



GEORGE W. BUSH ORAL HISTORY PROJECT

TRANSCRIPT

INTERVIEW WITH JOHN BELLINGER III

March 8–9, 2013
Charlottesville, Virginia

Participants

University of Virginia

Russell Riley, chair

Barbara Perry

University of Richmond

Stephen Long

State University of New York at New Paltz

Nancy Kassop

© 2021 The Rector and Visitors of the University of Virginia and the George W. Bush Foundation

Publicly released transcripts of the George W. Bush Oral History Project are freely available for noncommercial use according to the Fair Use provisions of the United States Copyright Code and International Copyright Law. Advance written permission is required for reproduction, redistribution, and extensive quotation or excerpting. Permission requests should be made to the Miller Center, P.O. Box 400406, Charlottesville, VA 22904-4406.

To cite an interview, please use the following general format: [name of interviewee] Interview, [date of interview], George W. Bush Oral History Project, Miller Center, University of Virginia



GEORGE W. BUSH ORAL HISTORY PROJECT

TRANSCRIPT

INTERVIEW WITH JOHN BELLINGER III

March 8–9, 2013

March 8, 2013

Russell Riley: This is the John Bellinger interview as a part of the George W. Bush Oral History Project. We're grateful for your coming to Charlottesville. We don't want to spend a great deal of time on your autobiography, but we'd like to hear a little about who this person is who comes into the administration in 2001, probably with some emphasis on what happens in this building since this is a homecoming of sorts. So tell us a little bit about your background and, in terms of professional development, maybe the three or four high points that you felt were instrumental in preparing you to take the privileged position that you had in 2001.

John Bellinger: I'm happy to do that and I'll try to be brief. I had about 25 years of law practice in combination of both government and private practice positions. I had graduated from the Woodrow Wilson School of Public and International Affairs at Princeton, spent a year at Harvard Law School, and then came down and spent a year here, from 1983 until 1984, doing my course work at the University of Virginia in the Woodrow Wilson Department of Government and Foreign Affairs with a Woodrow Wilson fellowship, largely because my then fiancée was down here at Sweet Briar and was very unhappy that I had not gone to Virginia Law School.

Riley: That explains it

Bellinger: So I came and did one year of course work here. Then, to make a little bit of money on the side, I responded to an advertisement from the Miller Center to help as an intern with the bicentennial of the United States Constitution project and to have mock debates at various historic Virginia courthouses in the '83, '84, '85 period. So I worked out of the Miller Center setting up those things. I was probably far out of my depth, because at that point I still was a foreign affairs person, and here I was doing Virginia history. But I always enjoyed my time at the Miller Center.

Riley: Who did you work with there?

Bellinger: His name was Tim O'Rourke, who was an assistant professor of government. I've lost track of him. Then I wrote my master's thesis for Audrey Kurth [Cronin] and Ken Thompson, and I did a lot of work with Inis Claude when I was here. This filled in a lot of my gaps in American foreign policy and I developed a particular interest in European integration and the postwar period. I wrote quite a few papers on the European coal and steel community, the European Defense Community, the EDC.

Riley: Out of curiosity, was Mike Fowler somebody you had known?

Bellinger: Yes, Mike Fowler had been a classmate of mine at St. Albans, and in fact we went all the way back to nursery school together in Washington. In a remarkable twist of academic romance, we both fell in love with girls in Virginia. He had a girlfriend who was at Virginia Law School and he took precisely the same year off from Harvard Law School that I did, so we both came down here. I may have been more successful romantically; he was more successful academically.

Riley: At least romantically with the people that you dealt with here.

Bellinger: I guess that's exactly right, because he met a different person, Julie Bunck, a great friend of ours here. So yes, that's exactly right. He was successful in a different way.

Barbara Perry: She was my roommate at Ivy Gardens, next door to the Miller Center. It's a very small circle we're talking about.

Riley: It is very incestuous.

Bellinger: Exactly right, Russ. Then I was one of the editors of the *Harvard International Law Journal*. I always knew I wanted to go into government at some point. I was the child of two civil servants, which becomes relevant to our story. My father had been in the Army; my mother had been a Russian analyst at the CIA [Central Intelligence Agency]. So I was raised in a career government, public service family.

I spent two years in law practice in Washington, always knowing that I wanted to go into government. Then lightning struck in a remarkable way and I was asked if I wanted to apply to be the special assistant to the CIA Director. I think I was selected for this position because I had been an intern previously at the CIA, and spent three years as special assistant to Judge [William] Webster. Bob Gates was the Deputy Director at the time. I worked for the two of them until Bob went over to be Deputy National Security Advisor, and I got bitten by the national security bug and became—That was my first real indoctrination into intelligence and covert action matters.

I then went back into private law practice at Wilmer Cutler & Pickering, where I worked with Lloyd Cutler, the quintessential government lawyer, who has gone back and forth. I had quite a few interesting assignments that were government-related and found that 10 percent of my time was working on government-related projects for Secretary James Baker, for Henry Kissinger, for George Shultz—We used to joke that this was my Secretary of State practice and what sort of a future is there to that? I ultimately got the last laugh. But I found that I was enjoying that 10 percent of my work so much that I really ought to be in government, so I left in '95 to begin what became 15 years of government involvement, first working as the general counsel of an intelligence commission that John Warner had set up, then counsel to the Senate Intelligence Committee, so I was doing a lot more intelligence work. Then I went to the Justice Department for a newly created position as the National Security Advisor to the head of the Criminal Division, coordinating national security cases.

To answer your question, I had not been politically involved after the election. I was “Hatch Act’ed,” of course. So all I wanted in 2000 was to be detailed to the NSC [National Security Council] staff, of which there were very few Justice Department detailees, which meant it would

have been unlikely anyway. Justice liked to keep an arm's length at that point, prior to 9/11. It felt that while there might be a unitary executive, the Justice Department was not part of that unitary executive, in part because they felt they might have to ultimately investigate the White House, and that if they were part of the process it would make it more difficult.

Riley: Sure.

Bellinger: But there had been one precedent. I had sent my résumé down to get to Steve Hadley and said I'd be interested in being detailed to the NSC staff. Lo and behold, I got a call from a member of Judge [Alberto] Gonzales's staff saying we have your résumé, would you come down and speak to us? I went down and spoke to Judge Gonzales and we had an interview about my intelligence background and the Justice Department background and foreign policy background. At the end of the interview he asked, "Are you a Republican?"

I said, "Well, in Virginia you don't have to register, but I've only ever worked for Republicans, John Warner, Jim Leach, and Bill Webster."

He said, "This is fine. I'd like to recommend you to Steve Hadley and to Condi [Condoleezza] Rice." I went and interviewed with both of them and—

Riley: Had you known Hadley before?

Bellinger: I briefly met Steve Hadley in Washington. I thought he might recognize my name. We did not know each other well. I had never met Condi Rice. The interview with Steve Hadley went well and he recommended that I go and meet with then Dr. Rice. It was quite a brief interview. I ran into Phil Zelikow in the hallway on my way in to see Dr. Rice. If I remember correctly, either she or then subsequently Judge Gonzales said, "Dr. Rice would like to hire you as the general counsel of the National Security Council, but the condition is that you sever your relationship with the Justice Department." This was the reverse of what I had expected; instead of being a two-year detailee, I was suddenly going to be the top lawyer for the National Security Council and was going to sever my relations with the Justice Department.

I thought about that, since it was not what I expected, but of course it was a tremendous opportunity. So I was then hired directly by the White House and the NSC staff. I inherited a staff of three people, one of whom had previously been the acting legal advisor, Brad Wiegmann, who is now in the National Security Division, and two other lawyers. I started in early February 2001 at the White House as the general counsel of the National Security Council staff.

Riley: Had you known Josh Bolten?

Bellinger: Josh had been at St. Albans a few years ahead of me. I had met Josh, but I did not know him well at that time.

Riley: So there was no connection there?

Bellinger: No, not to the hiring.

Nancy Kassop: Just on a structural thing. The counsel for the National Security Council is also

part of the White House counsel's office, is that correct? So you're dual-hatted?

Bellinger: Yes, excellent point. This had gone back and forth between administrations. I think they were reacting to feelings that in previous administrations the lawyer for the National Security Council was not sufficiently controlled by the most senior lawyer in the White House, the counsel to the President.

Kassop: That would have been Mary DeRosa, right?

Bellinger: My predecessor had been—yes. Nick Rostow, who had been the last legal advisor in a Republican administration, had not been a member of the counsel's office, but one of his deputies, oddly, was dual-hatted. So a more junior person was dual-hatted, whereas the senior national security lawyer was not. Whatever their reasons were, they felt that it was quite important to make clear that the National Security Council lawyer was in fact subordinate to the counsel to the President.

So yes, I had a dual-hatted relationship, which throughout my time there was a source of some considerable difficulty. My client and boss was the National Security Advisor and I was the lawyer for the National Security Council staff, and for her and for the National Security Council when they met as the council, but I was always subordinate to Judge Gonzales. My formal title was senior associate counsel to the President and legal advisor to the National Security Council.

Kassop: Where was your office?

Bellinger: My office was in the Old Executive Office Building, OEOB, a lovely office overseeing the Renwick Gallery on the corner, until after 9/11. They moved all of us out of the frontward-facing offices. We knew that the Office of Administration wanted to revamp the OEOB for many years anyway, and this gave them the opportunity to do it. For the remaining three years I got bumped along like a bad penny from office to office, working in a variety of tiny holes and missing my old office. As you know, the NSC staff has to trot back and forth from the Old Executive Office Building to see either the National Security Advisor or the Deputy.

Riley: As a part of this dual-hatting, were you formally involved in the organizational structure of the counsel's office? In other words, were you attending their meetings?

Bellinger: Excellent question, Russell. Yes, I attended two sets of staff meetings. The NSC staff met pretty much every morning, at least before 9/11, and then I think they met twice a week. The counsel's office met every morning, a little bit earlier, about 8:30. It became apparent to me from the first meetings of the counsel's office that I was a little bit of a fish out of water, because the other members of the counsel's office had all been politically active in the campaign. Many of them had bonded already. These were all people who had become good friends now, but they were much more ideological than I was.

As time went along—For four years in those meetings, I was quite surprised with the comments that were made by my colleagues in the counsel's office, rather snide comments about the National Security Council, the State Department in particular. I just had not been exposed to ideological conservatives who were reflexively suspicious of the State Department and who saw even the NSC staff as a soft extension of the State Department. I was quite surprised.

Perry: Did you ever respond to that, perhaps in meetings or outside of meetings on a one-to-one basis?

Bellinger: Yes, both. On occasion I would bite my tongue. On other occasions, people would say things that were so offensive about Secretary [Colin] Powell or others at the State Department that I felt that I would need to stand up for them. Then, on occasion afterward, I would stay after and have a word with Judge Gonzales to say that I really don't think this is appropriate; I'm quite surprised at this commentary. That was even before 9/11 and it continued afterward.

As I grew more into the job I became more assertive in defending both the NSC and the State Department. But I found that kind of commentary unfortunate.

Perry: How were your comments accepted when you would speak up, either at a meeting or one-to-one—or to Judge Gonzales—about this?

Bellinger: We got so we would laugh about it. They got to expect my comments to be more from a foreign policy vein, a more internationalist vein. At one point, far before 9/11, someone noted that right here in Virginia, if I recall correctly, that the Virginia Legislature decided that rather than fly the flag of Vietnam, they were going to continue to fly the flag of South Vietnam, which of course no longer existed. An issue had come up that the State Department had taken it upon itself to write to the Governor of Virginia—I may be misremembering this—to say that this was improper, that we should not be flying the flag of a country that we don't recognize, which seemed correct as a legal matter, but the counsel's office felt this was soft State Department stuff. Those were, of course, the days before 9/11, when things were a little bit easier.

Riley: What did you think you were going to be working on mostly when you came in?

Bellinger: This is another great question that we probably should cover. One, I expected—not incorrectly but maybe I hadn't done my homework well enough—that the George W. Bush administration would be more or less an extension of the George H. W. Bush administration, with a pragmatic internationalist foreign policy. That was what I expected ideologically.

In terms of the issues, President Bush made clear very early on that he was going to be very interested in international economic issues. He made the Secretary of the Treasury a member of the National Security Council by NSPD [National Security Presidential Directive]. He created, I believe for the first time, a second Deputy National Security Advisor for international economic matters to make clear that international economic matters stood coequally with traditional defense and security matters. I had no background in those issues, so I was looking forward to getting involved in international economic matters, trade matters, and so forth. One of my great disappointments after eight years was that, although many of those remained under my supervision at the State Department, I ended up becoming a leading expert in the law of war rather than the law of trade.

Riley: Right. Did you sense from Condoleezza Rice that she was in fact going to be a continuation of the George H. W. Bush administration, or did you become aware fairly early on that there were going to be some significant changes in the foreign policy approach of this administration?

Bellinger: Having not been a member of the NSC staff before—or really a pure foreign policy expert as opposed to, say, intelligence—I was not able to tell early on if there were slight differences at that point, so I didn’t detect significant differences. I did not detect a significantly more “conservative”—and I say that with quotes—approach in those first six to eight months. It seemed to be a pragmatic approach to foreign policy. There certainly did not seem to be any reflexively anti-international institution or anti-international law in general. I now get confused as to what was before 9/11 and what wasn’t, but there were certainly some immediate concerns about the International Criminal Court and so forth that continued on, but these were not things that were defining the administration at that point.

Riley: Do you recall what you were spending most of your time on in those first few months?

Bellinger: We had a variety of different incidents that occurred. We had the EP-3 incident. We had the shootdown of the missionary plane in Peru that raised issues under international law. We spent a considerable amount of time on the conflict with Saddam [Hussein] in Iraq and when we could use force in Iraq, and their regular locking onto our airplanes, and whether or not we could shoot back. So there was a good deal of discussion on the international law about do we treat this as business as usual or do we need to make clear that the next time Saddam locks onto one of our airplanes we’re going to do something different?

I would not say that it became apparent at that point that there were people in the administration who were anxious to get back into a war, but it was clear that there were some in the administration who were unhappy with this tit-for-tat policy, that they wanted a broader response. So there was a fair amount of time spent—The meeting with the Mexicans that we discussed with Dr. Rice was disrupted when there was a lock-on to one of our aircraft that ended up disrupting the Presidential visit.

Then finally we did spend a lot of time on—and I personally spent a lot of time on—counterterrorism issues. I spent a lot of time with Dick Clarke, who was head of the terrorism electorate. Throughout this period, we were reviewing the intelligence authorities that we had and decided that before we came up with new intelligence authorities—This of course has all been covered and declassified by the 9/11 Commission—we wanted to clarify what the policy was going to be, since policy should drive the authorities.

As fully explored by the 9/11 Commission, we had a series of deputies committee meetings that concluded that we couldn’t just decide on a policy toward al-Qaeda until we decided on a policy toward Afghanistan, and we couldn’t decide on a policy toward Afghanistan until we had decided on a policy toward Pakistan, and we couldn’t decide on a policy toward Pakistan until we decided on an Indo-Pak [India-Pakistan] policy.

So through the summer of 9/11 we were trying to pull together all of these different pieces, including the Predator, the armed drone that had been developed. We had an opportunity to take a shot at the so-called man in white [Osama bin Laden] and ultimately decided not to do that. All of these things were issues that were going on from February through August. Of course, we had the busy period in the summer of 2001 with the scares about al-Qaeda, then ultimately leading up to September 11.

Riley: Part of what the National Security Advisor is doing is the coordination of the other executive departments in her purview. Are you involved at all in the personnel decisions?

Bellinger: Not so much the personnel decisions. My job was as the lawyer for the National Security Council, for the staff and for her, so I was not heavily involved in the personnel decisions then as we were bringing people on and interviewing everyone as they came on. I did chair the interagency lawyers group, which reviews intelligence activities, but that is a substantive role, not a personnel role.

Kassop: So that would be State, Defense, Justice, CIA, and—?

Bellinger: Right.

Kassop: Would anyone else be included in that?

Bellinger: JCS [Joint Chiefs of Staff].

Kassop: Sure. Could you describe what a typical day was like for you, even though probably no day was typical?

Bellinger: Prior to 9/11, I was probably a little less disciplined, even though the National Security Advisor was getting in about 6:15 in the morning. I was probably getting in around 7:45 or 8:00 in the morning. I would review overnight intelligence and work on things I had not gotten done the previous day. I would then go to the 8:00 staff meeting over at the counsel's office. I think that was every morning.

Kassop: How large was the staff of the counsel's office at that point?

Bellinger: It was maybe a dozen people. They were often working on judicial appointments or other inside-the-White-House administrative issues. Then I would often go right into the NSC staff meeting, so the morning would often be taken with staff meetings for the first couple of hours. Then I would come back, often meet with my staff of three or four people, and we would continue to work for the rest of the day on interagency meetings in which we participated. I would often be the lawyer in the room if there was a deputies meeting or a principals meeting or even an NSC meeting on any conceivable issue. We were not always invited to every deputies or principals or NSC meeting. In fact, earlier in the administration, Dr. Rice and Steve Hadley were more restrictive. They wanted to keep meetings small, so they didn't feel that there always needed to be a lawyer in the room on every issue. Although, as time went along, I think they saw more and more that with almost every issue that seemed to be just a geographic or a policy issue, there always seemed to be some legal matter, whether it was the spending of money or use of force or some disagreement, so I got invited more and more.

A day often would consist of being the lawyer in the Situation Room, and often without too much to say, although sometimes a deputy or principal would say, "My lawyers tell me there is a legal issue." Since they didn't generally all come with their own lawyers, the National Security Advisor or Steve Hadley would say, "Well, John, is there an issue with the lawyers on this?" I would say, "Well, yes, let me explain to you where the lawyers stand."

Sometimes we would be chairing our own meetings if there were a legal issue where the lawyers needed to get together to discuss an interagency issue, say a sanctions issue or a use of force, or some of these Iraq issues. And then there was always a large amount of paperwork and emails involved in working closely with our different directorates, particularly with the Dick Clarke directorate on counterterrorism issues.

Riley: You've mentioned Clarke now twice. Tell us a little bit about how you were finding him and your working relationship with him. He has proved to be a little bit radioactive later. Was this evident very early on?

Bellinger: Less so. Condi knew Dick from the previous Bush administration. He had been on the NSC staff then. She thought highly of him and he was one of the few people that she asked to stay on. He certainly ran his own show. The directors that I worked most closely with were our intelligence directorate, because of our work on covert action and intelligence issues—

Riley: Right.

Bellinger: —and the counterterrorism directorate, because so many of the things that it was involved in had some legal issue. Either it was Justice and law enforcement or it was covert action or it was rewards for Justice. Dick had a very good staff working for him and they worked very hard. Dick was very territorial and had very strong views. He tended not to come to our senior staff meetings in the morning until he was directed to do so by Dr. Rice.

I was very impressed by his creativity. He did have sharp elbows. He would often send one of his staff down to dress us down in the legal office if he thought we were getting onto his turf. I would sometimes get emails from him. You knew he was really mad at you if not only was the text in about 16-point type but if he had turned on the colors, so you would get fuchsia or lime green.

Kassop: Sweet Briar colors, by the way.

Riley: You had also mentioned China, the situation with the airplane. Do you have any specific recollections about being involved in that or the development of the White House response to it?

Bellinger: All of these little crises had a legal angle to them. With respect to the EP-3, of course, the main issue was how to get back the airplane and the personnel. But we were examining closely who was in the right and who was in the wrong. Were we under the Law of the Sea Convention or other international law so that we could accuse the Chinese of international law violation, or were we in the wrong in that they were right to be able to use force?

Riley: Your conclusion? I don't remember.

Bellinger: I've forgotten. I'm sure we thought we were in the right. I remember another little one. Again, life was so much easier before 9/11. There had been what I guess probably existed before and now sadly continues to go on until just a few weeks ago, a rape in Okinawa, and the Japanese had arrested the young perpetrators and then didn't want to let them go. That raised some issues under the SOFA [Status of Forces Agreement]. In fact, I think there is an agreement or a protocol to the SOFA that suggests that in the case of heinous crimes the individuals will not

be turned over, that they can be held. I remember that was a mini crisis, before life got more complicated.

Kassop: Before we go to 9/11 and the other international legal issues that I think you were involved with, the Kyoto treaty [Kyoto Protocol] and also you mentioned the International Criminal Court, which obviously probably extended throughout your—Maybe talk about those issues pre-9/11 before we get bogged down in that.

Bellinger: Kyoto was unfortunate. I did not have any background on that. I was asked by Dr. Rice about some legal issue about withdrawing from the protocol or simply declaring our intent not to become a party. I didn't know the answer to the question and no one on my staff answered the question. So as we often would do, we decided we would make a discreet phone call to an affected agency. Not that this was improper; this was how we were—the NSC was composed of the sum of the parts, although you did have to be careful about calls.

I made a call to the legal advisor's office, I think without even asking, providing background, but I was just asking a legal question. I was extremely distressed one day later when the *Washington Post* ran a story saying the Bush administration was considering withdrawing from the Kyoto Protocol. Although we never tracked it back, and it really may not be right, because this discussion may have been going on in many other circles, I was always worried that because I had made a call to ask a neutral legal question that this had somehow set off alarm bells in the State Department and that it resulted in a leak.

Perry: That would have been Will Taft who was the—?

Bellinger: I'm not sure if I called Will. It quite frankly might have been to someone else on the staff. I had absolute confidence in Will, but I did learn that one has to be careful about calling just to ask what would seem to be neutral legal questions.

Regarding the International Criminal Court, of all the issues that I was involved with over eight years, from the beginning to the end, I would probably put those issues in the top half dozen that I spent time on. Prior to 9/11 there was less focus and less agitation—It really came to a head in 2002 when the Rome Statute was going to come into force. Although we may be getting a little bit ahead, while I'm on it—

Riley: Go ahead.

Bellinger: The Rome Statute was slated to come into force on July 1, 2002. Very late in the game the Defense Department—largely just the Defense Department—began to focus on the fact that the Rome Statute was going to come into force and therefore apply to us, because that's the way the statute works. They then proposed that the United States enter into an all-out campaign to try to prevent it from coming into force. The only way to do that would be to prevent it from reaching the required 60 votes. The problem was that at the time they proposed this campaign, they were already up to about 53 votes. So that meant that we would have to prevent about 130 of the 140 other countries in the world from voting for this in order to get the 7 to get up to the 60 needed. But that was the Defense Department's proposal.

The State Department, not surprisingly, thought that this was not going to be possible and was

going to cause us more harm than good. We had a series of meetings and this did ultimately go up to the President. I may have either written or was involved in writing the decision memo for the President, on whether we should accept the Defense Department recommendation that we try to block the Rome Statute from coming into force or whether we should take a different course. The President opted to take the different course, which was a pragmatic but still conservative move, in that he did not adopt the recommendation to try to prevent it from coming into force. But he did adopt the recommendation that we would make clear that we did not intend to become party, by having John Bolton send the famous letter to the Secretary-General of the UN [United Nations].

Of course, that became a much bigger thing than it really was. It has famously become known as the “unsigned” and was really just a one-line letter that said that the U.S. does not intend to become a party. Arguably, the [William J.] Clinton administration had already said that. President Clinton had signed the statute but had already announced that it was so flawed that it wasn’t going to be sent forward to the Senate. So if it’s not going to be approved by the Senate, we can’t become party to it.

Sending this letter was viewed as sort of a stick in the eye. At the same time during that period in 2002, Congress was, on its own, moving along with this anti-ICC [International Criminal Court] piece of legislation, the American Service-Members’ Protection Act. I came to learn that all Europeans blamed this act on the Bush administration, as if this were something that we had cooked up, and that the whole “Hague Invasion Act,” as it was known in Europe, was George Bush’s idea.

This was largely drafted by Steve Rademaker and the House Foreign Affairs Committee and led by Tom DeLay and the conservative Republicans in the House. When we looked at the legislation at the White House, I’m sure there were some who were supportive of the thrust, but as a legal matter it was so draconian in terms of tying the President’s hands—saying that you can’t provide this money and you can’t share this information and you can’t participate in these missions—that it clearly raised constitutional problems.

Really, contrary to what the rest of the world ultimately thought, I then became the White House negotiator in taking out a lot of these more absolutist parts of the American Service-Members’ Protection Act and putting in waiver authority. It did end up passing. In my public speeches now I am quick to remind Europeans, who blame this on President Bush, that Hillary Clinton, as a member of the Senate, voted to invade The Hague before President Bush did. It did pass, obviously, with a majority in both the House and the Senate, probably because it was very difficult to vote against anything called the American Service-Members’ Protection Act, particularly after 9/11. The President did sign that.

I’m getting way ahead of myself, but I will finish this thought up to 2004. So for 2002 to 2004, John Bolton—he was the Under Secretary at the State Department—did implement largely the requirements of the American Service-Members’ Protection Act, which was to cut off aid to countries who were party to—unless they had signed a nonsurrender agreement—the so-called Article 51 agreement. So he and his staff spent two years negotiating these Article 51 agreements, which caused enormous unhappiness and anger at the United States around the world because they felt that we were bullying small countries, threatening them, throwing our

weight around.

By 2004 it became very clear, at least from my personal perspective, that our ICC policy was causing us more harm than good and—I'm not going to second-guess the President's decision or where we were—that much of the rest of the world was convinced that we were trying to kill the court in its infancy, which may well have been the desire of some of my colleagues, but I do not believe that that was the President's decision. His decision was that we did not intend to become party—We have to implement the law, but we were not trying to prevent the others from using the court. As I understood it, the policy was—as given in an excellent speech by Marc Grossman on or about July 1, 2002, that explained the President's decision to not become party, but that had a lot of very pragmatic and constructive language stating that we supported the goals of the court—that we shared the goals of international justice and that we would work with those who were party and that there was common ground.

If that was the policy, you would not have thought that was the policy from 2002 to 2004 outside the United States. Most Europeans had never seen that speech. Their understanding of U.S. policy was that we had unsigned the treaty, we had signed The Hague Invasion Act, and we were bullying a lot of countries, threatening to cut off assistance unless they signed these nonsurrender agreements. That created an incredible backlash and was one of the two or three things that contributed to a feeling, in my view, around the rest of the world, that the Bush administration did not believe in international law, was actively hostile to international law and to international institutions, and particularly to international criminal justice.

While there were certainly elements in the administration who might have had those beliefs, it was never my understanding that this was the President's decision. In 2004—again, I'm getting way ahead—after we had won the election, Secretary Rice asked all members of the NSC staff to write a short memo to her on what we had achieved in the first term and what we hadn't achieved, and what our goals ought to be in the second term. One of my three points had to do with course-correcting on detention and counterterrorism policy, but the second was on course-correcting on the ICC, so that within the confines of the President's decision we made clear to the rest of the world that we were not out to kill the court, that we shared the goals of international justice for bad people, and that there could be essentially a peaceful coexistence.

Secretary Rice did not disagree with my recommendations. I spent a significant part of my time as legal advisor at the State Department to try to take us back to what the stated policy had been in the Marc Grossman speech in 2002.

Riley: Was the evident disagreement within the administration about this, at least the optics of it—was this ever litigated out inside? Was Bolton ever called down to Washington and urged to cool it or for everybody to get on the same page, or is this so far off the front pages that nobody is paying attention to it?

Bellinger: I don't think anyone was really complaining about—Certainly at the political level there was no one really disagreeing. Certainly in the bureaucracy of the State Department there was enormous unhappiness with this because they felt that this was causing significant foreign policy harm, that this was just typical of the Bush administration to be shooting itself in the foot this way. But I don't think anyone really complained. That became a bit more of an issue in the

second term.

Riley: But that becomes an issue in the second term because you're making it an issue, right?

Bellinger: Yes, and there were some others as well. I think at this point the Defense Department began to realize that the cutoff of counterterrorism assistance to countries that we needed in the War on Terror did not make a lot of sense. So they started pushing for waiver authority. Secretary Rice, because I think she had been hearing about this a lot from me and from the military, famously said in a hearing that cutting off counterterrorism assistance to our friends is a little bit like shooting ourselves in the foot.

There did not seem to be, from 2002 to 2004, any real disagreement with what had been the ICC policy. As we move forward, past 2004, there seemed to become a greater recognition, for a variety of reasons, led by me but also with our War Crimes Ambassador [U.S. Ambassador-at-Large for War Crimes Issues], Pierre Prosper, and at the Defense Department, that this sort of absolutist, anti-ICC approach was causing some problems.

Kassop: Wasn't there also some concern that there was a possibility that our own public officials could be subject to prosecution under the ICC?

Bellinger: That, of course, had been a major concern that predated 9/11. I'm glad you raised that, Nancy, because prior to 9/11 and then continuing through the lawyers at the Defense Department, and my friend Jack Goldsmith, who was there as the counsel to Jim Haynes—He had come in from academe—Jack wrote a number of papers, and the ICC was part of it, about lawfare and judicialization of politics and arguing that the United States really needed to push back on this because we were uniquely at risk, and that other countries were using law and international institutions to go after U.S. officials.

The ICC was one example because it applied to us under the terms of the Rome Statute, even though we were not a party. There was some talk about, well, were there ways to not have it apply to the U.S., essentially to reject the application to the United States even though that's what the treaty said? Even prior to 9/11, and what became the real concerns about prosecutions of U.S. officials, there were more theoretical concerns. In fact, this had come to an initial head, and we got an inkling of what was to come, when Henry Kissinger was stopped in Paris in the summer of 2001, received a subpoena, and was told that he couldn't leave until he submitted to questioning related to either Chile or Argentina, things back in the 1970s. Again, no one was suggesting he had done anything wrong personally, but somehow, in meetings with either Chilean or Argentine officials, he had not sufficiently objected to Chilean or Argentine policies.

Kissinger was outraged. Alex [Alejandro] Wolff was the Deputy Chief of Mission at the time and managed to negotiate a release for Henry Kissinger by essentially arguing that look, anything that Kissinger had done would have been as Secretary of State and not in a personal capacity, so any questions that the French had, the U.S. government would stand in for Kissinger and provide those answers.

That added fuel to the concerns of those who felt that law and international law and institutions were being used against the United States. Here was an example of it.

Long: Can I ask, while we're on the ICC pre-9/11—? In your opinion, was the balance, the objection to it, the claim of jurisdiction over states that had not even signed to ratify the treaty, or were there also—Do you think it might have been mitigated if the structure of the prosecutorial office for the ICC had been different, or if it had been promised that the first couple would be Americans or something? Was there any way that the ICC was going to get a green light as long as it didn't—? Was there any change that you could envision?

Bellinger: No. In our administration—Again, we have to remember that the Clinton administration had decided that it was fatally flawed, and our administration was even more concerned, interestingly, as the most visceral concerns were this idea that the Rome Statute parties could apply a treaty to us that we were not a party to. A lot of people in the administration seemed to think the Rome Statute violated basic principles of treaty law. Now, I think they didn't fully understand treaty law, because other countries apply their jurisdiction to our people all the time. So they sort of misunderstood the issue. But still, this idea that other countries could band together, negotiate a treaty, and then apply their own right to prosecute people to someone else was very troubling.

Secondarily, undergirding all of this was probably a visceral dislike of international institutions and international, supranational government at all. The people who were against the ICC didn't like the UN and they didn't like the ICJ [International Court of Justice] and they didn't like anything that smacked of international institutions as opposed to sovereign governments. Interestingly, though—This will come out somewhere in one of the papers—somewhere in this period of time, probably before our decision on the ICC, President Bush told Dr. Rice that a lot of foreign leaders say that there are a lot of protections in the Rome Statute and that we have nothing to worry about. He asked Dr. Rice, "Can you tell me more about this?"

She asked me to write a memo for the President on the pros and cons. It's the truth that there are safeguards. I explained in a short memo that there are lots of safeguards and that it was set up to have lots of safeguards, and that there was complementarity and multiple appeals, et cetera. It would be difficult—There would have to be a showing that the American had committed a war crime and that the United States hadn't prosecuted it; it would have to go through multiple appeals. But I then did say, at the end of the day, yes, there are places that you could get to that, over U.S. objection, a U.S. official could end up being prosecuted. I don't know the extent to which that influenced the President's thinking on the subject.

Perry: Could I ask, before we get to 9/11—? So far the President has been a bit outside, sort of a personality and a political figure in the background of our discussions. You had mentioned that coming into the administration you hadn't taken part in the 2000 election and we don't register by party in Virginia. What were your views of George W. Bush as you came into his administration, both as a political figure and a personality, and are you seeing much of him in those months leading up to 9/11? Are your ideas changing or evolving about him?

Bellinger: I was much more interested in foreign policy and international issues, so I'd not even studied his domestic positions. I understood him to be a compassionate conservative who had been a uniter with a lot of partisan support in Texas. I had not studied a lot about Texas politics or what he had cobbled together to win the election, but I had a positive impression and I was perfectly comfortable working in that administration. What I saw of him prior to 9/11—At my

level I did not see a lot of the President directly. We had only a couple of NSC meetings prior to 9/11, meaning those chaired by the President himself, so I had very little direct interaction prior to 9/11. What I saw publicly, I did not see anything that was troubling to me at that point. He was focused more on domestic issues. I did not see him heading in any direction that was troubling to me. I had rapidly become very impressed with Dr. Rice, Andy Card, our Chief of Staff, and Steve Hadley, all of whom seemed to be very experienced, pragmatic officials. So I felt perfectly comfortable, other than some of these more ideological and anti-international views that seemed to be coming out of others in the counsel's office.

Kassop: So if we apply the same question to both Judge Gonzales and to the Vice President, obviously you had quite a bit of interaction with Judge Gonzales; I don't know what your level of interaction was with the Vice President. Any thoughts about those?

Bellinger: I didn't see much of the Vice President before 9/11. I hadn't formed much of a view. Of course I saw a lot of Judge Gonzales, who was extremely nice and solicitous to me, and continued to be through all four years at the White House and afterward. He never would enter into these discussions about throwing barbs at the State Department or elsewhere. When I would see him afterward he would be always very supportive and say, "I understand. Let me have a word with whomever."

He also, prior to 9/11, in the areas where I did have more expertise than most others on covert action and intelligence issues, he seemed to be perfectly willing to let me run those issues out of the NSC and just keep him informed, which I would try to do. So I felt that he and I personally had a good relationship in the run-up to 9/11.

Kassop: And your interactions with David Addington pre-9/11?

Bellinger: David certainly was amongst those who would make critical comments about the State Department and the UN and things like that, so I could realize that we were coming at it from a different perspective. He and I had similar backgrounds in that we had both come out of the national security agencies or Defense or Congress. We had not, at that point, really started having significant disagreements that I recall.

Kassop: When you say that Judge Gonzales deferred to you on covert actions and other types of foreign policy issues, David Addington's expertise had also been in that same area as well.

Bellinger: It's interesting, for whatever reason—To my knowledge, David did not—even though he knew a lot about covert action, as much as I did—he did not try to interfere. It may be that the things that we were working on—He would see the papers because they would be disseminated to the Vice President's office. Certainly, I now confuse pre-9/11 and post-9/11, one of the books that came out recently correctly said that David Addington didn't do interagency.

Riley: We've heard.

Bellinger: The NSC, of course, is all interagency.

Kassop: Exactly.

Bellinger: It's all interagency meetings and it's DCs [deputies committee] and PCs [principals committee] and PCCs [policy coordinating committee], and David hated that, and he made clear that he hated that. He would not come to any legal meetings. He would not come to policy meetings even when lawyers were invited. He would make clear that he did not participate.

What he did do, and this became a perennial problem, both before and after 9/11, is that he would wait until there had been a full interagency process of whatever issue it happened to be, whether it was the preparation of an NSPD, a National Security Policy Directive, an Executive order, or any interagency-agreed position that might have been worked on for months and months. It would be agreed to all through the NSC. It would be in final staffing before signature by the President, and at that point it's at the smallest point of the cone, when it's only being sent around to the White House senior staff, and at that point it would get to David. He would take his pen and strike through often all 10 or 20 pages of it and would simply rewrite whatever happened to be—the President shall have the authority to do X or the President shall have the authority to do Y.

There would then be howls from the interagency, and if it happened to deal with legal matters, then of course they would call me up and say, "You have to go talk to David." I would say, "Why does it fall to me to talk to David?" So for four years I was perennially sent into battle to say, "David, we've spent a year working this out." He would say, "I know, that's what I hate. An interagency treaty carefully agreed to where every agency gets a little bit of what it wants does not serve the President." So I did understand it from his point of view. He was the Vice President's lawyer, and he thought that this was just the bureaucracy being the bureaucracy. He didn't like these trade-offs: well, if DOD [Department of Defense] will agree to these two words, then State will agree to those two words.

Perry: So what would you say to him when he would say that to you, when you were deputed to go with him?

Bellinger: I would say, "Look, I understand, and if you have some particular concerns, we can try to get those things fixed, but the President has asked for this Executive order," or "The President is expecting this NSPD, and we're not going to get there unless we can try to work these issues out. So please work with me." What I finally learned, and he actually conceded this to me in a fit of transparency. He said basically that he would negotiate—He ultimately said to me one day, "You know, you don't have to take any of my changes, John. I am providing you one person's views."

I would say that they are an important person's views. I think his view was that the Vice President would back him up to a certain point, and it was up to the rest of us to challenge him up to it and see if the Vice President would back him.

Riley: But the inference was always if he could get away with that. He couldn't have done it just as a staff member; he had to be working under the authority of the Vice President, right?

Bellinger: Right, for example, the OMB [Office of Management and Budget] is responsible for Executive orders and this happened frequently with Executive orders. David loved Executive orders because those were really the President's words. Executive orders also go through this

extremely formal process run by OMB. Those would often take lots and lots of work. It was the same thing. He would rewrite—He would send his comments back to OMB and OMB would then call me up and say, “John, we know that the President is waiting. He’s asked to sign this Executive order tomorrow. We got comments from David Addington completely rewriting sections six, seven, eight, and nine. What are you going to do?”

Finally, after a couple of years, I did realize that I would say the same thing to OMB, “Take what you want to take, ignore it, and just keep sending it back. We can see if he keeps bouncing it. You do not *have* to take those suggestions.” Even Steve Hadley, who, like all the rest of us, knew that David spoke for the Vice President—Steve, who worked with both David and the Vice President at the Defense Department, was inclined to be extremely solicitous of both the Vice President’s and David Addington’s views. But even Steve began to find, after a couple of years of this, that although we would try to address David’s views as best we could, we had to move the process forward. If the Vice President ultimately, at the end of the day, whether it was an Executive order, an NSPD, or anything else, said no, the President should not sign this, then it would have to be worked out. But if the Vice President wasn’t going to back it up, then we would just move forward.

Kassop: [REDACTED]

Bellinger: [REDACTED]

Kassop: [REDACTED]

Bellinger: [REDACTED]

Kassop: [REDACTED]

Bellinger: [REDACTED]

Riley: If you’re getting into the summer of that first year, are you okay to continue?

Bellinger: Yes, I’m good.

Riley: Are you, through July and August, finding the job rewarding? Are you getting burned out and thinking that maybe you’re ready to go back to the private sector?

Bellinger: No, I’m doing fine. I’ve not yet grown fully into the job. I didn’t have all the battle scars at this point. I still felt out of my depth on a number of issues that would come up that were not intelligence or criminal or foreign policy, like some question of international law. So when Secretary Rice would turn to me in front of the President or others and say, “Well, John, what is this question of treaty law?” it took a while to get comfortable on some of these issues.

Most of that period of time, I still was feeling a bit uncomfortable with this tension that had not yet even fully matured between the conservatives in the counsel’s office and the NSC. It had

really not yet come to a head.

Riley: Okay, take us through your day on September 11th?

Kassop: Can I stop before we get to that, only because once we get on that, we're going to stay on that for a long time.

Riley: Okay, go ahead.

Kassop: Did you want to talk a little bit about your role in the Avena case, since that took up so much of your time?

Bellinger: Avena didn't come out until 2004 and I didn't have to get heavily involved until 2005, so it was mostly a second-term issue for me.

Kassop: But it was not a 9/11 issue. I guess what I'm saying is that once we get into 9/11 subject matter—unless you want to do it chronologically.

Riley: I'm not wedded to the chronology but John has been generous enough to give us enough time where we'll be able to come back.

Bellinger: Why don't we do that when we get to State Department because that was in the second term, a State Department issue?

Kassop: Absolutely.

Riley: Okay.

Bellinger: So 9/11.

Riley: You're living in [Washington] D.C.?

Bellinger: I'm living in Arlington, which, thank goodness, was about a ten-minute commute to the White House and an eight-minute commute to the State Department. Gosh, I would not have wanted to do the job if I were living out in Ashburn or something. So I was filing into the—We had whatever it was, our 9:00 or 9:30 staff meeting. I had learned early in my first nine months that important people to befriend were the executive assistants to the National Security Advisor and the Deputy, who were these young people who sat, both of them, in this teeny little office about the size of a closet outside the National Security Advisor's office. All of us learned that if you couldn't get to the National Security Advisor or the Deputy, that if you made friends with these executive assistants, you could find out what was going on. You could get your memo moved up to the top. You could get them to ask whether you could do this or that.

I had learned that, and once or twice a day I would pop by the National Security Advisor's office and say hello to the executive assistants. So I popped by that morning on 9/11. It was Matt Waxman and I can't remember who else. Matt was working for Condi and the other person was working for Steve. I popped by and they had two televisions above their desks. There was smoke coming out of one of the World Trade Centers and something about a small plane hits World

Trade Center. Weird, how could that have happened?

I headed down to the Situation Room and we're starting our staff meeting, going around the room, when the door opens and someone comes in and gives the National Security Advisor a message. I can't recall now whether they said publicly that another plane has hit the other tower or whether they just came in and gave her a message. She left the room immediately. Much of the rest of the day was a haze.

I ultimately spent a good part of the day in the Situation Room on the phone with the lawyers at the Joint [Chiefs of] Staff. I was talking to them about the legal authority if we actually had to shoot down an airplane. That came down, frankly, to some fairly simple principles about whether the President felt that it was necessary to do this in self-defense.

Riley: So it was a constitutional issue?

Bellinger: Yes. A group of people ended up being herded down into the Presidential command center. The rest of the day became sort of a haze. I didn't see Secretary Rice for the rest of the day. I stayed in the Situation Room making these different telephone calls. I remember at one point in the afternoon one of the operators said, "Mr. Bellinger, your wife is on the phone." She had managed to call in to our emergency number because she was worried about me.

Riley: Sure.

Bellinger: I got on the phone briefly with her to say everything is okay; have you gotten the children? Get the children, I don't know when I'm going to be home. I ended up staying pretty much all night long. I had sent my staff home, except for my loyal Marine colonel, Jonathan [Jock Scharfen], who, being a good soldier, stayed over in the OEOP the whole time, waiting for me. When I finally came back, I don't know what we did for the rest of the day, but I remember he and I must have left—Of course, there were all these reports coming into the Situation Room about hundreds of planes; there were at least seven planes that were all heading toward different places. It looked like there were multiple planes flying everywhere.

When the dust had largely settled in terms of there didn't seem to be that many planes attacking us, that was when I ended up going back to my office. Jock was still there; we ended up locking up at about 5 o'clock in the morning. I remember going out and standing on this completely deserted street at the corner of 17th and Pennsylvania, because my car at that point was in a parking garage right across the way. I stood under the streetlight and said to him, "Our lives are never going to be the same."

Pretty much from that point on—I can't remember, it literally started that next morning—we went into sort of war mode. Dr. Rice made clear that she wanted a small group of senior staff to be in with her every morning at about 6:15. So for at least a year or so I would be in there at 6:15 in the morning for a small-group meeting with her. I pretty much stayed until 12 or 1 o'clock in the morning because there was just an endless amount of work for seven days a week on a whole variety of different issues.

Riley: Did you get evacuated at all on 9/11?

Bellinger: No.

Riley: There was an evacuation.

Bellinger: Yes, I guess there was. I can't remember how I ended up staying.

Riley: They didn't evacuate the Situation Room?

Bellinger: They did not evacuate the Situation Room.

Kassop: Who else was in the Situation Room with you?

Bellinger: Pretty much all of the Situation Room operators. I remember Tim Flanigan, the deputy counsel to the President, was there with me. He was talking to a different group; he may have been talking to either the Justice Department or to Jim Haynes, the DOD general counsel. He and I would talk to each other about the legal authority for shooting down the aircraft.

Kassop: When you looked at legal authorities, what did you consider? Were there precedents that you would look at?

Bellinger: We didn't have time inside the White House to do any research. It was more talking to the Joint Chiefs and to—I can't remember whether Tim was talking to the Justice Department.

Kassop: To OLC [Office of Legal Counsel]?

Bellinger: I would guess he probably would have been talking to OLC as a matter of constitutional authority, just so we could have, if anybody asked us, the best advice that we could get from the different departments.

Riley: There was an issue at one point—I think this is in the briefing materials—about the shutdown order and the origins of the shutdown order, whether the President had issued it or whether the Vice President was the one who issued it. Do you have any recollections of that?

Bellinger: I didn't have any independent recollection of that. We reviewed that extremely carefully. I ended up becoming essentially the defense counsel for the 9/11 Commission for the whole White House. It was primarily, of course, for Dr. Rice and Steve Hadley, but ultimately for the President and the Vice President, Andy Card, and everybody. That involved pulling together all the information that anybody knew about anything and every document. Of course, one of those issues was who gave the shutdown order? I knew this like the back of my hand in 2004, but I've now forgotten precisely what the President and the Vice President had said when they had talked to each other.

Long:



Bellinger: [1 page redacted]

My general understanding is that we were collecting certain phone calls between outside the United States and inside the United States. Of course FISA [Foreign Intelligence Surveillance Act] allows all sorts of different collections in communication and this was maybe slightly on the edge, capturing things that maybe were not clearly permitted. My general sense of it was not that this was a national security outrage well beyond the powers that could possibly be imagined, but by running it in such a secretive way it ended up causing problems. But again, I have not made a careful study of the issue.

Riley: Was there a discontent within the circles of people who were making these decisions? Was there a discontent with the way the FISA Court and the process was operating, or was it deemed to be inefficient in terms of time?

Bellinger: No. Again, I was working on so many other things that even when it became public—Of course I was fascinated, but I didn't have time to go and ask lots of people and dig into it myself. My sense was that the people who were concerned about it were not feeling that it was grossly illegal or there was huge overreach or anything like that, but more that this was a bit of a stretch, and probably the best thing to do would be to go and get congressional approval. Either change the statute with a slight little twist that might not be noticed by people, because there have been a lot of changes in technology since FISA was enacted—the statute has not fully kept up with it—or at least go and brief Congress to make sure that they were on board. If I recall, that seemed to be the noises that people were making to me.

Kassop: Can we go back then to—essentially very shortly after 9/11 but perhaps the genesis of what we're starting to talk about, which is really the AUMF [Authorization for Use of Military Force], which you were presumably involved with drafting. Then the questions—I know there is a whole different debate going on, literally at the moment, right now, but the point was, what did you think it would cover?

I know you also have been one of those who thought that it was drafted in a way that was very nonspecific. For example, would the Terrorist Surveillance Program have been something that could have been justified under the AUMF? Was military detention something that could have been justified?

Bellinger: That's a great question. The counsel's office—I think Tim Flanigan largely took the lead on that in negotiating with the Congress and was running drafts by me. At that point I was probably operating on so little sleep and was doing so many other things that I don't remember the debates about would this cover detention or would it cover Americans or would it cover surveillance. I'm purely speculating now, but my guess is that people were not thinking about any of those things. The debate was more about what groups did it cover and how to define a group or an individual who had planned, committed 9/11.

I personally have no recollection of any discussion either on the White House side or the congressional side of what exactly does all appropriate or all necessary force mean? Are we talking about detention? Are we talking about lethal force? Are we talking about any country in the world? Are we talking about electronic surveillance? I don't recall discussion on any of these

things that were ultimately hung on the AUMF later on. I'm happy for somebody to say, "Oh yes, we were completely talking about those things," but I have never heard anybody say that those were really thought of at the time.

Kassop: Then there was also the one—I forget the words that were used—about whether or not it would apply inside the United States versus—Then there was that Tom Daschle op-ed in the *Washington Post* that talked about the fact that he—I guess somebody from the White House wanted to try to insert a change of words just before it was about to be voted on in the Senate, and Tom Daschle said, "No, we shot it down."

Bellinger: Interesting. I don't recall that.

Kassop: You don't recall that? Okay. So were you focusing, in your mind and in all these things that you were doing, on the Afghanistan component of this process? Because up until 9/11 you obviously talked about other countries and things that were happening in other countries and things that we had to focus on, but now are you focused on AUMF and what will happen if we go into Afghanistan and what will be the different war issues and treaty issues, et cetera? Or has that not yet come to you, and *does* it come to you?

Bellinger: At this early point, I was largely focused on a number of intelligence matters that were more in my lane. Tim Flanigan was taking the lead on the AUMF. Since the CIA reports to the National Security Council, I was working more with them during this brief period of time on how do we respond to intelligence matters and do we have our intelligence authorities in order?

Kassop: Can we go back to when you were mentioning David Addington and the large role that he was playing as part of the Vice President's office? Somewhere in the briefing book it talked about occasionally you would see Lloyd Cutler, I presume long after you had left the firm. But did you see him at any time during this period just to have a friendly lunch? Did you ever say, Talk to me about the roles that people played in other administrations? Or did you ever run by him what was happening, without, obviously, revealing state secrets, but in terms of the power that people had that might be different and unprecedented from other administrations?

Bellinger: I did. I would have him down occasionally to the [White House] Mess. That's where I was as surprised as anybody to read in one of these things that David Addington held against me that I would have a Democratic counsel to the President into the Mess. During this period of time, I did ask him about several things, about what was the relationship between the NSC and the counsel's office. How involved did you get in reviewing things?

Later, although he was getting older at the time, we talked about his involvement in the [*Ex parte*] *Quirin* case and military commissions and so forth. He then told me for the first time what I had never known before, that as a young Army officer, he had been there as part of the *Quirin* case, the Quirin Commission, in the bowels of the Justice Department in the 1940s. So we talked a little bit about that.

Kassop: Did you ask specifically about the power structure that you were seeing?

Bellinger: I can't remember now.

Riley: You said that you were mostly dealing with intelligence issues. Are there things that you can tell us about, talk with us about, in terms of these authorizations?

Bellinger: Within a day or two, Judge Gonzales held a meeting in the Cabinet Room of the general counsels of all the national security departments and he asked everybody if there are any powers that the President needs that he doesn't have. We're at war. Is there anything that we now need?

I think each of the agencies volunteered on different fronts of things that they would like to have changed. I can't remember quite how they got in charge of it, although it was totally appropriate that Viet Dinh began this parallel effort that resulted in the [U.S.] PATRIOT Act [Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001] and most of that is—in fact, almost all of that is—domestic law enforcement. I and one of my deputies participated in that process. It was less purely national security than it was defense or intelligence. It really seemed to be more FBI or Justice sorts of things.

We played in it. I talked to Viet Dinh on a few occasions, but he was running the process. None of the national security agencies seemed to be complaining about it, so I left that to him. Again, my impression on the Patriot Act is that this is something that civil liberties groups have overreacted to. This was not newly invented Bush administration excesses. This is a bunch of stuff that had been sitting on the shelf. There is no way they could have come up with it in 72 hours. This was stuff that had been sitting on the shelf that a series of Presidents, President Clinton and others, had included in various previous legislative bills, or it hadn't gotten to a legislative bill, legislation that would have made the FBI's or DEA's [Drug Enforcement Agency] or anybody's life easier. So these things that have now riled up the ACLU [American Civil Liberties Union] about vast infringement on American civil liberties—and admittedly some of them, around the edges, on libraries or so forth, may be used more aggressively, but this is stuff that the law enforcement agencies have been looking for for a long time.

Riley: In this early interval, is one of the things that you're dealing with the existence of the so-called silos that tend to have preoccupied people's attention later on? Within your authorizations, is that an issue that you're looking at, the authority of the intelligence agencies to do certain things within the United States?

Bellinger: What do I remember about this? I don't have specific recollections of CIA saying we want to do X or Y. Over time there certainly became things that the different departments wanted to be able to do inside the United States, some of which seemed to be perfectly reasonable and surprising, and they felt they didn't have authority, like the MPs [military police] around a military base to be able to take down the license plate of a car that had circled around for the third time. Apparently that would be the domestic collection of intelligence. One would think that's not unreasonable.

But much of the September period was a haze to me. I remember working around the clock and I can't remember what we were doing except—I can pull out a couple of things. One, it became pretty clear that we were going to be heading into some sort of a war. We were having a huge number of interagency homeland security meetings. Larry Thompson had been put in charge of

some issues and Norm Mineta had been put in charge of other issues. We were locking everything down, preparing long lists of things that needed to be protected.

I do remember that there were a number of sillier ideas. Someone had proposed—I think this came out of the counsel's office—that maybe we should reissue the Great Seal of the United States so that the eagle was facing toward the ax rather than toward the olive branch. I did point out to Judge Gonzales that I thought that was not necessary. I was involved on the edges of the creation of the Department of Homeland Security. I have forgotten—That was not my lead. There were some issues there.

I probably should jump, in the interest of time, into the things that I did get most involved in, which I know were in your briefing book. You can go back if there are some things that I have forgotten.

Kassop: I have one quick question. The constitutional law expert in me has to ask the question, to what degree did *Youngstown* [*Youngstown Sheet & Tube Co. v. Sawyer*] fit into your discussions and your debates?

Bellinger: Particularly in terms of congressional authorization?

Kassop: Emergency power, inherent Presidential power.

Bellinger: I was personally less worried on those things; it may have been in the counsel's office that they were focusing on them. At this point I was spending more of my time on use of military force, intelligence issues, sanctions issues on OFAC [Office of Foreign Assets Control], and the long list of entities that we were sanctioning.

Kassop: Then I guess the related question is, why was it that there was not more of an effort to go to Congress? In other words, why is it that so much came directly out of the executive branch, and what was their thinking?

Bellinger: Nancy, that's a good question. Over time I became much more of an advocate of why don't we go back to Congress and get more clear authority on detention or Guantanamo or other things. In that very initial period of time, it may have been that I was just too tired to focus on or just couldn't see far enough down the pike that we would need to have broader authority or whether there was even a debate beyond the 50 words that we had put in the AUMF.

I guess the next big thing that I remember is the whole military commission debate. When was the invasion of Afghanistan, October 25th or something like that?

Kassop: Definitely October.

Bellinger: All of us knew something was going to happen. I didn't, up to the last minute, know precisely when it was going to happen. I watched from my office in the Old Executive Office Building as the TV screen began to light up with the planes going in. One of the first things my office had to do was to—

Riley: October 7th, there was the air strike against the Taliban.

Bellinger: So this was about three weeks later—was one, to prepare the War Powers Resolution notice, and second, to prepare the Article 51 notice to the UN. So we coordinated—None of those was terribly complicated. They were just legal things that needed to be done. Then the invasion began. We watched all of that.

Riley: Can I ask—? Again this is somebody who is on the periphery of these issues. I know the AUMF was treated as tantamount to a declaration of war. Was there ever a discussion about having a formal declaration of war?

Bellinger: That's another great question. I have no recollection of that. I'd love to find all the emails and other things that went on during this period. Starting sometime in early October, as we began capturing people, Pierre Prosper, as the War Crimes Ambassador, came to see Judge Gonzales, I think on behalf of Colin Powell. Everybody was doing things that were not part of their traditional jobs.

Obviously right now, the War Crimes Ambassador was not going to be spending so much time worrying about the war criminals in the Balkans. He came volunteering to put together a group to focus on how people we expected to capture, including [Osama] bin Laden himself, would be prosecuted. We began this interagency process—I can't remember how I became the cochair of it, but I did. I was nominally the cochair, but I mostly left it to my deputy, Jock, who had been a Marine JAG [Judge Advocate General], so he kept me apprised of the regular meetings of this group.

Riley: Who was the other cochair?

Bellinger: Pierre Prosper, Ambassador for War Crimes. I remember Jock briefing me on a periodic basis that we're developing a position paper and we're going to have three options. One will be federal courts, one will be courts martial, and one is going to be military commissions. There was not significant interagency disagreement that Jock Scharfen was reporting to me. They may well have been lurching toward recommending military commissions. I'm hazy on that.

What I do know is that there was not an interagency disagreement, to my knowledge. There was not Justice saying we have to have federal courts and the Defense Department saying we have to have court-martials. It was a process that was moving along.

Then, as has become famously reported—and I'm in my office on—is it November?

Kassop: The 13th is the date of the executive, the military commission.

Bellinger: John Rizzo calls me up and says, "John, what the hell are you all doing down there?" I said, "John, what are you talking about?" He said, "Military Order No. 1." I said, "What Military Order No. 1?" He said, "It's just come across the screens."

I said, "How could I have missed this? Let me look at this." Sure enough, the President has just signed Military Order No. 1, setting up the military commissions. I think I asked Jock Scharfen, who said he didn't know anything about it, so I ran over to the suite, the front office suite, and captured Steve Hadley and said, "Steve, what is this? I've not seen this." Steve said, "I'm not

familiar with this either.” So then, since it was creating military commissions, I called up Jim Haynes, the Defense Department general counsel. He refused to talk to me, and said, “Go talk to Judge Gonzales.”

So I went up and talked to Judge Gonzales and, as has now also been well reported, I was quite distressed with Judge Gonzales. And I said, “How can this have been done when the National Security Advisor and the Director of Central Intelligence don’t even know anything about it?” I can’t recall now what he said other than this was something that needed to be done quickly.

Kassop: It’s been reported also that the Prosper group was simply dismissed by Addington; he just never paid any attention to their work, and that Colin Powell was equally in the dark as well.

Bellinger: Frankly, it has taken several of these books to report this, because I think they’ve clearly talked to Tim Flanigan, which is good because I never did understand until a couple of years ago why Tim Flanigan, whom I gather was largely, along with David Addington, the brains behind this, why they felt this was necessary. I can certainly see if there had been complete interagency disagreement in the middle of a war that someone would cut through it all, but to my knowledge we were lurching toward a resolution.

The quotations that I’ve seen—that the bureaucracy needed a quick, swift kick in the pants—seem puzzling to me. Why, on something that was this momentous, would you just write it on the back of an envelope and get the President to sign it? To this day, I continue to go out quite regularly and defend why we need to have military commissions, because I think they are an unfortunate necessity. I certainly don’t think we need to have military commissions for everything, but can defend their use for certain purposes. I believe that many of these people could not be tried in federal courts because they had not committed federal criminal offenses, so we need to do something.

The problem was, because of this illegitimate creation of them, that no matter how many fixes have been made to them over the years—and we can talk about some of the fixes that I tried to get made over the years—that the civil liberties groups, the *New York Times*, and European governments were just never going to like them. Maybe I’m wrong, but if there had been a better process to create them, in which we had gotten even the ABA [American Bar Association], and then certainly the Congress, to have passed the statute—and yes, it may have watered some of it down—then there would have been buy-in initially. Had that been done in the immediate aftermath of 9/11, it would have passed just like that.

Riley: Everybody was rallying to the flag at that point.

Bellinger: I frankly think this is one of the top two or three greatest national security legal mistakes of the Bush administration. We will suffer from it for the next 40 years. By that I mean if we’re going to keep trying these people under these rules, they may keep going up to the Supreme Court and they may keep getting knocked back down again. I think it’s because a couple of people were trying to demonstrate Presidential power and that this was somehow not business as usual, and that apparently the rest of us who were going through the traditional interagency process were moving too slowly.

Riley: Is it also fair to suggest that the people involved were red flags to the more hard-boiled

conservatives? You've already said that you were suspect as an internationalist. Then your cochair has a position that can't be somebody—

Bellinger: Honestly, from these quotes from Tim Flanigan, and I still remain baffled as to—I don't know whether they still think in retrospect they did the right thing or not.

Riley: We don't know. I can't tip my hand on this because I genuinely—We haven't interviewed Addington, who hasn't accepted our invitation. We recently sent him a follow-up, telling him pretty please, but we'll see.

Kassop: We're probably leading toward Guantanamo as well.

Bellinger: Yes.

Kassop: What was the thinking behind what drove their thinking to create Guantanamo, and were there alternatives? Did they do it because they thought that U.S. law would not apply there?

Bellinger: This is a great question, and this is something where you will have to pull together the different pieces, as you do. I was pretty extensively involved in the creation. I can't remember what completely kicked it off, but at some point when it became apparent that we were capturing tens of thousands of people and that some of them were going—Our military commanders were complaining that they had no place to hold them, and that Kandahar basically just had a chain-link fence around it. The word came back that we were not going to be able to hold them in Afghanistan. We thought we were going to need to interrogate or prosecute them, so they needed to be held somewhere.

A series of interagency meetings began at the State Department. I can't remember if I was also cochairing these or not. I don't think I was chairing them. I was going to them, but I can't remember who was chairing them. Maybe this was also Pierre Prosper; I'm not quite sure. I have a very vivid memory of a meeting at the State Department where we considered a number of different locations to hold people. The principal factor was a secure location that people were going to let us use. There were not that many places in the world.

There were other islands in the Marshall Islands. There were places in Europe. We tried to get a country there that might agree to help us. And we were certainly thinking about inside the United States. So there were about half a dozen options on the table.

Riley: Shipboard?

Bellinger: I don't recall us ever considering holding anybody shipboard. An A issue was, what legal process would they be subject to? It was a significant one, but I would not say that it was the *driving* legal issue.

Riley: Was the removal from the theater a legal question?

Bellinger: I don't recall that. Later on there were issues on transfers, but I don't recall anybody raising a question of taking Afghans or others out of Afghanistan, if that would raise any issues under international law.

Kassop: What about status hearings in the field?

Bellinger: That came up later. These began as early as November. I'll get into the sorting process. First, there was the series—It seemed like we moved pretty quickly to Guantanamo as the most logical place because it was an island, we had legal authority over it, and it was close to the United States but not subject to U.S. jurisdiction.

I guess there are two points on this. It all seemed to get decided relatively quickly. I don't recall that it was terribly controversial. The suggestion that has become liberal or revisionist history is that it should have been apparent from the very beginning that we were trying to set up something illegal and outside the bounds of law. To me it seems more revisionism, based on what has happened over the last 12 years. At the time it was, basically, you have to hold these people somewhere and we need to hold them in a secure place. Of course, everybody thought that these were a bunch of terrorists. We didn't want them immediately filing a bunch of legal cases. I guess habeas came up, but certainly no one could completely foresee what would happen. We wanted it to be a secure military facility. I don't recall a lot of controversy about that. It was mostly because the commanders wanted us to get out of the theater.

In a moment I'll get to the sorting process and so forth.

Long: I'm not a lawyer, so I have to plead ignorance on this. I'm a political scientist, but I'd like to hear a little more, if you can share, about whether the notion came up at that point that one of the virtues of Guantanamo was that it was under American control but not subject to American law. You have hinted at it around the edges. We don't want them filing a bunch of cases, so that implies that they have fewer rights there than they do—

Bellinger: That was definitely a factor. I certainly remember the Justice Department being concerned about that. I don't recall that being the driving factor, anybody saying all right, we have to find a place where we can put them into a black hole where they will have no rights. As with any decision, there are a bunch of factors. There were geography factors, security factors, convenience factors, and legal factors. One legal factor was what laws are they going to be subject to? What circuit might they be in? Who could they appeal to? So it was certainly a factor to put them in a place where they would not be subject to the U.S. legal system.

Riley: But you did say, John, that there was some consideration of bringing them into the United States.

Bellinger: I don't recall this vividly, but it certainly seemed that it was one of the options that seemed to be rejected pretty quickly, of trying to—maybe because there wasn't a very good place to put them, although I'm sure they could have set up a penitentiary somewhere. What I don't recall is whether that was rejected because people said, "Oh, my goodness, bringing a bunch of terrorists into the United States. We couldn't possibly do that," or "Then they would all have the rights of the U.S. legal system." I'm speculating here. Germans and Japanese interned here did not have appeal rights. Much has changed in the last 50 years, but if you're holding them under the laws—although I don't think it would have been immediately apparent that bringing them here would have given them all sorts of legal rights.

Long: Was there any discussion of the downside of removing the accused terrorists from the

evidence against them, from the witnesses, from the scene, so to speak? That became a big part of the tangle later. These people were dangerous, no doubt, but there was no longer a direct tie between them and an act against American soldiers or something that justified going fully through the process.

Bellinger: At that point Afghanistan was such a mess. There had been something like 10,000 to 15,000 or more people captured; some were being held at Mazar-i-Sharif and some were being held at Kandahar, and that was still a zone of active hostilities. If I recall, the commanders—There was no evidence; there was mass disorganization. The soldiers had never been collecting any evidence at the time. It was the commanders saying we've got to get these people out of here. Kandahar continues to be under threat. We need to get these people moved out. So I don't recall any suggestion of any issues about taking them out of the theater for any reason, either international legal, to suggest it's improper to take people out of—I have not heard that even to this day.

Riley: It's a naïve question. I just didn't—

Bellinger: Understood. Because in other cases where we took people out of Iraq there became some big questions about whether you could transfer somebody out of Iraq. So it's not a bad question. I don't recall any issues about, gee, will it be harder to try people?

Now, that gets into the next issue, though. Prosecution was never the top—Actually, the first thing that got set up was the military commission order, but very early on the top priority was going to be interrogation and getting information that could prevent—That was agreed quite early on.

Shortly after Christmas—and this got reported in the papers—I can't remember what the precise impetus to it was, but an impetus was several principals and me and others reading in the *New York Times* an interview with a detainee in Afghanistan who said, "Mohammed X, who claimed that he was born in Iowa—" So suddenly, here we are reading in the *New York Times* that one of our detainees is an American citizen. This immediately got the principals concerned about who are we holding and what rights do they have and what are we going to do with them?

So there was a meeting shortly after Christmas 2001 in which the NSC principals agreed that there needed to be very rapidly a process for sorting the people we were holding. I can't remember at that point whether the first people had been flown to Guantanamo or not. This is, I think, a knowable thing.

Kassop: I think that was after the first of the year.

Riley: I think that happens in January.

Bellinger: That was first of January, so I think that's right.

Riley: January 16.

Bellinger: Even at the end of December there had been this meeting and the NSC had been put in charge. So I got put in charge of holding a group, which became the Detention or Detainee

PCC, which met twice a week for pretty much my entire time and even continued to meet during the State Department.

Long: Elliott Abrams was the—

Bellinger: He was the policy cochair. We started focusing on what the goals were, which were to get information. Prosecution and so forth were put as secondary. We ended up in a very short period of time, in about two weeks, preparing a whole group of extremely complicated charts that looked a little bit like the children's game of chutes and ladders. Detainee who has been interrogated, poses a threat but cannot be prosecuted. Detainee who has been interrogated, poses no threat, cannot be prosecuted; return. It had all these different outcomes. American citizen. It was all very complicated. The different kinds of detainees one might have and whether they would have information and whether they might be prosecuted and whether they might be sent home, et cetera.

Long: Did interrogation guidelines get discussed at all, or was that out of the purview?

Bellinger: That was out of the purview, of both the CIA program and the DOD program. So it was the concept that information needed to be collected and how they get it sorted. Who would make a decision? Would it be DOD or DOJ [Department of Justice] making the decision, and then how would they end up going—

What we then ended up having was a whole bunch of strands for the next four years, at least of detention legal issues. We had the interrogation issues, which were the famous CIA program, and then it turns out there was this separate DOD thing. Then we had the military commissions, which were stillborn, for not much happened for about four years. Then we had the sorting process, which gets to your question, or your question on the Article 5 tribunals. Then the visits from their countries and visits from the ICRC [International Committee of the Red Cross] and visits from the UN rapporteur, international access. I'd be happy to talk about any—I spent four years on every permutation of detention and nondemand.

Riley: Did you make the trip down to Guantanamo?

Bellinger: Oh yes, four times.

Riley: Tell us about—

Bellinger: Someone has helpfully put on my Wikipedia page a picture of me marching firmly through Guantanamo with a bunch of military people around me. I have my sunglasses on.

Riley: You go down there the first time after it's already set up?

Bellinger: Yes, I went down there four different times.

Riley: What are the purposes of those trips?

Bellinger: Each one had a slightly different purpose and I went with different groups along the way. I remember going down once with Gordon England, another time with Judge Gonzales,

another time with Jim Haynes, another time with—one was very much focused on military commissions. Another was focused on these CSRTs, Combatant Status Review Tribunals, that we were going to be starting.

I think the earliest trip I took was just to go down and see where these people were being held, what the conditions were, and get a briefing on that.

Riley: What did you find?

Bellinger: Of course, early, it was pretty ramshackle, just hastily poured concrete, chain-link fences. What did they use for toilet facilities? Just like a can in the corner of each room. Over time it got to be unbelievably sophisticated with incredible hospital facilities and exercise facilities and so forth.

Riley: Are you exposed directly to the detainees?

Bellinger: Yes.

Riley: Do you talk with them?

Bellinger: No, I don't talk to the detainees.

Perry: Did it change any of your thinking as you had to sort through all of this? Did it solidify thoughts you had before you went?

Bellinger: I don't think I ever—As you know, I really soured on Guantanamo over time, but the souring did not have anything to do with the conditions at the beginning, and certainly not at the end. It was an incredibly sophisticated facility. If anybody ever had to be incarcerated, this is where you would want to be. The medical facilities are state of the art. It's much better than any maximum security prison. This is one of the great ironies. I think the defense counsel for the detainees talk about this amongst themselves. It's what led to—I can't remember who wrote it a few weeks ago, saying keep them all in Guantanamo. If the defense counsels are ultimately ever successful with what at least is their intermediate goal, which is to close Guantanamo, what they really would like to do is have them all released. But if they close Guantanamo, then they would all go into maximum security prisons where they would be in isolation for 23 hours a day without good exercise or medical facilities.

Even though I think Guantanamo overall has been a black eye for us, indisputably the detainees get much better care there than they would if they were moved to a maximum security prison in the United States. So in terms of what you're getting at, no, none of my visits there—If anything, I was very impressed with the professionalism and, as time went on, the enormous amounts of money that were spent to build the facilities and provide exercise, medical, and various other things.

I never came away from any of these meetings feeling like this is really spooking me. These are people—including in this most recent *Zero Dark Thirty*—There is much effort to try to combine Abu Ghraib with Guantanamo. These are completely different situations.

Riley: John, there were four items that you mentioned that you said you were going to track through. Mentally, I took note that there were the four. You said we could pick up on any of those.

Bellinger: Pick away.

Riley: I don't know whether you want to just start the first of those and march through—I guess the sorting was not the first.

Bellinger: Sorting was one of the first issues that brought them there. Generally, what were we going to do? Fairly early on we made the decision that the ICRC would be allowed to have access; I don't recall much of a fight over that. There may have been some squabbling from some at the Defense Department, but there was not much of a squabble over that. Over the next seven years we continued to have significant disagreements—It never was resolved. It's interesting; it doesn't seem to have become an issue in the Obama administration—as to other groups that wanted to go down.

We had a whole series of UN rapporteurs and observers, UN rapporteurs on torture and UN rapporteurs on improper confinement, all of whom wanted to go down. The view of the Defense Department was that no, this is a war and the ICRC was the appropriate group and we were not going to open the detainees to public curiosity. Ultimately we reached a compromise in the second term, if I recall, in which we were willing to offer—and this was something I worked out with the Defense Department. We were willing to offer to allow these UN rapporteurs to come down, even though one would not normally do that in a war. That's what the ICRC is there for.

We said we would allow them to come down, but they would not be able to meet individually with the detainees because that was the role of the ICRC. The ICRC throughout the entire time has been able to meet with all of the detainees, the whole time, all of them, even the former CIA detainees who were in separate confinement. But the UN rapporteurs then said they would not accept that condition. They did not want to come down and be shown only one side, if they could not interview the detainees. So we were never able to work out that issue.

We did have, throughout, a good ongoing dialogue with the ICRC. I had so many—somewhat more of my time was spent in the second term when I was legal advisor. I got to know the ICRC people so well, including the President of the ICRC, that although they were certainly critical in their private reports, I respected the role that they played. They were largely leak-free. When occasionally there were leaks, it would drive the *Wall Street Journal* around the bend because they really didn't like the ICRC. But compared to the U.S. government, they were pretty nonleaky, particularly given the things that they were expressing concern about in their reports, most of which were not huge things, like people were being tortured. It was more things like men should not be required to go to the bathroom in front of other men, and things like that.

I was so impressed with them that I recommended that Secretary Rice meet with President [Jakob] Kellenberger, and ultimately that President Bush meet with President Kellenberger. That resulted in one of the more unusual meetings, when President Bush met personally with President Kellenberger of the ICRC. I did not attend that meeting, but I was told reliably that President Bush referred to him as “Doc.”

Riley: He knew he had it made then.

Bellinger: He had a handle.

Riley: Did you have one?

Bellinger: I can't remember what the President called me. What I also did, which I was proud of, and again I'm not sure who was more surprised, is that the—When did this begin? I don't recall precisely when it began, but I think it was when we brought the CIA—I'm getting a bit ahead of myself, but while we're on the ICRC, because of course there was the whole blood-on-the-floor battle over bringing in the CIA detainees. But when we did bring them in, and they had not previously had ICRC access because they were in undisclosed locations, then I arranged for there to be meetings between the ICRC and the CIA. I think I asked the CIA whether they would be willing to meet with the ICRC and they said they would be open to it. I asked the ICRC if they would be interested in meeting with the CIA, which they certainly were. So I ultimately put them together.

That then led to a series of meetings between the two of them, including between President Kellenberger and directors of the CIA. Each side told me they were—The CIA said they couldn't believe they were actually, or something that was supposed to be a secret intelligence agency, was meeting with the ICRC, and the ICRC couldn't believe they were out at Langley [Virginia]. That worked out reasonably well. That was part of our transparency initiative in the second term.

Kassop: You had mentioned a while back about the story that you read about one of the detainees, or more, one of the fellows saying, "I was born in Iowa" and that that sent up a red flag for you.

Bellinger: Oh, yes.

Kassop: So how quickly do the cases start percolating, including [Yasser] Hamdi, the American citizen whose case gets all the way to the U.S. Supreme Court? And do you recall what you thought about this percolating of cases, including that one in particular that involved a person with dual citizenship, including an American citizenship?

Bellinger: Well, we then got into the series of cases of Americans, which were the most complicated, which included a couple of Americans who were captured in Afghanistan. Then we had the couple of people who were in the United States.

Kassop: Joe [José] Padilla and [Abbas al-] Musawi?

Bellinger: Right, and there was one more. They were then held not in Guantanamo but in the brig at Charleston. Those cases did not go well. There was another occasion where we were watching a group in New York—I guess this is public—that were al-Qaeda-connected. Some members of the administration wanted to continue to treat them like Padilla and others because they were clearly al-Qaeda-related. They should be arrested by the military in New York and immediately clapped in a military penitentiary. I was very strongly opposed to that because these other cases were not going well. I thought having the military sweep into houses in New York and cart people off on military trucks was really—They clearly had committed federal crimes

and the FBI wanted to arrest them.

If I recall correctly, I think I did appeal to Dr. Rice on that. I can't remember precisely how that got worked out, but that I think over the objections of some in the administration, those people who were called the Lackawanna Six were ultimately arrested by the FBI and not by—

Kassop: Yes, it says that in the briefing. So when you say things were not going well, just for historical purposes, maybe perhaps describe that and what your thoughts were as these cases made their way through the U.S. system. Discuss this particularly going back to Stephen's point about having them in Guantanamo to begin with, perhaps not thinking in terms of will they have access, but very quickly they begin to try to have access and begin to be successful in that.

Bellinger: I guess we started getting complaints. I can't remember when the first major complaints were observed internationally, but that began in 2002 or so. There began to be allegations in the press that we were holding a bunch of innocent people. This began to percolate. This is tangentially addressing your question. About this time the CIA said we've just had a senior analyst, Emile Nakhleh, return from interviewing something like 200 of the detainees in Guantanamo and we'd like him to come talk to you.

It was interesting that this issue came from CIA, but they brought him down and he came and said, "I'm an Arabic speaker, I know the region. I've interviewed a bunch of these people and I'm convinced that maybe a quarter of these people really shouldn't be here." That was quite worrisome to me. It seemed to fit with some of the other concerns that we were getting.

I then went to—This has been reported elsewhere, I think in Jane Mayer's book, going back to one of our first themes. I was still, during this period, in a reasonably tense relationship with others in the counsel's office. Dr. Rice was giving me more and more of her backing but it hadn't quite—She couldn't quite figure out—One, this wasn't really her area, to be running detention. She had a bunch of other things. But she was backing me more and more.

I felt I needed to have somebody to go along with me, so I rounded up our then Deputy National Security Advisor, John Gordon, who was a three-star general. He was the deputy for combating terrorism, so I briefed him on this. I said, "I'd really like you to come along with me and we'll go talk to Judge Gonzales." We were supposed to have a private meeting with Judge Gonzales, but when we got there, David Addington was there. We said, "Look, we've had this report from the CIA that maybe there are a number of people who shouldn't be here." I said, "I don't know if this is true or not. I'm just taking this information from them, but there are getting to be more and more of these reports. We need to have more of a sorting process, a review process, to make sure that we're only holding the people we ought to be reviewing."

Oh, my goodness, we got a blast back—really from David Addington, less from Judge Gonzales—that no, the President has made a determination that each of these people is an enemy combatant. We cannot have any review process that is going to second-guess the President's determination. So that didn't work.

I then became an advocate, really throughout my time, but starting in about 2002, '03, '04, for more of a sorting process. I was not so much—

Kassop: On the battlefield?

Bellinger: Well, it could be either, but really for the people in Guantanamo—“sorting” is the wrong word, review process—so that we could review each case individually. I said, “The problem is, we’ve got all these people we are claiming are all enemy combatants, but there are these allegations that some of them might be mistakes, and we need to have a review process.” The rest of the agencies were adamantly opposed, except for the State Department.

Riley: Because that’s where the pressure is coming from, right? It’s coming mainly from abroad, less internally.

Bellinger: Right. We had proposed some kind of a review process so that each detainee could have his case reviewed, but Justice, Defense, CIA were adamantly opposed to that. So we ended up losing the *Hamdi* [*v. Rumsfeld*] case. I felt that if we’d done anything, and I think I even made this argument before *Hamdi*—I said that if we show that we’re doing anything, I think in this time of war the Supreme Court is not going to say, Well, you’re doing X, but we don’t think X is good enough, you should do X plus. I said if we do anything, it will relieve the pressure. To this day I think that if we had shown some willingness to review who we were holding that we would not have ended up with this requirement for the combatant status review tribunals.

Let’s see, that was leading me in another direction. It’s 2002, reviews.

Kassop: Post-*Hamdi*, were you involved with the setting up of the CSRTs, the actual development of that policy?

Bellinger: Yes. We were involved with the setting up of that policy.

I know where I was heading. About this period of time, ’03, ’04, I had persuaded Dr. Rice that we had major problems with our detention policy. She was growing increasingly frustrated with the lawyers and I think with Judge Gonzales, so she took over the detention policy. This was certainly not her favorite thing to do, so that the Detention PCC would then cycle up through DC and then PC meetings. We would then have detention DC and PC meetings, about every six weeks, in which we would sit around the table and talk about various issues having to do with detention, whether it was UN rapporteur access or foreign government access.

Initially the Defense Department did not want to allow countries to even visit their detainees, on the theory that in a war, countries don’t all get to march in and have consular visits. So it took huge amounts of time to sort out whether these were actually consular visits or not.

We then began a process, though, of not so much allowing the detainees to have their individual cases reviewed, but to have the government review: did we want to hold all of these and start transferring some of them? Part of this was as countries started to come to us and there was pressure—There began to become a recognition that we’re just not going to be able to hold all 775 of these people forever, although the Defense Department was very adamant about any releases or transfers. We spent a lot of time on this for the whole rest of the administration, but it was pretty much set up in the 2002, ’03, ’04 period. It was a review and transfer process, with the Defense Department proposing people who could be either released or transferred and under certain conditions.

Pierre Prosper was essentially the ambassador to negotiate the terms of these transfers. He initially was given such strict conditions that they would be almost impossible to comply with. The country would take responsibility for the individual, but they would not be released; they could agree to return them to us at any time, and all variety of other conditions. That became a real bone of contention between the State Department and the Defense Department, with the State Department saying we can't possibly negotiate these terms and the Defense Department saying we're not about to release anybody or transfer them if you don't agree with these terms.

That resulted in regular meetings on what the process and terms ought to be for transfers and releases. We had various countries, the British government, the Danish government, and others asking for their detainees back. We spent a large amount of time on the Uighurs. We had decided very early on that the Uighurs should be transferred, but we couldn't find any place to send them to. The only country that obviously wanted them was China. China volunteered to have them back.

Long: So they could execute them?

Bellinger: Yes.

Kassop: Then also, since we're in the 2003, 2004 period, to go back to 2002, the whole question about whether or not they fall under Geneva Conventions, and you obviously have a large role in that.

Bellinger: Yes, that's absolutely right. That was another early squabble, really difficult squabble, what law would apply to the detainees.

Again, I can't remember precisely how this got teed up as to whether and how the Geneva Conventions would apply. It became an interagency discussion at a midlevel issue. Then there became competing perspectives between the State Department and the Defense Department and the Justice Department. The State Department—and Will Taft was heavily involved in all of this—took the position, at minimum, that the Geneva Conventions applied to the *conflict* and, therefore, I think his position was that as you apply Geneva Conventions to the conflict, that al-Qaeda still would not be treated as prisoners of war but that the Taliban would be treated as prisoners of war. John Yoo and the OLC believed that the Geneva Conventions did not apply to the conflict at all. They ultimately wrote a memo for themselves that basically said that it really didn't matter what the State Department thought, because OLC is the final authority on all legal matters anyway. So they wrote a memo on memos.

That was largely being orchestrated by the counsel's office, and this recommendation went up to a principals committee meeting. As has been reported, Colin Powell was traveling and learned that the principals had decided that the Geneva Conventions would not apply at all. He apparently wrote a comment, presumably being put up to it by Will Taft and Dr. Rice. Dr. Rice agreed that they would then have a PC over again and that he could come in and make his case to the President.

So we then had a second PC on the subject. All of this was extremely contentious between the Defense Department and the State Department. The JCS felt caught a little bit in between. I frankly felt, I think it was Dick Myers at the time, did not—I guess I will simply say I think he

was caught between civilian DOD officials, who it was very clear did not want the Geneva Conventions to apply, and the military, who were mostly concerned about reciprocity, this idea that there would ever be a situation where the Geneva Conventions wouldn't apply.

If the military had put their thumb more on the scale it would have made a difference, but the Defense Department, Don Rumsfeld, Paul Wolfowitz, and Doug Feith were very clear that they felt that the Geneva Conventions should not apply. So that ultimately resulted in the President's order of February 2002 concluding that the Geneva Conventions did not apply, but that we would apply the provisions of the Geneva Conventions as a matter of policy to the extent possible. I do feel that Judge Gonzales got unfairly blasted on one aspect of this that was never true, which is the allegation that he had claimed that all of the Geneva Conventions were quaint. All you have to do is look at the paper; it doesn't say that. It says that some of the provisions—Anybody would say that paying people in Swiss francs and giving them eight ounces of tobacco a week is quaint. That was really what the memo said.

Now, it's certainly true that he was saying that this is a different kind of war and maybe the Geneva Conventions overall aren't suited, but that phrase that he got saddled with of calling the Geneva Conventions quaint and somehow suggesting that all of international law and accepted international law was quaint, he didn't say. I always felt bad for him about that.

Kassop: Was there anyone who tried to make the argument that the detainees should be considered prisoners of war?

Bellinger: What I can't now remember is whether the State Department argued that the Taliban should be treated as prisoners of war as the Army of Afghanistan. They certainly said that we're not suggesting that al-Qaeda members should be treated as prisoners of war, and what I now can't remember is whether they said that they thought that the Taliban should be. That was a much closer call.

Riley: The argument was certainly made, but I can't remember by whom.

Kassop: I think it would have been Taft.

Bellinger: Yes. So we ultimately concluded that the Geneva Conventions didn't apply. One thing we did not look as closely at then, and I began to look at it much later, was whether the Fourth Convention might apply—that is, the Fourth Convention applies to civilians. The thing is it says civilians who find themselves in the conflict. Well, if you're a member of al-Qaeda, who's a civilian, you don't exactly find yourself in the conflict. So you can see why people didn't think—

Now, I do remember very vividly—I may have mentioned this last time when we were with Dr. Rice—when we had made these initial decisions that the lawyers had decided that the Geneva Conventions didn't apply. The Third Convention didn't apply and the Fourth Convention didn't apply and that even Common Article 3 didn't apply because this was not a conflict of a non-international character. I remember vividly standing in her office, marching her quickly through each of these things. She said, "Okay, I understand. But the rest of the world is not going to be very comfortable if we say that no international law applies." That was very perceptive.

So that was the great Geneva Conventions battle.

Kassop: So how did you thread that needle, to say that international law would apply, but not the Geneva Conventions? I know that you said you would follow the policy—the old idea of consistent with but not pursuant to.

Bellinger: Exactly. It put us in a quite difficult position, particularly in the second term. In part of this memo that I referred to that I had written for Dr. Rice in 2004, about things we needed to change in the second term, I said we are in a bad place to suggest that the detainees are not covered by any international law. I began to urge through much of the second term that we at least accept that Common Article 3 applied and potentially also Article 75 of Geneva Protocol 1. Matt Waxman and I and several other people pushed extremely hard for two years, starting as soon as I became legal advisor, through 2005 through 2006, to have us say that Common Article 3 applied so that we could at least say that some aspect of the Geneva Conventions applied, even if the Geneva Conventions in their entirety didn't apply.

Kassop: Common Article 3 application was what the Supreme Court said, and that was in 2006, so you were making this argument even before it then became enforced by the Court.

Bellinger: Yes.

Perry: You were vindicated. Your position was vindicated.

Kassop: Is this the document you're referring to that you and Philip Zelikow, almost like a brainstorming session—this was July 2005?

Bellinger: Yes, this is all amusing. Philip and I—It's one of the things, as they were finalizing their recommendations for the 9/11 report, of the many, many things that we were talking about. I was telling Philip of the difficulties of what law applied. Philip must have internalized that—You'll have to get him to tell his side of the story—because that became one of the recommendations of the 9/11 Commission, that the administration work with other countries to clarify the legal framework that applies to the detention of individuals in this kind of a conflict. He said this, perhaps drawing from Common Article 3 of the Geneva Conventions.

So I had suggested that this might be something. Philip then, of course, came and joined us at the State Department. I'm always a bit amused because Philip said, "Well, John, you need to work harder on resolving these detention issues." I said, "Philip, I've been working on it."

Riley: Philip was here at the Miller Center at the time.

Bellinger: This is easier said than done. Philip did become a great ally and worked very closely with me for these two years, writing a series of papers, coming up with a series of ideas, working with the Defense Department, working with Gordon England. I worked with him on a whole series of these.

Perry: Whatever happened with these ideas?

Bellinger: I think that particular one was shot down by Secretary Rumsfeld. This is the one

particular paper that Philip and primarily Matt Waxman, who was then the Deputy Assistant Secretary of Defense for Detainee Affairs, had worked on. Then they took it up to Gordon England, who seemed to be on board. It was a way to resolve a lot of these detention issues.

Matt and I came to call it the “Big Bang,” the idea of taking a whole bunch of issues and trying to resolve all of them, bringing in the HVDs [high-value detainees]. I can’t remember what our six or seven different steps were, but announcing that we were going to apply Common Article 3, setting up a review process for those in Guantanamo, announcing that we were going to move toward closure of Guantanamo, addressing each of the concerns. That ended up being killed off by the Defense Department but I spent—and we can get into this next time—What I did was take this recommendation that I had made in 2004 to Dr. Rice, and as I had with my ICC recommendation when I became legal advisor, took my recommendation to try to resolve this whole bundle of detention issues from Guantanamo to military commissions to interrogations to the law applicable. We’ve got to put all these things behind us as best we can.

I worked with Matt Waxman, with Philip when he was there, with others, to push this forward with then Secretary Rice behind me for the next four years. I certainly think the whole set of detention issues was one of the most difficult parts of the Bush administration. It has really hurt the President’s legacy. It may not hurt the President’s legacy as much as time goes on. And particularly now that the Obama administration has kept so many of those things, it makes it a whole lot harder to criticize President Bush. The *New York Times* tries awfully hard to say well, it’s only because President Bush started it all, but that’s getting harder and harder to defend. It’s important to get into the history of all these things, so this is particularly apt for oral history.

Riley: We’re off to the races. You’ve been terrific, thanks. This is spellbinding.

March 9, 2013

Riley: We’re back with John on Day Two and we promised Stephen he would get the first crack today since he held off yesterday. You’ve had a chance to polish your question to a high gloss.

Long: I’ve been going back and forth on things I want to ask, but the biggest thing we talked about at the end of yesterday was the decision-making process about how and if and whether the Geneva Conventions would apply to al-Qaeda prisoners who were from outside of Afghanistan and the Taliban detainees. The decision eventually was that we didn’t consider them to be binding for the detainees from that theater, but we would apply many of the standards, nonetheless. Then later on, obviously, some of those standards were applied as a matter of law.

According to John Yoo in his own account, he briefed several people when he had finished writing the famous torture memo in the OLC, and he says that he briefed you as well. First, as a matter of record, do you recall being briefed by him about the contents of his memo?

Bellinger: Now, these, of course, are two different things. The Geneva Conventions memos were one set of memos and now you’re getting into interrogation. So this is like a whole hour’s

conversation, which, if we're going to shift I'm happy to do, because this is an important piece of history, but just to complete it—because interrogation in the CIA program is a whole line. So if we're finished on Geneva Conventions, because that was a whole ideological debate, I'll move on.

Perry: We should probably ask if you have any more to add to yesterday's discussion about that. Correct me if I'm wrong, but the delineation comes from al-Qaeda not having the Geneva Conventions applied, but Taliban would, ultimately, before the *Hamdi* decision. Is that correct?

Bellinger: No. Of course, the debate got extremely technical at the time, but the bigger picture was, do the Geneva Conventions apply to the people who you are holding at all?

Perry: Right.

Bellinger: The debate inside the administration almost became more of an ideological debate than a legal debate of those who believed that this was a new kind of war, and it would be business as usual to treat any detainees under traditional legal principles of war. They thought that even the Geneva Conventions were old think and therefore they didn't want to apply them.

Perry: Because they were not going to be viewed as prisoners of war; rather, they would be viewed as enemy combatants?

Bellinger: Right. It was never entirely—You'll have to talk to others as to exactly what their motivation was, whether it was primarily ideological or primarily, I guess I would say, utilitarian, in that they wanted to be able to interrogate people aggressively, and if you applied the Geneva Conventions, it might prevent interrogation, or maybe it was a combination of both. But in any case, we had these great battle lines inside the administration between both the lawyers and the policy people who were backing them about whether the Geneva Conventions ought to apply at all.

Then there got to be a divide because there was not a good legal argument that they should apply to al-Qaeda, because al-Qaeda was not a state party.

Perry: Right.

Bellinger: There was a better legal argument that they ought to apply to the Taliban because Afghanistan was a state party and Taliban was indisputably the Army of Afghanistan. Then the Justice Department developed an argument that even if Afghanistan was a state party, the Taliban was the army, and you still had to satisfy the criteria in Article 4 of the Third Geneva Convention of wearing uniforms, carrying arms openly, and following laws and customs, which you could pretty clearly say the Taliban were *not* doing.

Then there was a debate, if you were the army, did you also have to satisfy those criteria? That became one of those great debates. It got extremely, not only ideological but nasty and personal between OLC, the counsel's office, the Vice President's office, and DOD on one hand and Will Taft on the other. I was more trying to support Will Taft's position. The JCS would go back and forth. I think they were more sympathetic to the State Department position. Jane Dalton was the legal advisor to the Chairman. This is where I think General [Richard] Myers was not giving her

clear direction as to where he wanted to come out.

This whole debate over the Geneva Conventions was probably, after the military commissions, the pinnacle of the nastiness and fights in the administration. It really hit a high point. This is where the counsel's office finally decided—Since I was also in the counsel's office, they were pretty much telling me what they thought of Will Taft, which was that he was soft and didn't understand that we were in a new kind of conflict. There were all these liberal lawyers at the State Department.

Perry: So can I ask, then, did you see this, in part—where you began yesterday, about the rifts between State and the counsel's office and either, again, personality/ideological differences—as just carrying out in a different context and in a more difficult context?

Bellinger: It had not reached—Although Pierre Prosper had been cochairing that military commission project, that was less the legal advisor's office, and the result of that was a surprise. There was unhappiness afterward, but there was no disagreement building up. I don't recall real legal disagreements in the fall of 2001; it was in January, February, as a number of these legal opinions that OLC kept churning out, of which the Geneva Conventions was just the first, that we started having fights and nastiness, and it was the height of disagreeableness.

I would say to Judge Gonzales in particular, because I had a good deal of sympathy for Will Taft's position; I had respect for him—Often they would not even want to include him in meetings because they felt that he was so wrong that they didn't want to have him there. I would say: “One, he's the legal advisor of the State Department and he speaks for the Secretary of State. Two, he probably has more experience than any of us. He not only is now the legal advisor of the State Department, he used to be the general counsel of the Defense Department, was then the Deputy Secretary of Defense, and then the Acting Secretary of Defense, and I think he has something to say here.”

I finally did get Judge Gonzales to include him in some meetings, although what I have subsequently learned even now from the history books was that there was a whole parallel process that was going on with the OLC, DOD, counsel's office, and OVP [Office of the Vice President], a group that called themselves the War Council, who, at least according to the books that you and I have both read, believed that Will Taft and I were soft.

I was sort of half in and half out, largely more by proximity because I was in the White House, and I also was making more of a fuss about it. I had a sense that there were things that were going on—We talked about the NSA program, but I had a sense that there were meetings that were going on. I would see groups coming out of Judge Gonzales's office. I would periodically say to Judge Gonzales, as you've seen from some of these books, “Look, are we a single team or are we two teams?” The parallel processes that had resulted in Military Order No. 1 were apparently going on behind my back and Will Taft's back and developing all sorts of things, many of which I may still not know about today, although some of which I have now seen. They really wanted to cut Will Taft out of the process.

The reason I spent a bit of time on this is that this was the pinnacle of the nastiness, the fight over the Geneva Conventions and whether it ought to apply to anyone at all. The decision ultimately

was that it wouldn't apply to anyone at all. OLC finally got so mad at the legal advisor's office that they wrote themselves an opinion that said we don't have to listen to the State Department at all because their view doesn't matter.

What that then apparently led to—and it became important and we can spend some time on it—is that for the rest of the administration's first term, OLC wrote, apparently, several dozen opinions on international law questions without even soliciting the views of the State Department. So toward the end of my time at the White House, and certainly by the time I got to the State Department, I would occasionally find OLC opinions that would be referred to in footnotes of other opinions that would say things like, "As we have previously concluded in our opinion of X date," and I would say, "What opinion is there of X date?" There had been a whole series of opinions that neither the State Department was consulted about nor was I consulted about as the NSC legal advisor, including things like—just to give you an example, this one stunned me.

As I was the principal negotiator, along with John Negroponte, of the penultimate UN Security Council Resolution before the second Iraq War, 2003, which I believe was 1441—It turned out that OLC had themselves written an opinion on the meaning of 1441, even though they had had absolutely no involvement in any of the negotiation, by simply looking—This would become their wont—at the plain words of any text and deciding what they thought it meant. This was divorced from any input from the people who had actually negotiated it, or had input about what the others who had negotiated it might think.

Anyway, the fight over the Geneva Conventions really fractured, or resulted in the complete fracturing of, any relationship between State and the other agencies. I was the pivot point between these two. It also set in motion a considerable amount of complaining on my part, not only to Judge Gonzales about bad processes—He always tended to look somewhat apologetic and sorrowful—but then also to Steve Hadley and to Secretary Rice. I think initially they didn't quite know what to make of this and probably wondered if they had a problematic lawyer who was constantly complaining. They would urge me to try to work things out with Judge Gonzales.

I would tell them these are serious problems here, and they're going to hurt you and they're going to hurt the President. They began to see that there were serious problems amongst the lawyers, that there were ideological lawyers and that there were bad processes. They saw this with Military Order No. 1. They began to see it in the way detention was working. I would tell them about the secret OLC opinions that were being prepared that would have an impact.

Over the 2002, '03, '04 period, my sense, based on what Steve Hadley and Dr. Rice would tell me, is that they began to accept my view that there were some major problems here, and they began to play a more assertive role in the process. I believe that Dr. Rice and Judge Gonzales, as Dr. Rice said in her book, had some words over these things.

Riley: Can we go back to the beginning of this process? It's only because I'd like to get the sequencing and order. Let's begin with the predicate of what you knew about the OLC operation as of 9/11. Had they been a presence at all?

Bellinger: I'm glad you asked. This is where the questions do jog what's left of the memory. Yes, they had John Yoo, who I knew slightly from the American Council on Germany, so I

thought we would start off with a nice relationship. But even prior to 9/11 he started writing some opinions on—really to get his academic views on Executive power written into OLC opinions.

The one that I recall most memorably was whether a treaty that had been sent to the Senate—and now I can't remember which treaty it was—could simply be unilaterally withdrawn by the Executive once it was pending before the Senate. So it was not just a matter of saying that the Executive didn't support the treaty, but essentially could pull the treaty back. If I recall, John had written a law review article in academe on the subject and then he essentially turned that into an OLC opinion. The State Department disagreed strongly with it. Will Taft told me he disagreed strongly and felt that, since the State Department was largely responsible for the treaty process, they should have been consulted. At one point I said to him, "What are you going to do with this opinion, Will?" He said, "I put it in my bottom drawer and I plan to forget about it."

So there had been—I had seen prior to 9/11 some effort on the part of OLC, but it had not become a major problem.

Riley: Is it fair to say that within the legal profession John Yoo's opinions were considered somewhat esoteric? Were his ideas about Executive power—?

Bellinger: I don't know. I was not a domestic constitutional lawyer, so I don't know what people thought of John Yoo's writings before 9/11.

Riley: But it is safe to say that after 9/11 your sense was that it was—

Bellinger: I think John—like a lot of academics, but particularly in his case, thrust into the middle of some extremely important stuff—was writing things completely out of context and had a very pure vision of law that didn't involve context: We're not asked about context; we're asked about the law. It doesn't matter what policy views are and so forth, I'm just going to write these views.

He also was under enormous pressure from the counsel's office to essentially write the opinions that they wanted.

Riley: The "counsel's office" meaning?

Bellinger: The White House counsel's office.

Riley: [REDACTED]

Bellinger: [REDACTED]

Riley: Which leads to my core question: How do these opinions become so powerful and so controlling within the administration? He has to have advocates or sponsors within the White House.

Bellinger: Of course in any administration, legal opinions produced by the Office of Legal Counsel are the controlling legal views for the administration. After 9/11 there were so many new things that were being done that, if the President's war powers had to be exercised, these opinions were being churned out at the rate of dozens, each of which became extraordinarily important, and were being done by just one or two people. Generally, even if OLC felt that they had the final say, it would be shopped around and the agency general counsels would have input. Historically, there would always be, still, squabbles. An agency general counsel would say, "We completely disagree with your view of the law." OLC would take into account their views and would finally say, "Yes, but we're OLC."

In the international law area, there had always been tensions between OLC and the legal advisor's office as to who was the final say on international law, but without a doubt at this period of time—from January 2002 to the time John Yoo left and Jack Goldsmith came in, which would have been some time in 2004, so a pretty narrow period of time, about 18 months—the relationship on international law issues completely fractured. The State Department was completely cut out of the process. The counsel's office told OLC, "Don't even consult the State Department anymore, just write the opinions, even if they are on purely international law questions."

While I'm on that subject, when Jack Goldsmith came in, I had a conversation with him in which he essentially pledged that although they would still have the final say on any legal issues, he was not going to give up and say the legal advisor is out, but he said there would be no more secret legal opinions. I remember telling Dr. Rice that Jack Goldsmith was coming in. She said, "He's a good choice. He's a respected academic." We can talk about the second term, but during this period, OLC had apparently churned out between 10 and 20 opinions on war powers issues.

Let me give you one example of something that shows the inconsistency. I found out about this later on. Around 2007 or 2008, OLC started deciding that it would be better to release a number of these John Yoo opinions. It wasn't entirely clear why they decided to do that, but I think they decided that it would be better for them to release them rather than wait until the next administration were to release them. Then they could release them with some context.

So I found out at that point that there had been an OLC opinion undergirding the military commissions, what military commissions could be used for and so forth. In general, it was a thoughtful opinion. I think it was written by Pat Philbin. But one of the core premises of it was that al-Qaeda and the Taliban could be prosecuted for violations of Common Article 3 of the Geneva Conventions for violations of customary international law, because Common Article 3 was binding customary international law.

Well, since the President had just signed an order concluding that it was not binding, at least as a matter of treaty law, it would be a bit odd for us to say that we would prosecute the Taliban or al-Qaeda for violations of Common Article 3. Matt Waxman and I had spent three or four years pushing the administration to accept Common Article 3, even if it wasn't by any means conventional international law, to just accept it as customary international law so that we could say that we were applying something. Apparently there was a secret OLC opinion that said that we have been planning to prosecute the Taliban and al-Qaeda for Common Article 3 because we considered it to be customary international law.

There were not good processes throughout this whole period of time largely because of this—apparently this distrust by the counsel’s office, OLC, DOD, and OVP of State Department and me, and I think the JCS to a certain extent, and a feeling that somehow we were not to be trusted.

Kassop: Was this also the part of that larger umbrella that you talked about in terms of the distrust of international institutions?

Bellinger: Who knows what was motivating that? I would assume so, to a certain extent.

Kassop: And also an effort to try to bolster Executive power as much as possible?

Bellinger: I don’t know what was motivating that. Certainly these were people—I was not one who was against a strong Executive. I do think that there were a number of things where it would have made more pragmatic sense to have gotten congressional support. But I’m not sure what was—I never felt, and I’m sure Will Taft—as somebody who had been the DOD general counsel, Acting Secretary—never felt that we were somehow not committed to the nation’s security and were not as tough as anybody else. But obviously they felt that we were lily-livered.

Kassop: Soft.

Bellinger: Soft, yes.

[2 pages redacted]

Kassop: It would bypass the Attorney General?

Bellinger: Possibly. I don’t know. I have read in some of the materials that actually, new to me, John Ashcroft got so angry about some of these things that he made clear that he was not going to support John Yoo to replace Jay Bybee as the head of OLC.

Kassop: Just one other quick personnel thing. When you said that the counsel’s office knew that you had the strong support of Rice, both as National Security Advisor—and that’s the period we’re talking about now—what was their view of Rice? In other words, was she also—The reports have been that she was considered by Cheney, and particularly Rumsfeld, as being a lesser player and that she wasn’t respected as much and her views were not—

Bellinger: There were a few comments that they had made during this period along those lines and in the counsel’s office that shocked me, that reflected that they did view her as a soft internationalist.

Kassop: Yet she was so close to the President.

Bellinger: Yes. [REDACTED]

Long: I’m trying to get my head around the notion that it is a separate story, because all during 2002 you’re part of the group that debates the applicability of the Geneva Conventions to these detainees. Then you’re on the detainee treatment or detainee sorting committee with Abrams,

also starting 2002, meeting twice a week, according to Myers. Then in the same year, John Yoo at least says that he briefed you on the memo about interrogation techniques. So this is all happening very close together.

Bellinger: Yes.

Long: It seems to me that these are not all just distinct legal abstract issues that needed to be decided one by one. You must have been getting a picture of what the underlying interest was behind these policies, putting them outside the binding limits of the Geneva Conventions, figuring out which detainees are staying at Guantanamo, starting the precedent of indefinite detention for those that they weren't sure where they could send them back to, and then the interrogation techniques. At what point did it dawn on you what exactly was going on with these individuals? At what point did you begin to worry about how going public eventually would affect the President's legal situation or standing?

Bellinger: Some of these things I agreed with and some of them I disagreed with. Most people at the time even—and this has continued through the Obama administration—have not disagreed with the idea that we were in a war with al-Qaeda and therefore that one could hold people under the laws of war, and that therefore one could detain them indefinitely under the laws of war without trying them, and that even the Geneva Conventions don't apply. So those five things that I just listed, in the liberal critique, and even they disagree with all those things and think that's putting all people into a black hole and so forth. But we've found that there was not disagreement inside the Bush administration with those five things, and we've not had disagreement inside the Obama administration.

For example, we did not have people inside the Bush administration saying we should bring all these people and hold them inside the United States and we ought to try them in federal courts. We should hold people as prisoners of war under the Geneva Conventions. So a lot of those things that I guess I would call the most extreme liberal critique—that's probably an unfair label—there was not disagreement inside the Bush administration and there's not been disagreement inside the Obama administration. It was things that were beyond that by saying, "Well, the Geneva Conventions don't apply at all, no part of them applies; Common Article 3 doesn't apply," and things that were a little bit more extreme. So it wasn't the core of the idea that we were in an armed conflict and that we could use war powers, it was more—This idea of holding people outside the normal laws has become a criticism, and it certainly was at the time. The Bush administration was accused of putting people into a legal black hole, but there was not a lot of disagreement that it was proper to hold people under the laws of war.

A lot of this frankly came down to the bad processes. Military Order No. 1 was symptomatic. If we had somehow been able to get more support early on, both domestically and internationally, yes, it might have meant that we might have had to water down some of these positions a bit rather than taking the extreme version. So a lot of it was bad processes.

Riley: When you say bad processes, you mean not being inclusive of Congress or—

Bellinger: Even inside the administration. I certainly think one of the principal failings of the Bush administration's national security processes after 9/11, and that haunted it for the rest of the

administration, was essentially having a shadow government inside with a group of lawyers and officials doing things behind the backs of others. Military Order No. 1 was one example, the TSP Program, the Terrorist Surveillance Program, was another, and some of these other OLC opinions were a third.

[REDACTED]

[REDACTED]

Riley: [REDACTED]

Bellinger: [REDACTED]

[REDACTED]

Riley: [REDACTED]

Bellinger: [REDACTED]

[REDACTED]

Riley: [REDACTED]

Bellinger: [REDACTED]

Dr. Rice said that before the NSC considers this, we will want to have the opinion of the Justice Department. I can't remember if she immediately said, or within a week or two said, "And I do not want John Yoo's opinion; I want to have the Attorney General's opinion. The Attorney General has been an elected representative. I don't want an academic John Yoo opinion."

[3 pages redacted]

Let me talk about where I think so far if the historical record is wrong, it will hopefully be corrected at some point, and then where I think we did go wrong as a matter of process.

First on the historical record. Because this is so ideological, still, 12 years later, historians sadly have not gotten to how did this happen. The competing historical versions are ideological versions of either this was so clearly wrong and immoral that anybody in their right mind could never possibly have approved this. Critics say it was just wrong, so we're not interested in discussing what NSC principals actually knew at the time. Then there is the conservative version, which was that this was necessary and appropriate and it saved lives and it was effective. Period.

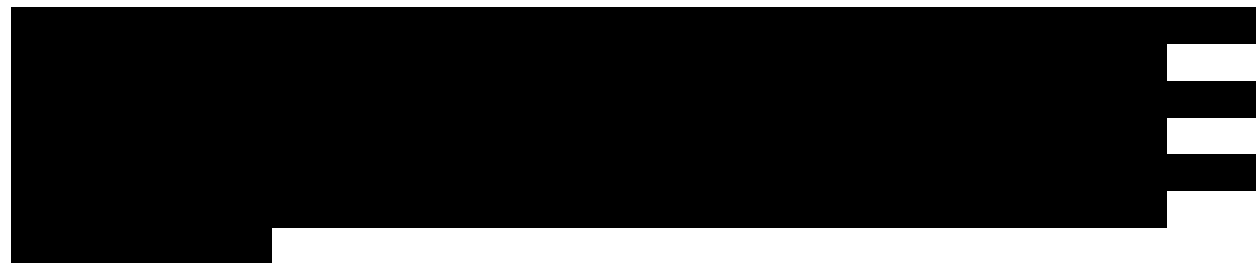
The answer actually is a much more interesting answer for the historians. Unfortunately, the history continues to be being written by people with ideological agendas who are intent to prove their side. To me, it's a more interesting, bureaucratic Cuban Missile Crisis, bureaucratic victims of group think kind of issue, where perhaps there is criticism that can be made of the processes. So by that I mean that to some extent the President ended being boxed in by the CIA, not unlike, frankly, what has happened with President Obama with the drones.

After 9/11, at a point of great threat and danger to the United States, the President is presented by the CIA principal intelligence advisor with a program that they claim is safe and effective and that the Attorney General says is legal. So at that point it's very difficult for the President to say I'm not going to do it. It's a little similar to the drones. Now, instead of an interrogation program, you have a killing program that, once again, the Attorney General has said is legal, so the President has had a difficult time saying no to that.

This was not invented in the Vice President's office. Yes, the Vice President's office may have been cheerleaders for it, but this was not invented at the White House. This was something that was conceived and sold by the CIA. It may have been sold to the leadership at CIA who then sold it to the White House. So that's really what happened.

[1.5 pages redacted]

I told Dr. Rice that the Justice Department's view—that the Attorney General had concluded that he agreed with that view, so I relayed to her that that was their view. Of course, for years now I have wondered about my own role. Should I have disagreed with the Justice Department? Should I have told Dr. Rice that I believed that they were wrong? Should I have resigned on the spot?



In hindsight, one wishes one would have done more things. I only learned later, for example, in detail, how the British government's aggressive interrogation techniques against the Irish ultimately ended up being challenged before the European Court of Human Rights, and that the Israelis' aggressive interrogation program ended up before their Supreme Court. As I got to know all of these things later on, I really turned against the program. We can get into this later, but as I got to know more information later, I became a great critic of this program. So that is part of what I had said to Condi: if I knew then what I know now, I might have come out in a different way. But we were doing this all in a very short period of time.

Riley: This is five months after 9/11—is that right? This is February of 2002?

Bellinger: Yes.

Riley: Decisions are being taken. You have the head of the intelligence service basically warranting to the President of the United States that this is absolutely necessary to save American lives. Is it possible to create a staff structure sufficiently adversarial to overcome the natural inclination of the principals under those conditions?

Bellinger: You are asking a helpful leading question, Russell, which is—That's right. That really was the situation that we found ourselves in. When you have—both as an institutional matter but also as a political matter—your Director of Central Intelligence—who, frankly, for whatever it's worth, is the holdover Democratic DCI, so therefore not known to be a tough, hand-chosen Republican but instead an inherited Democrat—still recommending to the President that you have to do this, this is my recommendation to you. The President—I don't know what other principals may have been thinking in terms of politics, but at least somewhere in the back of your mind—I actually was not thinking this because I wasn't thinking in political terms, but I have got to be assuming that others are thinking, *Well, if we say no to the clear recommendation from the DCI, who has also told us that more attacks are coming and that this is the guy who has it locked up in his brain and this is the only way to prevent it—How do you say no to that?*

The question is, should there still have been a better staff structure that might have resulted in a better decision? That's why it's so interesting. The liberal question is never, should there have been a better staffing structure that would have resulted in a better decision? The liberal critique, still 12 years later, is saying this was so evil and immoral—

Riley: It's black and white.

Bellinger: It's black and white. That's why it's disappointing to me that historians and even the press have not yet gotten to the nub of the issue.

Riley: One thought experiment in this regard: the President's relationship with the DCI takes a turn after Iraq, which we haven't gotten to yet.

Bellinger: Yes.

Riley: Suppose this cluster of questions comes up after something like Iraq, which then takes me back to John Kennedy and the military advisors both in the Bay of Pigs and the Cuban Missile Crisis. Kennedy knows to question his advisors in the Cuban Missile Crisis because they failed him in the Bay of Pigs.

Kassop: And he changed his advisors too.

Riley: So the question is, if the President is getting advice from his DCI after an interval when he knows that they're fallible, he may be much more likely to question and maybe come out with a different end, but he didn't have the experience.

Bellinger: In some ways we had the reverse. All of these things, as Condi has talked about in her book, are all happening at precisely the same time. I'm going from a meeting on the CIA program to Guantanamo to the Geneva Conventions to various other things. The 9/11 Commission investigation has now started during this period. I can't remember precisely when it started, but essentially it started in 2002. So this already has become sort of a witch hunt. Much of the witch hunt is directed at, did you ignore warning signs and did you ignore things that were suggested to you by CIA?

One of the things that CIA was pushing—to defend themselves for failing to prevent the 9/11 attack, even in the Clinton administration, but then certainly when the new Bush administration came in—was that CIA was feeding the White House all kinds of proposals and that the White House said no to them. To this day, no one really knows why Sandy Berger then went into the archives and apparently stuffed documents into his socks. But the speculation is that he was worried that the things that he was apparently taking were CIA proposals on how to deal with al-Qaeda that the Clinton NSC had not acted on. CIA—in feeding information to the 9/11 Commission, essentially made clear that the blame would not stop at CIA—was showing that well, we suggested this to the White House and we suggested that to the White House and we suggested this broad plan to the White House, so that they could say, “It wasn't us. We had great ideas, but the White House didn't act on them.”

At this exact same period of time, particularly as the program continued to be reauthorized in '03 and '04, it was a time when the White House is under attack from the 9/11 Commission for possibly ignoring recommendations from the CIA. So the country continues to be under great threat, the CIA is continuing to serve up ideas that it recommends strongly that the White House needs to accept, and the White House is on the defensive from the 9/11 Commission for ignoring past CIA proposals. That's why the context gets much more interesting than the black and the white.

Kassop: Going back to a little bit of what Russell was asking about the staff structure—In the meetings with the CIA about the interrogation process, was there ever an actual debate? Was there a devil's advocate? For that matter, for whatever you can say about the Obama administration, at least some of the books that have come out recently have shown that, literally,

the President sets up a debate and has warring sides and people take—

Bellinger: Nancy, that's a great question. In response to your question, probably for a momentous decision like this it would have been useful to have had more information. If there had been a process that could have produced better information, a more complete decision, but without involving lots and lots of people, that probably would have been the answer. So if there could have been some a devil's advocate process—

Back to the OLC opinions: they could have been a lot better. They could have included a lot more information that was not included. Again, by doing it in a very narrow—With just a few people involved, probably some of the same mistakes as some of the other OLC opinions may have been made here. In that regard, on a momentous decision—but on the other hand, this was a domestic criminal statute. This is not the sort of thing where you go and ask the Defense Department or the State Department how do they believe the intent requirement in a domestic criminal statute ought to be interpreted.

I don't know fully how this was staffed inside the Justice Department; it may not have been staffed more broadly in the criminal division. I think this was done by OLC. I had specifically wanted the criminal division to be involved. To this day, I think that some of the criminal division people who may have been involved may have tried to make it clear that they were not involved. I don't know whether they were involved or not involved.

What I do know is that when we're talking about a domestic criminal statute that you would want—and I had specifically asked that this not be done just by OLC because they do have this tendency to just look at the words on the page, but instead to ask the criminal division. They are the lawyers at DOJ who were responsible for the investigation, prosecution, previously under the statute and they know more about how this has been interpreted in the past.

So I don't know whether Justice internally—and there was also distrust between the divisions internally, inside the Justice Department. So that could have resulted in a better process potentially.

Riley: I wonder, and let me pose this to you. Should we go ahead and take this issue and track it through? Does it make sense?

Bellinger: Yes, why don't we do that? This does take me all the way through my time at the State Department. Should we take a break first?

[BREAK]

Riley: We're back on.

[1.75 pages redacted]

Bellinger: She [Dr. Rice] also said, as with any significant intelligence activities required by law, that we want to make sure that Congress is briefed. So Congress was briefed repeatedly on the program. One of the great outrages is how Congress has tried to pretend that they were not briefed on the program. Even people like Jay Rockefeller and others have tried to claim, well okay, we were briefed, but we couldn't do anything about it. That is absolutely false.

Sure, you cannot stand up if you're upset about a highly classified program and go to the floor of the Senate—I mean, you could—but there are ten other things that you can do. You can haul the DCI and the staff down for repeated briefings and ask them lots of questions. You can pass legislation. There is a classified annex to the annual authorization bill that has extremely precise instructions on reporting requirements that says we want this very specific report. You can cut off funding. So it's a national outrage that Congress—although it has become so typical—does not get involved in a program. Then when something goes wrong, they act as if they had nothing to do with it. Congress was briefed.

There were enough Members of Congress briefed that if they had had a problem with the program they could have done something about it. That was something, again, that Dr. Rice and I talked about, that we need to be sure that Congress was briefed.

Riley: Who would be briefed?

Bellinger: It was growing concentric circles. Admittedly in the beginning it was very tightly held, probably just the so-called gang of eight, the heads of the intelligence committees and the ranking and minority member in each house. But as the years went by—three, four, five, six, seven, eight—I've looked at the charts. Staff got involved. Dozens and dozens of Members were involved and never raised any significant problems. So the program continued to be approved.

[1 page redacted]

Condi and I had moved over to the State Department and I became less involved because I was not directly responsible for review of intelligence activities. At this point the OLC opinions were being revised several times over by first [inaudible] and then by Dan Levin and ultimately by Steve Bradbury. I kept raising some concerns about them as they were being redone. As a result, it ended up stopping the program while they were waiting for our comments.

Then I threw a wrench into the works when the [Salim] *Hamdan* decision [*Hamdan v. Rumsfeld*] came down that—Nancy, as you pointed out—I had been urging that we acknowledge Common Article 3 as a matter of customary international law, and the *Hamdan* decision concluded that Common Article 3 was binding. So that meant, in the conflict with al-Qaeda, that Common Article 3 prohibits not only torture but cruel, inhuman, and degrading treatment or outrages on personal dignity.

OLC then wrote an opinion, presumably at the request of CIA, saying that the program also complied with Common Article 3. So this now was more in my portfolio. I had never had direct responsibility for the interpretation of a domestic criminal statute, but I was legal advisor and we had agreed that there were going to be no more secret OLC opinions. Prior to this, they might have just decided on their own that it complied with Common Article 3.

They then wrote an opinion saying that the program still complied with Common Article 3, and I wrote back a stinging memo, most of which is now public. It was highly classified at the time; it is now buried in the OPR, Office of Professional Responsibility, report on the John Yoo memos—and I worked all through the night on this; this was quite an interesting episode—saying no, I did not think that the program complied with Common Article 3. I did not see how holding people naked and in shackles could possibly not be considered cruel, inhuman, and degrading treatment or an outrage on their personal dignity.

I said, moreover, that whatever we thought, I was certainly sure that other countries would think that holding people naked in shackles was going to be an outrage on their personal dignity. I was pretty sharp at the end and said that I thought that they had lost the forest for the trees here, and that this memo really read more like a legal defense of the program than the better interpretation of the law.

Before I sent this, I went to Condi and said that I've been asked to sign off on this OLC memo and I disagree with it and here's why. I said, "I know this is going to put a stop to the program. People are going to be very upset with me. I just want you to know before I do this. I'm ready to resign if you think I shouldn't do this."

I had talked briefly to my wife the night before, without telling her what was going on. I said that I'm really getting very tired and I'm going to talk to the Secretary tomorrow about something that may result in my resigning. Then, before going in to talk to the Secretary I went and talked to our chief of staff again, not really about the details, but saying I need to go in and talk to Condi about something to do with the CIA report.

Riley: Who was chief of staff then?

Bellinger: Brian Gunderson. That reminds me: he just sent me an email. I told him that I needed to talk to her about this and this may result in my leaving. So I went in and told her this. I didn't know what this conversation was going to result in, and just like this [snapping fingers], she said, "John, you're my legal advisor. If that's your view of the program, that's my view of the program. Send the memo. Anyway, I think you're right."

[2 pages redacted]

Kassop: To follow up on something—I was going to ask you the question in a larger context and you've now talked about it more narrowly, but—Given the fact that so many of your ideas were either dismissed or you were cut out of some of the discussions, what were your thought processes about should I stay or should I resign in protest? Did you think you could do more good by staying, trying to be the thorn in the side, and try to get them to do the right thing?

Bellinger: This was something that I thought about pretty regularly. It was somewhat easier in the second term, because at that point I had Secretary Rice's full backing. In the first term I was more of a staffer; I felt very much on thin ice. [REDACTED]

[REDACTED]

[REDACTED]

Riley: [REDACTED]

Bellinger: For the period of time that I was legal advisor, I did feel that I at least had the Secretary's backing and that things were beginning to change a bit. They were certainly not changing nearly as much as I would have liked. We did not get our "Big Bang" and we couldn't get Common Article 3 until the Supreme Court decided it. So I did periodically think about resigning.

Of course, I was tired anyway. The reason I ended up staying was—One, Secretary Rice is an extremely inspiring person whom I liked and I wanted to help her. She had a tough job and I felt that I could help her. I also felt, frankly, that if I did leave, there were certainly others who were like-minded, but there would not be anybody principally pushing on these issues. Philip had come in and had left; Matt Waxman had left. So I felt that if I did leave, there wouldn't be anybody pushing as much. This is one of the great questions for any official who has some significant concerns about the policy, do you stay or do you go?

Of course, during this whole period—We'll talk about this maybe next time—outwardly I had become the principal international defender and explainer of the policies, because I felt that that was something we needed to do more of, while internally I was trying to get a lot of them changed.

Kassop: We came up to 2007, could we backtrack to 2004 and Abu Ghraib as well as the election, the President's reelection?

Bellinger: That's another great story.

Riley: Can I interject one question before we get to that, and I'm happy to follow your lead on that. Do you know if Condi ever contemplated resigning, and over what?

Bellinger: No, not that I know of. I would occasionally see her tired, but rarely. She's so incredibly physically fit. She has incredible physical fitness and discipline. Even though she continued to get up at 4:45 every morning and work out, I rarely saw her fatigued.

Riley: Do you work out?

Bellinger: No, I ran on the weekends, but I was tired.

Riley: I understand that. So let's go back.

Bellinger: Abu Ghraib is another fascinating story. I guess it was the ICRC that broke the story; I can't remember precisely how it broke. I remember getting told that there were these pictures and that this was going to be a mess. I helped write the points that the White House would use in response, about this being a terrible thing. But what I really wanted to get done—and tried to get done, but it didn't happen—is—I said to Steve Hadley that the President has to show leadership

here. As with any corporate disaster where people are losing confidence, the President has got to seize this and order that something be done. What he needs to do is issue a directive to the Secretary of Defense that says I am deeply troubled by these reports. I want an investigation to be done. I want to have a report on my desk within 30 days. This has caused harm to the country.

I did a draft of this and sent it up to Steve Hadley through our internal NSC processing. What I then learned—I may have known this before, but this was the first time I had gotten bitten by it—is that Steve had agreed with, I think Scooter Libby, way back in 2001 that for any memo that was sent up by the NSC staff to the National Security Advisor, a copy of it would be sent to the Vice President’s office, so that they could see what the NSC staff was recommending. So apparently a copy of my recommendation to the National Security Advisor went to OVP, who then helpfully provided a draft copy of it to the Secretary of Defense. So before I even knew whether my memo had arrived and was read by Steve Hadley, I had a call from Steve Hadley saying, “John, what is this memo about that I hear you have the President directing an investigation of Abu Ghraib? I’ve just had a call from Paul Wolfowitz expressing grave concern about this.”

If I recall, I think I said, “Steve, I sent you a memo on this.” He said, “I haven’t seen it yet.” So I got summoned over to explain this to Steve. I think Steve had some sympathy with the argument that I was trying to make and he let me make my pitch to Condi. The Defense Department obviously did not want to be told by the President to do anything. I think Condi thought about this for a bit, then agreed with me and went down and discussed it with Andy Card. I don’t know the full array of what took place, but it ultimately was decided that the memo would not be sent. It was a small thing, but I personally think it was a big mistake.

Paul Wolfowitz argued, I guess to Steve Hadley, that it would look like the President was blaming the Secretary of Defense and was spanking him. I said, “Of course not. This is a line organization.” He’s not saying it’s the Secretary of Defense. He’s the President of the United States and he’s telling—This is an international disaster for the United States. Other than issuing a couple of talking points from the White House, the President ought to be seen as doing something about it. He should tell the Secretary of Defense what he expects. Anyway, the memo was not sent.

Kassop: You mentioned several times about the impact of these issues or incidents or programs on how the country was perceived abroad. So coming up to the 2004 election, did you also take into consideration, for example, when you said the President needs to do something, though you’re not a political animal, what impact these things would have on his reelection campaign, and his reelection, for that matter?

Bellinger: It didn’t seem that there was much concern in the broader populace about these issues. There was a good deal of criticism from civil society groups, the press, European governments, and I was primarily concerned that this could become a legacy issue for the President. It was certainly hurting us internationally. Politically, it did not seem it was going to be an issue one way or the other.

Riley: There was a piece of the previous story that you touched on and said you wanted to come back to, which was the HVD.

Bellinger: Yes, why don't we talk about that for a bit? Probably around 2003, certainly 2004, I began to worry about what we were ultimately going to do with these people who we are holding. I think I coined the term myself, which became used in popular parlance inside the interagency, that there needs to be an endgame. I started talking to John Moseman, the chief of staff at CIA, and said, "Look, what is your endgame here? You may hold them and question them this year and next year, but there must be a long-term plan. What do you want to do?"

About this point I think CIA itself was beginning to worry a bit about this. They prepared a quite thoughtful options memo—I can't remember all the options—in 2004. It essentially had things like bringing them in for prosecution and so forth. We had a meeting on this at the White House. It was agreed that this was something that we really did need to address. By the time they came up with their options paper, it was pretty deep into 2004, so it was agreed that we would see if President Bush was reelected or not, whether it was going to be our issue to have an endgame or whether it was going to be somebody else's issue to have an endgame.

President Bush was reelected. Then I began to push on this. I said to Secretary Rice when we moved over to the State Department that we really need to push for resolution on this; this cannot be. We can't leave these people there for the rest of time, for some President to find them and say, "Oh, what have we here?" Philip Zelikow was quite helpful on that. He came in and I will give him credit for the point of saying to Condi, which she then picked up—although she may have just done it on her own—that 9/11 happened on our watch, so to the extent that we are holding some of the people who were responsible for it, we need to begin to deliver justice on our watch. We need to begin to hold these people accountable.

She began to push Steve Hadley to bring in the CIA detainees into Guantanamo, where they could then be prosecuted. We started on this as early as February 2005. That may have been part of our whole Big Bang, part of the many pieces that, if we hit each one of these, we could resolve much of the detainee mess. Unbelievably, it took us two years to ultimately get this resolved. Steve Hadley put J. D. Crouch, who was his Deputy National Security Advisor, in charge of an interagency group that would consider the HVD issues. Philip and I were the State Department representatives. It was so complicated and took us so long to discuss all these issues that J. D. Crouch started calling us the midnight group, and he started providing pizza for us in the Situation Room.

There ended up being significant disagreement on this. The Defense Department did not want to have the CIA program bleed into Guantanamo. The Justice Department did not want to acknowledge the program. CIA was of a completely mixed mind. On the one hand, they didn't want to keep holding these people; on the other hand, they didn't really know how to get rid of them. The counsel's office and OVP were essentially backing the Justice Department. So we had us at State pushing for resolution of the HVD issue and everybody else against us, with CIA not sure what they wanted to do.

Amazingly, we were continuing to debate this a year and a half later. I was working in parallel on all these other things, trying to get Common Article 3, I had written my memo on the interrogation program, trying to get Guantanamo closed down, trying to reform the military commissions that we have not discussed, and trying to bring in the HVDs. This took 18 months. We were getting a little bit closer but the Defense Department, Steve Cambone, the Under

Secretary of Defense for Intelligence, I think had been told—In fact, I think Don Rumsfeld says this in his book—by Don Rumsfeld to go to these meetings but don't agree to anything, just keep throwing sand into the works. That was just one reason why we couldn't make any progress.

When the *Hamdan* decision came down, it complicated things with respect to the HVDs as well because it said that, in addition to the fact that Common Article 3 applied, because Common Article 3 applied, the military commissions were therefore set up illegally, which meant that if we wanted to move forward, we had to get new legislation. The decision was that we did not want to wait all the way until 2007 for a new cycle and we would try to start in September. I think *Hamdan* came down in June or July?

Kassop: It was the end of June of '06.


Bellinger: So the decision was, which was perfectly understandable, that rather than lose seven months, there would be a push to propose legislation to Congress for a whole new Military Commission Act. I argued, and I think others agreed, that we might be accused of misleading Congress if we got Congress to pass the Military Commissions Act and then a couple of months later told them that, oh by the way, we forgot to tell you that the people who we really want to try in these military commissions are these CIA high-value detainees. And this was a congressional election year, of course. I used this as an argument to try to get the HVDs, which I had been trying to get out anyway, to say that it would be an "October surprise" if we didn't tell them, and Congress would then feel significantly misled.

This resulted in August in a showdown in the Roosevelt Room of the White House on whether we would or we would not bring in the high-value detainees that summer, announce that we had them, and then Congress would know and it would be a backdrop to the military commission. Of course, we were damned if we did and damned if we didn't, because then the critics, when we ultimately did bring them in, claimed that that was an August surprise or September surprise to put pressure on Congress to pass the military commissions.

In any case, we had a meeting of the principals. Secretary Rice argued that 9/11 had happened on our watch, that we had been holding these people long enough, that there had to be an endgame, we needed to bring them in, and we needed to prosecute them. CIA finally got off the dime and decided that they wanted to support this as well because they didn't want to get stuck holding the bag forever. So they supported it.

The Justice Department continued to be opposed, but since they saw the way things were heading, they proposed, if I recall correctly, at this meeting, an utterly unworkable compromise, which was to say, all right, if we do bring them in, we'll bring them to Guantanamo, but we will not acknowledge that we were ever holding them. I called this the "immaculate conception." I said that will last about two hours until someone asks, "Okay, so where were these people before?" "We're not going to tell you."

The Defense Department remained opposed because they did not want to have anything to do with the CIA program.



[REDACTED] The President was surprised that his advisors still were in disagreement, so he said he would think about this.

The word then came back from Steve Hadley that we would essentially have a plan A and a plan B, and plan A would be to announce that we were bringing them in and we would do that. Plan B would be to not do it. We spent about the next ten days having interagency lawyers' meetings on exactly what the press announcement would be and what the Q's and A's [questions and answers] would be and how we would respond to all the nasty questions. I guess the White House then asked the speechwriters to prepare the speech that the President would give announcing this. That, unfortunately, turned out to be an unmitigated disaster.

The White House speechwriters [REDACTED] had their own view of the program, so they ended up writing precisely the opposite speech that I thought we would be able to write. Essentially the speech produced defeat out of the jaws of victory. It may well be that bringing in these HVDs—If anything, it would have just convinced the rest of the world that we were guilty of exactly what they thought we were guilty of. But I thought that we could have at least put a positive face on this, which was to say we have had to make difficult decisions, we have been doing things that we think the world may not agree with, but we're a country that is committed to rule of law, and toward that end we are bringing these people in and we're going to prosecute them. It would be a very lofty and high-minded speech.

Instead, it turned out to be very much a red-meat political speech, maybe because I wasn't thinking in political terms, and this was September of 2006. This was very much a red-meat, al-Qaeda attacked us, these are evil people, and they were plotting all of these attacks type of speech. And as a result we have developed these—if I recall, the word was "specialized procedures"—but we have been assured by the Attorney General that these are lawful. The first draft was awful. I talked to Condi about it and she authorized me to send in comments.

I guess I got authority from Condi to show a copy to Karen Hughes, who had been previously the President's communication director and his campaign director, and she has a very good sense of these things. At this point she was Under Secretary of State for Diplomacy and had read any number of speeches. She looked at this and said, "Specialized procedures? Yuck." Unfortunately, I think the "specialized procedures" stayed in the speech.

We got a few changes into the speech, but it was not the speech that I would have liked to have seen, and we did end up getting hammered by it. As I say, maybe anything that we did would have been criticized anyway, but I thought the speech didn't help. Ultimately, we did get the green light that we would go forward. We announced that they were being brought in. They were brought to Guantanamo.

[Final 8 pages redacted]