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Administration Lawyers and Administration Interrogation Rules

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Chairman Nadler, Ranking Minority Member Franks, members of the subcommittee, thank you for giving me the opportunity to testify with regard to what I know and strongly suspect about administration principals, lawyers, interrogation rules, and the abuse of detainees by U.S. personnel in the so-called Global War on Terror (GWOT), particularly during the period 2002-2005.

From the outset, let me say that I am not a lawyer nor do I make any pretense to interpret the law as a lawyer might. I am a soldier and a citizen, an academic specializing in national security affairs—particularly national security decision-making, and a four-year diplomat with the U.S. Department of State, having served on its policy planning staff and as its chief of staff.

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As I was serving in that latter capacity, in April 2004, Secretary of State Colin Powell came through the adjoining door to our offices on the 7th floor of the Harry S Truman building and startled me with words to the effect of:

There is going to be a news story about prisoner abuse at a facility in Iraq. There will be very damaging photographs, some of which will be published. I've put Will Taft [Legal Advisor to the Secretary of State] on the legal aspects of this and I want you to work the other aspects—how we got to where we are, who did what to whom, a timeline—a chronology—and any other relevant facts you come up with. It's important you do this as quickly as possible and that you work closely with Will.

From that moment to some time in the early fall, I labored to put together a dossier of classified, sensitive, and open source information that would help me and the Secretary understand how Abu Ghraib happened.

Almost immediately, I opened a channel to Admiral Church in the Pentagon because the Secretary alerted me to an effort by his fellow cabinet official, Donald Rumsfeld, also to get to the bottom of this issue and Admiral Church had been appointed to head that effort. I must say that after that initial telephone conversation with the Admiral and an agreement to exchange any information that we each developed, I never heard from him or any of his people again. I did ensure that whatever relevant documents I found at the State Department were sent to the Defense Department, and Will Taft did the same. I never received a single document in return. The Defense Department documents I did manage to get my hands on I had to scrounge.

I also discovered—as I had many other times in my then-34 year career in government—that open source material afforded me a more complete picture of what had happened than classified material. I learned that people such as Jane Mayer at *The New Yorker Magazine*, Tim Golden at the *New York Times*, and a host of others had done yeoman service for the American people through some of the best investigative journalism I have encountered. It was through Mr. Golden's research and writings, for example, that I learned that one of the first prison homicides had occurred—and its investigation slowed and obscured at numerous intervals and levels of command of the U.S. Army—in Afghanistan as early as December 2002. That homicide has been thoroughly examined in an award-winning documentary by Alex Gibney, entitled "Taxi to the Dark Side."

Mr. Chairman, let me back up for a moment and tell you why this was a particularly important effort for me and I believe for Secretary Powell as well. Clearly, we were—we are—both soldiers. Moreover, we are both veterans of the war in Vietnam and we are both students of military history. We both know how soldiers go astray in the heat of battle, with buddies being killed and wounded all around—particularly in wars that seem to have no end, no light at the end of the tunnel.

In Vietnam, as a first lieutenant and a captain of Infantry, on several occasions I had to restrain my soldiers, even one or two of my officers. When higher authorities took such actions as declaring free fire zones—meaning that anything that moved in that zone could

be killed—and you came upon a 12-year old girl on a jungle path in that zone, it was clear you were not going to follow orders. But some situations were not so black and white and you had to be always on guard against your soldiers slipping over the edge. As their leader, it was incumbent upon me to set the example—and that meant sometimes reprimanding or punishing a soldier who broke the rules. In all cases, it meant that I personally followed the rules and not just by "breaking" the so-called rules of engagement, as in the designated free fire zone, but by following the rules that had been ingrained in me by my parents, by my schools, by my church, and by the U.S. Army in classes about the Geneva Conventions and what we called the law of land warfare. I had been taught and I firmly believed when I took the oath of an officer and swore to support and defend the Constitution, that American soldiers were different and that much of their fighting strength and spirit came from that difference and that much of that difference was wrapped up in our humaneness and our respect for the rights of all.

So, Mr. Chairman, when I saw the first photographs from the prison at Abu Ghraib, I had two immediate reactions. First, I knew such things could happen. Second, I knew such things were wrong and I knew that leadership had failed. What I did not know, was on what level that leadership had failed. So I set out to find the answer.

In the months that followed, right up to the election in November 2004, I collected documents like a pack rat. I had several stacks in the corner of my office almost five-feet tall, and I had classified documents crammed into my safe. I also listened to every one who would talk to me, from throughout the government and elsewhere.

I had an open door policy at State. I was in my office by 5:30 or 6AM every morning and rarely left before 8 or 9PM in the evening. I was there on weekends. Under secretaries, assistant secretaries, ambassadors, office directors, members of the policy planning staff, foreign service officers, civil service officers, military men and women, Iraqis, Afghans, and a host of others flocked to my office to tell me their complaints or give me their counsel. I had built up quite an extensive network. The Secretary had asked me to guard his rear and his flanks and I knew that such a network was one of the best ways to do that.

As you may surmise, Mr. Chairman, people were attracted to my office also because of their knowledge that when they spoke with me, their concerns had a reasonable chance of reaching the Secretary.

Moreover, when I left government in January 2005, I became immediately involved in lecturing to the nation's war colleges and listening to the military men and women at those institutions, and to the interagency personnel who were scattered amongst them.

I also continued my extensive research. I joined an effort of some 25-30 flag officers and similar rank civilians who were linked with the Human Rights First organization. On 7-8 December 2005, at the Ritz Carlton in Crystal City, we met for the first time and I'll never forget what one flag officer said to me. He said he could not believe that in his lifetime—no, he corrected himself, in his country's history—that anyone would be

discussing the topic we were to discuss, torture and abuse encouraged at the highest levels of the U.S. Government.

We talked about the so-called Bybee memo. We were astonished that what appeared to be a legalistic argument not unlike the debate as to how many angels can sit on the head of a pin, pertained to one of the most serious matters imaginable—torture of another human being.

The Bybee memo had been furnished in a four-inch binder distributed to each of us at that first meeting. As I flipped through my binder to find the documents enclosed, I was stunned.

In that binder were:

- 1) Memorandum for Alberto R. Gonzales, Counsel to the President, from: Jay S. Bybee, Assistant Attorney General, *Re: Legal Standards Applicable Under 18 U.S.C. 2340-2340A* (Aug 1, 2002);
- 2) Secretary of Defense Rumsfeld Memo Re: Guantanamo Interrogation Policy, Dec 2, 2002;
- 3) Declaration of Vice Admiral Lowell E. Jacoby, USN, Director of the Defense Intelligence Agency, Jan 9, 2003 (Rumsfeld vs. Padilla J.A. 55-63);
- 4) Secretary of Defense Rumsfeld Memo Re: Guantanamo Interrogation Policy, April 16, 2003;
- 5) LTG Ricardo Sanchez Memo Re: CJTF-7 Interrogation and Counter-Resistance Policy, Sept 14, 2003;
- 6) Guantanamo Bay: Approved Interrogation Techniques – from White House briefing, June 22, 2004;
- 7) Memorandum for Deputy Attorney General James B. Coney, from Daniel Levin, Acting Assistant Attorney General, *Re: Legal Standards Applicable Under U.S.C. 18 2340-2340A* (Dec 30, 2004) [superseded the Aug 1, 2002 memo];
- 8) Pentagon Detention Policy, Nov 3, 2005.

There was much more as well; the four-inch binder was in fact bulging.

The one memorandum I did not find, that I had had when I was at State, was the President's memorandum of February 7, 2002, "Humane Treatment of al Qaeda and Taliban Detainees." I would get that memo in my hands once again a few days later from one of the producers of *CNN's Sixty Minutes*, who faxed it to me. It had been declassified of course.

This meeting in Crystal City coincided with Senator McCain's efforts in the Senate to secure passage of the Detainee Treatment Act and so we fed our thoughts into the Senator's staff and his staff fed their thoughts into our meeting.

After that meeting, I did not relax my efforts to discover more. I met Joseph Margulies who had written the book, *Guantánamo and the Abuse of Presidential Power*, and I

marveled at his ability to piece together essentially the same conclusions that I had come to preliminarily as I left the State Department in early 2005. Judging from his footnotes, he, too, had apparently been able to get his hands on many documents. The one additional piece of the puzzle I gained from reading his book and talking with him was about the SERE² techniques that formed a basis for some of the harsh interrogation methods that were used in Afghanistan, in Iraq, and at Guantánamo Bay. I had harbored some suspicions to that effect but did not have access to some of the documents and research that Margulies did and, indeed, that he was to expand.

As a professor of government and public policy on two campuses, I made a National Security Council (NSC) Exercise a part of my curriculum. The decision before the mock NSC was "How to manage and treat those personnel detained in the Global War on Terror." Law students from the George Washington University Law School and from the College of William and Mary School of Law acted in the capacities of Attorney General, counselors to the President and Vice President, Legal Advisor to the Secretary of State, and OSD General Counsel. From these exercises, I gained additional insights into the receptivity of the American people to harsh interrogation, as well as into the human dynamics of such decision-making.

One of the thoughts that resonated with the students was expressed eloquently by Senator John McCain when he remarked that, when questions arise about breaking the rules, it isn't about the enemy, it's about us. Whether our enemy is German SS troops in the snows of the Battle of the Bulge in 1944-45, north Korean soldiers at the Chosin Reservoir, or north Vietnamese troops in the Parrot's Beak, it is not about how they treat us in war. It is about how we treat them. It is about us, as Americans.

When you break the rules, you damage America's power. You not only put your own potential prisoners of war in jeopardy, you actually damage American prestige and that diminishes our real power in the world.

A month or so after some of the Abu Ghraib photos had actually been revealed, the door to my office at the State Department was slightly open and I could hear Secretary Powell on the telephone with Secretary Rumsfeld. His voice was louder than usual. He was remonstrating with his fellow cabinet member. He was asking him if he understood what GITMO was doing to America's reputation in the world, to our standing in the eyes of our friends and allies. I've no idea what Secretary Rumsfeld's response was but I know I had rarely heard Powell raise his voice to that degree. Of course, the photos from Abu Ghraib had served to confirm in the eyes of many of our friends and allies, as well as our enemies, that what they had suspected all along about the Cuban prison, was true.

As I said before, Powell is a soldier. Soldiers hurt when soldiers break the rules. But what I discovered in my efforts for Powell and confirmed even more in my subsequent efforts on my own, was that soldiers were not entirely responsible for what happened to

² Survival, Evasion, Resistance and Escape – referring to the type of training afforded in all the Armed Services and in special schools such as Ranger School in the US Army aimed at giving the trainee a very brief idea and feeling of what it is like to be a prisoner of war, among other things.

America's power and prestige in the world because soldiers were not alone responsible for what happened at GITMO, at Bagram and elsewhere in Afghanistan, and at Abu Ghraib and elsewhere in Iraq.

Mr. Chairman, I earlier posed the question: At what level did American leadership fail?

I believe it failed at the highest levels of the Pentagon, in the Vice President's office, and perhaps even in the Oval Office, though the Memorandum of February 7, 2002, which I cited earlier, tends to make me think the President may have been ignorant of the worst parts of the failure.

As I compiled my dossier for Secretary Powell, as I did further research, and as my views grew firmer and firmer, I needed frequently to reread that memo. I needed to balance, in my own mind, the overwhelming evidence that my own government had sanctioned abuse and torture which, at its worst, had led to the murder of 25 detainees in a total of at least a 100 detainee deaths. Death, Mr. Chairman, seems to me to be the ultimate torture, indisputable and final. We had murdered 25 or more people in detention; that was the clear low point of the evidence.

The President's February 2002 memo seemed to me, a student of national security decision-making from the passage of the 1947 National Security Act to the present, to constitute the same sort of compromise that I had discovered so often in that more than a half century of decision-making.

President Bush, it seemed to me, had tried to walk down the middle of the road when confronted with the challenge of reconciling the needs of our security with the needs of our democratic republic—he had tried to safeguard our soul without losing our security, as diplomatic historian Michael Hogan phrases it. The President's February 2002 memo expressed such a compromise—the same compromise that from time to time presidents such as Eisenhower, Johnson, Nixon, Reagan, and others had had to make also.

But it seemed to me that beneath the compromise that President George W. Bush had made in his February 2002 memo, others had moved out smartly to deviate.

They had a model to match that deviation against, in my view—though I cannot substantiate this.

After all my research, I believe the President did more than sign that February 2002 memo. I believe that like several presidents before him during the Cold War, he signed a highly-classified *Finding*.

That Finding directed, most likely, the head of the CIA, Mr. Tenet, to establish a very small, highly-qualified group of interrogators at the CIA who would, if the need arose, interrogate high value targets. They would use a number of methods, including waterboarding—which has been considered torture since at least the Spanish Inquisition—to interrogate these high value targets, when and if the President approved.

I emphasize that this was likely a very highly-compartmented program with minimum knowledge of it in the bureaucracy. I believe that this program is what the recent revelations by ABC TV's investigative team were about, though ABC TV had no way of knowing the particulars. You will recall that their revelations included transcripts, apparently, of principals' meetings wherein the participants discussed harsh interrogation methods, participants including Dr. Rice, then National Security Advisor, Attorney General Ashcroft, and Secretaries Powell and Rumsfeld and, by the President's own subsequent statement, the President himself.

I believe this is clear evidence that my speculation about a presidential Finding is on the mark.

But that would have been a highly-controlled, extremely selective program, however some might find it reprehensible. How did what was done there, in that program, migrate out to the Armed Forces and become so widespread?

After the tragic events of September 11, 2001, Secretary Rumsfeld and certain of his subordinates wanted the war that was coming to be a broad, global one, not just against al-Qa'ida. Read Mr. Feith's book, *War and Decision*, and he will tell you in that book how seriously he and Mr. Rumsfeld wanted to broaden the war. He will also tell you that he and Mr. Rumsfeld believed the fight was not simply against al-Qa'ida but against every terrorist who might raise his head, from the criminal thugs in the Philippines called *Abu Sayyaf*, to the al Qa'ida derivatives in Southeast Asia known as *Jemaah Islamiyah*. From the tone in the book, one gets the impression that Mr. Feith would have dearly loved to throw *Hamas* and *Hezbollah* into the mix as well.

To get into the fight all across the globe meant first and foremost disbursing Special Operations Forces (SOF) as widely as possible in areas of medium to high threat. It also meant—and this was utterly crucial—*actionable intelligence*. Otherwise those SOF would be spinning their wheels, unable to take direct action against or capture any terrorists at all.

As a military man for 31 years, I know how most people in the Defense Department viewed the CIA. I was special assistant to Chairman of the Joint Chiefs of Staff, General Colin Powell, in the first Gulf War. I know how he and General Norman Schwarzkopf railed at the CIA.

I have to believe that Secretary Rumsfeld felt similarly. All the evidence indicated he did. In March 2003, he made one of his closest subordinates, Stephen Cambone, the first Under Secretary of Defense for Intelligence—clearly indicating that he was going to take the some 80% of the approximately \$40B intelligence budget that was his and use it to his purpose.

He also set up a sort of intelligence "red team" in the office of his Undersecretary for Policy, Mr. Feith. This team vetted the intelligence community's raw materials, analysis and findings.

So, twin pressures were thus unleashed almost immediately in early 2002. First, the need for actionable intelligence was uppermost and urgent and this need was conveyed to the field down the chain of command. Second, echoing the President and the Vice President's own words, the word went out that the gloves were off, and we were going to have to work "sort of the dark side". That same day at Camp David, September 16, 2001, when the Vice President referred to the dark side, he also told Tim Russert: "...it's going to be vital for us to use any means at our disposal, basically, to achieve our objective."

These words reminded me of what Undersecretary of Defense Robert Lovett had argued as the Cold War was heating up, after the Soviets had developed and tested a nuclear weapon in 1949. Lovett argued in 1950 that the nation was "in a war worse than any we have ever experienced" and that this meant doing away with the "sharp line between democratic principles and immoral actions..." Lovett considered such distinctions as a "dangerous and unnecessary handicap" in the struggle with communism. He said he wanted to fight the Soviets "with no holds barred....". In my view, it was fortunate for the nation that Truman did not follow Lovett's advice.

But many in the Pentagon, and eventually the armed forces, did seem to follow the advice, however implicit, of Lovett's reincarnation in 2001, Vice President Cheney. In short, the Pentagon needed intelligence; people should go out and get it. And the usual rules were not going to apply; new rules would be forthcoming. Even as a result of my early investigations at the State Department, this overriding reality was clear. But somewhere in that early part of 2002, some of the principals also began to worry about legalities. It was likely earlier even but I could find nothing in late 2001. Perhaps someday others will.

These concerns derived from knowledge of the Church Committee and the damage it had done with regard to the clandestine service in particular but to the CIA in general, as well as from a sure knowledge among the selected intelligence personnel and their leaders that they were being asked to depart from the realm of what they considered legal activities.

This concern, I believe, generated the legal discussions that would begin to develop among David Addington in OVP, John Yoo and Jay Bybee at Justice, Alberto Gonzales in the White House and, eventually, expand to include the inputs from USD (P) Douglas Feith and OSD General Counsel Jim Haynes.

In effect, the most direct way for the Defense Department to create a legal screen for its own activities was to adapt the work that was in progress for the legal opinions backing the presidential finding to the needs of the DOD.

But let's backtrack for a moment and shed more light on what in my view had transpired to this point.

It's my strong view that the legal proceedings were led by David Addington, who turned to Jay Bybee and John Yoo at the Department of Justice, and Alberto Gonzales in the White House, then counselor to the President.

These were the lawyers who set the legal background against which other-than-standard interrogation methods would be explained away as "in accord with the Geneva Conventions", "not constituting torture", "fully within the Article II powers of the Commander-in Chief", and so forth. At Defense, Jim Haynes and Douglas Feith would adapt these views to their needs at the Pentagon. Indeed, in the recent book *Torture Team* by English barrister Philippe Sands, in extended interviews Mr. Feith appears to express no small degree of pride in having helped make the Geneva Conventions adaptable to the needs of the new interrogation regime. In my view, this was done largely through artifice not unlike the angels sitting on the pinhead. Such artifice may appeal to certain lawyers but I assure you soldiers have no use for it for they know how dangerous such arguments are when put to the hard act of execution in the field.

Meanwhile, the operational end of this affair was orchestrated by the Secretary of Defense and his subordinates, Haynes, Feith, Stephen Cambone and I'm quite certain others. Certain of these individuals, including Addington, even visited the prison at Guantánamo Bay in September 2002 to get a better grip on what was happening to acquire actionable intelligence and to inform their own views about what was possible.

There has been an argument that U.S. Southern Command queried the Defense Department with respect to interrogation procedures for GITMO, and thus the impetus for the new procedures came from the field. There is a paper trail that seems to have been laid down to support that. What I found, however, was that Southern Command's query was expected (set up perhaps?) and that OSD General Counsel, in league with the others in the legal group, had already worked up what the legal position was going to be. In short, there were people in DOD at the highest level who knew what they wanted: actionable intelligence. They also knew, or thought they knew, that the only way they were going to get it from battle-hardened al Qa'ida operatives was to use harsh interrogation methods. And that's the bottom line.

Depressingly to me, these men also seemed to have the cavalier disregard for any innocents who might be caught up in this process that one often finds in men safely to the rear of the real action. Soldiers call such men "REMFs". I won't elaborate on that acronym.

Mr. Chairman, I have given much thought to the idea of malice aforethought in these matters. That is, did any of these men clearly realize what they were setting in motion? Did they realize for example that a significant proportion of the detainees in all their prisons were innocent of any wrongdoing, they were simply swept up in military operations and, due to a debilitating shortage of troops, vetting in the field was poorly

done? This was particularly true in Afghanistan and, later, in Iraq. Did they realize that hooding and shackling and keeping such people in isolation was cruel and unusual punishment? Did they realize that what they had put in motion would spread and grow? That units from Afghanistan would bring methods to Iraq? That methods used at GITMO would migrate to Iraq via Major General Miller? That in Iraq the shortage of troops would be an enormous deficiency, complicating almost every activity including prisoner control? That at the end of the day their twin down-flowing pressures of getting intelligence and, if necessary, using "other means", would create a disaster in the Armed Forces—so much so that a U.S. Senator would have to bring legislation to the floor of the Senate to get the Armed Forces back where they should be, adhering to the established rules of warfare?

In that regard, I have read and reread Secretary Rumsfeld's memo of November 27, 2002 (1:00PM), "Counter-Resistance Techniques". This is the memo with the now infamous hand-written postscript: "However, I stand for 8-10 hours a day. Why is standing limited to four hours? D. R. "

I believe that more than any other single document this one demonstrates both the arrogance and the ignorance—and I use that latter term with great precision and not in a pejorative sense—of the signer. What is exhibited here is the sheer lack of understanding of a man who has never been in what I call the crucible of combat, the fiery furnace that soldiers call home from time to time, however reluctantly. And who works beneath a Vice President, a long-time colleague, who believes like Robert Lovett that any evil is justified in the name of security.

Moreover, this was a man—and these were men—who could not bring the challenge he thought he was confronting to the legislative branch and ask for relief. To come to the people's representatives, and through them to the people, was beneath this group. They would not deign to ask the legislature to change the rules for the Armed Forces—a legislature vested by our Constitution with the power to "make Rules concerning Captures on land and water" and "To make Rules for the Government and Regulation of the land and naval Forces."

Instead, they made the rules all by themselves in secret.

I expect that at the end of the day they calculated the legislature would not let them do what they wanted to do and that this calculation influenced heavily their decision to operate in secret. By my research and evidence, they even decided to keep the Chairman of the Joint Chiefs of Staff, the other Joint Chiefs, the Joint Staff, and the Service JAGs out of their secret deliberations and actions as well.

Mr. Chairman, the hard core of Secretary Rumsfeld's memos authorized as many as 30 techniques by my calculations ("a" through "dd" on one memo). As U.S. Navy Captain and JAG officer Alberto Mora has pointed out, no one seems to have considered the possibilities of an interrogator employing eight or ten of the "authorized" techniques at the same time, over extended periods, in near-hypothermic temperatures, in darkness and

in isolation, and the final results. Some would say—indeed experts have said—the results would be worse than actual physical torture. No one at the highest levels of the Department of Defense, including its Secretary, seems to have considered this, even for a moment.

Likewise, no one seems to have considered what I call the basic soldier test (how could they?—none of them were soldiers and they had removed the real soldiers from their deliberations).

What I mean by this is, for example, if you tell a soldier under pressure to produce actionable intelligence that he can use a muzzled dog, he will do it faithfully. And when that doesn't work—and it isn't likely to—the soldier will remove the muzzle. And when that doesn't work, he will let the dog take a bite.

That is the basic soldier test which should be applied to all such finely-tuned deliberations.

Similarly, when you slap on the Abu Ghraib prison wall as many as three different checklists in a 30-day period, checklists that tell the interrogators what they can do, you are asking for trouble. Mastering one checklist is about all you can expect of a soldier under the sorry conditions that existed at that prison. And when the prison guards are encouraged to "prep" their charges (this, too, is against the rules of course, ordering the soldiers guarding the detainees to "prep" them), you are asking for more trouble. Send an aggressive two-star general into the fray, just arrived from GITMO where the gloves are off and things are happening, and your trouble reaches the sort of levels of which the world saw visual evidence in the photographs from Abu Ghraib.

It is nothing new that uniformed military personnel, trying to accommodate the twin pressures of actionable intelligence and "the gloves are off", plus being under the immediate pressure to take actions that will keep their buddies alive, will violate the rules. Some of them will even do so with gusto if they perceive their officers to be in the game with them. And too many of the officers will be in the game with them if they perceive that all the way up the chain of command, as far as they can see, the leadership approves.

Mr. Chairman, as you no doubt realize there is much, much more that I have not delved into. There is bad leadership enough to sink a battleship, poor decision-making, a dysfunctional bureaucracy, and a President too removed from the day-to-day details of a war he essentially declared himself, with the help of a Congress acting largely as a rubber stamp.

As a student and teacher of every president's decision-making since Truman, I find the present circumstances rich ground to plow. There are unique insights available with every president, but none so full of such insights into failure as the current one. But as a soldier and a citizen I do not find this rich ground for an academic very uplifting. Instead I find it dangerous.

We have damaged our reputation in the world and thus reduced our power. We were once seen as the paragon of law; we are now in many corners of the globe the laughing stock of the law.

What has brought about this change is Abu Ghraib, Guantánamo, secret renditions, what much of the world perceives as an unlawful war in Iraq, and, more than all of these, a refusal to recognize and acknowledge any of this and do something about it.

I hope this subcommittee's efforts to deal with this failure will prove successful. I also hope that a new president in 2009, whether it is John McCain or Barak Obama, will move swiftly to tell the world that America—the real America—is back. In the realm of foreign policy, that will mean at a minimum closing Guantánamo, repudiating torture and abuse, and realigning our strategy in the Middle East.

Thank you and I look forward to your questions.