

THE RULE OF LAW ORAL HISTORY PROJECT

The Reminiscences of

Scott Horton

Columbia Center for Oral History

Columbia University

2013

PREFACE

The following oral history is the result of a recorded interview with Scott Horton conducted by Myron A. Farber on November 21, 2012. This interview is part of the Rule of Law Oral History Project.

The reader is asked to bear in mind that s/he is reading a verbatim transcript of the spoken word, rather than written prose.

VJD

Session One

Interviewee: Scott Horton

Location: New York, NY

Interviewer: Myron A. Farber

Date: November 21, 2012

Q: This is Myron Farber on November 21, 2012, interviewing Scott Horton for the Columbia University oral history of Guantánamo detention camp and related matters. This is session one.

Scott, I was gathering some materials I thought I want to make reference to in this interview and I came upon something that I had acquired a year ago or so. This is an email. The cover is an email from the deputy commander of the Criminal Investigation Task Force [CITF] at Guantánamo, in 2002. On October 28, 2002, he sends an email to headquarters and he attaches to the email minutes that were made of a meeting attended by an official of the CIA [Central Intelligence Agency], who is talking about what they need to do down there at Gitmo. At one point, as he says in this email, “Talk of ‘wet towel treatment’ [i.e. waterboarding] which results in the lymphatic gland reacting as if you are suffocating would in my opinion shock the conscience of any legal body looking at using the results of the interrogations or possibly even the interrogators. Someone needs to be considering how history will look back at this.”

So that's why we're here—looking back.

Horton: Great introduction to the issues we have. Yes.

Q: Now, be kind enough to tell me a little bit about your background. Are you a New Yorker?

Horton: I'm not. Actually, maybe the quickest short-hand description would be to say I'm an Air Force brat. My father was an Air Force colonel; as a result, I grew up being dragged all over the world, actually. My earliest memories were of North Africa. I lived in Morocco. My father was responsible for helping to construct an American air base there, which no longer exists. Then I lived in—I'm trying to think now—Germany, New Mexico, Texas, for briefer periods all around, very rarely more than two to three years in any one spot, but about half the time overseas.

Q: Where did you go to university?

Horton: I went to university in Germany, at the University of Munich, then to the University of Maryland, and then to the University of Texas, in Austin.

Q: What years were you at the University of Maryland?

Horton: 1977 and 1978.

Q: And you went to law school.

Horton: I went to law school.

Q: Whereabouts?

Horton: The University of Texas, in Austin.

Q: Graduating in—?

Horton: 1981.

Q: Were you a partner at Patterson Belknap [Webb & Tyler]?

Horton: Yes. I became a partner at Patterson Belknap in 1989, I think—so 1989 through 1997.

Q: Had Bob [Robert P.] Patterson [Jr.] gotten on the bench by that time?

Horton: Yes. In fact, I worked with Bob quite a bit, and he sought a judicial appointment, and was appointed to the bench while I was there.

Q: Is he still on the bench?

Horton: Yes. In fact, I think he's now taken senior status. In fact, he was at an age when he was appointed that was so far advanced that he had to make a pledge that he wouldn't take senior status for a period of, I think, five or ten years, before—. So he put in five or ten years of full service on the bench as a regular judge. But I think now he's taken senior status.

Q: But laying aside anything—your writing career—what have you been doing in the last fifteen-twenty years?

Horton: Well, I have a career I've pursued in the civil and human rights area, and I worked very intensively in the former Soviet Union. Andrei [D.] Sakharov was my client; Yelena Bonner was my client. I worked with a lot of other Russian dissidents. I worked with a number of human rights organizations in the United States and overseas, but I also had a career as a commercial lawyer. I did a lot of foreign transactional work, especially in the natural-resources sectors—oil and gas and mining—representing multi-national corporations and financial institutions, and sometimes governments.

Q: After Patterson Belknap?

Horton: While I was at Patterson Belknap, and now.

Q: Are you familiar with something called the American University of Central Asia?

Horton: Oh, indeed I am. I helped found that. I guess that goes back to about 1993-1994, in Bishkek, in the Kyrgyz Republic, where I spent a lot of time working for foreign investors, especially mining companies. A group of faculty at their state university decided they wanted to create an American college or university. They sought assistance through the United States to do it. Actually, it's an interesting case, because while there are a lot of American universities around the world, they're usually initiatives by Americans. This really started as an initiative by local

academics who had read about and liked the American model and wanted to try to emulate it. They got assistance from the U.S. government, from George Soros and the Soros Foundation, and they started something called the American Faculty. That, then, led to the American University. I was involved in that project pretty much from its beginning. In fact, its actual launch started with the creation of a board of trustees, and I was brought in after there had been a sort of blowup between the Soros Foundation and the government of Kyrgyzstan to try to mediate it, and put things together, because I had done work for the government of Kyrgyzstan and I had done work for the Soros Foundation. I looked to figure out a way to patch their differences and get the project going, which we did, and I was appointed as one of the first trustees, and I've been a trustee ever since.

Q: So it's a functioning university.

Horton: It's now a functioning university. We're now in the process of building a regular university campus, with a quadrangle, and developing it. But I certainly think it's a very successful effort. In fact, I think UNDP [United Nations Development Programme], when they came into the Central Asian region about seven years ago and did a study, ranked this as the best teaching university they could find in the region. The level of enthusiasm is very, very high, but I think the main distinction from the Soviet legacy was to create an American-style campus where there is a great deal of autonomy on the part of the students; there are student organizations and there is student life, as there is in an American university; and there is a tradition of autodidactic education where students spend twice the amount of time reading and thinking on their own.

Then they're really tested or examined on that in class, rather than the Soviet model, which was pretty much rote lecture.

Q: And when did you say it first got underway?

Horton: 1993 is the beginning point. Then its establishment as a university—well, actually, I have three different dates.

Q: But prior to that, had you spent much time in the Soviet Union?

Horton: Yes, extensively. Well, I have been on the list of proscribed persons by the border police in the late Soviet period because I was Andrei Sakharov's attorney. I had prepared petitions on his behalf to UNESCO [United Nations Educational, Scientific and Cultural Organization], United Nations, and other international organs. So I couldn't travel until he was called out of exile in Gorky [Nizhny Novgorod]—this is 1989—and then I was freed from this proscription and allowed to go to Russia. So 1989-1990-1991-1992, I was in Moscow frequently. I was also in the Caucasus region quite a bit, and in Central Asia.

Q: Well, apart from your association with the American University, you'd seen the Soviet Union before the breakup, and you've spent time there since. This is not today's topic, but just very briefly, in any sense, is it a different place?

Horton: It's a dramatically different place. As all countries, it is to a large extent the prisoner of its past, and you see the traces of the past everywhere, but it has been transformed in many different ways, and you have to look at each of these countries separately. But if you just look at Russia, for instance—and I look at young professionals—lawyers, academics, accountants, people like that—they have a completely different life from the life they had under the Soviet rule. They're prosperous. They live a very rich life, locally, just in terms of material well-being. They're able to travel abroad, and do with regularity. They drive Mercedes and BMWs. They're the people who have benefited quite dramatically from the transformation.

And, I think, even in terms of the intellectual life and freedoms. You can walk into a bookstore on Tverskaya [Street] now and you can buy the works of any dissident you care to read. They're there and they're available. Previously, that wasn't the case. There is also now a sort of chafing amongst that class of people because they feel that they've hit another ceiling and they want to break through it. I would say that that class, and even more so their children, want to see that change. So I think we're going to see a second push for greater freedoms in Russia, and probably the realization of a more meaningful form of democracy, in the coming decade. But I wouldn't say that's something that's going to happen right away.

Q: And would it be your estimate that [Vladimir V.] Putin is going to be there for a while?

Horton: I think Putin will be there for a few years. You can never tell. I think the Arab Spring shows us how situations that seem settled can be overturned very quickly. Putin has really grabbed hold of all the traditional levers of power in Russia, and I think no one can question that

he is competent in his management of those levers. Also, the way he interacts with the Russian people, the way he sets expectations—he's an effective ruler in a way that Boris [N.] Yeltsin, for instance, was not. But I also have a sense that there is a sort of bubbling anxiety or dissatisfaction with him and his system from below.

That being said, it's also important to note—and I think this is something very few outside observers do understand—that within the Russian political and intellectual world, Putin and [Dmitry A.] Medvedev belong to the liberal tradition. Their stronger, potential opposition are more reactionary, more conservative, more authoritarian than they are. That will probably come as a surprise to most people on the outside, but that's true. So I think, all things considered, it's not horrible that they're the people running the show when you look at the alternatives.

Q: Well, is it surprising that Putin got to where he got?

Horton: The process of how that occurred is interesting. In fact, if you look at it from the outside, here's a person who was barely known a year before he emerged as prime minister. So he seems to have appeared out of nowhere—boom—and to have taken this intelligence community back channel, or elevator, to the top—. I discussed this once with Boris [A.] Berezovsky, the man who insisted that he made Putin. Putin rejects that, but I think there's really no doubt that Berezovsky was a key figure in his rise. Maybe not *the* key figure, but he was one of them, and he was a person who facilitated his rise to the top. But I think that shows the powerful legacy of the intelligence community in Russia—how wedded they are to power and how capable they are of maneuvering the political situation and bringing their own people to the top. Boris Yeltsin was

outside that system, was a threat to them, and their reaction—although Yeltsin always had around him people from the intelligence corps. Putin was one of their own, no doubt about it, and they're in charge now, with him.

Another thing he's done—and also, this is something that doesn't get an awful lot of attention, but I follow the commercial world, I follow the natural resources scene very closely. One thing he's done—I think he recognizes that the levers of power are not all the obvious political offices now. They include commercial power, and he's really focused on the oil and gas sector as the key to long-term power. So one thing you've seen in his rule is natural resource nationalism, reversing the course of privatization to some extent, and bringing key oil and gas assets back under the control of the state. But then, also, he has inserted his people as the managers and directors of commercially organized companies. They are very close to him, and a large number of people from the intelligence community. It's as if the CIA had taken over Exxon and Chevron. That's what's going on.

Q: It's interesting to me, though, that because of your latter-day foray into the world of commentary and journalism—my own background—all that you said, especially the availability of dissident viewpoints, doesn't cover the fact that it's one of the most dangerous places in the world for journalists, isn't it?

Horton: Absolutely it is. I would say that there is more flexibility, in a certain sense, for journalists, but the physical threats and risks are greater now than they were in the Soviet period. Because, I think, journalists now will publish things that it was impossible to publish in the era

of Glavlit [General Directorate for the Protection of State Secrets in the Press under the USSR Council of Ministers] and in the late Soviet period. But they have to be self-censors, effectively. If they go too far, the risk they face is not losing their license or being shut down, although that, in some places, might be a risk. It's being executed. Anna [S.] Politkovskaya is a very good example of that. But I would say there are a half-dozen prominent Russian journalists, exposé journalists, who have died under mysterious circumstances where there is significant evidence of the involvement of the intelligence services in their deaths. They certainly don't appear to be victims of crime or something like that. It appears that they were publishing things that people in the Kremlin didn't want to see published.

Q: Cases that are largely unsolved, so to speak.

Horton: Yes. I would say there's a Chechen connection in many of these. I think the Chechen authorities have a sort of underworld basis for their own power. They have thugs who operate in Moscow. They are, in fact, a very powerful force in Moscow. I think they're the source of most of the violence. The bottom line is that they're connected to power, specifically connected to the president of Chechnya, who is basically a liege of Putin's, and they're protected by the Kremlin. So when they pull off these things, nothing happens, and I would say it extends even beyond the sphere of Russia. Because one of the things I've been tracking and studying lately is this spate of assassinations which appear to involve intelligence services from the post-Soviet Union that have occurred in Europe and the Persian Gulf area, and in particular we have found that a number of them have occurred in Vienna, probably one in Berlin, very high-profile. One that occurred in

London, several other attempts occurred in London, a recent attempt in rural Sweden. So it seems that there has just been a decision that you can go after your enemies.

One thing that I think has also not been tracked very much is that there is a direct parallel between this and American ideas about targeted killing; that is, that the Russians, at the highest level, within the FSB [Federal Security Service] and military intelligence—they track extremely closely how the United States rationalizes its own drone program, its own targeted-killing program—the legal and policy rationale. I have actually seen documents that have come from the FSB, classified documents that were made available by a defector I interviewed, in which they talk about this. They talk about how, when these killings are carried out, they are to be justified with exactly the same rationales used by the United States. The targets will be characterized as terrorists, or people who are consorting with terrorists, giving them material aid and so forth. There will be statements that there was no ability to deal with them through police means; that they constituted some immediate threat. So all the same language that the United States uses, they use as a rationale. This, I think, is one of the real threats of the drone program; that is, that if the United States can do it, any other power can do it. I think you see that the Russians don't have the drones and the drone technology, but they can send an assassin out and kill someone.

Q: That's very interesting, and I want to come back to that.

How would you describe yourself, politically? Have you taken part in any political campaigns?

I'm talking about especially prior to 2001.

Horton: I would say I am a Whig, basically. [Laughter] I'm a classical liberal.

Q: That won't play well in Wyoming.

Horton: I'm not a liberal in the sense that Teddy [Edward M.] Kennedy is a liberal, but I am a liberal in the sense that John Stuart Mill is a liberal. I also embrace, not in a dogmatic way, Austrian economic theory. So, in fact, if you look at Mikheil Saakashvili and his government in Georgia—I'm very close to Mischa and I worked with him. I would say that the reforms and perspectives which were adopted by that government are very close to my own.

So, you know, who associates themselves most with Mischa? Actually, it's the American conservatives and neo-cons who associate themselves most closely with his thinking. But that would be my views, although I don't associate myself with American neo-cons or conservatives. I don't think they're conservatives, frankly.

Q: Okay. Now at some point, in the 2000s I suppose, or maybe it was earlier, you started writing a blog. Isn't that correct?

Horton: Yes.

Q: Was that then associated with *Harper's Magazine*?

Horton: No, it wasn't. I'm trying to think when that started. It was about 2004 or 2005. I did a clipping service, basically. I clipped newspaper articles, magazine articles, and wrote some sort of gloss or commentary on them, and I circulated them. That was not, initially, associated with *Harper's*, but in late 2006—it was the same week—I was contacted by both *Harper's* and the *Atlantic*, out of the blue, and discovered that editors at both publications were reading my clippings. Both of them asked me, "Would you like to come and be a blogger for us?" I, in fact, was down in Washington talking to James [D.] Bennett and Andrew [M.] Sullivan at the *Atlantic*, and I talked with Roger [D.] Hodge and Rick [John R.] MacArthur at *Harper's*, and I decided to go with *Harper's*. Actually, it came totally out of the blue to me. I didn't expect this. Then when the proposal was made, I thought, "Why not?"

Q: And this became the blog "No Comment," at *Harper's*.

Horton: That's right.

Q: You've been doing it for at least five years, wouldn't you say?

Horton: That's right.

Q: And it covers the waterfront, doesn't it? It isn't exclusively on politics.

Horton: No, it isn't. In fact, it is a blog about politics, but it's also art, literature, and other matters.

Q: And you make the decision what appears in the blog.

Horton: Yes, right.

Q: Exclusively?

Horton: No. Basically, the way it works is I draft pieces, postings, and they go through editorial review at *Harper's*, and they decide what to post. But, I would say, generally, *Harper's* posts just about everything. It's not subject to the same sort of editorial review that an article appearing in the publication would go through, but that goes through a commission process, actually. Once in a blue moon, an editor will ring me up and say, "Have you thought about a post on this subject?"

Q: How about, "We've received your post, and maybe we don't entirely agree with that"?

Horton: I'm sure they don't agree with a lot of my posts. [Laughs]

Q: But they don't stop it.

Horton: They don't stop it. It does go through fact-check and style-edits with different editors, some of whom are more rigorous and others who are not. But if a piece is rejected—it's happened once or twice, but that's really pretty rare.

Q: Okay. Since 2001, how much of that blog would you say—and perhaps you haven't thought about it in these terms—has been devoted to Guantánamo Bay and related topics?

Horton: That's certainly one of my core issues, has been Guantánamo. I would say detainee treatment issues, generally, and maybe that's a third of what I write, total.

Q: Why is that the case?

Horton: It's an issue that I've been following very closely. I started dealing with the Association of the Bar of the City of New York, where I had some responsibility for organizing some studies and reports that I followed up constantly. So just the process of following it leads me to blog-like postings. So I'll see a development, I'll note it, I'll think about it, discuss it with some people, and write a little piece about it.

Q: You have been active in the Bar Association.

Horton: Yes.

Q: Is it now called the New York City Bar Association?

Horton: It is.

Q: But wasn't it once the Association of the Bar of the City of New York?

Horton: Exactly right. I have some immediate responsibility for that. [Laughter]

Q: I won't cover that. In any event, you have been active in the Bar Association.

Horton: Yes, very active.

Q: Okay. Now, very briefly, where were you on 9/11?

Horton: I had just returned from France. It was my first day back in the office. I remember walking to the office, looking down Sixth Avenue, and seeing smoke rising.

Q: Where was that?

Horton: My office was at Sixth Avenue and 43rd Street. Seeing smoke rising from one of the towers and thinking that was really strange. Then going in and hearing from my fellow workers that something had occurred. I should say, just a couple of days earlier I had been in France with a very good friend of mine, Barney [Barnett R.] Rubin, who's a leading U.S./Afghanistan expert—I would say *the* leading expert. I hang out with Central Asianists all the time. We'd been at a wine-tasting at some little vineyard in the south of France and his phone started going off like mad. He was receiving phone calls from people in the U.S. government, informing him that there had been an assassination in Afghanistan, and asking him for analysis and commentary. So I had heard about the events leading up to it, basically in real time, from Barney. Of course, at

that point, we had no sense of the connection between these things, which was subsequently established.

Q: In the weeks or whatever after 9/11—of course, Osama bin Laden was connected to it—what did you think it presaged? Or did you think about that at all—the consequences of 9/11—in terms of anything but particularly what the American government ought to be doing?

Horton: I think my initial reaction was just shock. But in the few weeks thereafter I was surprised by the scope of the reaction in the United States and by the thinking that this had led to a new era where everything was going to be different. That troubled me. In part, I kept thinking—I'd spent a lot of my life living overseas in places where security issues were sort of a constant, that people always worried about, and they didn't affect core social values or legal values. I was a little bit puzzled that there was such a dire reaction to this in the United States. It struck me as pointing to a shortage of civil courage.

Q: Well, what was your take on the *Bush v. Gore* [2000] matter, and [George W.] Bush being president at that time?

Horton: I was astonished at the whole *Bush v. Gore* matter. I had a pretty strong sense that that election had been decided by the Supreme Court instead of by the people.

Q: Fairly?

Horton: Not fairly decided. What happened in Florida I thought stank. I should say, I had some connections to it because a cousin of mine was working directly with the secretary of state in Florida in connection with voter accountability and registration and issues like that.

Q: You mean the famous Katherine Harris?

Horton: That's correct. In fact, she had been up in New York a few weeks earlier and had told me that Bush was going to win Florida, but it didn't particularly matter how people voted. [Laughter] I sort of laughed at the moment; then, afterwards, seeing what happened, I began to realize that there really was something very foul going on down there.

So yes, I think I was quite angry about that—the manipulation of the entire democratic process. But I thought, on 9/11, I thought Bush initially handled things very well. I thought the speech he gave before Congress was a very good speech, was well prepared, set the right tone, and was good. So I would say I had a generally negative attitude about him, but I thought his initial management of this was good.

Q: And did you note the passage of the authorization for military force [Authorization for Use of Military Force] and the subsequent order for military commissions? At that time, were you attuned to it?

Horton: I noted those things, the American Patriot Act, as well—or, the USA PATRIOT Act [Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and

Obstruct Terrorism Act of 2001]. I noted all those things. I thought they were coming sort of fast and furious without being considered adequately. But I wasn't really focused on the military commissions issue.

Q: How about the American response in Afghanistan? Was that something you supported?

Horton: Absolutely I supported it. In fact, I would say that I was, at that time, in communication with a number of leading U.S./Afghanistan experts discussing these issues. In fact, I had been an advocate of a higher level of U.S. engagement with Afghanistan for a long time, so I was happy to see that happen.

Q: Did you catch any wind of the establishment of the Guantánamo Bay detention camp before the first arrivals there in January of 2002?

Horton: I think I heard that something was going to be set up there, and I knew Guantánamo Bay as a detention facility because of its use for refugees from Haiti before. I had heard something about that. That had been somewhat controversial. But I think my immediate reaction was that it sort of made sense to have a place that was secure and a long ways away from everything.

Q: How important was it in terms of the activity of the American government between the time of the attack and the establishment of Gitmo—how important was it that the government, the prominent figures in the government involved, people like Dick [Richard B.] Cheney, Don [Donald H.] Rumsfeld, even at a level of David [S.] Addington, for example—how important

were those figures to the reaction of the government? Just draw a contrast to what you think would have been the reaction, had it been a [Albert A. "Al"] Gore [Jr.] administration.

Horton: Well, at the time—subsequently, I've come to a different view about this—but at the time I thought that the U.S. military had very well-established policies and traditions that covered this area, about how wars were conducted, and how prisoners were treated, and so forth. I would say that, in fact, it's something I'm quite proud of, this tradition. In fact, you know, I have a very proud and positive view of the military. I come from a military family. One of the aspects of that is that political figures come and go and they really don't have a great effect on these policies. They're long, old, and historically entrenched. I would say Dick Cheney—I didn't really have a particularly positive or negative view of him. He'd been a Washington fixture for a long time. I would say his management of the Department of Defense was certainly competent management. I don't think anybody would question that. So I certainly was not expecting what came.

Q: Well, do you think that had there been a Gore administration, there would have been a Gitmo?

Horton: No. Well, a Gitmo. It depends on what you mean by that. I think there would have been a detention facility that would have been set up outside of the theatre of engagement for these prisoners. It could have been at Gitmo, or it could have been ships at sea, or Diego Garcia, or it could have been a supermax in the United States or wherever. I certainly think there would have been a detention facility. I don't think that a Gore administration would have set up the sort of

facility that was originally set up at Gitmo, and I don't think it would have authorized the sort of harsh interrogation techniques that were used, torture that was used, and so forth.

Now I'll pull back and say, I don't think it would be love and kisses either, because I think if you look at the [William J. "Bill"] Clinton years, and you see there was a practice of renditions that was authorized, particularly in connection with the drug wars, with people in Latin America, Mexico, and so forth, being picked up and rough-handled, and so on. I think it would have been tough, but I don't think it would have—. But I think once people were turned over to the military, it would have been within the military traditions.

Q: Well, looking back over what you do know now, was there any justification for the view within the Justice Department, and the White House, that Guantánamo Bay was serviceable because it was, as it has often been called, a legal black hole?

Horton: No. In fact, I think, certainly if you have a grounding in international human rights norms, you know that the very idea of a legal black hole—an area that is outside the jurisdiction of any court or any legal regimen—is anathema. That idea led to serious war crimes during World War II, and before World War II, and afterwards. That is behind the idea of the crime of disappearings. In fact, people at the Justice Department who have some grounding in this would know that the Justice Department charged efforts to create legal black holes as a crime against humanity at both the Tokyo tribunals and the Nuremburg trials. So the Justice Department had taken a very firm position on this previously—"You can't do that."

Q: I suppose what I'm trying to get at is the consequence of particular people. There, in the Office of Legal Counsel [OLC] at the time you had people like John [C.] Yoo and Jay [S.] Bybee. You had this strong figure, David Addington, who seems to have been running an awful lot of things for Dick Cheney. By your account, it seems as if the Justice Department—if those people hadn't been staffing the Justice Department at that time, it wouldn't have occurred to the U.S. government to have sought a place that was a legal black hole.

Horton: No, I think that's right. Most of these issues are issues that have been explored by the Justice Department previously. They'd staked out clear positions and memoranda, legal opinions, and I think what came after 9/11 under Yoo and Bybee is a radical departure from prior, settled norms of the department. Why did that occur? I think you have a number of different factors coming into play at the same time. One is a radical ideology, which is the neo-con—neo-conservative—ideology, which disrespects laws, certainly the liberal notion of law as a detached repository of social values. It views law very much as an instrument of those who wield power, much as Marxist/Leninists do. So you have that. Then you also had people who were motivated by strong ambition, wanting to rise and make a career and name for themselves, and obtain high offices and preferments, who were willing to do what it took to get those positions. I think that's definitely true with Bybee and John Yoo. In the case of Bybee, for instance, we know that he had been working in the White House. He had had the discussion with Alberto [R.] Gonzalez when he was counsel to the president, telling him that he wanted a judgeship, and Gonzalez responded, saying, "You know, we have some work for you, and we'll see. If you can handle that, we'll see about getting you your judgeship." So it was very, very clear that a lifetime appointment on the

senior bench was being dangled in front of him in exchange for his basically overseeing the issuance of the torture memoranda.

Q: You know, I'll bet there are few Americans one could find before 2002 who even knew what the OLC was. Was it consequential before 2002?

Horton: It was important, I would say, within the legal community. Major law firms, for instance, were recruiting a lateral person, and someone on their résumé notes that they worked at the Justice Department, then it would be important to note the part of the Justice Department they worked at. For someone to have been a staff attorney at OLC is very important. That would be viewed as the brain trust of the Justice Department. So that's a plum position.

Q: And it isn't just the brain trust at the Justice Department. Isn't it the brain trust of the executive branch?

Horton: Yes. They are the president's lawyers, effectively. We have some dispute about how to characterize that, but they are characterized that way, and I think that's increasingly correct. Then, I think, we had Rumsfeld, Cheney, and Addington basically putting together the conservative grand design for how to govern in Washington, and they concluded that, with a handful of positions in their control, they would be able to do what they wanted. Those handful of positions were secretary of defense, National Security Council, a couple of other key posts in the White House, and the OLC—OLC being the office within the Justice Department that could give a green light for any sort of activity.

So that was their strategy, and I think they proved it during the Bush-Cheney years.

Q: Now the first prisoners—detainees, as they came to be known—arrived at the newly converted Guantánamo Bay detention facility in January of 2002. Did you note that, at that time? Did you see these pictures of them in their orange jumpsuits and goggles, and that sort of thing?

Horton: Yes, I noted that. I didn't have any particular reaction to it.

Q: Okay. Dick Cheney, Don Rumsfeld and others—General [Richard B.] Myers—were publicly describing these detainees as "the worst of the worst." Myers said they were people who would chew through the hydraulic lines of the planes carrying them to Guantánamo to bring the planes down. Did you hear them saying that? Did you hear them saying such things and react one way or another? Were you paying enough attention to note that?

Horton: Yes, I heard them saying those things, and generally I thought they must know what they were talking about, at the time. I would say, in the coming two years, I began to hear things regularly that made me really doubt whether that was true. And the things I heard that made me doubt it were coming from people who operated in the intelligence community, who basically expressed severe doubts that people who mattered had been apprehended. The view I kept hearing was, "These people might have some connection, but they're likely, if anything, very low-level figures." So they're not the eight hundred Al Qaeda and Taliban leadership figures for whom Guantánamo had been conceived.

Q: You weren't writing your blog at that time, right?

Horton: No.

Q: Can I assume that you weren't going around giving talks on this subject?

Horton: No, I was not.

Q: You weren't focused on this, at that time. I mean, focused in terms of commentary.

Horton: I would say when there was a report in the *Washington Post* about a death at Bagram, followed up by stories that were run in the *New York Times* about the death at Bagram, I then raised, within the Bar Association, some questions about this, and prepared a letter that we sent to Secretary Rumsfeld and his general counsel—who is also a member of the association—asking questions about whether there had been follow-up and proper investigations, and asking about treatment standards—asking them to confirm that traditional U.S. treatment standards were being applied. So that was the first time I became involved.

But even at that point, I was, let's say, concerned about the report of deaths. At that point there had been two deaths.

Q: Two deaths in—?

Horton: —in detention facilities. I think they were both in Bagram.

Q: Not in Gitmo.

Horton: Not at Gitmo—and thinking something just wasn't right about the way this was being handled and was being described. I thought, "It's appropriate at this point for the Bar Association to be publicly raising questions and pressing for proper investigations and accountings." So I raised that, the Bar leadership agreed; it was referred to a committee; the letter was prepared; it was sent out.

Q: On April 9, 2010—in honor of my birthday, I suppose, that day—you wrote a "No Comment" blog, "Did Bush Know Guantánamo Prisoners Were Innocent?" You made reference to some comments in the *Times of London* by Colonel Lawrence [B.] Wilkerson, who was Secretary of State [Colin L.] Powell's chief of staff, at the time we're talking about, in 2002. I'm looking at an affidavit now that Colonel Wilkerson filed on the case of *Hamad v. Bush*, many years later, in 2009. He says in this affidavit, "...it became apparent to me as early as August 2002, and probably earlier to other State Department personnel who were focused on these issues, that many of the prisoners detained at Guantánamo had been taken into custody without regard to whether they were truly enemy combatants, or in fact whether many of them were enemies at all. I soon realized, from my conversations with military colleagues as well as foreign service officers in the field that many of the detainees were, in fact, victims of incompetent battlefield vetting." And he goes on to say that many of them appeared to be innocent of anything. He also

says, "It was also becoming more and more clear that many of the men were innocent, or at a minimum their guilt was impossible to determine let alone prove in any court of law, civilian or military. If there were any evidence, the chain protecting it had been completely ignored."

Now he's recalling a period in 2002. He had information that you didn't have in 2002. I ask you, looking back on it, what should Colonel Wilkerson have done at that time, and his boss, Colin Powell? How is history going to look at that?

Horton: I think there really should have been a process established at Gitmo of weeding out people who didn't belong there and freeing up space, because the concept of Gitmo was to hold leadership figures, from Al Qaeda and the Taliban. I think it was pretty clear that they had very, very few of such people. In fact, I'd go the next step and say people who met that criterion actually weren't being held at Gitmo; they were being held at black sites, by and large. So there was some problem with this whole description, and the people who *were* there were, I would say, at best, third- or fourth-tier people who, in prior conflicts, would not have been held under such circumstances. They might have been held, but usually they would have been held in the territory in which they were captured, and they would be freed up, at some point, certainly at the time the conflict terminated. They might also be used as bargaining chips, for brokering a truce and things of that sort.

I think Wilkerson understood the situation, I think Colin Powell understood the situation. My sense is, at this point, that the FBI [Federal Bureau of Investigation] and the CIA both, also—at least senior personnel in both of these agencies—came to this same conclusion; and, that there

was an approach to the White House that occurred in October of 2002, basically to deliver this same message, that is, that you need to have a filtering program that will remove the small-fry. Jane Mayer has collected information about what happened to that approach, and it's in her book.

Q: *The Dark Side*.

Horton: *The Dark Side*. And as she describes it, an effort was made to speak to Judge Gonzalez, as counsel to the president, about this; and, perhaps, to get further up to the president, Dick Cheney learned about it, and Cheney had David Addington intervene. So that when this delegation went to the White House, they found they were meeting with David Addington, and David Addington said, "It's not going to happen. These people are guilty because the president has determined that they're guilty."

Q: He took over the meeting, in effect.

Horton: Right. That's right. I think that to understand what was really going on here—and Jane, I think, was a little bit too hesitant to point this out, but just pull back and look at the calendar. This was a matter of a few weeks before the midterm elections, in which the Republican Party was about to consolidate its power in Washington by taking control of the Congress as well as state houses all over the country. In fact, in that election campaign, the war and the government's aggressive, proactive acts in defending the country had been played up as *the* principal campaign theme.

Now, imagine the consequences—the political consequences, the electoral consequences—to the Bush administration of acknowledging that they'd made a mistake in Guantánamo. So I think it was that political consideration that led to the mistreatments of the people at Guantánamo. I've talked with Wilkerson about it. I know that's his view, too. He also thinks that it was definitely partisan politics that drove this.

And I think that's continued through the current day. I think you see—Republicans believe that, strategically, they cannot acknowledge that there were mistakes made at Guantánamo. So, instead, they grossly mischaracterize the nature of the people who are there, and they always try to portray them as "the worst of the worst"—people who would cut people's throats in the dead of night if they were put in a supermax prison in the United States. And that's tragic. But I think this is one of the consequences of politicization of what are essentially criminal justice issues.

Q: At that time you were just talking about, in the run-up to the congressional elections in 2002, was that also a time when they were already thinking, in the administration, about attacking Iraq?

Horton: They were always thinking about attacking Iraq. From the first day, we know that Rumsfeld was pushing that as the issue. Of course, he'll go into Afghanistan if he has to, but the whole name of the game here is to go after Iraq. That had been the war that they had in contemplation from the outside. And certainly, at this time in 2002, plans were well underway. The actual invasion occurred in, what? March 2003, right? I remember talking with senior military people right after the election and being told that the orders had been given. "It's going

to happen. It's just a question of fixing the exact date." But the logistical arrangements to carry it off were already in the course of being implemented.

Q: Well, at the time it occurred, in March of 2003, what was your own view of that? You had approved of the incursion into Afghanistan to get back at Al Qaeda. What was your view of what we were doing going into Iraq? Your own view of it.

Horton: I viewed Afghanistan and Iraq as totally different matters. I viewed Afghanistan as completely justified and necessary. In fact, if anything, I was very critical of the way Rumsfeld was dealing with it. I thought he wasn't deploying the level of troops that were necessary for it. I thought the ground presence was not there. He was handing out bales of cash to warlords, which I thought was a disastrous decision that was going to make it much harder to stabilize conditions for the longer haul in Afghanistan. So I thought there were a series of very foolish tactical decisions that had been made, which were motivated largely by a lack of willingness to put too many resources into Afghanistan.

But Iraq—I couldn't see that the justification was there for it. I would just say that I didn't believe the government's claims of the threat coming from Iraq. I would also say that I wasn't completely certain about it. I thought maybe they'll come up with weapons of mass destruction, but it didn't seem to me that a sufficient evidentiary case had been made for it, one that would justify an invasion of this sort.

Q: At that time, as we go into 2003-2004-2005, at what juncture did you decide that there was something more going on at Guantánamo Bay than you had first thought and that you needed to address it yourself?

Horton: Well, it's largely in connection with work I was doing at the New York City Bar Association. We had done letters, we'd gotten responses. There was something really strange and evasive in those responses. I took the view that this should be investigated and written about—the interrogation, the detention standards, and so forth. There was also sort of a drip of things appearing in the press about it—the *New York Times* and the *Washington Post*, principally. Some other publications, as well. But then, also, in 2003 I'm thinking now, I had a visit from a group of JAG [Judge Advocate General] officers who raised questions about interrogation and detention standards. That was at the Association of the Bar. I'm trying to think of the exact circumstances. I remember getting a call saying that there were some people who wanted to talk to us. We were, at this point, working on a report. We were also working on a set of recommendations for the ABA [American Bar Association]. I think that was the immediate connection.

So they wanted to see this issue pressed aggressively before the ABA House of Delegates and an ABA resolution voted on it. They wanted to see something that supported traditional American approaches on detention and adherence to the Geneva Conventions.

Q: By the way, have you ever been to Gitmo?

Horton: No.

Q: Have you ever represented any Gitmo detainees directly?

Horton: No.

Q: Okay. How would you have known what was going on inside there in 2003? At that time—correct me where I go wrong here, as I'm apt to do—the detainees weren't entitled to counsel. Isn't that so?

Horton: At the very beginning, until the Supreme Court ruled in *Hamdan* [*v. Rumsfeld*, 2006].

Q: That's right. In 2004.

Horton: That's right. Well, I would say—you're focused very heavily on Gitmo. I have been to Abu Ghraib, for instance; I've been in Iraq, and I've been in a series of detention facilities in Iraq.

Q: But I'm talking 2003. How would you have known what was going on?

Horton: In 2003, basically it was press accounts. As you know, I come from a military family, and growing up, most of my friends and colleagues were from military families. Most of them, now, are senior military figures. I was hearing a lot of real concern coming out about these detention operations, that something was really wrong, but it wasn't really well defined.

Q: All right. Looking back on it, is there a fair way to characterize what, in fact, was going on in terms of conditions at Guantánamo Bay, and interrogations at Guantánamo Bay, and whether, in fact, the interrogations down there were getting any intelligence of any value?

Horton: I think it became clear in the course of 2003 that the decision had been taken at some very high level in the Pentagon to walk away from the traditional rules on interrogation. These rules had been in place in some form or another—I'd say the rules you had in place at that point were very much like the rules from World War II. They'd been polished and changed. The World War II rules were, in large part, a legacy of the period of the Civil War—the Lieber Code and all that. So this was really something right at the core of American military doctrine, going back to the formation of the modern army. They were very rigorous and they were very rigorously enforced. And, there was the sense, historically, that you had to have this rigorous enforcement or control, because the instant you released it, abuses occurred. Certainly that's the history of World War II, in both theatres.

Q: And Vietnam?

Horton: Vietnam, yes. Vietnam, there was a lot of abuse associated with intelligence interrogation. Even the Korean War, although it's not so well known. There were some horrible instances that occurred there too that resulted in American camp commanders being court martialed at the end.

But I would say that there clearly was a decision at a very high level, at the policy level, to walk back from those restrictions and to get much more aggressive. Now what we didn't know was how all that worked out on paper, and who had made the decision, and what the new standards were.

Q: Well, what was going on inside? In fact, you had generals down at Guantánamo and in Southern Command who were devising a whole litany of extreme measures with regard to the treatment of detainees that were going up to Rumsfeld, that he was signing off on some, willingly, readily, and then he got some pushback from the TJAGs [The Judge Advocate Generals], and he created this working group, again with John Yoo an important player there. They approved various measures and it all came together through General [Michael E.] Dunlavey and General Geoffrey [D.] Miller. As we look back on it, harsh measures were taken. Perhaps the classic example of that is what happened to [Mohammed] al-Qahtani.

Horton: Yes.

Q: And that was during the period we're talking about—2002-2003 into 2004.

Horton: That's right. Well, the only thing I would disagree with there—you're seeing the new techniques being introduced, let's say, at the Southern Command level. I don't think that's correct. I think an effort was made to create this narrative, that is, that authorities in Gitmo and the Southern Command were asking for these techniques. They wanted them. They thought they would be effective and they were requesting approval. In fact—and I think Philippe Sands has

done a book that really demonstrates this quite effectively—the initiative came from the top. It came from Addington, Rumsfeld, people right at the top in the Pentagon, and they sent a team down to Gitmo, basically to tell them, "Ask for these things. This is what you want to do." So, basically, pressure was brought to bear on them to make those requests and then it went back up.

So I would say that the origin of the idea is at the top, and that includes the idea—which ultimately drove things—of using the—what is it called? The pilot training program. I'm trying to think of the acronym for it right now. It was used to prepare pilots for—

Q: SERE [Survival, Evasion, Resistance, and Escape].

Horton: SERE. Exactly. That used a collection of Soviet, Chinese, North Korean, North Vietnamese—

Q: This would have been pretty shocking to your father, right?

Horton: Absolutely shocking. Yes. Not *would* have been—it *was*. He was completely appalled by it when things came out. He couldn't believe that his had happened.

Q: Do you have any sense—again, looking back on it—whether any valuable intelligence was gotten out of these methods?

Horton: I think there have been several efforts to make the case that valuable intelligence was gotten. I don't see that it's been made. I think they have to start off by saying, "Can you say that intelligence only could have been gotten through these methods?" No. I think that clearly is not the case. Then can you say there actually was valuable intelligence gained? There, there have been several efforts, even to say that the location of Osama bin Laden was revealed through the use of these techniques. But none of them stands up to scrutiny. Ali [H.] Soufan has done a great job of refuting all this in fact, if you've read his book and seen him talk about it.

Q: I have to say parenthetically that Ali Soufan wrote a book of certainly more than four hundred pages. I want to say that the word "black," or something, is in the title—

Horton: *Black Banners*.

Q: —*Black Banners*, that has no index.

Horton: And you know why?

Q: How, this day in age, someone can produce a book on a subject like he's writing about—?

Horton: But you know why there's no index.

Q: No, I have no idea.

Horton: There was an index; the CIA refused to allow them to publish it.

Q: The index?

Horton: That's correct.

Q: That's fascinating. Are you sure of that?

Horton: Oh, I'm absolutely sure. I interviewed him about this.

Q: They were allowed to write the book but not publish the index?

Horton: They censored—they withheld the whole index and they wouldn't clear any—. In the text, you see it's blacked out all through, too, but one of the odd things is they would not allow him to publish the index—not just specific entries being blacked out, but the whole thing.

Q: Well. As we sit here today in 2012, if you had to make a determination as to the utility of what was done at Guantánamo Bay in terms of intelligence gathering—and, after all, that's really what the purpose was. Wasn't gathering intelligence supposed to be the purpose here of corralling these people into Guantánamo?

Horton: That was the rationale.

Q: More so than preventing them from going back on the battlefield. They were hardly generals. Was it successful?

Horton: No. In fact, there was not only a failure to gather useful intelligence from all these interviews that were conducted there; it was counter-productive because it turned into a recruitment tool for the enemy. America's name was associating with Guantánamo all around the world. It was condemned by our own allies—British prime minister, French president, German chancellor, Pope, and then, of course, all the others who are less attached to the United States—as something reflecting a moral failing by the country. The image of Guantánamo, as well as Abu Ghraib, was used to recruit people to these terrorist organizations, so it was extremely damaging to the United States. In fact, I think it's going to take generations to overcome the damage that this has done, and what is there on the plus side? I don't think there's anything on the plus side.

Q: Here you are, active in the Bar Association. I assume you knew that these people down at Guantánamo—and, after all, you were dependent upon press coverage, but I assume you knew. Should I assume you knew that these people didn't have any access to lawyers?

Horton: That's right.

Q: Was that important to you and to the people like you who were addressing the subject?

Horton: Well, my view, and I think the view of the Association as well, was that the intelligence focus was something that could be justified for a period, maybe, of six months or something like that, but it couldn't be justified on a rolling basis for many years. Beyond that, if these people were the "worst of the worst" who had been involved in horrible atrocities and misconduct and so forth, it was imperative that they actually be charged and tried. In fact, I think most of us view what happened in World War II as an excellent example, and I mean that at the macro level. Not every detail of procedure that was used with the Tokyo tribunals, or Nuremburg—I think there's a lot that could be criticized or discussed, but I think by and large, both of them are okay. Nuremburg is actually pretty good, and Tokyo passes muster, barely.

Q: Yamashita?

Horton: Yes. But I think the idea that you actually charge people, you put on credible evidence, and you prove to the world that these people were responsible for major crimes, that this has incredible value and benefit to the country, establishing that we're a rule-of-law state. We proceed with trials, we give people an opportunity to defend themselves, but ultimately that we're right in these characterizations, and these people really are criminals, not noble warriors who are out there representing another just cause. I think we have a very strong sense that that was important, and we couldn't understand why the government was not doing that.

Let's say the idea of legal representation is an essential element of that. But I think there has been sort of a mis-framing of that concern in the U.S. media because it winds up, frequently, with "the Bar is concerned about the rights of all these prisoners." No. The major concern—it is concerned

about their rights, but why is it concerned about their rights? Because they should be charged, put on trial, and convicted if they're guilty, and you can only do that credibly in a situation in which they are allowed to defend themselves and they have lawyers. That's the reason why you have to be concerned about these rights. You have to have proceedings, at the end of the day, that are credible and can be believed in the world. I think what happened, what the Bush administration did—it really trashed the reputation of American military justice. Military justice gets criticized all the time. Actually, the American military justice system is not a paragon, but it's pretty good. Certainly far better than most, and certainly meets minimum standards. I think what they did was inflict tremendous damage on that reputation.

Q: Well, at that time in 2003, particularly, and going into 2004, what was the feeling—if it was the feeling that you describe—what should we be doing about it?

Horton: Pushing for prosecutions is one thing. I think, actually, a lot of people at the Bar—what we constantly heard was concerns about lawyers and access to legal counsel and all sorts of petitions and complaints. But I think that was tied to a concern that criminal cases should be open and prosecution should be open; that people should face charges and either be acquitted or convicted based on the evidence. I think what we see, ultimately, is that they didn't want to push that because they didn't have evidence to bring against these people. They have no evidence. They really have no justification, even, for holding most of these people.

Q: Right. But you didn't know that at that time, did you?

Horton: We suspected there was something the matter here—the way they were pushing back, fanatically, with arguments that really didn't make a lot of sense.

Q: Alright.

Ultimately, there came to be a case—well, there were several cases that came to the Supreme Court. *Rasul* [*v. Bush*], *Hamdi* [*v. Rumsfeld*], [*Rumsfeld v.*] *Padilla*, all in 2004. Were you aware of the preparation at all for those cases? Did you know anyone who was involved in pushing those cases before the Supreme Court? And who were those people?

Horton: I had spoken to some of the lawyers who were involved in the cases—ACLU [American Civil Liberties Union] lawyers, CCR [Center for Constitutional Rights], also individual criminal Bar counsel. I had met, heard them speak, heard them discuss these cases, and I would say they were engaging heavily with the organized Bar, trying to get support from the organized Bar. I think, by and large, the attitude of the organized Bar was very sympathetic to them, and I think that is in part because the Bar exists to protect lawyers and ensure that they're able to ethically and properly carry off their jobs. I'd say, at the same time, the Bar was hearing from the prosecutors, the JAGs who were assigned to put together cases, and was hearing a lot of disturbing things from them as well that suggested that the system that was being created was rigged. It didn't meet basic American standards or comply with American traditions.

So the Bar was basically trying to support the lawyers in all the different roles that were involved here, both as prosecutors and as defense counsel.

Q: Did the Bar, especially the New York City Bar, did it file an amicus in *Rasul*, for example, or those other cases?

Horton: I'm almost sure yes. *Hamdan* for sure. I think we filed amicus briefs in a number of these cases, and pretty consistently against the administration. And pretty consistently advocating what I call traditional practices that basically—there should be military justice cases that, basically, every deviation from standards or norms of conduct of military justice are suspect and have to be justified by the administration and criticizing a lot of these deviations as unnecessary and unjustified.

Q: Well, if you didn't know exactly at that time what was happening in terms of any abuse, you certainly knew that these people had not been charged with anything. They were sitting down there, not being charged with anything, and they didn't have access.

Horton: That's correct.

Q: Now before I get to the Supreme Court, why didn't people like yourself and others just pick up the phone and call your congressman and your senator and say, "Look, aren't you taking care of this situation? Aren't you looking into this situation?" What I really mean is, what was the role of Congress between 2001 and 2004?

Horton: Well, let me just say, first of all, people like me and the Bar Association *did* lobby congressmen and senators and didn't get a lot of positive reaction from them. I would say that most of them were too timid to take these issues on. Some were, frankly, hostile. Chuck [Charles E.] Schumer, for instance, would just say, "Don't talk to me about—." I remember having one meeting with him—it was, "I don't even want to talk about these Gitmo issues." Yes. Just doesn't want to hear about it. Senator [Hillary R.] Clinton, she would listen to anything, and she was helpful on some of these issues, ultimately. Some members of the congressional delegation were okay; most of them didn't want to engage on it.

But I think that's right. I think the Bar was quite fixed on how can you engage and push the agenda of legal process forward most effectively? I think there was a sense that Congress was not a path for doing this. Certainly that was the case in, let's say, 2002-2003-2004. After the 2004 elections it opened up a bit, and after the 2006 elections it opened up a lot. I think we had more positive reaction from Congress after November 2006, probably for that two-year period. That was one of the strong periods. But otherwise there was direct engagement with the Department of Defense, with the White House, with the Justice Department. I never in my life experienced such deceit and refusal to have a dialogue as I did in those years, dealing with the Bush administration. It was really unusual. I've been involved, working with the Bar, for a very long time, and normally it's very polite, courteous. They'll sit down and receive your delegation; they'll send a polite response to letters. It was just, "We're not interested in talking to you."

Q: At that time, while these people were sitting at Guantánamo Bay, whatever was going on with them there, the government had created a network of what came to be called black sites—secret prisons—in a part of the world that you're very familiar with out there—

Horton: Right.

Q: —with the complicity—is that fair to say? With the complicity of certain foreign governments. Did you know anything about that? Or when did you catch drift of that?

Horton: I think in the years 2003-2004-2005, I began hearing stories from foreign government officials about these black sites with regularity. In fact, I'll say that I was in Georgia at one point, and the Georgian government official asked me if I wanted to visit their "CIA installation."

[Laughter] I said I didn't think the CIA would want me to visit the CIA installation. Oh, they were very proud of it. I was in Uzbekistan repeatedly, having talks with diplomats. In fact, I remember the British ambassador there who subsequently was fired over his criticism—but I remember even that diplomat—his predecessor had also raised questions about intelligence cooperation in Uzbekistan—the operation of black sites there. I'm trying to think where else.

There was at least one other country where some local official raised this question. It was a European country. Bulgaria. I was in Bulgaria working on a transaction with the government with a very high-level government official, and he told me that that same day Condoleezza Rice, who was then secretary of state, had arrived from Bucharest, in Sophia, and had given a speech all about—. This was this whole offensive she ran when she was going all over Europe about

how it's not the policy of the United States to blah blah blah—basically denying black sites and torture and all that. She had given that speech in Sophia and he tells me, "And you know, right after that public affair, she had a private meeting with our prime minister and our foreign minister, and they signed a protocol about a black site that they were denying existed?" He just started laughing; it was just so ridiculous.

Q: "We don't torture and we don't send to other countries without sufficient guarantees against torture," is what she was saying, and saying it very much in public here, as well.

Horton: That's exactly right, and it was just untrue. I remember—

Q: I'm curious about that. Hold that thought for a second. It *was* untrue.

Horton: It was untrue.

Q: Has her reputation suffered as a consequence of that? She's running around in very high positions now, is she not? She's at Stanford. She's on the Council on Foreign Relations.

Horton: Well, I understand she gets embarrassing questions from students at Stanford whenever she makes a public appearance there. But she is considered to be one of the bright lights of the GOP, right? Maybe too moderate or too liberal for many Republicans today. But, no, that's right. And John [B.] Bellinger [III] is a partner at a big law firm, Arnold & Porter. He has a seat on the Council on Foreign Relations. He's doing stuff. I remember right after the Abu Ghraib incidents

occurred and I was invited to the White House for a meeting with Condoleezza Rice and John Bellinger in which they said, "This is going to be investigated. This is aberrational. It absolutely was not authorized by policy." I had a little discussion with Bellinger on the side in which he said, "Well, you'll see, this is just some rotten apples who are doing this." Of course, I later discovered that, of course, he was lying to me point blank. They were both lying. Moreover, Bellinger and Condoleezza Rice, being the key people at the top of the National Security Council, had been in the chain of approval of everything and they had known about everything.

So, yes. On the other hand, diplomacy is the art of lying in the interest of one's country, as someone once said. Who was that? Ambrose Bierce, I guess. Right?

Q: Going back, they created these black sites and, as we now know of course, the so-called, what later came to be called "high-value detainees" that they did sweep up were there. They were not at Gitmo.

Horton: That's right.

Q: There's a strange kind of dichotomy here. The worst of the worst, arguably, are in these black sites where they're being—is it fair to say?—pretty roughed up.

Horton: Treated very abusively. I would say many of them were tortured. There's no doubt about that. We have people who were captured as a result of mistaken identity, like Khalid al-Masri, this German greengrocer, who was put in a black site and shot up. I interviewed the criminal

investigators in Munich who were looking at his case and he, of course, claimed that he had been tortured, he had been drugged, and so on, and one of the criminal investigators told me that, "Yes, we were able to completely corroborate his statements about this."

I said, "Corroborate how?"

He said, "Oh, physical evidence." Actually, they trimmed all of his nails and everything, trying to remove it, but hair and hair follicles—. So they were able, on the basis of this, to say what drugs he was given and when. It was clearly a sustained regimen over many weeks.

Q: Well, someone like Binyam Mohamed. Can there be any doubt what was done to him in Morocco, for example—?

Horton: —was torture.

Q: Physical evidence sustains it.

Horton: Absolutely.

Q: So not only was it the black sites where this roughing up was going on. More so, more than what happened to most people at Guantánamo, people were being rendered to countries like Morocco, Egypt, and Jordan and what have you for very rough treatment. I think the record demonstrates.

Horton: Yes.

Q: Now Guantánamo Bay has become, as you said earlier, the poster child or whatever that phrase is for what the United States did wrong to these people in the War on Terror. But, I daresay, the black sites and the renditions are known to relatively few people. Even today, it's Guantánamo Bay, Guantánamo Bay. People who want to shout against the United States, they're shouting, "Look what you did at Guantánamo Bay." But they're off on a little bit.

Horton: There are several reasons for that. One is, you're looking at sixteen people who were held. It was a very, very small number of people who were held at these black sites—a lot of them for fairly limited periods of time. Most of them really were serious terrorists, so you don't have quite the sympathy factor and so forth. Another is that the CIA has exercised tremendous pressure on American media not to report and talk about these things. They haven't completely squelched it, but they've gotten some real limitation in the amount of coverage. I give high marks to the *Washington Post*, really, for, against a torrent of CIA pressure, running a series of stories. On the other hand, I was in the group of people who identified the black site in Lithuania, and I gave the information about this to ABC News and they ultimately ran the story. But they came back and told me, "You just wouldn't believe the storm we got from the CIA about this. "This is against the national interest! You shouldn't be running this! Blah, blah, blah, blah, blah." I also was with a group of reporters who figured out the black site in Romania and I can't think of anybody in the U.S. who finally ran that story. I don't think we got a U.S. publication. It was all

over the news in Germany, for instance, and Italy and other countries. I don't think a major U.S. publication ever ran that story about what happened in Romania.

So that's part of the story. I'm going to Warsaw at the end of next week where I'm going to meet with people who are looking into the Polish black site situation. And, by the way, that's interesting because everybody in Poland knows about the black site. It's been all over the major newspapers. It's been the subject of their equivalent of *60 Minutes*. It's a big political issue that has very badly tarnished the reputation of the government that was in place at the time this occurred, and there's not really a big difference in the Polish political stage about it. It's basically, "What were they thinking to have done this?" Basically to turn over an East German intelligence training camp—the Stasi camp is where they were holding those people.

Q: Oh, really?

Horton: So that got a lot of questioning like, "How could the Americans have done something like this? And how could our government have allowed it?" And, of course, the head of Polish intelligence at the time has been indicted on this, and there are probably going to be some more people indicted. The prosecutor has said that the indictable people include the prime minister and the president. The only reason they're not indicted is that Polish law provides that the prosecutors cannot indict a president or prime minister, former president or former prime minister; it's only the Sejm [Polish parliament]. It has to vote that. It's viewed as a political act.

So it's a big issue, and people there are focused on it. It's not an issue that plays very well to the U.S., and Poland may be the most pro-American country in Europe. That's my sort of raw sense. I have data on it. But I think feelings toward the United States there are very strong and very positive. It hasn't affected that basic feeling of affinity toward the United States, but it is viewed as a horrible lapse of judgment both for the U.S. and for the Polish government.

Q: Do you know why these so-called high-value detainees from the black sites were transferred to Guantánamo in 2006, and is it clear, absolutely, to you, that the black sites are gone?

Horton: Yes, those are really good questions. I've looked into both of those questions. I'm not sure I know exactly the why. What I know is in the summer and fall of 2006, there was quite a squabble inside the Bush administration about the black sites. Condoleezza Rice did want them shut down. I'm pretty clear on that. But the leadership of the CIA wanted them shut down, and the second tier of the CIA also wanted them to shut down, and what's the rationale for that? I think you have different reasonings coming together. The sense within the CIA was—and some of this came out later—there were huge scandals, corruption scandals, attached to the black sites. Dusty [Kyle D.] Foggo—if you remember that whole case—he had been the mastermind responsible for constructing them, and he'd also been lining his pockets with the secret funds for this. He's in prison [in Pine Knot, Kentucky] right now.

So there was that. There was also sort of a sense that the "CIA is not in the business of running prisons. We don't have people who are trained to do it. We can hold people for a short, sustained period, but this long, indefinite, rolling thing—that's beyond our job description. We don't do it

well, and it's only going to create problems for us." That was sort of their sense. I think the Condoleezza Rice view was, "Well, this actually *is* a big violation of international law, and it's going to get us in a lot of trouble. We ought to shut it down and take credit for shutting it down." I think all that sort of came together with Bush then taking the decision to do it—to shut it down.

Q: And to send them to Guantánamo Bay?

Horton: Right.

Q: Because it was secure?

Horton: What are his alternatives? He's not going to release them, obviously. He's not going to take them onto the territory of the United States because this had become sort of a partisan political propaganda point already at that point. The risk—"We're going to keep them safe by keeping them—." The other arrangement that was available that had been used historically by the U.S. was a sort of quasi-custodial relation with cooperating states. Because we had black sites but we also had these prisons which were not really black sites where you could say, nominally, people were being held by the government of X, but really it was under arrangements where the U.S. controlled it. So there is a prison located in the suburbs of Rabat, for instance, operated by Direction de la Surveillance du Territoire under the interior ministry, where there was a wing that was constructed with CIA funds where people had been held. There were similar, collaborative arrangements that existed in Egypt, Jordan, Thailand, and other places.

Q: You mean that are not secret.

Horton: No, they're secret.

Q: What was the difference between those and the black sites?

Horton: Well, the prisons are not secret, but the special CIA relationship is secret. But those are the people—the CIA would say, "This person is not in our custody. They're in the custody of, in this case, Morocco, the Ministry of the Interior, in this prison." Insiders will tell you that that's not really true. I'm just saying that that was an alternative, and that was not really a terribly satisfactory alternative, because I think the U.S. wanted to have direct control over these people and potentially, even, to charge some of them. So I think that's the reason for sending them to Guantánamo.

[END OF SESSION]

VJD

Session Two

Interviewee: Scott Horton

Location: New York, NY

Interviewer: Myron A. Farber

Date: November 21, 2012

Q: This is Myron Farber, continuing with Scott Horton in session two.

Let me turn to the Supreme Court. They voted in *Rasul* that these folks down in Guantánamo had right of access to courts. Isn't that correct?

Horton: That's correct.

Q: Let me stick with that, rather than where Americans were involved, like *Hamdi*, *Padilla*, and what have you. That is what led to them getting lawyers. Now looking back on it, can you identify a few of the clearly important defense lawyers who have carried the day for the detainees?

Horton: Gee, I'd have to think about that. I don't think I could do it off the top of my head.

Q: Okay. But the Bar Association didn't say, "Well, okay, look. Now they're entitled to lawyers. They may even be entitled to some sort of habeas relief. We should send a pack of lawyers down there."

Horton: No, the Bar Association doesn't do that. The Bar Association is concerned about a level playing field—lawyers being able to fulfill their roles ethically and properly. And I think one of the concerns right away was that there wasn't a level playing field that was created. So if you look at the resource base, the prosecution had a much stronger resource base than the defense had, and that you needed to find a way to level that and be sure that a meaningful defense could be raised. So I think one thing the Bar did was facilitate law firms working with the military lawyers. You say a few defense lawyers. Largely, I'd say you have detailed JAG counsel, and the detailed JAG counsel were backed up by civilian lawyers. You had criminal defense lawyers, but then you also had law firms setting up clinics, and you also had law schools doing this. We had law schools all around the country that set up clinics with bright young students who did research. I think one thing we see right now is, the government has enormous resources—I mean, the CIA and all the investigators and everything else—but actually, the volunteer services of law students and lawyers around the country were absolutely a match for them. In fact, I would say more than a match, generally.

Q: Have you any sense of how important the Center for Constitutional Rights was in all of this?

Horton: I would think very important. I would certainly list it as one of the two or three key players, and I would say CCR was particularly significant because they had a strategic vision all the way through about what to do and how to pursue this. Also, they had historically been involved in so much litigation that actually turned out to be relevant here. They had a key role dealing with the Haitian internees in Gitmo previously, and they brought challenges about that. They had been heavily involved in cases involving the disappeared in Latin America previously,

too. So they were in a very, very good position. I would say ACLU was probably the second group, and then we had human rights groups that would come in on certain key policy questions, but not really wading into the cases.

Q: So lawyers came into the picture and the government pushed back with the Detainee Treatment Act of 2005. That went up to the Supreme Court, with a very active legal community, and they ruled in *Hamdan*. First of all, are you surprised by the Supreme Court's majority rulings in *Rasul* and *Hamdan*? And how important was *Hamdan*?

Horton: No, I was not surprised by them. In fact, I think they turned out pretty much where we thought they would be. In fact, I'd say, working with the Association of the Bar, we wrote two reports in which we looked at the major issues and we looked at all the intelligence interrogation methods, issues, and the vast amount of international litigation and commentary about this. We all came to the view that it's unlikely that a court is going to wade too aggressively into this. They're going to say that the administration—the executive has an awful lot of discretion on nailing down these guidelines; no court is going to step in and say, "No, these are the intelligence interrogation rules you have to use." That's not really a terribly judicial function. But then we also thought, you know, Common Article 3 of the Geneva Conventions really does provide this humanitarian baseline that can't be denied. This is the point where the government is making arguments that just aren't credible.

Q: Well, they say they're not entitled to this kind of protection. Isn't that what the government essentially was saying?

Horton: And that's clearly wrong. You go back and you look at the history of Common Article 3, the preparatory works from the 1949 Geneva Conventions, and the subsequent works—the arguments the government was making were just not correct. I think the New York City Bar Association felt particularly strong about this because the New York City Bar Association is, to a certain measure, the guardian of these documents. New York City Bar lawyers played key roles in the 1949 Geneva Conventions and in a lot of the human rights instruments. That was some of our most prominent members. So I think the Association has this long history of engagement with these things, and we were looking at the government's arguments and just thinking, "This is ridiculous." I think many times we would look at Justice Department briefs and just expressed shock that these words were issued on the authority of the U.S. Justice Department. They were ridiculous.

So I think there was a lot of really strong pushback coming from the Bar, and I would say the New York City Bar, as the largest private bar, completely private bar—other than the ABA itself—is very, very influential within the Bar nationally, and it really took the lead in shepherding these issues through the ABA as well. I think the New York City Bar's voice was pretty much determinative of what the ABA did in all these issues at the national level.

But there's no surprise with what the Supreme Court did. If anything, the Supreme Court did what we thought they would do, and the divisions were pretty much along the lines of what we expected. I would say, just consistently, if there was a hero for us on the court, it was John Paul Stevens, who is a man who consistently demonstrated a comprehensive understanding of

international humanitarian law and, more importantly, of military tradition and military doctrine that the others would try to manipulate for some political purpose—especially [Antonin G.] Scalia, who, I think, was just outrageous in this regard. But John Paul Stevens really seemed to understand what this tradition was and what it meant, and he articulated it very effectively. He was our hero. No doubt about that.

Q: Well, how about the habeas stripping provisions that the government was advancing? Was it believable?

Horton: Outrageous. Completely outrageous. My own views were that we lawyers basically want to take everything to court and resolve everything in court. The government is correct to a certain extent that in a wartime detention scenario, with military detentions, you can't have that level of judicial oversight and scrutiny; and you can't take everything to court. The unfortunate thing is that the government had departed so far from traditional international norms and American traditions that that was the only way of addressing the situation.

Q: Well, the Supreme Court had been traditionally deferring to the executive branch, had it not? In matters of national security?

Horton: Yes. You had cases during the Civil War, especially at the beginning of the Civil War, where it would give the government a bloody nose once or twice. Even during World War II you had a case where they irked [Franklin D.] Roosevelt rather severely. But by and large, right. Deference. Here, every time they took a case on, it was to give the government a bloody nose.

And moreover, in the *Hamdan* decision, they basically handed down a decision which suggested, very strongly, that the conduct of the U.S. government might have been criminal conduct. That's explicitly set out in a footnote. A friend of mine was having lunch with Jim [William J.] Haynes [II] the day the decision came down and she describes to me—he takes a phone call, he hears about it, and they read him that footnote. And I was told that Jim Haynes turned white as a sheet and got up and left immediately.

So I think they recognized that that ruling created enormous personal criminal exposure for officials of the U.S. government if you applied command-responsibility norms, and norms that the U.S. had, in fact, advocated at the end of World War II and other conflicts.

Q: Well, they actually had legislation, the government, to protect people who had been operating the black sites and doing other things.

Horton: That's correct. The shield legislation.

Q: They were worried.

Horton: That's right. Of course, the U.S. took the position when Serbia did that during the Balkans war that that legislation was further evidence of criminal conduct that may have inculpated the legislatures. So if that were true for Serbia, it might be true for the U.S. Congress as well. [Laughter]

Q: In any event, Bush struck back with the Military Commissions Act of 2006. That led to *Boumediene* [*v. Bush*, 2008], which Stevens, having written himself the majority opinion in *Rasul* and *Hamdan*, assigned to [Anthony M.] Kennedy. It's an interesting history, actually, where Stevens and Kennedy had originally decided not to grant cert in *Boumediene*, but they did so after they got—this goes back to what you were saying about military people—a petition, a re-petition—that included an affidavit from a Lieutenant Colonel Stephen Abraham about how these CSRTs [Combatant Status Review Tribunals], these procedures down there, were not working.

Horton: I'd say a huge embarrassment, frankly. What we subsequently learned about the operation of those proceedings—they were a farce and an embarrassment. I've talked to dozens and dozens of senior JAGs about them; you're hard-pressed to find anybody speaking personally and off the record who will say anything positive either about the CSRTs or the military commissions. Mo [Morris D.] Davis, who's my good friend and who was the first chief prosecutor, is absolutely livid about them and continues to be.

Q: One of the greatest lines coming out of the whole Guantánamo history was uttered by Colonel Davis when he said—a great line. I say this as a journalist; I'm not agreeing with it or disagreeing with it—that these people were brought to Gitmo, with regard to this business about chewing through hydraulic lines—"They couldn't chew through a chicken breast." [Laughter]

Horton: That's absolutely right.

Q: In any event, they've got these military commission things set up, with congressional approval this time, which they had to do, they were told, and yet it goes up to *Boumediene*, where Kennedy, writing for the majority, says, "There's a constitutional right to habeas here." Isn't that right?

Horton: Right.

Q: Was that important? Was it important to underline it with the Constitution?

Horton: I think so. The principle of habeas corpus is pretty simple, and that is that the government can be forced to account for its conduct through legal proceedings. It does underlie the Constitution because it makes the Constitution operative. It makes the rights meaningful that are granted. If you take it away, you have many, many circumstances in which there would be no way to bring it forward. I work a lot in civil law countries around the world and one thing we see in many of those countries, now—and those countries had, historically, built high walls to litigation that prevented individual citizen challenges to government action. That's really the civil law tradition all around the world. That, by the way, is what's going on now with our conservative jurisprudence and our Congress, is building these immunities. What we see going on now in civil law countries around the world is adopting habeas corpus, basically recognizing that they went too far; that there basically has to be a vehicle for the vindication of right. You can't take that away.

Q: All right. Well, some people would have thought that was self-evident, going back some time.

In any event, here we've had how many cases? In all the years, 779 people or so passed through Guantánamo. There are still 166 there. How many prosecutions? There have been what?

Horton: Sixteen.

Q: Actual prosecutions.

Horton: Announced. Not concluded prosecutions. There are fewer that have been concluded. So it's a handful, a tiny, tiny handful. If we had two dozen—you hear people say thirty or forty. I think if we had two dozen at the end of the day, that would be surprising. Then again, if you look at prior wars, in fact, it's not every single case that gets prosecuted, it's exemplary cases. So two dozen is what you need.

Q: When I say 779 that have passed through there, the Bush administration itself—

Horton: —released most of them.

Q: —released more than five hundred of them. What should one conclude from that?

Horton: That when they said "the worst of the worst," they knew that was not true.

Q: And they got them off their hands. Is that it?

Horton: That's exactly right. So I think what happened—if you look at the last couple years of the Bush administration, especially after September 2006, what you're seeing is the administration at the highest echelons realize that there have been horrible mistakes made at Guantánamo and acting to correct that, while never admitting that there were mistakes. So it's all done very, very silently, but, in fact, from what I can see, you have the decisions to release some very large numbers. You have negotiations for many, many more. So I think when [Barack H.] Obama came in, he was set up to release another couple hundred. You also had changes in the detention practices and the interrogation practices there, ameliorating them. So I think you had a realization—and I think you have to give Bush credit for this—you have a realization within the Bush administration at the highest level, including President Bush, that some pretty serious mistakes had been made. This was not a presidency that ever admitted its mistakes, so it didn't admit them but it did correct them. Who gets credit for this? Probably Condoleezza Rice does get credit for this, to some extent. John Bellinger, a handful of other people—Will [William H.] Taft [IV], who I think pushed that agenda very, very aggressively. But I think it's also, to a large extent, attributable to the fall in power and authority of Cheney. I think in the last two years of the Bush administration, he was relatively less influential.

Q: I must say, parenthetically, that Will Taft—who was the legal advisor at the State Department in the first Bush administration [George H.W. Bush]—was another one who had some reason, I think, to know that the people at Guantánamo were not who they were cooked up to be and that the basis for holding them, as time went on, was pretty thin. He fought against some of the

procedures that the Bush administration tried in 2002, as did his boss, Powell. But they then capitulated.

Horton: They didn't resign. No. In fact, I think if you look at the paper trail, Taft and Powell look pretty good here. But what's disappointing is their failure to underline the positions they took—

Q: That's right.

Horton: —by threatening resignation.

Q: Right, and when Gonzalez and others were arguing that this was a new paradigm and that these were Al Qaeda and Taliban people who were not entitled to Geneva protections, for example, Taft and others disagreed with that, but they didn't tell you, Mr. American Public or Miss American Public, that this is a serious matter that we disagree on and what have you.

But let me ask you, among these people who languished at Guantánamo for years, some of them took their own lives. How many of them? Do you know?

Horton: I think we have six people who died at Gitmo. One of the questions is, were these suicides or not?

Q: That's right. And in 2010, you received—it must have been to your surprise—the National Book Award—

Horton: The Magazine Award.

Q: Excuse me. The National Magazine Award for Reporting, for an article—not a blog, an article in *Harper's*—"The Guantánamo 'Suicides': A Camp Delta sergeant blows the whistle." This had to do with a very highly-publicized case of three prisoners who died on the night of June 29, 2006 at Guantánamo.

Now what prompted you to write that article? Do you believe, even today, that they did not, as you maintained, as you raised the issue in your article, that there's a very good case that they did not commit suicide but met their deaths at other hands and for other reasons? Do you still believe that? And what, if anything, has ever been done about it?

Horton: I'd say that I'm absolutely convinced that the official narrative of how they died is not correct.

Q: All in one night.

Horton: All in one night, all at the same time, in separate cells, and with the description of how they fashioned, using their laundry—all these ligatures and bindings and everything else. In fact, I'll say I've interviewed some prominent medical examiners who read the story and just shake their head and say, "Not plausible that anyone could have died this way." So I think that is absolutely not true. Then, I think one has to ask, "So why has this been put together and put out

in such an aggressive way by the U.S. government? And why has there been no really meaningful independent investigation of it?"

Why did I do this? Based on being approached by one of the camp guards that evening who gave me a description of what he witnessed. I did interview a number of his colleagues and wrote the article. What they observed are things that cannot be reconciled with the official narrative. These are people who had every reason to sign onboard with the official view. It's only harmful for them not to. One thing that is very, very interesting is that after the story came out, I really expected that these people—most of whom were still on active duty—would be subject to immediate recriminations. What I discovered was that they were being protected at very high levels within the military from any recriminatory or retaliatory acts. Which is interesting.

Q: Why? Why would they—?

Horton: Because I think there's a recognition at the high levels of the military that they're recounting honestly what they saw. It's not anything that is intended to make trouble, unduly, for the government. And I get a very, very strong sense that yes, there is a very, very troubling story here which it is still the official posture of Washington to cover up.

Q: Well, it's still the official policy of the Justice Department to oppose any effort by the families of these three people to have the matter examined further. Isn't that true?

Horton: That's correct.

Q: Why? If they're confident that their original story that these were three people who, as an act of asymmetric warfare, decided to kill themselves in protest at one time, why would they be interested in fighting it at this late date?

Horton: I think it has to do with national security interests of the United States. When I started writing this piece and I was trying to interview some key figures at NCIS [Naval Criminal Investigative Service] who had been involved in the investigation, I went to the Pentagon, at a very high level—an assistant-secretary level—and I was told, "We will guarantee you the right to go in and conduct an interview." I then contacted NCIS, and I was told, "No way."

And I said, "Well, I have this commitment from the Office of the Secretary of Defense that you will be available for interviews."

"Well, we'll submit to interviews by email. You submit a question, we'll submit the answers within a week."

I said, "Would you, conducting an investigation, agree that someone could answer your questions by email?" Never. That's really not acceptable.

But, to the end, they refused to do it. I thought that was absolutely amazing. I then got a call from one of the people at NCIS who invited me to look very closely at one of the web pages of the organization. He said, "Look at the mission statement." I looked at it and it said, "The mission of

NCIS is to protect the national security interests of the United States, to insure the security of the country, and to investigate criminal matters." He said, "You should note the order of those things."

So I said, "Criminal investigations is third, out of three things."

"That's right."

I said, "You're telling me that this was not driven by traditional criminal investigation?"

He said, "That's right."

I said, "Well, will you say this in an interview?"

"No."

Q: But why? Why would they have chosen to kill themselves in a coordinated fashion like that, at that time? From the government's point of view, that's what they did.

Horton: Yes. The official narrative is that this was an attack on the United States; that they committed suicide as a way of carrying forward their jihad. Of course, what I discovered in investigating this is that all three of them had been put on a list of people to be released, and all

three of them believed they were going to be released. [Unclear] So this whole idea of them being depressed and suicidal and so on—

Q: At least one was scheduled to be released within ninety days.

Horton: That's correct. So it just doesn't make any sense that they would do that.

Q: Well, alternatively—lay it bare—what do you think happened to them then?

Horton: To me, the most credible tidbit of evidence has to do with Shaker Aamer, because he told his lawyers that that same night he was hauled in and given this incredibly rough and abusive interrogation treatment where he was hooded and had his hands bound to a chair. He describes the entire situation, describes believing that he was going to die. He describes having had rags stuffed into his mouth to gag him, and he says he was interrogated about the hunger strike that was going on and his role in it. That's it. Then it's just amazing that it's the same night that those three men die. Shaker Aamer does not know where he was when this occurred. He, by the way, is still in Guantánamo, the last person of concern to the British who's held there. The U.S. has refused to allow him to be released. The U.S. has also only very rarely allowed him access to counsel or third persons to ask him any questions. So he's being held, effectively, in isolation.

But it's the same night that these three men die, and they all die with something stuffed down their throats. They all clearly had had their hands bound at some point; their markings reflect

that. So it looks like the treatment that Shaker Aamer describes. So my suspicion is that they were subjected to exactly the same treatment, probably by the same team or by a similar team that Shaker Aamer was—they had also all been involved with Shaker Aamer in the hunger strike—and something went wrong in the course of it. Probably, due to misadministration of the gags, they suffocated. That would be my suspicion.

Q: Well, if the troops were going to kill these three, does it make sense to kill them in the same manner?

Horton: No. I don't think it's likely that this was an intentional homicide. I think it's likely that it was some misadministration of techniques that caused their deaths.

Q: And they were being "dry-boarded?" Is that the term?

Horton: That's a possibility, too.

Q: You've got these two sides—the argument that you were saying deserves serious attention here. You've got the government's position. What will ever happen to it now?

Horton: There may be some more information about to come out about this, but I can't say right now. I can say that I know of the existence of further documents about what happened, which will very strongly discredit the official government account of what happened.

Q: As we sit here today, it's not a dead letter.

Horton: No.

Q: Good.

Horton: And I'll tell you, the big problem has been—there are individuals who know pretty much what happened. These individuals have been threatened very aggressively by the government with forfeiture of pensions and potential prosecution for revealing state secrets if they talk about it. That's been the big holdup for quite some time. We really thought with Obama that that aspect would come to an end, but it has not. I think Obama has made the decision to keep the lid on the dirty, dark secrets of those years.

Q: I'm going to come to that. Let me jump around a little bit here on various subjects relating to this matter.

Some of these detainees down at Guantánamo have been cleared for release, many of them Yemenis, but the government has decided not to send them back to Yemen and, apparently, no one else would take them or something. So they form a certain group. There may be as many as eighty of them or something of the 166 left.

Horton: It's half of the total.

Q: Half of the total. There is another group of people down there who are going to be tried. I'm not talking about the high-value detainees right now. There is another group of people who there is no plan to try them. How does that sit with you? There are no plans to release them and there are no plans to try them.

Horton: It's not an acceptable arrangement. I would say the Yemenis—it's very, very hard for me to justify why the Yemenis are still being held. They should be set free. They should be returned to Yemen. The concern is that Yemen is such a failed state, there's no effective control over them there. I just don't know. This is like the Department of Pre-Crime. It's assuming it's likely that they will be recidivists when there is no evidence of them having committed crimes in the first place. It's a reversal of all natural presumptions. And I would say, in prior wars, the United States has routinely released people who come back to the battlefield and fought, even while the war is still going on. We're talking about a situation now where the war as traditionally defined is over. That's what the [Judicial Committee of the] House of Lords, in fact, ruled recently, and I think correctly. So I just don't see how that's justified.

Now we come to a more difficult case with the remaining group, who the government says it doesn't have the evidence to charge, but it's convinced that they're guilty. Therefore, it has to hold them "for security reasons." It's hard to deal with this sort of posture in the abstract. You have to deal with it on the basis of actual cases and actual facts. The one thing I would say there is, two or three times I have heard people from the Justice Department and the Department of Defense make this argument about a case; the case has wound its way through; and I then discover that they never had any valid evidence on this person. They had a bunch of rumors and

suspicious that were proved not true—that were effectively refuted. And by not bringing on charges, you then don't give the person the ability to refute.

So this is, I think, the core problem here, what I would call the fetishization of intelligence.

Harold [R.] Tyler [Jr.], who was my mentor, who was deputy attorney general for a long time, told me that one of the silliest things he saw consistently in his tenure at the Justice Department was this fetishization of intelligence. Because something is stamped "Top Secret," or "Cosmic Top Secret," or whatever—"Compartmentalized Top Secret"—that it's viewed as necessarily true. The highest kind of intelligence has to be right. He said that he once thought they really should affix to this a little stamp underneath that says, "Yes, Top Secret, Classified, National Intelligence," but then underneath, "Uncorroborated Gossip." Because that's what it frequently is.

Q: I'm going to take something out of order here. About a month ago—let me do this two ways. One is, the D.C. Circuit, which hears the appeals of the habeas cases involving the Guantánamo detainees—and, by the way, if I understand it correctly, of those fifty-some cases decided at the district court level in Washington, of the habeas petitions, most of those detainees have won their cases, but not one of them has ever been released as a result of that action. Is that correct?

Horton: I think that's correct. And, basically, the Court of Appeals is standing in their way.

Q: All right. Now the D.C. Circuit Court of Appeals, D.C. Circuit, has adopted a rule—if that's the correct word, not being a lawyer—they adopted a rule that goes to the presumption of accuracy of government documents. This is fairly recent. It may have been in the *Latif* [v.

Obama] case. But a presumption of accuracy of a government document that is submitted, showing a detainee is guilty, did this or that action back when he was taken in.

Horton: That's *Latif*.

Q: That is *Latif*.

Horton: Yes.

Q: All right. Is that a consequential thing? It goes to what you were saying a moment ago about the fetishization of intelligence; that if it's on a piece of paper and stamped "Classified," it must be right.

Horton: That's right. It's one of the most ridiculous opinions I've ever seen come out of a court of appeals. And it basically shows a lack of familiarity with the intelligence-gathering process and the value of classified information. Information may be classified because of its source and because of a need to protect means and persons who are providing it, and that can be entirely legitimate, but it's not correct to assume that, because of that, the information is correct. A person who is entitled to protection may very well be providing information to serve his own purposes. So a warlord in Afghanistan may be having a feud with another warlord in Afghanistan, as they do—in fact, that's almost all they do—and, therefore, may be providing "super-secret" information about his adversary, which is utter bullshit, and is being provided for his own purposes. He may request and insist upon secrecy for that information. Then we may have

analysts who look at it and say, "Well, the guy seems reasonable to us. He's been correct on a lot of things, so we think this is reliable." But, in fact, it's completely and utterly wrong. Our legal system is designed to provide for confrontation to get at the truth, where lies will be disclosed as lies; or, at least the countervailing evidence can be mustered and measured against them.

So I think what the D.C. Circuit is doing is basically establishing a presumption of guilt in place of a presumption of innocence. It's utter nonsense. And I think what's really going on in the background here is highly ideological, and partisan, and political in nature. The Bush administration did this. "The Bush administration appointed us to the bench. Releasing these people is an embarrassment and a punch in the eye to the Bush administration; therefore, we're not going to allow that to happen." There are a couple of judges on the D.C. Circuit who are pretty close to having said that, openly. They betrayed their partisan political interests, as underlying this, but I think it's horrible jurisprudence and it is being noted around the world by people who are shocked and appalled by it.

Q: I must say though, that judges like circuit judges down in D.C., like [A.] Raymond Randolph and Janice Rogers Brown, and even Larry [Laurence H.] Silberman—

Horton: Especially Larry Silberman.

Q: Okay—they have wrapped the Supreme Court itself in the aftermath of *Boumediene* to the point where Judge [David S.] Tatel was saying, "There's probably nothing left, or there's very little left of *Boumediene*." But I must say that Raymond Randolph, in a speech at the Heritage

Foundation in 2010, he compared the Supreme Court justices who upheld *Boumediene* to Tom and Daisy Buchanan in *The Great Gatsby*, who are "careless people who smash things up and let others pick up the mess." In a way, this is kind of—

Horton: Arrogant and outrageous, frankly.

Q: It's kind of surprising.

Horton: But I'll tell you, just going back to—

Q: Why doesn't the Supreme Court take *Latif* and straighten them out?

Horton: They should have. I think that's a horrible disappointment, and I think the answer has to turn, ultimately, on Kennedy. They didn't take it on because there's not a majority to take an action against it. So I think Kennedy is probably the sticking point. But you look at the judges you just named. They're all marked by their partisan political zeal and fervor. The idea that a justice of the Supreme Court goes and addresses the Heritage Foundation, considering what it is—

Q: A circuit judge. A circuit judge.

Horton: A circuit judge. That's right. Was that Randolph who did that?

Q: Yes, Randolph.

Horton: Two of my good friends are analysts at the Heritage Foundation and they both told me candidly that it's become partisan political hackdom. That's all it is. The idea of it being a brain trust or an analytical think tank, those are past. It's hackery. That's what it engages in right now. So for a circuit judge to go and speak before them is already pretty suspicious.

Larry Silberman—Tyler worked very, very closely with Larry Silberman. He told me that Silberman was the least judicious judge he had ever met in his life; that when he would sit with him, he had never met a man who had so much passion for partisan political manipulation and tactical considerations. That's all he wanted to do, and all he wanted to think about. That's the character of judges we have now in a controlling position in the D.C. Circuit.

Q: Well, *Latif* was a really interesting case in the sense that the District Judge Henry [H.] Kennedy [Jr.] had found that [Adnan] Latif was putting forth a very credible story about how he had been injured in Afghanistan, and it had nothing to do with the Taliban or Al Qaeda or anything of that sort. Some people are making the argument that the Supreme Court is finished with Guantánamo and that's why it didn't take *Latif*. They've had it with Guantánamo.

Horton: But there is this argument that Guantánamo is about 160 people; why should so much judicial resources be devoted to this? It's just too small. It's too insignificant. But I think what's going on is, it's basically conservative pushback. I think there is a clear partisan political undercurrent to it; that these decisions are embarrassing to the Republican Party.

Q: All right. On another matter. In 2008, you wrote a "No Comment" piece called "Verdict on *Hamdan*." In this piece—which is not the focus of the piece—but you say, "The military commissions exist to try war crimes. Conspiracy is a war crime." Then, in the next paragraph, you say, "Notwithstanding vacuous congressional pronouncements, 'material support' is not a war crime." Bear that in mind because this matter came up just recently, in the D.C. Circuit of all places, and the D.C. Circuit ruled that [Salim] Hamdan—again, he seems to be—Hamdan is now a taxi driver in Yemen or something—that Hamdan, who was released, of course—that Hamdan is back, and this very conservative D.C. Circuit, including some very conservative judges on the conservative D.C. Circuit, are saying that the Hamdan conviction on material support, which he was convicted of before he was sent back, has to be overturned—it's all history now—but has to be overturned because material support was not a war crime at the time that Hamdan was taken into custody.

Horton: Which is completely clear. [Cross talk]

Q: It's interesting because in *Hamdan*, Justice Stevens was unhappy that he couldn't get a majority on one point, which was that conspiracy was not a war crime. But you say in "Verdict on *Hamdan*," in 2008, you call conspiracy a war crime. Straighten this out for me. And you say material support is not a war crime. What is going on here? Who's right here? Judge Horton or these judges down in Washington? Or Justice Stevens? What is happening in this *Hamdan* case? It's overturned because material support is not a war crime. Do you agree with that?

Horton: Yes, absolutely, because material support runs against the core premise of international humanitarian law; and that is that you have a principle of distinction, and you protect civilians. Material support is basically bringing in anyone who's giving medical support or food and water or anything to a combatant. So it's undermining the core distinction between combatants and noncombatants. Conspiracy is—I mean, you have to have conspiracy to do a crime, but it is a way of charging a crime, and it has been viewed as such under both the common law and civil law systems. So it's a joint criminal enterprise in the civil-law system; it's conspiracy in our system. You have to link it to an actual crime.

Q: Well, it upset Justice Stevens. He was saying it's not a war crime. But my point is that, in a singular sense, this historic figure of Salim Hamdan's material support conviction—and just parenthetically, he was acquitted of conspiracy in military commission—has been overthrown. That, alone, is a historical footnote.

But isn't it true that material support and conspiracy have been the main charges in these military commissions, and were expected to be the main charges in the military commissions at Guantánamo?

Horton: Which is the reason why most of these cases should be brought in federal criminal courts and not before military commissions.

Q: Because—?

Horton: There, they could be pursued.

Q: What's going to happen now, though, in the face of this D.C. Circuit decision on material support?

Horton: Well, I anticipated—in fact, I'd say, in international humanitarian law circles—I mean, there are some people who take the position that Justice Stevens takes about conspiracy. I would not say they're a majority. However, with respect to material support, there is no one who takes the other position. I couldn't find any credible figure in the area who embraces the view that that statute was correct, or a reflection of international humanitarian law. So I think it's not surprising that you get the D.C. Circuit handing down the ruling that it hands down.

So what's the outcome of this? The logical outcome of this is that these cases should go to federal courts rather than military commissions. My own view—I think Eric [H.] Holder [Jr.] and Barack Obama articulated the "gate" analysis correctly at the outset, which was a presumption in favor of federal courts, and some cases—but not very many cases—that would go to military commissions that would involve traditional war crimes. I think there was a tremendous amount of political pressure brought to bear on them to shift the "gate" in the other direction. That was driven by politics. It was devoid of serious legal analysis, and I think it should go back the other way now.

The problem, though, is, look at the amount of time that has been wasted by this bullshit. We're ten years, fifteen years—. At some point, you will not be able to bring these charges anymore.

And I think the biggest failing of the U.S. in the handling of these cases has been the delay. Had the U.S. proceeded using normal military and criminal justice standards at the outset, these cases should have been disposed of within five-six-seven years.

Q: In Article 3 courts, you mean.

Horton: Yes.

Q: With a handful in military commissions.

Horton: That's correct.

Q: But aren't you whistling Dixie? However Obama feels about it, isn't it true that Congress has made it impossible to try detainees in federal court?

Horton: Not impossible, but very difficult. Yes. But, of course, one thing we see with this ruling is that Congress was wrong. Moreover, if you go back and you look at the hearings on this, Justice Department lawyers were there saying, "You can't do this. It will be struck down." They were right. And what we had were Republican firebrands—Lindsey [O.] Graham chief among them—saying, "No, no, no. We're Congress. We can do what we like." But, no.

So I think the delay in the first instance really was the responsibility of the Justice Department, which should have prosecuted the cases and didn't; and the delay in the second instance is

Congress—Congress coming out with ridiculous legislation. Now if you go back and you look at Lindsey Graham and statements he made in the last two years of the Bush administration, all he said over and over again was, "You shouldn't constrain the options available to the executive. They should have this full palette. They should decide what makes most sense. Congress shouldn't second-guess." Well, he was right. But then the White House changes hands and he takes an entirely different attitude, which is micromanagement by Congress—which is not a smart thing.

Q: But that's the real world today, isn't it? The fact of the matter is that Congress has successfully—not just tried, but has successfully—blocked the trial of detainees in the United States, or even, I think, maybe, their housing—their being imprisoned in the United States.

Horton: That's right. It's blocked efforts to try to relocate them to Illinois. That's right. And now it's required the president to issue all sorts of certifications, which no one could ever reasonably give, before turning people loose. So yes, Congress has done a lot of damage and done a lot of ridiculous things. That's correct.

But I'd say something else. If you look at the Bush administration, the executive was able to do all sorts of things, notwithstanding Congress and congressional roles. It just took initiative and acted. I think part of the problem with Obama has been, frankly, his hesitancy. Now he justifies this when he's challenged on it by saying, "I want to have a positive working relationship with Congress," which is true. But it's resulted in the frustration of his commitment to close down Guantánamo—a commitment he repeated in the last days of this last presidential campaign. He

says it's still his objective to do it. I hope that that continues to be on his agenda and he finds a way to do it. But he should make fuller use of his executive authority to do it.

Q: Well, he's got some other things to fight, doesn't he?

Horton: He has plenty of other issues.

Q: Right. You have written on this. 9/11, the whole period since 9/11—the effect of 9/11, you called it. You made a point about the military. It had an effect on the military. In what overall sense? That the military is diminished in favor of civilian contractors? Is that really true, that we're fighting wars now where the military is overshadowed by civilian contractors?

Horton: Yes, that is true.

Q: That's an effect of 9/11?

Horton: 9/11 accelerated that. That actually started beforehand, but yes, if you look at the entire footprint of our defense, the role of the uniformed military is less and less of it. The civilian contractors are more and more of it, and that I think is very, very troubling from many different perspectives.

Q: Troubling because it undermines a sense of national service? Troubling because civilian contractors are less concerned with upholding codes of lawful conduct?

Horton: Yes. If you've studied military history, you know that profit motive only goes so far in conducting the military, and it can turn against you very quickly. [Niccolò] Machiavelli wrote about that in the wars in Renaissance Italy. Aristotle writes about that. Basically, profit-motive may be successful short-term, maybe, but then it can turn on you with a vengeance. You really have to have patriotic motives—the notion of a citizen army, or an army committed to defend the state and the values it enshrines—to succeed in the longer term. I think the U.S. was formed with a really different idea, moving away from traditional European ideas of military and military service, with this idea of the citizen army. I think it's one of the very noble and wonderful things about the United States, and I think it's underappreciated and has been underappreciated in the last decade. Certainly, I think, Donald Rumsfeld was someone who didn't get it at all.

Q: Well, isn't there a difference between a citizen army and a standing citizen army?

Horton: Sure. A professional army is what we call a standing army.

Q: The colonists were not really enthused—the founders' generation, certainly—were not enthused about a standing army, were there?

Horton: Yes. But even there, even the people who objected—James Madison was one of the people who objected to it, and a number of others—but by the time you got to the War of 1812, he had come around to realize that this idea of having a citizen army that was convened when needed just wouldn't work. The Swiss have exactly the same thing. They had to go to a standing

army at some level by the time of World War I. That's a nice ideal, but it really is not practical in the modern world. You have to have some sort of standing army.

Q: You say that 9/11 and ensuing events of the next decade had an effect on the NSA [National Security Agency]. You've also complained in "No Comment" from time to time about this enormous state security apparatus we've got in the United States now. Was that an effect of 9/11?

Horton: Yes.

Q: For the better?

Horton: No, for the worse. I think you can look at it just in budgetary terms. If you look at the CIA, for instance—we don't know exactly because they don't publish, formally, CIA budget figures, but the CIA has gone from—what? Ballpark \$12 to \$16 billion to ballpark \$80 billion a year, a huge ballooning, and the NSA also roughly quadrupled in terms of its budget. So these agencies have grown dramatically, and the large part of that, again—it's the same phenomenon we see with the Defense Department. It's not career professionals within the agencies, it's contractors. So large parts of what they do is being contracted out to contractors who are compensated at superior rates from the civil service, where profit motive is a large part of it. Yet, they are still brought within the umbrella of the classification regime. Their employees will have top-secret clearance to work on things and so on. But they're private, not public.

So yes. We're creating this huge national intelligence and national security apparatus, which is increasingly private, not public—which is bizarre, I think.

Q: All right. But should the average American be worried that they're being watched?

Monitored?

Horton: Worried. I think the average American is not aware of how their private space is shrinking, and they have expectations of privacy and confidentiality that aren't reasonable.

Q: I'm not talking about by Google or Yahoo or something. I'm talking about by the government.

Horton: No, I mean by the government. Data trawling is a fact. I think the U.S. exercises more restraints on it than other countries. I'm spending more than half my time outside the United States and I constantly experience things that just astonish me. In Central Asia or Russia or Eastern Europe, a state intelligence operative will come to you and say, "For \$30,000 we'll give you all of your commercial adversaries' phone conversations. Do you want their emails, too? Another \$5,000." These things have been commercialized. The Russian FSB operates, now, on the basis of commercial sales and services. They run a huge business.

Q: But in terms of the state security apparatus that you talk about—

Horton: And in the United States the same—they lag far behind the United States in their reach.

Q: Yes, but in the cultivation and processing of the information—is this really just a whole lot of information that is just up there in cyberspace? It doesn't affect anybody; it just gathers stuff. It doesn't mean anything.

Horton: You can think that. Yes, that's true, because how much information can government decision-makers, at any point, grapple with? You have to sift through it and pull out pieces. But the real risk is that the sifting and the pulling out is not entirely for proper state-security purposes, and historically we've had certain checks on the system to ensure that there are no abuses. I'm not saying that there are constant abuses—that we have a police state. I'm saying that the technological underpinnings for those abuses have been put in place and the protections against that have been removed. So we've created a very dangerous situation.

Now that's a totally different argument from saying we live in a horrible police state. Let's all quake with fear. That's not what I'm saying. I'm saying that the technological foundations for a police state have been laid and you'd better be very careful about this.

Q: But would you say that that is owing more simply to the inevitable advance of technology in this world or owing to a reaction to events like 9/11?

Horton: No, I think 9/11 caused the great escalation of it because so much more money was available to pursue these things. So the investment has been staggering. I also think, if you look at the intelligence community, I think the old kind of spy craft that focused on human intelligence-gathering and understanding cultures, mastering languages and things like that, that

has just faded away to an almost insignificant part of the operation of the intelligence community, and what has taken its place is signals intelligence; it's this obsession with machines and toys and making them work. That creates its own dangers. I really believe that the situation in Libya recently does expose a huge intelligence failure in the United States. In fact, it exposes one that we've seen repeatedly. We saw it in Egypt; we've seen it in Yemen and other places. And that is the risk of reliance on, effectively, signals intelligence, without making investments in human intelligence—that is, people who understand local culture, local languages, and network with people. You just don't know that much. You think you know a lot, but actually you don't know that much.

Q: You've argued in different forums that the CIA has been transformed into sort of a paramilitary organization. They're like a lightweight military, but not as good. Isn't that right?

Horton: That is right. And I don't think that's their role. I think if you go back to 1946 and 1947, there was a master plan that was laid down that set the rules for the division of responsibility between the professional military and the intelligence community. And remember, you started with an intelligence community that was uniformed and that was within the military. There was a realization that that wasn't always desirable, particularly in a Cold War setting. I think the rules of decision that were set down then were just right. I think they hit the nail on the head, and I think what we've seen recently is a staggering drift away from those guidelines, and no one in Washington even seems to mind. What I hear, talking to people, is, "You can't challenge this. It's not possible. You'll have your head cut off if you do it." Bill [William H.] McRaven, in his

collaboration—first of all, you have JSOC [Joint Special Operations Command]. Bill McRaven, I should tell you—

Q: Bill McRaven—didn't he organize the successful attack on Osama?

Horton: Yes.

Q: That's the same Bill McRaven.

Horton: Yes.

Q: Why am I under the impression that you know this guy?

Horton: Because he was a good friend of mine in high school.

Q: High school in what part of the world?

Horton: In San Antonio, Texas, actually.

Q: Oh, really? He's an admiral now, isn't he?

Horton: Yes. He's an admiral.

Q: And what is his position?

Horton: His father was a general. He is the head of JSOC, Joint Special Operations Command.

Q: Okay. And he is the one who organized the [U.S. Navy] SEAL [Sea, Air, Land Teams] mission.

Horton: That's right.

Q: Well, you've been critical of JSOC, haven't you?

Horton: Yes, I am. I'm not critical of Bill, but I am critical of—no, I think the whole structure of it—I think there are big questions. I think it was set up, basically—it antedates Rumsfeld, but he decided he wanted to have his own CIA and he was going to set this up as CIA. But I think, again, if you go back to the delineation from the National Security Act, I think it's the correct delineation. The CIA should be the CIA, and military intelligence should be military intelligence. And this idea of having the CIA inside the military and then militarizing the CIA—this is nuts, what they're doing. Completely nuts.

Q: Do you ever talk to people within the CIA about that?

Horton: Yes, and within JSOC, about that.

Q: Do you get sympathy in the CIA on that?

Horton: Yes.

Q: Well, they just had a general—what was his name? [David H.] Petraeus—running the show.

Horton: That's right. That's another problem. At least Obama—give him credit for requiring that he take off his uniform before he went there.

Q: I don't want this for history, to record that you said "take off the uniform"—

Horton: —"and put on a suit." [Laughter]

Q: Okay. You have said that 9/11 had a deleterious effect on the Department of Justice [DOJ]. Characterize that for me, and tell me if you believe that that's still true today.

Horton: Well, I think just look at Jay Bybee and John Yoo. That summarizes it, in the face of two people.

Q: But they're gone.

Horton: But I think what we see, just generally, is that the Department of Justice, historically, at its best, has been a guardian of the Constitution and a guardian of laws that advocate the public

interest. That's Ed [Edward Hirsch] Levi, that's Harold Tyler, that's what some of our great attorneys general have been. I just see that tradition as going up in smoke. I just don't see it today. What I see now is a Department of Justice that is obsessed with clientalism; that is, "Here's your client—this person, the government. Now you're going to do what the client wants and you're going to help him accomplish his objective." Now, I'm not saying that that's always wrong, but I think a Justice Department lawyer has a higher calling and higher responsibilities. That's particularly the case in matters where civil liberties and civil rights are raised, where I think there is this higher calling, more noble tradition. After 9/11, we've just seen the Justice Department stake out and take positions I never thought I would see the Justice Department take in writing in briefs, absurd positions that directly contradict things that the Department of Justice has said previously.

Q: Without getting lost in John Yoo again, do you remember in 2004 when these so-called torture memos were released—do you remember reading them at the time?

Horton: Yes. Before they were released, I read them.

Q: What did you think when you saw this stuff?

Horton: I was shocked.

Q: From a lawyer's point of view.

Horton: My first reaction—and I'll tell you, I first got these documents from—I'm trying to think. I think it was Michael Isikoff at *Newsweek*, who was looking for legal scholars to comment on these things. I know Michael, he came to me, and I gave him some ideas of people to talk to. Then he gave me a set of them, with the usual conditions, and I started looking at them. My immediate reaction was, "Are you sure these aren't forgeries? It looks like a Department of Justice memo," but I was reading the language and thinking, "I just can't believe this is the Department of Justice." Then I thought back to right after the Abu Ghraib disclosures, and I had appeared on *NewsHour* with Jim [James C.] Lehrer, with John Yoo, to talk about Abu Ghraib and the Geneva Conventions and so on. Then I was reading these memos and I'm thinking, "Oh, my god," I kept thinking, "this is actually exactly what he was saying."

Q: A couple months earlier.

Horton: It was the same phrases, the same language, and that caused me to think, "Well, this has got to be authentic." Then I went back and told Isikoff. I mean, there were key elements of legal analysis here which I'd not seen before. But I went back and looked at public comments that were made by John Yoo and I said, "This stacks up very closely with these memos, so I'm quite persuaded of their authenticity." But I thought, you have all sorts of obvious precedents that say the opposite of his conclusions. They're not referred, they're just ignored. I came to the conclusion that this didn't meet minimal levels of competence. As a professor at Columbia Law School, if someone gave me a memo like this, this would not get a passing grade. Not because I disagree with the conclusions, but because—. A lawyer is required to demonstrate mastery of the subject matter; that is, you have to show that you know all the authorities on both sides, and you

have to distinguish the authorities that are against you. So to present a memo that has one-eighth of the authorities that argue a very extreme position and ignores everything else—it's just not acceptable. That would be a failing grade.

Q: So you're saying he was giving them what they wanted.

Horton: Exactly. And what he has an obligation to do—he can have his view, and he can have his interpretation. That's fine. But he has an obligation to tell them that there is authority that goes the other way that says X,Y,Z. This is the reason why, I think, that does not control, and that was not done. So this is the difference. This is what will get you a failing grade in law school. You cannot do that. You have to demonstrate that you know everything—all of the authority.

Q: You're saying that this desire to please the client, to satisfy the client—which happens a lot, I suppose, in the corporate world—still infects the Justice Department.

Horton: Well, there's no doubt about it. I would say particularly in the national security sector. In fact, some of my former students work there, and I've talked to them and talked to them candidly about how decisions are made and how things are analyzed. They are very candid, saying, "Look, we have our client. The client is at the NSA, the client is at the CIA. They have a mission. This is their mission. We're supposed to help them figure out how to accomplish that." I tell them, "You didn't think that there aren't some times when you're supposed to tell them that

they have to re-characterize the mission, or they have to rethink the mission, because of some legal impediment?" No.

Q: What did you think of the Justice Department's final decision with respect to whether Yoo and Bybee were going to be disciplined—face disciplinary review? And David Margolis, at the DOJ—I think that's his name—he said, "No, they were guilty, if anything, of maybe poor reasoning but not professional misconduct."

Horton: Well, one of my former students was deeply involved with David Margolis and the preparation of those memoranda. So I know quite a bit about what happened on the inside. I'll just put it this way. I do not believe that David Margolis thinks that his memorandum is a correct statement of the law. I think that what Margolis wrote was a political document in which he tried to navigate his way right down the middle, being just critical enough of Bybee and Yoo to appease one side, without meting out any meaningful punishment to please the other side. I think Margolis is absolutely convinced that he had to serve the institutional interests of the Justice Department—the worthy institutional interests of the Justice Department—and I think the result is a very sad precedent for the Justice Department. Because, essentially, it is ratifying heinous misconduct by lawyers, saying that, "Well, if there's a political motivation for it, that's okay. There isn't going to be any serious harm. That will be okay. Maybe we'll say some nasty things about them, but no one's going to face disbarment or anything else." And then Margolis, also, pressed for disbarment of whistleblower lawyers within the Justice Department.

So you look at this and go, "What is in this guy's mind?" I think he really represents, in my sense, the institutional psychosis of the Justice Department, really obsessed with its own internal politics and abandoning the high ethical and moral standards it had in earlier ages.

Q: Is he still there?

Horton: Yes, he's still there. He'll be there until he dies. He received a departmental commendation for his preparation of that memo, as did John Durham for not prosecuting any of the CIA people who received a departmental commendation for his excellent work.

Q: What about Eric Holder himself? Am I wrong here that nobody, in or out of the military, in or out of the CIA, is going to face criminal charges for any of the abuse that has taken place, whether it [unclear] any of the real abuse that took place since 9/11 on detainees, including some deaths, that no one is going to be prosecuted?

Horton: Well, let's say no one above the level of NCOs [non-commissioned officers]. So grunts are just fine, and you can prosecute them and send them to prison, but not officers or political figures. That's the bottom line.

Q: Durham concluded what?

Horton: He concluded that there was not sufficient evidence to justify prosecuting any of the 101 cases from the CIA Inspector General's Report. And I think he's using the prosecutor's gray-out;

that is, saying, well, he doesn't think, if the case were brought—he's not saying that you couldn't bring a case. He's saying that there's enough reason to think that it wouldn't produce a conviction at the end of the day if you brought it.

Q: But isn't Holder saying, "We're not bringing it"? Hasn't he said—?

Horton: He has said, "We're not bringing." The problem with this is twofold. It's clearly the case that the evidence is there to bring the charges. You have the cases coming out of Abu Ghraib, to start with. You have the Iceman—[Manadel] al-Jamadi—case and I interviewed military prosecutors who looked at that already who, in fact, did bring charges and did obtain convictions out of that case. Not involving CIA people, but involving military actors who felt very confident in the ability to carry this forward and get convictions. And, in fact, they did. So I think that's a really weird decision.

Then you have the other problem that this relates to the U.S. obligations under the Convention Against Torture. When you're talking about torture allegations, the prosecutor does not have the full and open discretion about whether or not to bring prosecution. Because the executive committed itself on this convention, that it *would* bring prosecutions where the evidence exists. That is to say, you have to bring the charge, you have to put it on trial, and if there's an acquittal, there's an acquittal. But the executive doesn't have this discretion. I think Durham did not understand that.

And, by the way, the Committee Against Torture—that is, the United Nations committee that oversees implementation of the committee—just issued a commentary last week, which is directly a slap in the face to Durham, in which they say—they clarify this exact point—"There is no such discretion *not* to bring these cases." If the facts and the evidence create the basis for a *prima facie* case, you have to bring the prosecution. You cannot opt out using prosecutorial discretion. And Eric Holder stood behind them on this. To me, it's very disappointing for Holder and Durham, I think. The fact that he gets an award for not doing anything for seven years—and by the way, while this is going on, the Justice Department is sending notes to other law enforcement agencies around the world, saying, "Don't investigate this case of abuse because we're looking at it, and we may bring prosecutions." Which is not true.

Q: Let me ask you about Holder and targeted killings, and the killing of Anwar al-Awlaki, for example. It isn't just Holder. President Obama's directly involved in this, is he not?

Horton: Absolutely.

Q: Even to the point of passing, I think, on individual strikes.

Horton: Dan Klaidman has a pretty good portrait of how the decision process operates inside the White House. You've got several different instances in review, but it's all going on the authority of the president, ultimately.

Q: Right. But Holder's out there making a justification for it, isn't he?

Horton: Yes. In particular, it's Marty Lederman and David Barron. Marty Lederman, whom you saw at the thing at Fordham, who's my good friend and buddy, who wrote the memo on this—a very detailed legal justification for it.

Now I step back and say—so much of this debate gets framed in terms of is it legal for the president to do this or not? I'm not really persuaded that that's a terribly useful framing, because I think international law, laws of war basis, and U.S. constitutional law—there are certainly going to be circumstances where the president can be authorized to direct these sorts of strikes, even if they result in the death of an American citizen. That can be done. The bigger question is whether it is, basically, the consequences of these decisions, especially when they're taken as not an individual strike in a one-off case, but something that looks like a sustained military campaign going on over many months, involving hundreds of strikes. That's a different sort of thing because that, then, looks like war.

Q: That brings us back to something that came up much earlier on—the drone situation. Now as you pointed out earlier in this conversation, the United States has a virtual monopoly on these drones now, right?

Horton: For the time being. But that won't last long.

Q: Right. Isn't it inevitable that it's not going to last? After World War II, how many people had nuclear weapons? And if there wasn't a nonproliferation treaty that some people adhere to, you'd have a hell of a lot more.

Horton: And drones are not that kind of technology. In fact, the Japanese, the Chinese, many countries command the basic elements of the drone warfare technology. They just haven't applied it to building drones. So there are a large number of countries that could construct them very quickly. It's not like the bomb; it's something else.

Q: What are the issues surrounding the use of drones, as we have used them?

Horton: I think you have to start with accepting the fact that if the U.S. can do this, any country can do this; and then, what are the consequences for the entire world of—well, let's just say it's not every country but let's say it's thirty countries. Of thirty countries running around using drones this way, what are the consequences of that? That's what we're not focusing on, and what we have to focus on. It's polonium in a teapot in the Mayfair Hotel in London. The U.S. is creating an enabling environment in which many countries will feel they can do this all around the world, and this is going to create a very dark and violent place.

I think, in part, the problem is that there has been an advocacy problem with Barack Obama. He has not defined this as narrowly as it needs to be defined. What he should say is, "Look, we don't do this in all countries in the world. We do this in countries where there is lawlessness, there is no effective government. We can't extradite, we can't arrest." That's what he should be saying.

He will not say this, I am told by people at the Justice Department, because of protocols that exist with foreign governments that preclude him from talking about arrangements with those governments. That's particularly Yemen and Pakistan, but there may actually be a couple of other governments. But those two, in particular. That, I think, is just a farce. These secret protocols aren't secret, they've been disclosed. We know them. Everyone knows it [laughs], and everyone knows that everyone knows it. But, nevertheless, we can't discuss it. To me, this is totally unsatisfactory because there is an imperative that there be a policy rationalization for this that stands up, and Obama still hasn't provided that—notwithstanding having John [O.] Brennan give a speech at Harvard; having Harold [H.] Koh give a speech at ASIL [American Society of International Law]; having Eric Holder give a speech at Northwestern. None of the speeches were really very good, and none of them really addressed the full scale of the problem.

Q: Do you believe, as some people say, that the drone program—it used to be Gitmo that was used as a recruiting tool for radical Islamists. Now it's the drone program. Now they run around saying, "Well, look, people who are civilians are being killed by drones."

Horton: It's a little bit different from that. There is that element to it. But I would say the bigger threat is—the immediate threat of the drone program is the destabilization and the political changes inside of Pakistan. Pakistan, remember Colin Powell visits there and describes it as our most important non-NATO [North Atlantic Treaty Organization] ally, recipient of billions of dollars in military aid, a key asset for the U.S. in the region; nevertheless, deeply enmeshed with the Taliban, deeply enmeshed with other radical Islamicists—people who state raids in Mumbai, for instance, who are engaged in Kashmir, with India. They're all being funded, trained, even

directed from within Pakistani military intelligence, and we have a sort of tenuous relationship between the military apparatus there and the civilian government. What's happened as a result of the drone wars? Well, we agreed that we would keep Pakistani involvement and approval of that program secret. As a result, politicians across the spectrum in Pakistan lambast the U.S. for this drone program. We are pure evil, and the Pakistani public demands a government that distances itself from the U.S. and is prepared to take action against the U.S. So these are the rules of democratic process.

So our secrecy has grossly undermined our position in Pakistan. And by the way, what's going on here? The secrecy is two intelligence organizations agreeing that they will keep secret what's going on from the public of two democracies. Does that strike you as being a little bit suspicious in some ways? [Laughter] But that's really what's going on here. Pakistan probably has several hundred warheads and is busy at work on delivery systems right now. They are a serious, serious problem, much bigger a problem than the Taliban or Afghanistan, much bigger a problem. I see the drone war as something that, let's say maybe it's effective, but it's had its kills, and it's causing success, and the effort to attrit Al Qaeda and allied forces—maybe that's all true. But if at the end of the day it results in Pakistan being an enemy of the United States, it is a disastrous failure—and I think it is a disastrous failure. And what we see going on in Washington—all the analysis is, "Did we hit our man? Was it a successful strike?" That's it. That's a tiny part of what the analysis should be. And we don't have a broader analysis, I don't think, largely because of secrecies. It's all secret; we can't talk about it. Government can't say anything about it because we're not there. So this is an area where I think secrecy is leading to false decisions and, more immediately, it's undermining democracy.

Q: Right.

I want to ask you, before we go. Some people are saying, "Since 9/11 we haven't had an attack." We've had some near misses, like over Detroit and in Times Square, but we haven't a consequential attack, or any real attack since then. So, whatever else has happened, we can certainly credit the Bush and even the Obama administrations for that. Is that fair? Have they done something right, simply looking at it from that bottom line?

Horton: I think if you look at terrorism on a global basis—it's been up and down—but I would say that if you focus in and look at radical Islamicist groups, and Al Qaeda in particular as the adversary, it's clear that the efforts have been by and large successful in limiting, containing, and reducing the threat that they present. I think one of the problems the United States has had over the last decade is this obsessive focus on radical Islamicist groups as "the threat." That's it. In fact, would that things were so simple. They're much more complicated than that. The threats the country faces are much more diffuse. There are many different threats, and we have to be concerned about all these different threats.

So I think there has been some success in dealing with radical Islamicist groups. I think Homeland Security and the military have been certainly effective in tactical measures, even in some strategic measures that were taken, but I'm not really convinced that the overall security of the country is better than it was before. I think we have undercut one of our really strong suits, which is the U.S. as a beacon of democracy, liberty, and human rights, which has served us very,

very well for a hundred years, and has been badly tarnished by this. Barack Obama has buffed off a little bit of the taint, but not a lot. In fact, I think, around the world he's viewed very highly because he's not Bush [laughs], and people were so concerned with Bush and what Bush did that anybody who is not that is viewed as better. Just being overseas during much of the last election campaign, after the election, one thing I found really striking is it's hard to find anybody who looks with favor on [W. Mitt] Romney and the people around him. He's looked upon with absolute dread—outside, I assume, of Israel. But generally, no. Obama is prized because he's not them.

Q: I know you've got to go. Let me close this down in a minute. Apart from the "No Comment" blog for *Harper's*, you have written a couple of substantive pieces for *Harper's Magazine*, and in one of them, in 2008, you went into great detail about the formation of a commission to examine the government treatment of detainees, and beyond that subject, or related to that subject, whether there should be laws and criminal prosecutions, and maybe even pardons. You detailed this; you laid out what kinds of commissions have existed elsewhere in the world—truth and reconciliation commissions.

Now I noticed that this year, David [D.] Cole—Georgetown, I think he is—was also harping on this, and picking up your frayed banner. Is there any prospect for that kind of thing in this country, for a real commission to examine what happened at Gitmo, at the black sites, in rendition? The whole shmeer?

Horton: Well, yes, in short. I think the assumption within the intelligence community has been, "Well, that's all blown over. We can forget it." I think what they failed to cope with is the long memories of people in the human rights movement who will push and demand this for decades, if it takes that, until it finally happens. So I think it will eventually occur. I'm not sure how much longer it's going to take. I think it's important for educational purposes. I think it's important for the country, at some point, to know everything that was done. It's very clear now that we don't know a lot of it. We don't know the half of it. The next major step is the [Senate] Select Committee on Intelligence's report, and the senior people in the intelligence community are pulling out all the stops now to hold up issuance of that report. Dianne [G.B.] Feinstein has said that their investigation did show that there was a much higher level of policy making, supporting the abuses that occurred, and a reporting-to and control at the top, than people knew; and, that there are many more incidents than people knew of. The intelligence community is going to say, "Well, this will affect methods and so on, so you can't possibly reveal it." What they're really concerned about, of course, is a backlash against the individuals who are associated with it.

To me, what happened in South America is key here. So you look at what happened in Argentina, Chile, Uruguay, and Peru as well—you had tremendous abuse led by the intelligence community and military in those countries. You had them keep the lid on it for ten, fifteen, twenty years—twenty-five years, in some cases—and then, ultimately, there was a press for public exposure led by judiciary, led by independent commissions of inquiry and others, that brought it all out. And what happened in those countries? Prosecutions is what happened in those countries. Prosecutions way beyond the expiration of the statute of limitations; prosecutions of crimes that were being committed thirty-five years ago. In fact, they're still ongoing in Buenos

Aires right now. And we have people in the intelligence community like Jose [A.] Rodriguez [Jr.], who, by the way, spent his career down there watching all this stuff, who very well knows what's going to happen when all this comes out, and, therefore, is doing his damndest to keep the plug in place. They may hold it up for a few more years; they won't hold it up indefinitely. It will eventually come out.

Q: Thank you very much, Scott Horton. Unless there's something you want to add.

Horton: Oh, I think that's quite enough. I'm delighted that you wasted so much of your time reading my modest scribblings.

Q: I don't regard it as a waste. [Laughter] Thank you.

[END OF INTERVIEW]

Aamer, Shaker	70, 71
Abraham, Stephen	61
Addington, David S.	21, 24, 25, 30, 37
al-Awlaki, Anwar	99
al-Jamadi, Manadel	98
al-Masri, Khalid	48
al-Qahtani, Mohammed	36
Barron, David	100
Bellinger, John B., III	47, 48, 64
Bennett, James D.	15
Berezovsky, Boris A.	10
bin Laden, Osama	19, 38, 90
Bonner, Yelena	6
Brennan, John O.	102
Brown, Janice Rogers	76
Bush, George H.W.	64
Bush, George W.	19, 20, 26, 30, 31, 42, 45, 52, 53, 61, 64, 65, 76, 83, 104, 105

Bybee, Jay S.	24, 92, 96
Cheney, Richard B.	21, 22, 24, 25, 26, 30, 64
Clinton, Hillary R.	45
Clinton, William J. "Bill"	23
Cole, David D.	105
Davis, Morris D.	61
Dunlavey, Michael E.	36
Durham, John	97, 98, 99
Feinstein, Dianne G.B.	106
Foggo, Kyle D. "Dusty"	52
Gonzalez, Alberto R.	24, 30, 65
Gore, Albert A., Jr. "Al"	22
Graham, Lindsey O.	82, 83
Hamdan, Salim	79, 80
Harris, Katherine	20
Haynes, William J., II "Jim"	60
Hodge, Roger D.	15
Holder, Eric H., Jr.	81, 97, 98, 99, 102
Isikoff, Michael	94
Kennedy, Anthony M.	61, 62, 77

Kennedy, Edward M.	14
Kennedy, Henry H., Jr.	78
Klaidman, Dan	99
Koh, Harold H.	102
Latif, Adnan	78
Lederman, Marty	100
Lehrer, James C.	94
Levi, Edward Hirsch	93
MacArthur, John R. "Rick"	15
Margolis, David	96, 97
Mayer, Jane M.	30
McRaven, William H.	89, 90, 91
Medvedev, Dmitry A.	10
Miller, Geoffrey D.	36
Mohamed, Binyam	49
Myers, Richard B.	26
Obama, Barack H.	64, 72, 81, 82, 83, 84, 92, 99, 101, 102, 104, 105
Patterson, Robert P., Jr.	5
Petraeus, David H.	92

Politkovskaya, Anna S.	12
Powell, Colin L.	28, 29, 65, 102
Putin, Vladimir V.	9, 10, 11, 12
Randolph, A. Raymond	76, 77
Rice, Condoleezza	46, 47, 48, 52, 53, 64
Rodriguez, Jose A., Jr.	107
Romney, W. Mitt	105
Roosevelt, Franklin D.	59
Rubin, Barnett R.	18
Rumsfeld, Donald H.	21, 25, 26, 27, 31, 32, 36, 37, 85, 91
Saakashvili, Mikheil	14
Sakharov, Andrei D.	6, 8
Sands, Philippe	36
Scalia, Antonin G.	59
Schumer, Charles E.	45
Silberman, Laurence H.	76, 78
Soros, George	7
Soufan, Ali H.	38
Stevens, John Paul	58, 59, 61, 79, 80, 81

Sullivan, Andrew M.	15
Taft, William H., IV	64, 65
Tatel, David S.	76
Tyler, Harold R., Jr.	74, 78, 93
Wilkerson, Lawrence B.	28, 29, 31
Yeltsin, Boris N.	10
Yoo, John C.	24, 36, 92, 93, 94, 95, 96