Haynes: I don't recall specific concerns. I've told the panel, sir, with all due respect, I knew there were concerns. I don't recall these, and I don't recall seeing these memoranda.

Chairman LEVIN. Tab 14 is the Marine Corps response—mind you, they're responding, now, to a request of the Joint Chiefs of Staff to comment on a recommendation for treatment—relative to treatment of detainees. Each one of the services now responding. Tab 14 is the Marine Corps. It says, in the third full paragraph, quote, "Several of the category-2 and -3 techniques arguably viable—violate Federal law, would expose our servicemembers to possible contribution"—were you aware of the Marine Corps' concerns with those techniques?

Mr. Haynes: Sir, I think I've answered that before. I can't even read this document, but I don't remember seeing it.

Chairman LEVIN. Okay. Now, when the GTMO request got to your office, do you recall Eliana Davidson, who worked in your office, telling you that she thought the request needed further assessment?

Mr. Haynes: I don't recall that, specifically.

Chairman LEVIN. Do you know who Eliana Davidson is?

Mr. Haynes: Oh, absolutely. Yes, sir.

Chairman LEVIN. You don't recall her telling you that there was further assessment needed.

Mr. Haynes: I don't recall that, specifically, but there was a long period of time, and we did some further assessing, so maybe she said that at the beginning, and maybe we did it.

Chairman LEVIN. All right. Now, before the Secretary of Defense signed an order approving these—all of category-2 and some of category-3 techniques—the services' lawyers let your office know that they had serious problems with that request. You vaguely remember that there may have been something, but apparently you never took the time to ask for those documents. And yet, when you were asked, "Did you pay scrupulous attention to the law?" you studiously ignored the memos from the lawyers of the services that came to your office. You studiously ignored them.

Mr. Haynes: I disagree with that characterization.

Chairman LEVIN. And then you cut off the review, which had been requested, and that Admiral Dalton was carrying out. Now, I don't know how anybody can testify that you paid attention to the law when you ignored the lawyers in the services who brought to your office these concerns, and then, when there was a review going on by an attorney for the Joint Chiefs of Staff, you sent the word, which you don't doubt, that you wanted that review stopped. That is not studious attention to—

Mr. Haynes: Well—

Chairman LEVIN.—the law. It's quite the opposite. It is—

Mr. Haynes: Well—

Chairman LEVIN. It is stymying consideration of one of the most significant legal decisions which this country has made, and that is how to treat detainees. And the errors that result in those opinions have caused this country tremendous security damage.

So, now I'm going to ask you this question.

Mr. Haynes: Well, may I respond to your comments? Because I don't—

Chairman LEVIN. Yeah.

Mr. Haynes:—I don't—

Chairman LEVIN. Well, I know—I'm going to ask you a question, and then you're more than free to do it.

Mr. Haynes: Okay.

Chairman LEVIN. Do you agree that you cut off the Dalton review in the middle?

Mr. Haynes: I don't remember doing that.

Chairman LEVIN. How often have you ever—

Mr. Haynes: Well—

Chairman LEVIN.—cut off review—how many times has this happened?

Mr. Haynes: Well, Senator—

Chairman LEVIN. She says it's never happened.

Mr. Haynes: Well, I—you know, Senator, what she—what I heard her say was that we restricted the number of people involved. That's—

Chairman LEVIN. No.

Mr. Haynes: That's what I heard her say.

Chairman LEVIN. No. You—she said that she stopped the broad review. That's what she said.

Mr. Haynes: She said she stopped—

Chairman LEVIN. And it had never happened before or after, as far as she knew. This is the one time that that had ever happened, as far as she knows, and this is the one time where you intervened—and you don't doubt this, apparently—to stop that review.

Mr. Haynes: Well, I don't remember it.

Chairman LEVIN. That is not paying attention to the law.

Mr. Haynes: Well, Senator—

Chairman LEVIN. That is stymying a review of the law to make sure that what we are doing comports with the law.

Mr. Haynes: Well, Senator, I don't—I don't agree with that characterization. There are plenty of examples of restricting people who have a need to know, for security and speed reasons.

Chairman LEVIN. Well, of course. That's not what she was—

Mr. Haynes: Well, I don't know—

Chairman LEVIN.—testifying here. She was testifying to a review which she—was taking place.

Mr. Haynes: A broad review.

Chairman LEVIN. A broad review which—

Mr. Haynes: A broad review.

Chairman LEVIN.—was taking place for the Joint Chiefs of Staff, at their request. She says she never had had that kind of a request stopped in the middle before. She never knows of it happening afterward.

And then you say—then you have, to me, the audacity to say that all of this is caused because there's two groups that are in conflict—two groups in conflict—one are the law enforcement people and the other are the people who want information from interrogation, ignoring the third group, which you ignored in November of 2002. It's the third group, you ignored. And that third group were the lawyers for the military. The military services, to your office while this was under review, sent those memos, raising all kinds of red flags, and you ignored them, you don't remember seeing them. And then, when that broad review was being—taking place by Admiral Dalton, stymied that review.

Now, how can you say that there's only two groups here that are involved, and this is tension between two groups—on the one hand, the law enforcement folks; on the other hand, the people who are doing the interrogation, who want information—when there's that third group that sent to your office—and we have testimony today that your office was definitely sent those memos, and your staff had discussions about those memos with the people who sent you those memos—how do you ignore that third group of those services and their lawyers who raised those red flags? How do you ignore that? Why aren't they in your equation?

Mr. Haynes: Okay. Well, Senator, let me just make, at the outset, my vigorous disagreement with your characterization. Just so—

Chairman LEVIN. How do you ignore the presence of those lawyers?

Mr. Haynes:—just so we understand, Chairman.

Chairman LEVIN. I'm sure.

Mr. Haynes:—I disagree with your—

Chairman LEVIN. We understand.

Mr. Haynes:—characterization. I—

Chairman LEVIN. Now my question.

Mr. Haynes:—did not—

Chairman LEVIN. Now my question.

Mr. Haynes: I did not ignore concerns. I addressed the concerns that—of the legality. There has to be a—there has to be a decision-maker. That was the job of the general counsel of the Department of Defense. When you have multiple different perspectives and opinions, when you have a short period of time, when you have a novel situation, I made a decision. I did not ignore anything. It was my practice to be as open as I possibly could.

Now, there are physical constraints to that. There is other—there's time, there's classification, there's volume, there's a certain amount of redundancy when one sees different perspectives replayed from time to time. And I've never denied that there were disagreements, including legal disagreements, about—

Chairman LEVIN. What you have denied is seeing them, asking for them—

Mr. Haynes: Well—

Chairman LEVIN.—remembering them. That's—

Mr. Haynes: Senator, if—

Chairman LEVIN.—what's—

Mr. Haynes:—I may finish, I—

Chairman LEVIN. You may finish, but—

Mr. Haynes: I—

Chairman LEVIN.—ask that—

Mr. Haynes: I have—

Chairman LEVIN.—answer those questions.

Mr. Haynes: Well, I told you that I don't recall seeing these things. So, for you to say that I ignored them—

Chairman LEVIN. Well, you did ignore 'em.

Mr. Haynes: Well, if I—

Chairman LEVIN. You didn't ask for 'em.

Mr. Haynes:—didn't see them—if I didn't see them, I didn't ignore them.

Chairman LEVIN. You mean—well, you knew there were—

Mr. Haynes: I—

Chairman LEVIN.—concerns.

Mr. Haynes: Well, I—

Chairman LEVIN. Why not ask to see the memos that—

Mr. Haynes: I told you—

Chairman LEVIN.—contained those concerns?

Mr. Haynes:—I didn't know that they existed. I don't recall—

Chairman LEVIN. You didn't know those memos—

Mr. Haynes: I don't—

Chairman LEVIN.—existed?

Mr. Haynes: Senator, I don't recall seeing them, and I don't recall knowing about the memoranda. I knew—I recall—listen, this is 6 years ago. We had—I probably saw millions and millions and millions of pages of information over the 7 years that I served in that job. And so, for you to suggest that because I didn't see every single piece of paper that a lawyer might have expressed a view on an issue is ignoring it, I think, is an unfair characterization.

Chairman LEVIN. I think it's very fair. And I think it's right on target. You indicated, a few moments ago, you had misgivings, yourself, through this period.

Mr. Haynes: Sure.

Chairman LEVIN. What did—

Mr. Haynes: I did.

Chairman LEVIN. I've never heard you—

Mr. Haynes: I still do.

Chairman LEVIN.—never heard you express that before.

Mr. Haynes: Well, I still do. I think this is a—

Chairman LEVIN. Have you ever—

Mr. Haynes:—very—

Chairman LEVIN.—expressed that, before today—

Mr. Haynes: Oh, sure.

Chairman LEVIN.—publicly—

Mr. Haynes: Absolutely.

Chairman LEVIN.—publicly, that you had misgivings about that opinion?

Mr. Haynes: Oh—well, I don't—I don't know. But, I—

Chairman LEVIN. I don't either.

Mr. Haynes: But, I tell you, this is a very hard question.

Chairman LEVIN. It is very hard. It's a very hard question—

Mr. Haynes: But, it's more than just—

Chairman LEVIN.—which has a—

Mr. Haynes:—a legal issue—

Chairman LEVIN.—very critically important answer. And I just want to—I just want to be—you said there's two groups—and then I'm going to turn this over to Senator Sessions—there's two groups, you said, out there that cause this tension. You haven't answered my question about that third group, the military services, who told your office, in memo after memo after memo, all four services—they wanted much more analysis, they had great concerns about this. It may open up their troops and their men and women to legal action, including criminal action. That came to your office, concerns of the military services that their people may be subject to criminal action—

Mr. Haynes: Well, sir—

Chairman LEVIN.—and you say that, “Gee, I don't remember if I saw”—

Mr. Haynes: Well, Chairman—

Chairman LEVIN.—“those. I don't”—

Mr. Haynes:—I don't.

Chairman LEVIN.—“remember. And, gosh”—that's the third group, and you have not answered the question.

Mr. Haynes: Well, Chairman—

Chairman LEVIN. Is there not that third group which you should have consulted and considered?

Mr. Haynes: Well, Chairman, I think that's also a misperception of the reality that I experienced, because if you think that the two extraordinarily gifted women lawyers that were up here before, Admiral Dalton and Colonel Beaver, are not military lawyers who expressed views, then I don't know who—

Chairman LEVIN. I'm not talking—

Mr. Haynes:—what they are.

Chairman LEVIN.—about their views—

Mr. Haynes: Well—

Chairman LEVIN.—here now. I'm not talking about their views here today.

Mr. Haynes: Well, I'm talking about—

Chairman LEVIN. I'm saying that—

Mr. Haynes:—their views then.

Chairman LEVIN. Admiral Dalton was in the middle of a review, which you squelched.

Mr. Haynes: No—sir, I talked with her at—she testified that—

Chairman LEVIN. I heard her.

Mr. Haynes:—she talked at length.

Chairman LEVIN. You stopped that review in the middle, and she balked when I said “the middle.” I said, “Well, was it two-thirds or one-third?” She finally acknowledged it was stopped in the middle. And it's the only time she's ever heard that.

Mr. Haynes: Well, I—again, I've told you what my views are on that. I think that there was substantial discussion between me and her, and evidently with our staffs, as well. I mean—and there was a limited amount of time and a high degree of urgency and a—and an uncertain set of rules because of the—because of the conflict that we're in—alien enemy combatants outside the United States not covered by the Geneva Conventions, with potentially nation-threatening information.

Chairman LEVIN. Thank you.

Senator SESSIONS?

Senator SESSIONS. Thank you.

Mr. Haynes, I know these hearings are difficult and Senators care deeply about these issues. And I think it's healthy in our country that they do. But, I do think you deserve fairness.

I'm looking at Exhibit 11, which was the Air Force memorandum concerning these matters. The Chairman quoted where it said that the problems and liabilities might occur if all these techniques are used. But, if you go back up to the top—first of all, let me ask you, was that directed to you?

Mr. Haynes: This is Exhibit 11, which is the 3-page unsigned document—

Senator SESSIONS. From the Air Force—Air Force document.

Mr. Haynes: My tab 11 is—

Senator SESSIONS. Are you not—

Mr. Haynes:—is Criminal Investigation Task Force.

Senator SESSIONS. Well, maybe it's 10. Excuse me, 10. I'm incorrect. So, it raised questions about these techniques, but—all right, but was it directed to you?

Mr. Haynes: No, sir, this is directed to the U.N. and Multilateral Affairs Decision, J-5 of the Joint Staff, Commander Lippold.

Senator SESSIONS. That's not you. It wasn't directed to you. Is that right?

Mr. Haynes: Yes, you're right.

Senator SESSIONS. And then, look at the first paragraph, “General Comment. The Air Force has serious concerns regarding the legality of many of the proposed techniques, particularly those under category 3. Some of these techniques could be construed as torture as that crime is defined by 18 U.S.C. 2340. One of the pro-

posed techniques is the use of scenarios designed to convince a detainee that death may—or severely painful consequences are imminent for him or his family.” Now, did you approve that technique when you recommended to the attorney general your recommendation as to what, within the request, should be approved, or did you disapprove that?

Mr. Haynes: I did not recommend that. I’m glad you pointed that out, Senator. Having not seen these before, and not being able to read it while I was being asked questions, I didn’t see that the concern highlighted here is that which was not recommended, nor approved.

Senator SESSIONS. And, in fact, this memorandum was directed to the request from CENTCOM, General Hill’s office, originating from Guantanamo, not your memorandum. Isn’t that correct?

Mr. Haynes: Yes, sir, that’s correct.

Senator SESSIONS. So, it wasn’t your decision that they are complaining about here, but the request from Guantanamo, which you didn’t approve.

Now, look at the next one you were asked about, on Exhibit 13. It—you—it originally starts out—it’s a Memorandum for Legal Counsel to Chairman of Joint Chiefs of Staff, but that was struck through. That’s not you, either, is it?

Mr. Haynes: Well, again, I think we’ve got—we’re looking at something different.

Senator SESSIONS. Okay. Well, maybe it’s 12.

Mr. Haynes: Oh, this is—

Senator SESSIONS. Excuse me, 12.

Mr. Haynes: Okay.

Senator SESSIONS. All right. Do you see that? So, this memorandum that the Chairman asked you about, that he said you’re supposed to know about, it wasn’t directed to you, either, was it?

Mr. Haynes: No, sir, it’s addressed to the J-5 UNMA, attention Commander Lippold.

Senator SESSIONS. And their criticism, is it not, in paragraph 1, states that, quote, “The Army has reviewed the request of the Commander U.S. Southern Command”—that’s General Hill, four-star general—“for further legal review by the Department of Defense and the Department of Justice of the proposed—proposal to employ counter-resistance techniques in the intelligence interrogation of enemy combatants detained at Guantanamo Naval Base Station.”

So, that again was a reference to the request that was sent to you, an expression of concern. It did not—was not directed to you, so you should not have—we shouldn’t presume that you saw it. And, number two, it didn’t refer to your decision, which rejected many of the requests that came from Guantanamo. Is that right?

Mr. Haynes: That’s right, Senator.

Senator SESSIONS. And looking at, I guess, number 12—or within that—2 pages further on is the memorandum for the Office of the Army General Counsel. Now, you’re not the Army general counsel, are you?

Mr. Haynes: I was not, at the time.

Senator SESSIONS. You were counsel for the Department of Defense. And it says—this memorandum says, from John Ley, whoever that is, “I have reviewed the proposed request”—that’s Gen-

eral Hill's request—"for approval of counter-resistance strategies. I concur in proposed category-1 techniques, but have significant concerns—legal, policy, and practical—regarding most of category-2 and all of category-3 techniques." Is that correct?

Mr. Haynes: That's what it says.

Senator SESSIONS. And what—and that was not sent to you, not directed to you.

Mr. Haynes: Yes, sir.

Senator SESSIONS. And with regard to Exhibit 14, this would be a memorandum—I think you were asked about this one—it was a memorandum for the director of J-5, the Joint Staff. Would that be a memorandum directed to you or to somebody else in the Department of Defense?

Mr. Haynes: It would be to somebody else.

Senator SESSIONS. And so, if the routing had been appropriate, it wouldn't have come to you, is that right?

Mr. Haynes: Well, it might have—it might have gotten up to my office eventually. I just don't recall seeing it.

Senator SESSIONS. It wasn't directed to you.

Mr. Haynes: Correct.

Senator SESSIONS. And it—what office—who is that from, do you see, there, what department? Is that an Army—

Mr. Haynes: This says—well, the one I'm looking at is Captain, U.S.—

Senator SESSIONS. That's the Marine—

Mr. Haynes:—well, this is Captain, U.S. Navy, the one I'm looking at. Is that—

Senator SESSIONS. No, no.

Mr. Haynes: You're at a different one?

Senator SESSIONS. We're still on the wrong page. You and Senator Levin and—

Mr. Haynes: I've been—

Senator SESSIONS.—couldn't get on the same page, and neither can you and I.

Mr. Haynes: I'm 13.

Senator SESSIONS. I'm looking at, I guess, 14.

Mr. Haynes: 14. This is the one that's very blurry. I—

Senator SESSIONS. Yeah, it's blurry. But—

Mr. Haynes: It does say "U.S. Marine Corps Reserve" at the bottom.

Senator SESSIONS. Yeah. And that's—it says "Memorandum for the Director J-5, the Joint Staff," not directed to you, either.

Mr. Haynes: Yes, sir, that's right.

Senator SESSIONS. And it—the first paragraph says, "We concur with the general proposition of developing a more robust interrogation plan." Then it goes on to say, "We're concerned, however, with the measures proposed in the subject documents, especially category 3," which you rejected all but one of those techniques. And—

Mr. Haynes: Like—

Senator SESSIONS.—so, there again, referring to the proposal from Guantanamo, not from your and the—your recommendation to the Secretary that he put in the policy document.

Mr. Haynes: Yes, sir, that's correct.

Senator SESSIONS. One question—there was some suggestion about this issue, and I'll just ask you to—directly. When you visited Guantanamo in September '02, did you or any of the senior administration lawyers suggest to Major General Dunlavey that he request harsh techniques, based on the SERE program, when you talked with him?

Mr. Haynes: I sure don't recall doing anything like that, and I can't imagine I would have. The purpose of that visit, as I recall, was to visit three different detention facilities in a single day.

Senator SESSIONS. Well, I just would say I—this is a difficult, difficult thing. You were under great pressure. The American people were—wanted intelligence. We had a—great criticism of our failure to have good intelligence. People were afraid this country was going to be attacked again. They felt this 20th hijacker, particularly, had information that could perhaps prevent another attack. And I hope that—and believe—that you tried your best to strike the right balance. Some can question that, and maybe in the future we'll see it a different way. But, at this point, I believe you did your best to serve your country.

Thank you, Mr. Chairman.

Chairman LEVIN. Thank you, Senator Sessions.

It's been said that this matter has been investigated over and over again, at least the part of it that relates to how these techniques got to Afghanistan and Iraq. The focus of our investigation, of course, is not that; it's where they all began, not where they ended up.

But, in terms of those investigations, just again for the record, General Fay stated in his report that a January 24th, '03, memo, called an "Interrogation Techniques Memo"—and this was 9 days after the rescission by Secretary Rumsfeld—that memo, according to General Fay in an unclassified statement, recommended removal of clothing, a technique that had been in the Secretary's December 2nd authorization, in General Fay's words, and it discussed, quote, "exploiting the Arab fear of dogs," close quote, another techniques which was approved by the Secretary on December the 2nd, I point out.

Now, from Afghanistan, how did they get to Iraq? This is another report. It's been stated that this trail of these techniques from Guantanamo to Afghanistan and then Iraq have been investigated. And yes, they have been, and here's what the Department of Defense inspector general said, that at the beginning of the Iraq war, the Special Mission Unit forces in Iraq, quote, "used a January '03 standard operating procedure which had been developed for operations in Afghanistan." And here's what the Department of Defense IG said about the Afghanistan standard operating procedure, that that had been, quote, "influenced by the counter-resistance memorandum that the Secretary of Defense approved on December 2nd, 2002, and incorporated techniques designed for detainees who were identified as unlawful combatants. Subsequent battlefield interrogation standard operation procedures included techniques such as yelling, loud music, light control, environmental manipulation, sleep deprivation adjustment, stress positions, 20-hour interrogations, and controlled fear, muzzled dogs."

And then, General Fay, again in his report, said that the removal of clothing was imported to Abu Ghraib, and it could be traced through Afghanistan and GTMO and contributed to an environment at Abu Ghraib that appeared to, quote, “condone depravity and degradation rather than humane treatment of detainees,” close quote.

And again, as I mentioned in my opening remarks, that when I asked General Fay at a hearing whether the policy approved by Secretary of Defense on December 2nd, 2002, contributed to the use of aggressive interrogation techniques at Abu Ghraib, he responded simply, “Yes.”

So, yeah, there’s been a number of investigations of the events in 2003 and 2004, but what this focuses on today—number one, that shows the connection, those investigations, between what happened at Guantanamo between the December 2, 2002, decision of the Secretary of Defense and what happened a year later or so in Afghanistan and Iraq.

Now, my question—just a couple of more questions and then I’ll be done, Mr. Haynes. Did you ever discuss the SERE techniques with Major General Dunlavey?

Mr. Haynes: I don’t—excuse me—I don’t recall. I may have. I don’t recall.

Chairman LEVIN. All right. Now, there is a memo of Mr. Bybee from the Office of Legal Counsel, which was dated August 1, 2002, that provided guidance on interrogations prior to your recommendation to the Secretary. That was an OLC, Office of Legal Counsel, memo. Did you read it?

Mr. Haynes: I have read it.

Chairman LEVIN. No, at the time. Had you read it before you made your recommendation to the Secretary?

Mr. Haynes: I don’t know when I first read the memorandum.

Chairman LEVIN. Did you rely on that memo in your recommendation to the Secretary?

Mr. Haynes: Well, Senator, since I don’t—I don’t remember when I read that. I have told you what I relied on. But that—

Chairman LEVIN. Was that included in what you—

Mr. Haynes: It—

Chairman LEVIN.—told us?

Mr. Haynes: Well, I don’t think so. I think—

Chairman LEVIN. I don’t either.

Mr. Haynes:—what I told you is what I—is the thought process that I remember employing in determining that the request that I—the subset of the request that I recommended be approved was legal.

Chairman LEVIN. Did you tell our staff that it’s likely that you did read it before November 27th?

Mr. Haynes: I may have. I just don’t—I just don’t remember when I first read it.

Chairman LEVIN. Now, this is an Office of Legal Counsel memo which—legal memo which would be binding on the entire Government, right?

Mr. Haynes: Would be authoritative—

Chairman LEVIN. For you. As general counsel at the DOD.

Mr. Haynes: Sure. Yes, sir. If it expressed—if it expressed an opinion on the law for the executive branch, that would be authoritative within the executive branch.

Chairman LEVIN. So, why would you not have read that before recommending a decision to the Secretary of Defense?

Mr. Haynes: I—

Chairman LEVIN. It was dated—

Mr. Haynes: I—

Chairman LEVIN.—before that.

Mr. Haynes: Well, for one thing, that one is addressed to somebody else.

Chairman LEVIN. So, you may not have known about it.

Mr. Haynes: I just don't remember, Senator, when I read it. I just don't remember. I may have. I just don't remember. It's 6 years ago. There were a lot of things going on, Chairman.

Chairman LEVIN. Even though you may not have read it, were you aware of the contents of it when you made the recommendation to the Secretary to sign his December 2nd, 2002, order?

Mr. Haynes: Chairman, I just—I told you, I just don't remember.

Chairman LEVIN. Senator Sessions, are you all set?

Senator SESSIONS. Attorney General Casey, in his confirmation, pointed out a Bybee memo, which apparently attempted to set forth the full power of the executive branch during a time of war in dealing with prisoners. And, as he said, not only was—it was a mistake; it was worse, because it was unnecessary. I think that's—was unwise for us to try to anticipate and set the Bybee memo to anticipate all kinds of possible scenarios, and then to approve or disapprove 'em. You're much better off going case-by-case by carefully considering all the circumstances in a fact-based circumstance. And, while I think it did set the—may have at—for that time, as long as it stayed in effect, some constitutional limits, I have doubts about its wisdom. And I guess it's fair to say the Department of Defense, as a matter of policy, did not feel, with regard to these interrogations, that it was appropriate to use every single power you may have, because some of the things that you prohibited were policy decisions, as well as legal decisions, were they not? Or—

Mr. Haynes: Well, yes, but let me remind everyone that the lawyers don't decide what gets used. We give advice, and that's what I did.

Senator SESSIONS. So, your advice was what?

Mr. Haynes: Well, my advice was—well, it depends on what the question was, but in the case of the—I guess it was the December 2nd decision by the Secretary, based on my recommendation that was—that was shared with the Chairman of the Joint Chiefs, the Deputy Secretary of Defense, and the Under Secretary for Policy—was that only a subset of those techniques requested by Guantanamo be approved, and implicitly—and I'm sure I said so explicitly—that those that we recommended, that I recommended, were legal—as did Colonel Beaver and as did Admiral Dalton—that they were legal.

Now, the next go-round, which was as a result not only of the working group—and this is where I—I just wish that exercise had a better appreciation by Chairman Levin and some others, because it was very valuable to the leadership of the Department of De-

fense—that second round that resulted in Secretary Rumsfeld’s decision in April of 2003 about what techniques should employ—should be employed, was also—

Senator SESSIONS. Where he restricted some he had previously approved.

Mr. Haynes: He restricted, or outright did not authorize at all, a different of, I believe, 24 techniques, with extraordinary safeguards and approval levels. Far short of what the Justice Department advised the law would allow.

Senator SESSIONS. Thank you, Mr. Chairman.

Chairman LEVIN. And to go beyond that would require approval of the Secretary, is that correct?

Mr. Haynes: Yes, sir. That’s my recollection of what the documents say, and it—I think that’s what it says.

Senator SESSIONS. Mr.—one more question, Mr. Haynes. With regard to the Secretary Rumsfeld, on either of those occasions did he impose a personal action to approve a technique that you didn’t recommend, to your recollection?

Mr. Haynes: I’m not sure I can tell you about that kind of thing, but it—I think I’m restricted in what deliberative and attorney-client communications I’ve had. So, I probably should not answer that question. But, there’s not a sinister answer.

Chairman LEVIN. Mr. Haynes, we thank you.

What today’s hearing is focused on is the SERE techniques which were incorporated into interrogation documents which were never intended to be incorporated into interrogation rules. Those SERE procedures were properly designed to help our men and women survive, should they be exposed to the actions that violated Geneva of our enemies. They were never intended to be taught to interrogators, used by interrogators against our enemies. That testimony was very, very clear in the panels that we had today. And yet, we found those techniques, including stripping detainees, including the use of dogs to induce stress—we found those techniques—not only were they adopted at Guantanamo and used in special instances, but then they moved over to Afghanistan and Iraq in ways that the various investigations have disclosed.

We’ve paid a huge price, as a country, for what was unleashed when that December 2nd, 2002, order of the Secretary of Defense was signed. When it was rescinded, 6 weeks later, and then a different document was put in its place a couple of months after that, by then what had spread to Afghanistan and Iraq was what we, I’m afraid, saw in those tragic pictures at Abu Ghraib, because, while they were not the interrogators that were photographed, they were the Guards, and those guards, according to our own—the investigations that have been shared with this country, were influenced by the techniques which were the interrogation techniques which had been shipped over to Afghanistan and then Iraq. So, we paid a very large price for what happened.

We will continue this investigation by asking people who have been named in this investigation as being present in meetings where SERE techniques have been discussed, whether or not they were present at those meetings in Guantanamo, what was discussed. And we will, of course, continue our effort to find out what happened to those services documents, those services recommenda-

tions, those services red flags that were shared with the Secretary of Defense's Office of Legal Counsel. They may not have been addressed there. They were not addressed to the Legal Counsel, but the testimony today indicated that, as a matter of fact, they were shared with the general counsel, excuse me, of the Secretary of Defense. That's what the testimony was today.

The general counsel—or, the former general counsel, Mr. Haynes, isn't sure that he saw them. He heard about concerns, does not remember whether he saw the documents or asked for the documents. That is a—to put it mildly, a very disappointing kind of a response to what is an extraordinarily serious question, which is, How do you deal with detainees? And the legal response here was inadequate, and—to put it, I think—to understate it. But, we will continue to get into the various questions that I have just indicated, and others.

And it's been a long day, I know, for our witnesses. We thank all of our witnesses. We thank you, Mr. Haynes, for being here voluntarily. And we thank our colleagues for participating in this.

And we will stand adjourned.

[Whereupon, at 5:15 p.m., the hearing was adjourned.]