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APPLICABILITY OF FEDERAL CRIMINAL LAWS TO THE INTERROGATION OF DETAINEES

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

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CONTENTS

DECEMBER 20, 2007

Page

OPENING STATEMENTS

The Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Chairman, Committee on the Judiciary 1
The Honorable Lamar Smith, a Representative in Congress from the State of Texas, and Ranking Member, Committee on the Judiciary 3
The Honorable Jerrold Nadler, a Representative in Congress from the State of New York, and Member, Committee on the Judiciary 5
The Honorable Robert C. "Bobby" Scott, a Representative in Congress from the State of Virginia, and Member, Committee on the Judiciary 6
The Honorable Sheila Jackson Lee, a Representative in Congress from the State of Texas, and Member, Committee on the Judiciary 7

WITNESSES

Professor Stephen A. Saltzburg, The George Washington University Law School
Oral Testimony 8
Prepared Statement 10
Professor John Radsan, William Mitchell College of Law
Oral Testimony 14
David B. Rivkin, Jr., Esquire, Baker & Hostetler
Oral Testimony 16
Prepared Statement 19
Ms. Elisa Massimino, Washington Director, Human Rights First
Oral Testimony 21
Prepared Statement 24

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Letter dated December 17, 2007, from the Honorable John Conyers, Jr., to the Honorable Michael B. Mukasey, Attorney General of the United States 66
Letter dated December 7, 2007, from the Honorable John Conyers, Jr., the Honorable Robert C. Scott, the Honorable Jerrold Nadler, and the Honorable William Delahunt to the Honorable Michael B. Mukasey, Attorney General of the United States 68
Letter dated December 13, 2007, from the Honorable Michael B. Mukasey to the Honorable John Conyers, Jr., the Honorable Robert C. Scott, the Honorable Jerrold Nadler, and the Honorable William Delahunt, with enclosure 70

APPLICABILITY OF FEDERAL CRIMINAL LAWS TO THE INTERROGATION OF DETAINEES

THURSDAY, DECEMBER 20, 2007

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:10 a.m., in room 2141, Rayburn House Office Building, the Honorable John Conyers, Jr. (Chairman of the Subcommittee) presiding.

Present: Representatives Conyers, Nadler, Scott, Jackson Lee, Cohen, and Smith.

Staff Present: Sean McLaughlin, Minority Deputy Chief of Staff; and Allison Beach, Minority Counsel.

Mr. CONYERS. Good morning, the Committee will come to order. I welcome everyone for coming. The purpose of this hearing of course derives from the recent revelation of the destruction of the CIA videotapes, which involve hundreds of hours of audio and visual and we are concerned about the decision to destroy them and a number of questions have been raised that are ripe for congressional oversight.

The enhanced interrogation techniques reportedly depicted on the tapes implicate various laws governing the proper use of interrogation techniques as we have come to understand them. And the destruction of the tapes and the issues surrounding the investigation of the matter raises obvious questions of obstruction of justice, as well as the ability of coequal branches of government to initiate their own inquiries.

So I welcome our witnesses here, and I regret the absence of a representative from the Department of Justice despite repeated requests, including my letter of December 17. Attorney General Mukasey hasn't sent anyone here to testify. We have not even gotten a letter explaining why, although I am encouraged by reports in the press this morning that the Department may be yielding to the demands for a congressional oversight with reference to the House Intelligence Committee. We will look forward to a long overdue discussion with the head of the Department of Justice when we return in January.

Now another reason for this gathering today is that this is the first public hearing and discussion on the issues connected with the government's interrogation of detainees since the incredible news of the CIA's destruction of videotapes. Up until now, the Senate Intelligence Committee has had a hearing, but it was secret. The Department of Justice tells us that they have an inquiry going on.

That is secret. And so it is important that we try to get an understanding, not only between ourselves and our experts invited here today, but that the American people be given a little more understandable information about the very serious matters raised in connection with this subject matter.

One of the most important responsibilities of the Judiciary Committee is its oversight capacity. That was demonstrated when we illustrated the firing of the U.S. attorneys, some nine of them, and the politicization that was involved in that. And so oversight is something we, all of the Members, are very zealous about maintaining.

Now the purpose of this hearing is to explore the who, how, when, where, why of the destruction of the videotapes and, as importantly, what might have been shown on them. Now there are those that say, well, they are gone now, there is nothing that we can do. Well, I wish I knew that with any particular certainty. I don't know if there are any copies around. There are certainly people who do know what went on and are still around. There are those that seem to know what was on these tapes and that becomes another very important reason for our inquiry. And then to separate out all the various laws that govern such activity.

You start from my point of view with the Geneva Conventions and the Convention Against Torture ratified in 1941, 1977, 1984. These are international obligations that we urged other nations to join with us on. We were the leaders in this brave new examination of how we should treat those with whom we don't agree. And we urged others to sign and that required our country as well to prohibit and to criminalize acts of cruel and inhuman and degrading treatment. We criminalize those kinds of violations of treaty which of course are law in this country.

The Administration originally claimed that these obligations didn't apply to detainees held or connected with the war on terror, but the United States Supreme Court objected to that position in the Hamdan case. This is the first time we have had a chance to hear and discuss the issues that are involved. We want to have it made clear that the Geneva Convention applies to the treatment even of people that may be or are connected in this anti-terrorist activity.

Although the Administration convinced the previous Congress to enact laws to try to mitigate that decision, we will hear from experts today that torture is still cruel and inhumane and degrading, including waterboarding, and may well subject those interrogators and those above them who approved it to legal liability. That is an important reason why the destruction of the tapes may well have been an obstruction of justice.

Like many others, I believe that the idea of appointing a special counsel to independently investigate and prosecute violations of Federal criminal laws regarding the interrogation of detainees and others is a prudent way for a variety of reasons. First, there is credible evidence, numerous Federal crimes; second, that the White House itself attempted to shield government officials from criminal prosecution; third, the Attorney General Mukasey has still not told us whether waterboarding and other forms of torture are outright

illegal; and, fourth, the Department of Justice wrote the legal opinions authorizing torture.

So tomorrow we will be hearing from a Federal court that has gone into this matter and we will be waiting for their results. So I congratulate those Members of the Committee that were able to be with us today. We thank them for their interest and cooperation. There is no way we can tell when we were going to get out of here. Things got better and we were able to officially close the proceedings on the floor yesterday. So I look forward to the Members of the Committee's inquiry about these important issues, and I am very grateful that the witnesses are here today.

I would now like to recognize Lamar Smith, who is the senior Ranking Member of the minority from Texas who has worked with me this first year in a way that has surprised and pleased us all. We are grateful for his cooperation and insight into the objectives of the Judiciary Committee, and I am pleased to recognize him at this time.

Mr. SMITH. Thank you, Mr. Chairman. Mr. Chairman, you were complimentary of the Members who are able to be here today. Unfortunately, that compliment can only apply to me for a very short period of time because I am trying to get to the airport, but I appreciate your having the hearing and if I may, I will make my opening comments even if I have to leave shortly after that.

Mr. CONYERS. Thank you.

Mr. SMITH. Mr. Chairman, the Justice Department in conjunction with the CIA's Office of the Inspector General has already begun a preliminary inquiry into the circumstances surrounding the discarding of two videotapes of CIA interrogations of terrorists. I understand that all records and documentation that would facilitate the inquiry are in fact being preserved.

What we do know is that members of both political parties had been fully briefed on the CIA's interrogation program and no objections were raised. According to *The Washington Post* in September 2002, four Members of Congress met in secret for a first look at a unique CIA program designed to bring vital information from reticent terrorism suspects in U.S. custody.

For more than an hour the bipartisan group, which included current House Speaker Nancy Pelosi, was given a virtual tour of CIA's overseas detention sites and the harsh techniques interrogators had devised to try to make prisoners talk. Among the techniques described, said two officials present, was waterboarding. On that day, no objections were raised. The enhanced interrogation program would be treated as one of the Nation's top secrets for fear of warning al-Qaeda members about what they might expect.

The Post continued, saying U.S. officials knowledgeable about the CIA's use of the technique say it was used on three individuals, the alleged master mind of the September 11, 2001 terrorist attacks, a senior al-Qaeda member and Osama bin Laden associate captured in Pakistan in March 2002 and a third detainee who has not been publicly identified.

According to CIA Director Hayden, the videotapes of the terrorist interrogations were discarded to both protect the identities of the interrogators and keep them out of the hands of terrorists who might use the information to develop effective counter strategies.

But while we can't watch the videotapes, ABC News conducted a very telling interview with one of the former CIA officials, John Kiriakou, who was involved in one of the videotaped interrogations of terrorist Abu Zubaydah.

When the terrorist Zubaydah, a logistics chief of al-Qaeda, was captured, he and two other men were caught in the act of building a bomb. A soldering gun that was used to make the bomb was still hot on the table along with building plans for a school. Zubaydah refused to offer any actual intelligence until he was waterboarded for between 30 and 35 seconds. According to Mr. Kiriakou, from that day on he answered every question. The threat information that he provided disrupted a number of attacks, perhaps dozens of attacks.

When a former colleague of Kiriakou asked Zubaydah what he would do if he was released, he responded, I would kill every American and Jew I could get my hands on. Near the end of the ABC interview Mr. Kiriakou was asked what happens if we don't waterboard a person and we don't get that nugget of information and there is an attack on a movie theater or shopping mall or in midtown Manhattan, you know, at rush hour, then what would we do? I would have trouble forgiving myself.

According to reports, Khalid Sheikh Mohammed, the mastermind behind the 9/11 attacks that killed 3,000 people, stayed quiet for months until he was waterboarded for just 90 seconds. After that he revealed information that led to the capture of many other terrorists, including those who were plotting to derail trains, to use acetylene torches to bring down the Brooklyn Bridge, to bomb hotels and nightclubs, detonate U.S. gas stations, poison American water reservoirs, trigger radioactive dirty bomb attacks, incinerate residential high-rises by igniting apartments filled with natural gas and cultivating anthrax.

There are clear laws governing CIA interrogation. Specifically, U.S. law prohibits persons in the custody or control of the U.S. Government, regardless of nationality or physical location, from being subjected to cruel, inhuman or degrading treatment or punishment. The Supreme Court has made it clear that such unconstitutional acts are only those that shock the conscience.

What shocks the conscience depends entirely on the circumstances and purpose of the interrogation. For example, if someone were picked at random on the streets of New York and waterboarded, that would undoubtedly shock the conscience. But what if that person was one of the 9/11 terrorists or perhaps a known terrorist with information that could save hundreds or thousands of lives? Waterboarding a member of al-Qaeda or a known terrorist as a last resort to save the lives of thousands of people would not shock the conscience.

Mr. Chairman, we should be careful not to unjustly persecute anyone, especially those whose efforts enable us and our families to sleep better at night.

Thank you, Mr. Chairman, I yield back.

Mr. CONYERS. I thank the gentleman. I am glad that he made his opening statement.

I am now pleased to call upon the Chairman of the Constitution Committee of the House Judiciary. His name is Jerry Nadler, sen-

ior member of the Judiciary Committee, and we recognize him now for his opening comments.

Mr. NADLER. I thank you, Mr. Chairman. Mr. Chairman, I want to commend you for scheduling this timely hearing into some very disturbing reports. It is important that we investigate these allegations carefully, because it is true we may be facing the possibility of a dangerous and criminal abuse of power at the highest levels of our government.

The matters at stake here are far from trivial. We have been investigating the abuse of prisoners in U.S. custody, as well as the practice of turning over individuals to other countries designated by our government in those countries that routinely engage in torture. We have also investigated the practice of holding individuals, many of whom our government now concedes are innocent of any wrongdoing, for years without any hearing or due process of any sort. We have also investigated widespread spying on Americans without any legal authorization.

We have been told that the surveillance was not a violation of criminal law, but I know of no possible excuse other than those absurd ones told by the Administration that could justify that conclusion. At every turn we have run into concerted efforts to stonewall the public, the Congress and the courts. They have refused to testify, they have withheld vital information, they have flouted subpoenas.

Today we examine perhaps the most disturbing of all allegations that our government destroyed tapes of interrogation which employed what it euphemistically called extreme interrogation techniques and what civilized people call torture. These tapes clearly spoke to many of the cases in question that the Congress, the public, and the 9/11 Commission have debated, including unlawfulness of the interrogation methods used, evidence for proceedings against those held as unlawful enemy combatants. The destruction of these tapes may have occurred in violation of a court order and while it was known that the matter was under investigation, they were concealed from the 9/11 Commission, the existence as well as the destruction of the tapes. They concealed it from the 9/11 Commission, from the Intelligence Committee, and the Congress.

These tapes may very well have been relevant in at least one criminal prosecution, and their destruction may ultimately result in the release of a convicted terrorist. These actions raise some very disturbing questions, the answers to which may determine whether we remain a Nation of law.

Who ordered the destruction of the tapes and why? Who knew about the existence of the tapes and their destruction? What did the President and the Vice President know and when did they know it? Who in the White House was involved in the decisions leading up to the destruction of these tapes? What other evidence, if any, has been concealed or destroyed? Did the destruction of the tapes constitute a crime? And if so, who in the Administration is criminally liable? Did the acts recorded in the tapes constitute a crime or crimes? Were any of the decisions made by our government and Congress, including the decision to declare detainees not to be prisoners of war but to allow the President to define retroactively what constitutes illegal torture? Were any of these deci-

sions made to protect people in this Administration from prosecution for criminal acts? These are very disturbing questions and ones to which we need answers.

Mr. Chairman, in times of crisis it is always beneficial to remember the principles upon which this Nation was founded. It was John Adams who observed that, "Power always thinks that it is doing God's service when it is violating all the laws." We are supposed to be a Nation of laws and we are a free and democratic Nation but, as we are often reminded, freedom isn't free. Today is the day when we must decide whether we are going to pursue the difficult questions that are necessary to pursue in order to protect our freedoms.

I look forward to the testimony of our witness, and I thank our Chairman again for calling this important and timely hearing. I yield back the balance of my time.

Mr. CONYERS. Thank you very much. I would like to inquire if the Chair of the Crime Committee would like to make an opening statement.

Mr. SCOTT. Just very briefly, Mr. Chairman.

Mr. CONYERS. The gentleman from Virginia is recognized for that purpose.

Mr. SCOTT. Thank you, Mr. Chairman. I thank you for holding the hearing because I think it is important for us to know exactly what the laws are against torture. We have heard an interesting response from the Administration that goes along the lines of United States does not torture. If we did it, therefore that must not have been torture because we don't torture, and furthermore the torture worked. We need to know what the laws are and who may have violated the laws.

What was on the tape? Were criminal laws documented? We have heard we can't tell whether or not a particular technique is torture until we have some more specifics. If we had it on tape, people could look at the tape and ascertain whether or not that was torture, but the tape, the evidence has been destroyed. Who was responsible for the destruction and what criminal laws could be implicated by the destruction itself?

We have heard that four Members of Congress were briefed on this. Some have publicly contradicted some of the statements by the Administration. But even if there is no complaint, four Members of Congress can't change the criminal laws. So insofar as Administration officials have been publicly implicated, from writing legal memos justifying both what seems to be torture to most people and the destruction of the documents, many had knowledge of the tapes before the destruction, the tapes were not disclosed when required apparently to the 9/11 Commission, to Congress, and to the courts.

Mr. Chairman, for those reasons I think it is essential that we have an independent counsel appointed, because so many Administration officials from top to bottom from the CIA, Department of Justice, and the White House have been implicated in this matter. So I join your call for an independent counsel. I yield back the balance of my time.

Mr. CONYERS. Thank you very much.

I don't think I have to ask Sheila Jackson Lee if she wants to make a comment because she takes full advantage of the experience that she brings to the Judiciary Committee, and I'd be happy to recognize the gentlelady from Texas at this time.

Ms. JACKSON LEE. Good morning. Thank you, Mr. Chairman, and thank you for being the kind of responsive chairperson that is made aware or is aware, if you will, of some of the important challenges that this Nation faces. We do know that we live in a different world after 9/11 and we respect that difference. It is the obligation of this country to ensure the safety of all Americans. But I believe that the American people did not want us to extinguish the Constitution in the backdrop of protecting our security.

Let me acknowledge the distinguished witnesses that we will listen to and offer a few thoughts about the importance of this hearing.

The representation is that the CIA in 2005 destroyed at least two videotapes documenting the interrogation of two senior al-Qaeda operatives in the agency's custody. The CIA reportedly took this step in the midst of congressional and legal scrutiny pertaining to the CIA's detention program, a major challenge to the Constitution. It is also important to note that Congressman Peter Hoekstra, the Intelligence Chairman from 2004 to 2006, explained that he was never briefed or advised that the tapes existed or that they were going to be destroyed. Furthermore, it is also noted that Congresswoman Jane Harman, the Ranking Member of the Intelligence Committee, explained that she had told CIA officials several years ago that destroying any interrogation tapes would be a bad idea.

I too want to protect the operatives and certainly don't want to put their families in jeopardy, but we cannot have a government that is out of control. Questions of obstruction of justice rage throughout this incident, and I believe it is important for this congressional Committee to chiefly have oversight as to whether or not the Constitution has been violated.

It has been alleged, and I say alleged, that several then White House lawyers, Alberto Gonzales, David S. Addington, Don Bellinger, III, and Harriet Miers, allegedly had some involvement in counseling regarding the tapes in question.

The destruction of the tapes has raised questions about both the possibility that the tapes documented unlawful conduct and that their destruction in and of itself was unlawful. It is sad to note that many institutions were forbidden from getting information regarding the tapes, including Congress, the Federal courts and the 9/11 Commission. This government has to be based upon truth and transparency and it certainly must be based upon security and the protection of America. But the United States does not make those practices violating the laws, violating the Constitution, violating the International Convention on Torture. It must not make that the norm and acceptable practices. Therefore, we must not draw to the practices of foreign dictators, but we must stand alone as a beacon of light, shining around the world, to ensure that the principles of democracy and freedom and equality and justice reign strong in this Nation.

And so I am grateful for this hearing and look forward enthusiastically to the testimony of the witnesses. I join with my col-

leagues in calling on an independent prosecutor to ensure that justice reign strong. I look forward to the testimony, and I yield back my time and ask that my complete statement be submitted into the record.

Mr. CONYERS. Without objection, so ordered.

We welcome from the Human Rights First, Lisa Massimino. We welcome Attorney David Rivkin of Baker & Hostetler. We are delighted to have with us Professor John Radsan, and we begin our testimony with Professor Steven Saltzburg, Wallace and Beverly Woodbury University Professor of Law at George Washington University.

He has had extensive prosecutorial experience. He has been Associate Independent Counsel in the Iran-Contra investigation, was later Deputy Assistant Attorney General in the Criminal Division, and we are pleased that he has prepared a statement. And his statement, like every one here, will be entered into the record and you may make your presentation at this point. Professor, welcome this morning.

TESTIMONY OF PROFESSOR STEPHEN A. SALTZBURG, THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

Mr. SALTZBURG. Thank you, Mr. Chairman, Members of the Committee. I don't intend to read my testimony since you already have it, but I would like to highlight some points.

First, there isn't any dispute about the destruction of the tapes and that it happened. Second, the rationale for destroying the tapes to protect the identity of the interrogators is almost as embarrassing as the destruction itself. There are four facts that demonstrate this. One, the tapes could have been modified to make the faces and voices unrecognizable. Second, one copy of each tape could have been maintained in a secure place. Third, the CIA keeps a record of who interrogates in an interrogation. So even with the tape gone there is a record. And fourth, the interrogators and others in the CIA know who did the interrogation.

And so the explanation for destruction fails the straight face test. It is unnecessary to prevent the tapes from revealing the identities of the interrogators and the destruction doesn't protect their identities.

And so the question is what does it tell us when an agency gives an excuse that plainly is frivolous? It says that there is another reason why these tapes were destroyed. And the only plausible explanation I believe is that the CIA wanted to assure that those tapes would never be seen by any judicial tribunal, not even a military commission, and they would never be seen by a Committee of Congress or any individuals in Congress.

Over the last several years, when this House and the Senate considered the Detainee Treatment Act of 2005 and the Military Commission Act of 2006, Members have been asked their opinion about whether waterboarding is torture. They have been asked whether or not they support restrictions on CIA interrogation. And one of the problems is that terms like "waterboarding" are tossed around as though everybody seems to believe that they know what they are talking about.

One of the things that we would love to know is whether what those tapes showed was that the actual implementation of waterboarding was quite a bit different than people assumed it would be. In fact it might have been quite a bit different from what the Members of Congress, the four Members who had a secret session, were told in an earlier year. I mean, if they showed nothing more than what was already known to Congress, there would be no need for them to be destroyed.

The destruction of the tapes means that there will inevitably be disputes about what actually occurred during the interrogations. The tapes themselves would have been indisputable, but with them gone we have the ultimate coverup. The indisputable evidence no longer exists and memories will undoubtedly differ about what happened.

Now despite the fact that the tapes have been destroyed the Department of Justice originally asked Congress to stay its hand, not to investigate, and I think that would be a major mistake. The Department seems to have changed its mind at least to some extent. It is vitally important for this Congress to recognize that it is part of the interrogation process, that it regulated to some extent interrogation when it enacted those two statutes in 2005 and 2006. This Congress decided not to restrict the CIA, at least not explicitly, and it decided not to confine the CIA to interrogation techniques that are contained in the Army Field Manual. And one of the issues that the Congress may well want to consider is should the CIA be restricted.

This is not a Republican issue and it is not a Democratic issue. This is an issue about credibility of the United States. When United States officers act in a way that is regarded as torture around the world; when United States officers engage in practices which, if inflicted upon our own military, we would regard as reprehensible, we would regard as violations of the Geneva Conventions, we would regard as war crimes, and we would regard as things that should be prosecuted; then it is important for Congress to look and make its own judgment about whether or not what is going on is something that can be done in the name of the United States.

There are a number of questions for Congress to ask and demand answers to. Some of these are: What specific reasons were actually advanced for the tapes' destruction in 2005 and are those reasons set forth in writing? If they are, who wrote those reasons? And were those reasons vetted inside and outside the agency? If so, what were the responses? Were they vetted by the Department of Justice? If so, what were its responses?

Two other questions that should be asked are these: Are the frivolous explanations that are being offered in 2007 the same explanations that were actually given in 2005? And why was the destruction of these tapes kept secret for some period of time? The longer the time, the harder it is to reconstruct what actually happened. Congress already has a 2-year gap to worry about and it is important that Congress not wait any longer to do an investigation.

Another issue for Congress to consider is whether there should be restrictions on destruction of other forms of evidence. Whether or not the CIA should be required to maintain certain records for

an extended period of time or perhaps forever is a debatable question. I don't think the answer is clear, but I do think it is important that Congress should look to the practices of the agency and decide whether or not those practice are acceptable.

Without meaning to be insulting, I think the fact is that Congress was effectively absent for 4 or 5 years from the debate about the war on terror after the attacks of 9/11. Congress watched as Guantanamo unfolded and Congress did nothing to restrain an Administration committed to creating a new detention regime and new system of justice if you think that term can accurately be used to describe Guantanamo.

Congress finally awoke and exercised some oversight responsibility in 2005 and 2006, but that oversight responsibility largely rubber stamped everything that the Administration did. With the destruction of these tapes it is clear that Congress no longer can afford to be a rubber stamp. Congress must be a coequal, co-responsible branch of government, exercising the oversight function the framers of the Constitution so clearly intended.

Congress can exercise this oversight role without interfering with or infringing upon the Department of Justice. The Intelligence Committees have the ability to consider classified information in very secure situations. This Committee can hold closed hearings as well as open hearings and therefore adjust the hearings to deal with the sensitivity of the information before it.

As the Chairman noted back in the 1980's, I served as Associate Independent Counsel on Iran-Contra. I also then represented the Department of Justice in dealing with classified information in that case. It was important that Congress get to the bottom of Iran-Contra and it is important that Congress get to the bottom of the destruction of these tapes. There is no reason to believe the congressional investigation would jeopardize any future criminal prosecutions.

What we learned is Congress has got to be careful about immunizing testimony, particularly public testimony. That is a lesson of Iran-Contra. But we also learned that Congress can proceed full bore if it proceeds carefully with its own investigation and criminal prosecutions can still ensue.

There are a number of questions that Congress needs to ask, a number of answers that Congress needs to provide. The most important thing, I believe, is that Congress needs to exert itself to demonstrate that it can fulfill and is committed to fulfilling its constitutional role of oversight over all branches of the executive.

Thank you.

[The prepared statement of Mr. Saltzburg follows:]

PREPARED STATEMENT OF STEPHEN A. SALTZBURG

Chairman Conyers, Ranking Member Smith, Members of the Committee, it is always an honor and a privilege to appear before you. Today, it is also an opportunity, an opportunity to discuss with you the importance of Congress investigating without delay the destruction of interrogation tapes by the Central Intelligence Agency (C.I.A.).

We know very little about the tapes that were admittedly destroyed in 2005, and even less about the decision-making process that led to their destruction. News reports indicate that lawyers in the White House and possibly in other parts of the Administration advised the C.I.A. not to destroy the tapes, and that despite this ad-

vice lawyers within the C.I.A. signed off on the legality of the destruction before it was approved by a high agency official.

The only justification offered thus far for destroying the tapes—i.e., to protect the identity of interrogators—is completely unpersuasive. Indeed, the explanation is almost as embarrassing as the destruction. Consider these facts:

1. The tapes could have been modified to make the faces and voices of the interrogators unrecognizable.
2. One copy of the tapes could have been maintained in a secure place with limited access.
3. The C.I.A. must keep a record of who interrogated whom for various reasons, so that even with the tapes destroyed there is a record of who the interrogators were.
4. The interrogators and others within the C.I.A. know who conducted the interrogations, and as long as they are alive there is the possibility that the identity of an interrogator will be revealed.

In sum, the explanation offered for the destruction of the tapes does not pass the straight-face test. It is flawed in two fundamental ways. First, the destruction was unnecessary to prevent the tapes from revealing the identities of interrogators. Second, the destruction does not prevent the disclosure of identities.

When an agency's explanation for its actions is plainly frivolous, one must consider what the real explanation for that action must be and why the agency is desperate to conceal this explanation. In my judgment, the only plausible explanation for the destruction of the tapes is that they were destroyed to assure that they would never be viewed by any judicial tribunal, not even a military commission, or by a congressional oversight committee.

Over the last several years, Congress has debated whether certain forms of interrogation constitute torture. But, the debate has been at a certain level of abstraction. Both this House and the Senate in various hearings have asked witnesses whether techniques like waterboarding constitute torture, but the testimony has assumed that members of Congress and witnesses share a common understanding of how techniques were and are actually employed. Videotapes of interrogations—particularly interrogations of "high value" detainees—would provide concrete details and permit members of Congress to see how techniques are employed against actual human beings.

It is probable that during military commission trials and perhaps future proceedings in federal civilian courts, issues will arise as to whether confessions were coerced and whether they are reliable enough to be used as evidence. It will not be surprising if conflicting testimony arises as to what interrogators did, how long they did it, the frequency of their actions, and the physical and mental hardships inflicted upon detainees. A videotape of an interrogation of one detainee might provide circumstantial evidence as to how other detainees were interrogated, especially if they were interrogated by the same individuals or individuals trained by the same agency.

Destruction of the videotapes assured that what might have been incontrovertible evidence of what occurred during interrogation sessions will never be available to any court, congressional committee, or government investigator. It is the ultimate cover-up. With the tapes destroyed, anyone seeking to determine with precision what occurred during an interrogation will be forced to depend on testimony from witnesses who have different perspectives and biases and whose recollections are virtually guaranteed to differ.

Now that the tapes have been destroyed, the Attorney General has asked Congress not to investigate their destruction for some period of time and to defer to the Department of Justice's own investigation. I applaud the Department's immediate reaction to learning that the tapes were destroyed and its initiation of an investigation. But, I believe it would not only be a mistake for Congress to do nothing at this point; it would be an abdication of responsibility.

The Administration persuaded Congress to address the treatment of detainees and interrogation methods in two major pieces of litigation: the Detainee Treatment Act of 2005, and the Military Commission Act of 2006. This legislation restricted the interrogation methods that may be employed by the Department of Defense and its components, but did not restrict the methods used by the C.I.A. Moreover, Congress has provided that statements obtained from detainees through coercive methods may be admitted in military commission trials. Congress therefore has both declined to impose upon the C.I.A. the same interrogation restrictions it imposed upon DOD, and Congress has adopted evidence rules for military commission proceedings based upon its understanding of the types of interrogation actually conducted by United States officers.

The destruction of the videotapes surely requires Congress to ask itself what it might have learned had its intelligence committees been aware of the tapes and been permitted to review them. For several years now, Congress has debated whether interrogation techniques constitute torture, how torture should be defined, and how it should be punished. Congress enacted legislation based upon assumptions. The videotapes might well have informed the debate by replacing assumptions with undisputed facts. So, Congress has an obligation to ask what it might have learned from those tapes, and there is no time to waste and no reason to wait to decide whether the legislation previously passed needs reconsideration.

The Department of Justice investigation will focus on whether laws were broken when the tapes were destroyed, and perhaps that inquiry will lead to an inquiry into whether the tapes reveal criminal acts (which might well not be prosecuted as a result of the Military Commission Act of 2006). The inquiry by Congress ought to focus on other, equally important issues. These include, but are not limited to, the following:

Who was alerted to the fact that the C.I.A. was considering destroying the tapes? When were they alerted? And what advice, if any, did the knowledgeable individuals give to the C.I.A.? The reason for asking these questions is to determine how decisions were made, which agencies were involved, and the quality of advice, both legal and practical, that was provided. I note that the New York Times reported last week that the Department of Justice has refused to indicate to Congress what role it might have played in the destruction of the tapes. This refusal is all the more reason for Congress to investigate and to investigate now. It is important for Congress to know which agencies were consulted before the tapes were destroyed and the nature and quality of any counsel provided by these agencies.

What specific reasons were advanced for their destruction at the time the tapes were destroyed? Are those reasons set forth in writing, and if so, by whom? Were those reasons vetted inside and outside the agency, and if so, what were the responses? Since it is inconceivable that anyone could truly believe that the destruction was either necessary or sufficient to protect identities, the question that naturally arises is whether the explanation given in 2007 squares with the reasons set forth in 2005. If it should turn out that a deliberate decision was made to deny courts and Congress "evidence," Congress might well decide that new legislation on record preservation is required.

Why was the destruction kept secret for as long as it was? A delay between an action and review of that action means that memories will fade, and reconstruction of events will be more difficult. It will be hard enough for Congress to obtain accurate, complete answers concerning events that are now more then two years old, but it becomes more difficult with the passage of time.

Should the restrictions on interrogation imposed on the Department of Defense be extended to the C.I.A.? This question has been debated over several years, but the destruction of the tapes is a reason to revisit it. I do not mean to suggest that the answer will suddenly be agreed upon by all. But, destruction of the tapes may suggest that there are reasons why the C.I.A. did not want them to be seen by a Congress that has considered imposing interrogation limits.

Should there be prohibitions on destruction of videotaped interrogation sessions and possibly other evidence gathered in the "war on terror?" Perhaps the answer is no, but the question is important and requires some careful thought—now, not tomorrow, and not next year. It is possible, despite the adverse public reaction to the disclosure of the destruction of the tapes, that C.I.A., the Department of Defense or some other federal agency will destroy additional material in months to come. Congress needs to know sooner rather than later the advice that was given to the C.I.A., the true rationale for its action, and whether destruction of additional evidence is planned or possible. Only with knowledge can Congress decide whether legislation is needed to protect and preserve evidence.

Congress was effectively absent after the attacks of 9/11 for years while it gave almost complete deference to the Executive to detain and interrogate those deemed "suspected terrorists." Congress watched as Guantanamo unfolded and did nothing to restrain an Administration committed to creating a new detention regime and system of justice if that term may be used to describe Guantanamo.

Congress finally awoke and enacted two major statutes in 2005 and 2006. These statutes ratified rather than restricted much of what the Administration had put in place. Congress therefore shares responsibility for the types of interrogation that United States officers may utilize and for the evidentiary use that may be made of the results. That responsibility should require Congress to find out what was lost when the videotapes were destroyed and to consider whether changes in United States law should be made with respect to interrogation and use of evidence in military commission proceedings. Congress also should consider whether, in its over-

sight of the Executive it is necessary to prevent destruction of evidence that might inform the oversight function. Congress might even consider whether new laws are needed to assure that Executive agencies do not inhibit congressional inquiry or reduce the reliability of judicial proceedings.

Congress can exercise its oversight role without interfering with or damaging the investigation by the Department of Justice. Congress can utilize its intelligence committees to consider certain sensitive information in secure settings. It can hold closed hearings on matters that are less sensitive but cannot be publicly disclosed without risk of compromising important governmental interests. And Congress can hold public hearings on broad questions such as whether governmental agencies should be required to maintain certain types of evidence for specified periods of time and whether notice to Congress should be provided before certain types of evidence are destroyed.

Back in the 1980's, I served as Associate Independent Counsel in the Iran-Contra investigation. Later, I served as Deputy Assistant Attorney General in the Criminal Division of the Department of Justice and was responsible for handling classified information on behalf of the United States as Independent Counsel Lawrence Walsh prosecuted Lt. Col. Oliver North, Admiral John Poindexter and others. Judge Walsh asked Congress to delay its inquiry into Iran-Contra while he investigated, and Congress acceded to his request by postponing for several months its public inquiry. We learned that Congress can damage the ability of a prosecutor to prosecute a case successfully if Congress grants immunity to witnesses and forces their testimony in public. But we also learned that Congress has a role to play in boosting public confidence that the rule of law is alive and well in America through its investigative function.

There is no reason to believe that an investigation into the destruction of the tapes would require Congress to immunize witnesses or to conduct all of its proceedings in open session. As I have indicated, there exist a range of options for Congress to protect classified and sensitive information while satisfying itself that it is meeting its responsibilities as a co-equal branch of government. Assistant Attorney General Kenneth L. Wainstein and John L. Helgerson, the C.I.A.'s inspector general, have written to Congress and have claimed that "[o]ur ability to obtain the most reliable and complete information would likely be jeopardized if the C.I.A. undertakes the steps necessary to respond to your requests in a comprehensive fashion at this time." There is reason for concern here. It would be an unnecessary drain on resources and distraction for the C.I.A. to respond to overlapping inquiries by this Committee, the House Intelligence Committee and other committees of the House and Senate. This is a time for the House and the Senate to exercise leadership and allocate the oversight responsibility so that the C.I.A. is not required to repeatedly answer the same questions. It is possible to have oversight that is tailored, efficient and respectful of national security concerns. It is that oversight that I encourage Congress to undertake.

Earlier this year, in an article which I attach entitled *A Different War: Ten Key Questions About the War on Terror*, I wrote the following about the Detainee Treatment Act and the Military Commission Act: "As a result, it may well be that the judiciary will find that its ability to serve as a check on executive power is weakened, and that Congress has given the President the virtual blank check to act that he previously did not have. If this is so, the above questions, which contend are vital, lead me, and may well lead many others, to wonder whether our cherished system of checks and balances now provides inadequate checks and too little balance. . . ." Congress needs to exert itself to demonstrate that it is an adequate check on executive excess and arrogance.

Mr. CONYERS. Thank you so much.

Might I inquire if Steve Cohen, the gentleman from Tennessee, had a comment that he'd like to make at this time?

Mr. COHEN. Thank you, Mr. Chairman. The only thing I would like to say is how proud I am to serve in this Congress and on this Committee with you as Chair. It is the end of my first year in Congress and the first year on this Committee, which I chose as my Committee because of issues such as this. I think our Constitution and our laws are so important, and being on this Committee and you having this hearing is the reason why I am so proud to be a Member of this Congress. And I thank you for not allowing me to be the Rodney Dangerfield of the Committee. I thank you.

Mr. CONYERS. You are more than welcome. As a matter of fact, I should give you more time.

But at any rate, moving to Professor John Radsan, we thank you, Professor Saltzburg, for your opening comments.

Professor John Radsan, Associate Professor of Law at William Mitchell College of Law. A leading authority on national security issues with a unique combination of professional experience in both law enforcement and intelligence activities. He served as a Federal prosecutor at the Justice Department and later as Assistant General Counsel to the CIA from 2002 to 2004. We are very pleased you could join us today, and we yield the floor to you at this time.

TESTIMONY OF PROFESSOR JOHN RADSAN, WILLIAM MITCHELL COLLEGE OF LAW

Mr. RADSAN. Thank you very much, Mr. Chairman. Thank you, Members of Congress. I apologize that I was not able to share with you my prepared remarks, long remarks. I am even amazed that I was able to get the one-page outline cleared by the Publication Review Board at the CIA. So I will even summarize my outline here.

I am also sorry, Mr. Chairman, that the Committee was not able to have a representative from the Department of Justice at this hearing, as you noted. I think it is clear that as a former prosecutor, I am not speaking for the Department, I am not speaking for the agency. I think it is also clear that my stock does not rise with my colleagues from the Justice Department or the CIA by being here, but I welcome your invitation to speak to these very important issues.

It is much easier for us as former officials to talk about the CIA detention and interrogation program since September 6th, 2006. That is an important date because for the first time the President acknowledged what the American public knew what Members of Congress knew, that we had a secret detention and interrogation program. That became clear then the debate was going to be on the details of the program, the type of oversight that we would have.

What I would like to do with my few minutes is to make some general observations about this program and then to go very specifically to your question about the destruction of the CIA tapes. I am fortunate that I was out of the agency during much of this relevant period, so I can comment in a way that Professor Saltzburg has as an informed observer of these events, and I share these observations with you all.

I agree with the Committee's work that it will serve the American people to have more transparency, more openness on what kind of interrogation techniques the CIA is using, the Department of Defense is using and our law enforcement people are using. The Administration to counter says that if we are too explicit the terrorists, the bad guys, will train in counter interrogation, they will prepare themselves for whatever is in store. I am not saying that this is a frivolous argument but I believe strongly on balance that it makes more sense for the American public and for support overseas to be a bit more transparent, and more transparent than we are today after the Military Commissions Act, after the President's Executive order part of which is classified.

Congress can be explicit if it doesn't like a technique such as waterboarding, it can ban it. If it doesn't like seep depravation, it can ban it. And I commend any work in that direction to be more open about what is on the table and what is off the table.

I would also like us to be sympathetic though to the CIA, and we speak broadly about an agency, that this department learned the lessons of the Church Committee hearings, it learned the lessons of Iran-Contra. And there are two broad lessons, one to do anything that is aggressive or controversial there must be presidential authorization. And two, even if you have authorization it is not sufficient because the President cannot authorize us to break the law.

What many of my colleagues believe is that they accomplish both those tasks. According to the press, we had a comprehensive finding by the President soon after 9/11 for very aggressive actions against al-Qaeda and other terrorists so that there was a presidential finding. Similarly we have reportings that there was a lot of lawyering from the Justice Department to the CIA on the specific techniques or a specific aspect of the program. You and I may disagree on the quality of that analysis, but if you are looking at it from the perspective of a CIA officer, who is not a lawyer, that person may shrug and say, what else could we have done? We had a presidential finding, we also had advice from the lawyers, we are trying to comply with the law. I agree with you that the destruction of the tapes is different and much more alarming for the reasons that you identified.

It has become fashionable now for Democrats and Republicans to talk about a national security court, a FISA type court, to sort out these interrogation issues, what is allowed, what is not, to have oversight from an additional branch of government. I support those ideas. I also plug people from the Midwest that we had come up with some of these ideas even before it was fashionable for professors at Georgetown or Harvard. And if you look at a 2006 National Law Journal article written by yours truly, you will see that someone was thinking about this as a way to balance these legitimate interests of oversight and allowing the CIA to do what is necessary to protect us.

What is the context in 2005? And I close my remarks on why this was important that the tapes were destroyed then, and I agree with Professor Saltzburg that we know that the tapes were destroyed. The question is why and why then? I don't agree with Professor Saltzburg when he implies that the CIA is a monolith, it has one brain or one soul. So far from what we can tell it was a decision by the head of the clandestine service, Jose Rodriguez, to destroy the tapes in November '05. What was going on in November of '05. This was after Abu Ghraib and the revelations that occurred in the spring of '04. That was a Department of Defense program, abuses related to their program, but it had an effect on the CIA's program.

In this period we have had legal guidance from the Justice Department, the so-called torture memo of August 2002 that had been withdrawn. The Justice Department was starting to withdraw or back away from some of the more aggressive guidance that had been given the CIA. It is also very important that another part of

check on the CIA is the media, and this is right around the time that Dana Priest in *The Washington Post* broke her story about secret prisons in Eastern Europe. She knew the countries, but in the back and forth with the CIA, *The Washington Post* chose not to identify the countries. The media reported that some of these interrogations that were on the tapes might have been in those secret facilities, so this would have been of concern to people running that very secret program.

We also know at that time, as I am sure all the Members of Congress recall, that Senator McCain was gaining support for the McCain amendment that was going to restrict permissible interrogation. The McCain amendment was passed in December of 2005, but it was cleared in November that the political lines were changing and that what would have been permissible early in our counterterrorism policies was no longer likely——

Mr. CONYERS. You can finish your thought, please.

Mr. RADSAN. From one other, and I will credit your staff members on this, another development you mentioned the Hamdan decision, that did have an effect on the CIA when Common Article 3 started to affect CIA policies. This is before the Military Commissions Act. If we go back to that period we will see that the *Hamdan v. Rumsfeld* case had been granted cert by the Supreme Court and that would have been another concern by Jose Rodriguez and others at the CIA.

Thank you very much, Mr. Chair.

Mr. CONYERS. Thank you very much, Professor Radsan. We appreciate your views. And our next witness is Attorney David Rivkin, partner at Baker & Hostetler, Visiting Fellow at the Nixon Center, Contributing Editor at the National Review. Mr. Rivkin has extensive experience in a wide range of international and domestic policy issues. He served in a variety of legal and policy positions in at least two Administrations in the White House Counsel's Office, the Office of the Vice President and the Departments of Justice and Energy. He has also had an earlier career as a defense and foreign policy analyst focusing on Soviet affairs, arms control, naval strategy and NATO-related issues.

We are delighted, sir, you can join us, and your statement will appear fully in the record as we proceed. Welcome.

TESTIMONY OF DAVID B. RIVKIN, ESQUIRE, BAKER & HOSTETLER

Mr. RIVKIN. Thank you very much. Thank you very much, Chairman Conyers and other distinguished Members of the Committee, for asking me to testify about this important set of issues, I am delighted to be here. Whatever circumstances surrounding the destruction of interrogation videotapes—and let me just say that there are certain explanations that are far less sinister than some have proffered and I agree in that respect with some of the points made by Professor Radsan—it is the law that governs interrogations that should be our foremost concern and it is in this area that I will make some remarks this morning.

There is frequently a misperception that this law bans and absolutely prohibits all coercive stressful interrogation techniques. That is not the case.

As you all know, the most direct set of statutory provisions governing interrogations is contained in the so-called McCain amendment, and the first provision of the McCain amendment specifies that no person in the custody or effective control of the Department of Defense or detained at DOD facilities shall be subjected to an interrogation treatment or technique that is not authorized by the United States Army Field Manual, and let me add that this is a 2005 version of that manual and waterboarding is not authorized by that manual.

Crucially, however, the McCain amendment does not limit other U.S. Government agencies with responsibility for interrogations, particularly the Central Intelligence Agency, with techniques listed in the manual. As to these other agencies, the McCain amendment simply provides that no person in the custody or control of the United States Government, regardless of their nationality or physical origin, will be subjected to "cruel, inhuman or degrading treatment of punishment." And in deciding whether the treatment falls below the standard the McCain amendment defines as cruel and unusual, inhuman treatment a punishment to mean those acts prohibited a by 5th, 8th and 14th amendments of the Constitution. It is worth noting here—I am sure it does not come as any surprise to you—that the duality, the distinction between two sets of procedures governing the military and CIA interrogations that was adopted by Congress with after some back and forth supported by the White House came after extensive and informed debate and reflected in my view a joint belief by the two political branches that the two agencies, DOD and CIA, interrogated different sets of combatants with vastly different policy equities in place.

I would say briefly that point was made by Ranking Member Smith that as far as the relevant constitutional standards in forming their definition of the term "cruel, inhuman and degrading" are concerned, the Supreme Court and lower courts have long recognized that these constitutional standards are inherently contextual. There is a case law, a number of cases like *Sacramento v. Lewis.*

By the way, I should admit that none of those cases deal with interrogations. Those cases deal with far more mundane matters like high speed chases, denial of a right to counsel in *Betts v. Brady*; ex parte aspects of child custody proceedings in *Miller v. The City of Philadelphia.* But all of them present not an absolutely contextual, all facts and circumstances type analysis of what is it that the 5th, 8th and 14th amendments of the Constitution provides and what shocks our conscience and what not.

To me it is really a matter of common sense and is not particularly surprising.

Let me briefly make a couple of other points. I happen to think that while the legal parameters that govern our interrogations are not infinitely elastic, in fact are quite restrictive, they are not as inflexible as some would have you believe.

The real questions are policy questions. Put differently, our legal box in my opinion is wider from the policy box. There may well be reasons to set interrogation standards tighter than the law requires, and we should not be debating only about the law. That to me is a real set of issues for your consideration.

We need to ask ourselves a couple of questions. The first one is whether coercive interrogation techniques are actually useful. I heard many critics argue that while building rapport of captured enemy combatants invariably produces success, by contrast coercive efforts are inherently unreliable because they produce lies. I think it is overly simplistic. In fact, I would hope that our government takes nothing to al-Qaeda operatives or Taliban operatives or any other terrorist groups waging combat against the United States at face value, whether the fruit of milder or more coercive interrogation methods. Every bit of intelligence must be carefully vetted and cross-checked regardless of the interrogation method used.

Just as the context is important in deciding what shocks our conscience, what techniques work better is also inherently a contextual matter. There cannot be in my opinion any empirical data as to which are the best under all circumstances. In many cases, from what we hear, inducing detainees to speak at all is remarkably difficult. Coercive methods of some kind may be appropriate in such circumstances. Other detainees by contrast may speak freely, making coercive efforts less necessary. In my opinion, the best interrogation technique is whatever technique within the law produces the best results upon a specific detainee in a specific factual context.

My second point is that I find it extremely unfortunate that so much of our discussion is focused on waterboarding. This is just one coercive interrogation technique and a very harsh one and frankly the one that gives me and some people some pause. But there are many other coercive techniques that are much milder, still beyond the narrow scope Army Field Manual. And that scope I want to emphasize is very narrow. I will give you one example. One of the toughest techniques authorized by the manual is called Mutt and Jeff, which is essentially another word for good cop, bad cop routine, but it is enormously circumscribed here. This is from the 2005 manual, page 17. The bad cop, in that situation the bad interrogator, may go as far as "convey an unfeeling attitude" while being "careful not to threaten or coerce the source" in any way while the other individual adopts a more friendly tone. Let me suggest to you that for better or worse a far more aggressive version of a good cop and bad cop technique are practiced daily in the police stations in this country in the interrogation of suspected purse snatchers or bank robbers.

I realize that discussion of coercion as used is difficult, it jars our 21st century sensibilities, it is a very difficult task for any democracy. But I personally cannot conceive of any practical possibility but in the foreseeable future, especially given the threats we face, we live in a world in which we can abandon the use of coercion in a public sphere across the board, over employing training routines of our military forces, interrogation of criminal suspects or engagement from unlawful enemy combatants.

Let me be very emphatic, I am even less capable of envisioning of a moral practical reasons for adopting a legal regime that would advantage interrogationwise unlawful enemy combatants as compared with ordinary criminal suspects. Yet adopting across the board, as you heard a number of people suggest, including previous witnesses, the Army Field Manual procedures across the board to

CIA interrogations to precisely accomplish this outcome would be interrogating detainees, high valued detainees less sternly—it has nothing to do with waterboarding—than bank robbers or purse snatchers. I think with all due respect it makes no sense.

I thank you for your patience and look for to your questions.

[The prepared statement of Mr. Rivkin follows:]

PREPARED STATEMENT OF DAVID B. RIVKIN, JR.

I want to thank Chairman Conyers, Ranking Member Smith, and the other Members of the Committee for inviting me to testify at this important hearing.

Whatever the circumstances regarding the destruction of the interrogation videotapes, the law governing interrogations must be our foremost concern. It is on this law that I will focus my remarks this morning. It is frequently misunderstood to mean that all coercive or stressful interrogation techniques are unlawful. This is not the case.

The most direct set of statutory proscriptions, governing interrogations, is contained in the so-called McCain Amendment. The first provision of the McCain Amendment specifies that no person in the custody or effective control of the Department of Defense ("DOD") or detained in a DOD facility shall be subjected to any interrogation treatment or technique that is not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation. P.L. 109–148, Title X, § 1002 (2005); P.L. 109–163, Title XIV, § 1402 (2006). I note that "waterboarding" is not authorized by the Manual.

Crucially, however, the McCain Amendment does not limit other U.S. government entities with responsibility for interrogations, such as the Central Intelligence Agency ("CIA"), to the techniques listed in the Field Manual.

As to these, the McCain Amendment simply provides that no person in the custody or control of the United States government, regardless of their nationality or physical location, shall be subjected to "cruel, inhuman or degrading treatment or punishment." 42 U.S.C. § 2200dd. In deciding whether treatment falls below this standard, the McCain Amendment defines "cruel, unusual, and inhuman treatment or punishment" to mean those acts prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution. It is worth noting that this distinction between the procedures governing military and CIA interrogations was adopted by Congress, with the White House's support, after an extensive and informed debate, which reflected a joint belief by the two political branches that the two agencies interrogated different types of enemy combatants, with vastly different policy equities in place.

As far as the relevant constitutional standards informing the definition of the term "cruel, unusual and inhuman treatment or punishment" are concerned, the Supreme Court and lower courts have long recognized that these constitutional standards are inherently contextual. I point the Committee to the case of *Sacramento v. Lewis,* 523 U.S. 833, 850–51 (1998). As Justice Souter noted, "[r]ules of due process are not subject to mechanical application in unfamiliar territory. . . . [P]reserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience-shocking."

Similarly, in *Betts v. Brady,* 316 U.S. 455, 462 (1942), the Court explained that "due process of law" denotes a right "more fluid" than others guaranteed by more specific provisions of the Bill of Rights. Claims of a denial of due process are, the Court explained, "to be tested by an appraisal of the totality of facts in a given case."

More recently, in *Miller v. City of Philadelphia,* 174 F.3d 368, 375 (3d Cir. 1999), the Third Circuit explained that "the exact degree of wrongfulness necessary to reach the 'conscience-shocking' level depends upon the circumstances of a particular case."

Simply put, that which is cruel, inhuman and degrading in one set of circumstances will not necessarily be so in another. This is common sense. The "ticking bomb" example may be overused, but it is directly on point here. The law recognizes that, whether an interrogation technique "shocks the conscience" depends, in the final analysis, on the kind of information that interrogators are trying to elicit and the circumstances in which they are doing so. The McCain Amendment is, of course, binding law. At the same time, its language should—and must—be interpreted in a manner informed by the wisdom of these judicial pronouncements.

I would like to make two further points.

First, given that the legal parameters within which the United States government conducts interrogations of terrorist detainees are relatively flexible, the real question for the Committee is one of policy. In this regard, we must first ask ourselves

whether coercive interrogation methods are actually useful. Some critics argue that, while building rapport with captured unlawful enemy combatants invariably produces success, by contrast, coercive methods are inherently unreliable, that they produce lies. This is overly simplistic. I hope our government takes nothing that al-Qaida operatives say at face value, whether the fruit of milder or more coercive interrogation methods. Every bit of the intelligence "take" must be carefully vetted and cross-checked, regardless of the interrogation method used.

Which techniques work better is a contextual matter, and there is not—indeed, there cannot be—any empirical data as to which are the "best" under all circumstances. In many cases, inducing detainees to speak at all is remarkably difficult. Coercive methods may be appropriate in such situations. Other detainees may speak freely, making coercive methods less necessary. The "best" interrogation technique is whichever technique, within the law, produces the best results upon a specific detainee in a specific factual context.

Second, I find it unfortunate that so much of our discussion has focused on "waterboarding." This is just one coercive interrogation technique. There are many other "coercive techniques" that are much milder, but still beyond the narrow scope of the Army Field Manual. And that scope is very narrow, indeed. In fact, the toughest technique authorized by the Manual is called the "Mutt and Jeff." This is a good cop/bad cop routine in which one interrogator may go so far as to "convey an unfeeling attitude" while being "careful not to threaten or coerce the source," while the other adopts a more friendly tone.[1] Let us remember that, for better or worse, more aggressive treatment is daily meted out in police interrogations of criminal suspects.

I realize that discussion of coercion and its use jar our 21st Century sensibilities and it is an inherently difficult task for any idealistic democracy. However, I cannot conceive of any practical possibility that, in the foreseeable future, we would live in a world in which we can abandon the use of coercion in the public sphere across the board, whether employed in the training routines of our military forces, interrogation of criminal suspects, or engagement with captured unlawful enemy combatants. Frankly, I am even less capable of envisioning either moral or practical reasons for adopting a legal regime, which would advantage, interrogation-wise, unlawful enemy combatants as compared, for example, with ordinary criminal suspects. Yet, adopting the Army Field Manual procedures across the board would accomplish precisely this outcome.

I thank the Committee for its patience and look forward to the members' questions.

Mr. CONYERS. Thank you, David Rivkin. Your testimony raises a number of questions that compare what we do in the private sector and what we do among governments.

We now turn to the Washington Director of Human Rights First, Elisa Massimino, an expert on a range of international human rights issues, a national authority on U.S. compliance with human rights laws. Attorney Massimino has taught international human rights law at the University of Virginia and teaches human rights advocacy at Georgetown University. As a litigation associate at Hogan-Hartson, she was pro bono counsel in a number of human rights cases and joined Human Rights First as a staff attorney in 1991 and has directed its Washington office since 1997.

Human Rights First and Physicians For Human Rights recently released a report entitled "Leave No Marks, Enhanced Interrogation Techniques and the Risk of Criminality." It provides the first comprehensive analysis of ten techniques widely reported to have been authorized for use in the CIA's secret interrogation program, including sleep depravation, simulated drowning, stress positions, beating and induced hypothermia. We are delighted you could join us and we welcome you at this time.

[1] Headquarters, Department of the Army, Field Manual 2–223 (FM 34–52), Human Intelligence Collector Operations ch. 8, 17 (2005).

TESTIMONY OF ELISA MASSIMINO, WASHINGTON DIRECTOR, HUMAN RIGHTS FIRST

Ms. MASSIMINO. Thank you, Mr. Chairman. And I have a longer statement as well prepared for the record, which I will try to summarize as quickly as I can. I want to thank you for your leadership and for the work of the Committee and its excellent staff in persistently staying on top of these important issues. As a human rights advocate based in the United States, it is very important for my own ability to do my work in pressing other governments to respect human rights, that my government do its best to play a leadership role in promoting those standards. We have heard a lot this week from Attorney General Mukasey and others about the need to modernize outdated surveillance laws to reflect 21st century technologies. But there is one area of our counterterrorism policy that is quite literally stuck in the dark ages, and that is our interrogation policy.

When I left private practice to help open the Washington office of Human Rights First more than 16 years ago, I never imagined that in 2007, I would find myself in the middle of a debate with my own government about whether waterboarding, the 21st Century euphemism for a form of torture that dates back to the time of witch-hunts and the Inquisition is illegal. But that is where we are today.

On December 6 the CIA director, General Michael Hayden, acknowledged that the Agency destroyed videotapes of two senior al-Qaeda members being subjected to interrogation techniques that reportedly included waterboarding, stress positions, exposure to extreme cold and other interrogation methods that leave no marks. The tapes were destroyed in November 2005, 3 years after the interrogations took place. At around that same time, Congress was scrutinizing the secret CIA detention program and Vice President Cheney was engaged in an aggressive lobbying campaign to carve out an exception for the CIA from the McCain amendment's prohibition on cruel, inhuman and degrading treatment.

The *New York Times* reported yesterday that high level White House and CIA lawyers were involved in the discussion that led to the tapes' destruction. The CIA's decision to destroy the interrogation tapes indicates that at least some in the Administration understood what we know: that the acts depicted on those tapes were unlawful and would shock the conscience of any decent American who saw them.

The Administration now appears willing to acknowledge the legitimate role of Congress in investigating these matters. And we welcome its decision late yesterday to permit CIA Acting General Counsel John Rizzo to testify about the decision to destroy the tapes. He and others have much to answer for, not only with respect to the destruction of the tapes, but also about who authorized the acts depicted on those tapes.

Throughout the torture scandal, beginning with the revelations of abuses at Abu Ghraib, accountability for these policies has come only at the lowest level. I hope as Congress begins this investigation, it will break the pattern that it has held so far; punish the monkey and let the organ grinder go. I hope my testimony today, which derives heavily from the report that you mentioned, Mr.

Chairman, will help shed some light on the legal standards governing interrogation which the Administration has sought for so long to distort, obscure and evade.

You have asked me to address the applicability of Federal criminal law to the interrogation of detainees. 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 part of that 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 prisons.

During his confirmation hearing, Attorney General Mukasey was asked whether he felt waterboarding, which creates in its victims the terrifying fear of imminent death by drowning, is illegal. He equivocated claiming that the answer would depend on a complex statutory analysis that he could not undertake without access to classified information. But a group of retired generals and admirals who served as the top uniformed lawyers in the Army, Navy and Marine Corps had a more straightforward answer to that question.

As they said in a letter to the Senate Judiciary Committee, "The law has long been clear: waterboarding detainees amounts to illegal torture in all circumstances. To suggest otherwise or even to give credence to such a suggestion represents both an affront to the law and to the core values of our Nation."

Judge Mukasey seems have to missed the most fundamental point about U.S. interrogation policy after the Hamdan decision, a point that he should bear foremost in mind during his deliberations about the legality of waterboarding and other enhanced techniques that he is reportedly undertaking now. 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 Convention 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 executive order that the President issued in July, it means the United States 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. Some, including Admiral McConnell, Director of National Intelligence, have implied that the United States wants detainees to believe that they will be tortured by 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 does not. Ambiguity about U.S. interrogation practices has not benefited U.S. security. Quite the opposite. 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. And for what? In the case of Abu Zubaida, tapes of whose interrogation were among those destroyed by the CIA, the FBI claims that the use of enhanced tech-

niques rather than producing reliable intelligence, interrupted and corrupted the flow of intelligence they were getting from Zubaida. That assertion comports with mainstream military opinion.

For example, in releasing the new U.S. Army Field Manual on interrogations last year, 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 5 years, hard years, tells us that." Likewise, General David Petraeus, commander of U.S. forces in Iraq, wrote earlier this year 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 are also frequently neither useful nor necessary."

Moreover, military officers have said that 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 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.

Mr. CONYERS. Thank you.

[The prepared statement of Ms. Massimino follows:]

PREPARED STATEMENT OF ELISA MASSIMINO

TESTIMONY OF
ELISA MASSIMINO

WASHINGTON DIRECTOR
HUMAN RIGHTS FIRST

HEARING ON

THE APPLICABILITY OF FEDERAL CRIMINAL LAW TO THE INTERROGATION OF DETAINEES

BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY

DECEMBER 20, 2007

Introduction

Chairman Conyers, Ranking Member Smith and Members of the Committee, thank you for inviting me to be here today to share the views of Human Rights First on the laws governing interrogation of prisoners. We are grateful for the Committee's persistent attention to these important issues, and we look forward to continuing to work with Committee members to ensure that U.S. interrogation policy is effective, humane and consistent with our laws and values, and that those who violate the laws prohibiting torture and other cruel and inhuman treatment by authorizing or engaging in the abuse of prisoners are held accountable for their actions.

We have heard quite a bit this week from Attorney General Mukasey and others about the need to modernize outdated surveillance laws to reflect 21st century technologies. But there is one area of our counterterrorism policy that is quite literally stuck in the Dark Ages, and that is our policy on interrogation of prisoners. When I left private practice to help open the Washington office of Human Rights First more that 16 years ago, I never imagined that in 2007 I would find myself in the middle of a debate with my own government about whether "waterboarding" – the 21st century euphemism for a form of torture that dates back to the time of witch hunts and the Inquisition – is illegal. But that is where we are. I hope my testimony today can help shed some light on the legal standards governing interrogation which the administration has sought for so long to distort, obscure and evade.

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 all 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. My testimony today draws heavily from the analysis and conclusions of that report.

I. The Administration's Approach to Intelligence Interrogations and the Law

You have asked me to address the applicability of federal criminal law to the interrogation of detainees. 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 John Rizzo in testimony before the Senate Intelligence Committee just six months ago, 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 requiring 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.

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 was evasive, simply reiterating the claim that "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 criminal.[2]

During his confirmation hearing, Attorney General Mukasey was asked whether he thought waterboarding, which creates in its victims the terrifying fear of imminent death by drowning, was illegal. He equivocated, claiming that the answer would depend on a complex statutory analysis that he could not undertake without access to classified information. But a group of retired generals and admirals who served as the top uniformed lawyers in the Army, Navy and Marine Corps had a more straightforward answer. As they said in a letter to Senate Judiciary Committee members, "the *law* – has long been clear: Waterboarding detainees amounts to illegal torture *in all circumstances*.

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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).

To suggest otherwise – or even to give credence to such a suggestion – represents both an affront to the law and to the core values of our nation."

Judge Mukasey seems to have missed the most fundamental point about U.S. interrogation policy after *Hamdan*, a point that he should bear foremost in mind during his deliberations about the legality of waterboarding and other "enhanced" techniques: 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 July 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.

Some, including Admiral McConnell in that same appearance on *Meet the Press*, have 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. Quite the opposite. 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 continue to assert that the "enhanced" interrogation methods are justified because they 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] As this Committee explored in a hearing held last month, 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. In the case of Abu Zubaida, tapes of whose interrogation were among those destroyed by the CIA, the FBI claims that the use of "enhanced" techniques, rather than producing reliable intelligence, interrupted and corrupted the flow of intelligence they were getting from Zubaida.

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

That assertion comports with mainstream military opinion. For example, in releasing the new U.S. Army Field Manual on interrogations last year, 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, wrote earlier this year 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, 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.

II. Laws Governing Interrogation of Prisoners

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

U.S. law on the treatment of prisoners proscribes a range of conduct, not all of which is criminalized under domestic law. While the focus of this hearing is on the applicability of federal *criminal* law to interrogations, it is important to note that U.S. law prohibits a range of conduct that may not rise to the level of felony torture or war crimes under domestic law. Such conduct is nonetheless prohibited. 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. Congress Intended to "Rein In" the CIA's Use of "Enhanced" Interrogation Techniques in the MCA's Amendment to the War Crimes Act.

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[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.

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."[6] 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…."[7]

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."[8] 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:[9]

- 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.

Congress made it clear that these techniques – at a minimum – are felonies under the MCA amendments to the War Crimes Act.[10] There are doubtless other acts that

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[6] "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.

[7] 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.

[8] 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.

[9] *Id.*

[10] 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.

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.

During debate on these provisions here 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.[11] 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.[12]

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 and to ensure that sleep deprivation, hypothermia and other forms of extreme deprivation were clearly understood to be grave breaches of Common Article 3 prohibited by the MCA.

The Military Commissions Act recognizes both "torture" and "cruel or inhuman treatment" as felonies. It draws a distinction between the two offenses in the following manner: "torture" is defined — as it is in the federal anti-torture statute — as an act 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,[13] exposure to extreme cold and heat[14] and waterboarding.[15]

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[11] 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…."

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

[13] 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).

[14] 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(c)); 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

For offenses 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 have concluded that the "enhanced" techniques can have "a devastating impact on a victim's physical and mental health."[16] 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 experience treating torture victims provide ample testimony that these techniques cause "prolonged" mental harm, as I describe below. 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.

C. Individuals who Authorize or Use the "Enhanced" Interrogation Techniques Face a Substantial Risk of Criminal Liability.

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 violate the law.

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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").

[15] 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.")

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

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:

> *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….[17]

[17] 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).

Medical literature and legal precedent overwhelming support the conclusion that these techniques are unlawful and are known to cause the severe or serious mental or physical pain that must be intended for such acts a felony under either the War Crimes Act or the anti-torture Act. Furthermore, we know that these techniques are almost always used in combination, amplifying the risk of physical and psychological harm described below.[18]

- **"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…."[19] U.S. federal courts of appeals have long held that assault during an interrogation violates the Fifth and Fourteenth Amendments regardless of whether the subject suffered physical injury.[20]

- **"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. It is known to cause blood clots, which can travel to the lungs as potentially fatal pulmonary embolisms, as well as peripheral nerve damage. Just as passengers on transcontinental flights are warned of the dangers of swelling and blood clots in 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.

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[18] Human Rights First and Physicians for Human Rights, *Leave No Marks: Enhanced Interrogation Techniques and the Risk of Criminality*, 7 (2007).

[19] 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…."

[20] Ware v. Reed, 709 F.2d 345, 351 (5th Cir. 1983) (recognizing that it is a constitutional violation to use any physical force against a person who is in the presence of the police for custodial interrogation and who poses no threat to their safety); Gray v. Spillman, 925 F.2d 90, 93 (Cir. 4th 1991) ("It has long been held that beating and threatening a person in the course of custodial interrogation violates the fifth and fourteenth amendments of the Constitution. [Citation omitted.] The suggestion that an interrogee's constitutional rights are transgressed only if he suffers physical injury demonstrates a fundamental misconception of the fifth and fourteenth amendments, indeed, if not our system of criminal justice.").

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."[21] 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."[22]

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 down until they collapsed from fatigue."[23]

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[21] United States v. Tetsuo Ando, Yokahama, May 8, 1947.
[22] United States v. Chikayoshi Sugota, Yokahama, April 4, 1949.
[23] Benjamin Hu, "Nightmares from the North," *Washington Times,* April 30, 2004.

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.[24]

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.[25]

- **Sleep deprivation**, often used in combination with standing as is reportedly the case in CIA interrogations, is a classic form of torture. It is one of the most efficient means of inflicting mental pain, and medical studies have established a relationship between sleep deprivation and psychiatric disorders such as major depression. 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."[26]

  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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[24] 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).
[25] *Id.*
[26] 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.

- **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.[27] Exposure to cold can cause, amnesia, cardiac arrest, organ failure, and long term mental slowing and diminished reflexes. The Fifth Circuit has specifically held that "turning the fan on inmates while naked and wet" constitutes cruel and unusual punishment.[28]

- **Waterboarding.** Medical complications from the asphyxiation caused by waterboarding include: acute or chronic respiratory problems; chronic pain in the back and head; panic attacks; depressive symptoms; and prolonged posttraumatic stress disorder. 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.[29] 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.[30] 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.

D. CIA "Enhanced" Techniques also Violate Federal Criminal Statutes Prosecutable under the SMTJ and MEJA

[27] See United States v. Matsukichi Muta, Yokahama, April 15-25, 1947.
[28] Gates v. Collier, 501 F.2d 1291, 1306 (5th Cir. 1974).
[29] Jay S. Bybee, Memorandum for Alberto Gonzales, August 1, 2002.
[30] 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.

While the War Crimes Act and the federal anti-torture statute target especially egregious interrogation abuses, U.S. personnel who engage in abusive interrogations may also be subject to prosecution under other U.S. criminal statutes if they fall under the Special Maritime and Territorial Jurisdiction (SMTJ) Act or the Military Extraterritorial Jurisdiction Act (MEJA).

The Special Maritime and Territorial Jurisdiction (SMTJ) Act, 18 U.S.C. § 7, is based on the concept that the jurisdiction of U.S. courts can be constitutionally expanded to fill a vacuum wherever "American citizens and property need protection, yet no other government effectively safeguards those interests."[31] In 2001, Congress through the USA PATRIOT Act expanded SMTJ jurisdiction to cover certain listed offenses committed against *or by* a U.S. national in (among other things) "buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of [U.S. diplomatic, consular, military or other] missions or entities, irrespective of ownership" in a foreign state. For purposes of detainee interrogations, among the approximately thirty listed SMTJ offenses the most relevant include murder, maiming and assault.

In 2006, former CIA contractor David Passaro was convicted of assault and sentenced to a prison term of just over eight years for beating and kicking a detainee to death during an interrogation in Afghanistan. Similarly, among the various reported CIA "enhanced" interrogation techniques, violent shaking, striking prisoners, waterboarding, and inducing hypothermia would each amount to serious criminal assault subject to prosecution under the SMTJ. And just as the remote U.S. Army forward operating base in Afghanistan where Passaro beat Abdul Wali to death qualified as "buildings … and land … used for purposes of" U.S. military or other missions, so also should a CIA "black site" abroad come under SMTJ coverage.

Just one year before September 11, Congress had enacted the Military Extraterritorial Jurisdiction Act (MEJA). 18 U.S.C. §§ 3261-67. MEJA permits prosecution in U.S. federal court of certain persons for acts considered criminal and punishable under federal law by imprisonment for more than a year had the conduct occurred within the United States. In its original form, MEJA applied only to (a) military personnel who committed a crime but had left military service (for example, because of discharge) before they could be court-martialed, and (b) civilians "employed by or accompanying the Armed Forces outside of the United States." The statute at first defined those "employed by the Armed Forces" as Department of Defense (DoD) civilian employees and contractors; persons "accompanying the Armed Forces" were defined at first as dependents residing with members of the Armed Forces or DoD employees or contractors.

After conducting hearings into the Abu Ghraib abuses – including by civilian contractor interrogators and interpreters for U.S. government agencies *other than* DoD – Congress in 2004 expanded the MEJA to include employees and contractors of *all* government agencies (including the CIA) – "to the extent such employment relates to supporting the mission of the Department of Defense." MEJA thus could be used to

[31] *United States v. Corey* 232 F.3d 1169 (9th Cir., 2000), at 1171.

prosecute acts of detainee abuse in interrogation amounting to (among other crimes) assault, murder, manslaughter, kidnapping, sexual abuse, and conspiracy. To date, however, this post-Abu Ghraib expansion of MEJA jurisdiction has remained completely unexercised by the Justice Department: not one CIA agent *or any other civilian* has yet been prosecuted under MEJA for detainee abuse.

III. Ensuring Compliance with Federal Laws Prohibiting Torture and Other Cruel Treatment

Congress must ensure that existing prohibitions against torture and other cruel treatment are enforced and that those who violate those laws are held accountable. It must also provide all U.S. interrogators – civilian and military – with the clear guidance they need to perform their critical duties in accordance with U.S. law and American values.

On December 6, 2007, CIA Director General Michael Hayden acknowledged that the agency destroyed videotapes of two senior al-Qaeda members being subjected to interrogation techniques that reportedly included waterboarding, stress positions, exposure to extreme cold and other interrogation methods that leave no marks. The tapes were destroyed in November 2005, three years after the interrogations took place. At around that same time, Congress was scrutinizing the secret CIA detention program and Vice President Cheney was engaged in an aggressive lobbying campaign to carve out an exception for the CIA from the McCain Amendment prohibition on cruel, inhuman and degrading treatment. The *New York Times* reported on Wednesday that high level White House and CIA lawyers were involved in the discussions that led to the tapes' destruction. The CIA's decision to destroy the interrogation tapes indicates that at least some in the administration understood what we know: that the acts depicted on those tapes were unlawful and that anyone who saw them would conclude that they shock the conscience.

It is unfortunate that Attorney General Mukasey has thus far refused to cooperate with the request of this committee and others to provide information about the destruction of video tapes of CIA interrogations. It is imperative that Congress continue to investigate all allegations of torture and cruel treatment and I applaud your efforts, Mr. Chairman, to obtain – by subpoena if necessary – any evidence of CIA prisoner abuse that has not yet been destroyed or of the destruction of any evidence of such wrongdoing. All evidence of criminal acts committed by U.S. personnel in the course of interrogations must be preserved for purposes of congressional oversight and potential future prosecution.

In addition to requiring accountability for unlawful acts already committed, future abuses must be prevented by ensuring that there is a clear and publicly articulated standard of conduct for the treatment of all prisoners by any U.S. personnel. The House took an important step toward that goal last week by including in the Intelligence Authorization Act a provision that would require the CIA and its contractors to abide by the interrogation rules contained in the Army field Manual. In a December 12 letter to

the Chairmen of the House and Senate Intelligence committees, thirty-four generals and admirals supported this provision stating:

> "The current situation, in which the military operates under one set of interrogation rules that are public and the CIA operates under a separate, secret set of rules, is unwise and impractical. In order to ensure adherence across the government to the requirements of the Geneva Conventions and to maintain the integrity of the humane treatment standards on which our own troops rely, we believe that all U.S. personnel – military and civilian – should be held to a single standard of humane treatment reflected in the Army Field Manual."

The United States must enforce all existing prohibitions against torture and other cruel treatment, and it must ensure that all U.S. policies on interrogation are consistent with these laws. Failure to enforce such prohibitions creates a dangerous situation for our troops, exposes officials to potential future criminal liability, and erodes U.S. moral authority in the world.

Conclusion

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 allies and our own military lawyers 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 Congress to determine whether that damage is permanent.

Thank you.

Mr. CONYERS. We are indebted to all of you for your excellent evaluations and analysis. I am struck, Attorney Rivkin, by the fact that you refer to this good cop, bad cop thing, which seems to be common practice. The Chairman of the Crime Committee, Bobby Scott, has listened to police violence and brutality down through the years, long before he became Chairman of this part of Judiciary Committee. And I was thinking, you suggested that maybe some of these restrictions on people held at Abu Ghraib and other places may be under more coercion or may have more rights or less harshly treated than what happens in police stations in the common course around here. And that is very interesting to me because we have been working on that in a number of ways, prosecutorial abuse and police violence, which, by the way, is up as I recall.

And so I hope we get a chance to go into that some more. Now, we have the question of whether a special prosecutor makes a good next step or whether we should create a FISA like court or whether we should try to engage in effective oversight. And Professor Saltzburg, do you have a feeling about what direction we might want to consider moving in when we come back for the last half of the 110th Congress.

Mr. SALTZBURG. I do. Maybe I ought to address that in just three specifics. I think Professor Radsan's suggestion, and he does deserve credit for talking early on about the idea of a new court, which basically might be an expansion of a FISA kind of court, I think it is certainly worth serious consideration. But it is a longer-term solution, I believe. Right now, we have facing you the question of what are we going to do about these tapes that were destroyed and what kind of an inquiry should take place. Ordinarily, I think the lessons of special prosecutors are not happy ones. And ordinarily I would say I have a strong presumption to let the Department of Justice investigate.

The problem here, however, is that the Department itself has refused to answer questions about whether it was asked about destruction or whether it advised on destruction. And if, in fact, there is a possibility that it was asked and it did advise, and if it in fact authorized in any way the destruction of the tapes, it seems inappropriate to have it investigate itself. And I think this is a big issue. Now, *The Washington Post* yesterday, 2 days ago actually, had a story which indicated that—and Congressman Scott was talking about this, I have the article right here—that indicated when Judge Mukasey was the judge in the Padilla case, or Padilla, he has now said it both ways, he approved a material witness warrant, and some of the information that was obtained and used in the warrant was obtained in the interrogation of Abu Zubaida.

Now, that means that Judge Mukasey himself has had a case which may, in fact, have been tainted in a way by that interrogation, or at least affected. "Tainted" may be the wrong word. That raises a question about whether he is the right person right now to be leading this investigation. One thing that the Committee is surely going to be aware of is that there is a movement in this country in major police departments, the District of Columbia being one, and the American Bar Association supports this, to require the videotaping of all interrogations. And the reason is so that we know exactly what happened. And if there is a challenge to the

lawfulness of what happened we have incontrovertible evidence. If a police department destroyed a videotape of an interrogation in the District of Columbia, you can bet a judge would be saying why, I want to know why, and I am not sure I am going let a confession in where there is now only testimony and no tape.

This Committee, I think, needs to exercise its oversight function to answer the questions that you raise, Mr. Chairman, and some of us have suggested, into why it was that those tapes actually were destroyed. Now, Professor Radsan may be right, there may be a whole lot of things that were going on. But most of those things end up being things which the CIA seems to have feared that if tapes ever saw the light of day that people would see things that they might find profoundly disturbing.

As I said earlier, I don't know exactly what the CIA is doing in the secret interrogation facilities. I don't know whether there is one form of waterboarding only or whether or not the CIA has perfected it and advanced it. I suspect that videotapes would have told us a lot. I just can't resist the one comment about what goes on in police stations and what goes on in secret interrogation facilities. Since 1966, when somebody is interrogated in custody, he or she is given the Miranda warnings. They are told they have a right to remain silent, they are told they have a right to a lawyer. There is no good cop, bad cop until those people decide they don't want a lawyer and they are willing to talk, and then we have certain rules on top of it. We don't give Miranda warnings, and I don't think we should, to people who are detained for intelligence interrogations. But to compare the two and say we are tougher on people who are arrested and charged with crime in the United States than we are on terrorists is ridiculous. It ignores what goes on daily in every police station in the United States where police officers conform to the law.

So basically, I think you make a good case given the peculiar circumstances that we face now that there should be a special prosecutor. I think that some consideration given to a court that has expertise in intelligence matters that would canvas more than just interrogation, including surveillance and the like, can make a lot of sense, but that this Committee and this Congress has an obligation to proceed to investigate and not wait for a new court.

Mr. CONYERS. Thank you. Professor Radsan.

Mr. RADSAN. Mr. Chairman, when I was a student, I didn't like when professors answered my questions with a double negative, but I am going to do that here. I am not opposed to a special prosecutor for the reasons that you have highlighted. The Justice Department was actively involved in giving guidance on the detention and interrogation program. We are going to find out whether the Justice Department was involved in any way in advising about the destruction of the tapes. We know that there is at least one case, the Padilla case, that may have bee influenced by something that went on in one of those interrogations. It is going to cloud some of the existing criminal cases that the Department of Justice has.

I know that people were concerned about the attorney general's reticence about waterboarding. If I were in the Department and you asked me, I think it is a cleaner way to get to the bottom of what happened with the tapes. To alarm the Committee a bit more,

it is only a few weeks ago that The New York Times reported that Director of the CIA, Michael Hayden, had set up an internal unit to inspect the Inspector General. That we didn't trust our internal affairs, we had another internal affairs.

The reporting has been that this is a joint investigation into the tapes between the Justice Department and the inspector general. That complication, the complication between the inspector general, the general counsel, the inspector general and the director may be another reason suggesting that we should have a special prosecutor on the tapes.

Mr. CONYERS. Thank you very much. Attorney Rivkin.

Mr. RIVKIN. Thank you, Mr. Chairman. On the question of special counsel, these are in many respects the kind of institutional issues that I don't think that the two branches would ever see eye to eye across the board. But let me just point out a couple of things. And let me quote *The Washington Post* editorial from a couple of days ago. We do have a new attorney general, a man of exceptional property, I have not heard anybody challenge that, who has said very clearly that we have normal investigatory procedures by the career people in the Department involving career attorneys from both our national security division and public integrity section.

In some sense, when somebody says that per se this is inadequate, we are impugning the integrity of people who spend their lives in the government who are not partisan who are looking presumably at the facts as they are. If at some point in time information comes to light that suggests there is real conflict here, I have no doubt that the attorney general would reach a decision to appoint a special counsel. Not an independent counsel. There are no more independent counsels. But a special counsel in accordance with the Department of Justice regulations. But the notion that it should just be done at the outset without going through a normal process, it seems to me somewhat unfair.

Mr. CONYERS. You don't see any existing conflict?

Mr. RIVKIN. Not on the facts—let us assume for example, and I hate to speculate, but these are speculations in the media—let us assume that, I know it is not an assumption that everybody in this room would share, that while the destruction of the tapes may have been foolhardy or their creation may not have been wise, because with all due respect to my colleague, the normal procedure in the FBI and the police department right now is not, repeat, not, to create videotapes.

I think the decision to destroy them would have been foolhardy. Whatever it is worth, if it was up to me, I wouldn't have done it. But let us assume it is a policy question. You have a whole bunch of lawyers, including the White House counsel's office and the Justice Department who said our advice to you is not to do it. But because we are modest lawyers, we are not trying to play a policymaking role here because there is no legal bar, our advice as a prudential matter, don't do it, but always it is up to you.

If it is that kind of situation, I don't see any conflict here. And I think nobody has suggested in any of the stories in the media so far that the attorney urged or encouraged them to destroy it. I mean, every single person, including some individuals who I am

sure you would have policy difficulties, including David Addington and Harriet Miers have urged them reportedly not to destroy them.

So where is the conflict for the lawyers involved. If it appears to be a problem I am sure that the attorney general would do that. But let me take 30 seconds and make the point, which I think, frankly, is far more important on how this investigation will proceed. I am not advocating rough techniques in police stations. All I am saying to you is this. That the particular parameters for the good cop, bad cop routine outlined in the Army Field Manual with all due respect are far more restrained than nonabusive lawful interrogation techniques. For example, you are not supposed to threaten somebody.

Let us think about what it means. Then the police interrogators or investigators are going to interrogate a fellow by the name of Fastow, who was one of the key players in Enron, and tell him if he doesn't cooperate they are going to nail his wife and put her in prison. If it not a threat, if it is not a coercion, I don't know what coercion is. And that technique is available to you in the context of a normal criminal investigation. And yet, under the plain language of a manual, it doesn't appear to be available to an interrogator because you cannot use intimidation of any kind. We should hear at least an honest mature discussion why we cannot have a baseline across the board in public sphere as to what level of coercion is appropriate instead of only talking about it in this context. Because I cannot imagine why we should be treating Andy Fastow, who I am not holding any candle for, who undoubtedly is a bad guy and a criminal, why should we be treating him better than Abu Zubaida. That makes no sense to me.

Mr. CONYERS. We should also notify the producers of television cop shows that they ought to use a little bit more legal restraint in the course of their activities, because people get the idea that it is okay because you see it every night. Ms. Massimino, help us out here.

Ms. MASSIMINO. I have a couple of points I would like to make on this. One is Mr. Rivkin referred early on to the importance of the question of the legality of the underlying conduct even being more important than the tapes. And I think that is where the conflict arises, which leads to a requirement of having a special counsel here. Because we are talking about questions about whether or not techniques that are depicted on those videotapes are unlawful. That relates to the question of whether or not the destruction of the tapes would be the obstruction of investigation into criminal activity.

So I think that is really for me the strongest argument for a special counsel. I do need to take issue with one thing that my friend to my right said. And that is that I wouldn't want this Committee to get the impression that what we are talking about here when we are discussing interrogation techniques is whether or not interrogators can yell at a prisoner or be mean.

The enhanced techniques that we are talking about and that we outline in our report "Leave No Marks," are serious forms of torture and cruel inhuman and degrading treatment. Long-time standing, another euphemism for stress positions that the United States has prosecuted as a war crime, waterboarding, forced hypo-

thermia, forced nakedness, the use of dogs, these are techniques that have been reported to have been used under this enhanced interrogation program.

We are not talking here about whether or not you can yell at a prisoner or make them uncomfortable.

Mr. CONYERS. Thank you so much. If you want to put your document into the record we will accept it at this point.

Ms. MASSIMINO. Thank you, sir, very much. I would like to do that.

Mr. CONYERS. I would like to now turn to the Chairman of the Constitution Subcommittee, Jerry Nadler.

Mr. NADLER. Thank you Mr. Chairman. Let me start with Professor—well, either Professor Saltzburg or Professor Radsan. There is—we are talking about the destruction of tapes that the CIA has admitted being destroyed about the interrogation of two alleged terrorists, Abu Zubaida and I forget the name of the second fellow. But there is also evidence that other tapes were destroyed. A number of the interrogation tapes of Padilla, Jose Padilla, were released to his attorneys early this year, but the tapes of a crucial interrogation had, as one government lawyer explained, mysteriously disappeared, unquote.

It disappeared even though the Federal judge presiding over Padilla's criminal case which was initiated by the Federal Government to avoid Supreme Court review of his prolonged military confinement, even though the judge in that case had ordered the government to preserve all interrogation tapes and tapes of more than a dozen other interrogations were never turned over, do you believe that the destruction of these tapes is part of a larger phenomena, not phenomena, of a larger situation in which the government is destroying evidence.

Mr. SALTZBURG. I don't want to believe that.

Mr. NADLER. But does the evidence indicate that?

Mr. SALTZBURG. Every time—what we know about the CIA's destruction is that it was willful, that it was carefully thought out, that it was done after seeking some advice at least. We don't know all the advice, that is one of the questions. The Padilla tape is, in some ways, more disturbing, equally disturbing I guess, because we have a criminal prosecution where the government has the highest obligation to preserve evidence and a missing tape is a big deal.

And the interrogation presumably took place during a time when Padilla was deemed to be a terrorist suspect. That is why he was originally detained. There appears to be some effort to prevent judges, and perhaps Congress, from actually seeing what goes on in some of these interrogations. That is the disturbing thing. You asked whether it is a pattern. I think that is one of the things that this Congress needs to look at. I don't think you know or have any idea how many interrogation tapes actually exist.

There are rumors in the intelligence community, there are rumors that there are videotapes of interrogations conducted by foreign officials on detainees who were transferred to them by Americans who were present during the interrogations but weren't the interrogators. Now, if those tapes exist I would think that this Congress would want to have a look at them and want to be sure that they were not destroyed. But we don't know about what tapes

exist, and then we don't know that they have been destroyed until there has been a disclosure after the fact, which is what happened both in the CIA situation and in the Padilla situation. It is surely disturbing.

Mr. NADLER. Let me ask you a follow-up question, if I may. Your testimony suggests that there are other tapes that may exist that may indicate all kinds of perhaps misconduct, perhaps not misconduct in interrogation situations. Congress certainly has a right to see them. Now, if we were to subpoena, issue a subpoena for all interrogation tapes, would there be any legal, I am sure the Administration would find some excuse, but would there be any legitimate legal reason for the Administration to say no we refuse to supply them?

Mr. SALTZBURG. Let me answer that question in two parts. First of all, I have absolutely no doubt if you issued a subpoena it would not be obeyed. And the reason it would not be obeyed is there would be a claim of national security privilege. Second, is that claim valid against the United States Congress. The answer is no. If it were, then any claim of national security would prevent this Congress from ever seeing anything the government didn't want to produce.

Mr. NADLER. So a claim of national security privilege is never valid against a subpoena from Congress?

Mr. SALTZBURG. The problem is enforcing it.

Mr. NADLER. As a matter of law, you would say because Congress has—our rights under the national security law is never valid.

Mr. SALTZBURG. I believe this is one of those issues on which people who believe in absolute executive power will tell you the executive has the right to make the final decision on national security. Those of us who believe that no branch is absolute, believe that checks and balances require that, in some fashion now, the executive is responsible to Congress and that, for example, the Intelligence Committee ought to be able to review tapes, again in a very secure manner, I am not suggesting that the subpoena ought to mean that Congress gets to see it and disclose it, but certainly Congress, in order to exercise its oversight role, is entitled to be exposed to some of the most important secrets we have. Otherwise you couldn't legislate, and actually you couldn't fund the things the executive wants to do.

Mr. NADLER. We are certainly finding that to be the case with some of our other things like FISA. Professor Radsan, will you comment on the same questions?

Mr. RADSAN. The second question first. I agree with Professor Saltzburg. It would be a very interesting constitutional law question. I agree that the executive would not easily comply with the subpoena. If you went to the courts, I don't think the courts would take it. They would avoid the issue through the political question doctrine. They would leave it to the two branches to sort out. That is a prediction about constitutional law. You can ask the constitutional law professors to speculate. This would be a great hypothetical for next year's examination. On your first question about the tapes——

Mr. NADLER. In that case, our only recourse would be the power of the purse, the CIA gets no money unless they give us the tapes? Would that be what we should do?

Mr. RADSAN. The branches have other ways to put pressure on each other. And if you go down that road, it will be a very interesting interaction between the two political branches. If there is a pattern of destroying tapes as you suggest, and I have no reason to believe that there is, the pattern may even be broader than we are talking about. It is not—if your theory is true it is not just the CIA for this reason. I don't know that the Padilla tapes were necessarily CIA tapes. They may have been Department of Defense tapes, Justice Department tapes. If there was a pattern, if your facts are right, then it would be a pattern that links up something that went on in that case and a known destruction in a CIA case. We do have another set of tapes though, tapes that were referred to in the filing that the Justice Department made in the Moussaoui case, and those tapes seem to be different from any other tapes.

And as far as we know from the public record, those tapes have been intained. I have read that filing. My conclusion, and I am not confirming anything from the classified record, my conclusion by that affidavit is those tapes were tapes that were made by a foreign liaison service during those interrogations that the Justice Department was aware of. But you could ask for those tapes. The Intelligence Committee could ask for those tapes. We could confirm that those tapes still exist. That is what the reporting has been.

Mr. NADLER. Thank you, Professor. Mr. Rivkin.

Mr. RIVKIN. Thank you, Congressman Nadler, let me just say a couple of things. It is hard to predict how the court would work here. But the broader the more open-ended your request is the more difficult, I think, for you to vindicate this, you are right. The more targeted, the more circumscribed the request is, the more limited to the Intelligence Committee, the greater is the chance that it will be both complied with in my opinion. I would be vindicated if you were prosecuted here. On the underlying issue, let me give you a slightly different perspective, and again as a lawyer, I do not like the destruction of any documents that exist, and if I were asked about it without the benefit of hindsight even I would have said no destroyed. But in some respects, these problems reflect the difficulty we have in applying the full blown criminal justice oversight paradigm that has developed, been honed in in decades of remarkable peace and prosperity to very difficult circumstances. Because to embellish the point made by Professor Radsan, do you not think, Congressman, that the vivid power of visual images is such if you think about all the damage done by Abu Ghraib tapes, and I am not saying that they didn't reveal bad conduct, is it not possible for the honorable men and women in the Intelligence Committee to wonder?

Mr. NADLER. Excuse me, we are not talking about Congress reviewing this, not necessarily the public.

Mr. RIVKIN. No, no, I am not talking about that. But they would have been leaked.

Mr. NADLER. Maybe they would and maybe they wouldn't have. I have limited time. I want to get in another question. Again to Professor Saltzburg, we have been asked in this entire question of

the destroyed tapes, we have been asked by the Justice Department to delay our investigation lest it interfere with the Justice Department investigation or with the CIA investigation. Do you think it makes any sense at all for us to do that, especially in light of the question that perhaps we can't trust anybody. Certainly we can't trust the Justice Department. We had to call for a special prosecutor. But should this Committee, should Congress delay investigations waiting for the Justice Department?

And if the answer is no, what is the justification or is there any justification in law for the Justice Department to simply refuse to supply the documents to Congress on the grounds that they are investigating it and supplying us with documents that might inhibit, in some way, their investigation.

Mr. SALTZBURG. My answer is no, that you shouldn't wait. One of the reasons is time is flying. You got more than 2 years that has already gone by. Memories will fade. People may die while you wait. Now, what is the justification. I don't think you should ask the Justice Department to produce its investigative file, what it is investigating. I think you ought to ask the Justice Department to produce any advice, copies of any documents it created with respect to the destruction in 2005. And I think you ought to deal directly with the CIA.

Every case is a little bit different in terms of whether you can interfere in some way with an investigation. I just don't see that here. Much of what happened is known. We already know the tapes were destroyed. That is not going to be new. We have some of the names of people who were consulted. What you don't know is exactly what they said. You don't know exactly what the rationale was. What we know is there is a lot of lawyering that was going on here. What the advice was we are not sure about. But I think you have got to get to the bottom of what happened.

By the way, there are two things here. There is the criminal investigation whether people get prosecuted. I think unless you immunize witnesses and put them out for public testimony, the chances you will disrupt a legitimate investigation and ability to prosecute are very small. But there is the other part of this, of finding out what happened, even if it is just bad policy and not criminal, and figuring out what you are going to do about that. That is part of the oversight function. God forbid that this Congress will limit itself to deciding the only oversight is to look into criminal activity.

Mr. NADLER. Thank you. One more question for Ms. Massimino, and this is slightly different. Starting in 2003, the Administration argued that the Geneva Convention did not apply to members of al-Qaeda. The Supreme Court decided to review a case which became known as Hamdan versus Rumsfeld. On November 7, 2005, I think it granted cert. The tapes were destroyed that same month. What were the potential implications with respect to the tapes of the Supreme Court rejecting the Administration's position that the Geneva Convention did not apply, as indeed the Court ultimately did when it issued its ruling in Hamdan in June of 2006. In other words, could the destruction of the tapes be connected with the decision by the Supreme Court to accept that case?

Ms. MASSIMINO. Yes, I think so. I don't think we have to speculate too much about that because we know that when the case was decided it sent shock waves through the CIA and the enhanced interrogation program was put on hold immediately. There was already some pullback from it after the passage of the McCain amendment. But then in July of last year when the case came down, the reports are that that was a shocking development for the CIA.

And they started to understand finally that not only was Congress withdrawing its political support for a program like this, but that the Administration was wrong in its argument that the Geneva Conventions did not apply. Remember, early on in the deliberations inside the White House about whether or not the Geneva Conventions applied, a key consideration leading to the conclusion that the Geneva Conventions did not apply was the fear that, well, if they did, we might find ourselves subjected to prosecution for war crimes.

Mr. NADLER. Thank you, Professor Radsan. That will be it.

Mr. CONYERS. Thank you so much. The gentleman from Virginia, Bobby Scott.

Mr. SCOTT. Thank you, Mr. Chairman. I have a series of questions. Let me just begin with whether or not torture is illegal? Is there any question that torturing people is illegal, Professor Radsan?

Mr. RADSAN. Torture is clearly illegal.

Mr. SCOTT. Now, where in the criminal law can we find the prohibition against torture?

Mr. RADSAN. You will find it in other statutes. But we did not feel it necessary when we incorporated the convention against torture to pass a torture statute within the United States. A torture statute applies to anything outside of the United States. But any conduct that would be torture would be unconstitutional, would be illegal, I don't think there is any doubt about that. The doubt is on how we define these studies.

Mr. SCOTT. Now, is the definition of torture so subjective that people can't understand what it is?

Mr. RADSAN. With respect, I think there are some clear examples of things that are not torture; providing National Geographic magazines. There are clear examples of things that are torture; electroshock, cutting off limbs.

Mr. SCOTT. Do other countries have problems with the definition?

Mr. RADSAN. I think in the various courts they are going to have difficulties on what the line is, even if we all agree that waterboarding is torture.

Mr. SCOTT. Does anybody outside of this Administration anywhere in the world think that waterboarding is not torture?

Mr. RADSAN. I take your point, and I am not aware of anyone that defends waterboarding outside of the United States.

Mr. SCOTT. Outside of this Administration, because other Administrations have specifically found waterboarding to be torture.

Mr. RADSAN. And I am not here speaking for the Department or the Agency. I think it is fairly clear waterboarding is something prohibited by statutes.

Mr. SCOTT. According to public reports, the Department of Defense and the CIA have referred 20 cases to the Department of Justice, including two deaths. There has only been one indictment. So if the—let me go to another point. If the tapes clearly depict torture, let us kind of think of who could be guilty of a criminal offense. Those who are actually doing the torture, any question that they would have liability under the criminal statutes?

Mr. RADSAN. If we agree that the conduct on those tapes crossed any line that person that did the conduct is guilty and anyone that aided and abetted, anyone that ordered would be drawn into that criminal conduct, that is for sure.

Mr. SCOTT. What about others who watched while others did it?

Mr. RADSAN. Watching while others did it, that is difficult. But I think you would make an argument that it is aiding and abetting, or you would make an argument that it is part of a conspiracy to commit that criminal conduct.

Mr. SCOTT. What about those who authorized it?

Mr. RADSAN. The same analysis. We would have to pursue the facts. But if this was part of a pattern and it had the intent to do something that was illegal and was known to be illegal, that is a problem, clearly.

Mr. RIVKIN. May I make a point, Congressman? It seems, with all due respect, to be somewhat anomalous to simultaneously scurry the Department of Justice for providing allegedly legal opinions that defined these types of techniques is not torture, and then simultaneously say that individuals are not lawyers who followed that advice. And let us assume that they stayed within the parameters of permissible procedures not due to any criminal conduct. You are certainly entitled to rely on the, in good faith on the advice proffered by the appropriate lawyers.

Mr. SCOTT. Let us assume that we have concluded that the technique involved is clearly torture, can the Department of Justice by memo immunize everyone doing it?

Mr. RIVKIN. That is a difficult question, but your hypothetical in a way contains the answer. If we determine. Who are we? It is the province of, in the first instance of executive, in the second instance of Judiciary, to pronounce what the law is. If duly constituted officers of the United States concluded that given conduct construing a given statute does not amount to violation of a statute that would go to great length to immunize individuals who rely on that conduct, which is why I personally don't think we have any evidence that it was an obstruction of justice.

Mr. SCOTT. There are a lot of people who think the memo is absurd on its face to suggest that waterboarding is not torture and the Department of Justice can't immunize people from doing what everybody in the world knew was torture. Ms. Massimino.

Ms. MASSIMINO. I think that it is not correct to suggest that there was no fear of prosecution. There clearly was. That is why the memo was sought in the first place. And section 2340 of 18 U.S. Code, which is the Federal anti-torture statute, was never thought to be vague or unclear until there was a desire to get around it. And a memo was drafted that construed it in such a way that drained those powerful words of all of their meaning.

Mr. SALTZBURG. Congressman, if I could add a point. Congress has sort of made this a bigger problem than it otherwise might have been in the Military Commissions Act when it put in that provision which essentially said that if you are charged with torture between 9/11 and 2005 when the Detainee Treatment Act was passed, you have the right to rely on advice of counsel as a defense. And I think that was clearly intended to say that people could be prosecuted, but then they can wave around that memo and say I relied on it. It doesn't mean they shouldn't be prosecuted. It just means that Congress has expanded their possibility of arguing advice of counsel as a defense.

Mr. SCOTT. Well, let us talk about the independent counsel. If the Department of Justice, CIA and White House, if they define torture in such a way that people could I guess retroactively rely on it when the memo legally misstated the law, would that be a reason to have an independent counsel rather than having the Department of Justice try to defend the memo subsequently determined to be legally incorrect?

Mr. SALTZBURG. I don't believe, my own opinion, standing alone, that that would be enough with a new attorney general who was not responsible for the memo. Let us be clear, that 2002 torture memo was probably one of the most embarrassing poorly written poorly reasoned documents I have ever seen. And I believe you are right, Congressman, no one with a straight face could defend that document as stating accurately the law. And I think that any attorney general who was independent would repudiate that document. I think this attorney general would repudiate that document today. But the other circumstances added to it, I think, do make a case for a special prosecutor.

Mr. RIVKIN. As I understand, with all due respect, the facts are as follows, that opinion was withdrawn long before this attorney general came in. But if you look carefully at how it was withdrawn, the language, my reading of it suggests that the breadth for it, and the reason we are repudiated, not the bottom line, and again, the speculation in the media is the two subsequent more narrow opinions written by the Department of Justice. The parameters have always permitted, Congressman, the memo change.

If I may just say one thing. The thing I am troubled a bit is this notion that you can have the entire executive branch of United States Government, whose duty is execute the law, parse the law and conclude that they disagree, with all due respect, to my good friend, Ms. Massimino, and flesh out a statutory term in a given way. If that happens I don't know who else is supposed to come in unless the matter is somehow justiciable in an Article 3 court which is a different conclusion, I don't see anything in your powers frankly in Article 1 that gives Congress the right to interpret the law. It is a problem.

Mr. SCOTT. Well, in all due respect, there is not a lot of interpretation that needs to be done. This Administration has suggested that waterboarding is not torture. They are having trouble trying to figure out when it is and when it isn't, and when you have it on tape the tape is destroyed. I don't know that you can change the law by legal memo. And you have the Department of Justice—is the Department of Justice involved in possibly authorizing some of

this torture by virtue of their memos? Did they authorize the destruction of the tapes? Was the Department of Justice present—the Department of Justice investigating itself on who authorized it, who failed to disclose to the 9/11 Commission and to Congress and to the courts whether the existence of the tapes—well, let me ask another question. What is the statute of limitations on all of these crimes?

Mr. RADSAN. Congressman, I am not aware. I don't know that there is a statute. I will be corrected by my colleagues. But if I could take a minute to clarify my answer to a prior question. I think I am agreeing with you, but perhaps not in the way that you would like. We can look at conduct that occurred on the tape, and we may all look at that and agree that it crossed the line. That will be reason to be concerned and continue the investigation. But then there is a second step, and this is alluded to by Professor Saltzburg. We will have to figure out why that interrogator did this. And if that interrogator reasonably relied on advice, and that advice, as we can tell, would have been issued in a classified channel, that interrogator more likely than not was not a lawyer. If that interrogator reasonably relied on advice, even though it went past the line, whether it is waterboarding or any other conduct, that prosecution is going to be very difficult. And that is a situation that many of these officers find themselves in. I agree with you.

Mr. SCOTT. And I agree with you. If you have a legal memo that says what everybody believes is illegal and you can proclaim it to be legal and someone reasonably believes the memo, then you have a mens rea problem in a criminal prosecution. However, if the memo is just clearly ridiculous you can't just change the law by memo. I yield back.

Mr. CONYERS. The Chair is pleased to recognize the gentlelady from Texas, Sheila Jackson Lee.

Ms. JACKSON LEE. Again, let me thank the witnesses for this instructive testimony. And if I might, let me lay the groundwork for my line of questioning with a citation from the article from The New York Times. And I recognize that any information exposed in public is questioned—is subject to questioning. But let me lay this groundwork so that I can pursue a line of questioning.

Mr. Bennett, who is a lawyer for Mr. Rodriguez insisted that his client had done nothing wrong and suggested that Mr. Rodriguez had been authorized to order the destruction of the tapes. He had a green light to destroy them. To me, that is a billboard of obstruction of justice. There is a reference or a suggestion that the destruction came about to protect the identity of the CIA agents. And might I have a PS and say it is our obligation to protect our operatives who are around the world.

And let me pointedly say to the CIA, take that duty extremely seriously and hold them in high esteem for the role they play in national security. I don't think that we should argue with that premise. However, another comment in the article dated the 19th, I believe, indicates until their destruction, the tapes were stored in a safe in the CIA station in the country where the interrogation took place. Current and former officials said, according to one former senior intelligence official the tapes were never sent back to the CIA headquarters, which I would imagine might have an un-

derground, if you will, secure, safe or other chamber, despite what the official described as a concern by keeping such highly classified material overseas, lays the groundwork if you will whether there is sufficient truth to document that, that there is question as to how much security the CIA was giving to these tapes as a basis upon which they use to destroy them.

I would like to also take note of the fact that, if I might also put into the record, the comments of Senator McCain as he was trying to make the argument on how torture demeans and debases those of us who represent a certain degree of values. And so just if I might just quickly indicate his words when he was asked, where did the brave men I was privileged to serve with in Vietnam draw the strength to resist to the best of their ability the cruelties inflicted on them by our enemies? They drew their strength from our faith in each other, from our faith in God and from our faith in our country. Our enemies didn't adhere to the Geneva Convention.

Many of my comrades were subjected to the very cruel and very inhuman and degrading treatment and a few of them were unto their death. The enemies we fight today hold such liberal notions in contempt as they hold in contempt the international conventions that enshrine them. But we are better than them and we are stronger in our faith. Another comment indicates that one might question the kind of testimony one would get from someone subjected to torture and whether or not that can actually or that testimony or that, if you will, information can truly be counted as, if you will, accurate.

So let me, if I can, both professors raise these questions on this whole issue of the obstruction of justice which pushes more urgently forward the need for a special prosecutor, slash, independent counsel terminology interchange even though the statute has expired in light of where we are today. As has been in the press and as stated by the testimony today, the CIA interrogation tapes were destroyed around the same time that conspicuous congressional oversight scrutiny was increasing. The photos from Abu Ghraib were uncovered, the DOJ began to withdraw memos rationalizing exceptions to the Geneva Convention and the McCain amendment against torture was gaining momentum. Some of Mr. McCain's comments were in the public domain.

Does this not raise very serious issues of obstruction of justice or of violating or undermining congressional prerogatives and isn't this the best argument for the need for an immediate appointment of a special prosecutor that is, indeed, independent from the White House and the DOJ investigation. And my question goes to the point of the DOJ asking the House Intelligence Committee and others to delay their investigation while they are moving forward. I believe there is such a fracture in the constitutional protection that it is urgent that we move forward now. Would you two professors comment on that?

Mr. SALTZBURG. One of the anomalies in the law, is at least as I understand it, is that it is not obstruction of justice in the criminal sense for the executive to destroy evidence so that Congress won't see it. It is obstruction of justice to interfere with a judicial proceeding under the statute and destroy evidence with that in mind. It would not surprise me when all is said and done if lawyers

advising Mr. Rodriguez concluded that there was no judicial proceeding in which a request was pending for this particular evidence, and therefore, they could destroy the tapes without being guilty. He could order them destroyed or approve them destroyed without committing obstruction of justice. The executive, unfortunately I think, feels that it is quite free to deny Congress evidence when Congress requests it.

And even to destroy evidence that Congress might want to see. And basically, in the noncriminal sense, it is a classic obstruction of justice. It is obstruction of oversight. It is infringing upon the legitimate oversight function of Congress. But there is very little that Congress has done about that in the past. And that is one of the issues, I think, Congress probably needs to address.

Ms. JACKSON LEE. Can I just pursue that with you. Do we not have a basic legitimacy in pursuing that because of the independent branches of government. Are you suggesting we write law, are you suggesting that we take advantage of our oversight responsibility? What is the tool that you are suggesting we use?

Mr. SALTZBURG. I think that—all I suggested earlier was something that needs careful examination and more careful than I could do in the limited time we had available. And that is whether Congress should, in fact, legislate to require certain records to be preserved and maintained—for its inspection over time.

Ms. JACKSON LEE. Professor Radsan.

Mr. RADSAN. Ms. Jackson, we thank you very much. I agree with you that these facts, as they have unfolded, are very disturbing. I did cases for 6 years. I am going to speak about how I did cases. But I think many prosecutors pursue it in the same way, is they are going to gather the facts. They are not going to try to pigeonhole it necessarily into a particular statute. There are difficulties in the various obstruction of justice statutes with those elements.

But if there has been wrongdoing intent, then there are statutes in the Federal Code that can cover the wrongdoing. One friend of all Federal prosecutors is 18 U.S.C. 1001, the false statute that makes it a crime to make a false statement or a material omission to Congress, to the Judiciary or, and the case law will bear this out, even intrabranch. So that if there were false statements made related to these tapes by Mr. Rodriguez to a lawyer, Mr. Rodriguez to a supervisor, then the joint investigation or any special investigation should and will pursue that. And the false statement statute is available. It is a very broad statute that Federal prosecutors have.

Ms. JACKSON LEE. Do you have any—do you care to comment on the fact that we should be denied our rights to investigate simply because the Department of Justice is proceeding as well.

Mr. RADSAN. It is a difficult issue. But I agree that we need vigorous oversight. Where I think Professor Saltzburg and I agreed, and maybe this was whispering, is that it becomes especially difficult if and when anybody of congress is issuing immunity. I haven't heard anything. No one has mentioned that today. We learned that from Iran contra, the complications, even with very scrupulous prosecutors when you have immunized testimony. That is the concern that the Department has. But we are not at that stage yet, so I don't see any reason for Congress to delay its in-

quiry. I think we need vigorous oversight. And I agree that these ideas that you should delay, as far as I understand, I don't have all their reasoning, that they seem to be weak to me.

Ms. JACKSON LEE. I am sorry, were you—I saw somebody——

Mr. RIVKIN. If I may briefly shed a different light on this. If a delay is finite in time and if you are sure that given the commencement of internal investigations, all the documents are being kept, and also very importantly, individuals involved are not communicating with each other because that would be viewed as obstruction, I see absolutely no good reason not to give the Justice Department a certain amount of time to get to the bottom of it. Because let me just suggest this: Quite aside from the immunity issue, if you were to invite to testify one of the people involved and he came, he or she came and prepared for testimony, and other individuals involved in this same matter or had an opportunity to listen to what his or her story is, any prosecutor will tell you that it is a horrible thing. What you do is you slowly build the case, you go to the junior people, then you go up the food chain.

Ms. JACKSON LEE. Mr. Rivkin, I have a short period of time and I have another question here, and I appreciate it. I think your premise is based upon Congress having confidence in the present Department of Justice and others, and certainly we don't malign all, but we have had difficulties in documents being preserved in the past.

Let me just quickly raise this question, and I would like Ms. Massimino and the others to answer it. I have Mr. Rivkin as pointedly, but I will get to him last. Based upon—Mr. Rivkin, you testified that evidence exists, that coercive and severe interrogation techniques can work. But I ask you, are potential results, as I mentioned in my comments, a legal justification with potential or merely ex post facto rationalization and an excuse for violating Federal laws international conventions and American values. And moreover, if these severe and coercive techniques do indeed yield an otherwise unattainable information regarding imminent threats, then why was Congress not briefed? Why were these tapes destroyed and why are our efforts being hampered in the ongoing investigations that we have?

So I guess, in essence, the question is why would the Bush administration have something to hide if these techniques work and are lawful and they can show that they prove results and there is a basis of constitutionality and complies with the national conventions. It seems that there is a fracture in the utilization of these techniques because now we have to investigate why we were never told about the destruction of tapes. Why don't I start with you, Ms. Massimino.

Ms. MASSIMINO. Thank you.

Well, this Committee, actually, I think, as recently as last week, held an excellent hearing on the question of the efficacy of the use of torture and other cruel, inhumane and degrading treatment, which I think was quite enlightening for many people.

There is, as I mentioned in my own testimony, but there is also a growing body of expertise that calls into serious question claims that these kinds of enhanced techniques produce actionable intelligence.

That is not the same thing as saying that they never result in a detainee divulging true information. This is another point to which Senator McCain spoke very eloquently about his own experiences under torture in which he, when asked for the names of men in his unit, gave the starting line-up of the Green Bay Packers.

But experienced interrogators have repeatedly said and military commanders have agreed, from General Petraeus on down, that these techniques are not only immoral and illegal but unnecessary and counterproductive.

You know, there is, I suppose, one sense in which the coercive and abusive techniques used, not just by military but by the CIA, at Abu Ghraib and elsewhere worked, and that is as a recruitment tool for al-Qaeda. We have to look at the broader question here and the cost of a policy of official cruelty, which undermines not only our moral authority but our security.

This is what I have heard repeatedly from a number of retired flag and general officers who I have had the privilege of working with over the last several years. They are emphatic and uniform on this point, that these are not only rules based on experience in the Field Manual, decades of experience, including recent experience—the manual was revised last year—but they reflect values that all U.S. agencies should comply with.

Ms. JACKSON LEE. Professor Radsan and Saltzburg?

Mr. RADSAN. Ms. Jackson Lee, let me take your question as an opportunity to be critical of the three branches of Government and the American people on this issue. I am going to make many friends today.

I think that we need a national dialogue on what sort of techniques we are comfortable with—it needs to be open—techniques that go beyond what might be permitted in the criminal justice system, but techniques below what is defined reasonably as torture. Even if we resolve the issue of waterboarding, we have many other issues that we need to resolve and we have not resolved, even with this Executive order from the President, after the Military Commissions Act.

For example, sleep deprivation, is this something that is acceptable or not? Another example, bombarding somebody with music. I don't care for Nirvana; maybe you like Nirvana. But we have to figure out, if we play this all day at a loud volume, does this cross this line? These are very serious issues.

Where I differ with the Administration is I think it makes more sense for us to be open, as a people, as members of our Government: This is the line; this is what we are going to do and what we are not going to do.

Because what happens is, if we have someone in a site, a secret site, and that person might have had information and we have an attack, there will be other kinds of recriminations—recriminations that come out of shows like "24." Why didn't we send Jack Bauer in there to get the information?

This is a difficult place for elected Members of Congress and for our elected President to figure out what is the line, what will we defend and what will we not defend.

Ms. JACKSON LEE. Professor Saltzburg?

Mr. SALTZBURG. I think I agree with every word that was said by my two colleagues here. My experience is the same. I think that when you talk to military leaders, they tell you that harsh interrogation techniques and torture do not produce actionable intelligence. They are counterproductive, for the most part. They are not saying you never get anything.

But, you know, one of the things I just didn't want to leave unsaid, you might think, from what we have heard today, that the Army Field Manual was drafted by a Scout troop, you know, which had no experience fighting wars. The military drafted that, and they take enormous pride in it. They think that they are leading the world, that other militaries will look at that Field Manual and say, "The United States is proud that these are our techniques."

I mean, when we look at Europe and other countries, they don't look at us and say, "Why are you soft on the people you are detaining?" They look with pride at what we have done. And we have squandered, we have squandered our image in the world in so many ways. But, boy, one of the things we have done right is that Army Field Manual.

And I don't know anybody in the Department of Defense, in the military side of it who is embarrassed by it. They are pleased that they did it and proud that they did it. And the only people who seem to attack it are the civilians who are supposed to be leading this country and leading the world. And they got it backwards, and they got it wrong.

Mr. CONYERS. Gentlelady's time has expired.

Gentleman from Tennessee, Steve Cohen.

Mr. COHEN. Thank you, Mr. Chairman.

I am not sure who to ask this to, maybe Mr. Rivkin. Why do you think they made the tapes to start with? I mean, generally police and law enforcement folks do interrogation; sometimes they audiotape them. They don't generally videotape them. Why do they videotape them anyway?

Mr. RIVKIN. My total speculation would be, Congressman, precisely because they felt, especially at the time it took place, in the post-September 11 atmosphere, we have to get at the facts. And, quite frankly, in this situation where I think there is plenty of evidence that the Intelligence Committees were briefed about this these techniques, they wanted to get as much intelligence mileage out of it. And I suppose facial expressions, gestures can yield additional insight into whether or not somebody—you know, if you look at Bill O'Reilly these days, he puts on experts almost every day——

Mr. CONYERS. Who?

Mr. RIVKIN. Fox's Bill O'Reilly.

Mr. COHEN. Never heard of him. [Laughter.]

Mr. RIVKIN. Well, there are people who make careers out of interpreting people's gestures. If you tilt your head this way, you are telling the truth. If you lower your eyes, you are lying. So there is probably an additional element of intelligence value that could be squeezed from videotaping——

Mr. COHEN. I think they want you to turn your mike on.

Mr. RIVKIN. No, what I was saying is it was probably entirely innocuous that he wanted to gain additional intelligence insight, because looking at people's facial expressions, the ones you are inter-

rogating, their gestures, would tell you more about the credibility of their statements.

I am saying, in popular culture, there are lots of people who put in their shows experts who analyze politicians, depending on how they look on camera, what is the sincerity of statements. So that would be my interpretation.

Mr. COHEN. Does anybody else have an opinion on this?

Ms. MASSIMINO. Yes. If we can express our opinions, this is one of the things that hopefully you will find out in your investigations. But I think the Administration has, for some years, dismissed the claims, until it was faced with the photographs of Abu Ghraib, claims of abuse by detainees by arguing that those complaints are part of al-Qaeda's strategy. And it very well may be true that complaining about abuse is part of the al-Qaeda manual of what to do when you get captured.

One of the ways that the Administration could prove that point is by videotaping. This is why videotaping has become so popular, I think, in domestic law enforcement agencies, is to be able to defend against erroneous claims of abuse by people who have been interrogated.

One of your colleagues here in the House, Congressman Rush Holt of New Jersey, has for several years proposed legislation that we have supported that would have required the videotaping of interrogations for the purpose of inhibiting abuse and protecting against erroneous claims of abuse. And perhaps that is something the Committee ought to examine coming out of this incident.

Mr. COHEN. Thank you.

Professor?

Mr. RADSAN. Thank you, Congressman Cohen.

General Hayden, in his letter to CIA employees, offered an explanation of why they kept tapes of these two interrogations that went over many hours. One was to monitor the compliance with the program by the interrogators, to make sure that they were following the law. I am not saying whether that is right or wrong; this is his offered explanation.

The second is the point that Mr. Rivkin made, that they wanted to have a record, a complete record for intelligence value to figure out whether the information was good, whether the person was being deceptive, the person that was being interrogated.

But I think, as your question suggests, there are benefits and there are burdens to having a very complete record—and a video is going to be more graphic than a transcript or an audio—benefits and burdens that may come back to hurt you.

And maybe I can give the third point by passing a question to Professor Saltzburg. It is the same issue or a similar issue of why does the FBI not record its interviews with witnesses? Why does the FBI not videotape? Because they have determined, on that balance of burden and benefit, that is better for them to have the only record. They do it through an FBI 302, a report of the interview.

There are States that have gone the other way on their law enforcement and said, "We want these things videotaped because we don't necessarily trust the record." But I think the FBI, in its case, says, well, they would rather have FBI agents testifying about

what actually happened, and you could draw the analogy to the CIA.

Mr. COHEN. And you were going to pass the question to Professor Saltzburg. And based on your vitae, I think you probably have a good question.

Mr. SALTZBURG. I think the question was, isn't this why the FBI does what it does, and I think it is.

But there is another reason why they might have videotaped, very closely related to what was stated to the CIA employees, and that is you will remember that the FBI was telling the CIA not to do what it was doing, that these techniques don't work and that they are harsh and unnecessary. And one of the reasons for making the tapes is I think the CIA probably wanted to show that it works. They had a record. Their view is they got a lot of intelligence, and if anybody doubts it, they can show you exactly what they did and that it worked, in their view.

The problem is when it came time to show these tapes, they may have looked back and said, "Uh-oh, even if it worked, we don't want people to see what we did."

Mr. COHEN. Does anybody on the panel believe that the tapes were destroyed to preserve the anonymity of CIA operatives? Does anybody buy that at all?

Mr. Rivkin?

Mr. RIVKIN. I would only buy it in the context with the following observation, which I made several times today. It is not that you, as Congress, would reveal this information, but in a time where everything leaks—and that is not an overstatement—having those tapes posted on the Internet, being leaked the same way the Abu Ghraib tapes were, in a situation where individuals doing the interrogation were shown—these individuals are overseas. It would either destroy their careers or would may well put their lives in jeopardy.

Mr. COHEN. But wasn't it possible to easily block out their face or their identity and still have the tape but to secure the anonymity of the CIA operative?

Mr. RIVKIN. Well, again, this assumes that one can guarantee that an unredacted tape would not be leaked or, even if somehow the identify was obscured, that it could not be restored. And that is a big assumption, given what else has happened with the most secret of programs that this Government has employed in the last several years.

Mr. COHEN. Thank you, sir.

Professor?

Mr. RADSAN. With respect, I disagree with Mr. Rivkin. It doesn't make sense to me that the tapes needed to be destroyed to protect identities. You have alluded to one possibility of redacting, but the other basic possibility—there was no indication that they wanted to share this with anybody. If they were worried about a leak—and the CIA protects a lot of classified information—if you had tapes at an overseas location, then have the tape moved back to headquarters, as Ms. Jackson Lee said, put it in a safe in the Director's office. If a tape is not safe in the Central Intelligence Agency, in the office of the Director of the Central Intelligence Agency, we are in trouble.

A historical note is you remember with the Bay of Pigs, there was a very controversial Inspector General investigation that was done internally. The Director of Central Intelligence at that time didn't want this leaking and didn't want it well-known. The Director of Central Intelligence said, "We will take back the copies of the report. I will keep one. I will put it in the safe." And it was safe for a long period of time.

Mr. COHEN. From Ranking Member Smith's testimony, assuming it be entirely accurate—and I have no reason to believe otherwise—waterboarding apparently is a very successful or effective tool at ferreting out information.

And is there any other techniques that you all know of that might be just as effective but within the law?

Mr. RIVKIN. I personally have serious problems with waterboarding. I think it is a very difficult thing to justify.

The thing that concerns me, Congressman—and I think it is an excellent question—is the critics are painting everything with a broad brush. If we were to adopt the procedures in the Army Field Manual, no coercive technique of any kind—including sleep deprivation, even in modest amounts; temperature manipulation, even in modest amounts—would be tolerated. That would take us way beyond.

Look, everybody agrees, I don't know anybody who holds a candle for torture or even for cruel, inhumane and degrading treatment. We are talking about things way below that level. And if we are going to do that, I agree with one fundamental respect, let's have an honest debate as a society, as a country, to say we are not going to sully our hands with any kind of coercive techniques. And let's also explain to the American people why it is okay to do it to our own personnel in the course of training, why it is okay to have coercion in penitentiaries and police stations, different doses, but here there would be one coercion-free corner in the entire public sphere for interrogating combatants.

If you can make the case where American people buy into it, that is fine. What worries me is the case is not being made and is being done through indirection.

Mr. COHEN. Yes, sir.

Professor?

Mr. RADSAN. Congressman, I agree that we should have a special program for the CIA, that we may need some enhanced techniques. Where we are going to disagree or where the discussion goes are what sort of techniques will we allow. And I am fortunate to be in the middle, I am right down the middle there with the Chairman.

I think where the discussion will get very interesting for enhanced techniques that we allow the CIA to use is not on waterboarding. I think most of us will agree we are going to take waterboarding off the table. But what about sleep deprivation? Menachem Begin, who was the leader of Israel, was tortured himself, and he said that, of all the techniques, the most defective was depriving him of sleep. He said that the quest for sleep is far greater than the need for food or water.

And we would figure out—this is something you can't do in the criminal justice system. You can't keep somebody up for a day or 2 to try to find out whether they robbed the bank. But perhaps for

this interrogation and detention program that we allow the CIA, perhaps this is something that is going to be acceptable.

I haven't made up my mind, but I would like to hear the debate. And the effects of sleep deprivation we know are different from the effects of some of these other techniques.

Mr. COHEN. Professor, let me ask you this. You suggested in your testimony maybe some type of FISA court to determine what might be proper techniques. Are you satisfied with the FISA court's jurisdiction and their powers, that they are sufficient to protect the American public? Because they have a very limited scope.

Mr. RADSAN. They have limited scope, but we don't have any evidence that any information is leaked from the FISA court, that it does provide some sort of review. It is close, and we don't have people advocating on behalf of the person that might be surveilled. We may need to adjust the statute, I think we probably would, to set up some FISA-type court for interrogation.

And where I would go—and I have laid this out in articles—is I might put an annual cap on how many people can into the program. I might have an ombudsman in the special court, not a defense lawyer, to protect the classified information, but to have some more of a check to figure out whether this is someone who deserves to be in the program or not.

And perhaps with a FISA-type court, we could have the court reviewing what sort of techniques are permissible or not. It is not full oversight, but it is something better than complete black sites, which I am opposed to.

Mr. COHEN. And I appreciate what you suggested, because I have thought we do have to have certain techniques to be able to ferret out information and protect our people. At the same time, we have to respect our laws. And one of the major conflicts is, if we permit something, the other countries may use it against our own folks. And certainly Senator McCain, who was a prisoner of war, could have been subjected to, and probably was, different techniques. We want to protect our folks.

If we have a court that decides these things—and a FISA court would be not so publicized and not so public. And I am not saying that al-Qaeda or Iraq or whoever is going to say, "Oh, America lets this happen, so we will; if they don't, we won't." How can we say that, if we have these courts, that some other country won't have a court, and how can we have faith in their courts to have rules that protect our folks?

Mr. RADSAN. Congressman, I recognize that I am trying to have it both way ways, that I want to have a very limited program to allow some techniques that are not permitted in the criminal justice system, that I would not permit to the Department of Defense. And I would hope, by containing it and having additional oversight through this special court, that we could prevent those arguments from being made that you suggested, that if one of our service people falls into the hands of the enemy, that we don't want the argument that this technique, whether it is sleep deprivation or some enhanced technique, is permissible.

I am trying to cabin this off to say that we may need aggressive techniques on someone like Khalid Sheikh Mohammed, the presumed mastermind of 9/11. We may need them on Abu Zubaydah.

But we don't want this to spread to Guantanamo, to Abu Ghraib. I am trying to carve out an exception and maintain it within the rule of law. It is difficult, but I don't know of a better solution.

Mr. RIVKIN. You guys forget one point. There is legal basis——

Mr. CONYERS. Could we let Ms. Massimino have the last word, Mr. Cohen?

Mr. COHEN. Yes, sir.

Ms. MASSIMINO. Thank you, Mr. Chairman.

Mr. CONYERS. Before we do that, I didn't want to cut off Mr. Rivkin.

Mr. RIVKIN. Thank you, Mr. Chairman, for your indulgence.

There is a very simple legal basis to have your cake and eat it too, which is when you deal with lawful enemy combatants who, upon capture, become POWs, you cannot use any coercive techniques whatsoever. When you deal with unlawful enemy combatants, the entitlement is a great deal less, entitled to humane treatment. You cannot torture them, but you certainly can use stress techniques that fall below that level.

Ms. MASSIMINO. Thank you. I just want to correct one impression about sleep deprivation and what Menachem Begin said about it, and that was that he would have said anything in order to get an hour of sleep—not that he would have told the truth, but he would have said anything. And that is the problem with a lot of these techniques.

I also want to say I am not an interrogations expert, but I would commend to you, Mr. Cohen, the letter from 35 retired flag and general officers, including six four-star officers of each of the four branches of service. And these are not flower children. They are combat-hardened men, all men who have overseen troops who have had to face very dangerous enemies.

And they say in their letter, "The Field Manual is the product of decades of practical experience and was updated last year to reflect lessons learned from the current conflict. Interrogation methods authorized by the Field Manual have proven effective in eliciting vital intelligence from dangerous enemy prisoners. Some have argued that the Field Manual rules are too simplistic for civilian interrogators. We reject that argument. Interrogation methods authorized in the Field Manual are sophisticated and flexible. And the principles reflected in the Field Manual are values that no U.S. agencies should violate."

This idea that we can somehow cabin it, a little bit of torture or something less than torture, only in certain circumstances, only by certain people, is a fantasy. That is exactly what the Administration tried to do. I don't believe that the Administration set out to have Abu Ghraib happen or to have there be widespread abuse of prisoners: 100 deaths in custody, 34 homicides, eight people literally tortured to death. I do not believe that that was the intent of this Administration. But it happened because there was a simplistic belief that you could do a little bit here, a little bit there and not, as Senator McCain pointed out, change who we are as a Nation.

That is where we are right now. This is not a theoretical debate that we are having. We are in that hole right now, and whether we stay there or climb out is largely up to you all.

Thank you.

Mr. COHEN. I would like to thank the panel.

And I would also like to suggest to the Chair and Members of the Committee—and I respect the Members of the Committee, and serving with them, just as with the Chairman, has been a great honor this year. This Committee, particularly on my side of the aisle, has some outstanding Americans who believe in the Constitution, and so it is so special to serve here.

I think we have learned a couple of things today. First of all, sleep deprivation is a very effective tool. And the Senate should have gone ahead and let the Republicans filibuster. Maybe they would have said some things that they shouldn't that we should have heard over the last year. And they should think about that for next year.

And the second thing is, Mr. Chairman, as I look at the Department of Justice again having an empty seat, I think back upon this year when this Committee saw officials from the Department of Justice, particularly Ms. Miers, not show up before this panel and not bring information.

And I hope at the beginning of the next year we will bring our contempt citation to the floor and show this Administration that this Committee and this Congress is not going to take it any longer and that we are going to be an independent branch, in the tradition of John Yarmuth and the freshman, and believe Article 1 and assert our power, as the American people have invested in this and as we took an oath to uphold it.

Thank you, Mr. Chairman.

Mr. CONYERS. And I think the witnesses and all the Members and those who have joined us today.

This is an excellent beginning, and we look forward to examining the record so that we can move forward to continued hearings.

Thank you very much.

The Committee is adjourned.

[Whereupon, at 12:32 p.m., the Committee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

LETTER DATED DECEMBER 17, 2007, FROM THE HONORABLE JOHN CONYERS, JR., TO THE HONORABLE MICHAEL B. MUKASEY, ATTORNEY GENERAL OF THE UNITED STATES

JOHN CONYERS, JR., Michigan
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Congress of the United States
House of Representatives

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JIM JORDAN, Ohio

December 17, 2007

The Honorable Michael Mukasey
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530

Dear Mr. Attorney General:

I am writing to follow up on communications by my staff to the Department regarding the Judiciary Committee's hearing this Thursday on the "Applicability of Federal Criminal Laws to the Interrogation of Detainees." The Committee has requested orally to the Office of Legislative Affairs that the Department provide an official to testify at this hearing. Our interest in hearing from a Department official is more urgent in the wake of your December 13th response to the Committee's December 7th letter requesting information pertaining to the destruction of the CIA videotapes showing interrogations of detainees. In that December 13th letter, you refused to provide our Committee with any of the requested information, other than a statement that an investigation is pending. Letters to other congressional committees similarly declined to provide information and asked that congressional investigations be delayed for an indefinite period of time. The Department has also resisted judicial inquiry into these issues.

As you well know, this Committee has jurisdiction over the Department and an obligation to perform meaningful oversight of the Department's activities, and other committees have oversight responsibilities concerning the CIA. We also note that congressional precedent dictates that parallel congressional and executive investigations occur frequently, and therefore should not be used as a shield against proper and necessary oversight. In light of the importance of the issues surrounding the Department's investigation into the destruction of the CIA tapes, we expect that the Department will provide a high level official to testify on this subject matter, specifically including the Department's attempts to forestall legislative or judicial inquiry.

The Honorable Michael Mukasey
Page Two
December 17, 2007

Sincerely,

John Conyers, Jr.
Chairman

cc: Hon. Lamar S. Smith
Hon. Jerrold Nadler
Hon. Robert C. Scott
Hon. William Delahunt
Hon. Trent Franks
Hon. Louie Gohmert
Hon. Brian Benczkowski

LETTER DATED DECEMBER 7, 2007, FROM THE HONORABLE JOHN CONYERS, JR., THE HONORABLE ROBERT C. SCOTT, THE HONORABLE JERROLD NADLER, AND THE HONORABLE WILLIAM DELAHUNT TO THE HONORABLE MICHAEL B. MUKASEY, ATTORNEY GENERAL OF THE UNITED STATES

JOHN CONYERS, JR., Michigan
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TRENT FRANKS, Arizona
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JIM JORDAN, Ohio

December 7, 2007

The Honorable Michael Mukasey
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530

Dear Mr. Attorney General:

We are writing with serious concern about published reports in the New York Times and elsewhere, largely confirmed by CIA Director Michael Hayden, that the CIA destroyed in 2005 at least two videotapes documenting "severe interrogation techniques" used in 2002 against terrorism suspects who had been in the agency's custody. According to the Times article, this destruction occurred "in the midst of Congressional and legal scrutiny" about the CIA's detention and interrogation program. Indeed, the former director and general counsel of the September 11 Commission explained that they had requested such materials but were never even told about the tapes, and that such withholding of evidence sought in fact-finding or criminal investigations could amount to obstruction of justice. Serious questions have similarly been raised about whether the tapes were improperly withheld from the federal court hearing the Zacarias Moussaoui case, which had requested evidence taken from interrogations of CIA prisoners.

These troubling revelations relate directly to our Committee's continuing investigation into the use of torture and severe interrogation methods by our government and the role of the Department of Justice with respect to such activities. Accordingly, we ask that you promptly respond to the following questions:

1. Prior to the CIA's statement to employees concerning the destruction of the videotapes this week, was anyone in the Department of Justice aware of the previous existence, plans to destroy, or destruction of the videotapes? Please explain.

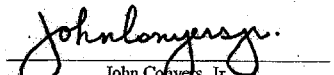
2. Did the CIA notify the Department of Justice of its intention to destroy the tapes and if so, when? Did the CIA receive a legal opinion from the Department of Justice's Office of Legal Counsel, or any other entity, relating to the destruction of the tapes? Please provide copies of any such written materials.

3. When the CIA provided information to Department of Justice lawyers in 2003 and 2005 with respect to the request of the court in the Moussaoui case for evidence taken from interrogations of CIA prisoners, as stated in the Times article, what information concerning the tapes was provided to Department lawyers? To the extent that any such information was provided, please explain what information was and was not provided to the Moussaoui court, state why the Department decided to provide or not provide such information, and provide copies of any relevant materials, including but not limited to submissions to the court.

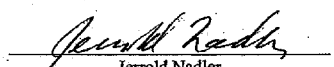
4. In light of the concerns about possible obstruction of justice relating to the destruction of the tapes, is the Department planning to investigate this matter?

Please provide the requested information and direct any questions to the Judiciary Committee office, 2138 Rayburn House Office Building, Washington, DC 20515 (tel: 202-225-3951; fax: 202-225-7680). We look forward to receiving your answers to these important questions by December 17, 2007. Thank you for your cooperation.

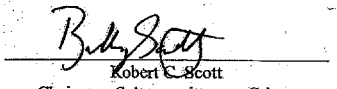
Sincerely,



John Conyers, Jr.
Chairman



Jerrold Nadler
Chairman, Subcommittee on the Constitution, Civil Rights and Civil Liberties



Robert C. Scott
Chairman, Subcommittee on Crime, Terrorism and Homeland Security

William Delahunt
Member, House Committee on the Judiciary

cc: Hon. Lamar S. Smith
Hon. Trent Franks
Hon. Randy Forbes
Hon. Silvestre Reyes
Hon. Peter Hoekstra
Hon. Brian Benczkowski
Chris Walker, Director of Congressional Affairs, CIA

LETTER DATED DECEMBER 13, 2007, FROM THE HONORABLE MICHAEL B. MUKASEY TO THE HONORABLE JOHN CONYERS, JR., THE HONORABLE ROBERT C. SCOTT, THE HONORABLE JERROLD NADLER, AND THE HONORABLE WILLIAM DELAHUNT, WITH ENCLOSURE

Office of the Attorney General
Washington, D.C.

December 13, 2007

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable William Delahunt
Member
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Robert C. Scott
Chairman
Subcommittee on Crime,
Terrorism and Homeland Security
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Jerrold Nadler
Chairman
Subcommittee on the Constitution, Civil
Rights and Civil Liberties
U.S. House of Representatives
Washington, D.C. 20515

Dear Messrs. Chairmen and Congressman Delahunt:

Thank you for your letter of December 7, 2007, regarding your concerns about the reported destruction by the Central Intelligence Agency (CIA) of videotapes showing interrogations of detainees and the Department's review of this matter.

As you may be aware, the Department's National Security Division is conducting a preliminary inquiry in conjunction with the CIA's Office of Inspector General. Enclosed please find a letter from Assistant Attorney General Kenneth L. Wainstein to CIA Acting General Counsel John A. Rizzo which provides some further detail regarding this inquiry, and which was released to the public on December 8th.

As to your remaining questions, the Department has a long-standing policy of declining to provide non-public information about pending matters. This policy is based in part on our interest in avoiding any perception that our law enforcement decisions are subject to political influence. Accordingly, I will not at this time provide further information in response to your letter, but appreciate the Committee's interests in this matter. At my confirmation hearing, I testified that I would act independently, resist political pressure and ensure that politics plays no role in cases brought by the Department of Justice. Consistent with that testimony, the facts will be followed wherever they lead in this inquiry, and the relevant law applied.

I hope that this information is helpful.

Sincerely,

Michael B. Mukasey
Attorney General

Enclosure

U.S. Department of Justice

National Security Division

Assistant Attorney General *Washington, D.C. 20530*

December 8, 2007

John A. Rizzo
Acting General Counsel
Central Intelligence Agency
Washington, DC 20505

Dear Mr. Rizzo:

I am writing this letter to confirm our discussions over the past several days regarding the destruction of videotapes of interrogations conducted by the Central Intelligence Agency (CIA). Consistent with these discussions, the Department of Justice will conduct a preliminary inquiry into the facts to determine whether further investigation is warranted. I understand that you have undertaken to preserve any records or other documentation that would facilitate this inquiry. The Department will conduct this inquiry in conjunction with the CIA's Office of Inspector General (OIG).

My colleagues and I would like to meet with your Office and OIG early next week regarding this inquiry. Based on our recent discussions, I understand that your Office has already reviewed the circumstances surrounding the destruction of the videotapes, as well as the existence of any pending relevant investigations or other preservation obligations at the time the destruction occurred. As a first step in our inquiry, I ask that you provide us the substance of that review at the meeting.

Thank you for your cooperation with the Department in this matter. Please feel free to contact me if you have any questions.

Sincerely,

Kenneth L. Wainstein
Assistant Attorney General
National Security Division

cc: John L. Helgerson
Inspector General
Central Intelligence Agency