S. HRG. 110–849

U.S. INTERROGATION POLICY AND EXECUTIVE ORDER 13440

HEARING

BEFORE THE

SELECT COMMITTEE ON INTELLIGENCE

OF THE

UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

SEPTEMBER 25, 2007

Printed for the use of the Select Committee on Intelligence

Available via the World Wide Web: http://www.access.gpo.gov/congress/senate

U.S. GOVERNMENT PRINTING OFFICE

48–396 PDF WASHINGTON : 2009

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
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CONTENTS

SEPTEMBER 25, 2007

OPENING STATEMENT

WITNESSES

SUBMISSIONS FOR THE RECORD

U.S. INTERROGATION POLICY AND EXECUTIVE ORDER 13440

TUESDAY, SEPTEMBER 25, 2007

U.S. SENATE,
SELECT COMMITTEE ON INTELLIGENCE,
Washington, DC.

The Committee met, pursuant to recess, at 3:40 p.m., in Room SH–219, Hart Senate Office Building, the Honorable Christopher S. Bond (Vice Chairman of the Committee) presiding.

Committee Members Present: Senators Bond, Feinstein, and Whitehouse.

Committee Staff Members Present: Andy Johnson, Staff Director; Louis Tucker, Minority Staff Director; Michael Davidson, General Counsel; Kathleen McGhee, Chief Clerk; Randy Bookout, Eric Chapman, Tom Corcoran, John Dickas, Melvin Dubee, Evan Gottesman, David Grannis, Andrew Kerr, Paul Matulic, Don Mitchell, Eric Pelofsky, Mike Pevzner, Jacqueline Russell, Michal Schafer, Alissa Starzak, Greg Thielmann, and Jim Wolfe.

Vice Chairman BOND [presiding]. This hearing will come to order.

OPENING STATEMENT OF HON. CHRISTOPHER S. BOND, VICE CHAIRMAN, A U.S. SENATOR FROM MISSOURI

Unfortunately, the Chairman has been called away for a very important ceremony honoring his colleague in the Capitol, so, without objection, his full opening statement will be entered into the record.

[The prepared statement of Chairman Rockefeller follows:]

PREPARED STATEMENT OF HON. JOHN D. ROCKEFELLER IV, CHAIRMAN, A U.S. SENATOR FROM WEST VIRGINIA

We are now going to continue our discussion of interrogation in today's second panel.

Although we very rarely hear from non-government witnesses, the topic of interrogation poses legal and moral questions that require public debate.

If we truly want to answer the question of what is in the best interest of the country, we must ensure that we hear outside perspectives on the impact of U.S. interrogation policies and practices.

Our witnesses are well equipped to provide us that outside perspective. Our panelists today have military and interrogation experience, legal familiarity with international treaty obligations, and experience treating patients exposed to the harsh interrogation tactics of other countries. These witnesses can help us answer a variety of unclassified questions on interrogation issues.

Our witnesses today can help us better understand the recent Executive Order interpreting Common Article 3 of the Geneva Conventions. Is the Executive Order consistent with historical interpretation of Common Article 3? Does it change the "humane treatment" standard of Common Article 3 to permit treatment that we would find unacceptable if used against an American solider? Will the 193 other countries that have signed on to the Geneva Conventions agree with our interpretation of Common Article 3?

Our witnesses can also help us consider the practical impact of the Executive Order. What does the Executive Order say about our commitment to human rights and our international treaty obligations? How will it affect our military personnel operating abroad?

Finally, our witnesses can help us consider prospective U.S. policies. The need to obtain actionable intelligence from detainees is unlikely to end in the near future. How do we go about conducting interrogation if we want to ensure both that we obtain the intelligence we need to protect the nation from attack and that we maintain our moral standing in the world?

Although the Committee has agreed to conduct this second panel in closed session, many of the witnesses for this panel do not have clearances. Therefore, no classified information may be discussed during this second session.

Because the Committee thinks it is important that the debate on these important topics be made public, the Committee has made the decision to post witness statements immediately following the hearing. Once the hearing transcript from this second portion of the hearing is completed and reviewed, the transcript will also be made part of the public record.

I welcome our witnesses today for the second panel: Lieutenant General Charley Otstott; Colonel Steven Kleinman; Dr. Allen Keller, the Program Director of the Bellevue/NYU Program for Survivors of Torture; Elisa Massimino, the Washington Director of Human Rights First Professor; and Robert Turner, from the University of Virginia Law School's Center for National Security Law.

Vice Chairman BOND. It is important, I should note, that we have previously agreed that although the Committee has agreed to conduct this second panel in closed session, many of these witnesses do not have clearances; therefore, to my Members and staff, no classified information may be discussed during this second session.

But, because the Committee thinks it's important that the debate on these important topics be made public, the Committee has made the decision to post witness statements immediately following the hearing. Once the hearing transcript from the second portion of the hearing is completed and reviewed to assure no classified information, the transcript will also be made part of the public record.

Today it's my pleasure on behalf of the Chairman to welcome our witnesses for the second panel—Lieutenant General Charlie Otstott, Colonel Steve Kleinman, Dr. Allan Keller, the program director of the Bellevue/NYU Program for Survivors of Torture, Elisa Massimino, the Washington Director, Human Rights First, and Professor Robert Turner from the University of Virginia Law School Center for National Security Law.

With that, I will now call upon General Otstott.

STATEMENT OF LIEUTENANT GENERAL CHARLEY OTSTOTT, U.S. ARMY, RET.

General OTSTOTT. Good afternoon, Senators, and thank you for hosting us today. It's a pleasure to be here to provide my personal views as a combat veteran on the topic of handling of detainees.

I was commissioned in the infantry from West Point in 1960 and served 32 years in the Army. I served two combat tours in Vietnam, first as an advisor to South Vietnamese infantry battalions in 1964–1965 and then as a member of the 101st Airborne Division as a rifle company commander and a battalion operations officer in 1967 to 1968.

I was always guided by my understanding during that time of the Geneva Conventions and by a clear ethical code that said essentially treat detainees as you would wish them to treat you. I followed this code even when I suspected the enemy might not treat

us the same way. But I believe that operating from this position on the moral high ground gives our soldiers the right to expect decent treatment if they are captured.

The language of Common Article 3 of the Geneva Conventions provides a clear standard of treatment of detainees on the battlefield. The Army has recently published a revised field manual, following Abu Ghurayb, which further codifies the proper handling and interrogation of detainees. In my view, soldiers need clear guidance in the heat of combat. The new field manual provides an easily understood standard, and the Army has taken measures to correct the ambiguities that probably contributed to the situation at Abu Ghurayb.

Some might claim the new field manual is too simplistic for sophisticated interrogators, but the principles reflected in the field manual are values that no U.S. agency should violate. The FM provides a set of approaches to interrogation that should be sufficient to guide even the most sophisticated interrogator.

General Petraeus recently reinforced the field manual standards in his letter to the troops of the Multinational Force–Iraq on 10 May of this year, which condemned the abuse of detainees. In the letter he says the following: "We are indeed warriors. We train to kill our enemies. We are engaged in combat. We pursue the enemy relentlessly, and we must be violent at times. What sets us apart from our enemies in this fight, however, is how we behave. In everything we do, we must observe the standards and values that dictate that we treat noncombatants and detainees with dignity and respect."

So the military or the uniformed services are back on track, trying to adhere to a simple, clear and understandable standard for the treatment of detainees as found in the field manual. Senior military leaders are now speaking out to make sure that the standards are understood all the way down to the lowest levels.

But the President's Executive Order of 20 July expresses an interpretation of Common Article 3 which appears to provide a different set of standards for the CIA in the handling and interrogation of detainees. In my opinion, there are two problems associated with this new Executive Order.

First, any techniques used by the CIA under this program are essentially those which our soldiers could expect to have used against them if they fall into enemy hands. Admiral McConnell, in speaking publicly about the Executive Order and the CIA program, admitted that he "would not want a U.S. citizen to go through the processes" that are allowed under this order.

Second, the Order reintroduces ambiguity into situations where CIA and U.S. military personnel are working side by side, as in many locales within Iraq today. The existence of different standards does not work well in practice and provides a confusion factor which detracts from clear guidance and simple standards. This confusion can lead to the disgraceful behavior which we saw earlier in the current conflict.

I conclude by urging you to do all within your power, Senators, to maintain the integrity of Common Article 3 and to provide a single, clear standard of behavior for all U.S. personnel engaged in this and future conflicts.

Thank you.

Vice Chairman BOND. Thank you very much, General. Now we turn to Colonel Kleinman.

STATEMENT OF COLONEL STEVEN KLEINMAN, U.S. AIR FORCE RESERVE, EDUCING INFORMATION STUDY SENIOR ADVISOR

Colonel KLEINMAN. Mr. Vice Chairman and Members of the Committee, it's truly an honor to be here today and share my thoughts on this very important issue.

My background, over 20 years of commissioned service, focused primarily on human intelligence operations, much of that involving interrogations, including three military campaigns—in Panama, first Gulf War and, most recently, in Iraqi Freedom. In addition, I was the DOD's senior intelligence officer for special survival training. What that means is I was also an expert on the counter-strategies to resist interrogation, one of the few people, fortunately enough, who have actually worked on both sides of the table, so to speak.

Senator FEINSTEIN. Did you say "fortunate" or "unfortunate?"

Colonel KLEINMAN. I will say fortunate, very fortunate.

This background will indelibly inform the perspectives that I want to share with you today, as I was asked to address three primary areas—historical U.S. practices, the effectiveness of various interrogation approaches, and, finally, challenges faced by the United States as we move forward.

As a student at the Defense Intelligence College, I wrote a thesis on the U.S. interrogation program during World War II, and I began that thesis with a quote from a British officer who worked in a counterpart program. He said, "Interrogation of prisoners is a difficult and delicate task that cannot be conducted by anybody anywhere, by no matter what method. It is indispensable if results of any value are to be obtained, that the examination be conducted in a skilled, planned, and methodical manner."

The U.S. program I studied, known as MIS–Y, clearly took that guidance to heart. Operating without established doctrine, these very creative and dynamic individuals serving as interrogators, as analysts and as monitors, developed an incredibly effective program, the product of which would soon be on par with the vaunted communication intercepts of the ENIGMA program.

The lessons I learned in my studies are these. Number one, interrogation is a complex, dynamic process that is as operationally vexing as any clandestine operation. MIS–Y responded to the challenge by recruiting a cadre of individuals with impressive academic credentials, such successful life experience, with knowledge of the language and culture and an ability to produce results in an ambiguous and chaotic environment.

Secondly, to maximize the return on their investment, they selected only those prisoners that they knew to possess information of critical intelligence value. That process of selection was both judicious and meticulous. The exhaustive research that went into the effort before every interrogation was amazing. The standard became three to six hours of preparation for every hour actually spent in interrogation.

Unfortunately, due to the time when we transitioned rapidly from World War II into the era of the cold war, much of this information, the corporate knowledge from MIS–Y, was classified and remained unavailable to inform the stories that unfolded during subsequent conflicts in Korea, Vietnam and in the Gulf. So those chapters were not informed by the previous and very successful chapter.

Moving on to effectiveness, most of the debate surrounding the topic of interrogation has focused on this question. Interrogation is, at its best, an art and a science, probably more the former than the latter, and certainly effectiveness falls into that. While the U.S. government invested an extraordinary amount of time and money into studying what we used to call the communist interrogation model during the fifties, sixties and seventies, very little time was spent studying interrogation—meaning the collection of intelligence information from sources who might possess that intelligence.

The intent was honorable. If we could deconstruct that model, perhaps we could identify counter-strategies to resist it. Unfortunately, we spent very little time studying the interrogation for intelligence gathering purposes, and I would state for you today that most of the approaches, most of the strategies, in fact the paradigm behind the current Army field manual is not based on scientific inquiry. It is, at best—and I've done my research in the archives—it is, at best, based on a collection of lessons learned assembled after World War II. The trail backward from the present disappears in 1950 but has nonetheless been codified in each successive iteration. So what we know about "pride and ego-up" and "emotional love of country," and "we know all", is essentially speculation.

In the limited time I have I wanted to turn very briefly to the concept of "effectiveness" as it might apply to the use of coercion. The debate around the employment of coercive methods seems to center exclusively on the legal and moral elements rather than the idea of what might be operationally effective. There seems to be a presupposition that coercion does work. It's just a question of should we, as a nation, use it.

I submit that I have not seen—and I believe I can say that I've studied this issue at length—any definitive studies that would prove that coercive methods are at all useful in consistently producing valid intelligence information. Please recall that the whole purpose of interrogation is to have access to somebody's accurate, timely and comprehensive memory. A literature review on the psychology of eye- witness testimony will immediately raise important questions about the impact of stress on memory.

I will just quickly press on to the conclusions. We need to understand both the art and science, and that will require a meaningful plan to conduct more research.

We need to develop, I believe, like MIS–Y, an entity of common concern for the intelligence community that would address this research and ultimately put that research into effect, setting standards to truly professionalize this discipline, with all that this implies. In doing so, I think we can still meet the serious operational challenges we face, both those we encounter today and those that might emerge in a different paradigm in the future, and do so in

a way that I think our country may think is impossible—that is, to conduct our affairs in a way that is truly good, thereby sending the message to the world that we are country that wishes to be truly great.

Thank you very much.

[The prepared statement of Col. Kleinman follows:]

PREPEARED STATEMENT OF COLONEL STEVEN KLEINMAN

Mr. Chairman, Mr. Vice-Chairman, members of the Committee, I would like to thank-you for the wonderful opportunity to testify at this hearing on interrogation policy.

In the course of my more than twenty years of military service, I have had the great fortune to have been involved in the design, management, and conduct of the full spectrum of human intelligence operations. This experience has included service as an interrogator during three major military campaigns: Operation JUST CAUSE, Operations DESERT SHIELD/STORM, and Operation IRAQI FREEDOM. I also was entrusted with directing the Air Force Combat Interrogation Course during which we provided a unique training program for interrogators from all the services as well as several foreign countries. Reflecting upon these experiences today, I can assure you that never could I have imagined one day having the honor of appearing before this august body with what is almost certainly a once-in-a-lifetime opportunity to share my observations, insights, and recommendations.

I have been asked to focus my remarks on three primary areas: 1) historical U.S. interrogation practices, 2) the effectiveness of various interrogation approaches, and 3) the challenges faced by the United States in developing an effective interrogation program. I'll begin, then, by addressing each of these issues before offering several concluding thoughts.

Historical U.S. Interrogation Practices

As a student in the graduate program in strategic intelligence at the National Defense Intelligence College, I began my thesis on the U.S. strategic interrogation program during World War II with a quote from a British officer who had served in the United Kingdom's Combined Services Detailed Interrogation Center, an extraordinary program that would became the model for our own. I believe Flying Officer S.D. Felkin eloquently captured the intrinsic nature of interrogation when he observed:

> "Interrogation of prisoners is a difficult and delicate task that cannot be conducted by anybody, anywhere and by no matter what method. It is indispensable, if results of any value are to be produced, that the examination be conducted in a skilled, planned and methodical manner."

The U.S. program that I studied in depth, conducted under the auspices of the Military Intelligence Service and referred to simply as MIS–Y, clearly took this guidance to heart. Operating without previously established doctrine, the dynamic and creative individuals who served as interrogators, analysts, and monitors developed an incredibly effective program, the product of which would soon be valued on par with the decisive intelligence generated by the vaunted Enigma communications intercept program.

The lessons I uncovered in my research[1] would, I believe, be of significant value in informing the American approach to interrogation in this contemporary era.

- Interrogation is a complex, dynamic process that is as operationally vexing as any clandestine intelligence operation. MIS–Y responded to the challenge by recruiting a cadre of individuals with impressive academic credentials, successful life experience, knowledge of the language and culture, and adept at producing results in an environment marked by chaos and ambiguity.
- To maximize the return on investment, only those prisoners with access to, and knowledge of, information of critical intelligence value were ultimately selected for long-term examination at the Fort Hunt Facility. The multi-tiered selection process that developed can be described as both meticulous and judicious.[2]
- Exhaustive research and preparation prior to the conduct of every interrogation was standard. As the process evolved, three to six hours were invested in preparation for every hour spent in the actual interrogation. Interrogator—and inter-

[1] A summary of my thesis has been made available to the committee's counsel.

[2] A total of 3,451of prisoners-of-war passed through Fort Hunt from August 1942 to July 1945.

rogation teams—became bona fide subject matter experts in the array of specialized and technical areas of intelligence interest.

Unfortunately, due to the prevailing national security interests that unfolded as the nation rapidly transitioned from World War II into the era of the Cold War, much of the corporate knowledge developed by the MIS–Y effort remained classified and largely unavailable until this treasure was once again declassified in the early 1990s. As a result, the stories of the American interrogation programs that emerged during subsequent conflicts in Korea, Vietnam, and the Gulf did so without the benefit of this extraordinary preceding chapter.

Effectiveness of Various Interrogation Approaches

Much of the debate surrounding the topic of interrogation in recent times has focused on this very question. I think it would be safe to say that in viewing interrogation as both an art and a science, the discussion of effectiveness falls primarily within the province of the former. While the U.S. Government invested in the study of interrogation during the 1950s through the 1970s, those programs almost exclusively examined the intricacies of what was once labeled the Communist Interrogation Model. The initial intent, I would submit was honorable: if we could deconstruct the nature of this coercive model, perhaps we could identify effective counter-strategies and therefore better prepare Americans going in harm's way who might find themselves detained by nations that did not conduct their affairs in a manner consistent with the Geneva Conventions relative to the treatment of prisoners.

Unfortunately, there was little interest in studying the nature of interrogation as a unique method of collecting critical intelligence information from foreign nationals detained by the United States. As a result, the interrogation strategies set forth in the current Army Field Manual are not based on scientific inquiry. Immersing myself in the archives, my best guess is that they are derived from lessons learned from tactical interrogations conducted during World War II. Those lessons—captured in such strategies as Pride & Ego Up, Rapid Fire, and We Know All—have since been codified into the various iterations of the Field Manual.

Arguments for or against the effectiveness of this paradigm are based almost exclusively on anecdotal evidence. The fact that Specialist Jones orchestrated the Emotional Love of Family approach and obtained information of intelligence is too often viewed as prima fascia evidence of the effectiveness of this strategy. Factors such as the interrogator's presence or personality, the physical setting, and the events experienced by the prisoner prior to interrogation lay beyond our ability to thus far measure.

While I have observed effective interrogations—and would like to think I've been effective in the course of the interrogations I've conducted—the only conclusion I can state that would meet the standards of scientific rigor is this: we don't know if the methods we are employing are effective, nor do we know for certain what other strategies or methods might be more effective than what we are teaching today.

That said, the sum total of my experience suggests that the most effective means of conducting interrogations—and by effective, I mean achieving consistent success in obtaining accurate, comprehensive, and timely information—is through what has been frequently described as a "relationship-based" model. Let me emphasize that this is far more than just establishing rapport; it involves the pursuit of operational accord. Employing non-threatening principles of persuasion and enlightened cultural finesse, the interrogator seeks to establish a productive, non-adversarial relationship wherein the source perceives his interests to be best served by engaging cooperatively with the interrogator. To borrow from negotiation theory, this involves fostering strategies rather than forcing strategies.

Since issues relating to coercion and torture continue to occupy centerstage in the public debate over this country's interrogation policy, I think it would show lack of courage on my part to sidestep this issue completely. I continue to be amazed that in the debate involving the so-called "ticking bomb" scenario, there appears to be a pre-supposition that physical, psychological, and/or emotional coercion will compel a source to provide actionable intelligence with the parties focusing only on the legal and moral arguments in favor or in opposition. To the best of my knowledge, there is no definitive data to support that supposition and considerable historical evidence to suggest the contrary.

I find that even the effort to define torture to be an elusive game at best. The problem lies in the fact that interrogations are conducted in the theater of reality, not a virtual world of words. From this operator's perspective, I find myself in full agreement with the observations of author Mark Moyar as set forth in his book, Phoenix and the Birds of Prey, a well-researched account of the Vietnam-era Phoenix Program.

Some people define torture as the infliction of severe physical pain on a defenseless person. I define torture as the infliction of any pain on a defenseless individual because deciding which activities inflict severe pain is an excessively complicated and imprecise business.

Challenges Faced by the United States in Developing an Effective Interrogation Program

It is this professional's opinion that the challenges before us—what I have described in my writings as barriers to success—are threefold:

The first is the linguistic/cultural barrier to success. The interrogator's ability to engage with a source with near-native fluency and acute cultural awareness is of vital importance. Distilled to its most fundamental form, interrogation is about information and relationships, with language and cultural intelligence serving as the primary instruments.

The second is the specialized knowledge barrier to success. Most experts agree that the both counterterrorism and counterinsurgency are intelligence-driven activities. In this regard, interrogation moves from the margins to play a central role in intelligence collection. As an example, General Hayden recently noted that more than 70 percent of the human intelligence used in the National Intelligence Estimate pertaining to threats to homeland security was based on information obtained from detainees.

The nature of the information required in these realms, however, is profoundly different from that sought in a conventional Battlespace. Rather than order of battle and lines of communications, interrogators need a detailed understanding of arcane finance structures, amorphous cell networks, and communications systems brought forward from antiquity. As with the cultural barrier to success, the specialized knowledge barrier to success is predicated on Sun Tzu's timeless exhortation to know the enemy.

Finally, there is what I've labeled the interpersonal barrier to success. The advent of the behavioral science consulting team concept resulted from a recognition that interrogation is an intense interpersonal dynamic bounded by complex informational and relational factors. Thus far, however, behavioral science consulting teams have been primarily comprised of clinical psychologists. To effectively overcome the myriad interpersonal challenges, the interrogator's methods should be informed by the full array of sound behavioral science, including at a minimum, such disciplines as social psychology and cultural anthropology.

Conclusions

It is likely evident from my foregoing remarks that I believe we have challenges before us in evolving the American way of interrogation. These challenges, however, are not unlike those facing the United States in 1942. In recommending a way forward, then, I rely in part upon the lessons I learned in studying the MIS–Y experience. Leaders at that time identified four key areas of emphasis to ensure mission success.

First, they needed to design an in-depth training program that transcended what was being taught in the basic interrogation courses. Today, this would require a comprehensive research effort and the systematic study of our interrogators who have demonstrated an ability to achieve consistent results.

Second, they would require an innovative and adaptable approach to interrogation. The prisoners they faced were often well-educated, conversant in several languages, and moved easily across cultures. This also describes many of the high-value detainees we have encountered. A more sophisticated strategic model mandates a more sophisticated approach to research.

Third, they needed to create a function-driven organization. I believe the Intelligence Community would be well-served by the creation of an organization of common concern vested with the responsibility for professionalizing the discipline of interrogation, managing a robust approach to studying the "science" of interrogation, and designing doctrine for incorporating the products of that research into field operations.

And forth, they needed to establish a facility built to precise standards driven by operational requirements. To appreciate the importance of this step, one only need to reflect back upon the early difficulties experienced at the Guantanamo Bay facility.

My operational experience has convinced me that these four steps can be taken in a manner that meets the spirit and even the most stringent interpretation of national and international law relative to the treatment of prisoners. Perhaps of more importance, I am equally convinced this course will enable us to meet current and

emerging threats in a fashion consistent with the best moral traditions of this nation.

In this way, I am confident that we would be able to what some of our countrymen have come to believe is impossible: to conduct our operations in a manner that demonstrates to all that we are truly good, so that we might, as a nation, embrace our desire to be truly great.

Vice Chairman BOND. Thank you very much, Colonel Kleinman.

Now we'll turn to Dr. Keller.

STATEMENT OF ALLEN S. KELLER, M.D., ASSOCIATE PROFESSOR OF MEDICINE, NEW YORK UNIVERSITY SCHOOL OF MEDICINE; DIRECTOR, BELLEVUE/NYU PROGRAM FOR SURVIVORS OF TORTURE; MEMBER, ADVISORY COUNCIL, PHYSICIANS FOR HUMAN RIGHTS

Dr. KELLER. Thank you.

Thank you for the privilege of testifying before this Committee today. I'm testifying on behalf of the Bellevue/NYU Program for Survivors of Torture, as well as Physicians for Human Rights.

I want to share with you my perspective as a physician concerning torture and interrogation practices. Mine is not a theoretical one. It's based on more than fifteen years of experience in caring for more than 2000 men, women and children from all over the world who have experienced torture and mistreatment, and studying the health consequences.

The focus of my comments is on the profound and dangerous health effects of torture and interrogation techniques, often referred to in the seemingly innocuous way of "enhanced interrogation techniques." I know you are all familiar with the list of these techniques. In my written testimony I have discussed several of them. I would be happy to answer questions. It is crucial that you understand from a medical, scientific and health perspective that there is nothing, nothing benign about these methods.

If you take one thing away from what I say today, let it be that you know that these methods are dehumanizing, they are traumatizing, they are dangerous, and they have horrific health consequences. I've treated traumatized and damaged individuals who were subjected to every one of these techniques. Many forms of torture and abuse, including the enhanced interrogation techniques, may leave no physical scars but can nonetheless cause severe physical and psychological suffering. If a gun is held to someone's head and the trigger pulled in a mock execution, there may be no physical marks, but the nightmares, the terror, the fears can last a lifetime. Stress positions can kill you. I have patients who were nearly killed or still suffer, years after, from being forced to stand for extended periods and likewise suffer the psychological impact of what they endured.

It's also important to note that any one form of torture or mistreatment rarely occurs in isolation but in combination with several abusive methods, and the context is also critical. There's a profound difference between the student pulling an all-nighter, the young physician who is on call every third night versus the detainee who is kept up for long periods who has no sense of when that mistreatment will end and rightfully fears for their life.

Such methods are potentially harmful even to individuals who were healthy before. When used with individuals who have under-

lying psychological or medical problems such as heart disease or high blood pressure, they can be life-threatening by causing heart attacks or strokes.

Now while the health consequences are clear, it's dubious at best that such methods elicit accurate information. I know from the victims I have cared for that they've told me that they would say whatever they thought needed to be said, whether it was true or not, to make these methods and this brutality stop. But there must be no mistake about the brutality of these enhanced interrogation techniques and no mistake about their health consequences.

Let me just focus on two examples—first of all, stress positions and standing. There has been much discussion from individuals, saying, well, I stand for 18 hours a day while working. Let me tell you there is a profound difference between that and an individual forced to stand in one position for that period. I have a Tibetan monk who I've cared for, an individual who was arrested and mistreated for promoting freedom in Tibet, and as a result of his actions/activities, he was forced to stand and was beaten. He developed deep vein thromboses, clots in the lower extremities that migrated up to his lungs. When I saw him, he could barely breathe. He almost died. If not for life- saving surgery, in fact, he would have died.

Sensory deprivation, such as being held in a dark cell or hooded results in disorientation, profound panic, and an adrenergic surge, a release of catecholamines that make you have heart palpitations and horrible fear.

I have individuals who I've cared for years afterwards who remain claustrophobic and terrified of the dark, and these aren't individuals who were weak before they suffered this abuse. They were often high-functioning individuals who years later tragically are shells of who they were.

I was asked to say a few words about the medical ethics of physician and health professional participation in interrogation. Let me just say this. First, it is a gross breach of professional ethics for health professionals to participate in torture in any way or countenance or condone torture or cruel, inhuman, or degrading treatment.

Regarding interrogations, most major medical organizations have stated that it is a violation for health professionals to participate in any way. I'm also concerned as a health professional that if we as a nation in any way condone these methods, we are pouring kerosene on what is already a worldwide public health epidemic of torture and mistreatment.

So, in conclusion, I would say, as a physician and scientist who has spent much of his career evaluating and caring for torture victims, I want to clearly state that these methods are cruel, inhuman and have horrific health consequences. I urge you to ensure that there is transparency, because that's the most effective means for stopping and preventing torture and to ensure that these methods are not allowed to be used on our watch.

[The prepared statement of Dr. Keller follows:]

PREPARED STATEMENT OF ALLEN S. KELLER

Thank you for the privilege of testifying before this committee today. I am testifying on behalf of the Bellevue/NYU Program for Survivors of Torture and Physicians for Human Rights. As a physician, I want to share with you my perspective on torture and abusive interrogation practices. My perspective is not a theoretical one. It is based on more than 15 years of experience in evaluating and caring for victims of torture and mistreatment from around the world, and studying the health consequences of such trauma. I will also address the ethical restrictions for health professionals regarding interrogations as well as the impact of U.S. policies on torture and mistreatment worldwide.

The focus of my comments are on the profound and dangerous health consequences of torture and interrogation techniques, often referred to as seemingly benign "enhanced interrogation techniques." While the full spectrum of such techniques used by U.S. authorities including the Central Intelligence Agency has not been disclosed, there have been reports that the "enhanced" interrogation program includes methods such as stress positions, shaking and beating, temperature manipulation, threats of harm to person or loved ones, prolonged isolation, sleep deprivation, sensory overload, sensory deprivation, sexual humiliation, exploitation of fears and phobias, cultural or religious humiliation, and water-boarding. From a medical, scientific and health perspective, there is nothing benign about them. Such techniques are gruesome, dehumanizing and dangerous. Noted one torture victim I cared for: "As someone who has experienced torture, I know these things are torture." And in fact based on the medical evidence he is correct. Clinical experience and data from the medical literature are clear and unequivocal. These techniques can cause significant and long lasting psychological and often physical pain and harm. Furthermore, these methods have been implicated in the deaths of several detainees in U.S. Custody since the tragic events of September 11, 2001.

I urge the Committee to conduct a full investigation into the use of these techniques; ensure transparency with regards to what interrogation techniques are used, given that transparency is crucial in preventing torture and abusive interrogation techniques; and ensure that torture and abusive interrogation techniques such as those cited above are prohibited.

I am an Associate Professor of Medicine at New York University School of Medicine. I am Director of the Bellevue/NYU Program for Survivors of Torture in New York City and the NYU School of Medicine Center for Health and Human Rights. Since our Program began in 1995, we have cared for over 2,000 men, women and children from more than 80 countries. Our Program is a member of the National Consortium of Treatment Programs (NCTTP) whose approximately 30 member organizations care for torture victims in more than 20 states across the United States. Additionally we are members of the International Rehabilitation Council of Torture Victims (IRCT) which includes more than 130 torture rehabilitation centers and programs worldwide. Individuals cared for in the Bellevue/NYU program have been persecuted for daring to question ruling powers; for expressing religious beliefs; or simply because of their race or ethnicity.

Additionally, I am co-chair of the Bellevue Hospital Bioethics Committee and oversee bioethics education at NYU School of Medicine. I have also served as a member of the American College of Physicians Ethics and Human Rights Committee.

I am a member of the Advisory Council of Physicians for Human Rights (PHR). I have participated in PHR's asylum network examining victims of torture and mistreatment applying for political asylum here in the United States. I have also participated in several PHR investigations and studies documenting torture and mistreatment, and training health professionals in conducting such documentation. I served as an advisor and reviewer for the recent report from PHR and Human Rights First "Leave No Marks." This report documents the harmful health impact of enhanced interrogation techniques and the risk of criminality. In my testimony today, I draw on my own clinical and research experience, including evaluation of several former U.S. detainees, as well as information presented in the PHR report and data from the medical literature.

In my work with torture victims, I have seen the scars from shackles, the marks from cigarette bums inflicted during interrogation and the wounds and broken bones from severe beatings. I have listened to stories of shame and humiliation from individuals raped or sexually humiliated, of haunting nightmares, and memories that will not go away. One patient of mine, for example, who was repeatedly submerged in a vat of water while being interrogated, years later still felt as if he was gasping for air whenever he showered or went out in the rain.

Torture can have devastating health consequences on the victim's physical, mental and social well being. Severe beatings or being restrained in painful positions can result in bruises, broken bones, severe and chronic pain including joint and muscle pain. Neurological symptoms including headaches, dizziness, hearing loss and loss of sensation are also common. Burns from cigarettes, beatings with whips or sticks can result in scars.

Many forms of torture and abuse, including the enhanced interrogation techniques, may leave no physical scars but can nonetheless cause severe physical and psychological suffering. For example, if someone is forced to witness the rape or torture of a family member, or subjected to the sexual humiliation of forced nakedness, or a gun is held to their head and the trigger pulled in a mock execution, there may be no physical scars, but the nightmares, the terrors can persist for years after the trauma. One patient of mine while being interrogated had a gun pointed at his head which was abruptly pulled away and shot into the air. He told me "Until now I still hear the sound of the gun in my brain. This psychological torture is encrusted in my brain."

According to one recent study published in the medical literature, the significance of harm caused by non-physical psychological abuse is virtually identical to the significance of the harm caused by physical abuse. In a study conducted by our own program, we found that psychological symptoms were significantly higher among those who experienced death threats.

Psychological distress is alarmingly common among survivors of torture and trauma. This includes posttraumatic stress disorder (PTSD) manifested by recurrent terrifying memories and nightmares and profound social impairment; as well as depression manifested by extreme feelings of sadness and hopelessness, including suicidal thoughts. Severe and chronic sleep difficulties are also signs of both depression and PTSD and common sequellae of torture and abuse. Extreme stress results in a physiologic response that involves release of stress hormones, such as cortisol, that have immediate effects on cardiac function, and blood pressure and may even have long lasting effects on insulin resistance and immune function.

The physical, psychological and social dimensions of health are interdependent. For example, an individual who was severely beaten may experience musculoskeletal pain. The recurring pain may trigger significant psychological symptoms, such as intrusive thoughts of the trauma. Because of these symptoms, the individual may be socially isolated, withdrawn and distrustful of society. Torture also impacts on the health of the community through fear and intimidation, which can become pervasive.

It is important to note that any one form of torture or mistreatment rarely occurs in isolation, but in combination with several abusive methods. The harm caused by the combination is greater than the additive effect of individual techniques. Prolonged isolation, for example, combined with sleep deprivation, exposure to loud noises, and exposure to cold, compound their devastating psychological impact. Furthermore the potential of these techniques to cause harm is intimately related to the context and setting in which they are used. Settings are designed to maximize the detainee's sense of loss of autonomy and control and complete vulnerability to the interrogator. Fear of harm or even death is real, not imagined. Cultural and religious humiliations, and language barriers heighten stress.

Such methods are potentially harmful to even individuals who were previously healthy. When used with individuals who have underlying psychological or medical problems, such as heart disease which may or may not be known, they can be potentially lethal for example by causing heart attacks or strokes.

To think that abusive methods, including the enhanced interrogation techniques, are harmless psychological ploys is contradictory to well established medical knowledge and clinical experience. These methods are intended to break the prisoners down, to terrify them and cause harm to their psyche, and in so doing result in lasting harmful health consequences.

While the health consequences of these methods are clear, it is dubious at best, that such brutal methods elicit accurate information. I know from the torture victims I have cared for that individuals so brutalized will often say whatever they think their interrogator wants to hear in order to stop the torture. Noted one torture victim I cared for: "I would say anything to stop the torture. Even if what I was saying was not true. I would say what ever they wanted to hear to make them stop."

There must be no mistake about the brutality of the stress and duress "enhanced interrogation methods" and that the harmful medical consequences, both physical and psychological, of such coercive methods can be long lasting and severe. Each tactic, by itself or in combination has the potential to cause significant harm. These methods should be called for what they are: torture. Let me give some examples:

Sleep Deprivation

Prolonged periods of sleep deprivation can result in confusion and psychosis-delusions and paranoia—clearly not predictors for eliciting accurate information. Physical symptoms include headaches and dizziness and chronic disruptions of normal sleep patterns. One patient of mine who in his country of origin was kept in a prison cell with bright lights and loud noises described the following. "The absence of sleep made me feel so sick. I felt dizzy. I had headaches. It affected my mind. I had trouble in my mind I felt like I was going crazy." Sleep deprivation also weakens the immune system and deprives vital organs of needed time to repair damage inflicted to the body.

Stress Positions

Restraining persons for extended periods, keeping individuals in painful positions can lead to significant and potentially long-term musculoskeletal pain as well as torn ligaments and other injuries and disabilities. Forcing individuals to stand for prolonged periods results in pooling of the blood and painful swelling of the lower extremities. It may result in blood clots in the legs (deep vein thromboses), which can subsequently travel to the lungs as pulmonary embolism—a potentially life threatening condition. Individuals forced to stand for extended periods are also more likely to faint and collapse, resulting in head trauma.

One patient of mine, a woman who was a professor at a university in her African country was arrested there for criticizing the ruling party. She was beaten, sexually assaulted and forced to stand naked. She described how her captors mocked and laughed at her while she stood there. They refused her access to a toilet and she subsequently urinated on herself. Unable to stand any longer she fell to the ground, but was forced to stand up again. As a result of her abuse she suffered chronic deep vein thromboses in both of her legs, which caused painful swelling, and required anticoagulation medication for several years following her abuse. Another patient of mine—a Tibetan monk, arrested after working to promote freedom in Tibet— suffered deep vein thromboses and subsequently pulmonary embolism as a result of prolonged standings and beatings. At the time I initially evaluated him he could barely breathe from the pulmonary embolism and nearly died. Several deaths of detainees in US custody in Iraq and Afghanistan are believed to have resulted directly from the use of stress positions, according to an analysis of coroners' reports.

Sensory Deprivation

Sensory deprivation, such as being held for prolonged periods in a dark cell or hooding can result in disorientation, severe anxiety and long term psychological damage, particularly when combined with mock execution or other psychological methods. Years after being held in isolation in small dark cells, patients of mine describe experiencing profound nervousness particularly in the dark or in enclosed spaces. This is not because they were weak persons. To the contrary, they were commonly individuals who prior to their abuse were high functioning, strong and self-confident.

Violent Shaking

Shaking can result in intracranial hemorrhages (bleeding of the brain), cerebral edema (swelling of the brain), resulting in increased intracranial pressure and permanent neurological deficits including cognitive impairments and/or death.

Sensory Overload

Sensory bombardment with light and noise can inflict extreme mental and physical harm whether it is used as a discrete interrogation tool or to disrupt sleep. These methods are intended to cause physiologic distress and disorientation. The body interprets such over-stimulation as danger signals, and an adrenergic response ensues with the release of stress hormones, which result in increased heart rate, increased blood pressure. This can potentially increase the risk of life threatening conditions such as myocardial infarctions (heart attacks).

Exposure to loud noises can result in chronic decreased hearing loss or even deafness or chronic tinnitus (ringing in the ears). Many of the patients I have cared for continue to suffer from poor hearing, tinnitus, and the sense that "the noise is still in their head."

Exposure to Extreme Cold or Heat

Subjecting a prisoner to extremes of temperature clearly can cause enormous physical discomfort and suffering. The body is highly regulated to maintain core body temperature within a narrow range which is essential for human survival. Thus prolonged exposure to either extremes of cold or heat is potentially life threatening resulting in hypothermia or hyperthermia.

Exposure to cold for example, by being placed in a room where it is very cold or forced to stand outside naked in the cold, and having cold water thrown on you, can have harmful consequences even if the environmental temperature is well above freezing. Even moderate cold exposure can lead to significant shifts from peripheral circulation—the body's way of maintaining core body temperature. This in turn can result in life threatening cardiac arrythmias, slowing of gastrointestinal functioning and possible decreased resistance to infection, and neurologic and cognitive impairments. Such methods conjure memories of the infamous hypothermia experiments conducted by the Nazis where concentration camp prisoners were immersed in vats of cold water from which many died.

Exposure to heat can result in dehydration, delirium, unconsciousness, and heat stroke—a life threatening condition. One patient of mine who was held in an overcrowded prison cell which was extremely hot and had bright lights described to me how dehydrated, weak and confused he became. He described how his skin became dry, cracked and even changed color "like a snake." Many of his fellow cellmates fared even worse. "People died in my arms," he told me.

Sexual Humiliation

Forced nakedness and sexual humiliations, such as being forced to perform sexually humiliating or embarrassing acts; being naked in front of members of the opposite sex; sexual touching or insults or threatening with rape; result in feelings of shame, guilt and worthlessness. Witnessing others subjected to this can be extremely traumatizing as well. While many individuals I have evaluated who were subjected to sexual humiliations were raped and sodomized, even those who were not, commonly feared this would happen to them.

Individuals whom I have evaluated, including those formerly detained in U.S. custody, subjected to sexual humiliations commonly described how utterly helpless, terrified and degraded they felt by such acts which destroyed their sense of dignity and self-confidence. Many of these victims shared their strong belief that such sexual humiliation was far worse than any beatings they may have experienced, and years later are haunted by shameful memories, nightmares, and loss of libido (decreased sexual functioning). While sexual humiliations are potentially traumatizing in all cultures, in certain cultures their impact may be even more traumatizing.

Water-boarding

Water-boarding or mock drowning, where a prisoner is bound to an inclined board and water is poured over their face, inducing a terrifying fear of drowning clearly can result in immediate and long-term health consequences. As the prisoner gags and chokes, the terror of imminent death is pervasive, with all of the physiologic and psychological responses expected, including an intense stress response, manifested by tachycardia, rapid heart beat and gasping for breath. There is a real risk of death from actually drowning or suffering a heart attack or damage to the lungs from inhalation of water. Long term effects include panic attacks, depression and PTSD. I remind you of the patient I described earlier who would panic and gasp for breath whenever it rained even years after his abuse.

Beatings

Beatings can clearly result in serious bruises, soft tissue injuries, acute and chronic pain and broken bones and death. Slapping with an open hand can result in serious injury, for example when an individual is hit in a particularly vulnerable area such as the face. Neck injuries from an "attention slap" to the face where the head suddenly jolts back is predictable. I have cared for many individuals with chronic visual problems as a result of being struck on the face. Individuals subjected to beatings are also at risk of significant psychological symptoms including depression and PTSD.

The combination of beating and stress positions has been implicated in at least two deaths of U.S. detainees. The use of beating in U.S. interrogation of detainees has often been called more benign names such as the "attention" slap or "attention grab," Such forms of beatings can potentially cause significant injuries and harm.

Threats of Harm to Person, Family, or Friends

It is well known through clinical experience and documented in the medical literature that threats to an individual's life or physical well-being or to the well-being of his family or friends can have profoundly harmful and long-lasting psychological impact. Such threats result in extreme fear and helplessness which are strongly associated with PTSD and major depression among trauma survivors.

Many of my patients I have evaluated have described how such threats and the anticipation of such harm were psychologically devastating. Individual's have told me that even worse than their own torture was the feelings of guilt and helpless-

ness from witnessing friends and loved ones tortured or that they might be subjected to such cruelty.

Exploitation of Fears and Phobias

Exploitation of fears and phobias, such as exposure to animals intended to terrify individuals can be psychologically traumatizing. For example, one Iraqi former Abu Ghraib detainee whom I evaluated, described being threatened with dogs. "I would hear the dog barking very close. Sometimes they would take (my) hood off so I could see the dog approaching."

Medical Ethics and Interrogations

It is a gross breach of professional ethics for health professionals in any way to countenance, condone or participate in the practice of torture, or other cruel, inhuman or degrading treatment or punishment of prisoners. This has been clearly stated by major health professional organizations including the American Medical Association, the American College of Physicians, the American Psychiatric and Psychological Associations, and the World Medical Association. Furthermore a health professional who becomes aware of abusive or coercive practices has a duty to report such practices to appropriate authorities. The American Psychological Association has specifically banned its members from participation in the tactics that allegedly make up the CIA's "enhanced" interrogation program.

Regarding interrogations, all of these organizations, with the exception of the American Psychological Association, have stated it is a violation for health professional to participate in interrogations in any way, including medical monitoring of the subject. The basis for this is that a dual role as health professional-interrogator undermines the health professional's role as healer, and thereby erodes trust in the health professionals and their profession. Furthermore, exploiting, sharing or using medical information from any source for interrogation purposes is unethical.

Throughout the 20th century, human rights groups have seen a clear pattern amongst governments that torture of co-opting the expertise, credibility and perceived neutrality of the medical profession to legitimize the use of many of the tactics in the CIA's "enhanced" interrogation program. Sadly, the US, a nation that has consistently spoken out against torture and the use of medical professionals in these practices is now seeking to cloak abusive and illegal interrogation techniques in the white coat of the medical profession. The Director of National Intelligence, Admiral Michael McConnell, claimed in July that the "enhanced" program is safe because of medical supervision. Health professionals that participate in the role Admiral McConnell describes violate the War Crimes Act, the Hippocratic Oath and the terms of their health professional license. By monitoring interrogations, health professionals cease to be healers and instead become calibrators of harm.

Health Impact of U.S. Interrogation Policies Worldwide

I am very concerned as a health professional that when we as a country condone such methods, we are putting our soldiers and others U.S. citizens living around the world at risk. Furthermore, practicing or condoning torture by the United States in any way runs the risk of increasing what is already a world wide public health epidemic of torture—documented to occur in more than 100 countries. Torture is frequently invoked in the name of national security, whether the victim is a Tibetan monk calling for independence or an African student advocate protesting for democracy. While torture is not effective in eliciting accurate information, it is effective in undermining community, trust and safety. Any condoning of torture or mistreatment by our country, puts innocent civilians around the world promoting democracy and freedom under despot regimes in harms way.

Added a torture victim I cared for: "In order for the United States to be strong and speak truly to oppressive leaders around the world, the United States must not torture or mistreat its prisoners—even terrorists. The United States must lead by example. When the United States uses these methods to get the information they want, the other governments who don't care about the population use torture to oppress their populations. They say 'Even the United States uses torture. Why not us to protect our power?' It is essential that we have clear standards for the treatment of all detainees in U.S. custody.

Conclusion

As a physician and scientist who has spent much of his professional career evaluating and caring for victims of torture and abuse, I want to clearly state that torture and inhuman interrogation techniques are cruel, ineffective and can have devastating health consequences. As a health professional, these abuses and the harm they cause deeply offend medical ethics and values. As an American, they offend the traditions and principles we have long shared and cherished as a nation, including

a ban on torture and cruel, inhuman or degrading treatment or punishment that has stood inviolate since George Washington was Commander-in-Chief. I urge you to ensure that no one is authorized to violate these defining principles in the name of the United States.

Recommendations

1. The Intelligence Committee should conduct a full investigation regarding interrogation practices.

The Intelligence Committee should conduct a full investigation into what interrogation methods and related practices have been and are being used by the intelligence community, particularly with regards to the Central Intelligence Agency.

2. The Intelligence Committee should ensure transparency regarding interrogation methods used.

The idea that interrogation techniques must be secret is an invitation to torture. Arguably the most effective means of preventing torture is to ensure transparency.

3. The Intelligence Committee should ensure that torture and abusive interrogation techniques are prohibited.

The restrictions contained in the Army Field Manual should apply to the treatment of all detainees during interrogations conducted by all U.S. personnel (including the CIA and any contractors) anywhere in the world. Additionally, torture and abusive interrogation techniques such as stress positions, shaking and beating, temperature manipulation, threats of harm to person or loved ones, prolonged isolation, sleep deprivation, sensory overload, sensory deprivation, sexual humiliation, exploitation of fears and phobias, cultural or religious humiliation and water-boarding should be explicitly forbidden through amendments to the War Crimes Act.

4. The Intelligence Committee should ensure that health professionals do not violate their professional ethics

Health professionals must uphold the ethical standards of their professions and must not be put in positions where they are expected or asked to violate them. Press reports and government documents have shown that health professionals, especially psychologists and other mental health specialists, have allegedly played a central role in the design, supervision, and implementation of these abusive and illegal tactics. Congress must ensure that role is uniformly prohibited without exceptions.

Vice Chairman BOND. Thank you, Dr. Keller.

Ms. Massimino.

STATEMENT OF ELISA MASSIMINO, WASHINGTON DIRECTOR, HUMAN RIGHTS FIRST

Ms. MASSIMINO. Thank you, Senator.

I am honored to be here today and I appreciate the opportunity to share with you the views of Human Rights First on this important issue. I'm not an expert on interrogations or intelligence. I've spent most of the last two decades working to leverage the positive example of the United States to pressure other governments to respect human rights. But I start from the premise that intelligence gathering is a vital tool in disrupting terrorist networks. Effective interrogations are an important part of this effort when they are conducted consistent with the laws and values of the United States.

As General Otstott mentioned, the Director of National Intelligence recently said that he would not be comfortable having the CIA techniques used against Americans, but if there's one rule of U.S. interrogation policy after the Hamdan decision, it's this: if the U.S. does not want Americans to be subjected to these techniques, it must not employ them itself. If the CIA is authorized to use a particular interrogation method under the Executive Order, it means the U.S. considers that method compliant with Common Article 3 and that our enemies can lawfully use those methods

against captured Americans in any situation governed by Common Article 3.

This is hardly a theoretical concern. During the cold war, when my father served, captured CIA officers were subjected by Chinese interrogators to precisely the same kinds of abusive interrogation techniques that are now reportedly being used by the CIA—sleep deprivation, long time standing and other techniques that leave no physical external marks. Would it have made a difference to us if the purpose of the Chinese in interrogating those prisoners was not to humiliate or degrade the CIA officers but simply to gain information? I don't think so. Yet there is language in the Executive Order that would have offered the Chinese just such an argument. If it's read in this manner, the Executive Order sets a dangerous precedent.

It's important to remember that all violations of Common Article 3 are prohibited, not just the grave breaches outlined in the Military Commissions Act. Congress explicitly rejected the Administration's proposal to limit U.S. obligations under Common Article 3 to torture and other war crimes. All of Common Article 3 applies to the CIA and the MCA did nothing to change that.

Nor does the MCA authorize the enhanced interrogation techniques. To the contrary, Senator Warner said during debate that all the techniques banned by the Army field manual constitute grave breaches of Common Article 3 and are clearly prohibited under the MCA. No one contradicted that statement at any point in the Congressional debate, and no Member of Congress defended the specific techniques reportedly used by the CIA or claimed that those techniques would be legal. To the contrary, the Congressional record is crystal clear. The MCA was intended to rein in the CIA program.

The highest-ranking uniformed lawyers of all four branches of the service agree that such techniques are illegal. They have all testified that the stress positions, the use of dogs, forced nudity and the like are illegal, inhumane and violate Common Article 3. This view is consistent with past U.S. practice, our own court precedent, and the views of our closest allies, as I outline in my written testimony.

Administration officials frequently imply that the U.S. wants detainees to believe that they will be tortured by their American captors, yet we want the rest of the world to believe just the opposite. We can't have it both ways. The problem now is not that the enemy knows what to expect from us; it's that the rest of the world, including our allies, does not. There was a time, not that long ago, when the President declared that the demands of human dignity were "nonnegotiable," when no one in the U.S. government questioned the meaning and scope of humane treatment provisions of the Geneva Conventions, and when the rest of the world viewed with great skepticism claims by U.S.-held prisoners that they had been abused.

Today we are in a very different place. Our stand on human dignity seems to be that it is negotiable so long as there's no permanent damage. The humane treatment provisions of Common Article 3, which were clear to our military for more than half a century, are now considered by the Administration to be too vague to en-

force, and much of the rest of the world believes that the U.S. routinely tortures prisoners in our custody.

Congress should ensure that the U.S. adheres to a single standard of humane treatment of all prisoners in its custody. The most effective way to accomplish this would be to make the McCain amendment's Army field manual provision binding on all government agencies. For the safety of U.S. personnel and the integrity of human rights standards, the U.S. must make clear to the American people and to the rest of the world what it means when it says it will abide by its obligations under Common Article 3.

Interrogation techniques need not cause permanent damage in order to be unlawful, but they have inflicted enormous damage on the honor and reputation of the United States. Your actions will help to determine whether that damage is permanent.

Thank you.

[The prepared statement of Ms. Massimino follows:]

TESTIMONY OF
ELISA MASSIMINO

WASHINGTON DIRECTOR
HUMAN RIGHTS FIRST

HEARING ON

U.S. INTERROGATION POLICY AND EXECUTIVE ORDER 13440
INTERPRETING COMMON ARTICLE 3 OF THE GENEVA CONVENTIONS

BEFORE THE

UNITED STATES SENATE
SELECT COMMITTEE ON INTELLIGENCE

SEPTEMBER 25, 2007

Introduction

Chairman Rockefeller, Vice Chairman Bond and Members of the Committee, thank you for inviting me to be here today to share the views of Human Rights First on these issues of such importance to our Nation. I have appreciated the opportunity to work with your office, Mr. Chairman, as well as with others on the Committee, and I look forward to continuing to do so as you consider how to fulfill your duty to ensure that U.S. interrogation policy is effective, humane and consistent with our laws and values.

My name is Elisa Massimino, and I am the Washington Director of Human Rights First. Human Rights First works in the United States and abroad to promote a secure and humane world by advancing justice, human dignity and respect for the rule of law. We support human rights activists who fight for basic freedoms and peaceful change at the local level; protect refugees in flight from persecution and repression; help build a strong international system of justice and accountability; and work to ensure that human rights laws and principles are enforced in the United States and abroad.

For nearly thirty years, Human Rights First has been a leader in the fight against torture and other forms of official cruelty. Human Rights First was instrumental in drafting and campaigning for passage of the Torture Victims Protection Act and played an active role in pressing for U.S. ratification of the Convention Against Torture and other forms of Cruel, Inhuman or Degrading Treatment or Punishment. We worked for passage of the 1994 federal statue that makes torture a felony and for passage of the 2005 McCain Amendment, which reinforces the ban on cruel, inhuman or degrading treatment of detainees in U.S. custody, regardless of their location or legal status. We successfully fought efforts by the administration to weaken the humane treatment requirements of the Geneva Conventions during debate over the Military Commissions Act last year. In June 2007, Human Rights First published a joint report with Physicians for Human Rights entitled *Leave No Marks: Enhanced Interrogation Techniques and the Risk of Criminality*, the first comprehensive evaluation of the nature and extent of harm likely to result from "enhanced" interrogation techniques and the legal risks faced by interrogators who employ them.

I. Intelligence Interrogations and the Law

You have asked me to address the legal interpretations of Common Article 3 of the Geneva Conventions contained in the President's recent Executive Order and the consistency of that order with U.S. and international law. I start from the premise that intelligence gathering is a necessary – and perhaps the most important – tool in disrupting terrorist networks. Effective interrogations designed to produce actionable intelligence are a legitimate and important part of this effort. Such interrogations can and must be conducted consistent with the laws and values of the United States.

But that has not been the case. The administration's approach to interrogations after 9/11 was to assert broad executive power and seek to redefine the rules governing treatment of prisoners. This approach is epitomized by the Justice Department's

infamous "torture memo," which construed the domestic criminal statute prohibiting torture so narrowly that much of what the United States has condemned as torture when done by other governments would not be prohibited. That same memo, which was publicly embraced as "reasonable" by the CIA's acting general counsel in testimony before this committee in June, also sought to reassure interrogators that, even if their conduct constituted torture under the memo's narrow definition, they need not worry about being prosecuted under the statute because the President could authorize violations of the law in his power as commander in chief.

The administration took a similar approach to human rights and humanitarian law treaty obligations. Administration lawyers argued that the United States was not bound by the Geneva Conventions' prohibitions against torture, cruel treatment and outrages upon personal dignity because, as unlawful combatants, detainees in U.S. custody were not entitled to those protections. The administration likewise sought to evade U.S. treaty obligations under the Convention Against Torture, which requires states to prevent the use of cruel, inhuman or degrading treatment, by reinterpreting a reservation to the treaty to mean that the United States was not bound by the prohibition on cruelty when it acted against foreigners abroad. When Congress rejected this untenable position by passing the McCain Amendment and required all U.S. personnel – including the CIA – to refrain from cruel, inhuman and degrading treatment of prisoners, no matter what their location or legal status, administration lawyers started arguing that the McCain Amendment did not rule out *all* official cruelty, but only that which "shocks the conscience" – a standard Vice President Cheney argued was infinitely flexible and "in the eye of the beholder."

Finally, when the Supreme Court ruled in the *Hamdan v. Rumsfeld* case that the humane treatment standards of the Geneva Conventions, i.e., Common Article 3, were binding on the United States in its treatment of all detainees, the administration tried to convince Congress to replace that standard with its more flexible "shocks the conscience" interpretation. Congress refused. Though it narrowed the range of conduct that would be considered a war crime under domestic law, Congress rejected the administration's proposal to redefine and narrow Common Article 3 itself. Nonetheless, the President concluded upon signing the bill into law that the CIA could continue to use a set of "alternative interrogation techniques" beyond those authorized for use by the military. On July 20, 2007, he formalized that conclusion in Executive Order 13440, which purports to interpret Common Article 3 and authorizes a CIA program of secret detention and interrogation.

It is against this backdrop that Executive Order 13440 must be assessed.

II. Evaluating Executive Order 13440

Section 6(a)(3) of the Military Commissions Act (MCA) directs the President "to promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches of the Geneva Conventions" and to issue such interpretations by Executive Order published in the Federal Register. While the MCA recognizes the traditional role of the President to interpret international treaties, it reiterates the role of Congress and the courts to ensure that such interpretations are consistent with U.S.

obligations under those treaties. Senator John McCain, a lead sponsor of the MCA, cautioned when the Act was passed that the President remains bound by the conventions themselves and that "[n]othing in this bill gives the President the authority to modify the conventions or our obligations under those treaties."

Two days after the President issued the Executive Order authorizing the CIA program to resume, Director of National Intelligence Admiral Mike McConnell appeared on *Meet the Press* to defend the program. When asked whether Americans would be troubled if measures permitted under the CIA program were used by the enemy against captured U.S. personnel, McConnell seemed uncomfortable and simply insisted "it's not torture." Finally, under pressure to say whether the CIA standard was one the United States could live with in the treatment of its own people, McConnell admitted that he would not be comfortable having the CIA techniques used against Americans. All he could say by way of reassurance was that those subjected to these methods would not suffer "permanent damage."[1]

But these techniques need not inflict permanent damage in order to violate the law and potentially result in very serious criminal sanctions for those who authorize or employ them. Federal law prohibits not only torture but any cruel, inhuman or degrading treatment of detainees, regardless of who they are, where they are held, or which U.S. agency holds them. Under U.S. law, the severity of physical pain or mental harm caused by an interrogation technique is central to determining whether the technique is lawful.[2]

Moreover, Admiral McConnell seems to have missed the most fundamental point about U.S. interrogation policy after *Hamdan*: if the U.S. government does not want American citizens or soldiers to be subjected to these techniques, then it may not employ them itself. The Supreme Court ruled that Common Article 3 of the Geneva Conventions governs U.S. treatment of al Qaeda detainees, including all interrogations conducted anywhere by any U.S. agency. If the CIA is authorized to use a particular interrogation method under the new Executive Order, it means the U.S. government considers that method to be compliant with Common Article 3. And if it is compliant with Common Article 3, then U.S. enemies can use it against captured Americans in any situation governed by Common Article 3.

The administration has not released the legal guidance underpinning the President's Executive Order, but administration officials have said that it permits the CIA to return to at least some aspects of the pre-McCain Amendment interrogation program. And there is language in the Order itself which raises serious questions about whether the administration is once again trying to subvert the standards which Congress has repeatedly sought to impose on it. Section 3(b)(i)(E) of the Order is particularly concerning; on its face, this section would appear to *permit*, rather than prohibit, "willful and outrageous acts of personal abuse" so long as the purpose of such acts was to gain intelligence rather than to humiliate or degrade the prisoner. If read in this manner, the

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[1] *Meet the Press* (July 22, 2007) transcript available at http://www.msnbc.msn.com/id/19850951/.
[2] Human Rights First and Physicians for Human Rights, *Leave No Marks: Enhanced Interrogation Techniques and the Risk of Criminality*, 1 (2007).

Executive Order fails completely to do what Congress required of the President in the MCA – to articulate interrogation standards higher than those which constitute felony war crimes.

It is imperative for the United States to make clear that its interrogation practices are consistent with U.S. values and with domestic and international law. Admiral McConnell, in that same appearance on *Meet the Press*, implied that the United States *wants* detainees to believe that they will be tortured by their American captors. Yet it wants the rest of the world to believe just the opposite. We cannot have it both ways. Our biggest problem now is not that the enemy knows what to expect from us; it is that the rest of the world, including our allies, does not. Ambiguity about U.S. interrogation practices has not – on balance – benefited U.S. security. On the contrary, this ambiguity, combined with the Abu Ghraib scandal and the deaths of prisoners in U.S. custody, has severely damaged U.S. efforts to defeat al Qaeda.

The President and other administration officials have asserted that the "enhanced" interrogation techniques are effective at obtaining information. That is a difficult claim to refute – not because it is so obviously true, but because any evidence that would tend to support it is kept secret and known only to those who make this assertion. But effectiveness cannot convert a felony into lawful conduct, would not rectify a breach of Common Article 3 and does not make a given technique any less painful, cruel or degrading.

I would note, however, that the recent report of the Intelligence Science Board published by the National Defense Intelligence College raises serious questions about the supposed effectiveness of abusive interrogations.[3] There is a substantial body of opinion among serving senior officers and career interrogators that such techniques are not only illegal but ineffective as well, and undermine our ability to elicit reliable intelligence.

For example, in releasing the new U.S. Army Field Manual on interrogation Lieutenant General John F. Kimmons, deputy chief of staff for Army intelligence, said that "no good intelligence is going to come from abusive practices. I think history tells us that. I think the empirical evidence of the last five years, hard years, tells us that."[4] Likewise, General David Petraeus, the commander of U.S. forces in Iraq, recently wrote in an open letter to U.S. troops serving there: "Some may argue that we would be more effective if we sanctioned torture or other expedient methods to obtain information from the enemy. They would be wrong. Beyond the basic fact that such actions are illegal, history shows that they also are frequently neither useful nor necessary."[5] Moreover, military officers have said any suggestion by the White House that such techniques can be used by the CIA will undermine the authority of military commanders in the field,

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[3] Intelligence Science Board, *Educing Information – Interrogation: Science and Art – Foundations for the Future*, National Defense Intelligence College 2007.

[4] News Transcript, U.S. Department of Defense, Sept. 6, 2006 *available at* http://www.defenselink.mil /Transcripts/Transcript.aspx?TranscriptID=3712.

[5] Letter from General David H. Petraeus (May 10, 2007) *available at* http://www.mnf-iraq.com/images/stories/CGs_Corner/values_message_%2810_may_07%29.pdf.

where troops face "ticking time bombs" every day in the form of improvised explosive devices, but are told by their commanding officers that such techniques are never acceptable.

As the Committee evaluates the legality and sufficiency of Executive Order 13440 and the CIA program it purports to authorize, it should bear in mind the following.

A. All Violations of Common Article 3 are Prohibited – Not Just "Grave Breaches."

The Military Commissions Act defines certain "grave" breaches of Common Article 3, including "torture" and "cruel or inhuman treatment." These grave breaches constitute felonies under the War Crimes Act. But Congress explicitly rejected the Administration's proposal to limit U.S. obligations under Common Article 3 to these "grave" breaches. Indeed, it specifically directed the President to define those "violations of treaty obligations which are *not* grave breaches of the Geneva Conventions" (emphasis added). In other words, *any* interrogation technique which is humiliating or degrading is prohibited by Common Article 3, even if it does not rise to the level of conduct set forth in the War Crimes Act. *All* of Common Article 3 still applies to CIA interrogations under *Hamdan*, and the MCA did not change that in any way. To the extent that the Executive Order is read to authorize or permit such conduct, then the President has exceeded his authority under the MCA to interpret Common Article 3.

B. What the CIA Can Lawfully Do, the Enemy Can Lawfully Do.

Under *Hamdan*, a decision that an interrogation technique may be employed by the CIA in the conflict with al Qaeda amounts to a decision that the technique does not violate Common Article 3. Thus, if the United States adopts a legal interpretation that a particular interrogation technique does not violate Common Article 3 and its prohibition on "cruel treatment" and "outrages on personal dignity," this will establish a precedent that the subsequent use of this technique on U.S. personnel does not violate Common Article 3.

This fact underscores the wisdom of the U.S. Army Field Manual guidance on determining the outer limits of permissible interrogation:

> In attempting to determine if a contemplated approach or technique should be considered prohibited ... consider [this test]: If the proposed approach [or] technique were used by the enemy against one of your fellow soldiers, would you believe the soldier had been abused?[6]

[6] "Human Intelligence Collector Operations," FM 2-22.3, September 2006.

This same standard must guide the administration's decision on permitted CIA interrogation techniques, because this decision will amount to an authoritative U.S. legal interpretation of the requirements of Common Article 3.

This is hardly a theoretical concern for the United States. During the Cold War, captured CIA officers John T. Downey and Richard Fecteau were subjected by Chinese interrogators to precisely the same kinds of abusive interrogation techniques that are now reportedly being used by the CIA. According to public reports, the captured Americans were subjected to sleep deprivation, "long time standing," prolonged use of leg irons and other "harsh" techniques – but were not beaten or otherwise physically assaulted:

> The interrogations began, with sessions usually lasting for four hours, but some as long as 24 hours straight. Sleep deprivation was part of the game: the men were prohibited from sleeping during the day and the Chinese would invariably haul them off for middle of the night interrogations after a half hour's sleep.... The men were never tortured physically or, after their initial capture, beaten. Fecteau reported that he wore leg irons constantly for the first 10 months and that he was made to stand during interrogations to the point of falling down from exhaustion, especially after being caught lying or bluffing. Downey remembered the leg irons and the intense psychological pressure of interrogations....
>
> Each received the Distinguished Intelligence Medal for "courageous performance" in enduring "sufferings and deprivations...." Their story, [former CIA Director George] Tenet declared, "is one of the most remarkable in the history of the Central Intelligence Agency."[7]

It would be astonishing for the administration to approve the very techniques to which these CIA agents were subjected and to declare, in effect, that under Common Article 3, U.S. personnel may lawfully be subjected to such "sufferings and deprivations" as sleep deprivation, stress positions and other such abusive interrogation techniques.

C. US Troops and Allied Forces Rely on a Strict Interpretation of Common Article 3.

The United States has relied heavily on Common Article 3 in the past and has insisted on a broad interpretation of its requirements. There have been many situations – including that of U.S. POWs in Vietnam – in which our adversaries in armed conflict have argued that U.S. forces were not entitled to the full protections of the Geneva Conventions. They have argued, for instance, that U.S. personnel were "war criminals" or that the conflict in question was a "civil war" and not of an "international character."

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[7] Nicholas Dujmovic, "Two CIA Prisoners in China, 1952–73: Extraordinary Fidelity," *Studies in Intelligence: Journal of the American Intelligence Professional, 50* (4) (2006).

The U.S. legal response has been that these positions were incorrect, but that, even if they were correct, U.S. forces were entitled to the full protections of Common Article 3 under any circumstances.

During the debate on the MCA, a group of 49 distinguished retired military leaders, including General John Shalikashvili, USA (Ret.), former Chairman of the Joint Chiefs of Staff; General Joseph Hoar, USMC (Ret.), former commander of the Central Command; and Ambassador Douglas "Pete" Peterson, USAF (Ret.), who spent six years as a POW in Vietnam, made this argument in a September 12, 2006 letter to Senators Warner and Levin. They argued that the United States relies heavily on Common Article 3, and weakening its standards places U.S. servicemembers at increased risk:

> We have abided by [Common Article 3] in our own conduct for a simple reason: the same standard serves to protect American servicemen and women when they engage in conflicts covered by Common Article 3. Preserving the integrity of this standard has become increasingly important in recent years when our adversaries often are not nation-states....
>
> If any agency of the U.S. government is excused from compliance with these standards, or if we seek to redefine what Common Article 3 requires, we should not imagine that our enemies will take notice of the technical distinctions when they hold U.S. prisoners captive. If degradation, humiliation, physical and mental brutalization of prisoners is decriminalized or considered permissible under a restrictive interpretation of Common Article 3, we will forfeit all credible objections should such barbaric practices be inflicted upon American prisoners.
>
> This is not just a theoretical concern. We have people deployed right now in theaters where Common Article 3 is the only source of legal protection should they be captured. If we allow that standard to be eroded, we put their safety at risk.

Likewise, eroding Common Article 3 also places at risk allied forces fighting side-by-side with U.S. troops. When these groups ally themselves with the United States – like the Northern Alliance in Afghanistan or the Hmong during the Vietnam War – they need a strong interpretation of Common Article 3. U.S. adversaries in these conflicts may argue that local U.S. allies are not POWs because they were fighting in an "internal" conflict, were "traitors" or "spies," were not in organized units with a clear chain of command, did not wear uniforms, or all of the above. U.S. commanders do not want to be put in a position of having to say, "Our forces are POWs – you are on your own." In other words, even if the United States argues that CIA interrogation techniques cannot legally be applied to uniformed U.S. servicemembers, the U.S. would still be forfeiting its standing to argue that its allies cannot be subjected to brutal interrogation techniques because they are prohibited by Common Article 3.

D. Congress Intended to "Rein In" the "Enhanced" Interrogation Techniques in the MCA.

Contrary to the claims of administration representatives and even some critics of the MCA, the MCA did not – and was not intended to – authorize the CIA's "enhanced" interrogation techniques. In fact, the most prominent Republican sponsors of the Military Commissions Act stated publicly that specific "enhanced" CIA interrogation techniques would, under the MCA, no longer be permissible. Senator Lindsey Graham said specifically during the Senate debate that the bill "reined in the [CIA] program."[8] Senator McCain said that he was "confident" that the bill would "criminalize certain interrogation techniques, like waterboarding and other techniques, that cause serious pain or suffering that need not be prolonged...."[9]

Perhaps most significant of all, Senator Warner, then-Chairman of the Senate Armed Services Committee, stated that all the techniques banned by the U.S. Army Field Manual constitute "grave breaches" of Common Article 3 and are "clearly prohibited by the bill."[10] No one contradicted that statement by the Committee Chairman and key negotiator of the language at any point in the congressional debate. Senator Warner stated that the following techniques were not only "clearly prohibited by the bill," but these acts all constituted "grave breaches" – felonies – under the MCA:[11]

- Forcing a detainee to be naked, perform sexual acts, or pose in a sexual manner
- Applying beatings, electric shocks, burns, or other forms of physical pain
- "Waterboarding"
- Using dogs
- Inducing hypothermia or heat injury
- Conducting mock executions
- Depriving a detainee of necessary food, water or medical care.

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[8] "Not only is torture a war crime, serious physical injury, cruel and inhumane treatment mentally and physically of a detainee is a crime under title 18 of the war crimes statute. Every CIA agent, every military member now has the guidance they need to understand the law. Before we got involved, our title 18 War Crimes Act was hopelessly confusing. I couldn't understand it. We brought clarity. We have reined in the program. We have created boundaries around what we can do. We can aggressively interrogate, but we will not run afoul of the Geneva Conventions." Congressional Record, September 28, 2006, pg S10393.

[9] Congressional Record, September 28, 2006, pg S10414. In other instances, Senator McCain has cited techniques that cause "extreme deprivation" such as "sleep deprivation, hypothermia and others...." (*Face the Nation*, September 24, 2006) as well as stress positions that cause serious pain and suffering.

[10] Senator Warner addressed his remarks to the Kennedy Amendment which listed the specific techniques banned in the Field Manual. Senator Warner said of the techniques: "The types of conduct described in the amendment, in my opinion, are in the category of grave breaches of Common Article 3 of the Geneva Conventions. These are clearly prohibited by our bill." Congressional Record, September 28, 2006, pg S10390.

[11] *Id.*

Congress made it clear that these techniques – at a minimum – are felonies under the MCA amendments to the War Crimes Act.[12] There are doubtless other acts that constitute "grave breaches" and, as noted above, even non-grave breaches still violate Common Article 3 under the MCA. But these techniques are "clearly" grave breaches.

In the House, senior Republican Representative Christopher Shays, Vice Chairman of the Government Reform Committee and a member of the Homeland Security Committee, also said that "any reasonable person" would conclude that the CIA "enhanced interrogation techniques" clearly cause serious mental and physical suffering.[13] Another senior Republican, Representative John McHugh, denounced as "absolutely false" any claim that the bill authorized the "enhanced" interrogation techniques, saying that such claims "fly in the face" of the bill's language.[14]

Not a single member of Congress defended the specific "enhanced" techniques discussed below or maintained that these techniques were legal under the MCA provisions. To the contrary, Senators McCain, Graham and Warner – the three Republican Senators who negotiated the compromise language in the bill – were clear: the MCA was intended to rein in the CIA program, making sleep deprivation, hypothermia and other forms of extreme deprivation grave breaches of Common Article 3, which are clearly prohibited by the MCA.

E. CIA "Enhanced" Techniques Violate Common Article 3.

The most detailed public account of the "enhanced" interrogation techniques used by the CIA was published in a November 8, 2005 ABC News report. While the Administration has refused to confirm or deny this account, it is widely cited and seen as credible. I do not know or assume that this is a comprehensive list of all the interrogation techniques that have been authorized or used in the CIA program. But I will address each of these particular techniques as a means of illustrating the manifest ways in which they, at a minimum, violate Common Article 3, other international standards and past U.S. policy and practice.

The techniques reported by ABC News include violent "shaking," striking prisoners, stress positions, extreme cold, sleep deprivation and waterboarding. ABC News described the "enhanced" techniques as:

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[12] This same point was made during the House debate on the MCA by the then-Ranking Member of the House International Relations Committee, Representative Lantos, who stated that the legislation would keep it "a crime to engage in serious physical abuse against detainees; it prohibits the worst of the abuses that we have seen, including those that are also banned by the Army's new Field Manual on interrogation...." Congressional Record, pg H7556.

[13] Congressional Record, pg H7554: "When I read the language in this bill – and specifically the definitions of cruel, inhumane and degrading treatment – I believe any reasonable person would conclude that all of the techniques would still be criminal offenses under the War Crimes Act because they clearly cause 'serious mental and physical suffering.'" As will be discussed in detail below, the MCA makes it a felony under the War Crimes Act to commit the "grave breach" of "cruel and inhuman" treatment which is defined as causing "severe or serious physical or mental pain or suffering...."

[14] Representative McHugh, Congressional Record, pg H7539.

*1. **The Attention Grab**: The interrogator forcefully grabs the shirt front of the prisoner and shakes him.*

*2. **Attention Slap**: An open-handed slap aimed at causing pain and triggering fear.*

*3. **The Belly Slap**: A hard open-handed slap to the stomach. The aim is to cause pain, but not internal injury. Doctors consulted advised against using a punch, which could cause lasting internal damage.*

*4. **Long Time Standing**: Prisoners forced to stand handcuffed and with feet shackled to an eye bolt in the floor for more than 40 hours. Exhaustion and sleep deprivation are effective in yielding confessions.*

*5. **The Cold Cell**: The prisoner is left to stand naked in a cell kept near 50 degrees. Throughout the time in the cell the prisoner is doused with cold water.*

*6. **Waterboarding**: The prisoner is bound to an inclined board, feet raised and head slightly below the feet. Cellophane is wrapped over the prisoner's face and water is poured over him. Unavoidably, the gag reflex kicks in and a terrifying fear of drowning.*

Each of these techniques violates Common Article 3. Each constitutes an outrage upon personal dignity and can cause not only pain and humiliation but also serious physical injury. During the MCA debate, a group of prominent medical experts, including the Presidents of the American Psychiatric Association and the American Psychological Association, concluded:

> There must be no mistake about the brutality of the "enhanced interrogation methods" reportedly used by the CIA. Prolonged sleep deprivation, induced hypothermia, stress positions, shaking, sensory deprivation and overload, and water-boarding ... among other reported techniques, can have a devastating impact on the victim's physical and mental health. They cannot be characterized as anything but torture and cruel, inhuman, and degrading treatment....[15]

[15] Letter to Senator McCain, September 21, 2006, signed by Allen S. Keller, MD (Program Director, Bellevue/NYU Program for Survivors of Torture), Gerald P. Koocher, PhD (President, American Psychological Association), Burton J. Lee, MD (Physician to the President for George Herbert Walker Bush), Bradley D. Olson, PhD (Chair, Divisions for Social Justice, American Psychological Association), Pedro Ruiz, MD (President of the American Psychiatric Association), Steven S. Sharfstein, MD (former President, American Psychiatric Association), Brigadier General Stephen N. Xenakis, MD (USA-Ret.), Philip G. Zimbardo, PhD (professor emeritus, Stanford and past President, American Psychological Association).

F. Each of the "Enhanced" Interrogation Techniques Is Illegal.

In several instances, close U.S. allies have declared these techniques or variations of them to be clearly illegal. In Northern Ireland, the United Kingdom used what were euphemistically called "the five techniques" including wall standing (a form of stress position), hooding, subjecting the prisoner to continuous loud noise, deprivation of food and drink and sleep deprivation combined with "disorientation" and "sensory deprivation" techniques. In 1972, the United Kingdom publicly abandoned these techniques and on February 8, 1977, made an unqualified commitment never to reintroduce them. It declared that they were illegal.

In Israel, a unanimous Supreme Court stated in 1999 that the following techniques violated "absolute" prohibitions to which there were "no exceptions" and "no room for balancing." The techniques included: a stress position in which the prisoner was handcuffed in an uncomfortable position in a low chair; forcing the prisoner to crouch on his toes for a prolonged period; shaking; excessive tightening of handcuffs; and sleep deprivation.

Whatever grey areas may exist at the boundaries of permissible interrogation, comparing the UK and Israeli decisions and other precedents to the "enhanced" techniques demonstrates that the CIA techniques are clearly in the prohibited category.

- **"Shaking"** is a physical assault that can cause death. Indeed, it did cause the death of a prisoner held in Israel. Subsequently, the Israeli Supreme Court found that "shaking is a prohibited investigation method. It harms the suspect's body. It violates his dignity. It is a violent method which does not form part of a legal investigation...."[16]

- **"Slapping"** is another form of physical assault. In fact, the ABC News description says that this technique is deliberately designed to cause pain and fear. Using "forms of physical pain" on a prisoner is expressly banned by the U.S. Army Field Manual on Interrogation and as was noted above, Senator Warner stated emphatically that the techniques banned by the Field Manual are "grave breaches" of Common Article 3 and "clearly" prohibited by the MCA. Assaulting a bound and defenseless prisoner can cause severe and lasting psychological trauma as doctors who specialize in this field can easily document. Physically striking a prisoner – regardless of whether it is done with an open hand – also risks serious and potentially permanent physical injury, such as detached retinas and spinal injuries.

- **"Long time standing"** is extremely painful and dangerous. Just as passengers on transcontinental flights are warned of the dangers of swelling and blood clots in

[16] Israeli Supreme Court, September 6, 1999. As the Court noted, "[a] democratic, freedom-loving society does not accept that investigators use any means for the purpose of uncovering the truth. The rules pertaining to investigations are important to a democratic state. They reflect its character. An illegal investigation harms the suspect's human dignity. It equally harms society's fabric...."

the legs if they do not move around during the flight, forcing manacled prisoners to stand motionless for literally days on end is not only painful, but life-threatening. It has long been considered a form of torture.

After World War II, U.S. military commissions prosecuted Japanese troops for employing such "stress" techniques on American prisoners. Corporal Tetsuo Ando was sentenced to five years hard labor for, among other offenses, forcing American prisoners to "stand at attention for seven hours."[17] A Japanese seaman named Chikayoshi Sugota was sentenced to **10 years hard labor** for, among other things, forcing a prisoner to "bend his knees to a half bend, raise his arms straight above his head, and stay in this position anywhere from five to fifteen minutes at a time" – treatment the commission termed "torture."[18]

As noted above, one of the techniques abandoned as illegal by the United Kingdom was "wall standing" – a technique in which the prisoner was forced to stand on toes spread eagled against a wall, hands above the head, with weight of the body mainly on the fingertips. In its decision the Israeli Supreme Court found that having the prisoner stand in a "stress position" on the tips of his toes for even a relatively brief period was illegal because it was "degrading and infringes upon an individual's human dignity...."

In *Hope v. Pelzer*, 536 US 730 (2002), the United States Supreme Court condemned the "obvious cruelty" of leaving a prisoner in the sun in a standing stress position, calling it "degrading," "dangerous" and "antithetical to human dignity." In this case, the Bush administration filed an *amicus* brief siding with the prisoner. The Court found that:

> The obvious cruelty inherent in this practice should have provided ... notice that [the guards'] alleged conduct violated Hope's constitutional protection against cruel and unusual punishment. Hope was treated in a way antithetical to human dignity – he was hitched to a post for an extended period of time in a position that was painful, and under circumstances that were both degrading and dangerous.

This technique has been employed by some of the world's most repressive states, including, according to the U.S. State Department, Burma, Iran and Libya. The *Washington Times* reported in 2004 that "some of the most feared forms of torture" cited by survivors of the North Korean gulag "were surprisingly mundane: Guards would force inmates to stand perfectly still for hours at a time, or make them perform exhausting repetitive exercises such as standing up and sitting

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[17] United States v. Tetsuo Ando, Yokahama, May 8, 1947.
[18] United States v. Chikayoshi Sugota, Yokahama, April 4, 1949.

down until they collapsed from fatigue."[19]

Ironically, it was the KGB that pioneered the use of "long time standing." Here is a description of the consequences of "long time standing" from a CIA-funded 1957 study of KGB interrogations conducted at Cornell University:

> After 18 to 24 hours of continuous standing, there is an accumulation of fluid in the tissues of the legs.... The ankles and feet of the prisoner swell to twice their normal circumference. The edema may rise up the legs.... The skin becomes tense and intensely painful. Large blisters develop, which break and exude watery serum.... The heart rate increases, and fainting may occur. Eventually, there is a renal shutdown, and urine production ceases.[20]

If continued long enough, the study noted, this simple technique can lead to psychosis "produced by a combination of circulatory impairment, lack of sleep, and uremia," a toxic condition resulting from kidney failure.[21]

- **Sleep deprivation**, often used in combination with standing as is reportedly the case in CIA interrogations, is a classic form of torture. The *tormentum insomniae* was a recognized form of judicial torture in the Middle Ages. Six decades ago the U.S. Supreme Court cited with approval an American Bar Association report that made the following observation: "It has been known since 1500 at least that deprivation of sleep is the most effective torture and certain to produce any confession desired."[22]

  Sleep deprivation was a classic technique of the totalitarian police state as Robert Conquest explains in his classic work on Stalin's Russia, *The Great Terror*:

  > [T]he basic [Soviet secret police] method for obtaining confessions and breaking the accused man was the 'conveyor' – a continual interrogation by relays of police for hours and days on end.... [A]fter even twelve hours, it is extremely uncomfortable. After a day, it becomes very hard. And after two or three days, the victim is actually physically poisoned by fatigue. It was as painful as any torture....

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[19] Benjamin Hu, "Nightmares from the North," *Washington Times,* April 30, 2004.
[20] Hinkle, Lawrence and Harold Wolff, "Communist Interrogation and Indoctrination of 'Enemies of the State'," AMA Archives of Neurology and Psychiatry, Vol. 76, pg 134 (1956).
[21] *Id.*
[22] Ashcraft v. Tennessee, 322 US 143, 149 (1944).

Sleep deprivation was one of the "sharpened interrogation" techniques authorized in 1942 by German Gestapo chief Heinrich Müller for prisoners with plans "hostile to the state."

In recent years, the State Department has condemned many other countries, including Iran, Saudi Arabia and Tunisia, for employing this method, which it has called torture.

Both the United Kingdom and Israel have prohibited the use of sleep deprivation as an interrogation technique.

- **Dousing naked, freezing prisoners with cold water.** It is hard to imagine that anyone could argue with a straight face that keeping naked, shivering prisoners doused with water does not amount to an "outrage upon personal dignity." It was also prosecuted as a war crime by U.S. military commissions after World War II.[23] Nor does this technique pass the U.S. Army Field Manual test: would it be acceptable for an enemy to do this to a U.S. prisoner? Indeed, the Field Manual explicitly bans inducing hypothermia to aid interrogation.

- **Waterboarding.** Waterboarding was used extensively during the Spanish Inquisition, has been used by the most brutal regimes in the world, including the Khmer Rouge and the military junta in Argentina, was prosecuted repeatedly after World War II as a war crime and is explicitly banned by the U.S. Army Field Manual. Although the administration recently leaked to the press that it ceased the use of this form of torture last year, it has never repudiated waterboarding as unlawful. So while waterboarding may be "off the table," it is still "in the room." What is needed is an affirmative, unequivocal statement from the Administration that this technique is illegal and will *not* be used under any circumstances. Even the now-discredited Bybee Memorandum notes that certain acts "are of such a barbaric nature" that a U.S. court would likely find that they constitute torture.[24] According to the memorandum, this includes "threats of imminent death, such as mock executions." This is, of course, the precise means by which "waterboarding" attempts to produce information – by persuading the prisoner that he is about to die. Both foreign and U.S. personnel have been prosecuted by the United States as war criminals for using this technique.[25] It is prohibited by the Field Manual and, according to Senator Warner, clearly constitutes a "grave breach" of Common Article 3 punishable under the War Crimes Act.

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[23] See United States v. Matsukichi Muta, Yokahama, April 15-25, 1947.
[24] Jay S. Bybee, Memorandum for Alberto Gonzales, August 1, 2002.
[25] See United States v. Chinsaku Yuki, Manila, 1946, and the Court-Martial of Major Edwin F. Glenn, Iloilo, the Philippines, June 7 and 14, 1901.

G. CIA "Enhanced" Techniques Constitute "Grave Violations" Under the MCA

The Military Commissions Act makes both "torture" and "cruel or inhuman treatment" felonies. It draws a distinction between the two offenses in the following manner: "torture" is defined as acts intended to cause "severe physical or mental pain or suffering," while "cruel or inhuman treatment" involves acts which cause "severe or *serious* physical or mental pain or suffering." "Severe" physical pain or suffering is not explicitly defined by statute, but U.S. federal courts have found mistreatment to constitute torture when it involved methods such as stress positions,[26] exposure to extreme cold and heat[27] and waterboarding.[28]

For acts that occurred prior to passage of the MCA, the act requires that the "serious" mental pain or suffering cause prolonged mental harm in order to constitute the crime of "cruel or inhuman treatment." For offenses that occur after passage of the MCA, the act states explicitly that the resulting "serious" mental harm "need not be prolonged" in order to amount to the felony of "cruel or inhuman" conduct.

Medical experts state that these techniques can have "a devastating impact on the victim's physical and mental health."[29] Indeed, there is a large body of peer-reviewed medical and psychological literature and clinical experience with the "severe" mental and physical pain and suffering they can cause. But that is not required in order for an act to constitute a felony – "serious" suffering is sufficient. Likewise, clinicians with years of

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[26] Cicippio v. Islamic Republic of Iran, 18 F. Supp. 2d 62 (1998) (citing the chaining of plaintiff Frank Reed to a wall and shackling him in a painful position and not permitting him to stand erect among many other forms of mistreatment perpetrated by the Iranian government that the Court found to constitute torture under the Torture Victims Protection Act.); Hilao v. Marco, 103 F.3d 789 (9th Cir. 1996) (listing being chained to a cot for three days among many other forms of mistreatment perpetrated by the Filipino military against plaintiff Jose Maria Sison that were found to constitute torture under the Torture Victims Protection Act).

[27] Cicippio v. Islamic Republic of Iran, 18 F. Supp. 2d 62 (1998) (identifying exposure to the cold as a form of physical torture used by Hezbollah where plaintiff Joseph Cicippio was chained outdoors and exposed to the elements during winter which caused him to develop frostbite to his hands and feet and holding that Cicippio's allegations of abuse constituted torture and were therefore sufficient to support a claim under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(e)); Lhanzom v. Gonzales, 430 F.3d 833 (7th Cir. 2005) (listing exposure to the cold as a form of torture used by the government of China against Tibetans as stated in the U.S. State Department Report in a case remanding a Board of Immigration Appeals opinion denying an asylum claim); In re Estate of Marcos Human Rights Litigation, 910 F. Supp. 1460, 1463 (1995) (describing the method used under the Marcos regime in the Philippines of "[f]orcing a detainee while wet and naked to sit before an air conditioner often while sitting on a block of ice" as a "form of torture").

[28] Hilao v. Marco, 103 F.3d 789, 790 (9th Cir. 1996) (called it "water torture" where "all of [the plaintiff's] limbs were shackled to a cot and a towel was placed over his nose and mouth; his interrogators then poured water down his nostrils so that he felt as though he were drowning."); In re Estate of Marcos Human Rights Litigation, 910 F. Supp. 1460 (1995) (describing many uses of suffocation used by the Marcos regime including "the 'water cure', where a cloth was placed over the detainee's mouth and nose, and water poured over it producing a drowning sensation; "the 'wet submarine', where a detainee's head was submerged in a toilet bowl full of excrement;" and "the 'dry submarine', where a plastic bag was placed over the detainee's head producing suffocation.")

[29] Letter to Senator John McCain, *supra* note 15.

experience treating torture victims can provide ample testimony that these techniques cause "prolonged" mental harm. But that is also not required in order for an act to constitute a felony if the interrogation occurred after the MCA was adopted.

Future CIA interrogations that cause "serious" mental or physical suffering which need not be prolonged are felonies under the MCA and the "enhanced" techniques are *calculated* to cause serious suffering. It is inherent in their purpose – to cause suffering sufficiently serious to break down resistance despite determined opposition.

III. The Way Forward

In May 2007, in an op-ed in the Washington Post, retired four-star Marine Corps Generals Charles Krulak and Joseph Hoar warned:

> Right now, White House lawyers are working up new rules that will govern what CIA interrogators can do to prisoners in secret. Those rules will set the standard not only for the CIA but also for what kind of treatment captured American soldiers can expect from their captors, now and in future wars. Before the president once again approves a policy of official cruelty, he should reflect on that.

Those rules have now been promulgated under the Executive Order, and they open the door to just the danger General Krulak and General Hoar cautioned against. By issuing an interpretation of Common Article 3 solely for the purposes of the CIA program, and by failing to make clear that previously authorized techniques which violate Common Article 3 are no longer permissible, the Executive Order threatens to thwart Congress's effort to establish a single standard of humane treatment that is consistent with how the United States wants its own troops to be treated.

There was a time not that long ago when the President declared that the demands of human dignity were "non-negotiable," when no one in the U.S. government questioned the meaning and scope of the humane treatment provisions of the Geneva Conventions, and when the rest of the world viewed with great skepticism claims by U.S.-held prisoners that they had been abused.

Today, we are in a very different place. Our stand on human dignity seems to be that it is negotiable, so long as there's no "permanent damage." Common Article 3's prohibition against torture, cruelty and degradation, clear to our military for more than half a century, is now considered by the administration to be too vague to enforce. And much of the rest of the world believes – not surprisingly, given the administration's refusal to renounce interrogation techniques our own allies consider unlawful – that the United States routinely tortures prisoners in our custody. Interrogation techniques need not cause permanent damage in order to be unlawful. But they have inflicted enormous damage on the honor and reputation of the United States. It is up to you to determine whether that damage is permanent.

Interrogation policy under the Executive Order forfeits our greatest assets in the asymmetric battle with al Qaeda – our values, our ideals, and our commitment to human rights and the rule of law which set us apart from our enemies. And we are doing this for little, if any, gain. It is time for a clean break from this approach.

This Committee was right to question in its May report on the Intelligence Authorization Act for FY 2008 "whether having a separate CIA detention program that operates under different interrogation rules than those applicable to military and law enforcement officers is necessary, lawful, and in the best interest of the United States." I believe that it is not.

On August 13, 2007, the American Bar Association adopted overwhelmingly a resolution urging Congress to enact legislation that would:

> (a) Supersede the Executive Order of July 20, 2007, which authorizes the Central Intelligence Agency to operate a program of detention and interrogation that is inconsistent with U.S. obligations under Common Article 3 of the Geneva Conventions of August 12, 1949 (Common Article 3); and
>
> (b) Ensure that whenever foreign persons are captured, detained, interned or otherwise held within the custody or under the physical control of the United States, or interrogated in any location by agents of the United States (including private contractors), they are treated in accordance with the minimum protections afforded by Common Article 3 and in a manner fully consistent with the standards of treatment and interrogation techniques contained in FM 2-22.3, the U.S. Army Field Manual on Intelligence Interrogation of September 2006.

Human Rights First concurs in this recommendation. The CIA's use of abusive interrogation techniques, suspended after Congress passed the McCain Amendment and further frozen by the Supreme Court's ruling in *Hamdan*, has reemerged under the July 20, 2007 Executive Order. Its existence constitutes a crisis which Congress must address.

I urge you to support legislation to ensure that the United States adheres to a single standard of humane treatment of all prisoners in its custody. The most effective way to accomplish this would, in my view, be to make the McCain Amendment's Army Field Manual provision binding on all government agencies. For the safety of U.S. personnel and the integrity of fundamental human rights and humanitarian law standards, the United States must make clear – to the American people and to the rest of the world – what it means when it says it will abide by its obligations under Common Article 3.

Thank you.

Vice Chairman BOND. Thank you very much, Ms. Massimino.
Now we'll turn to Professor Turner.

STATEMENT OF PROFESSOR ROBERT F. TURNER, SJD, CENTER FOR NATIONAL SECURITY LAW, UNIVERSITY OF VIRGINIA SCHOOL OF LAW

Mr. TURNER. Vice Chairman Bond, Members of the Committee, it is a great honor to be here today. I have a rather lengthy prepared statement that I would propose to submit for the record.

Vice Chairman BOND. That will be submitted, without objection. We appreciate your summarizing it in five minutes.

Mr. TURNER. I believe I was invited because I co-authored an op ed article in the Washington Post on July 26 with former Marine Corps Commandant P.X. Kelley criticizing the Executive Order in question. My formal statement is divided into three parts, starting with constitutional law, then international law, then some public policy considerations which I would really like to expand upon.

My constitution discussion is somewhat detailed because I think there's a great deal of confusion about separation of powers in this area of foreign affairs and intelligence. I wrote a 1,700-page doctoral dissertation on this issue many years ago, and I've been frustrated by much of the debate on both sides.

Guided by writers like John Locke and Montesquieu and William Blackstone, as well as their own experience under the Articles of Confederation, the Founding Fathers did not intend for Congress to have any role in what John Jay in Federalist 64 called "the business of intelligence" beyond providing funds. Jay discussed the importance of protecting intelligence sources and methods and explained that because Congress and the Senate could not be trusted to keep secrets, the Constitution had left the President "able to manage the business of intelligence as prudence might suggest."

The early appropriations for intelligence told the President to just tell us how much you spent and we will replenish the kitty, but do not tell us if you think anything has to be kept secret. In my statement I quote Thomas Jefferson and his rival Alexander Hamilton as well, explaining that the grant of "executive power" to the President in Article II, Section 1, carried with it the general management of foreign affairs, subject to a few narrowly-construed negatives or "exceptions" vested in the Senate or in Congress. I quote Chief Justice John Marshall in perhaps the most famous of all Supreme Court cases, Marbury v. Madison, as declaring "there exists no power" to control the President's constitutional discretion in the foreign affairs area.

I strongly suggest that one of our biggest problems in the post–Vietnam era has in fact been legislative law-breaking. Both the President and Congress must obey the higher law of the Constitution. To give you just one example, since the Chadha decision in 1983 that outlawed legislative vetoes, Congress has enacted more than 500 of those unconstitutional acts. But there is no constitutional problem with Congress legislating to enforce Common Article 3, because one of those "exceptions" expressly given to Congress is the power, in Article I, Section 8, to define and punish violations of the law of nations, and certainly that includes the Geneva Con-

ventions, which are the most subscribed-to conventions in the history of the world.

The constitutional section of my prepared statement also notes that under our Constitution the President has sole power to interpret the international meaning of treaties in the nation's dealing with the external world. Both the President and Congress have the power to violate treaty obligations, but I stress—and this is critically important—this is only true in terms of domestic United States law; and such actions make us an international lawbreaker liable to a variety of potential remedies available to other treaty partners. And while we're talking about war crimes I would emphasize that includes the right of 193 other countries to try Americans for violations of Common Article 3 and any grave breaches of the law of armed conflict. There is no statute of limitations. People engaged in this behavior may spend the rest of their lives unable to travel to foreign countries.

Part two of my statement addresses international law issues. It looks briefly at the history of Jus in Bello and, in particular, the travaux of Common Article 3 of the four 1949 Geneva Conventions. In doing some additional research for today's hearing, I must confess I was surprised to find a very strong case that Common Article 3 was originally written to address the problem of civil wars and revolutions within a single state and that many prominent scholars have interpreted it that way, despite some last-minute changes in its wording that to me suggest it applies to all armed conflicts not involving sovereign states on both sides.

I believe the United States is bound by Common Article 3, but were there no Common Article 3, we would still be bound by the humanitarian principles it embodies as a matter of customary international law. That has been the position of our government for many years.

I've given you some examples of ways in which language similar to that in Common Article 3 has been interpreted by international tribunals like the European Court of Human Rights, the International Criminal Court for the former Yugoslavia, and the International Criminal Tribunal for Rwanda. With the permission of the Committee, I would like to expand that section for the record in the next few days.

Vice Chairman BOND. Without objection, it will be accepted.

Mr. TURNER. Turning to policy issues, in 1809, Thomas Jefferson wrote a letter to newly-elected President James Madison in which he said, "It has a great effect on the opinion of our people and the world to have the moral right on our side." In his very excellent speech earlier this month to the Council on Foreign Relations, General Hayden emphasized "winning the war of ideas actually defines the long-term victory that we seek." I could not agree more. And to win this war, America must maintain the high moral ground.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Turner follows:]

CONSTITUTIONAL AND INTERNATIONAL LAW IMPLICATIONS OF EXECUTIVE ORDER 13440 INTERPRETING COMMON ARTICLE 3 OF THE 1949 GENEVA CONVENTIONS

Prepared Statement of

Prof. Robert F. Turner, SJD

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Before the

Select Committee on Intelligence
United States Senate

Tuesday, September 25, 2007 • 3:30 PM

219 Hart Senate Office Building

CONTENTS

Good afternoon, Chairman Rockefeller, Vice Chairman Bond, and members of this distinguished Committee. I welcome your invitation to come before you and discuss the President's interpretation in Executive Order 13440of Common Article 3 of the 1949 Geneva Conventions.

Although as national security adviser to Senator Robert P. Griffin (R-MI) in 1976 I played a small role in drafting Senate Resolution 400 that set up this Committee, and in the mid-1980s I accompanied senior State Department witnesses before this Committee while I was serving as Acting Assistant Secretary of State for Legislative and Intergovernmental Affairs – this is my first appearance as an academic before you. When I left the State Department in 1985 I was approached by Chairman Durenberger's staff about possibly serving as Staff Director of the Committee, but I was anxious to return to academic life and declined. I am honored to be here this afternoon.

From my perspective there are three aspects to this issue. I will first talk about what might be thought of as domestic legal considerations – the Constitution, statutes, and Executive Order 13440. I will then turn to issues of international law, focusing primarily on Common Article 3 to the 1949 Geneva Conventions. My final remarks will address issues of wise public policy.

I. Constitutional and Statutory Considerations

Much of the world views international law and domestic law as integral parts of a monist system of laws in which national governments are free to act so long as they do not violate their nation's obligations under treaties and customary international law. In the United States, we follow a dualist approach, with our Constitution being supreme to both statutes and rules of international law. Treaties can create rights and obligations under our domestic law, and when they do they are considered equal but not superior to acts of Congress as the "supreme Law of the Land."[1] (To have any domestic legal effect, many treaties must first be implemented by legislation,[2] which similarly replaces incompatible prior legislation and is subject to being changed by future legislation or treaty.) Congress has the power to enact legislation inconsistent with treaty obligations, and when that happens – assuming the courts are not capable of reconciling the two obligations – for purposes of *domestic United States law* the statute will prevail over the treaty. As the Supreme Court explained in *Whitney v. Robertson*:

> [W]hen a law is clear in its provisions, its validity cannot be assailed before the courts for want of conformity to stipulations of a previous treaty not already executed. Considerations of that character belong to another

[1] U. S. CONST., Art. VI, cl. 2.
[2] *See Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).

> department of the government. The duty of the courts is to construe and give effect to the latest expression of the sovereign will. In [the] *Head-Money Cases*, . . . it was objected to an act of congress that it violated provisions contained in treaties with foreign nations, but the court replied that, so far as the provisions of the act were in conflict with any treaty, they must prevail in all the courts of the country; and, after a full and elaborate consideration of the subject, it held that, "so far as a treaty made by the United States with any foreign nation can be the subject of judicial cognizance in the courts of this country, it is subject to such acts as congress may pass for its enforcement, modification, or repeal."[3]

Of course, despite the Court's language, Congress may not by its own actions actually "repeal" a treaty.[4] Only the President or his agents can act internationally for the United States, and if Congress enacts clearly inconsistent legislation the President will normally give notice of withdrawal or denunciation pursuant to the terms of the treaty. If that can't be done – for example, under Article 142 of the 1949 Geneva Convention Related to the Treatment of Prisoners of War, a denunciation can not take effect during a conflict that was ongoing at the time of denunciation[5] — American courts would still apply the more recent statute, and in consequence the United States would become an international "lawbreaker" and might be liable to other treaty parties for any resulting injury.

By this same theory that "the latest expression of the sovereign will" prevails, if the President ratifies a treaty with the advice and consent of at least two-thirds of the Senate, American courts will give effect to the treaty over a prior inconsistent statute to the extent that its provisions create justiciable rights or duties within this country.[6] Treaties and statutes are co-equal under U.S. law, and the Constitution is supreme to both.

This last point is extremely important: The Constitution is supreme to both treaties and statutes. And a great deal of the recent controversy over presidential actions that has resulted in charges of an "Imperial President" and presidential "lawbreaking" is founded

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[3] *Whitney v. Robertson*, 124 U.S. 190, 195 (1888).

[4] *See, e.g.*, LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 164 ("Such legislation does not affect the validity of the treaty and its abiding international obligations, thought it compels the United States to go into default."). *See also*, QUINCY WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 261 (1922).

[5] Geneva Convention Relative to the Treatment of Prisoners of War, Art. 142 adopted Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 13. ("The denunciation shall take effect one year after the notification thereof has been made to the Swiss Federal Council. However, a denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict shall not take effect until peace has been concluded, and until after operations connected with release and repatriation of the persons protected by the present Convention have been terminated.")

[6] Even if in a case before it the Supreme Court does interpret a treaty for purposes of domestic law, the President is not bound by that interpretation in his dealings with other sovereign States. *See*, LORI FISLER DAMROSCH *et al*, INTERNATIONAL LAW: CASES AND MATERIALS 178 (4th ed., 2001) ("Since, in deciding cases, the Supreme Court is the final arbiter of United States law . . ., a determination or interpretation of international law by the Supreme Court would also bind the executive branch in a case to which the United States is a party for purposes of that case, and effectively for other purposes of domestic law. The president may, however, be free to take a different view of the law *vis-à-vis* other nations.")

in either a failure to understand that principle, or more likely a failure to understand that under our Constitution the president is granted a great deal of unchecked discretion regarding foreign affairs. I have in the past two years discussed these issues extensively before the Senate[7] and House[8] Judiciary Committees. Because this Committee by its mandate skates on very thin constitutional ice, it is probably worthwhile to briefly review the separation of powers between the political branches regarding the collection of intelligence and other aspects of our foreign affairs.

The Constitution and Foreign Affairs

To begin with, it is useful to understand that, as a group, the men who wrote our Constitution were remarkably well-read individuals. They were familiar with the writings of John Locke, Montesquieu, William Blackstone, and others who had thought and written much about the separation of powers. In *Federalist* No. 47, for example, James Madison wrote that the "oracle who is always consulted and cited" on the subject of separation of powers was "the celebrated Montesquieu."[9] And like Locke,[10] Blackstone,[11] and many other writers of their time, Montesquieu viewed the control of foreign relations to be an exclusive "executive" power: "In every government there are three sorts of power: the legislative; *the executive in respect to things dependent on the law of nations*; and the executive in regard to matters that depend on the civil law." Montesquieu explained that by the first of these "executive" powers, the prince or magistrate "makes peace or war, sends or receives embassies, establishes the public security, and provides against invasion."[12]

In his *Second Treatise on Civil Government* (which Thomas Jefferson described as "perfect"[13]) Locke argued that relations with foreign powers, which depended greatly upon changing circumstances that could not be anticipated by antecedent laws, had to be entrusted to the Executive "to be managed for the public good."[14] John Jay paraphrased Locke's reasoning when in *Federalist* No. 64 he explained:

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[7] Links to my two most recent prepared statements to the Senate Committee on the Judiciary can be found online at: http://www.virginia.edu/cnsl/pdf/Turner-testimony.pdf.

[8] A link to my prepared statement on September 5, 2007, before the House Committee on the Judiciary can be found online at: http://www.virginia.edu/cnsl/pdf/Turner-testimony.pdf.

[9] THE FEDERALIST NO. 47 at 324 (Jacob E. Cooke, ed. 1961) (Madison).

[10] *See,* JOHN LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT §147 (1689).

[11] *See,* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 242-45 (1765).

[12] 1 BARON DE MONTESQUIEU (CHARLES DE SECONDAT), SPIRIT OF THE LAWS 151 (Thomas Nugent, ed. 1900).

[13] *Jefferson to Thomas Mann Randolph,* 8 WRITINGS OF THOMAS JEFFERSON 29 (Mem. ed. 1903). ("Locke's little book on Government, is perfect as far as it goes.")

[14] LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT §147. ("[W]hat is to be done in reference to Foreigners, depending much upon their actions, and the variations of designs and interest, must be left in great part to the Prudence of those who have this Power committed to them, to be managed by the best of their Skill, for the advantage of the Commonwealth.")

> The loss of a battle, the death of a Prince, the removal of a minister, or other circumstances intervening to change the present posture and aspect of affairs, may turn the most favorable tide into a course opposite to our wishes. As in the field, so in the cabinet, there are moments to be seized as they pass, and those who preside in either, should be left in capacity to improve them. So often and so essentially have we heretofore suffered from the want of secrecy and dispatch, that the Constitution would have been inexcusably defective if not attention had been paid to those objects.[15]

I submit you could devote a series of hearings to examining ways in which the post-Vietnam Congress has harmed the nation by violating these principles. When Congress in 1973 snatched defeat from the jaws of victory in Indochina by prohibiting the use of appropriated funds "to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia,"[16] it is likely that not a single member of either chamber considered that the President might two years later need to use the military to rescue the crew of the *S.S. Mayaguez* after they were seized on the high seas and taken to a Cambodian island. President Ford flagrantly violated this (in my view clearly unconstitutional) statute, and when the merchant seamen had been rescued through "combat activities" "in" and "over" and "from off the shores" of Cambodia, the Foreign Relations Committee quickly passed a unanimous resolution praising the rescue.[17] Senator Frank Church – one of the primary co-sponsors of the May 1973 statute that banned any use of force in Indochina – told the media that President Ford "had my full support" from "beginning to end."[18] Senator Clifford Case, the Ranking Republican on the Foreign Relations Committee and another sponsor of the statutory prohibition, added: "I don't want anyone saying that we liberals or doves would prevent the President from protecting American lives in a piracy attack."[19] (Presciently, in vetoing the 1973 War Powers Resolution, which was also violated by the *Mayaguez* rescue, President Nixon had specifically warned that it might impair the President's power to deal with ship "hijackings."[20])

Another example can be found in the current debate over the Protect America Act. I worked in the Senate when FISA was enacted in 1978, and it is absolutely clear from the reports and other legislative history that Congress did not intend to limit the President's constitutional power to intercept foreign-to-foreign communications. For example, time and again, the 1998 HPSCI report on FISA emphasized that the new statute would only regulate "electronic surveillance conducted *within the United States* for foreign intelligence purposes."[21] The report explained: "The committee has explored the feasibility of broadening this legislation to apply overseas, but has concluded that certain

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[15] THE FEDERALIST NO. 47 at 435 (Jacob E. Cooke, ed. 1961) (Madison).
[16] Continuing Appropriations Act for 1974, Pub. Law No. 93-52, 87 Stat. 130.
[17] ROBERT F. TURNER, THE WAR POWERS RESOLUTION: ITS IMPLEMENTATION IN THEORY AND PRACTICE 63 (1983).
[18] *Id.*
[19] *Id.*
[20] *Id.* at 61.
[21] H. REP'T NO. 95-1283 at 24. *See also, id.* at 26, 36, and other references.

problems and unique characteristics involved in overseas surveillance preclude the simple extension of this bill to overseas surveillance."[22]

But Congress did not anticipate that technology might change over the years, and it left the President no discretion to protect the nation if unforeseen changes did occur. In 1978, virtually all telephone conversations were transmitted by wire. Today, they are largely wireless. The FISA Court has reportedly concluded that the technical language of the 1978 statute makes it unlawful for our government to even monitor a communication between Osama bin Laden in Pakistan and a top al Qaeda lieutenant in Afghanistan if said communication happens to pass through a server in northern Virginia or Silicone Valley – and FISA was therefore responsible for denying our Intelligence Community at least twenty-five percent of the vital intelligence we should have been getting to protect the people of this country from another 9/11 attack. When you add to this the reality that FISA was almost certainly unconstitutional,[23] and that a large number of the majority party reportedly want to turn this into an election issue and deny our government the power to monitor such conversations, I can only suggest that if the truth gets out the American people are going to be outraged. My greatest fear is that the partisanship of the past few years will encourage al Qaeda to try to carry out additional attacks within this country – attacks which might well dwarf what we witnessed on 9/11 – just as congressional partisanship over the continued deployment of peacekeepers to Beirut in 1983 contributed substantially to the murder of 241 sleeping Marines.[24]

That this control over the new nation's foreign affairs was understood as a component of the grant of "executive Power" vested in the President by Article II, Section 1, of the Constitution, is absolutely clear. It was repeatedly discussed by Madison, Jefferson, Washington, Jay, Hamilton, Marshall, and others. Thus, in 1790, Jefferson cited this grant of the nation's "executive power" in a memorandum to President Washington and explained: "The transaction of business with foreign nations is executive altogether; it belongs, then to the head of that department, except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly."[25] Sharing Jefferson's memo with Chief Justice John Jay and House Republican leader James Madison (often described as the "Father of Our Constitution"), Washington recorded in his diary that they agreed that the Senate "had no constitutional right to interfere"[26] with

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[22] *Id.* at 27.

[23] Every President from FDR to Carter took the position that the President has independent constitutional power to authorize warrantless foreign intelligence wiretaps, Congress itself recognized this power by statute in 1968, the Supreme Court has twice had the opportunity and refused to prohibit such electronic surveillance, every federal court of appeals to decide the issue has held the President has such power, and even the appellate Court of Review established by FISA itself has unanimously declared that FISA could not usurp the President's constitutional power in this area. See my September 5, 2007, prepared statement to the House Judiciary Committee, available on line at: http://www.virginia.edu/cnsl/pdf/Turner-HJC-5Sept07-(final).pdf.

[24] ROBERT F. TURNER, REPEALING THE WAR POWERS RESOLUTION: RESTORING THE RULE OF LAW IN U.S. FOREIGN POLICY 138-44 (1991); P.X. Kelley & Robert F. Turner, *Out of Harm's Way*, WASH. POST, Oct. 23, 1995, at C2.

[25] *Jefferson's Opinion on the powers of the Senate Respecting Diplomatic Appointments,* April 24, 1790, in 3 THE WRITINGS OF THOMAS JEFFERSON 16, 17 (Mem. ed. 1903) (bold italics added).

[26] 4 DIARIES OF GEORGE WASHINGTON 122 (Regents' Ed. 1925).

the business of diplomacy save for what Jefferson in his Senate rules manual had termed the Senate's "negative" over treaties and nominations.[27] Three years later, Jefferson's arch rival, Alexander Hamilton, took the same position in his first *Pacificus* letter, reasoning that:

> [A]s the participation of the Senate in the making of treaties, and the power of the Legislature to declare war, are exceptions out of the general "executive power" vested in the President, they are to be construed strictly, and ought to be extended no further than is essential to their execution.[28]

The judiciary, as well, recognized the President's special responsibilities in the field of foreign affairs – including a great deal of power that was not intended to be "checked' either by Congress or the courts. In the most famous of all Supreme Court cases, Chief Justice John Marshall (a political foe of incumbent President Thomas Jefferson) explained:

> By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . . [A]nd *whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion.* The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, *the decision of the executive is conclusive.*[29]

To emphasize that he was talking especially about the field of foreign affairs, Marshall continued:

> The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the president. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.[30]

Similarly, in the most frequently cited Supreme Court case on the separation of foreign affairs powers, the Supreme Court explained in 1936:

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[27] The great Professor Quincy Wright, who first inspired my own interest in these issues more than forty years ago, wrote in 1922: "In foreign affairs, therefore, the controlling force is the reverse of that in domestic legislation. The initiation of development of details is with the president, checked only by the veto of the Senate or Congress upon completed proposals." THE CONTROL OF AMERICAN FOREIGN RELATIONS 149-50.

[28] 15 THE PAPERS OF ALEXANDER HAMILTON 39 (Harold C. Syrett ed., 1969) (bold emphasis added).

[29] *Marbury v. Madison*, 5 U.S. [1 Cranch] 137, 165-66 (1803) (emphasis added).

[30] *Id.* at 166.

> Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but *participation in the exercise of the power is significantly limited.* In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. *Into the field of negotiation the Senate cannot intrude, and Congress itself is powerless to invade it.*[31]

This view was also accepted by Congress until about the time of the Vietnam War. In 1906, for example, Senator John Coit Spooner arose to criticize an effort by Senator Augustus Bacon to demand negotiation documents pertaining to a treaty from President Roosevelt. Senator Spooner held a Ph.D. and was "one of the best constitutional lawyers of his time."[32]

> From the foundation of the Government it has been conceded in practice and in theory that the Constitution vests the power of negotiation and the various phases – and they are multifarious – of the conduct of our foreign relations *exclusively* in the President. And, Mr. President, he does not exercise that constitutional power, nor can he be made to do it, under the tutelage or guardianship of the Senate or of the House or of the Senate and House combined.[33]

When Senator Spooner had completed his extensive remarks, Senator Henry Cabot Lodge of Massachusetts took the floor. This Harvard Law School graduate, who had earlier received Harvard's first Ph.D. in Political Science – and whose six terms in the Senate included subsequent service as Majority Leader – commented: "Mr. President, I do not think that it is possible for anybody to make any addition to the masterly statement in regard to the powers of the President in treaty making . . . which we have heard from the Senator from Wisconsin [Mr. Spooner] this afternoon."[34] Senator Lodge is well known as a champion of the powers of the Senate for his role in leading the successful effort to defeat ratification of the League of Nations Covenant following World War I.

I once wrote a 1700-page doctoral dissertation on the separation of constitutional national security powers, but in the interest of time let me limit myself to one more example. The late Senator J. William Fulbright is well known as a champion of legislative powers during the Vietnam War. But as Chairman of the Senate Foreign Relations Committee in

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[31] *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (emphasis added).

[32] Arthur Bestor, *Separation of Powers in the Domain of Foreign Affairs*, 5 SETON HALL L. REV. 661 (1974). Senator Spooner declined an invitation to serve as Attorney General in the McKinley administration, as well as a similar request from President Taft to serve as Secretary of State. BIOGRAPHICAL DICTIONARY OF THE AMERICAN CONGRESS 1774-1971 at 1737, S. Doc. No. 8, 92d Cong., 1st Sess. 1048 (1971).

[33] 40 *CONG. REC.* 1418 (1906) (emphasis added).

[34] *Id.* at 1431.

1959, he delivered an address at Cornell Law School in which he presented the traditional understanding of the separation of foreign affairs powers:

> The pre-eminent *responsibility* of the President for the formulation and conduct of American foreign policy is clear and unalterable. He has, as Alexander Hamilton defined it, all powers in international affairs "which the Constitution does not vest elsewhere in clear terms." He possesses sole authority to communicate and negotiate with foreign powers. He controls the external aspects of the Nation's power, which can be moved by his will alone—the armed forces, the diplomatic corps, the Central Intelligence Agency, and all of the vast executive apparatus.[35]

Note that Senator Fulbright was not describing the President as the "agent" of Congress or the Senate – charged with communicating policy views to foreign States as instructed by the sovereign authorities on Capitol Hill. He said the President was responsible both for the conduct of foreign policy and the *formulation* of that policy (subject, of course, to the Senate's negative over completed treaties and the similar power of Congress to block a declaration of war).

Relevant "Exceptions" to the Grant of "Executive Power" to the President

I have quoted Jefferson and Hamilton as referring to a general presidential control over foreign affairs, subject to certain, narrowly construed, "exceptions" vested in the Senate or Congress. (This view was also shared by Madison and others.) A full discussion of those exceptions is beyond the scope of this presentation, but two are worth mentioning. Under Article I, Section 8, Congress is given the power to "make Rules for the Government and Regulation of the land and naval Forces,"[36] and to "*define and punish* Piracies and Felonies committed on the high Seas, and *Offences against the Law of Nations* . . . ."[37] The first of these authorized Congress to legislate Articles of War (or what we now call the Uniform Code of Military Justice) prohibiting and establishing punishments for the commission of war crimes and other wrongful acts by our military. The second is even broader, and clearly empowers Congress to both define (for purposes of United States criminal law) the content of Common Article 3 and provide criminal sanctions governing all Americans and foreigners who come within the lawful jurisdiction of our courts – keeping in mind that under international law there is universal jurisdiction for war crimes.[38]

Congress also has the power to "make Rules concerning *Captures on Land* and Water,"[39] which might at first glance seem to convey authority to regulate detainees "captured" on

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[35] J. William Fulbright, *American Foreign Policy in the 20th Century Under an 18th-Century Constitution*, 47 CORNELL L. Q. 1, 3, (1961) (emphasis added).
[36] U.S. CONST., Art. I, Sec. 8, cl. 14.
[37] *Id.* cl. 10 (emphasis added).
[38] *See, e.g.*, AMERICAN LAW INSTITUTE, RESTATEMENT (3D) ON THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987).
[39] *Id.* cl. 11 (emphases added).

either land or water. But the history of this clause is clear – it refers only to a power to authorize the capture of enemy *property*.[40]

The Constitution and "the Business of Intelligence"

Long before the Constitution was written, American leaders realized that large legislative assemblies could not be trusted to keep secrets. Indeed, because this was true the Continental Congress in 1775 established a five-member "Committee of Secret Correspondence" to negotiate with foreign governments, run spies, and perform similar functions necessitated by the absence of any federal executive. It instructed the Committee to delete the names of intelligence agents in any reports it sent to the full Congress.[41]

The following year, when secret agent Thomas Story reported to the Committee that France had agreed to a covert operation by which it would provide major support to the American rebels, Benjamin Franklin and the four other men on the Committee he chaired decided they could not share this information with the rest of the Continental Congress, recording: "We find by fatal experience that Congress consists of too many members to keep secrets."[42]

The most valuable single source of information about the new Constitution to those who would ultimately ratify it were the *Federalist Papers*, since Madison's *Notes* and the official *Journal* of the Convention were not made public for many decades. While some assume that concern about protecting "sources and methods" of intelligence is a product of the post-World War II CIA era – or perhaps a product of the Nixon or Reagan years – the Founding Fathers were in reality very conscious of this problem. Writing in *Federalist* No. 64, John Jay (who was offered the post of Secretary of Foreign Affairs [State] before it was given to Thomas Jefferson) explained:

> It seldom happens in the negotiation of treaties, of whatever nature, but that perfect SECRECY and immediate DESPATCH are sometimes requisite. *There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery.* Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives; and there doubtless are many of both descriptions, who would *rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular Assembly.* The convention have done well, therefore, in so disposing of the power of making treaties, that although

[40] For an excellent discussion of the history and content of this power, *see* John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1201-02 (2004).

[41] 4 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789 at 345 (Worthington C. Ford, et al. eds, 1905).

[42] "Verbal statement of Thomas Story to the Committee," 2 PAUL FORCE, AMERICAN ARCHIVES: A DOCUMENTARY HISTORY OF THE NORTH AMERICAN COLONIES, 5th Ser., 819 (1837-53).

> *the President* must, in forming them, act by the advice and consent of the Senate, yet he will be *able to manage the business of intelligence in such a manner as prudence may suggest.*[43]

The idea that intelligence and diplomacy were exclusive presidential concerns was reflected in the first appropriations legislation for foreign affairs, which permitted the President to report to Congress merely the *amount* of sensitive expenditures, keeping the secret details to himself.[44] The consistent practice from the administration of George Washington, through John Adams and Thomas Jefferson (and for many years thereafter) was captured by President Jefferson in a note to his treasury secretary:

> The Constitution has made the Executive the organ for managing our intercourse with foreign nations. . . .
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> From the origin of the present government to this day . . . it has been the uniform opinion and practice that the whole foreign fund was placed by the Legislature on the footing of a contingent fund, in which they undertake no specifications, but leave the whole to the discretion of the President.[45]

During an 1818 debate on the floor of the House of Representatives, the legendary Henry Clay declared that it would "not be a proper subject for inquiry" for Congress to investigate expenditures from the President's foreign affairs fund.[46] This congressional deference – premised upon the understanding that the Constitution had confided the business of intelligence exclusively in the Executive branch – continued until the 1970s.

I know you have all heard that the National Security Act of 1947 expressly provides for legislative oversight of intelligence programs, but only thanks to a 1974 amendment does it now do so. The original National Security Act in 1947 made absolutely no provisions for congressional involvement in intelligence operations. Like the Founding Fathers, the authors of that statute understood that intelligence was exclusively presidential business. I might add that when Hughes-Ryan was first enacted, Congress acknowledged that it was making an unprecedented incursion into presidential constitutional power by prefacing the requirement with this language:

> *To the extent consistent with all applicable authorities and duties, including those conferred by the Constitution upon the executive* and legislative branches of the Government, *and to the extent consistent with due regard for the protection from unauthorized disclosure of classified information and information relating to intelligence sources and methods,*

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[43] FEDERALIST NO. 64 at 434-35 (Jacob E. Cooke, ed. 1961) (emphasis added).

[44] U.S. STATUTES AT LARGE, vol. 1, p. 129 (1790). ("[T]he President shall account specifically for all such expenditures of the said money as in his judgment may be made public, and also for the amount of such expenditures as he may think it advisable not to specify, and cause a regular statement and account thereof to be laid before Congress annually.")

[45] 11 THE WRITINGS OF THOMAS JEFFERSON 5, 10 (Mem. ed. 1903).

[46] 32 ANNALS OF CONG. 1466 (1818).

> the Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States involved in intelligence activities shall: (1) keep the. . . [intelligence committees] fully and currently informed of all intelligence activities.[47]

Sadly – as someone who has followed this field professionally first as a Senate staff member, later as Acting Assistant Secretary of State for Legislative Affairs, and for twenty years as a scholar and educator – I have watched for more than three decades as both houses of Congress have leaked the nation's secrets. In 1976, while the House was debating whether to make the classified Pike Committee report on intelligence abuses public, it was leaked to the media. I was present in a closed session of the Senate Foreign Relations Committee when the committee voted to make public a classified annex to an international agreement with Saudi Arabia. The next day, after the document had appeared in the *Washington Post*, a sheepish committee met again and reversed its decision to release classified information to the press – which just happened to violate Senate rules.

During the early dispute over U.S. support for the Nicaraguan "Contras," I was following that program closely as Counsel to the President's Intelligence Oversight Board at the White House. Time and again I would get calls from the CIA Inspector General's office advising me that a classified document was being delivered to the House and Senate intelligence committees. It was rare for it to take more than two days for the content of each document to make it into the *Washington Post*. Then there was the conservative Republican legislator who, believing he was just being courteous, compromised the identity of an important CIA station chief by mentioning his name and position in a trip report published in the *Congressional Record*.

More recently, "congressional sources" who have asked not to be identified have been cited in news stories about NSA "data mining"[48] and an alleged classified opinion by the

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[47] National Security Act of 1947, § 501; 50 U.S.C. § 413 (1982) (emphasis added). (This language has subsequently been *repealed*). For a discussion of congressional duplicity regarding this statute during the Iran-Contra Affair, *see* Robert F. Turner, *The Constitution and the Iran-Contra Affair*, 11 HOU. J. INT'L L. 83, 113-14 (1988).

[48] The controversy over NSA "data mining" is in my view absolutely *absurd*. First of all, Congress itself – in setting up the Department of Homeland Security – expressly instructed DHS to "establish and utilize . . . data-mining" in the struggle against international terrorism. *See*, Homeland Security Act of 2002, Pub. L. 107-296, § 201(d). More fundamentally, the idea that using a computer to search telecommunications records that do not include names, addresses, or any hint of content, to try to identify telephone numbers that regularly communicate with one or more numbers known or believed to be used by terrorists constitutes a violation of "civil liberties" is bizarre. This is very much akin to the FBI searching digital records of millions of fingerprints to try to identify a print found on a murder weapon – are my civil liberties really violated when that computer glances for a micro-nanosecond at my fingerprint records? This reminds me of the old philosophical riddle: "If a tree falls in a forest and no one is around to hear it, does it make a sound?" (The answer to that surely depends upon the definition one ascribes to the term "sound" – the falling tree creates sound waves that are not converted by a human ear into the signals we "hear" as sound.) But if a computer searches through billions of pieces of digital data and submits twenty-five numbers of telephones that frequently communicate with phones used by known or suspected terrorists to NSA analysts, can it really be asserted that the civil liberties of the millions of owners of the telephones

FISA Court.[49] It is difficult not to recognize the wisdom of the Framers of our Constitution.

I would only add that I worked in the Senate when FISA was enacted in 1978 and believed it to be unconstitutional at the time. Every president from FDR to Jimmy Carter conducted warrantless foreign intelligence surveillance in the belief that it was lawful, Congress itself recognized that the President has independent constitutional power to authorize warrantless foreign intelligence wiretaps just a decade earlier, and every federal court to decide the issue in American history (that was not subsequently reversed[50]) has found such a power. As I pointed out in testimony earlier this month before the House Judiciary Committee, when Attorney General Griffin Bell testified on the pending FISA legislation he observed that Congress could not take away a presidential power by statute, but declared that FISA could still *work* because President Carter was willing to comply with it:

> [C]landestine intelligence activities, by their very nature, must be conducted by the executive branch with the degree of secrecy that insulates them from the full scope of these review mechanisms. Such secrecy in intelligence operations is essential if we are to preserve our society, with all its freedoms, from foreign enemies. . . .
> [T]he current bill recognizes no inherent power of the President to conduct electronic surveillance, and I want to interpolate here to say that *this does not take away the power of the President under the Constitution.* It simply, in my view, is not necessary to state that power, so there is no reason to reiterate or iterate it as the case may be. It is in the Constitution, whatever it is. *The President, by offering this legislation, is agreeing to follow the statutory procedure.*[51]

Obviously, a sitting President has the prerogative to comply with the terms of a statute that clearly usurps his constitutional authority. But equally obviously, through that process one President does not have the power to surrender the constitutional authority of his successors in office.

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whose numbers were *not* extracted have been meaningfully violated? And even if one could argue there is a *de minimis* intrusion, will anyone seriously claim it *outweighs* the governmental interest in stopping the next terrorist attack? *See Haig v. Agee,* 453 U.S. 280 (1981) ("It is "obvious and unarguable" that no governmental interest is more compelling than the security of the Nation. . . ."). More fundamentally, the Supreme Court has already considered the issue of using pen registers to record phone numbers calling or being called by a specific number and affirmed that this does not violate Fourth Amendment privacy rights. *See, Smith v. Maryland,* 442 U.S. 735 (1979)).

[49] *See, e.g.,* Eric Lichtblau, James Risen & Mark Mazzetti, *Reported Drop in Surveillance Spurred a Law,* N.Y. TIMES, Aug.. 11, 2007 at A1 ("Intelligence Committee members acknowledged that they learned in May that the secret court ruling . . . .").

[50] This qualification excludes the 2006 Detroit district court opinion in *ACLU v. NSA.*)

[51] Testimony of Attorney General Griffin Bell, FOREIGN INTELLIGENCE ELECTRONIC SURVEILLANCE, HEARINGS BEFORE THE SUBCOMMITTEE ON LEGISLATION OF THE PERMANENT SELECT COMMITTEE ON INTELLIGENCE, HOUSE OF REPRESENTATIVES, January 10, 1978 at 14-15 (emphasis added).

I respectfully suggest that those who keep attacking the Executive branch for making broad claims of "executive power" on the grounds that the President thinks he is "King George" ought to take a serious look at the problems of legislative lawbreaking. As I pointed out in my recent House testimony, FISA clearly contributed to the success of the 9/11 attacks in several ways. The clearly unconstitutional 1973 War Powers Resolution played a major role in getting 241 sleeping Marines killed on October 23, 1983[52]; and as former Senate Majority Leader George Mitchell has observed, the 1973 statute "threatens not only the delicate balance of power established by the Constitution. It potentially undermines America's ability to effectively defend our national security."[53]

As still further evidence of outrageous legislative lawbreaking, consider the 1983 Supreme Court decision in *I.N.S. v. Chadha*, which declared "legislative vetoes" to be unconstitutional. Ironically, as a Senate staff member seven years earlier I had drafted remarks for my Senator making exactly the same point for the same reasons.[54] Yet, despite this clear and constitutionally binding decision from the U. S. Supreme Court, since *Chadha* was decided Congress has enacted more than 500 *new* legislative vetoes – thumbing its nose at the Supreme Court, the Constitution, and the rule of law in the process.[55]

The Constitution and the Interpretation or Termination of Treaties

I have already noted that both Congress and the President have constitutional authority to act inconsistent with treaties – but in so doing they could leave the nation in breach of solemn international obligations. Given the contemporary practice of accusing the President of lawbreaking of being an "imperial president" when he exercises powers clearly belonging to his office in the foreign affairs realm, it may be useful to emphasize that his power to violate international treaties is firmly established. For example, Professor Henkin writes in *Foreign Affairs and the Constitution*:

> A treaty, moreover, does not dispose of constitutional power: internationally the United States retains the power (the right) to violate its treaty obligations; constitutionally, the President and Congress can exercise their powers even in violation of a treaty undertaking. . . .

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[52] *See*, P.X. Kelley & Robert F. Turner, *Out of Harm's Way*, WASH. POST, Oct. 23, 1995, at C2.

[53] CONGRESSIONAL RECORD, May 19, 1988, *quoted in* ROBERT F. TURNER, REPEALING THE WAR POWERS RESOLUTION 162-63.

[54] Hon. Robert P. Griffin, *International Security Assistance and Arms Export Control Act of 1976-1977*, 122 CONG. REC. S 9026 (daily ed., June 11, 1976.)

[55] LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 152 (5th ed. 2007). ("From the day that *Chadha* was issued on June 23, 1983, to the end of 2006, more than 500 new legislative vetoes had been enacted into law.")

> In any event, since the President acts for the United States internationally he can effectively terminate or violate treaties, and the Senate has not established its authority to join or veto him.[56]

A classic example of an American President violating international law occurred in October 1962, when President John F. Kennedy elected to ignore the clear prohibition against "the threat or use of force" found in Article 2(4)[57] of the UN Charter in order to deter the Soviet Union from delivering more nuclear missiles to Cuba. Interestingly, Kennedy's explanation was that the advent of nuclear weapons justified what very much appears to have been a policy of "preemption."[58]

Let me turn now to the important issue of treaty interpretation, which is of course at the core of the issue of this hearing. By Executive Order No. 13440, President Bush has "interpreted" Common Article 3. Does he have a constitutional right to do this? Is he infringing upon powers of the Senate or Congress? May Congress impose its own interpretation on the treaty against the President's will? These are important issues.

It is well established that once the Senate consents to the ratification of a treaty, its limited constitutional function is done.[59] It is useful to keep in mind that when the Senate considers treaties and diplomatic appointments, it goes into "executive session" and considers items from the "executive calendar." It is not acting as a part of the legislative branch, but is joined with the President in what Professor Henkin has described as the "fourth branch of government."[60]

Early in the administration of George Washington the role of the Senate in interpreting an existing treaty arose. Secretary of State Thomas Jefferson provides this account of his July 10, 1793, conversation with "Citizen Genet," the French Minister to Washington:

> He asked me if they [Congress] were not the sovereign. I told him no, they were sovereign in making laws only, the executive was sovereign in executing them, and the judiciary in construing them where they related to their department. "But," said he, "at least, Congress are bound to see that the treaties are observed." I told him no, there were very few cases indeed arising out of treaties, which they could take notice of; that the President is

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[56] HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 151, 169. *See also*, 1 AMERICAN LAW INSTITUTE, RESTATEMENT (3D) ON THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) at § 111; LORI FISLER DAMROSCH *et. al*, INTERNATIONAL LAW: CASES AND MATERIALS 175-77 (4th ed., 2001).

[57] U.N. CHARTER, Art 2(4) ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.")

[58] President John F. Kennedy, Address to the Nation, Oct. 22, 1962 ("We no longer live in a world where only the actual firing of weapons represents a sufficient challenge to a nation's security to constitute maximum peril. Nuclear weapons are so destructive and ballistic missiles are so swift, that any substantially increased possibility of their use or any sudden change in their deployment may well be regarded as a definite threat to peace.")

[59] Obviously, if the treaty calls for the expenditure of treasury funds or other action that requires legislation, the Senate will play its normal legislative role at the appropriate time.

[60] HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 148.

> to see that treaties are observed. "If he decides against the treaty, to whom is a nation to appeal?" I told him the Constitution had made the President the last appeal.[61]

It is firmly established that Jefferson was correct. Professor Henkin writes:

> Attempts by the Senate to withdraw, modify or interpret its consent after a treaty is ratified have no legal weight; nor has the Senate any authoritative voice in interpreting a treaty or in terminating it. . . .
>
> The obligation and authority to implement or enforce a treaty involve also the obligation and authority to interpret what the treaty requires. For international purposes, no doubt, the President determines the United States position as to the meaning of a treaty.[62]

The lack of any Senate role in the interpretation of treaties has also been clearly established by the Supreme Court.[63]

I should add that – as Chief Justice Marshall explained in *Marbury v. Madison*[64] – the courts do not have a role in second-guessing presidential interpretations of America's international obligations under treaties. Interpreting and terminating treaties are among those "political powers" Marshall was talking about in *Marbury*. Professor Henkin explains:

> If issues as to who has power to terminate treaties arise again, however, it seems unlikely that Congress will successfully assert the power. . . .
> The power to terminate a treaty is a political power: courts do not terminate treaties, thought they may interpret political acts or even political silence to determine whether they implied or intended termination. If there is a breach of a treaty by the other party, it is the President not the courts who will decide whether the United States will denounce the treaty, consider itself liberated from its obligations, or seek other relief or none at all.
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> Nor do courts sit in judgment on the political branches to prevent them from terminating or breaching a treaty.[65]

This is in accord with the American Law Institute's *Restatement on Foreign Relations Law of the United States*, which provides:

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[61] *Quoted in* 4 JOHN BASSETT MOORE, DIGEST OF INTERNATIONAL LAW 680-81 (1906).
[62] HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 136, 167; *See also,* WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 23-25, 39.
[63] *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901).
[64] *See supra*, notes 29 & 30 and accompanying text.
[65] HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 170-71. WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 173.

§ 339. Authority to Suspend or Terminate international Agreements: Law of the United States

Under the law of the United States, the President has the power

(a) to suspend or terminate an agreement in accordance with its terms;

(b) to make the determination that would justify the United States in terminating or suspending an agreement because of its violation by another party or because of supervening events, and to proceed to terminate or suspend the agreement on behalf of the United States; or

(c) to elect in a particular case not to suspend or terminate an agreement.[66]

Of course, even if the President's constitutional authority to interpret treaties were not so well established, in this instance there would not be a problem. Congress by statute directed him last year to issue this particular Executive Order:

SEC. 6. IMPLEMENTATION OF TREATY OBLIGATIONS.

(a) . . . .

(3) INTERPRETATION BY THE PRESIDENT.—

(A) As provided by the Constitution and by this section, the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions and to promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches of the Geneva Conventions.

(B) The President shall issue interpretations described by subparagraph (A) by Executive Order published in the Federal Register.[67]

Statutes of Relevance to the Controversy Over Common Article 3

I have already mentioned that, under the American legal system, acts of Congress are equal in stature to international treaties. Thus, like the President, Congress has the *power* to violate Common Article 3 and any provision of any other treaty – for purposes of domestic U.S. law. I would emphasize that a more recent and incompatible act of Congress does *not* release the United States from its international duties under a treaty or

[66] 1 AMERICAN LAW INSTITUTE, RESTATEMENT (3D) ON THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 339 (1987).
[67] Military Commissions Act of 2006, Pub. L. No. 109–366, 120 STAT. 2600, § 6(a)(3)(B).

immunize the nation (or even members of Congress[68]) from international responsibility or accountability under the treaty. But for purposes of domestic U.S. law, a more recent statute will be given effect over a prior treaty.

There are four or five statutes that seem especially relevant to today's hearing. I will briefly examine them chronologically.

The Torture Convention Implementation Act of 1994[69] implements the Convention Against Torture (CAT),[70] which the United States ratified in 1990. It makes it a federal offense for any American to commit an act of "torture," as that term was defined by the Senate in consenting to ratification of the treaty. (To constitute torture, an act must violate the protections guaranteed by the Fifth, Eighth, or Fourteenth Amendments of the U.S. Constitution). This statute also provides jurisdiction over acts of torture committed by foreigners who later enter the United States. It applies alike to military and civilians, during both war and peace.

The War Crimes Act of 1996[71] provides federal jurisdiction for "war crimes" (defined as "grave breaches" of the 1949 Geneva Conventions, violations of Common Article 3, and some other offenses) and applies only to American nationals whether civilians or members of the military. The definition of "grave breach" in the Third Geneva Convention is found in Article 130 and provides:

> Grave breaches . . . shall be those involving any of the following acts, if committed against persons or property protected by the Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or willfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.[72]

In preparation for this testimony I have engaged in a number of extended communications with prominent experts within our military and *jus in bello* scholars around the world, and there seems to be a broad view that violations of Common Article

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[68] Were Congress by law to authorize grave breaches of the law of armed conflict, individual members might be at risk for prosecution under the 1949 Geneva Conventions. Within the United States the Constitution is supreme, and the Speech or Debate Clause absolutely protects legislators from liability for any vote or other legislative act. U.S. CONST., Art. I, Sec. 6, cl. 1 ("They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and *for any Speech or Debate* in either House, *they shall not be questioned in any other Place.*" [Emphasis added.]) But war crimes are subject to universal jurisdiction, and there are presently 193 other Parties to the Conventions who have a duty to investigation and either try or extradite accused war criminals.

[69] Torture Convention Implementation Act of 1994, 18 U.S.C. §§ 2340, 2340A, & 2340B.

[70] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], *entered into force* June 26, 1987.

[71] War Crimes Act of 1996, Pub. L. No. 104-192, §2, 110 Stat. 2104 (1996).

[72] Geneva Convention Relative to the Treatment of Prisoners of War, *supra note 5*, Art. 130.

3 are *not* "grave breaches" of the Conventions. Article 31 of the 1969 Vienna Convention on the Law of Treaties (which the United States has not ratified but does recognize reflects binding customary international law in most aspects) provides: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[73] Applying that test, had I not encountered so much resistance from experts who regularly follow this issue more closely than I do, I would have assumed that a material violation of Common Article 3 that involved torture or other serious physical abuse would constitute a grave breach. Given the opposition I have found to this interpretation (from JAG officers who I know are outraged over the abuse of detainees in the current conflicts), at this point I express no opinion on whether such behavior would constitute a grave breach.

I should perhaps at least briefly mention the **Military Extraterritorial Jurisdiction Act of 2000**,[74] which I believe was required to comply with our obligations under the 1949 Conventions. It provides for federal court jurisdiction over crimes committed outside the United States by civilians who accompany U.S. military forces. It applies to American and foreign nationals (who are not nationals of the host country) who serve as contractors or are employed by our military abroad, and also civilians who accompany those individuals (such as dependants). It creates no new substantive offenses, but incorporates by reference existing federal laws that would cover most war crimes.

The Detainee Treatment Act of 2005[75] provided, *inter alia*, that no one "in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment" – again tying the definitions of those offenses to violations of the Fifth, Eighth, or Fourteenth Amendments as the United States had done when ratifying the CAT.[76] It also created a statutory defense to the prosecution of any government employee who previously engaged in any interrogation technique that had been "officially authorized and determined to be lawful at the time that they were conducted" so long as the employee "did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful." The Act authorized the government to provide counsel or pay counsel fees, etc., for government employees involved in civil or criminal legal proceedings for such behavior.

I should perhaps add here that this statute does not protect military or CIA interrogators from future criminal charges either in a foreign tribunal (since there is universal jurisdiction for war crimes) or even within the United States should a future Congress elect to repeal this protection. While Congress is prohibited by the Constitution from enacting *ex post facto* laws[77] that criminalize past behavior, the commission of war

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[73] Vienna Convention on the Law of Treaties, Art. 31. Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. 1155 U.N.T.S. 331.
[74] 18 U.S.C. §§ 3261-3267.
[75] Detainee Treatment Act of 2005, Pub. L. No. 109-148, 42 U.S.C. 2000dd-1.
[76] U.S. reservations, declarations, and understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, § I(1), Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990).
[77] U.S. CONST., Art. I, Sec. 9, cl. 3.

crimes was clearly illegal well prior to the start of the war against terrorism. Nothing in the Constitution would preclude a future Congress from withdrawing a statutory defense that did not exist at the time an alleged offense was committed, and were that defense withdrawn such a prosecution could proceed. I am aware of nothing that could protect interrogators or their superiors from foreign judicial proceedings, but a presidential pardon could be issued that would permanently prevent any prosecution by the United States Government.

The Military Commissions Act of 2006[78] was enacted in response to the Supreme Court's *Hamdan* decision, and seeks *inter alia* to deny detainees (or anyone else) access to federal courts based upon allegations of violations of the 1949 Geneva Conventions. It also clarifies that acts which violate the 1996 War Crimes Act constitute violations of Common Article 3 of the Geneva Conventions "prohibited by United States law." It further states that these statutory provisions "fully satisfy the obligation under Article 129 of the Third Geneva Convention for the United Staes to provide effective penal sanctions for grave breaches which are encompassed in common Article 3 in the context of an armed conflict not of an international character," and adds: "No foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions enumerated in subsection (d) of such section 2441." As already noted, it calls upon the President to issue an Executive Order "to interpret the meaning and application of the Geneva Conventions . . . ." In an effort to immunize prior questionable conduct by government interrogators, the act is made retroactive to November 26, 1997.

A number of scholars (including at least one former CIA attorney[79]) have suggested that the definitions of prohibited conduct under Common Article 3 in some of these statutes fall short of America's obligations under Common Article 3. I don't disagree.

The *Hamdan* Case

As already noted, the Military Commissions Act was passed as a legislative response to the Supreme Court's June 2006 decision in *Hamdan v. Rumsfeld.* Coincidentally, as the Court was announcing its opinion I was giving a paper at the Naval War College in Newport, Rhode Island, in which I asserted that the United States had an obligation under both Common Article 3 and customary international law[80] to treat all detainees in armed conflicts "humanely." And this was as well the conclusions of the Supreme Court, which rejected the argument that the conflict with al Qaeda was "international" in scope by

[78] Military Commissions Act of 2006, Pub. L. No. 109-336, 120 Stat. 2600 (codified in scattered sections of 10 and 18 U.S.C.)

[79] John Radsan, *The Collision Between Common Article Three and the Central Intelligence Agency*, 56 CATH. U. L. REV. 959, 971 (2007). *See also, id.* at 962-63.

[80] I noted that the United States has repeatedly affirmed that the humanitarian requirements of Article 75 of Protocol I Additional to the Geneva Conventions constituted customary international law and was thus binding on the United States. This issue will be addressed below.

explaining: "The term 'conflict not of an international character' is used here [in Common Article 3] in contradistinction to a conflict between nations."[81]

Executive Order 13440

On July 20th of this year, acting pursuant to the Military Commissions Act, President Bush issues Executive Order 13440. I first learned of the order that afternoon, when I was invited by the Department of Justice to take part in a conference call discussing the order. I was sent a copy, and upon reading it I was absolutely outraged – to the point that I repeatedly raised my voice during the subsequent conference call, which is very atypical behavior for me.

My concern focused on the language in **bold** (my emphasis) below from the order:

> (b) I hereby determine that a program of detention and interrogation approved by the Director of the Central Intelligence Agency fully complies with the obligations of the United States under Common Article 3, provided that:
>
> (i) the conditions of confinement and interrogation practices of the program do not include:
>
> (A) torture, as defined in section 2340 of title 18, United States Code;
>
> (B) any of the acts prohibited by section 2441(d) of title 18, United States Code, including murder, torture, cruel or inhuman treatment, mutilation or maiming, intentionally causing serious bodily injury, rape, sexual assault or abuse, taking of hostages, or performing of biological experiments;
>
> (C) other acts of violence serious enough to be considered comparable to murder, torture, mutilation, and cruel or inhuman treatment, as defined in section 2441(d) of title 18, United States Code;
>
> (D) any other acts of cruel, inhuman, or degrading treatment or punishment prohibited by the Military Commissions Act (subsection 6(c) of Public Law 109-366) and the Detainee Treatment Act of 2005 (section 1003 of Public Law 109-148 and section 1403 of Public Law 109-163);
>
> (E) **willful and outrageous acts of personal abuse *done for the purpose of humiliating or degrading the individual* in a manner so serious that any reasonable person, considering the circumstances, would deem the acts to be beyond the bounds of human decency, such as sexual or sexually indecent acts *undertaken for the purpose***

[81] *Hamdan v. Rumsfeld*, 548 U. S. 1, 67 (2006).

> ***of humiliation,*** **forcing the individual to perform sexual acts or to pose sexually, threatening the individual with sexual mutilation, or using the individual as a human shield**; or
>
> (F) acts intended to denigrate the religion, religious practices, or religious objects of the individual;

As most of you may recall from law school, the Latin expression *expressio unius est exclusio alterius* roughly translates "the expression of one thing excludes other things." As I read subsection (E) in the language above, so long as the subjective "purpose" of the interrogator is not to "humiliate" or "degrade" the detainee – for example, if the purpose instead is the gather intelligence that might be used to save American lives from future attacks – this subparagraph does not apply. Thus, presumably, "outrageous acts of personal abuse" like "forcing an individual to perform sexual acts" and threatening "sexual mutilation" are not constrained by this subsection.

Now, clearly, some of these acts would be barred by other provisions of the Executive Order and by applicable federal law. But as I read the order, all of my alarms from years of working in government went off. It appeared to me that *someone* – almost certainly not the President himself, as Presidents don't normally draft such documents – had inserted an "escape clause" designed to authorize serious physical abuse of detainees in flagrant violation of America's obligations under international law, on the theory that the "purpose" of the abusive treatment was intelligence gathering and not a desire to humiliate or degrade the individual as occurred at Abu Gharib.[82]

Much of my initial anger, I suspect, was focused on the fact that any bright high school graduate who read the order would likely spot this language and conclude that the President was trying to deceive the country into believing America was going to comply with its Common Article 3 obligations while actually reserving to option of serious physical and mental abuse. This was but the latest of many examples where it appeared this administration simply didn't care about domestic or international public opinion.[83]

The Kelley-Turner Op-Ed

I can't remember being so angry since the immediate aftermath of 9/11. To release some of that emotion, I sent a long private e-mail to a small number of close friends that evening expressing my outrage and mentioning that I was considering writing an op-ed

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[82] Here I am relying on the conclusions of the Schlesinger Report and conversations with close friends who were personally involved in the Abu Ghraib investigation that the horrible abuses captured in photographs at Abu Ghraib were a result of personal misconduct by a small number of soldiers whose superiors were negligent in providing adult supervision. I am led to believe that only one of the individuals in the original photographs was even being held for intelligence purposes. I have no personal expertise on this matter, other friends who have read the same materials have reached different conclusions, and this reference is not intended to initiate a quarrel. My strong expectation is members of this Committee will have had access to classified materials of direct relevance to this issue for which I am no longer cleared to read.

[83] I will return to this issue in Part III of my presentation.

article. General P. X. Kelley – a former Commandant of the Marine Corps and one of my very few living "heroes" for his courage in standing up to *despicable* congressional abuse in the wake of the 1983 Beirut bombing, knowing as he did that it would cost him his chance to become the first Marine general to serve as Chairman of the Joint Chiefs of Staff – e-mailed me back a supportive note and offered to co-author such an op-ed (which we had done in 1994[84]). The resulting article was quickly accepted by the *Washington Post* and was published as the lead op-ed on Thursday, July 26, under the title "War Crimes and the White House."[85] To my surprise, it remained the most frequently e-mailed story from the *Post* for more than twenty-four hours and was later favorably cited by an American Bar Association resolution.[86]

This was a personally painful article to write. I love this country dearly, and I grew up in a military family believing that all partisanship must stop at the water's edge and we must unite against the common enemy during wartime. I have a bumper sticker on the back of my Toyota Prius that reads "STAND UNITED IN WAR" and has a red circle and slash – the international symbol for a prohibited act – over the words "political partisanship." (It is the only one you are likely to see, because I had it custom made.)

I am far from perfect in my own existence, and I do not insist that my government be perfect. We have done many things in Iraq[87] and elsewhere that have struck me in retrospect as being very unwise, but I have remained quiet (save for some candid discussions with my students) just as I did when America violated international law to overthrow Panamanian dictator Manuel Noriega in 1989. Had I been asked by my government about the wisdom (or legality) of that action in advance, I would have opposed it. But I was not asked, and there was no reason why I should have been asked.

I decided to speak out on Executive Order 13440 because I hoped I (and, when General Kelley offered to join me, *we*) might make a difference. My strong suspicion was that the President had not even read the full text of the EO, which presumably was drafted and

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[84] P.X. Kelley & Robert F. Turner, *Out of Harm's War: From Beirut to Haiti, Congress Protects Itself Instead of Our Troops*, WASH. POST, Oct. 23, 1994 at C2.

[85] P.X. Kelley & Robert F. Turner, *War Crimes and the White House*, WASH. POST, July 26, 2007 at A21.

[86] American Bar Association, *Res. 10B*, adopted by ABA House of Delegates, Aug. 13-14, 2007.

[87] I strongly felt that something needed to be done to address both the security threat and the humanitarian crisis caused by Saddam Hussein in Iraq. Candidly, I was furious at the UN Security Council, which after more than a dozen resolutions in as many years was emulating the League of Nations, issuing reports and drawing new lines in the sand to be ignored by Saddam. The very first principle set forth under the "Purposes" of the United Nations in the UN Charter is "[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and *removal* of threats to the peace . . . ." [My emphasis.] At the same time, I feared that unilateral action might destabilize the balance of power in the region to Iran's benefit. I was glad I was a schoolteacher and not back in the White House, State Department, or the policy cluster of the Pentagon – where someone might seriously care about my views. But when a decision was made to go to war, I readily accepted invitations from both CINCPAC and EUCOM to defend Operation Iraqi Freedom before foreign international lawyers in Honolulu and Munich and wrote a number of articles defending the war. While the WMD issue was certainly a consideration, in a 15,000-word defense of the war written as it began I barely mentioned that issue, focusing instead on the need to enforce the rule of law if we wanted it to be a force for peace and the humanitarian crisis. *See*, Robert F. Turner, *Was Operation Iraqi Freedom Legal?*, in LAURIE MYLROIE, BUSH VS. THE BELTWAY 164-210 (2003).

staffed through an inter-agency process and then put on his desk for his signature. And I thought if the obvious "escape clause" were actually brought to the attention of the President and his senior political advisers, they would realize it was a great blunder and quickly issue a corrected version along with a public statement regretting the error and affirming the American commitment to the humanitarian principles of the Geneva Conventions. Sadly, that hasn't happened.

II. Considerations of International Law

Let me now turn to issues of international law. In 1752, the great French political philosopher Montesquieu wrote in volume one of *The Spirit of the Laws* that "[t]he law of nations is naturally founded on this principle; that different nations ought in time of peace to do one another all the good they can, and in time of war as little injury as possible, without prejudicing their real interests."[88] Forty-one years later, Thomas Jefferson wrote in a legal memorandum to President Washington:

> The law of nations . . . is composed of threee branches. 1. The moral law of our nature. 2. The usages of nations. 3. Their special conventions. . .
>
> Compacts then, between nation and nation, are obligatory on them by the same moral law which obliges individuals to observe their compacts. There are circumstances, however, which sometimes excuse the non-performance of contracts between man and man; so are there also between nation and nation. When performance, for instance, becomes impossible, non-performance is not immoral; so if performance becomes self-destructive to the party, the law of self-preservation overrules the laws of obligation in others.[89]

Since there was no "International Court of Justice" to resolve legal disputes between sovereign States, Jefferson recognized that each nation was to judge for itself. But, being an honorable man and wishing the new nation to preserve and cherish its honor as well, he wrote:

> Of these [obligations], it is true, that nations are to be judges for themselves; since no one nation has a right to sit in judgment over another, but the tribunal of our consciences remains, and that also of the opinion of the world. These will revise the sentence we pass on our own case, and as we respect these, we must see that in judging ourselves we have honestly done the part of impartial and rigorous judges.[90]

Two decades later, Jefferson addressed this same issue in a much different context in a letter to a Maryland newspaper editor:

> A strict observance of the written laws is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-

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[88] 1 MONTESQUIEU, THE SPIRIT OF LAWS 5 (Thomas Nugent, trans. Rev. ed., 1900).

[89] *Opinion on the question whether the United States have a right to renounce their treaties with France, or to hold them suspended till the government of that country shall be established*, in 3 WRITINGS OF THOMAS JEFFERSON 226, 228 (Mem. ed. 1903).

[90] *Id.* at 229.

> preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.[91]

I think America can learn a great deal from the wisdom of Thomas Jefferson, and I think he is exactly right on two points: (1) international law is important, and if we elect to violate our commitments we will jeopardize critical support both from our own people and from people of good will around the world; and (2) ultimately, if international law prevents us from taking otherwise reasonable measures to protect our people from catastrophic terrorist attacks, we ought not sacrifice the *end* of a free and secure nation upon the altar of the *means* of international law. I will address these issues a bit more in Part III of my presentation. For I fear that some in Washington do not fully understand the effect of being perceived as a lawbreaker can have on the long-term support of our own people, of people of good will around the globe, and even of our allies.

A Brief History of *Jus in Bello* and Common Article 3

The "law of war"[92] (today often referred to as the "law of armed conflict" or LOAC) has developed over centuries as States began in their own self-interest to find ways to mitigate the horrors of war. The first multinational treaty dealing with these issues was the 1856 Declaration of Paris, which among other things outlawed privateers and ultimately made the power of Congress to "grant Letters of Marque and Reprisal"[93] an anachronism.

American specialists in this field take pride in the fact that the first effort to codify the customary rules of warfare was in this country during the Civil War. General order No. 100, entitled "Instructions for the Government of Armies of the United States in the Field" and written by former Columbia University legal scholar Francis Lieber, was issued by President Abraham Lincoln in 1863. The "Lieber Code" is still cited today for its landmark effort to collect in one place the customary law of war.

The first Geneva Convention dealing with humanitarian principles of armed conflict was concluded in 1864. It provided that members of armed forces during war who were wounded, sick, or "harmless" were to be respected and cared for. By 1867, all of the great powers except the United States had ratified it, and we did in 1882. Another Geneva Convention followed in 1906.

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[91] *Jefferson to J.B. Colvin*, 12 *id.* 418.

[92] For a good overview of the history and modern law of armed conflict, see generally, Howard S. Levie & Jack Grunawalt, *The Law of War and Neutrality*, in NATIONAL SECURITY LAW (John Norton Moore & Robert F. Turner, eds. 2d ed. 2005).

[93] U.S. CONST., Art. I, Sec. 8, cl. 11.

Historically, conflicts within a single State – armed revolutions or civil wars – were viewed as outside the scope of the law of nations. Indeed, even inquiring about how a sovereign State treated its own nationals was viewed as wrongful interference in that State's internal affairs. However, in 1756, Emerich de Vattel wrote in *The Law of Nations* that parties to a civil war had a duty to observe the established customs of war.[94] In 1912 the International Committee of the Red Cross (ICRC) sought to interest States in a draft convention on the role of the Red Cross in civil wars and insurrections, but there was no interest.

The first convention to provide humane treatment for prisoners of war came in 1929 but was limited to international armed conflicts. In 1938, at the Sixteenth International Red Cross Conference, a resolution was passed urging the application of the "essential principles" of the Geneva Convention to "civil wars."[95]

The horrors of World War II led to demands for a new multilateral treaty regime. At a preliminary Conference of National Red Cross Societies in 1946, the ICRC recommended that "in the event of civil war in a country, the parties should be invited to state that they were prepared to apply the principles of the Convention on a basis of reciprocity." The conference went even further, and recommended inserting a new article at the beginning of the Convention to the effect that: "In the case of armed conflict within the borders of a State, the Convention shall also be applied by each of the adverse parties, unless one of them announces expressly its intention to the contrary."[96] In 1947, the ICRC convened a Conference of Government Experts that drafted an article providing that "the principles of the Convention" were to be applied in civil wars by contracting parties "provided the adverse Party did the same."[97]

This principle of "reciprocity" was a key element in international law, as nations agreed to surrender rights in return for assurances that their treaty partners would obey the same constraints. If one country abused prisoners of war, its adversary in the conflict would reciprocate -- in the process providing an incentive for the first violator to adjust its behavior in order to protect its own soldiers from abuse. Indeed, Thomas Jefferson – an early champion of the humane treatment of prisoners of war[98] -- argued that engaging in reprisals in response to mistreatment of prisoners of war was the most humane approach,[99] as it would promote compliance with the law by both sides. As international humanitarian and human rights law rapidly developed in the years following World War II and the birth of the United Nations, a different view emerged asserting that no State

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[94] G. I. A. D. Draper, *Humanitarian Law and Internal Armed Conflicts*, 13 GA. J. INT'L & COMP. L. 253, 256-57 (1983).

[95] Much of this historical material can be found in 1 JEAN S. PICTET, COMMENTARY ON THE GENEVA CONVENTIONS 39-43 (1952).

[96] *Id.* at 41-42.

[97] *Id.* at 42.

[98] *See, e.g., Jefferson to William Phillips,* July 22, 1779, in 3 PAPERS OF THOMAS JEFFERSON 44 (Julian P. Boyd, ed., 1951).

[99] "When a uniform exercise of kindness to prisoners on our part has been returned by as uniform severity on the part of our enemies, you must excuse me for saying it is high time, by other lessons, to teach respect to the dictates of humanity; in such a case, retaliation becomes an act of benevolence." *Id.* at 45-46.

had a "right" to engage in torture or inhumane treatment in the first place, so no derogation should be permitted from these rules. This is logically true, but it undermines the incentives by which much of international law is routinely enforced.

Pictet asserts that the reciprocity clause was ultimately omitted because "doubt was expressed as to whether insurgents could be legally bound by a convention which they had not themselves signed.[100] If the insurgents claimed to be the lawful government of the country, they would then be bound by the country's treaties. Besides, there was no harm to the *de jure* government, "for no Government can possibly claim that it is *entitled* to make use of torture and other inhumane acts prohibited by the Convention, as a means of combating its enemies."[101]

The ICRS drafted a new article for submission to the 17th International Red Cross Conference in Stockholm, which read in part:

> In all cases of armed conflict which are *not of an international character,* especially cases of civil war, colonial conflicts, or wars of religion, which may occur *in the territory of one or more of the High Contracting parties,* the implementing of the principles of the present Convention shall be obligatory on each of the adversaries.[102]

This was the first time the idea of extending what became Common Article 3 beyond "civil wars" was suggested. But the language "especially in cases of civil war, colonial conflicts, or wars of religion" was objected to and omitted by conference delegates, as were the words "or more."

Pictet asserts that this deletion had the effect of enlarging the scope of the provision,[103] which is a reasonable but hardly the only reasonable interpretation. He notes that the principal objections to the Stockholm draft involved concerns that "it would cover in advance all forms of insurrection, rebellion, anarchy, and the break-up of States, and even plain brigandage."[104] In response, he notes:

> Others argued that the behaviour of the insurgents in the field would show whether they were in fact mere brigands, or, on the contrary, genuine soldiers deserving of the benefit of the Conventions. Again, it was pointed out that the inclusion of the reciprocity clause in all four Conventions . . . would be sufficient to ally the apprehensions of the opponents of the Stockholm proposals. It was not possible to talk of "terrorism", "anarchy" or "disorders" in the case of rebels who complied with humanitarian

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[100] PICTET, COMMENTARY ON THE GENEVA CONVENTIONS 51.
[101] *Id.* at 52.
[102] *Id.* 42-43 (emphasis added).
[103] *Id.* at 43.
[104] *Id.*

principles.[105]

Specifically deleting the words "or more" in the sentence "which may occur in the territory of one or more of the High Contracting parties" could reasonably be interpreted as a *narrowing* of the scope of Common Article 3 to cover only conflicts occurring within the territory of a single State, such as a civil war or internal revolution. As will be discussed, this was the understanding of the language by several prominent international experts on the Geneva Conventions.

The lack of agreement on the Stockholm draft led to the appointment of a Working Party to prepare new drafts. The second of these provided in part: "This obligation presupposes, furthermore, that the adverse party likewise recognizes its obligation in the conflict at issue to comply with the present Convention and the other laws and customs of war."[106] Pictet observes that that there was "almost universal opposition to the application of the Convention, with all its provisions, to all cases of non-international conflict."[107]

A second Working Party was established to attempt to find a solution, and the final language is largely a product of this effort. It dropped the requirement for reciprocity.[108] In 1949, delegates from fifty-nine countries took part in a diplomatic conference that produced four Geneva Conventions dealing with the humanitarian law of armed conflict. The United States ratified all four in 1955, and today all 194 sovereign States are parties to all four conventions. Indeed, more States are parties to the 1949 Geneva Conventions than to any other treaty in the history of the world.

The Text and Meaning of Common Article 3

Initial plans to have a formal preface to the Geneva Conventions were scrapped, and instead all four Conventions began with the same first three articles. Pictet asserts that the purpose was to place at the beginning of all four conventions "the principal provisions of a general character, in particular those which enunciated fundamental principles"[109] of international law. He adds that Article 3 was viewed by the ICRC as "one of the most important articles" of the Conventions, and also one of the most controversials. Twenty-five meetings were devoted to it.[110]

In the end, Common Article 3 (called "Common" because it appears as the third article of each of the four treaties) provided:

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[105] *Id.* at 44.
[106] *Id.* at 45.
[107] *Id.* at 46.
[108] *Id.* at 47-48.
[109] *Id.* at 36.
[110] *Id.* at 38.

Article 3

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, *each Party* to the conflict shall be bound to apply, as a *minimum*, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, *detention*, or any other cause, *shall in all circumstances be treated humanely*, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain *prohibited at any time and in any place whatsoever* with respect to the above-mentioned persons:

(a) *violence to life and person*, in particular murder of all kinds, mutilation, *cruel treatment* and *torture*;

(b) taking of hostages;

(c) *outrages upon personal dignity*, in particular *humiliating* and *degrading* treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.[111]

There are several points to note here:

- The article attempts to set "minimum standards" for all parties to the conflict;

[111] Geneva Convention Relative to the Treatment of Prisoners of War, Art. 3 (emphasis added), available online at: http://www.icrc.org/ihl.nsf/WebART/375-590006.

- Everyone detained who is no longer taking an active part in the conflict is entitled to be "treated humanely";
- All "violence to life and person," especially including "cruel treatment" and "torture," is prohibited;
- "Outrages upon personal dignity" and "humiliating" and "degrading" treatment are expressly outlawed.

Many scholars have observed that the *travaux préparatoires* (negotiating history) provide very little clarity on the meaning of these terms.[112] Indeed, Pictet writes that it was viewed as "dangerous" to try to enumerate all of the rights of protected persons under Common Article 3, because it would be difficult to anticipate every conceivable form of abuse, and a detailed list of specific examples might be interpreted as the exclusion of others (*expressio unius est exclusio alterius*) that should be covered.[113]

The interpretation of treaties and other international agreements is government by the 1969 Vienna Convention on the Law of Treaties. Although the treaty has been in force for most of the world since 1980 and was signed and submitted to the Senate by President Nixon in 1976, the United States is still not a Party. While serving as Acting Assistant Secretary of State for Legislative and Intergovernmental Affairs in 1984-85 I attempted without success to urge the Senate to take action on the Vienna Convention, but my efforts were halted when I was informed by staff members to Senator Helms that the Senator was not going to permit the treaty to be "railroaded through" the Senate. I was already working hard to obtain Senate consent to the ratification of the Genocide Convention, and elected to expend my energies in that direction.

Although not a Party, the United States has repeatedly acknowledged that most of the provisions of the Vienna Convention on the Law of Treaties were binding on all States as customary international law. Theses include Article 31, governing the interpretation of treaties. The basic rule is that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[114] Recourse may be had to the travaux and other supplemental means of interpretation only when the "ordinary meaning" test leaves the meaning of the treaty "ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable."

Obviously, terms like "humane treatment" are not only ambiguous but also contextual. During the Vietnam War, for example, it would not have been reasonable to demand that

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[112] David A. Elder, *The Historical Background of Common Article 3 of the Geneva Convention of 1949*, 11 CASE W. RES. J. INT'L L. 37, 59 (1979).

[113] PICTET, COMMENTARY ON THE GENEVA CONVENTIONS 52-53.

[114] Vienna Convention on the Law of Treaties, Art. 31. Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. 1155 U.N.T.S. 331.

North Vietnam – whose own people were subsisting on rations of rice and small servings of fish – feed American POWs the kinds of meals to which they were accustomed in the United States or on Navy aircraft carriers. (But this was no excuse for striking POWs with rifle butts and hanging them from the ceiling with their arms painfully bound with ropes – behavior that outraged Americans and led to sufficient international criticism that torture was largely stopped by the end of 1969.)

Does Common Article 3 Apply to the War Against Al Qaeda?

The White House and Department of Justice have argued that Common Article 3 was intended only to apply 'to internal conflicts between a State and an insurgent group,"[115] and the conflict with al Qaeda is clearly taking place in several nations. Thus, the argument goes, it is an international conflict and not an "armed conflict not of an international character" so as to be covered by Common Article 3. Like most legal scholars,[116] I have always dismissed this argument, for the same reason the Supreme Court did in *Hamdan* – the test is not where the conflict takes place but whether there are sovereign States on both sides. True, the Conventions say "occurring in the territory of *one* of the High Contracting Parties," but I have explained this away on the theory that if a conflict occurred on the territory of one (or more) States that were not Parties to the Conventions, that State could not be bound by a treaty it had never accepted. Thus, to be applicable, the non-international conflict had to occur within the territory of (at least) one Party State.

However, in candor, while researching the issue further in preparation for this hearing, it became clear to me that the argument that Common Article 3 was intended to apply only to civil wars and internal conflicts has some support for it both in *travaux* and the scholar literature. Pactet's *Commentary* on the 1949 Geneva Conventions – published by the ICRC – are replete with references to Common Article 3 as addressing "civil wars, " "insurrections," and armed conflicts "of an internal character."[117]

Pictet notes this is a "general" and "vague" expression, and discusses the various amendments that were proposed in an effort to explain the intentions of the delegates. All of them referred to "revolt" or "insurgents" – strongly suggesting that this was viewed as a provision addressing *internal* conflicts or civil wars.[118] And in discussing the Article, Pictet himself repeatedly refers to "cases where armed strife breaks out in a

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[115] *Quoted in* A. John Radsan, *The Collision Between Common Article Three and the Central Intelligence Agency,* 56 CATH. U. L. REV. 959, 972 (2007).

[116] Fionnuala Ní Aoláin, *Hamdan and Common Article 3*, 91 MINN. L. REV. 1523, 1556 (2007) ("Because of the apparent absence of a nexus between al Qaeda and any sovereign State, most legal scholars seem to have viewed this as a conflict not of an international character.")

[117] *See, e.g.*, 1 JEAN S. PICTET, COMMENTARY ON THE GENEVA CONVENTIONS (1952) p. 38-43 (where "civil war" is used well over a dozen times, along with "armed conflicts . . . of an internal character," "insurrections," "social or revolutionary disturbances," and conflicts "within the borders of a state.").

[118] *Id.* at 49-50.

country," "civil disturbances," and conflicts involving "internal enemies."[119] But the actual language adopted was broader, and the "ordinary meaning" of "armed conflicts not of an international character" would seem to encompass transnational conflicts in which there are not sovereign States on both sides. Further, in the *Paramilitary Activities Case* in 1986, the International Court of Justice concluded that Common Article 3 provided a "minimum yardstick" for international and non-international conflicts alike.[120] However, this view is rejected by some of the world's foremost scholars of international law.[121]

Writing in a special issue of the *Georgia Journal of International and Comparative Law* honoring former Secretary of State Dean Rusk, the late and legendary British scholar Col. G.I.A.D. Draper, OBE – who served as Director of Legal Services for the British Army and participated in the Nuremberg War Crimes Trials – introduced his discussion of Common Article 3 by asserting: "This is the sole article in each of the four Conventions that deals exclusively with so-called 'internal armed conflicts.'"[122] Other scholars make similar points.[123]

It may or may not be of interest to the Committee that the International Criminal Tribunal for the Former Yugoslavia also applied Common Article 3 in a non-civil war setting in its 1997 *Tadic* case.[124] Ultimately, for our purposes, the issue is arguably moot because the Supreme Court in *Hamdan* declared that Common Article 3 does apply. However, that was based upon an interpretation of the 1949 Conventions, and as discussed in Part I, under *Whitney v. Robertson*,[125] the Court will be bound by an inconsistent statute of more recent date.

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[119] *Id.*

[120] Paramilitary Activities Case (*Nicaragua v. United States*), 1986 I.C.J. 14, 113-14 (June 27, 1986). This has been among the World Court's most criticized opinions, including in my own writing. *See*, Robert F. Turner, *Peace and the World Court: A Comment on the Paramilitary Activities Case*, 20 VAND. J. TRANSNAT'L. L. 53, 56-69 (1987).

[121] Included in this group would be Professor Yoram Dinstein, former President of the University of Tel Aviv and Dean of its Law School. We share the common bond of having both occupied the Charles H. Stockton Chair of International Law at the Naval War College, and I took the liberty of communicating with him in preparation for this hearing.

[122] G. I. A. D. Draper, *Humanitarian Law and Internal Armed Conflicts*, 13 GA. J. INT'L & COMP. L. 253, 268 (1983). Elsewhere in the same article he added: "No convention dealing with the law of war made any reference to conduct in *internal armed conflicts* until the four Geneva Conventions of 1949." *Id.* at 259.

[123] *See, e.g.*, Fionnuala Ní Aoláin, *Hamdan and Common Article 3*, 91 MINN. L. REV. 1523, 1558 (2007). ("[A] 'formal' legal application issue arises when applying Common Article 3: the provision only textually applies to armed conflicts occurring in the territory of a state party. This issue raises the question of whether Common Article 3 applies in transnational contexts. A formalistic approach would suggest that a conflict must be either an interstates (international) conflict or an internal conflict taking place in the territory of a specific state.") *See also*, ALBERTO T. MUYOT & ANA THERESA B. DEL ROSARIO, THE HUMANITARIAN LAW ON NON-INTERNATIONAL ARMED CONFLICTS 14-15, 27-28 (1994).

[124] *The Prosecutor v. Dusko Tadic*, Case No. IT-94-1-T, Opinion and Judgment, May 7, 1997.

[125] *See supra* note ___ and accompanying text.

Can the United States Withdraw from the Geneva Conventions?

I can't imagine that the United States would want to withdraw from the 1949 Geneva Conventions, but it is a legal issue that some may find of interest so I will address it briefly. As a general principle, State Parties can denounce the Convention and be liberated from its constraints as conventional international law upon one-year notice. However, that is not the case if the country is engaged in an ongoing conflict when notice of denunciation is given. Article 142 is clear on this point:

Article 142

> Each of the High Contracting Parties shall be at liberty to denounce the present Convention.
>
> The denunciation shall be notified in writing to the Swiss Federal Council, which shall transmit it to the Governments of all the High Contracting Parties.
>
> The denunciation shall take effect *one year* after the notification thereof has been made to the Swiss Federal Council. *However, a denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict shall not take effect until peace has been concluded,* and until after operations connected with the release and repatriation of the persons protected by the present Convention have been terminated.
>
> The denunciation shall have effect only in respect of the denouncing Power. It shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.[126]

One might argue that the President could relieve the United States of the obligations of Common Article 3 on the theory of *rebus sic stantibus* or "fundamental change of circumstances." Both international[127] and American[128] law recognize this doctrine, which permits a State to terminate a treaty obligation as a result of an unforeseen change of conditions from when the obligation was assumed that makes compliance far more burdensome to the party. For example, if State A enters into a treaty with State B to provide electricity from a hydroelectric power plant near the mutual border, and a subsequent earthquake diverts the river into a third State – or merely reduces the flow to

[126] Geneva Convention Relative to the Treatment of Prisoners of War, Art. 142 (emphasis added).
[127] Vienna Convention on the Law of Treaties, Art. 62.
[128] AMERICAN LAW INSTITUTE, RESTATEMENT (3D) ON THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 336.

the point that State A can no longer satisfy its own power needs – international law will allow State A to terminate the agreement.

One might make the argument that when the United States ratified the four Conventions in 1955 it understood Common Article 3 to apply solely to internal conflicts or civil wars, and it had not foreseen the possibility that more than half-a-century later there would be transnational non-governmental organizations in search of weapons of mass destruction and capable of covert attacks within this country slaughtering thousands of innocent people at a time. If a decision were made to violate Common Article 3, it might make more sense to argue such a case than to simply announce that the United States has decided to violate its solemn international legal obligations. As discussed, the President has the power to do either. But such an argument would find little support around the world, and relieving the United States from the obligations of Common Article 3 would not really solve the problem.

First of all, since every single State in the world has ratified the Geneva Conventions, it would be extremely difficult to argue that the fundamental provisions of Common Article 3 are not binding upon the United States as customary international law even if we could withdraw from or denounce the treaties themselves. Indeed, the majority view today is certainly that offenses like torture are already established as *jus cogens* or peremptory norms from which no derogation is permitted under any circumstances.[129]

And Common Article 3 is hardly the sole source of these basic obligations. Although the United States is not a Party to Protocol Additional I to the 1949 Geneva Conventions, we have a long record of stating officially that Article 75 of that treaty (which has been ratified by 167 States) binds us as customary international law. Article 75 contains an even more detailed list of wrongful acts in assuring humane treatment of detainees and others who are no longer able to take part in a war, and it has been formally recognized as customary international law binding upon the United States by President Reagan's Secretary of State George Shultz [130] and Deputy State Department Legal Adviser Michael Matheson,[131] and the current administration's State Department Legal Adviser William Howard Taft, IV.[132] Indeed, this recognition was noted by the Supreme Court in *Hamdan*.[133] So freeing ourselves of the obligation to treat detainees captured during armed conflict humanely – even if we were inclined to do that – would be extremely difficult and would likely do irreparable damage to our global reputation as an honorable and law-abiding nation.

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[129] *See, e.g,* Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L L. 1, 15 (1986). A New York University law Professor, Meron is among the nation's most distinguished scholars of public international law and a former President of the UN International Criminal Tribunal for the Former Yugoslavia (ICTY).

[130] 2 MARCO SASSÒLI & ANTOINE A. BOUVIER, HOW DOES LAW PROTECT IN WAR (2nd ed., 2006) at 972-73.

[131] E-mail from Michael Matheson to Robert F. Turner, Sept. 21, 2007, *citing* 2 Am. U. J. Int'l L. & Pol. 427-28.

[132] *Id.*

[133] 548 U.S. at 70.

Learning to Live With Common Article 3

As noted in Part I of my testimony, both Congress and the President clearly have the power to relieve the government from the constraints of Common Article 3 *as a matter of United States law*. Neither can relieve us from our obligations under international law, nor immunize our interrogators or their superiors all the way up the chain of command from the possibility of being arrested and tried as war criminals if they ever travel to a foreign country. (Let me emphasize that I am not suggesting that many interrogators have actually committed war crimes. I don't have the facts. But the perception is there, and there is universal jurisdiction that would permit 193 foreign countries to initiate such a trial.)

I believe it is important to find a way to operate without violating Common Article 3, and to that end a discussion of the actual meaning of its terms may be useful. In addition, the letter of invitation I received to testify at this hearing specifically asked me to address "historical U.S. and international interpretations of the obligations of Common Article 3 . . . ." I want to emphasize that I am not an expert on international tribunals, but I have done some quick research in an effort to find cases that might be of assistance to you. Unfortunately, most of the opinions are rather tautological – almost along the lines of "inhumane treatment means treating someone inhumanely." And rather than focusing on the specific language of Common Article 3, they tended to address similar language in other treaties.

Perhaps the most on-point case I found was from the European Court of Justice in 1978 involving British interrogation practices in Northern Ireland. In *Ireland v. United Kingdom*, the Irish government charged that forcing detainees to stand on their toes, covering their heads with hoods, playing loud music, and depriving them of sleep, food, and water violated Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which provides:

> **Article 3 – Prohibition of torture**
>
> No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

By a vote of 16 to 1, the Court held that the use of the five techniques "constituted a practice of inhuman and degrading treatment" in violation of Article 3. By a vote of 13 to 4, the Court found that "the five techniques did not constitute a practice of torture within the meaning of Article 3."[134]

In another case, the same Court defined "degrading treatment" as "feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical and moral resistance."[135] Of course, that is presumably the purpose for which the techniques were being used – to break the detainees' resistance to

[134] This opinion is available online at: http://www.worldlii.org/eu/cases/ECHR/1978/1.html.
[135] *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A at 39 (1989).

interrogation. As a result of such cases, the British Government announced it would cease relying on such techniques.

The United States is not a Party to the International Criminal Court, but given that I was asked to discuss international interpretations of Common Article 3, I might call to your attention the volume *Elements of War Crimes Under the Rome Statute of the International Criminal Court*, by Knut Dörmann. In discussing the meaning of "wilfully causing great suffering, or serious injury to body or health," he notes the ICTY in the *Aleksovski* case defined it as "intentionally and unlawfully inflicting serious injury to the body or health of the protected person," and in the *Blaskic* case "an intentional act or omission consisting of causing great suffering or serious injury to body or health, including mental health . . . ."[136] Relying on the ordinary meaning of the words as defined in the *Oxford English Dictionary* ("not slight or negligible"), the International Criminal Tribunal for Rwanda (the Chief Judge of which was a distinguished American retired Army JAG officer and now a Distinguished Professor at Syracuse College of Law) discussed "serious injury to body or health" by emphasizing: "Causing serious bodily or mental harm to members of the group does not necessarily mean that the harm is permanent and irremediable."[137] In its *Musema* case, this same tribunal defined "degrading and humiliating treatment" as "Subjecting victims to treatment designed to subvert their self-regard."[138]

In distinguishing causing "great suffering" or "serious injury to body or health" from "inhuman treatment," the ICTY in the *Kordic and Cerkez* case found that: "This crime is distinguished from that of inhuman treatment in that it requires a showing of serious mental or physical injury. Thus, acts where the resultant harm relates solely to an individuals human dignity are not included within this offense."[139]

A 2003 decision of the ICTY provides this description of the offense of "willfully causing great suffering" in the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War:

> The Commentary to Article 147 of Geneva Convention IV describes the offence of willfully causing great suffering as referring to suffering which is inflicted without ends in view for which torture or biological

[136] KNUT DÖRMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 77(2003).

[137] *Quoted in id.* at 78.

[138] *Prosecutor v. Musema*, Case. No. ICTR-96-13-A, Judgment and Sentence 285 (Jan 27, 2000).

[139] DÖRMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 79-80.

> experiments are carried out. It could be inflicted for other motives such as punishment, revenge or out of sadism, and could also cover moral suffering. *In describing serious injury to body or health, it states that the concept usually uses as a criterion of seriousness the length of time the victim is incapacitated for work....* This offence includes those acts that do not fulfill the conditions set for torture even though acts of torture may also fit the definition given. . . . [S]erious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment, or humiliation. It must be harm that results in a *grave and long-term disadvantage to a person's ability to led a normal and constructive life.*[140]

I'm no expert, but this language might well exclude many of the techniques that have been attributed to CIA interrogators.

My final "interpretation" is not from an international tribunal at all, but instead from the Army Judge Advocate General's Legal Center and School, located right next door to our law school. In training their lawyers to teach the obligations of Common Article 3, JAG School instructors use what they call a "Modified Golden Rule": "Would it bother you if it was done to one of your soldiers?" They also teach "There are things we can do to U.S. soldiers that we CANNOT do to Detainees (SERE training, lack of sleep, mandatory PT)." In dealing with 99 percent of detainees, that strikes me as an excellent approach. The difficulty comes in dealing with the small number of high-value subjects who reportedly have been entrusted to the care of the CIA. If these hard core al Qaeda lieutenants are providing us with 75 percent of our HUMINT intelligence, and that information is being used to save lives in this country and abroad, I can understand why the President and General Hayden are not anxious to shut the program down.

When I was first asked my views on the reports of "torture" and abuse of detainees, it was by a Voice of America reporter who caught me on my cell phone while I was driving across the Midwest taking my son on vacation. My response was that some very good people had apparently done some very bad things for very good reasons." I have no personal information on the treatment that has actually taken place, and trust with your security clearances you are far closer to the truth on that issue than I am. If there really has been "torture," I believe it was a horrible mistake and it deeply saddens me. If detainees have been treated "inhumanely," that, too, is illegal under our international treaty commitments and it saddens me. But I bear no hatred for our interrogators, and I understand their desire to get information that may save the lives of thousands of our fellow citizens. Indeed, one of my concerns about this entire issue is that we may have set up some extraordinary fine young men and women to spend the rest of their lives afraid to travel outside our borders for fear of facing a war crimes trial.

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[140] *Naletilic and Martinovic*, (Trial Chamber), March 31, 2003, para. 339-343 (emphasis added).

Do the Alleged CIA Interrogation Techniques Violate Common Article 3?

Again, I stress that I have no personal knowledge about what the CIA is or has been doing in this area. Good friends within the government assure me that most detainees are being treated exceptionally well, with three meals planned to accommodate their religious preferences served each day and the best medical and dental care of their lives. The Abu Ghraib photographs, I am assured, were the result of individual misconduct rather than some planned effort to soften up detainees for intelligence interrogation. (The one major exception, I am told, was the use of an unmuzzled working dog to terrify a detainee who was in fact of interest to our intelligence people.) But you know the facts better than I do.

There are a few things that are clear. There is nothing wrong with assigning a female soldier or an individual of the Jewish faith to interrogate Muslim detainees. While we must be respectful towards their religion, we don't have to practice it with them or punish our own forces because of a detainee's prejudices. Using our most able interrogators does not constitute wrongful "humiliation" of a detainee.

. Indeed, a multi-volume 2006 publication by the International Committee of the Red Cross provides a useful discussion of "International Humanitarian Law and Cultural Relativism":

> Jean Picket, one of the most famous thinkers and practitioners of IHL, tried to explain the cultural universalism of this branch of public international law:
>
> > The modern world has placed its hopes in internationalism and therein no doubt its future lies. Now, in an international environment, man's rights can only be on what is universal, on ideas capable of bringing together men of all races . . . .
> >
> > This leads to an awareness that humanitarian principles are common to all human communities wherever they may be. When different customs, ethics and philosophies are gathered for comparison, and when they are melted down, their particularities eliminated and only what is general extracted, one is left with a pure substance which is the heritage of all mankind.
>
> . . . . Unfortunately, the question of the universal nature of international humanitarian law has prompted little scholarly deliberation . . . . [T]he great non-Western legal traditions present, both for international humanitarian law and for human rights law, obstacles which at first seem insurmountable, at least in terms of their legitimacy.

> However, it cannot be denied that respect for human dignity is an eminently universal concept. The foundations of international humanitarian law, or at least their equivalents, are thus found in the major cultural systems on our planet: the right to life, the right to physical integrity, the prohibition of slavery and the right to fair legal treatment. However, a considerable problem is the fact that those principles are not universally applied. . . .
>
> This does not, however, necessarily negate the universal foundations of international humanitarian law. Non-Western cultures cannot escape the steamroller of modern life . . . .
> Moreover, the showing of respect for other cultural systems . . . must not mean that we cast aside the greatest achievements of modern times: the critical faculty. Thus, if we came across a group of human beings who practiced the systematic torture of prisoners in the name of tradition or religion, this would not make torture somehow more acceptable.[141]

According to Physicians for Human Rights and Human Rights First, the CIA interrogation techniques are based largely on techniques long used on American forces by our own military as part of its Survival, Evasion, Resistance, and Escape (SERE) program.[142] I gather these techniques include "waterboarding," which these human rights group report may no longer be used in interrogation but which many legal experts view as not only "inhumane" but crossing the line into torture.

I'm not the witness to tell you what the CIA is still doing or what the long-term physical or psychological effects of playing loud music, adjusting room temperature, or depriving detainees of sleep or food will be. I was concerned by a letter sent to Senator McCain cosigned by "several leading medical and psychological experts, including current and past presidents of the American Psychiatric Association and the American Psychological Association," that was quoted in a booklet published by the two human rights groups I just mentioned. The letter declared that: "Prolonged sleep deprivation, induced hypothermia, stress positions, shaking, sensory deprivation and overload, and water-boarding . . . among other reported techniques, can have a devastating impact on the victim's physical and mental health."[143]

Each of these techniques involves variables. Keeping someone awake for 18 hours with a 60 watt light bulb on while they listen to an iPod set at maximum volume is not likely to qualify as "inhumane." Keeping the same person awake for 5 days with four klieg

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[141] 1 MARCO SASSÒLI & ANTOINE A. BOUVIER, HOW DOES LAW PROTECT IN WAR (2nd ed., 2006) at 85-87.
[142] PHYSICIANS FOR HUMAN RIGHTS & HUMAN RIGHTS FIRST, LEAVE NO MARKS: ENHANCED INTERROGATION TECHNIQUES AND THE RISK OF CRIMINALITY 2 (2007).
[143] PHYSICIANS FOR HUMAN RIGHTS & HUMAN RIGHTS FIRST, LEAVE NO MARKS: ENHANCED INTERROGATION TECHNIQUES AND THE RISK OF CRIMINALITY 2-3 (2007). *See also*, Metin Basoglu, *et al. Torture vs. other Cruel, Inhuman, and Degrading Treatment: Is the Distinction Real or Apparent?,* 55 ARCHIVES GEN. PSYCHIATRY 277 (2007).

lights shining at close range in their eyes with rap music blasting in their ears at 140 decibels almost certainly would constitute "torture." And accusations involving words like "prolonged" and "loud" are even less precise than the language of Common Article 3.

III. Public Policy Considerations

For considerations of time, this section is not going to be as extensive as originally intended. But as an attorney who has both worked and taught in the policy field, I think it is important to emphasize that, once we establish what the relevant laws prohibit and what they require, there is usually a broad area in which decisions ought to be made largely on policy grounds. (Indeed, as I have already suggested, there are occasions in which policy considerations are so critical that even the rules of international law ought to give way. But these are rare, and when they occur the decision to act contrary to the law ought to be made at the highest levels of government with full knowledge of the costs likely associated with becoming an international lawbreaker.) So let me talk briefly about some policy issue.

Earlier this month, CIA Director General Michael Hayden – whom I have never met, but for who I have the greatest respect – gave an excellent speech[144] to the Council on Foreign Relations in New York City. I've been a member of the Council for decades, but I was not present and had to read the speech later. I was particularly impressed with the observation that, to an extraordinary extent, the outcome of this war will be determined by how good our intelligence is as opposed to how good our military is. We need intelligence to find al Qaeda and discover their plans. Unlike World War II or the Cold War – where our enemies were numerous and equipped with tanks, airplanes and other intimidating weapons of war – killing members of al Qaeda is a fairly easy process. It is *finding* them that I difficult. And in that sense, I submit that this committee is more critical to this war than the Committee on Armed Services, and leaks or legislation that compromise sources and methods or hamstring the ability of our intelligence professionals to do their job are more harmful than publishing the sailing dates of warships or the locations of our forces in the field.

In his CFR address, General Hayden revealed that more than seventy percent of the actionable human intelligence we are receiving in this war is coming from detainee interrogations. He is an honorable man, and I believe him. And we need to take that reality to heart as we assess what to do about the CIA interrogation program. Recognizing that all human life has moral value, we must nevertheless ask how many American lives are we prepared to sacrifice so that an al Qaeda terrorist can be guaranteed his right to humane treatment under international law. I have the greatest respect for international law – teaching it is part of my profession – and I view preserving and upholding the rule of law to be a very conservative value. With the Lieber Code, we led the world in trying to codify the humanitarian law of armed conflict. Abandoning that historic commitment would come at a high cost. But I cannot say that if we were actually confronted by a "ticking bomb" scenario, that Osama bin Laden's personal comfort ought to outweigh the right to life of thousands or perhaps hundreds-of-thousands of innocent human beings.

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[144] General Hayden's Remarks at the Council on Foreign Relations, Sept. 7, 2007, available online at: https://www.cia.gov/news-information/speeches-testimony/general-haydens-remarks-at-the-council-on-foreign-relations.html.

But there were other parts of General Hayden's speech that also caught my attention and reaffirmed my sense that he is an exceptionally wise man. Time and again, he emphasized that "American cannot win this war without allies," and "[w]inning the war of ideas actually defines the long-term victory that we seek." I could not agree more. And I am once again reminded of an observation by Thomas Jefferson, the founder of my university, who in an 1809 letter to President Madison observed: "It has a great effect on the opinion of our people and the world to have the moral right on our side . . . ."[145] If we are to prevail in this conflict, we *must* maintain the high moral ground.

As I discussed in Part I of my testimony, both Congress and the President have the constitutional power to violate international law. That is not in my view at issue. The question we must all ask is whether doing so makes sense as a matter of public policy.

I'm not talking about the exceptional case – if, indeed, there would ever be such a case – involving a "ticking bomb" scenario in which we know with reasonable certainty that a terrorist in our control has information that might save thousands or innocent lives. I cannot imagine any moral person arguing that Osama bin Laden's right to personal integrity outweighs the right to life of thousands of innocent human beings. In a very thoughtful case, the Supreme Court of Israel suggested that an interrogator who violated the law in such a setting might be able to offer a "necessity" defense – a legal principle that breaking the law can be justified if done to achieve some extraordinary moral end, such as saving the lives of innocent people. The problem with this reasoning is that the necessity defense is not allowed if the legislature has considered the contingency at issue and precluded derogation from the legal norm. And certainly in international law, that is the case.[146]

Alternatively, the Isreali Supreme Court note, the legislature could authorize a departure from the norms of international humanitarian law. Some feel Congress did that with the Military Commissions Act. My own sense is that "ticking bomb" cases will be so rare that formally undermining our international law obligations is not warranted. If such a case ever actually happened, the first line of defense might be a presidential pardon. Jury nullification is also a possibility, as few jurors would likely relish sending to prison a hero who had saved thousands of innocent lives. Neither approach, of course, will immunize any American who actually commits a war crime from possible international prosecution.

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[145] *Jefferson to Madison*, April 19, 1809, in 1 PAPERS OF THOMAS JEFFERSON: RETIREMENT SERIES 154-55 (J. Jefferson Looney, 2004).

[146] For example, Section 3.02 of the American Law Institute's *Model Penal Code* permits an actor to violate one law "to avoid a [greater] harm or evil to himself or another" provided that "a legislative purpose to exclude the justification claimed does not otherwise plainly appear." Excerpts from the *Model Penal Code* may be found on line at http://www.fordham.edu/law/faculty/denno/fall2007/model%20penal%20code%20selected%20sections%20toc.pdf.

As I made clear in the *Washington Post* op-ed I co-authored with General Kelley, I was personally *outraged* by the language of Executive Order 13440. It read as if the President was reserving America's right to engage in "willful and outrageous acts of personal abuse . . . in a manner so serious that any reasonable person . . . would deem the acts to be beyond the bounds of human decency . . . ." It was a political gift to America's enemies around the globe – written "proof" that George W. Bush was masterminding war crimes while pretending to do the right thing. It sometimes seems like this administration doesn't understand that public opinion matters.

In reality, I doubt *seriously* that is what has been going on or what anyone has planned. Someone – perhaps the CIA Inspector General, perhaps this Committee – needs to find out what is actually going on, correct any problems, and then reassure the American people and the world that the CIA is not hiring retired Nazis to torture our enemies.

Over the past three or four decades I've met eight of the twenty-one Directors of Central Intelligence who have served since the CIA was first established. Some I considered good friends, all were exceptionably honorable and able men. I've known scores if not hundreds of CIA employees over the years, and as a group they have been as fine as any career public servants I have encountered. They are often mission-oriented, to be sure, but their commitment to our Constitution and the rule of law is unsurpassed. I don't know what is going on with the detainee interrogation program, but I very much hope you will be able to learn the truth, fix any problems, and assure the American people that all is well.

The Church Committee and Hollywood have done a grave disservice to this nation and to the tens of thousands of public servants who have proudly served in our Intelligence Community. I was visiting friends in Tulsa a couple of Christmas' ago when they showed a DVD called "The Borne Identity." It was about a highly trained CIA assassin who had lost his memory. It is but one of numerous modern films that tell stories about CIA assassins, usually casting them as arch-villains. When the movie ended, I asked my hosts if they actually believed that the CIA went around the word assassinating people. "Of course they do," came the answer. After all, they saw it on TV.

As I'm sure all of you know, the Church Committee spent months investigating allegations of CIA "assassinations." In the end, they reported that Presidents Eisenhower and Kennedy had directed that the CIA try to kill Fidel Castro (whose unlawful efforts to overthrow a variety of governments in Latin America may well have made him a lawful target in collective self-defense under Article 51 of the UN Charter and the OAS Charter). There was also a plan to kill Patrice Lumumba of the Congo. They bungled the Castro hits repeatedly, and Lumumba was killed by rival leftist guerrillas before the CIA could get its plan in motion. In the end, the Church Committee concluded that it had not found a single instance in which the CIA had ever "assassinated" anyone.[147] Indeed, both

[147] *See Alleged Assassination Plots Involving Foreign Leaders*, S. Rep. No. 94-465, at 256 (1975). *See also*, Robert F. Turner, *It's Not Really "Assassination": Legal and Moral Implications of Intentionally Targeting Terrorists and Aggressor-State Regime Elites*, 37 U. RICH. L. REV. 787, 791-98 (2003).

Richard Helms and my old friend Bill Colby had each issued internal CIA directives prohibiting any CIA involvement in assassination years before the Church Committee was set up.

Let me close with a great concern. I spent a good deal of time in Indochina between 1968 and the final evacuation in April 1975. During the final 15 months, I was national security adviser to a member of the Senate Foreign Relations Committee. And I watched with a great sense of sadness as misinformed "peace" protesters fed untrue information to the Hill and fueled a horribly partisan struggle that weakened this country for decades. In the end, I was the last congressional staff member in Vietnam – trying desperately to get permission to travel to Phnom Penh and rescue Cambodian orphans before the Khmer Rouge seized control. I failed in that mission, and most of those orphans were among the estimated 1.7 million Cambodians who were slaughtered by the Communists. In Vietnam, by betraying our solemn SEATO Treaty pledge, John F. Kennedy's promise that America would "oppose any foe" for the cause of human freedom, and a statutory commitment to defend South Vietnam and Cambodia approved by 99.6 percent of the Congress, Congress consigned tens of millions of decent people to a Communist tyranny that for decades ranked among the "dirty dozen" and "worst of the worst" human rights violators.

Stalin once remarked that a single death was a tragedy, a million deaths but a statistic. Most Americans have difficulty envisioning the slaughter of 1.7 million human beings (the Yale Cambodia Genocide Program estimates more than 20 percent of the entire population of Cambodia[148]), just as they can't relate to the genocide in Darfur that continues as we meet here this afternoon. So let me put it in more micro terms. National Geographic Today ran a story about the Cambodian killing fields in 2003. It noted that, to save bullets, the Khmer Rouge would often murder small children by simply picking them up by their legs and *bashing them against trees.*[149]

Like the 1983 slaughter of 241 sleeping Marines in Beirut, that didn't have to happen. And also like Beirut, had it not been for an irresponsible U.S. Congress (which in both instances was violating the Constitution), it probably would not have happened. In Beirut, the partisan congressional debate virtually placed a bounty on the lives of our Marines, announcing to our enemies that if they would kill a few Marines Congress would reconsider its vote and probably bring the American forces home. I would add that bin Laden has stated that he concluded from our withdrawal from Beirut that America could not tolerate casualties, which may well have been a factor in his decision to attack us on 9/11.

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[148] While many experts place the number of human beings slaughtered in Cambodia by Pol Pot's *Khmer Rouge* ("Red Cambodians") following the American military departure in 1975 at two million or more, I am particularly impressed by the work done at Yale University by the Cambodian Genocide Program, which estimates that 1.7 million people were killed – just over 20% of the nation's population at the time. Their web site can be found at: http://www.yale.edu/cgp/.

[149] Zoltan Istvan, *"Killing Fields" Lure Tourists in Cambodia*, NATIONAL GEOGRAPHIC TODAY, Jan. 10, 2003, available online at: http://news.nationalgeographic.com/news/2003/01/0110_030110_tvcambodia.html.

I've authored or edited three major books about Vietnam and numerous articles, and I've taught seminars on the war at the undergraduate and graduate level at Virginia and also at the Naval War College. There is a growing consensus today among Vietnam scholars that America essentially had the war won by the early 1970s. Indeed, this version of history is reinforced by accounts written by former North Vietnamese and Viet Cong officials, who note we had them on the ropes and their only hope was that the American peace movement – which we now know was wrong about virtually every issue – would pressure Congress into cutting off funds. Congress went them one better and actually made it *unlawful* for the President to spend treasury funds defending victims of armed international aggression in Indochina.[150] (Hanoi has since the war ended repeatedly boasted of its May 19, 1959, decision to open the Ho Chi Minh Trail and send tens of thousands of soldiers and hundreds of tons of supplies into South Vietnam to overthrow that country's government.[151])

In Vietnam, we won every major battle. But we lost the war because we failed to engage in the political struggle, and by the early 1970s the American people didn't know what to believe and had lost their will to continue. Public opinion matters. Let's not have another "Vietnam."

In Part I of my testimony I documented the Founding Father's understanding the Congress was to have no role in intelligence save for providing the President with adequate funds to do his job. (At one point, the foreign affairs fund constituted 14 percent of the federal budget.) Many of you have scored political points against the incumbent President by telling the American people is thinks he is "above the law." If you've read Part I of this testimony, you should realize that it is Congress rather than the President that has been breaking the law. You have the power to take a leadership role in fixing that situation, or you can sit back, score partisan political points, and pray that the American people don't learn the truth before the next election.

Mr. Chairman, in closing I would like to leave you with one of my favorite quotations from a distinguished member of this Chamber. On February 10, 1949, Senator Arthur Vandenberg delivered a "Lincoln Day" address in Detroit. His theme was the importance of bipartisanship. And he told his audience:

> It will be a sad hour for the Republic if we ever desert the fundamental concept that politics shall stop at the water's edge. It will be a triumphant day for those who would divide and conquer us if we abandon the quest for a united voice when America demands peace with honor in the world. In my view nothing has happened to absolve either Democrats or

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[150] "Notwithstanding any other provision of law, on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia." Pub. L. 93-52, 87 Stat. 130.

[151] *See, e.g., The Legendary Ho Chi Minh Trail*, VIETNAM COURIER (Hanoi), vol. XX, no. 5, May 1984 at 9.

> Republicans from continuing to put their country first. Those who don't will serve neither their party nor themselves.[152]

Thank you, Mr. Chairman. That concludes my prepared statement.

[152] *Quoted in* TURNER, THE WAR POWERS RESOLUTION 118.

Vice Chairman BOND. Thank you, Professor Turner.

Without objection, the Committee has received statements from the American Psychological Association and the National Religious Campaign Against Torture.

Without objection, those will be included in the record.

[The information referred to follows:]

STATEMENT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION CONCERNING PSYCHOLOGY AND INTERROGATIONS

For more than two years the American Psychological Association (APA), a scientific and professional organization of more than 150,000 psychologists and affiliates, has examined in depth the ethical aspects of psychologists' involvement in interrogation settings. Members of the APA and outside groups with an interest in this issue have discussed and debated the appropriate role for psychologists in eliciting information in both domestic and foreign non-treatment related contexts.

The APA has drawn three central conclusions from its work on this complex and challenging issue:

- First, psychologists have important contributions to make in eliciting information that can be used to prevent violence and protect our nation's security;
- Second, there must be clear ethical guidelines governing processes by which information is elicited from an individual who may not be willing to provide the desired information;
- Third, further research on all aspects of information-educing processes is critical.

Psychologists' Contributions to Eliciting Information

Conducting an interrogation is inherently a psychological endeavor. Forming a relationship and building rapport have proven to be effective means of eliciting information. Psychology is central to this process because an understanding of an individual's belief systems, desires, motivations, culture and religion likely will be essential in assessing how best to form a connection and facilitate educing accurate, reliable and actionable intelligence. Psychologists have expertise in human behavior, motivations and relationships. The background, training, and experience offered in psychology are therefore highly relevant to the process of creating and nurturing conditions that will maximize the likelihood of obtaining good and useful information. Psychologists have valuable contributions to make toward the goals of preventing violence and protecting our nation's security through interrogation processes.

Need for Strict Ethical Guidelines within Interrogation Policy

The process of eliciting information from an unwilling individual must be governed by strict ethical guidelines. The APA has issued three statements in the past three years that speak directly to the ethics of psychologists' involvement in information-eliciting processes. The central message of these texts, taken individually and as a group, is that there is no room for abuse in forming the kind of relationship that will result in gathering useful information and that respecting the individual's dignity is essential in all aspects of these endeavors.

The first of the three APA statements was issued in 2005, the *Report of the Task Force on Psychological Ethics and National Security*. This task force report contained twelve statements that formed the initial position for APA on psychologists' involvement in interrogation settings:

1. Psychologists do not engage in, direct, support, facilitate, or offer training in torture or other cruel, inhuman, or degrading treatment.
2. Psychologists are alert to acts of torture and other cruel, inhuman, or degrading treatment and have an ethical responsibility to report these acts to the appropriate authorities.
3. Psychologists who serve in the role of supporting an interrogation do not use health care related information from an individual's medical record to the detriment of the individual's safety and well-being.
4. Psychologists do not engage in behaviors that violate the laws of the United States, although psychologists may refuse for ethical reasons to follow laws or orders that are unjust or that violate basic principles of human rights.

5. Psychologists are aware of and clarify their role in situations where the nature of their professional identity and professional function may be ambiguous.
6. Psychologists are sensitive to the problems inherent in mixing potentially inconsistent roles such as health care provider and consultant to an interrogation, and refrain from engaging in such multiple relationships.
7. Psychologists may serve in various national security-related roles, such as a consultant to an interrogation, in a manner that is consistent with the Ethics Code, and when doing so psychologists are mindful of factors unique to these roles and contexts that require special ethical consideration.
8. Psychologists who consult on interrogation techniques are mindful that the individual being interrogated may not have engaged in untoward behavior and may not have information of interest to the interrogator.
9. Psychologists make clear the limits of confidentiality.
10. Psychologists are aware of and do not act beyond their competencies, except in unusual circumstances, such as set forth in the Ethics Code.
11. Psychologists clarify for themselves the identity of their client and retain ethical obligations to individuals who are not their clients.
12. Psychologists consult when they are facing difficult ethical dilemmas.

Central ethical issues that govern psychologists' involvement in interrogations emerge from these twelve statements of the *Task Force Report on Psycholoqical Ethics and National Security*:

- Psychologists must never engage in, promote, or facilitate torture or cruel, inhuman, or degrading treatment or punishment;
- Psychologists who become aware that torture or cruel, inhuman, or degrading treatment or punishment is being perpetrated have an ethical responsibility to report such abuse to appropriate authorities;
- Psychologists must keep separate their roles as healthcare providers from their non-healthcare provider roles; and
- Psychologists must stay within the bounds of their competence.

The following year, the APA's governing body, the Council of Representatives, adopted the *2006 Resolution Against Torture and Other Cruel, Inhuman, and Degradinq Treatment or Punishment*. This resolution elaborated upon key elements of the 2005 task force report. The 2006 resolution reemphasized the absolute prohibition against torture in several clauses:

> BE IT RESOLVED that regardless of their roles, psychologists shall not knowingly engage in, tolerate, direct, support, advise, or offer training in torture or other cruel, inhuman, or degrading treatment or cruel, inhuman, or degrading punishment;
> BE IT RESOLVED that psychologists shall not provide knowingly any research, instruments, or knowledge that facilitates the practice of torture or other forms of cruel, inhuman, or degrading treatment or cruel, inhuman, or degrading punishment;
> BE IT RESOLVED that psychologists shall not knowingly participate in any procedure in which torture or other forms of cruel, inhuman, or degrading treatment or cruel, inhuman, or degrading punishment is used or. threatened . . . ;

The 2006 resolution reiterated that psychologists have an ethical responsibility to report acts of abuse:

> BE IT RESOLVED that psychologists shall be alert to acts of torture and other cruel, inhuman, or degrading treatment or cruel, inhuman, or degrading punishment and have an ethical responsibility to report these acts to the appropriate authorities;

In addition, the 2006 resolution drew from international human rights instruments by adopting the definition of torture set forth in the *UN Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment*, and by stating that psychologists must work in according with human rights instruments relevant to their roles:

> BE IT RESOLVED that, in accordance with Article I of the United Nations Declaration and Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, [T]he term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted upon a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or

> a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official [e.g., governmental, religious, political, organizational] capacity. It does not include pain or suffering arising only from, inherent in, or incidental to lawful sanctions [in accordance with both domestic and international law];
> BE IT RESOLVED that based upon the APA's long-standing commitment to basic human rights including its position against torture, psychologists shall work in accordance with international human rights instruments relevant to their roles;

The 2006 Resolution thus emphasizes and elaborates upon key aspects of the 2005 *Task Force Report on Psychological Ethics and National Security*.

In 2007, the APA issued a third resolution titled *Reaffirmation of the American Psychological Association Position Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment and Its Application to Individuals Defined in the United States Code as "Enemy Combatants."*

The APA's 2007 resolution elaborates upon several elements central to the 2006 resolution and the 2005 task force report. The 2007 resolution identifies techniques that fall under the definition of "torture" and other "cruel, inhuman, and degrading treatment," thus adding specificity to the concepts of torture and abuse:

> BE IT RESOLVED that this unequivocal condemnation includes all techniques defined as torture or cruel, inhuman or degrading treatment under the 2006 Resolution Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, the United Nations Convention Against Torture, and the Geneva Convention. This unequivocal condemnation includes, but is by no means limited to, an absolute prohibition for psychologists against direct or indirect participation in interrogations or in any other detainee-related operations in mock executions, water-boarding or any other form of simulated drowning or suffocation, sexual humiliation, rape, cultural or religious humiliation, exploitation of phobias or psychopathology, induced hypothermia, the use of psychotropic drugs or mind-altering substances used for the purpose of eliciting information; as well as the following used for the purposes of eliciting information in an interrogation process: hooding, forced nakedness, stress positions, the use of dogs to threaten or intimidate, physical assault including slapping or shaking, exposure to extreme heat or cold, threats of harm or death; and isolation, sensory deprivation and over-stimulation and/or sleep deprivation used in a manner that represents significant pain or suffering or in a manner that a reasonable person would judge to cause lasting harm; or the threatened use of any of the above techniques to the individual or to members of the individual's family;

In addition, the 2007 resolution further elaborates the ethical responsibility of psychologists to cooperate with oversight activities:

> BE IT RESOLVED that the American Psychological Association asserts that all psychologists with information relevant to the use of any method of interrogation constituting torture or cruel, inhuman, or degrading treatment or punishment have an ethical responsibility to inform their superiors of such knowledge, to inform the relevant office of inspector generals when appropriate, and to cooperate fully with all oversight activities, including hearings by the United States Congress and all branches of the United States government, to examine the perpetration of torture and cruel, inhuman, or degrading treatment or punishment against individuals in United States custody, for the purpose of ensuring that no individual in the custody of the United States is subjected to torture or cruel, inhuman, or degrading treatment or punishment;

The 2007 resolution also calls upon U.S. legal systems to reject testimony that results from torture or cruel, inhuman, or degrading treatment or punishment:

> BE IT RESOLVED that the American Psychological Association, in order to protect against torture and cruel, inhuman, or degrading treatment or punishment, and in order to mitigate against the likelihood that unreliable and/or inaccurate information is entered into legal proceedings, calls upon United States legal systems to reject testimony that results from torture or cruel, inhuman, or degrading treatment or punishment.

Central to the APA's analysis of these issues in the 2005 task force report and the 2006 and 2007 resolutions is that the appropriate question is not whether psychologists may contribute to eliciting information to prevent acts of violence and protect our nation's security, but rather how they may do so in an ethical manner.

Need for Relevant Research

The third and final conclusion that the APA has drawn from its work in this area is that essential research is lacking. Creating a research agenda is critical and cannot wait. A cursory review of the issues yields questions that are central to the process of eliciting information but that have little basis in extant research. Five examples are:

- What is the most effective means of eliciting information from a recalcitrant subject?
- What indicia may be used to differentiate when a subject is providing accurate and actionable intelligence from when a subject is intentionally providing false or useless information?
- How may culture, ethnicity, religion and gender facilitate, or hinder, the process of eliciting information?
- What characteristics make an individual a more—or less—effective interrogator?
- What background and training best prepares interrogators for their task?

These are a very few of the myriad questions for which research is necessary. In line with the November 2006 *Intelligence Science Board Study Report on Educinq Information*, APA recommends that this Committee authorize development and funding of a research "center of excellence" on educing information under the Director of National Intelligence. Five and ten years from now we should not be forced to rely on anecdotal accounts of what is or is not effective interrogation. The APA has been actively engaged in examining the ethical role of psychologists in interrogation settings. Research will be critical for psychologists to move our understanding of these processes to a deeper and more effective level.

For more information please contact: Stephen Behnke, JD, PhD, Director, Ethics Office, American Psychological Association, 202.336.6006 or *sbehnke@apa.org*.

STATEMENT OF REV. GEORGE HUNSINGER ON BEHALF OF THE NATIONAL RELIGIOUS CAMPAIGN AGAINST TORTURE CONCERNING CIA INTERROGATION TECHNIQUES

I appreciate the opportunity to submit this written statement to the committee. The National Religious Campaign Against Torture (NRCAT) is a campaign of over 125 religious organizations working together to abolish U.S. policy permitting torture or cruel, inhuman or degrading treatment of anyone, without exception. NRCAT members include representatives from the Catholic, evangelical Christian, mainline Protestant, Orthodox Christian, Unitarian Universalist, Jewish, Quaker, Muslim, and Sikh communities. Additional information about NRCAT, our membership, and our work are attached to this statement.

NRCAT believes that torture violates the basic dignity of the human person that all religions hold dear. It degrades everyone involved—policy-makers, perpetrators and victims. It contradicts our nation's most cherished ideals. Any policies that permit torture and inhumane treatment are shocking and morally intolerable.

Since the disclosure of the pictures from Abu Ghraib, through the reports by released detainees and human rights groups, and up to the July 20 Executive Order by President Bush, we have been aware of the fact that the CIA has engaged in an interrogation program that uses techniques involving torture and cruel, inhuman, or degrading treatment. Although the Executive Order now says it prohibits such treatment of detainees, it allows the CIA to continue to use undefined and undisclosed "alternative interrogation techniques," creating serious doubt as to whether the prohibition is real. And, as you know, the Executive Order does not close or prohibit the use of secret prisons—the only purpose of which is perceived to be to engage in torture or cruel, inhuman, or degrading treatment—nor does it prohibit sending detainees to countries which have been known to torture for interrogation.

With the President's Executive Order and the accompanying statements of the President and the Director of the CIA, the United States Government has reaffirmed its policy of treating some human beings as outside the protections of any law and of using—in the name of national security—techniques that amount to torture. We believe that the United States should be doing just the opposite—affirming the right of every human being to be protected by the laws of civilized society and decrying any treatment that comes close to the edge of torture or cruel, inhuman or degrading treatment.

I am not speaking today on whether or not torture "works," the implications of our country's use of torture on our military personnel when they are captured, or the effect our use of torture has on how the United States is perceived around the world. While I believe the conclusion to each of those discussions is a compelling decision not to use torture, I am speaking to you today only from the moral or religious perspective. NRCAT is submitting this statement, because regardless of what anyone believes about torture's effectiveness (and I believe the overwhelming evidence is that torture is not effective), it is morally wrong and should never be used by the United States against anyone under any circumstances.

The urge to humiliate, torment and degrade lurks deep within the human breast. Under conducive circumstances no one can entirely withstand it. Sadism is not born but made. That is why torture, once chosen, cannot readily be contained, and is soon preferred. Torture, once chosen, both proliferates and corrupts. Proliferation is its dimension of breadth, and corruption its dimension of depth. Torture undermines victim and torturer alike. It corrodes the society that permits it. It overthrows the rule of law, and then destroys the tyrannies that it spawns. Corrupting the soul, it eventually corrupts everything in its path. Torture is itself the ticking bomb.

We speak to the issue of torture and the CIA's "alternative interrogation techniques" from our common religious principles that affirm the inherent worth and dignity of all people. Although our beliefs are rooted in many different religions, and although we worship in different ways and in different languages, we stand firmly united and unswerving on this crucial moral issue. Our condemnation of torture is not based on any political opinion or on the laws or treaties of any nations. Rather, we are guided by a higher law that serves as a compass for all of humanity.

Continuation of the CIA's "alternative" interrogation program, including the use of secret prisons and rendition for torture, is wrong. As people of faith—who value our common humanity and our religious responsibility to treat all people with decency and the due process protections of civilized law—we urge you immediately to stop the use of the "alternative interrogation techniques", to close all secret prisons, and to stop rendition to torture.

Thank you for the opportunity to submit this statement.

Vice Chairman BOND. Now, because of time constraints, I will not only call on the distinguished Senator from California to ask

questions, but I will pass to her the ultimate weapon of authority, the small wooden gavel. I thank our witnesses for their testimony.

Senator FEINSTEIN [presiding]. Well, thank you very much, Mr. Vice Chairman. We understand that you have to leave. The two of us will carry on here.

I want to begin by thanking the five of you for coming here today. I want to thank you for the papers you've submitted. They are not classified, and it's my intention to take them out and take them with me and really read them as carefully as I possibly can. One of the problems we have here is that we can't really take notes with us of classified information. So I think your history, your ideas, your thoughts are really, really important.

Let me give you a summary statement. I very much agree with you. I think that this is essentially a war of ideas. I think our values are being tested. I think the people we interrogate are not people who are drafted into the North Korean army or into the German army during World War II. They are hard, fast ideologues who are prepared to give their lives for what they believe, either by exploding themselves or whatever else.

And I candidly believe that some of this just doesn't work. Although we're not often told this, we probably get a lot of bad intelligence in the process as well. We probably get some good intelligence in the process as well.

I also agree with you on the President's July 20, 2007, statement. I'd just like to point something out. On page 2, subsection (e), where it states that "wilful and outrageous acts of personal abuse done for the purpose of humiliating or degrading the individual in a manner so serious," et cetera, but I gather if it's done for the purpose of collecting foreign intelligence, it's okay. I think that's a real problem with the statement.

Have you looked at that? Do you agree with this, or do you have any other thoughts?

General OTSTOTT. I absolutely agree with you on that. It opens the door for bad behavior.

Mr. TURNER. You will remember from law school, no doubt, the Latin expression "expressio unius est exclusio allerius"—the expression of one thing is the exclusion of another. And when you say if you do this for the purpose of humiliating people, you can't threaten to sexually mutilate them and so forth, implicit in that, at least a reasonable interpretation of that is that if your purpose is, as you say, collecting intelligence or trying to protect against the next terrorist attack, then these things are not off limits.

That's very offensive.

Senator FEINSTEIN. Thank you. Senator Whitehouse, you're on.

Senator WHITEHOUSE. Thank you.

I'd like to join you in thanking these witnesses. I found their testimony very helpful. Professor Turner, it's nice to see a professor from my alma mater here testifying.

Senator FEINSTEIN. Oh, that's why you're so smart.

Senator WHITEHOUSE. For the record, she was referring to Professor Turner. [Laughter.]

Senator WHITEHOUSE. I thought, Ms. Massimino, that your comparisons with some of the historical antecedents where we were on the other side was extremely helpful to understand particularly the

episode of the Japanese officer sentenced to hard labor for war crimes for the techniques that you indicated.

Colonel Kleinman, you entered the service in 1985?

Colonel KLEINMAN. I was commissioned in 1985, yes, sir.

Senator WHITEHOUSE. And you're still on active duty today?

Colonel KLEINMAN. I'm an active reservist. I'm the senior reserve intelligence officer for the Air Force Special Operations Command.

Senator WHITEHOUSE. In the 22 years that you have been serving, how much of that time has been dedicated to interrogation and human intelligence collection?

Colonel KLEINMAN. One hundred percent, sir. That's my career. The sum total of my career has been in human intelligence, much of it relating to either interrogation or resisting interrogation.

Senator WHITEHOUSE. And you've been an advisor to intelligence teams and interrogators operating truly at the forefront of our most significant conflicts, correct?

Colonel KLEINMAN. Yes, sir. I've conducted interrogations myself. I was also a team chief during the Gulf War, where I had interrogators from all the services under my command as we interrogated literally thousands of Iraqis. I was an advisor to a Special Operations Task Force on Interrogation during Iraqi Freedom. So I've had a chance to really look at the academic theoretical side, but I am steeped in the operational side.

Senator WHITEHOUSE. If you look at what we're allowed to do to collect information under the Army field manual, there are arguably two constraints on it, two limiting factors. One is the limiting factor that we have discussed here, the sort of moral limiting factor, the if we do it to them they can do it to us factor—the sort of golden rule of interrogation, if you will.

Let me ask you, just for purposes of argument, to set that aside for a minute and consider, as a real career expert in intelligence-gathering from people who you have custody over, if you could set aside the rest of it, if you were in a dark room, you knew nobody would ever look, the intelligence that you needed to get was of urgent value, would you feel that from a point of view of intelligence-gathering effectiveness you would or could or should go beyond the Army field manual and the techniques that are authorized in the Army field manual in order to obtain that intelligence?

Colonel KLEINMAN. Senator, I thank you so much for that question, because I think I've been waiting twenty years to answer it. That is, absolutely not. I do not perceive the construct of the Army field manual places undue limitations in terms of what I need to do to generate useful information. That's the key—accurate, useful information, not leading questions to force somebody to say what they think I want to hear. My goal is to explore the full spectrum of their knowledgeability, where they answer not only the questions I ask but also, by developing what I call operational accord, I am able to build a relationship such that they see it's in their best interests, under non-pressure, non-coercive circumstances that it would be in their best interest to answer these questions fully.

I've had situations during the Iraq war where we were very interested in the location of SCUD missile systems. I had a source that nobody suspected of having knowledge in this area. At the conclusion of four hours of interrogating him about other ele-

ments—and it was a treasure trove of information—we had a relationship such that as I was getting up, shuffling my papers, he said, "Didn't you want to know where the SCUD missiles were?" So I said, "We've spent four hours already, I'm tired, can't we do this tomorrow. [Laughter.]

Colonel KLEINMAN. I, of course, sat back down and he gave us incredible information. And the reason, he told me, was that he was so amazed at his treatment. I hoped, he said, that if I was going to be captured, that I would be captured by one of your allies, not by the Americans, because I was told you were animals. But you've treated me like a gentleman. You've treated me with respect, and you are clearly knowledgeable of my customs and my culture. I'm more than happy to answer any question you have.

Senator WHITEHOUSE. May I follow up? I'm afraid something you said might be taken out of context. I'd like to go back and ask you to go over with it again with me. You said briefly "I am not limited by the Army field manual." When you said that, I assume you did not mean that in the actions that you undertake in your professional capacity there's anything you do that's not limited by the Army field manual, as a matter of law.

I assume that what you meant to say was that you did not see the constraints of the Army field manual—the moral constraints, the legal constraints—as in any way inhibiting the effectiveness of your examination techniques—that you could do everything you wanted to, that you missed for nothing because of those restrictions. Is that what you intended to say?

Colonel KLEINMAN. Senator, I am forever in your debt for allowing me to correct myself, because that's precisely what I meant to say. I don't see those as limiting my ability to work—the spirit or the letter of that guidance. My approach was what we call a relationship-based approach—far more than just rapport-building. I've never felt any necessity or operational requirement to bring physical, psychological or emotional pressure on a source to win their cooperation.

So, following the guidance in the field manual, I feel unconstrained in my ability to work in the paradigm that I've taught for so many years.

Senator WHITEHOUSE. Can you assume another country in which there is no such constraint, in which the Chinese feel at liberty to put American prisoners into prolonged stress positions or the Japanese feel free to take American prisoners of war and lean them against the wall on their fingertips for extended hours, or other such devices that would exceed the limitations of the Army field manual are pursued? Why is it that those interrogators utilize those techniques? Is it just professional disagreement? Do they have a sort of different view of what is effective? Why do they do it?

Again, setting aside the moral constraints, which I know animate you very much and me as well, but for purposes of discussion, from a pure intelligence collection perspective and setting aside any moral or golden rule limitations on the behavior that you would want to limit yourself to, why is that some interrogators would feel that it was appropriate to go beyond what's permitted by the Army field manual?

Colonel KLEINMAN. As a graduate of the University of California, I tip my hat to the University of Virginia for the critical thinking skills that are taught to the graduates, because, sir, that gets to the very heart of the matter, and it is this: there are two objectives that one can pursue in interrogation—either winning cooperation or compliance. They seem very similar, but there are profound differences.

Compliance means to take action that's against your interests, that you don't support, and frequently has nothing to do with intelligence. Cooperation is winning a source's willingness to provide useful information. What the Chinese were interested in, what the Koreans were interested in, what the North Vietnamese were interested in was maybe five percent intelligence, 95 percent compliance, meaning creating propaganda.

Now that's a whole different paradigm. And the approaches that they used—like sleep deprivation and torture—ultimately will get any one of us in this room to do things that we couldn't imagine today. But it doesn't necessarily mean our ability to provide useful information.

The other part of that paradigm is the fact that obtaining intelligence—as I mentioned in my opening remarks—is getting access to somebody's functioning memory. If you think back to just the panel before ours, if I were to question each of you systematically, under the best of circumstances, to tell me what happened—who said what, when, what were the proposals, who agreed, who disagreed and so forth—we would find some real deficits in your memory—again under perfect circumstances.

Imagine now if I had had you standing for twelve hours or in stress positions and now I'm asking you to call upon your memory. Even if you wanted to, even if you were wilful, you would be undermined in your ability to do so. So I think the key point, sir, is are we trying to produce compliance, which is propaganda, or cooperation, which leads to intelligence.

Senator WHITEHOUSE. Madam Chair, thank you for letting me go over. It's been enormously valuable to me to hear firsthand from somebody who has such firsthand lifelong experience in the field in this discussion. So thank all of the panel. Colonel, I thank you, and I thank the Chair for letting me expend the time.

Senator FEINSTEIN. You are very welcome. Let me ask one last question.

This is a very troubling aspect, I think, of our processes now, and the question really comes how to handle it. There is a real element of fear that our country is vulnerable and that we know there are people that want to hurt us and hurt us in the most grievous manner possible. Therefore, to be able to get the maximum amount of information I think the country has been somewhat humiliated by the fact that Usama bin Ladin has never been found. Therefore, there's a lot of pressure to try to find as much as possible out about al–Qa'ida, its whereabouts, its training grounds, its leadership, and to be able to get to them.

You have submitted, all of you, that you do not believe that so-called EITs—and we won't say what they are, but let's use your description of them, whether that description is right or wrong—enhanced interrogation techniques are not necessarily effective.

At this stage, how would you recommend that we proceed? How do you recommend we find the information that we need? It is amazing to me that, despite a $50 million reward, no one has come forward with information with respect to the whereabouts of Usama bin Ladin. One has to assume that there are a lot of people that actually know where he is who could really benefit from that money.

But I think the level of fear, the level of cooption, the level of ideologic zealotry that is connected to this fanaticism is really unprecedented in our history.

I know you'll say the manual, and I happen to agree with that. But if you have any other comments I'd like to take just one last shot at hearing what they are.

Ms. MASSIMINO. If I might, Senator, there is another field manual that I think is important, which really gets to the heart of your question of how we win a battle against an enemy like that. And that is the manual that General Petraeus oversaw before he left to take over in Iraq—the counterinsurgency manual. There I think that the field manual on interrogations fits like a glove with the overall strategy outlined in the counterinsurgency manual, which is that you seek to de-legitimize the enemy in the eyes of the population from which it gets its recuperative power, its recruits. You seek to separate the enemy from its support base. And one of the ways of doing that is to maintain the moral high ground, to criminalize the actions of the enemy in the society where they are operating.

And one of the warnings in that manual is the degree to which our forces and our personnel use the methods of the enemy. We then forfeit our benefit in this asymmetric war against them. They will use methods that we would never contemplate. That's their supposed advantage.

Ours is that our values and our ideas are better and we don't want to forfeit that. If we forfeit that, that's the message of the counterinsurgency manual, as I read it, and it really gets to the heart of what you're asking about, I think.

Senator FEINSTEIN. Thank you. Any other last comment?

General OTSTOTT. I would just comment that we are in what has been described as a long war or a persistent conflict, and these are religious zealots. Our most dangerous enemies are Islamic jihadist fundamentalist zealots. The people that know exactly where Usama bin Ladin is at any given time probably are no more than a dozen or a hundred. And they are zealots and they are religiously motivated. I don't think you could pay them enough money to come out of the cave and say he's in there, because that would just go against everything that they are very, very strongly religiously motivated by.

So it comes down to the war of ideas. We've got to somehow spread the ideas we have that are on a higher plain and get them to disown jihadism. We need to offer ideas in their cultural understanding that prevents jihadism from growing amongst the people who are disadvantaged, who have no hope, who have no economy to speak of and have no purpose in life except to pick up an AK–47 and wage war against the "crusaders" or the infidels. Somehow we've got to get beyond the idea that we can torture information

out of somebody and make them tell us where Usama bin Ladin is and then all will be well.

Mr. TURNER. About two years ago I going on vacation, riding across the country with my son, when Voice of America called and said what do you think about all this stuff about torture. My response was, "some very good people have done some very bad things for very good reasons," which is to say good people are trying to stop terrorism and they think this is the way to do it.

I don't think it's the way to do it. The people I've talked to in the FBI and people here on this panel say that doesn't work. I don't agree we necessarily need to have a uniform standard. That is to say it may well be the CIA has a very senior Islamic scholar who they could send in and engage in a debate about what the Qur'an means. For a Christian Army sergeant to go in and do that would be absolutely asinine. So, to me, the standard ought to be "humane treatment."

Common Article 3 and customary international law require humane treatment. It's a fairly high standard. I love the test the Army uses, which they call their modified golden rule. Ask yourself how you would feel if they did this to our prisoners. If you find it objectionable, don't do it.

We have the ticking bomb scenario. My guess is we'll never have that case. If we did, I'm not prepared to say that I would risk 2,000 or 100,000 lives in a setting involving WMD protecting the civil liberties of a terrorist. We would violate the law. We would be vulnerable to war crimes trials. But I can understand somebody making that policy judgment. But ultimately you certainly don't do it by issuing an Executive Order saying as long as you don't want to humiliate a detainee you can rip his fingernails out.

We have to maintain the high moral ground. I think the Director of the CIA was exactly right when he said this is a struggle for ideas. The General just said that. We can't win that struggle if the world and our own people see us as barbarians.

Colonel KLEINMAN. I just wanted to answer your question this way. We have actually encountered this very same circumstance once before, back in 1941. When we went to interrogate Japanese prisoners of war, they were seen as zealots. The language was "impenetrable." The culture was "inscrutable." It was beyond our understanding. But we had an approach, conducted by a small group of people who spent a lot of time in Japan, who spoke the language, who were absolutely comfortable in that culture. They used what I call enlightened cultural finesse.

These prisoners were taught bushido from the youngest age, where not only would they resist; they could not even envision becoming a prisoner. But they found themselves as prisoners and they found people who understood them, who could speak the language, who treated them with respect under that code, and it was amazing the intelligence that flowed and the relationships that developed. It was beyond what everybody thought possible. Everybody thought the Japanese only knew force. And that's what was used other places and was ineffective.

So I think probably it's a mistake to say that we've never quite encountered this type of zealotry. We have, but America was successful before.

Senator FEINSTEIN. Thank you very much.

Dr. KELLER. Senator, I'd like to say, just briefly, first of all, we all know what's at stake. I will tell you on September 11 I was rounding the bend at the Lincoln Tunnel when the first plane hit the World Trade Center and had an unobstructed view of that. So in my being I understand this, and rushed to the Bellevue emergency room to do what we could.

These methods—first of all, taking it from the side of the interrogators and why it's so important to have clear standards, we like to think of people who would torture as two-headed monsters, and we've learned very clearly in the psychological literature that it's easier to do these things than we'd like to think it is. That's why there's a need for very clear guidance, that these methods in no way are allowed.

The other thing, from a health perspective, that really frightens me is that I know from my colleagues caring for torture survivors around the world that those at risk of being tortured, individuals speaking out for democracy and freedom, are at far greater risk now of being tortured, I believe, than they were before. So we've made the world a much more dangerous and, I believe, far more unhealthy place for ourselves and for civilians around the world.

Senator FEINSTEIN. On that note, let me once again say thank you to the five of you, and the hearing is adjourned.

[Whereupon, at 4:32 p.m., the Committee adjourned.]