

EXHIBIT

III

OCT. 19. 2003 4:18PM

NO. 648- P. 1



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DA C-06125-03



U.S. HOUSE OF REPRESENTATIVES

Permanent Select Committee on Intelligence

H-405, U.S. Capitol

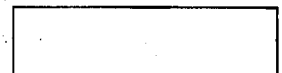
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October 10, 2003

EXECUTIVE MEMBERS:
J. DENNIS HASTERT, SPEAKER
NANCY PELOSI, DEMOCRATIC LEADER

The Honorable George Tenet
Director of Central Intelligence
Washington, D. C. 20505

Dear Director Tenet:

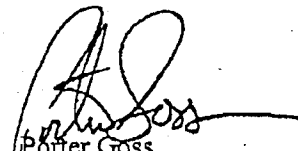
Since September 11, 2001, the Intelligence Community has been successful in deterring, disrupting and capturing numerous key terrorists. The potential information that could be gleaned from these terrorists is vital to protecting U.S. persons, facilities and interests located worldwide. Therefore, the Committee is intensely interested in ensuring that the Intelligence Community maximizes the opportunity to collect information from these terrorists in order to prevent future terrorist attacks.

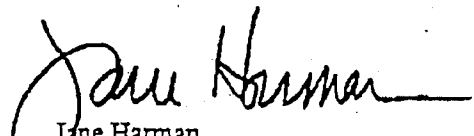
On Thursday, October 16th, 2003, the committee will hold a full committee briefing on the information being obtained from terrorist detainees, including but not limited to, information from three of the most noticeable terrorists in detention, Khalid Sheik Mohammed, Abu Zubaida and [redacted]. The Committee requests that you send senior-level briefers who can provide the Committee a full and detailed account on this subject. Some recent briefings to the Committee have been disappointing and the Committee has been frustrated with the quality of the information being provided.

The Committee also requests that the briefers provide details relating to the efforts by the Executive branch to utilize and disseminate the information gathered as a result of the detention of these individuals. The Committee requests a description of the analytical backdrop currently used to corroborate or reject the obtained information, as well as examples of operational activities that have already used and benefited from detainee provided information.

The Committee appreciates your efforts to provide this information. Any questions regarding this request should be directed to Mr. Mike Kostiw at (202) 225-4121.

Sincerely,


Porter Goss
Chairman


Jane Harman
Ranking Democrat

HPSCI 2003-1600

~~TOPSECRET~~ [redacted]

EXHIBIT

II

01/28/2004 WED 01:37 FAX 2022280280

002

PATRICK LEAHY
VERMONTDAC-00438-04
COMMITTEE
AGRICULTURE, NUTRITION, AND
FORESTRY
APPROPRIATIONS
JUDICIARY

United States Senate

WASHINGTON, DC 20510-4502

APPROVED FOR RELEASE (b) (2)
DATE: APR 2008 (b) (3)

January 27, 2004

The Honorable George Tenet
Director of Central Intelligence Agency
Central Intelligence Agency
Washington, DC 20505

Dear George,

On October 8, 2003, I wrote to inquire about the standards the Central Intelligence Agency applies to the treatment of detainees in its custody around the world. I am afraid that the reply I received to that letter dated November 3, 2003 from General Counsel Scott Muller did not answer the specific question I posed, namely, whether the policies and practices relating to the interrogation of detainees stated in a June 25, 2003 letter to me from Defense Department General Counsel William Haynes apply in full to the CIA.

Mr. Haynes' letter acknowledged that the United States has an obligation under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment not to engage in torture and to "undertake . . . to prevent other acts of cruel, inhuman, or degrading treatment or punishment which do not amount to torture." He further stated that the United States interprets the term "cruel, inhuman, or degrading treatment or punishment" as treatment or punishment that would be prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the U.S. Constitution. And he pledged that "United States policy is to treat all detainees and conduct all interrogations, wherever they may occur, in a manner consistent with this commitment."

Are all interrogations of detainees in CIA custody overseas conducted in a manner that is consistent with Mr. Haynes' statements?

I raise this concern in part because I wonder whether the rules under which CIA interrogators operate may deviate from those followed by the U.S. military, which, as you know, are highly developed and transparent. For example, U.S. Army Field Manual 34-52 prohibits "the use of force, mental torture, threats, insults, or exposure to unpleasant and inhumane treatment of any kind." It also rightly stresses that "the use of force is a poor technique, as it yields unreliable results, may damage subsequent collection efforts, and can induce the source to say whatever he thinks the interrogator wants to hear."

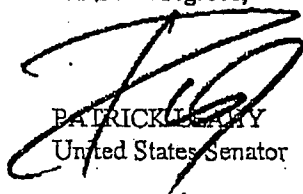
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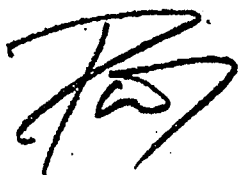
I hope you can assure me that interrogations conducted by the CIA or any persons working on its behalf are governed by the same guidelines as the Department of Defense. If CIA guidelines differ, could you clarify how, and why? I would also be interested in the results of the CIA's investigation into the matter referred to in the October 4, 2003 article in *The Guardian*.

Thank you for your assistance.

With best regards,



PATRICK LEAHY
United States Senator

George - all the best




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JJ



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**U.S. Senate
Select Committee on Intelligence**

Fax Cover Sheet

To: JOHN NEGROPONTE
From: SENATOR ROCKEFELLER
SSCI#: 2006.3664
Date: 9/22/2006
Time: 1424
Page 1 of 4
Prepared by: LShppard

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United States Senate

SELECT COMMITTEE ON INTELLIGENCE

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SSCI #2006-3664

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ANDREW W. JOHNSON, MINORITY STAFF DIRECTOR
KATHLEEN P. MOGHEE, CHIEF CLERK

September 22, 2006

The Honorable John Negroponte
Director of National Intelligence
Office of the Director of National Intelligence
Washington, D.C. 20511

Dear Director Negroponte:

The Senate will likely consider legislation next week relating to the Central Intelligence Agency's (CIA) detention and interrogation program. President Bush disclosed the existence of the CIA program in his September 6th White House statement. Since this disclosure, the President and senior Administration officials, including yourself, have publicly disclosed details about the past and current operation of the CIA program, including representations about why the program was suspended and the lawfulness of interrogation techniques following the Supreme Court's *Hamdan* decision.

As the Senate prepares to debate legislation in this area, I will need confirmation from your office that the enclosed statements are unclassified. I have carefully reviewed what the President and others have said publicly about the CIA program in recent weeks and I believe these statements will provide important context to the debate without divulging national security information. As a measure of caution, however, I have classified the enclosure.

Given the urgency of this matter, I ask that your office complete its classification review no later than 5 p.m. on Monday, September 25th. Please contact Mr. Andy Johnson, the Minority Staff Director, at 202-224-1732, if you have questions about this request.

Sincerely,



John D. Rockefeller IV
Vice Chairman

Enclosure

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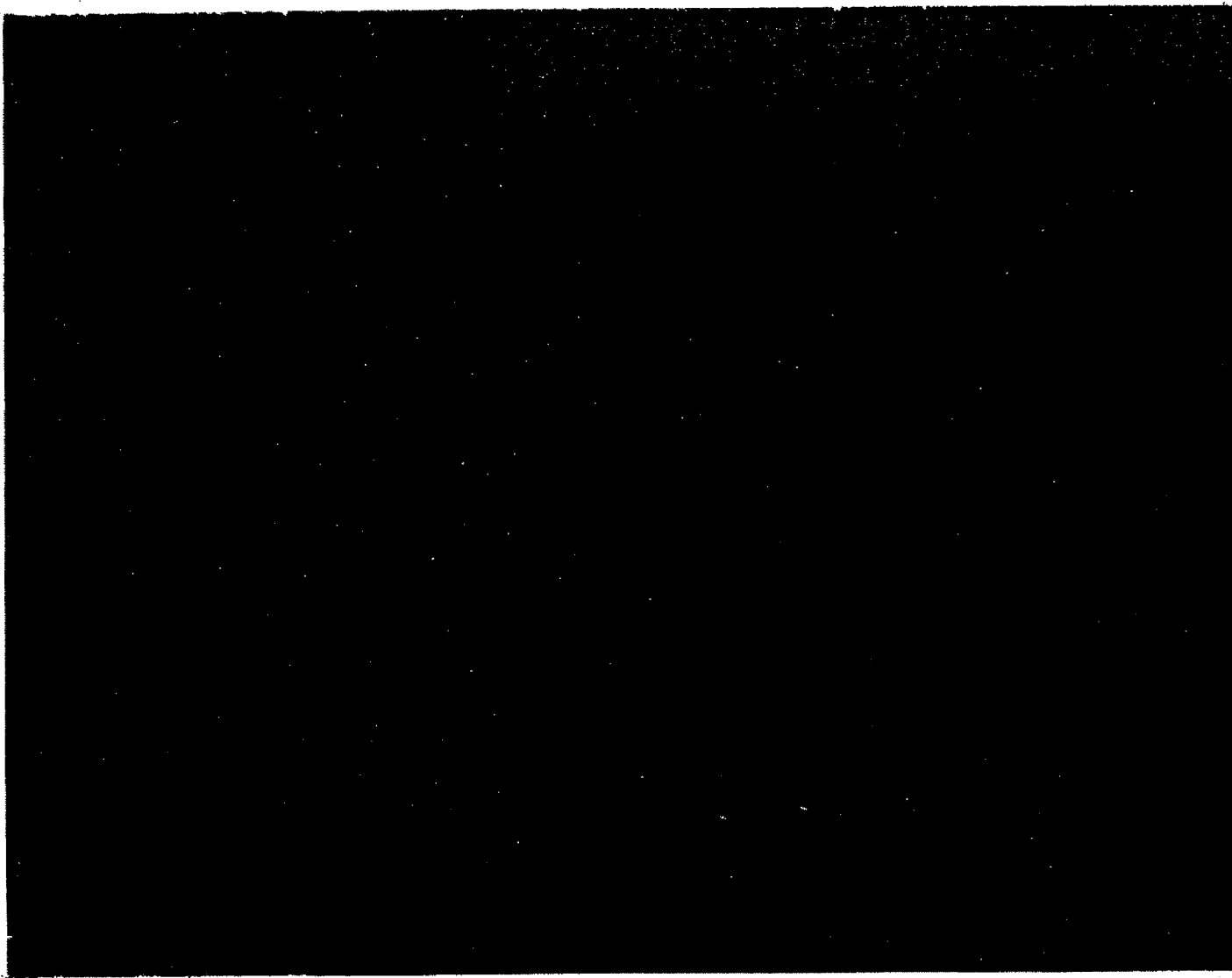
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EXHIBIT

KK

INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR
2008

MAY 31, 2007 – Ordered to be printed

Mr. ROCKEFELLER, from the Select Committee on Intelligence, submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany S. 1538]

The Select Committee on Intelligence, having considered an original bill (S. 1538) to authorize appropriations for fiscal year 2008 for intelligence and intelligence-related activities of the United States Government, the Intelligence Community Management Account, and the Central Intelligence Agency Retirement and Disability System, and for other purposes, reports favorably thereon and recommends that the bill do pass.

CLASSIFIED ANNEX TO THE COMMITTEE REPORT

The classified nature of United States intelligence activities precludes disclosure by the Committee of details of its budgetary recommendations. The Committee has prepared a classified annex to this report that contains a classified Schedule of Authorizations. The Schedule of Authorizations is incorporated by reference in the Act and has the legal status of public law. The classified annex is made available to the Committees of Appropriations of the Senate and the House of Representatives and to the President. It is also available for review by any Member of the Senate subject to the provisions of Senate Resolution 400 of the 94th Congress (1976).

SECTION-BY-SECTION ANALYSIS AND EXPLANATION

The following is a section-by-section analysis and explanation of the Intelligence Authorization Act for Fiscal Year 2008 that is being reported by the Committee. Following that

Section 509. Other technical amendments relating to the responsibilities of the Director of National Intelligence as head of the intelligence community.

Section 509 makes several technical and conforming changes to the Public Interest Declassification Act of 2000 (50 U.S.C. 435 note) to substitute the “Director of National Intelligence” for the “Director of Central Intelligence.”

COMMITTEE COMMENTS

CIA Detention and Interrogation Program

The fiscal year 2008 intelligence authorization bill is the first passed by the Committee in which all members were briefed on the CIA’s detention and interrogation program. While the program has been briefed from its outset to the Committee’s Chairman and Vice Chairman, the Administration’s decision to withhold the program’s existence from the full Committee membership for five years was unfortunate in that it unnecessarily hindered congressional oversight of the program.

Significant legal issues about the CIA detention and interrogation program remain unresolved. The Department of Justice has not produced a review of aspects of the program since the Supreme Court’s *Hamdan* decision and the passage into law of the Detainee Treatment Act in 2005 and the Military Commissions Act of 2006. The Committee urges prompt completion of such a legal review as soon as possible, regardless of whether the program is currently being used. The Committee expects that such review will be provided to the Committee as a part of its ongoing oversight of the program.

The Committee recognizes that the program was born in the aftermath of the attacks of September 11, when follow-on attacks were expected. The Committee acknowledges that individuals detained in the program have provided valuable information that has led to the identification of terrorists and the disruption of terrorist plots. More than five years after the decision to start the program, however, the Committee believes that consideration should be given to whether it is the best means to obtain a full and reliable intelligence debriefing of a detainee. Both Congress and the Administration must continue to evaluate whether having a separate CIA detention program that operates under different interrogation rules than those applicable to military and law enforcement officers is necessary, lawful, and in the best interests of the United States.

Moreover, the Committee believes that the demonstrated value of the program should be weighed against both the complications it causes to any ultimate prosecution of these terrorists, and the damage the program does to the image of the United States abroad.

Foreign Intelligence Surveillance Act Modernization and Liability Defense

EXHIBIT

LL

~~TOP SECRET//HCS//ORCON//NOFORN//MR~~

NOV - 9 2007



U.S. Department of Justice
United States Attorney
Eastern District of Virginia

2100 Jamieson Avenue
Alexandria, Virginia 22314

(703)299-3700

October 25, 2007

FILED WITH THE
COURT SECURITY OFFICER
CSO: M2C1550
DATE: 10/26/07

Hon. Karen J. Williams
Chief Judge
United States Court of Appeals
for the Fourth Circuit
1100 East Main Street, Suite 501
Richmond, VA 23219-3517

Hon. Leonie M. Brinkema
United States District Judge
Eastern District of Virginia
401 Courthouse Square
Alexandria, Virginia 22314-5799

Hand-delivered via Court Security Officer

Re: United States v. Zacarias Moussaoui
Fourth Circuit Docket Nos. 03-4792, 06-4494
District Court Case No. 01-455-A

Dear Chief Judge Williams and Judge Brinkema:

The Government respectfully submits this letter to inform the Court that two *ex parte* declarations previously submitted by the Central Intelligence Agency ("CIA") in this case contain factual errors concerning whether interrogations of certain enemy combatants were audio or video recorded. The errors, described more fully below, do not prejudice the defendant in light of his guilty plea, extensive admissions in the penalty phase, and the jury's decision not to impose a death sentence. We advise both Courts because the declarations in question were filed in the District Court and included in appendices filed in the Fourth Circuit.

~~Derived from: Multiple Sources~~
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~~TOP SECRET//HCS//ORCON//NOFORN//MR~~

Recently, we learned that the CIA obtained three recordings (two video tapes and one short audio tape) of interviews of [REDACTED]

[REDACTED] We are unaware of recordings involving the other enemy combatant witnesses at issue in this case [REDACTED] Further, the CIA came into possession of the three recordings under unique circumstances involving separate national security matters unrelated to the Moussaoui prosecution.

On September 13, 2007, an attorney for the CIA notified us of the discovery of a video tape of the interrogation of [REDACTED]

[REDACTED] On September 19, 2007, we viewed the video tape and a transcript [REDACTED] of the interview. The transcript contains no mention of Moussaoui or any details of the September 11 plot. In other words, the contents of the interrogation have no bearing on the Moussaoui prosecution.² The existence of the video tape, however, is at odds with statements in two CIA declarations submitted in this case, as discussed in detail below.

After learning of the existence of the first video tape, we requested the CIA to perform an exhaustive review to determine whether it was in possession of any other such recordings for any of the enemy combatant witnesses at issue in this case. CIA's review, which now appears to be complete, uncovered the existence of a second video tape, as well as a short audio tape, both of which pertained to interrogations [REDACTED] On October 18, 2007, we viewed the second video tape and listened to the audio tape, while reviewing transcripts

¹ [REDACTED] was one of the enemy combatant witnesses whom Moussaoui wanted to call to testify on his behalf; [REDACTED]

² The recording from [REDACTED]

³ [REDACTED]

[REDACTED] Like the first video tape, the contents of the second video tape and the audio tape have no bearing on the Moussaoui prosecution — they neither mention Moussaoui nor discuss the September 11 plot. We attach for the Courts' review *ex parte* a copy of the transcripts for the three recordings.⁵

At our request, CIA also provided us with intelligence cables pertaining to the interviews recorded on the two video tapes. Because we reviewed these cables during our discovery review, we wanted to ensure that the cables accurately captured the substance of the interrogations. Based on our comparison of the cables to the [REDACTED] videotapes, and keeping in mind that the cables were prepared for the purposes of disseminating intelligence, we found that the intelligence cables accurately summarized the substance of the interrogations in question.

The fact that audio/video recording of enemy combatant interrogations occurred, and that the United States was in possession of three of those recordings is, as noted, inconsistent with factual assertions in CIA declarations dated May 9, 2003 (the "May 9 Declaration"), and November 14, 2005 (the "November 14 Declaration"). The May 9 Declaration arose after the Fourth Circuit directed the District Court to consider substitutions under the Classified Information Procedures Act ("CIPA") in lieu of enemy combatant testimony sought by the defendant. In an ensuing CIPA hearing, on May 7, 2003, Judge Brinkema ordered the Government to determine, *inter alia*, whether interrogations [REDACTED] were recorded. *See* 5/7/03 Tr. 11-13, 69. Two days later, the Government filed the May 9 Declaration, which was *ex parte* and accompanied by a motion under CIPA § 4 to make a limited disclosure to the defense of only the answers to the District Court's questions (but not the full explanations contained in the declaration). Judge Brinkema granted the § 4 motion, permitting the Government to make the following disclosure, among others, to the defense:

⁴ The transcript of the audio tape previously existed and was contained within an intelligence cable.

⁵ Although we have provided defense counsel with a copy of this letter, we have not provided them with a copy of the transcripts for two reasons. First, the interviews address other national security matters for which defense counsel lack a need to know. [REDACTED]

~~Derived from: Multiple Sources~~

~~Declassify on: 25X1 Human~~

Question: Whether the interrogations [REDACTED] are being recorded in any format?

Answer: No.

See Docket No. 905 (Attachment A).⁶

The November 14 Declaration arose after the Fourth Circuit published its decision in *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004), and after Moussaoui pleaded guilty. Following these events, and in anticipation of the penalty-phase trial, the District Court ordered the Government to disclose various information [REDACTED] including whether interrogations were recorded. See 5/2/05 Order (Docket No. 1275). Judge Brinkema subsequently reconsidered most of that order, at the Government's request (see Docket No. 1282), but still directed the Government to "confirm or deny that it has video or audio tapes of these interrogations," see 11/3/05 Order (Docket No. 1359), at 4. The November 14 Declaration ensued, in which a CIA executive stated that the "U.S. Government does not have any video or audio tapes of the interrogations of [REDACTED]" See 11/14/05 Declaration (Docket No. 1369), at 3.

Unbeknownst to the authors of the declarations, the CIA possessed the three recordings at the time that the Declarations were submitted. We asked the CIA to ascertain the reason for such an error. [REDACTED]

As best as can be determined, it appears that the authors of the Declarations relied on assurances of the component of the CIA that [REDACTED] unknowing that a different component of the CIA had contact with [REDACTED]

As noted above, the errors in the CIA declarations at issue, although unfortunate, did not prejudice Moussaoui, who pled guilty, reiterated his guilt in substantial admissions in the penalty phase, and ultimately received a life sentence after the jury declined to sentence him to death.

⁶ This response was cited by the District Court in an opinion, dated May 15, 2003. See Docket No. 925, at 9. Both the response and the May 15 opinion were included in the classified Supplemental Joint Appendix filed with the Fourth Circuit at the same time. See SC 249, 273. The May 9 Declaration was included in the classified Supplemental *Ex Parte* Appendix filed with the Fourth Circuit on May 23, 2003, in docket number 03-4162. See SGX, at 17-23.

~~Derived from: Multiple Sources~~
~~Declassify on: 25X1-Human~~

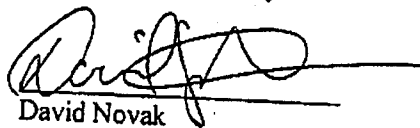
We bring the errors to the Court's attention, however, as part of our obligation of candor to the Court.

The Government will promptly apprise the Court of any further developments.

Sincerely,

Chuck Rosenberg
United States Attorney

By:



David Novak
David Raskin
Assistant United States Attorneys

cc: Justin Antonipillai, Esq.
Barbara Hartung, Esq.
Appellate Counsel for Zacarias Moussaoui
(without transcripts)

EXHIBIT

MM

THE 9/11
COMMISSION
REPORT

CONTENTS

List of Illustrations and Tables ix

Member List xi

Staff List xiii–xiv

Preface xv

1. “WE HAVE SOME PLANES” 1
 - 1.1 Inside the Four Flights 1
 - 1.2 Improvising a Homeland Defense 14
 - 1.3 National Crisis Management 35

2. THE FOUNDATION OF THE NEW TERRORISM 47
 - 2.1 A Declaration of War 47
 - 2.2 Bin Ladin’s Appeal in the Islamic World 48
 - 2.3 The Rise of Bin Ladin and al Qaeda (1988–1992) 55
 - 2.4 Building an Organization, Declaring
War on the United States (1992–1996) 59
 - 2.5 Al Qaeda’s Renewal in Afghanistan (1996–1998) 63

3. COUNTERTERRORISM EVOLVES 71
 - 3.1 From the Old Terrorism to the New:
The First World Trade Center Bombing 71
 - 3.2 Adaptation—and Nonadaptation—
in the Law Enforcement Community 73
 - 3.3 ... and in the Federal Aviation Administration 82
 - 3.4 ... and in the Intelligence Community 86

3.5	... and in the State Department and the Defense Department	93
3.6	... and in the White House	98
3.7	... and in the Congress	102
4.	RESPONSES TO AL QAEDA'S INITIAL ASSAULTS	108
4.1	Before the Bombings in Kenya and Tanzania	108
4.2	Crisis: August 1998	115
4.3	Diplomacy	121
4.4	Covert Action	126
4.5	Searching for Fresh Options	134
5.	AL QAEDA AIMS AT THE AMERICAN HOMELAND	145
5.1	Terrorist Entrepreneurs	145
5.2	The "Planes Operation"	153
5.3	The Hamburg Contingent	160
5.4	A Money Trail?	169
6.	FROM THREAT TO THREAT	174
6.1	The Millennium Crisis	174
6.2	Post-Crisis Reflection: Agenda for 2000	182
6.3	The Attack on the USS <i>Cole</i>	190
6.4	Change and Continuity	198
6.5	The New Administration's Approach	203
7.	THE ATTACK LOOMS	215
7.1	First Arrivals in California	215
7.2	The 9/11 Pilots in the United States	223
7.3	Assembling the Teams	231
7.4	Final Strategies and Tactics	241
8.	"THE SYSTEM WAS BLINKING RED"	254
8.1	The Summer of Threat	254
8.2	Late Leads—Mihdhar, Moussaoui, and KSM	266
9.	HEROISM AND HORROR	278
9.1	Preparedness as of September 11	278
9.2	September 11, 2001	285
9.3	Emergency Response at the Pentagon	311
9.4	Analysis	315

10. WARTIME	325
10.1 Immediate Responses at Home	326
10.2 Planning for War	330
10.3 "Phase Two" and the Question of Iraq	334
11. FORESIGHT—AND HINDSIGHT	339
11.1 Imagination	339
11.2 Policy	348
11.3 Capabilities	350
11.4 Management	353
12. WHAT TO DO? A GLOBAL STRATEGY	361
12.1 Reflecting on a Generational Challenge	361
12.2 Attack Terrorists and Their Organizations	365
12.3 Prevent the Continued Growth of Islamist Terrorism	374
12.4 Protect against and Prepare for Terrorist Attacks	383
13. HOW TO DO IT? A DIFFERENT WAY OF ORGANIZING THE GOVERNMENT	399
13.1 Unity of Effort across the Foreign-Domestic Divide	400
13.2 Unity of Effort in the Intelligence Community	407
13.3 Unity of Effort in Sharing Information	416
13.4 Unity of Effort in the Congress	419
13.5 Organizing America's Defenses in the United States	423
<i>Appendix A: Common Abbreviations</i>	429
<i>Appendix B: Table of Names</i>	431
<i>Appendix C: Commission Hearings</i>	439
<i>Notes</i>	449

- The post-9/11 Afghanistan precedent of using joint CIA-military teams for covert and clandestine operations was a good one. We believe this proposal to be consistent with it. Each agency would concentrate on its comparative advantages in building capabilities for joint missions. The operation itself would be planned in common.
- The CIA has a reputation for agility in operations. The military has a reputation for being methodical and cumbersome. We do not know if these stereotypes match current reality; they may also be one more symptom of the civil-military misunderstandings we described in chapter 4. It is a problem to be resolved in policy guidance and agency management, not in the creation of redundant, overlapping capabilities and authorities in such sensitive work. The CIA's experts should be integrated into the military's training, exercises, and planning. To quote a CIA official now serving in the field: "One fight, one team."

Recommendation: Finally, to combat the secrecy and complexity we have described, the overall amounts of money being appropriated for national intelligence and to its component agencies should no longer be kept secret. Congress should pass a separate appropriations act for intelligence, defending the broad allocation of how these tens of billions of dollars have been assigned among the varieties of intelligence work.

The specifics of the intelligence appropriation would remain classified, as they are today. Opponents of declassification argue that America's enemies could learn about intelligence capabilities by tracking the top-line appropriations figure. Yet the top-line figure by itself provides little insight into U.S. intelligence sources and methods. The U.S. government readily provides copious information about spending on its military forces, including military intelligence. The intelligence community should not be subject to that much disclosure. But when even aggregate categorical numbers remain hidden, it is hard to judge priorities and foster accountability.

13.3 UNITY OF EFFORT IN SHARING INFORMATION

Information Sharing

We have already stressed the importance of intelligence analysis that can draw on all relevant sources of information. The biggest impediment to all-source analysis—to a greater likelihood of connecting the dots—is the human or systemic resistance to sharing information.

The U.S. government has access to a vast amount of information. When databases not usually thought of as "intelligence," such as customs or immigra-

tion information, are included, the storehouse is immense. But the U.S. government has a weak system for processing and using what it has. In interviews around the government, official after official urged us to call attention to frustrations with the unglamorous “back office” side of government operations.

In the 9/11 story, for example, we sometimes see examples of information that could be accessed—like the undistributed NSA information that would have helped identify Nawaf al Hazmi in January 2000. But someone had to ask for it. In that case, no one did. Or, as in the episodes we describe in chapter 8, the information is distributed, but in a compartmented channel. Or the information is available, and someone does ask, but it cannot be shared.

What all these stories have in common is a system that requires a demonstrated “need to know” before sharing. This approach assumes it is possible to know, in advance, who will need to use the information. Such a system implicitly assumes that the risk of inadvertent disclosure outweighs the benefits of wider sharing. Those Cold War assumptions are no longer appropriate. The culture of agencies feeling they own the information they gathered at taxpayer expense must be replaced by a culture in which the agencies instead feel they have a duty to the information—to repay the taxpayers’ investment by making that information available.

Each intelligence agency has its own security practices, outgrowths of the Cold War. We certainly understand the reason for these practices. Counterintelligence concerns are still real, even if the old Soviet enemy has been replaced by other spies.

But the security concerns need to be weighed against the costs. Current security requirements nurture overclassification and excessive compartmentation of information among agencies. Each agency’s incentive structure opposes sharing, with risks (criminal, civil, and internal administrative sanctions) but few rewards for sharing information. No one has to pay the long-term costs of overclassifying information, though these costs—even in literal financial terms—are substantial. There are no punishments for *not* sharing information. Agencies uphold a “need-to-know” culture of information protection rather than promoting a “need-to-share” culture of integration.¹⁵

Recommendation: Information procedures should provide incentives for sharing, to restore a better balance between security and shared knowledge.

Intelligence gathered about transnational terrorism should be processed, turned into reports, and distributed according to the same quality standards, whether it is collected in Pakistan or in Texas.

The logical objection is that sources and methods may vary greatly in different locations. We therefore propose that when a report is first created, its data be separated from the sources and methods by which they are obtained. The

report should begin with the information in its most shareable, but still meaningful, form. Therefore the maximum number of recipients can access some form of that information. If knowledge of further details becomes important, any user can query further, with access granted or denied according to the rules set for the network—and with queries leaving an audit trail in order to determine who accessed the information. But the questions may not come at all unless experts at the “edge” of the network can readily discover the clues that prompt to them.¹⁶

We propose that information be shared horizontally, across new networks that transcend individual agencies.

- The current system is structured on an old mainframe, or hub-and-spoke, concept. In this older approach, each agency has its own database. Agency users send information to the database and then can retrieve it from the database.
- A decentralized network model, the concept behind much of the information revolution, shares data horizontally too. Agencies would still have their own databases, but those databases would be searchable across agency lines. In this system, secrets are protected through the design of the network and an “information rights management” approach that controls access to the data, not access to the whole network. An outstanding conceptual framework for this kind of “trusted information network” has been developed by a task force of leading professionals in national security, information technology, and law assembled by the Markle Foundation. Its report has been widely discussed throughout the U.S. government, but has not yet been converted into action.¹⁷

Recommendation: The president should lead the government-wide effort to bring the major national security institutions into the information revolution. He should coordinate the resolution of the legal, policy, and technical issues across agencies to create a “trusted information network.”

- No one agency can do it alone. Well-meaning agency officials are under tremendous pressure to update their systems. Alone, they may only be able to modernize the stovepipes, not replace them.
- Only presidential leadership can develop government-wide concepts and standards. Currently, no one is doing this job. Backed by the Office of Management and Budget, a new National Intelligence Director empowered to set common standards for information use throughout the community, and a secretary of homeland security who helps

extend the system to public agencies and relevant private-sector databases, a government-wide initiative can succeed.

- White House leadership is also needed because the policy and legal issues are harder than the technical ones. The necessary technology already exists. What does not are the rules for acquiring, accessing, sharing, and using the vast stores of public and private data that may be available. When information sharing works, it is a powerful tool. Therefore the sharing and uses of information must be guided by a set of practical policy guidelines that simultaneously empower and constrain officials, telling them clearly what is and is not permitted.

“This is government acting in new ways, to face new threats,” the most recent Markle report explains. “And while such change is necessary, it must be accomplished while engendering the people’s trust that privacy and other civil liberties are being protected, that businesses are not being unduly burdened with requests for extraneous or useless information, that taxpayer money is being well spent, and that, ultimately, the network will be effective in protecting our security.” The authors add: “Leadership is emerging from all levels of government and from many places in the private sector. What is needed now is a plan to accelerate these efforts, and public debate and consensus on the goals.”¹⁸

13.4 UNITY OF EFFORT IN THE CONGRESS

Strengthen Congressional Oversight of Intelligence and Homeland Security

Of all our recommendations, strengthening congressional oversight may be among the most difficult and important. So long as oversight is governed by current congressional rules and resolutions, we believe the American people will not get the security they want and need. The United States needs a strong, stable, and capable congressional committee structure to give America’s national intelligence agencies oversight, support, and leadership.

Few things are more difficult to change in Washington than congressional committee jurisdiction and prerogatives. To a member, these assignments are almost as important as the map of his or her congressional district. The American people may have to insist that these changes occur, or they may well not happen. Having interviewed numerous members of Congress from both parties, as well as congressional staff members, we found that dissatisfaction with congressional oversight remains widespread.

The future challenges of America’s intelligence agencies are daunting. They include the need to develop leading-edge technologies that give our policy-

EXHIBIT

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A Review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq



Oversight and Review Division
Office of the Inspector General
May 2008

UNCLASSIFIED

The OIG also interviewed more than 230 witnesses and reviewed over 500,000 pages of documents provided by the FBI, other components of the Department of Justice (DOJ), and the Department of Defense (DOD). OIG employees made two trips to GTMO to tour the detention facilities, review documents, and interview witnesses, including five detainees held there. We also interviewed one released detainee by telephone.³

Our review focused primarily on the activities and observations of FBI agents deployed to military facilities under the control of the Department of Defense between 2001 and 2004. With limited exceptions, we were unable to and did not investigate the conduct or observations of FBI agents regarding detainees held at CIA facilities for several reasons. First, we were unable to obtain highly classified information about CIA-controlled facilities, what occurred there, and what legal authorities governed their operations. Second, during the course of our review we learned that in January 2003 the CIA Inspector General had initiated a review of the CIA terrorist detention and interrogation program. Therefore, our review focused mainly on the conduct and observations of the approximately 1,000 FBI employees related to detainee interviews in military zones.

A. Organization of Report

The OIG's complete report, which contains the full results of our review, has been classified by the relevant government agencies at the Top Secret/SCI level. The full report contains 12 chapters. The first three chapters provide introductory and background information, including a description of the role of the FBI in the military zones and the various FBI interrogation policies in place at the time of the September 11 attacks. Chapter Four discusses the FBI's involvement in the joint interrogation of a "high value detainee," Zayn Abidin Muhammed Hussein Abu Zubaydah, shortly after his capture, and the subsequent deliberations within the FBI regarding the participation of its agents in joint interrogations with agencies that did not follow FBI interview policies.⁴ Chapter Five examines the dispute between the FBI and the

as DOD or CIA personnel, who would have been necessary to make such a determination.

³ In addition, the OIG examined prior reports addressing the issue of detainee treatment in the military zones. Among the most significant of those reports were the *Church Report*, a review of DOD interrogation operations conducted in 2004 and 2005 by the DOD, and the *Schmidt-Furlow Report*, a DOD investigation in 2005 into allegations of detainee abuse at GTMO.

⁴ When the OIG investigative team was preparing for its trip to GTMO in early 2007, we asked the DOD for permission to interview several detainees, including

(Cont'd.)

DOD regarding the treatment of another detainee held at GTMO, Muhammad Al-Qahtani. The dispute regarding Al-Qahtani arose from the tension between the differing interrogation techniques employed by the FBI and the military. This dispute was elevated to higher-level officials and eventually resolved in favor of the DOD's approach.

Chapter Six examines the FBI's response to the public disclosure of detainee mistreatment at Abu Ghraib prison in Iraq and related concerns expressed by FBI agents in the military zones. These responses included issuance of the FBI's May 2004 Detainee Policy, which reminded FBI agents not to use force, threats, or abuse in detainee interviews and instructed FBI agents not to participate in joint interviews in which other agencies were using techniques that were not in compliance with FBI rules. The FBI also conducted an internal review to determine the extent of the FBI's knowledge regarding detainee mistreatment. The seventh chapter discusses the communication of FBI policies to FBI employees who were deployed in military zones, including the FBI's efforts to provide training and guidance to its agents on appropriate interrogation techniques.

Chapters Eight, Nine, and Ten detail the results of the OIG's survey and investigation into what FBI agents saw, heard about, and reported with respect to detainee interrogations in GTMO, Afghanistan, and Iraq.

Zubaydah. The DOD agreed, stating that our interviews would not interfere with their attempts to obtain any intelligence from the detainees, including Zubaydah. However, the CIA Acting General Counsel objected to our interviewing Zubaydah. [REDACTED]

[REDACTED] In addition, the CIA Acting General Counsel asserted that the OIG had not persuaded him that the OIG had a "demonstrable and immediate need to interview Zubaydah at that time" given what the Acting General Counsel understood to be the OIG's "investigative mandate." In addition, the CIA Acting General Counsel asserted that Zubaydah could make false allegations against CIA employees. We believe that none of these reasons were persuasive or warranted denying us access to Zubaydah. First, neither the FBI nor the DOD objected to our access to Zubaydah at that time. In addition, neither the FBI nor the DOD stated that an OIG interview would interfere with their interviews of him. Second, at GTMO we were given access to other high value detainees. Third, we did have a demonstrable and immediate need to interview Zubaydah at that time, as well as the other detainees who we were given access to, notwithstanding the CIA Acting General Counsel's position that we had not persuaded him. Finally, the fact that Zubaydah could make false allegations against CIA employees – as could other detainees – was not in our view a legitimate reason to object to our access to him. In sum, we believe that the CIA's reasons for objecting to OIG access to Zubaydah were unwarranted, and its lack of cooperation hampered our investigation.

EXHIBIT

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UNCLASSIFIED

Verbatim Transcript of Combatant Status Review Tribunal Hearing for ISN 10015

OPENING

REPORTER: On the record.

RECORDER: All rise.

PRESIDENT: Remain seated and come to order. Proceed, Recorder.

RECORDER: This Tribunal is being conducted at 0813, 14 March 2007 on board U.S. Naval Base Guantanamo Bay, Cuba. The following personnel are present:
Captain [REDACTED], United States Navy, President
Lieutenant Colonel [REDACTED], United States Air Force, Member
Lieutenant Colonel [REDACTED], United States Marine Corps, Member
Lieutenant Commander [REDACTED], United States Navy, Personal Representative
[REDACTED], Translator
Gunnery Sergeant [REDACTED], United States Marine Corps, Reporter
Lieutenant Commander [REDACTED], United States Navy, Recorder
Captain [REDACTED] is the Judge Advocate member of the Tribunal.

OATH SESSION 1

RECORDER: All Rise.

PRESIDENT: The Recorder will be sworn. Do you, Lieutenant Commander [REDACTED], solemnly swear to carry out the duties as Recorder assigned in this Tribunal so help you God?

RECORDER: I do.

PRESIDENT: The Reporter will now be sworn. The Recorder will administer the oath.

RECORDER: Do you, Gunnery Sergeant [REDACTED], swear that you will faithfully discharge your duties as assigned in this Tribunal so help you God?

REPORTER: I do.

PRESIDENT: The Translator will be sworn.

RECORDER: Do you swear or affirm that you will faithfully perform the duties of Translator in the case now in hearing, so help you God?

ISN #10015
Enclosure (3)
Page 1 of 36

UNCLASSIFIED

UNCLASSIFIED

TRANSLATOR: (TRANSLATION OF ABOVE).

PRESIDENT: You stated that you were tortured into confession by your captors. And, that you made certain statements in order to stop the torture?

TRANSLATOR: (TRANSLATION OF ABOVE).

DETAINEE
(through translator): Yes.

PRESIDENT: Alright. I need some more details about that.

TRANSLATOR: (TRANSLATION OF ABOVE).

DETAINEE
(through translator): I have a lot of information.

PRESIDENT: Alright. I'll ask questions and then please respond to them.

TRANSLATOR: (TRANSLATION OF ABOVE).

DETAINEE
(through translator): Okay.

PRESIDENT: Do you know, the ah, who your captors were?

TRANSLATOR: (TRANSLATION OF ABOVE).

DETAINEE
(through translator): No. I do not.

PRESIDENT: Were they Americans, Yemenis?

TRANSLATOR: (TRANSLATION OF ABOVE).

DETAINEE
(through translator): They were Americans.

PRESIDENT: And ah. When did this occur?

TRANSLATOR: (TRANSLATION OF ABOVE).

DETAINEE
(through translator): From the time I was arrested five years ago, they have been torturing me. It happened during interviews. One time they tortured me one way and another time they tortured me in a different way.

UNCLASSIFIED

PRESIDENT: Please describe the methods that were used.

TRANSLATOR: (TRANSLATION OF ABOVE).

DETAINEE

(through translator): [REDACTED]. What else do I want to say? . [REDACTED] Many things happened. There were doing so many things. What else did they did?

[REDACTED]. They do so many things. So so many things. What else did they did?

[REDACTED]. After that another method of torture began. [REDACTED] They used to ask me questions and the investigator after that used to laugh. And, I used to answer the answer that I knew. And, if I didn't reply what I heard, he used to [REDACTED]. So many things happened. I don't in summary, that's basically what happened.

PRESIDENT: Alright. Let me ask. So then since the time of capture 2002 until you came to Guantanamo you experienced these types of events?

TRANSLATOR: (TRANSLATION OF ABOVE).

DETAINEE

(through translator): Yes.

PRESIDENT: Are you under any pressure or duress today?

TRANSLATOR: (TRANSLATION OF ABOVE).

DETAINEE

(through translator): No. Not today.

PRESIDENT: You mentioned in your statement that there were seven things you admitted to. The French Merchant Vessel Limburg incident and the rest.

TRANSLATOR: (TRANSLATION OF ABOVE).

PRESIDENT: Do you have that there in front of you?

TRANSLATOR: (TRANSLATION OF ABOVE).

DETAINEE

(through translator): Yes.

PRESIDENT: You admitted to these seven things. You're telling us because the treatment you received?

ISN #10015
Enclosure (3)
Page 16 of 36

UNCLASSIFIED

UNCLASSIFIED

DETAINEE

(through translator): I also about the USS COLE. They took lot of information from me during the investigation about this incident. The business was about fishing not uh, not uh bombings. And, I spent a lot of time with people who I had fishing project with. And the people who where involved with, in the project, died because of a natural incident. And after that I got to know the people who were involved in the explosion. We were also, we were planning to be involved in a fishing project. I left the thing, I left the project and left. They are the ones who were involved in those things. I'm not responsible for them or what they have in their heads.

PRESIDENT: What did you say to your interrogators about your involvement in the *COLE* bombing?

TRANSLATOR: (TRANSLATION OF ABOVE).

DETAINEE

(through translator): From what I remember in simple details. For example, I was in Afghanistan. When I knew that two people were going to Yemen to be involved in a fishing project. And, I took about five or ten thousand dollars from Usama bin Laden. He used to help all people. He used to help people get married and so forth. So I just I get help from him too. So I went to Yemen to get involved with those people but during the investigation that's not what was explained. In the investigation they think that I took the money to be involved in a military incident. And, they used to [REDACTED]. So, I use to say yes, yes; I went there. I took money from Usama bin Laden. I was planning this and that. After that they used to ask me how many times did I go to Usama bin Laden, and take money and went back continue planning and explosions. I just make up I don't know how many times. I used to stop by Usama bin Laden and take some money. Also regarding the explosions in Sa'ada because this is not connected it had nothing to do with *COLE* bombing. It's the truth that during the investigation I admitted to. I told them that I took some money then I gave it to somebody to buy, to buy explosives. That's, this, this thing news in general is true. But during the investigation I told them yes I took this money and to get involved in some bombings. But in reality I took them and I gave them to my friend and I gave them to my friend Rhibay. For Herdada. It was simple. I don't recall. Maybe three or four boxes, fifty kilograms. I gave it to him. In Yemen they use that to dig wells. So buying explosives is a common thing. That's in general what happen. I still told them a lot of thing. A lot of details like how to buy a boat or a new boat that boat. Things like that.

PRESIDENT: So, you took money from Usama bin Laden in order to get married? To get married and because he was being generous to you?

TRANSLATOR: (TRANSLATION OF ABOVE).

ISN #10015
Enclosure (3)
Page 19 of 36

UNCLASSIFIED

UNCLASSIFIED

DETAINEE

(through translator): Yes. I took a lot of money from him.

PRESIDENT: And, you gave explosives to friends but that was to dig wells?

TRANSLATOR: (TRANSLATION OF ABOVE).

DETAINEE

(through translator): Yes. But during the investigation I told them those things were used to bomb, to bomb the *COLE*.

PRESIDENT: And, you're involvement with the people, who did bomb the *COLE* or involved in the Limburg, was because of your fishing business and not because of the bombing?

TRANSLATOR: (TRANSLATION OF ABOVE).

DETAINEE

(through translator): Yes. It was business relationship, like fishing projects.

PRESIDENT: Going back to the seven items that are in your statement.

TRANSLATOR: (TRANSLATION OF ABOVE).

PRESIDENT: It, ah. You said you made statements about bombing American ships or about planning to attack ships. And about Usama bin Laden having a nuclear bomb and a plan to hijack a plane.

TRANSLATOR: (TRANSLATION OF ABOVE).

DETAINEE

(through translator): I just this, I just said those things to make the people happy. They were very happy when I told them those things. But when they freed me, I told them all I only told you these things to make you happy.

PRESIDENT: So what your telling us today is those statements, those statement are not true?

TRANSLATOR: (TRANSLATION OF ABOVE).

DETAINEE

(through translator): For example the rockets in Saudi Arabia. In general it the truth there was a man who took rockets from Yemen to Saudi Arabia. But I know nothing about things. I only know the person only. But doing the investigation they [REDACTED] and tortured. And I said yes I know these things. I used to say yeah, yeah we did those things to hit you in the peninsula. And this person in prison right now in Saudi Arabia right now. He cannot say I help them in the planning, because I

ISN #10015
Enclosure (3)
Page 20 of 36

UNCLASSIFIED

UNCLASSIFIED

don't know about that thing. That is the reason why my mom, my father, my brother, and my family are in prison. The people in Saudi Arabia they want me to surrender. That's the reason why I left Saudi Arabia and went to Pakistan. That's one point. Regarding point number four, which talks about which talks about the plan to bomb the American ship in the Gulf, I had a project in Dubai regarding a ship. A business project. But I took money from Usama bin Laden to do this project. And at the end, Usama bin Laden asked me if I can use those things in military actions. But when I went to Dubai I ended the whole project. I sold the boat and I let the people go. I was able to do this project if I wanted to with the people on the boat and put the explosives on the boat and send them to Yemen and bomb anything. But I ended the project. I wasn't planning anything. I worked for about six or seven months on the project as a business project. At the end I knew that Usama bin Laden was able to use this project as the military tool. But I stopped everything and I let the people go. And what I had on my mind is to get married and live in Dubai. In regarding point number five. A relationship with people committing bombings in Saudi Arabia. They tortured me. [REDACTED]. They used to call me the "commander of the sea". They used to call me the "commander of the Gulf". He was in charge of the people there. When everything happened in Saudi Arabia or whenever explosions occurred. They used to tell me what relation do I have with those things and they used to torture me. And I have nothing to do with these things. Five years they weren't able to get anything from me. I don't know. Like now to admit what. Yes, I know those people. I know a lot of people in Saudi Arabia who do not want a military presence in Saudi Arabia. They will move against you in a natural way. I know some people in Saudi Arabia who I have helped financially. Some of them to get married and some of them to do other stuff. But I'm not responsible if they take the money and they go and fight or do something else. Number six. Usama bin Laden having a nuclear bomb. [REDACTED]. Then they used to laugh. Then they used to tell me you need to admit to those information. So I used to invent some of the stuff for them to say Usama bin Laden had a nuclear bomb. And they used to laugh and they were very happy. They were extremely happy because of this news. Then after that I told them, listen. He has no bomb. After a month of playing games and doing this and that. I understood at one time I talk to Hilad. We were walking in the street. I was joking with him and I told him we had nuclear missiles or bombs and to hit the Americans. Like in the movies, like in a movies that contain talk about the nuclear weapons. [REDACTED]. So when you used to lie to them, they used to get very hard, they used to get happy. One time Mukhtar told me about a point which is, which is not listed here. General talk. Maybe we should find somebody to kill him and get rid of him. So I used to say okay. Do, do whatever you want. I was traveling during that time. [REDACTED]. I really didn't understand what they were getting at. They want you to admit that you are planning. General stuff that everybody was talking about. I used to take a ride in a taxi cab. And he used to say that it was important for the Americans to leave. And if I find an American I will hit them

ISN #10015
Enclosure (3)
Page 21 of 36

UNCLASSIFIED

UNCLASSIFIED

Verbatim Transcript of Combatant Status Review Tribunal Hearing for ISN 10016

OPENING

PRESIDENT: This hearing shall come to order.

RECORDER: This Tribunal is being conducted at 1334 hours on 27 March 2007 on board U.S. Naval Base Guantanamo Bay, Cuba. The following personnel are present:
Colonel [REDACTED], United States Air Force, President,
Lieutenant Colonel [REDACTED], United States Air Force, Member,
Lieutenant Commander [REDACTED], United States -- Commander [REDACTED], United States Navy, Member,
Lieutenant Colonel [REDACTED], United States Air Force, Personal Representative,
Language Analyst¹, [REDACTED],
Sergeant First Class [REDACTED], United States Army, Reporter,
Lieutenant Colonel [REDACTED], United States Army, Recorder,
Colonel [REDACTED] is the Judge Advocate member of the Tribunal.

OATH SESSION 1

RECORDER: All rise.

PRESIDENT: Standby, we'll correct the record on that. Lieutenant Colonel [REDACTED] is the Judge Advocate member of this Tribunal. Recorder, you may proceed. All rise. The Recorder will be sworn. Do you, Lieutenant Colonel [REDACTED], swear or affirm that you will faithfully perform the duties as Recorder assigned in this Tribunal so help you God?

RECORDER: I do.

PRESIDENT: The Reporter will now be sworn. The Recorder will administer the oath.

RECORDER: Do you, Sergeant First Class [REDACTED], swear or affirm that you will faithfully discharge your duties as Reporter assigned in this Tribunal so help you God?

REPORTER: I do.

¹ Language Analyst, Translator, and Linguist are used interchangeably.

UNCLASSIFIED

Representative to speak on my behalf. I hope from you justice, and I know that is what you seek. [REDACTED] They did this to me because they thought I was [REDACTED] a partner to USAMA BIN LADEN, as is mentioned in the unclassified Summary of Evidence against me. [REDACTED] After this, I started feeling the symptoms of my 1992 injury to my head, including the complete loss of my memory and an inability to speak, read, or write. But, these abilities slowly came back to me although I still have shrapnel in my head. Also, another form of torture was when they-- when they-- excuse me, I'll repeat this sentence. Also, another form of torture was when they wouldn't give me my diary, which caused me to have nearly 40 seizures. The mental anguish that came from broken promises in which they said that they would give me my diary back contributed to the seizures. Most importantly, my diary can refute the accusations against me and it can show that I am personally against the sort of acts that were committed. Dear Members of the Tribunal. I am saying all of this-- excuse me. In saying all of this, I am not trying to gain your pity. I am only trying for you to see the big picture, the true picture not the picture, depicted by the media, which the CIA found out too late. Therefore, I would like you to know this truth before you make your decision. I know this is not a criminal trial, as you say, but all I hope from you is that you try me for something that I am proud of having done, not something I didn't do or am against, nor something that would shame me before the world. I am not here to lie to you, or cheat you, or to lie to myself by saying that I am not an enemy of your injustice. I have been an enemy of yours since I was a child because of your unjust acts against my people, the Palestinians, through your help and partnership with Israel in occupying our land and by killing our men and raping our women and kicking out our people and turning them into refugees for more than 60 years. Until now, half of my people are refugees in refugee camps. I can not deny that, since back when I was a child, I liked a lot of things in your country and your history and your culture. I am not lying by saying that, but it is the truth. My moral position is not against the American people or America, but against the government which I see as a partner in oppression. A partner of a killer is also a killer. I also resent the military that is used by this government to inflict this oppression. In other words, dear members of the military, I am against you. My words are not hypocrisy, and I do respect you. I believe that even my enemy should be respected. I don't deny that I am an enemy of your injustice, but I deny that I am an enemy combatant. I never conducted nor financially supported, nor helped in any operation against America. Yes, I write poetry against America and, yes, I feel good when operations by others are conducted against America but only against military targets such as the U.S.S Cole. But, I get angry if they target civilians, such as those in the World Trade Center. This I am completely against [REDACTED] My diary will prove that some of our accusations

UNCLASSIFIED

were not my plans. How can I plan for operations that I don't believe in? What you call plans about what BIN LADEN did on 9/11, I wrote in my diary in response to BIN LADEN's action, noting that he had many choices on how to conduct war which are wrong in Islam, such as race war, killing civilians, burning cities, and targeting civilians in markets. This is what people of war do, and I am sorry you are one of them. This is the truth. If someone reads my diary with a biased mind, he will misinterpret my meaning. Dear Members, this is what I have for you. As you have noticed, it wasn't a defense that contained much evidence [REDACTED]. I also do not have a lawyer to defend me in front of this Tribunal. Take notice that if a lawyer was present, he would not have allowed me to say what I said because I said the truth without reservation. And I am willing to be hung for it for something I have done. I am not a lawyer to defend myself. I can't even speak clearly, temporarily, God willing. It is only to demonstrate to you."

PRESIDENT: ZAYN AL ABIDIN MUHAMMAD HUSAYN, do you have anything to add to that statement?

DETAINEE: No.

PRESIDENT: No. Thank you. In your statement, you mentioned months of torture. Has anything that you provided us today regarding your written statements related to those times that you have been tortured?

DETAINEE: No. [conversation between Detainee and Language Analyst discussing the President's question] Actually, most of what they say I did in first months they take against me even for some things or like this they take I was--I was nearly before half die plus what they do torture me.--it--There I was not afraid from die because I do believe I will be shahid [Language Analyst translates] martyr, but as God make me as a human and I weak, so they say yes, I say okay, I do I do, but leave me. They say no, we don't want to. You to admit you do this, we want you to give us more information. This part I can't because I don't know. I say, "yes, I was partner of BIN LADEN. [REDACTED] and I'm his partner of RESSAM." I say okay but leave me. So they write but they want what's after, more information about more operations, so I can't. They keep torturing me, tell me why them self they discover you are not torturing. So some, not all, some what you have here even me say of me here in the paper, it is from FBI. But I don't know of the dealing; I was in the hands of FBI or CIA. But FBI people when I met them in the last month, [REDACTED] And they have my part--four part of my diary and the origin is with them. So who's torture me and taking over information. Maybe they are FBI, maybe are CIA; I don't know, 'till now. So here they say FBI-- FBI, they not talk about the CIA, so I don't know.

UNCLASSIFIED

PRESIDENT: So you did make statements during that treatment?

DETAINEE: A lot.

PRESIDENT: And what you said, was it correct, was it incomplete or was it not correct or untrue in any way?

DETAINEE: [REDACTED] This first part the second part, okay. What is the operation? I not have the specifics; I talk about open idea. So most of this here the CIA, they admitted that I admitted too. [REDACTED] They start asking me again and again about this thing. I tell them no. [REDACTED] I was like this, I was like this, I want to finish this. And something they not believe all what I do, say in that time. Some they believe, some they not believe. I don't know what they need or not need. They only ask and I answer.

PRESIDENT: In your previous statement, you were saying specific treatments. Can you describe a little bit more about what those treatments were?

DETAINEE: [REDACTED]

PRESIDENT: I understand.

DETAINEE: And they not give me chance all this, [REDACTED]

PRESIDENT: So I understand that during this treatment, you said things to make them stop and then those statements were actually untrue, is that correct?

DETAINEE: Yes.

PRESIDENT: Ok. Regarding your statements that you have made here today at this Tribunal session, have they been completely voluntary of your own free will?

DETAINEE: Yes.

PRESIDENT: Very well. What you have told us will be included in the record of these proceedings and will also be reported for any appropriate investigation. Also, we will carefully consider what you have told us as we make our determination as to your enemy combatant status. I understand it was difficult for you to provide that information to us and I appreciate your time in providing it as well as all the information you provided us today.

RECORDER: Sir, may I ask for one point of clarification?

PRESIDENT: Please. Continue Recorder.

UNCLASSIFIED

RECORDER: ZAYN AL ABIDIN MUHAMMAD, have you been mistreated at any time since you have been in U.S. military custody here at Guantanamo Bay?

DETAINEE: The truth, no. But small things. Here I discover they have rules, strict rules for detainees, but they do not care about the [Via Language Analyst] sick. From some side I appreciate what the doctors they do for me even here. But see [points to his leg] the problem of my leg and knee. I need to cover my-- this thing, I used the, what this [Detainee removes his left shoe and extracts a prayer cap] what we use it for pray to, I request them give me socks; this is too much cold I feel twenty four hours even in the very hot time since I have the injury. They say socks in this not allowed in this area in this place. Sometime I appreciate what you do; sometime I say maybe they mean it because they look for me as enemy. Ok, me myself, I am not big group; I am small group. I was having rules for my group if we can catch anybody, even if he Israeli my enemy. I am Palestinian. you should trust--uh respect him completely and take--we finish his case if we make [Via Language Analyst] an Islamic trial. Or if he is not army or something me myself I will send him to his country. It was small group. But this big country, we have rules, they make small things really, its affect person same me from his half-half body my eyes, my hole in my head, my problem all is from this side sorry again and again, I have one testicle; I lost it even and this problem here is all this part it is not complete. [Indicating his left thigh] This part--still good, still strong. [Indicating his right thigh] I tried to adjust myself as I can with this but small problems; socks make big problems. Small socks as much I request I need to cover it by my head [Via Language Analyst]. The prayer hat I had to use it in my socks, as socks.

PRESIDENT: And-- and during the session, you did remove your prayer hat from your shoe that you have been using to keep your feet warm. We understand that.

DETAINEE: At least twenty--twenty years hours I ask. And one of this big problem is it is my diary. Not my diary only, it is my papers. I do believe this seizure not came only here before sixteen years I have this big problem the holes or injury which I lost my memory. I not have seizure when I came here because angry because I don't know thinking about my paper diary [REDACTED] When I came here I ask about it again and again. I do not whose take it; [REDACTED]. I was only thinking--thinking I found myself I found myself fell down. They not believe in the beginning but the specialist doctor they tell me yes most of the seizure he have he bring it for himself by that think. And I know I try to escape but I can't. Thinking--thinking sixteen years, I have these paper with me as my child Maybe it is too [Via Language Analyst] it's emotional. But I try to be practical mind but I find myself too weak in front of these things because I write and everything happen for me so when they take it I feel they take my child. The child his age is sixteen or seventeen years. So I think if you ask

ISN # 10016
Enclosure (3)
Page 25 of 27

UNCLASSIFIED

UNCLASSIFIED

anybody outside they say this not torturing this is ordinary. For me, it is bigger than what CIA for me. [REDACTED] What they do on my body I will forget it, plus now taking the paper, my paper. Maybe not the army take, it but the army, I think, is responsible about making me suffer. In these two fingers or three fingers, [Pointing to his feet.] it's too cold I didn't know what how to say it in English Twenty Four Hours. And small things, really, it's not too important thing but its affect person as me is--uh I don't like to admit I'm a sick person. I try to be good Muslim person but the truth is almost half of my body is not good.

RECORDER: Thank you for your response.

PRESIDENT: Okay.

DETAINEE: I will. [Tries to return prayer cap to his left shoe] I will use it after.

PRESIDENT: Okay, we will see that your shoe is tended to at the end of this hearing; if we can proceed.

CLOSING UNCLASSIFIED SESSION

PRESIDENT: All unclassified evidence having been provided to the Tribunal, this concludes the open tribunal session. ZAYN AL ABIDIN MUHAMMAD HUSAYN shall be notified of the Tribunal decision upon completion of the review of these proceedings by the Combatant Status Review Tribunal Convening Authority in Washington, D.C. If the Tribunal determines that you should not be classified as an enemy combatant, you will be released to your home country as soon as arrangements can be made. If the Tribunal determines you're classified as an enemy combatant, you may be eligible for an Administrative Review Board hearing at a future date. The Administrative Review Board will make an assessment of whether there is continued reason to believe that you pose a threat to the United States or its coalition partners in the ongoing armed conflict against terrorist organizations, such as al Qaida and its affiliates and supporters, or whether there are other factors bearing upon the need for continued detention. You will have the opportunity to be heard and to present relevant information to the Administrative Review Board. You can present information from your family and friends that might be of help to you at the Board. You are encouraged to contact them as soon as possible to begin to gather information that may help you. A military officer will be assigned at a later date to assist you in the Administrative Review Board process.

ADJOURN OPEN SESSION

PRESIDENT: The open session of this Tribunal hearing is adjourned.

UNCLASSIFIED

Verbatim Transcript of Combatant Status Review Tribunal Hearing for ISN 10020

OPENING

PRESIDENT: This hearing shall come to order.

RECORDER: This Tribunal is being conducted at 08:42 on 15 April 2007 on board U.S. Naval Base Guantanamo Bay, Cuba. The following personnel are present: Colonel [REDACTED], United States Air Force, President, Commander [REDACTED], United States Navy, Member, Lieutenant [REDACTED], United States Air Force, Member, Major [REDACTED], United States Air Force, Personal Representative, Sergeant First Class [REDACTED], United States Army, Reporter, Major [REDACTED], United States Air Force, Recorder. Lieutenant Colonel [REDACTED] is the Judge Advocate member of the Tribunal.

OATH SESSION 1

RECORDER: All rise.

PRESIDENT: The Recorder will be sworn. Do you, Major [REDACTED], swear or affirm that you will faithfully perform the duties as Recorder assigned in this Tribunal, so help you God?

RECORDER: I do.

PRESIDENT: The Reporter will now be sworn. The Recorder will administer the oath.

RECORDER: Do you, Sergeant First Class [REDACTED], swear that you will faithfully discharge your duties as Reporter assigned in this Tribunal, so help you God?

REPORTER: I do.

PRESIDENT: We'll take a brief recess while the Detainee is brought into the room.

RECORDER: The time is 08:43 on 15 April 2007. This Tribunal is now in recess. All rise. [All personnel depart the room.]

CONVENING AUTHORITY

RECORDER: [All personnel return into the room at 08:48.] All rise.

PRESIDENT: This hearing will come to order. You may be seated. Good morning.

DETAINEE: Good morning. How are you guys doing?

UNCLASSIFIED

I would like to make a few quick comments regarding the questioning of my witnesses. The CSRT refused to show me exactly what type of questions they were going to ask my witnesses until they were answered by my witnesses. But overall, we talked in general about what kind of questions were going to be asked. I did see the exact questions that were presented to SAIFULLAH PARACHA prior to him seeing them.

I am not fully satisfied with this whole tribunal process, but my Personal Representative has done a fine job guiding me through the whole process. Special thanks to my Personal Representative.

Before the end of these proceedings, I would like to present to you "my after arrest report" and I even call it "torture report." It has some facts about how the CIA, [REDACTED], and DoD abused me.

If you don't want to hear the entire report, then at least allow me to present you the summary of this report which is very short and to the point. This report is directly related to the Summary of Evidence due to the Summary of Evidence coming from a combination of both classified and unclassified sources. [REDACTED]. These are the same people who tortured me. Please read it before believing the government sources. These are my words and truth as I know it.

PRESIDENT: Thank you. There are a few more statements that I believe Mister McK-- Mister KHAN would like to be read in. Is that correct?

PERSONAL REP: Yes, Sir. I just want to confer with the Detainee regarding this statement.

PRESIDENT: Please.

PERSONAL REP: MAJID, do you want the entire statement read or the summary statement?

DETAINEE: Two things I ask you. The, if the President allows, the entire statement is about twelve pages and the summary is to the point. But the summary doesn't really explain what really happened. I would prefer, if you can allow it, to read the whole report. It is more Intel but it's not to the point, but I think it have to do with ah--it have to do the whole thing because it has to do with the CIA and FBI and everything. So, I would prefer the whole report. And it's up to the President if he allows it or not.

PRESIDENT: We are certainly going to read everything that's provided to us and I will allow to have the whole thing read in. It would save us a little time as far as all three of us hearing it at one time. And again, we will also read all this material that is provided to us carefully and consider the matters regarding your determination as an enemy combatant status. So at this point, Personal

UNCLASSIFIED

ISN # 10020
Enclosure (3)
Page 21 of 39

UNCLASSIFIED

Representative, when you are ready, you may proceed with the ah--I believe the written statement regarding his treatment.

PERSONAL REP: Exhibit D-b. MAJID KHAN written Statement of Torture for Combatant Status Review Tribunal taken March 2007 by PR3. [REDACTED].

For me, things got better [REDACTED], and [REDACTED] I am brought to Guantanamo Bay, Cuba. I swear to God this place in some sense worst than CIA jails. I am being mentally torture here, [REDACTED].

[REDACTED].

Since I got here, I have tried to cut my artery which goes through my elbow, on January 12th, 07, and again on February 22nd, 07. I went on hunger strike for four weeks on January 2nd, 07, and lost almost thirty pounds. And I have already spent two and half month in disciplinary status without comfort, incentive items, and sometimes even without basic items. On 28 November 2006, I wrote on my walls, "Stop torturing to me-- stop torturing me; I need newspaper, my lawyer and my mail, etc." I don't cooperate with them until they would treat me as human and until they would stop mentally torturing me.

[REDACTED]

My real problem with this administration where I am staying right now, that they are corrupt and some of guards, supervisors, and manager who may be DoD contractor today, [REDACTED].

Since these guards managers hate me [REDACTED], that what caused me to do or they call it act out. They are gotten-- getting even with me here under DoD, and making me suffer by mentally torturing me. They know my weaknesses--what drive me crazy and what doesn't. [REDACTED]. In following paragraph, I am writing some facts about DoD and how they are abusing their powers, and there is no check and balance system. Even the doctor, medic, and Naval people are in this together, meaning that they are manipulators and corrupt. There is extensive torture even for the smallest of infractions.

[REDACTED].

On October 6th, 06, ICRC gave me my only daughter pictures which was born after my abduction. I left my wife pregnant but didn't know the sex of the baby until ICRC told me about her. So anyway, when I took this picture and came back to my camp building, the guard forcibly took it from me. Then I went crazy and yelled for one hour and they ignored me as if they

UNCLASSIFIED

ISN # 10020
Enclosure (3)
Page 22 of 39

UNCLASSIFIED

February 22, 07, I chewed my artery again. Medic cleaned my wound.

February 2-- February 23rd, 2007, I got my stuff back after six weeks.

February 26th, 07, they took some of incentive and comfort items, telling me that they are afraid as if I am going to hurt myself and they returned them on March 3rd, 2007. But never put me in disciplinary status.

Some Facts How They Are Mentally Torturing Us:

They them self use the best kind of stuff but they give us cheap branded, unscented deodorant soap to wash ourselves with. Also, same goes for shampoo, toothpaste, and deodorant, etc.

This camp gives us only twelve to fourteen pages of newsletter only once week. Most of the stuff is crap; only few pages are worth of reading it.

In main rec no weight lifting machine, no toilet, no sink, no hoops, and even balls them self have little air in them; they hardly bounce.

In end of January 2007, they brought a big fan which makes noise, which makes more noise than produce air in main hall. It drives us crazy. They have since turned the fan off and I have been moved to A19 on 6 April 2007. The fan itself is still there.

They know how we feel about family members. They intentionally make our ICRC mails delay- very,very delay in so call censorship issues.

We only get one hour of communal rec and only one hour of main rec per day, 2 books per week, and that's it. No mind stimulations, no solitary games, no DVD players, no entertainment, and you know how small and cozy our cells are in size. It has been seven months like this, no improvement.

[REDACTED] So please, before making any decision on me, please read this report of torture and then think yourself if these people can go that far and how hard it is for them to make something up, [REDACTED] I affirm these are my words and the truth as I know it.

PRESIDENT: Personal Representative, thank you.

PERSONAL REP: There is one additional statement, Sir.

PRESIDENT: Okay. Before we continue, I have a question. The title of this document says it was taken on March 2007. There's no specific date. And then at the end, it was certified as dated the 15th of April, which I would assume,

UNCLASSIFIED

ISN # 10020
Enclosure (3)
Page 26 of 39

UNCLASSIFIED

PERSONAL REP: Just to reiterate, there are points in the oral summary that are not contained in the written summary. So the written report that was just read, there are additional points in the in the oral statement. [SCI¹].

PRESIDENT: Yes. I am looking forward to hearing those, yes.

PERSONAL REP: Exhibit D-c. MAJID KHAN Oral Statement of Torture for Combatant Status Review Tribunal taken March/April 2007 by PR3. Mister President and Members of the Combatant Status Review Tribunal, thank you for letting me make a statement regarding the torture I received after my kidnapping [REDACTED].

[REDACTED]

After my arrest, Allah blessed me with only one beautiful daughter, but I have still been unable to talk to her.

Since my arrival at Guantanamo Bay I have been without communal recreation for eleven weeks all together.

I have had my beard forcibly shaven twice.

On two occasions I choed-- chewed my artery and three times they have made me wear the protective suicide prevention smock for days.

For three weeks, I was without basic, incentive, or comfort items.

For nine weeks, I was without incentive or comfort items.

Four weeks without sunlight and fresh air.

Four weeks straight I went on hunger strike and lost twenty-five pounds. They put nine bags of IV's of sodium, potassium, and glucose mix forcibly in my arm. It left big bruises on my arms for weeks. I was threatened by the medic with nose feeding where they would strap me in a special chair that allows nose-- no movement at all-- at all for more than ten straight hours each feeding.

There are many more abuses. Please read tort-- the report of torture that my Personal Representative has provided to the Board. My statements are 100% true. I can take a lie detector test and I tried to prove in my reports from the fact that these statements are 100% true. I affirm these are my words and the truth as I know it.

¹ Simultaneous Communication Interruption

UNCLASSIFIED

DETAINEE: There was always statement, [REDACTED].

PRESIDENT: Statements that you made.

DETAINEE: Statement that I made, even written.

PRESIDENT: Understood.

DETAINEE: [REDACTED]

PRESIDENT: Well I was just using the terminology that you had in your statement where you said you-- you [SCI] did not cooperate.

DETAINEE: [REDACTED]

PRESIDENT: Well, and I'd like to ask about those statements. Were those statements true or incorrect?

DETAINEE: Definitely not true.

PRESIDENT: That's all I am looking for and- [SCI]

DETAINEE: Okay. [SCI]

PRESIDENT: -first direct statement on that.

DETAINEE: Definitely not true. Most of the stuff, yes.

PRESIDENT: Very well. Okay, that completes the questions I had. I will make an-a statement here regarding what we've heard here today. Ah-What you have told us will be included in the record, obviously. We'll also be reported to appropriate authorities for any investigation that's necessary. As you know, we will carefully consider what you have said to us today, as we make our determination regarding your enemy combatant status. [We] consider this a very important matter. You've heard us take our oath and ah-- you know we won't ah-- consider these-- this evidence that you provided as well as we received, very carefully. *[Tribunal President's post-hearing note: The previous sentence is a direct transcript of my statement; however, it is incomplete and disjointed as I attempted to transition to receiving the Detainee's final statement. As directly stated previously, I intended to reiterate that the Tribunal would carefully consider the Detainee's statements.]* At this point in the hearing, we've received all the unclassified information [Detainee acknowledges with "ah ha."] and, ah, we're now about to complete this portion by providing you an opportunity to provide a final statement. Would you like to make a final statement at this time?

DETAINEE: I have few questions of what we talked about today.

UNCLASSIFIED

EXHIBIT

PP

on August 20, 2007.¹ But the attached proposed interim Guantanamo SCI Protective Order also includes additional provisions the government believes are necessary because this case involves information classified at a level higher than that involved in *Bismullah*. A redline of the proposed interim Guantanamo SCI Protective Order compared to this Court's *Bismullah* order (with proposed modifications sought on August 20, 2007) is attached as Exhibit B.

The stipulated order agreed to hereby is an interim measure designed to enable Petitioner's counsel to communicate with Petitioner Majid Khan during resolution of any issues that may arise regarding an appropriate protective order. Accordingly, both parties consider this proposal to be an interim measure during resolution of all issues regarding the appropriate Guantanamo SCI Protective Order and both parties retain all right to seek modifications to this order upon further consideration. Additionally, the parties hereby apprise the Court that the parties may by further joint motion seek modifications of the interim Guantanamo SCI Protective Order entered by the Court. This order should remain in effect until further order of this Court. The stipulated order

¹ The government has challenged the *Bismullah* decision, including the protective order entered on July 30, 2007, and reserves the right to challenge any protective order entered in this case based on that decision. Petitioners also reserve the right to challenge any protective order entered in this case based on that decision.

agreed to hereby is an interim measure designed to enable Petitioners' counsel to communicate with Petitioner Majid Khan during resolution of all issues regarding the appropriate protective order. The parties retain their right to seek modification of this Order or to challenge it before this Court or the Supreme Court.

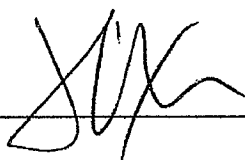
CONCLUSION

For the foregoing reasons, the parties stipulate to this Court's immediate entry of a Guantanamo SCI Protective Order in the form of Attachment A, hereto.

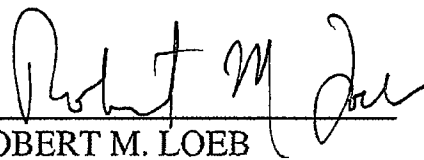
Respectfully submitted,

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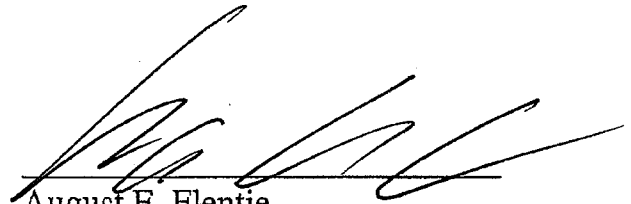


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CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2007, I served the foregoing
“EMERGENCY STIPULATION TO IMMEDIATE ENTRY OF INTERIM
GUANTANAMO SCI PROTECTIVE ORDER” upon counsel of record by e-mail and
by causing copies to be sent by regular mail to:

J. Wells Dixon
Gitanjali S. Gutierrez
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012



August E. Flentje

Exhibit A

1. General Provisions

- A. The court finds that this case involves classified national security information or documents, the storage, handling and control of which require special security precautions, and access to which require a security clearance and a "need to know." This case may also involve other protected information or documents, the storage, handling and control of which may require special precautions in order to protect the security of United States personnel and facilities, and other significant interests.
- B. The purpose of this Protective Order is to establish the procedures that must be followed by a Petitioner, Petitioner's Counsel, and all other individuals who receive access to classified information or documents, or other protected information or documents, in connection with this case, including the Department of Defense (DoD) Privilege Team.
- C. The procedures set forth in this Protective Order will apply to all aspects of this case, and may be modified by further order of the court *sua sponte* or upon application by any party. The court will retain continuing jurisdiction to enforce or modify the terms of this Order.
- D. Nothing in this Order is intended to or does preclude the use of classified information by the Government as otherwise authorized by law outside of this action under the Detainee Treatment Act.
- E. Petitioner's counsel of record is responsible for advising his or her partners, associates, and employees, the petitioner, and others of the contents of this Protective Order, as appropriate or needed.
- F. All documents marked as classified, and information contained therein, remain classified unless the documents bear a clear indication that they have been declassified or determined to be unclassified by the agency or department that is the original classification authority of the document or of the information contained therein.
- G. Any violation of this Protective Order may result in a sanction for contempt.

2. Designation of Court Security Officer

The Court designates Christine E. Gunning as Court Security Officer for these cases, and Jennifer H. Campbell, Erin E. Hogarty, Joan B. Kennedy, Charline A. DaSilva, Nathaniel A. Johnson, Daniel O. Hartenstine, Michael P. Macisso, James P. Londergan, Barbara J. Russell and Miguel A. Ferrer as Alternate Court Security Officers, for the purpose of providing security arrangements necessary to protect from unauthorized disclosure of any classified documents or information, or protected documents or information, to be made available in connection with these cases. Petitioners' counsel shall seek guidance from the Court Security Officer with regard to appropriate storage, handling, transmittal, and use of classified documents or information.

3. Definitions

- A. "Detainee" means an alien detained by the DoD as an alleged enemy combatant at the U.S. Naval Base at Guantánamo Bay, Cuba.
- B. "Petitioner" means a Detainee or a "next friend" acting on his behalf.
- C. "Petitioner's Counsel" includes a lawyer who is employed or retained by or on behalf of a Detainee for purposes of representing the Detainee in this litigation, as well as co-counsel, interpreters, translators, paralegals, investigators, and all other personnel or support staff employed or engaged to assist in this litigation.
- D. As used herein, the words "documents" or "information" include, but are not limited to, all written or printed matter of any kind, formal or informal, including originals, conforming copies and non-conforming copies (whether different from the original by reason of notation made on such copies or otherwise), and further include, but are not limited to:
 - i. papers, correspondence, memoranda, notes, letters, reports, summaries, photographs, maps, charts, graphs, interoffice and intraoffice communications, notations of any sort concerning conversations, meetings, or other communications, bulletins, teletypes, telegrams, telefacsimiles, invoices, worksheets; and drafts, alterations, modifications, changes and amendments of any kind thereto;
 - ii. graphic or oral records or representations of any kind, including, but not limited to, photographs, charts, graphs, microfiche, microfilm, videotapes, sound recordings of any kind, and motion pictures;
 - iii. electronic, mechanical or electric records of any kind, including, but not limited to, tapes, cassettes, disks, recordings, electronic mail,

films, typewriter ribbons, word processing or other computer tapes or disks, and all manner of electronic data processing storage; and

iv. information acquired or conveyed orally.

E. The terms "classified information" and "classified documents" refer to:

- i. any document or information that has been classified by any Executive Branch agency in the interests of national security or pursuant to Executive Order, including Executive Order 12958, as amended, or its predecessor Orders, as "CONFIDENTIAL," "SECRET," or "TOP SECRET," or additionally controlled as "SENSITIVE COMPARTMENTED INFORMATION (SCI)," or any classified information contained in such document;
- ii. any document or information, regardless of its physical characteristics, now or formerly in the possession of a private party that has been derived from United States government information that was classified, regardless of whether such document or information has subsequently been classified by the Government pursuant to Executive Order, including Executive Order 12958, as amended, or its predecessor Orders, as "CONFIDENTIAL," "SECRET," or "TOP SECRET," or additionally controlled as "SENSITIVE COMPARTMENTED INFORMATION (SCI)";
- iii. oral or nondocumentary classified information known or reasonably should be known to be classified to the Petitioner or Petitioner's Counsel; or
- iv. any document or information as to which the Petitioner or Petitioner's Counsel has been notified orally or in writing that such document or information contains classified information.

F. The terms "protected information" and "protected documents" refer to any document or information deemed by the court, either upon application by the Government or *sua sponte*, to require special precautions in storage, handling, and control, in order to protect the security of United States Government personnel or facilities, or other significant government interests.

G. "Access to classified information" or "access to protected information" means having access to, reviewing, reading, learning, or otherwise coming to know in any manner any classified information or protected information.

-
- H. "Communication" means all forms of communication between Petitioner's Counsel and a Detainee, including oral, written, electronic, or by any other means.
 - I. "Legal Mail" consists only of documents and drafts of documents that are intended for filing in this action and correspondence directly related to those documents that-
 - i. relate directly to the litigation of this action;

- ii. address only (a) events leading up to the capture of the Detainee on whose behalf the petition in this action was filed, (b) events occurring between such Detainee's capture and any hearing before a Combatant Status Review Tribunal (CSRT) relating to such Detainee, and (c) the conduct of the CSRT proceeding relating to such Detainee; and
- iii. do not include any of the following information, in any form, unless directly related to the litigation of this action:
 - a. information relating to any ongoing or completed military, intelligence, security, or law enforcement operations, investigations, or arrests, or the results of such activities, by any nation or agency;
 - b. information relating to current political events in any country;
 - c. information relating to security procedures at the Guantánamo Naval Base (including names of United States government personnel and the layout of camp facilities) or the status of other Detainees;
 - d. publications, articles, reports, or other such material including newspaper or other media articles, pamphlets, brochures, and publications by nongovernmental or advocacy organizations, or any descriptions of such material.

J. "Secure area" shall mean a physical facility accredited or approved for the storage, handling, and control of classified information.

4. Roles and Functions of the DoD Privilege Team and Special Litigation Team

A. The "DoD Privilege Team" comprises one or more DoD attorneys and one or more intelligence or law enforcement personnel. If required, the DoD Privilege Team may include interpreters/translators. The DoD Privilege Team is charged with representing and protecting the interests of the United States Government related to security and threat information. The DoD Privilege Team is authorized to review all communications specified in this order, including written communications and other materials sent

from Petitioner's Counsel to the Detainee and communications from the Detainee to his counsel. The DoD Privilege Team may not disclose a communication from Petitioner's Counsel to the Detainee or from the Detainee to his counsel other than information provided in a filing with the court and served on government counsel, unless the disclosure of such information is authorized by this or another order of the court or by Petitioner's Counsel.

- B. The DoD Privilege Team may redact or screen out material not meeting the definition of "Legal Mail" in section 2(l) above.
- C. When the DoD Privilege Team proposes to redact or screen out material sent from Petitioner's Counsel to a Detainee, Petitioner's Counsel for that Detainee must be notified.
- D. With the consent of Petitioner's Counsel, the DOD Privilege Team may consult with an individual or individuals in appropriate federal agencies for the purpose of identifying classified information and marking the documents with the appropriate classification. If Petitioner's Counsel does not consent to such consultation, information for which consultation is required will remain classified. Any such consultation will not waive attorney client, attorney work product, or any other applicable privilege. Further, the individual consulted for such purposes will not share the information with other government lawyers and/or officers involved in the litigation of this or other matters involving the petitioner, and the information shall not be used as a result of the consultation in the interrogation or investigation of petitioner. If the individual consulted is involved in the classification review of other documents, that individual may have discussions concerning such documents with government lawyers and/or officers involved in this and other matters involving the petitioner on condition that such discussions be for the sole purpose of classification review of such documents.
- E. In the event a dispute regarding the screening and redaction of material from legal mail sent from Petitioner's Counsel to a Detainee cannot be resolved among the parties and Petitioner's Counsel seeks the intervention of this court, the DoD Privilege Team may disclose the material at issue to the Commander, JTF-Guantánamo Naval Base or his representatives, including counsel for the Government.
- F. A "Special Litigation Team" is authorized to represent the DoD Privilege Team with respect to execution of its duties. The Special Litigation Team will be composed of one or more attorneys from the Department of Justice, who may not take part or be involved in litigating the merits of this

action under the Detainee Treatment Act or any other case brought by or against the Detainee.

- G. The DoD Privilege Team may, through the Special Litigation Team (see § 3(H) below), inform the court of any issues or problems related to the release or processing of information related to this case.
- H. The Special Litigation Team may not disclose information provided by the DoD Privilege Team, or any information submitted by Petitioner's Counsel to the DoD Privilege Team for review, except as provided by this Order or as permitted by Petitioner's Counsel or by the court.
- I. Petitioner's Counsel or the Special Litigation Team may submit filings to the court concerning the DoD Privilege Team or actions taken by it.
- J. Until otherwise notified, potentially privileged information in such filings must be submitted to the court under seal and contain a conspicuous notation as follows: "Submitted Under Seal-Contains Privileged Information." To maintain such information under seal, an appropriate application must be made to the court. Such information must be maintained under seal unless and until the court determines the information should not be sealed. Such filings by Petitioner's Counsel or the Special Litigation Team may not be served on counsel for respondent, except as authorized by Petitioner's Counsel or the court. With respect to a submission made under seal, a redacted version suitable for filing in the public record must be provided. Unresolved disputes concerning such redacted versions may be presented to the court.
- K. Petitioner's Counsel may not convey to a Detainee information redacted or screened by the DoD Privilege Team or designated for such redaction or screening, absent consent from the DoD Privilege Team, the Special Litigation Team, or the Government, or authorization by this court.

5. Access to Classified Information and Documents

- A. Without authorization from the Government, neither Petitioner nor Petitioner's Counsel may have access to any classified information involved in this case.
- B. Petitioner's Counsel is presumed to have a "need to know" all the information in the Government's possession concerning the Detainee he represents. This presumption is overcome to the extent the Government seeks to withhold from Petitioner's Counsel highly sensitive information or information concerning a highly sensitive source that the Government

presents to the court *ex parte* and *in camera*. Except for good cause shown, the Government must provide notice to Petitioner's Counsel on the same day it files such information with the court *ex parte*.

- C. Petitioners' counsel to be provided access to classified information shall execute the MOU appended to this Protective Order, and shall file executed originals with the Court and submit copies to the Court Security Officer and counsel for the government. The execution and submission of the MOU is a condition precedent for petitioners' counsel to have access to, or continued access to, classified information for the purposes of this proceeding.
- D. The substitution, departure, or removal of petitioners' counsel from this case for any reason shall not release that person from the provisions of this Protective Order or the MOU executed in connection with this Order.
- E. Authorization from the Government to access classified information will not be granted to Petitioner's Counsel unless Petitioner's Counsel has first:
 - i. received the necessary security clearance as determined by the Department of Justice; and
 - ii. obtained written evidence of authority to represent the Detainee or obtained evidence of authority to represent the Detainee through the Detainee's next friend; and
 - iii. signed the Memorandum of Understanding ("MOU"), attached hereto as Exhibit A, agreeing to comply with the terms of this Protective Order.
- F. Prospective counsel for a Detainee may have up to two visits with a Detainee to obtain his authorization to seek review of the CSRT's determination of his status.
- G. The substitution, departure, or removal of Petitioner's Counsel from this case for any reason will not release that person from the provisions of this Protective Order.
- H. Except as provided herein, Petitioner's Counsel may not disclose any classified or protected information to any person including counsel in related cases brought by Guantanamo Bay detainees in this court or any other court. Petitioner's Counsel may not disclose classified or protected information to a detainee, unless that same information has been previously provided to Petitioner's Counsel by the same detainee.

Counsel may not confirm or deny to the detainee the assertions made by the detainee based on knowledge counsel may have obtained from classified documents.

- I. A disclosure of classified information includes any knowing, willful, or negligent action that could reasonably be expected to result in a communication or physical transfer of classified information.
- J. Neither Petitioner nor Petitioner's Counsel may disclose or cause to be disclosed in connection with this case any information known or believed to be classified except as otherwise provided herein.
- K. At no time, including any time subsequent to the conclusion of this case, may Petitioner's Counsel make any public or private statements disclosing any classified information made available pursuant to this Protective Order, including the fact that any such information is classified.
- L. Petitioner's Counsel is required to treat all information learned from a Detainee, including any oral or written communication with a Detainee, as TS//SCI information, unless and until the information is submitted to the DoD Privilege Team or counsel for the Government and determined to be nonclassified. All classified material must be handled, transported, and stored in a secure manner, as provided by Executive Order 12958, DOD Regulation 5200.1-R and AI 26, OSD Information Security Supplement to DOD Regulation 5200.1R. To the extent the handling, transportation, or storage restrictions imposed by this order are more restrictive than the Executive Order and regulations, this Protective Order shall govern.
- M. Petitioner's Counsel or the DoD Privilege Team must disclose to government counsel or Commander, JTF-Guantánamo Naval base any information learned from a Detainee involving any future event that threatens national security or is likely to involve violence. In such cases, the Privilege Team must provide contemporaneous notice to Petitioner's Counsel and retain for Petitioner's Counsel a copy of the material provided to government counsel or Commander, JTF-Guantánamo Naval Base.
- N. Petitioners' counsel shall not disclose the contents of any classified documents or information to any person, except those authorized pursuant to this Protective Order, the Court, and counsel for the government with the appropriate clearances and the need to know that information.
- O. In the event that classified information enters the public domain, counsel is not precluded from making private or public statements about the

information already in the public domain, but only where the statements are not subject to the limitation set forth below. Counsel may not make any public or private statements revealing personal knowledge from non-public sources regarding the classified or protected status of the information or disclosing that counsel had personal access to classified or protected information confirming, contradicting, or otherwise relating to the information already in the public domain. In an abundance of caution and to help ensure clarity on this matter, the Court emphasizes that counsel shall not be the source of any classified or protected information entering the public domain.

- P. The foregoing shall not prohibit petitioners' counsel from citing or repeating information in the public domain that petitioners' counsel does not know or have reason to believe to be classified information or a classified document, or derived from classified information or a classified document.

6. Secure Storage of Classified Information

- A. The Court Security Officer shall arrange for one appropriately secure area for the use of petitioners' counsel. The secure area shall contain a working area that will be supplied with secure office equipment reasonable and necessary to the preparation of the petitioners' case. Expenses for the secure area and its equipment shall be borne by the government.
- B. The Court Security Officer shall establish procedures to ensure that the secure area is accessible to the petitioners' counsel during normal business hours and at other times on reasonable request as approved by the Court Security Officer. The Court Security Officer shall establish procedures to ensure that the secure area may be maintained and operated in the most efficient manner consistent with the protection of classified information. The Court Security Officer or Court Security Officer designee may place reasonable and necessary restrictions on the schedule of use of the secure area in order to accommodate appropriate access to all petitioners' counsel in this and other proceedings.
- C. All classified information provided by the government to counsel for petitioners, and all classified information otherwise possessed or maintained by petitioners' counsel, shall be stored, maintained, and used only in the secure area.
- D. No documents containing classified information may be removed from the

secure area unless authorized by the Court Security Officer or Court Security Officer designee supervising the area.

- E. Consistent with other provisions of this Protective Order, petitioners' counsel shall have access to the classified information made available to them in the secure area, and shall be allowed to take notes and prepare documents with respect to those materials only in the secure area.
- F. Petitioners' counsel shall not copy or reproduce any classified information in any form, except with the approval of the Court Security Officer or in accordance with the procedures established by the Court Security Officer for the operation of the secure area.
- G. All documents prepared by petitioners' counsel that do or may contain classified information (including without limitation, notes taken or memoranda prepared by counsel and pleadings or other documents intended for filing with the Court) shall be transcribed, recorded, typed, duplicated, copied, or otherwise prepared only by persons who have received approval from the Court Security Officer for access to classified information. Such activities shall take place in the secure area on approved word processing equipment and in accordance with the procedures approved by the Court Security Officer. All such documents and any associated materials containing classified information (such as notes, memoranda, drafts, copies, typewriter ribbons, magnetic recordings, exhibits) shall be maintained in the secure area unless and until the Court Security Officer advises that those documents or associated materials are unclassified in their entirety. None of these materials shall be disclosed to counsel for the government unless authorized by the Court, by petitioners' counsel or as otherwise provided in this Protective Order.
- H. Petitioners' counsel shall discuss classified information only within the secure area or in another area authorized by the Court Security Officer, shall not discuss classified information over any standard commercial telephone instrument or office intercommunication system, and shall not transmit or discuss classified information in electronic communications of any kind.
- I. The Court Security Officer or Court Security Officer designee shall not reveal to any person the content of any conversations she or he may hear by or among petitioners' counsel, nor reveal the nature of documents being reviewed by them, or the work generated by them, except as necessary to report violations of this Protective Order to the Court or to carry out their duties pursuant to this Order. In addition, the presence of the Court Security Officer or Court Security Officer designee shall not

operate as a waiver of, limit, or otherwise render inapplicable, the attorney-client privilege or work product protections.

- J. All documents containing classified information prepared, possessed or maintained by, or provided to, petitioners' counsel (except filings submitted to the Court and served on counsel for the government), shall remain at all times in the control of the Court Security Officer for the duration of these cases.
- K. As stated in more detail in SECTION 9 below, failure to comply with these rules may result in the revocation of counsel's security clearance as well as civil and/or criminal liability.

7. Access to Protected Information

- A. The Government may apply to the court to deem any information "protected," and if filed in this court to be maintained under seal. Such information must be maintained under seal unless and until the court determines the information should not be designated as "protected."
- B. Without authorization from the Government or the court, protected information may not be disclosed or distributed to any person or entity other than the following:
 - i. Petitioner's Counsel and counsel bound by the terms of this protective order in a case filed on behalf of another Detainee seeking review under the Detainee Treatment Act,
 - ii. the court and its support personnel, and
 - iii. a Detainee if the information was obtained in the first instance from the Detainee.
- C. Neither Petitioner nor Petitioner's Counsel may disclose or cause to be disclosed any information known or believed to be protected in connection with any hearing or proceeding in this case except as otherwise provided herein.
- D. At no time, including any period subsequent to the conclusion of the proceedings, may Petitioner's Counsel make any public or private statements disclosing any protected information made available pursuant to this Protective Order, including the fact that any such information is protected.

- E. Protected information may be used only for purposes directly related to this case and not for any other litigation or proceeding, except by leave of the court. Photocopies of documents containing such information may be made only to the extent necessary to facilitate the permitted use hereunder.
- F. Nothing in this Protective Order prevents the Government from using for any purpose protected information it provides to a party. Nothing in this Protective Order entitles a nonparty to this case to protected information.
- G. Within ninety (90) days of the resolution of this action, and the termination of any certiorari review therefrom, all protected documents or information, and any copies thereof, provided to Petitioner's Counsel must be promptly destroyed, and Petitioner's Counsel must certify in writing that all designated documents and materials have been destroyed. Counsel for the government may retain one complete set of any such materials that were presented in any form to the Court. Any such retained materials shall be placed in an envelope or envelopes marked "Protected Information Subject to Protective Order." In any subsequent or collateral proceeding, a party may seek discovery of such materials from the government, without prejudice to the government's right to oppose such discovery or its ability to dispose of the materials pursuant to its general document retention policies.
- H. The Record on Review will be provided to Petitioner's Counsel upon a date established by order of the court.

Procedures for Filing Documents

- A. Until further order of this Court, any pleadings or other document filed by a petitioner shall be filed under seal with the Court through the Court Security Officer unless the petitioner has obtained from the Court Security Officer permission, specific to a particular, non-substantive pleading or document (e.g., motions for extensions of time, continuances, scheduling matters, etc.) not containing information that is or may be classified or protected, to file the pleading or document not under seal. Petitioner's counsel will provide the original pleading and six copies thereof to the Court Security Officer. Two copies of an additional title page should accompany the filing provided to the CSO. This title page should only include the caption of the case, an unclassified title and should not include any classification markings. The Court shall direct the clerk to enter on

the docket sheet the title page, the date it was filed, and the fact that it has been filed under seal with the Court Security Officer. The date and time of physical submission to the Court Security Officer shall be considered the date and time of filing with the Court. The Court Security Officer shall promptly examine the pleading or document and forward it to the appropriate agencies for their determination whether the pleading or document contains classified information. The CSO may consult with an individual or individuals in appropriate federal agencies for the purpose of identifying classified information and marking the documents with the appropriate classification markings. If it is determined that the pleading or document contains classified information, the Court Security Officer shall ensure that portion of the document, and only that portion, is marked with the appropriate classification marking and that the document remains under seal. If it is determined that the pleading or document contains protected information, the Court Security Officer shall ensure that portion of the document, and only that portion, remains under seal. Any document filed by petitioner that is determined not to contain classified information or protected information, and is not subject to any other restrictions on disclosure, shall immediately be unsealed by the Court Security Officer and placed in the public record. The Court Security Officer shall immediately deliver under seal to the Court and counsel for the government any pleading or document to be filed by petitioners that contains classified information or protected information.

- B. Any pleading or other document filed by the government containing classified information shall be filed under seal with the Court through the Court Security Officer. The date and time of physical submission to the Court Security Officer shall be considered the date and time of filing with the Court. The Court Security Officer shall serve a copy of any classified pleadings by the government upon the Petitioner at the secure facility.
- C. Nothing herein shall require the government to disclose classified or protected information. Nor shall anything herein prohibit the government from submitting classified information or protected information to the Court *in camera* or *ex parte* in these proceedings, or entitle petitioners or petitioners' counsel access to such submissions or information. Except for good cause shown in the filing, the government shall provide counsel for the petitioner or petitioners with notice served on such counsel on the date of the filing.

9. Penalties for Unauthorized Disclosure

- A. Any disclosure of classified information in violation of this order may constitute violations of United States criminal laws. In addition, any violation of the terms of this Protective Order shall be immediately brought to the attention of the Court and may result in a charge of contempt of Court and possible referral for criminal prosecution. See, e.g., Executive Order 12958, as amended. Any breach of this Protective Order may also result in the termination of access to classified information and protected information. Persons subject to this Protective Order are advised that direct or indirect unauthorized disclosure, retention, or negligent handling of classified documents or information could cause damage to the national security of the United States or may be used to the advantage of an adversary of the United States or against the interests of the United States. Persons subject to this Protective Order are also advised that direct or indirect unauthorized disclosure, retention, or negligent handling of protected documents or information could jeopardize the security of United States government personnel and facilities, and other significant government interests. This Protective Order is to ensure that those authorized to receive classified information and protected information will not divulge this information to anyone who is not authorized to receive it, without prior written authorization from the original classification authority and in conformity with this Protective Order.
- B. The USG reserves the right to unilateral take protective measures to safeguard classified information if it concludes that any provision of the protective order has been violated and the result of such violation reasonably could be expect to lead to the unauthorized disclosure of classified information.
- C. The termination of these proceedings shall not relieve any person or party provided classified information or protected information of his, her, or its obligations under this Protective Order.

Exhibit A

**MEMORANDUM OF UNDERSTANDING REGARDING ACCESS TO
CLASSIFIED NATIONAL SECURITY INFORMATION**

Having familiarized myself with the applicable statutes, regulations, and orders related to, but not limited to, unauthorized disclosure of classified information, espionage and related offenses; The Intelligence Identities Protection Act, 50 U.S.C. § 421; 18 U.S.C. § 641; 50 U.S.C. § 783; 28 C.F.R. § 17 et seq.; and Executive Order 12958; I understand that I may be the recipient of information and documents that belong to the United States and concern the present and future security of the United States, and that such documents and information together with the methods and sources of collecting it are classified by the United States government. In consideration for the disclosure of classified information and documents:

(1) I agree that I shall never divulge, publish, or reveal either by word, conduct or any other means, such classified documents and information unless specifically authorized in writing to do so by an authorized representative of the United States government, or as expressly authorized by the Protective Order entered in the case captioned _____.

(2) I agree that this Memorandum of Understanding and any other non-disclosure agreement signed by me will remain forever binding on me. (3) I have received, read, and understand the Protective Order entered by the court in the case captioned _____, and I agree to comply with the provisions thereof.

EXHIBIT

QQ



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CCR Attorney Gives Unprecedented Classified Briefing to Senate Intelligence Committee on Details of CIA Torture Program

CCR Calls for Congressional Oversight and Investigation Into CIA Torture Program and Destruction of Evidence

Contact:

Jen Nessel, press@ccrjustice.org

March 14, 2008, Washington, DC – Today, an attorney from the Center for Constitutional Rights (CCR) provided the Senate Select Committee on Intelligence with an unprecedented classified briefing on details of the CIA's torture program. Gitanjali Gutierrez, CCR staff attorney, provided a thorough account of what was done to CCR client Majid Khan and of the on-the-ground implementation of the CIA's "enhanced interrogation" program. For the first time, Congress was briefed on details of the program by an individual independent from the Executive Branch and its official version of the CIA's practices.

The content of the briefing will be withheld from the public because the CIA deems the details classified. The government has required the attorneys for Mr. Khan to agree to a strict protective order to be able to meet with their client that has prevented them from publicly disclosing his treatment.

CCR represents former Baltimore resident and CIA ghost detainee Majid Khan, who spent three and half years in secret CIA prisons before reappearing at Guantanamo in September 2006. In court filings, CCR attorneys have asked a judge to order the preservation of all evidence relating to Majid's torture at CIA black sites and to declare that the interrogation methods used against Majid constitute torture. The declassified versions of the filings are heavily redacted, with any details of Majid's treatment censored.

"Few outside of the Bush administration deny that the CIA has been operating a program of state-sanctioned torture," said CCR attorney Gitanjali Gutierrez. "Yet the CIA seeks to avoid any accountability for its acts and, in fact, clings to its attitude that torture is 'business as usual.' As American citizens who learned details about the actual implementation of the torture program, we have turned to the Senate Committee to safeguard this country from an agency that is operating criminally, shamefully and dangerously."

The Senate Intelligence Committee briefing was only open to members of the committee and their staff.. The briefing came les

than a week after President Bush vetoed an intelligence authorization bill passed by both houses of Congress that would have prohibited the coercive interrogation practices publicly believed to be part of the CIA ghost detention program. Last month, CIA Director Michael Hayden officially acknowledged for the first time that three men had been waterboarded by the United States. The White House subsequently defended the use of waterboarding, reserving the right to use it again and controversially reasserting that it does not violate any laws.

*"Majid Khan was disappeared and tortured for years by the U.S. government," said **CCR Executive Director Vincent Warren**. "This was the first time any member of Congress has had the opportunity to hear what happened to him, but hearing second hand in a secret committee briefing is not enough. It is past time for Congress to intervene to stop torture and secret detention, and for the public to know what has been done in our name."*

CCR has led the legal battle over Guantanamo for the last six years – sending the first ever habeas attorney to the base and sending the first attorney to meet with a former CIA “ghost detainee” now held at Guantanamo. CCR has been responsible for organizing and coordinating a coalition of hundreds of pro-bono lawyers in order to defend the men at Guantanamo. On December 5, CCR represented the detainees along with co-counsel before the Supreme Court; the ruling is expected this spring.

For more information and documents relating to Majid Khan, go to <http://ccrjustice.org/ourcases/current-cases/khan-v.-bush-/-khan-v.-gates>.

The Center for Constitutional Rights is dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966 by attorneys who represented civil rights movements in the South, CCR is a non-profit legal and educational organization committed to the creative use of law as a positive force for social change.

EXHIBIT

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**REPORT OF THE JOINT INQUIRY INTO THE TERRORIST ATTACKS OF SEPTEMBER 11, 2001 --
BY THE HOUSE PERMANENT SELECT COMMITTEE ON INTELLIGENCE AND THE
SENATE SELECT COMMITTEE ON INTELLIGENCE**

**JOINT INQUIRY INTO
INTELLIGENCE COMMUNITY ACTIVITIES
BEFORE AND AFTER THE TERRORIST ATTACKS OF
SEPTEMBER 11, 2001**

**REPORT
OF THE
U.S. SENATE SELECT COMMITTEE ON INTELLIGENCE
AND
U.S. HOUSE PERMANENT SELECT COMMITTEE ON
INTELLIGENCE**

TOGETHER WITH ADDITIONAL VIEWS

DECEMBER 2002

[page 130] network against the United States, but largely without the benefit of an alert, mobilized and committed American public. Despite intelligence information on the immediacy of the threat level in the spring and summer of 2001, the assumption prevailed in the U.S. Government that attacks of the magnitude of September 11 could not happen here. As a result, there was insufficient effort to alert the American public to the reality and gravity of the threat.

Discussion: The record of this Joint Inquiry indicates that, prior to September 11, 2001, the U.S. Intelligence Community was involved in fighting a “war” against Bin Ladin largely without the benefit of what some would call its most potent weapon in that effort: an alert and committed American public. Senior levels of the Intelligence Community, as well as senior U.S. Government policymakers, were aware of the danger posed by Bin Ladin. Information that was shared with senior U.S. Government officials, but was not made available to the American public because of its national security classification, was explicit about the gravity and immediacy of the threat posed by Bin Ladin. For example:

- In December 1998, as noted earlier, the DCI wrote: “We must now enter a new phase in our effort against Bin Ladin... We are at war... I want no resources or people spared in this effort, either inside CIA or the [Intelligence] Community.”
- A classified document signed by the President in December 1998 read in part: “The Intelligence Community has strong indications that Bin Ladin intends to conduct or sponsor attacks inside the United States”; and
- A classified document signed by the President in July 1999 characterized a February 1998 statement by Bin Ladin statement as a “de facto declaration of war” on the United States.

In addition, numerous classified intelligence reports were produced and disseminated by the Intelligence Community prior to September 11, based upon information obtained from a variety of sources, about possible terrorist attacks being planned by Usama Bin Ladin’s terrorist network. Some of this information was summarized and released, in declassified form, in the Joint Inquiry’s September 18, 2002 hearing, including: [page 131]

- In June 1998, the Intelligence Community obtained information from several sources that Usama Bin Ladin was considering attacks in the United States, including against Washington, D. C. and New York;

EXHIBIT

SS

**TOO MANY SECRETS: OVERCLASSIFICATION AS A
BARRIER TO CRITICAL INFORMATION SHARING**

HEARING

BEFORE THE

SUBCOMMITTEE ON NATIONAL SECURITY,
EMERGING THREATS AND INTERNATIONAL
RELATIONS

OF THE

COMMITTEE ON
GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

AUGUST 24, 2004

Serial No. 108-263

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CONTENTS

	Page
Hearing held on August 24, 2004	1
Statement of:	
Leonard, J. William, Director, Information Security Oversight Office, National Archives and Records Administration; Carol A. Haave, Deputy Under Secretary of Defense, Counterintelligence and Security, U.S. Department of Defense; Steven Aftergood, Federation of Concerned Scientists; and William P. Crowell, the Markle Foundation Task Force on National Security in the Information Age	22
Letters, statements, etc., submitted for the record by:	
Aftergood, Steven, Federation of Concerned Scientists, prepared statement of	43
Crowell, William P., the Markle Foundation Task Force on National Security in the Information Age, prepared statement of	61
Haave, Carol A., Under Secretary of Defense for Intelligence, U.S. Department of Defense, prepared statement of	36
Kucinich, Hon. Dennis J., a Representative in Congress from the State of Ohio, prepared statement of	9
Leonard, J. William, Director, Information Security Oversight Office, National Archives and Records Administration, prepared statement of	25
Shays, Hon. Christopher, a Representative in Congress from the State of Connecticut, prepared statement of	3

TOO MANY SECRETS: OVERCLASSIFICATION AS A BARRIER TO CRITICAL INFORMATION SHARING

TUESDAY, AUGUST 24, 2004

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON NATIONAL SECURITY, EMERGING
THREATS AND INTERNATIONAL RELATIONS,
COMMITTEE ON GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 2154, Rayburn House Office Building, Hon. Christopher Shays (chairman of the subcommittee) presiding.

Present: Representatives Shays, Platts, Kucinich, Ruppertsberger, and Tierney.

Staff present: Lawrence Halloran, staff director and counsel; Thomas Costa, professional staff member; Jean Gosa, minority assistant clerk; and Andrew Su, minority professional staff member.

Mr. SHAYS. A quorum being present, the Subcommittee on National Security, Emerging Threats, and International Relations hearing entitled, "Too Many Secrets: Overclassification is a Barrier to Critical Information Sharing," is called to order.

An old maxim of military strategy warns, "He who protects everything, protects nothing."

Nevertheless, the United States today attempts to shield an immense and growing body of secrets using an incomprehensibly complex system of classifications and safeguard requirements. As a result, no one can say with any degree of certainty how much is classified, how much needs to be declassified, or whether the Nation's real secrets can be adequately protected in a system so bloated, it often does not distinguish between the critically important and the economically irrelevant.

This much we know: There are too many secrets. Soon after President Franklin Roosevelt's first executive order on classification in 1940, the propensity to overclassify was noted. Since then, a long and distinguished list of committees and commissions has studied the problem. They all found it impossible to quantify the extent of overclassification because no one even knows the full scope of the Federal Government's classified holdings at any given time. Some estimate 10 percent of current secrets should never have been classified. Others put the extent of overclassification as high as 90 percent.

During the cold war, facing a monolithic foe determined to penetrate our national secrets, overclassification may have provided a

needed security buffer. But the risk/benefit calculation has changed dramatically. Against a stateless, adaptable enemy, we dare not rely on organizational stovepipes to conclude, in advance, who should have access to one piece of an emerging mosaic. Connecting the dots is now a team sport. The cold war paradigm of “need to know” must give way to the modern strategic imperative, “the need to share.”

The National Commission on Terrorist Attacks Upon the United States, referred to as the 9/11 Commission, concluded that, “Current security requirements nurture overclassification and excess compartmentation of information among agencies. Each agency’s incentive structure opposes sharing, with risks—criminal, civil, and internal administrative sanctions—but few rewards for sharing information. No one has to pay the long-term costs of overclassifying information, though these costs—even in literal financial terms—are substantial.”

The National Archives’ Information Security Oversight Office, ISOO, reported that in 2003, more than 14 million documents were classified by the 3,978 Federal officials authorized to do so. They classified 8 percent more information than the year before. But recently declassified documents confirm the elaborate and costly security applied to some information is simply not worth the effort or expense. A former dictator’s cocktail preferences and a facetious plot against Santa Claus are not threats to national security in the public domain, yet both were classified.

The most recent ISOO report correctly concludes “allowing information that will not cause damage to national security to remain in the classification system or to enter that system in the first instance, places all classified information at needless increased risk.”

Current classification practices are highly subjective, inconsistent and susceptible to abuse. One agency protects what another releases. Rampant overclassification often confuses national security with bureaucratic, political or a diplomatic convenience.

The dangerous, if natural, tendency to hide embarrassing or inconvenient facts can mask vulnerabilities and only keeps critical information from the American people. The terrorists know their plans. Fewer people classifying fewer secrets would better protect national security by focussing safeguards on truly sensitive information, while allowing far wider dissemination of the facts and analysis, the 9/11 Commission says, must be shared.

Any discussion of intelligence reform must include a new approach to classification, one that sheds cold war shackles and serves the strategic needs to share information. Our witnesses this morning bring impressive experience and insight to this important issue and we look forward to their testimony. I welcome each of them.

At this time, the Chair would recognize the ranking member of the committee, Mr. Kucinich.

[The prepared statement of Hon. Christopher Shays follows:]

EXHIBIT

TT

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HENRY A. WAXMAN, CALIFORNIA
RANKING MINORITY MEMBER

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MEMORANDUM

To: Members of the Subcommittee on National Security,
Emerging Threats, and International Relations

From: Lawrence J. Halloran

Subject: Briefing Memorandum for the hearing, *Emerging Threats:
Overclassification and Pseudo-classification*, scheduled for
Wednesday, March 2, 1:00 p.m., 2154 Rayburn House Office
Building.

Date: February 24, 2005

PURPOSE OF THE HEARING

The purpose of this hearing is to examine the proliferation of categories of information that are not classified but are withheld from public disclosure.

HEARING ISSUES

1. **To what extent do current policies and practices permit the excessive or abusive classification, or delayed declassification, of federal materials?**

2. **What is the impact of current classification policies and practices on efforts to enhance interagency and intergovernmental information sharing?**

BACKGROUND

The Final Report of the National Commission on Terrorist Attacks Upon the United States (“the 9/11 Commission Report”) found that information security policies and practices impede the robust forms of information sharing required to meet the threat of terrorism. The Report states:

Current security requirements nurture overclassification and excessive compartmentation of information among agencies. Each agency’s incentive structure opposes sharing, with risks (criminal, civil, and internal administrative sanctions) but few rewards for sharing information. No one has to pay the long-term costs of over-classifying information, though this costs—even in literal financial terms—are substantial. There are no punishments for *not* sharing information. Agencies uphold a “need-to-know” culture of information protection rather than promoting a “need-to-share” culture of integration.¹

The Commission endorsed creation of a decentralized, technologically advanced “trusted information network” to make threat information more widely accessible and to reverse Cold War paradigms and cultural biases against information sharing. The Commission noted such a network had been described in a task force report commissioned by the Markle Foundation (**Web Resources 1**), but the concept “has not yet been converted into action.”²

¹ The 9/11 Commission Report, *Final Report of the National Commission on Terrorist Attacks Upon the United States*, p. 417.

² *Ibid.*, p.418.

Since 1940, classification of official secrets has been governed by policies and procedures flowing from executive orders of the President. Current security requirements are mandated by E.O. 12958 as amended by E.O. 13292. **(Attachment 1)** Successive executive directives reflect Cold War counterespionage concerns as well as persistent tension between the need for secrecy the public access to government information. By varying degrees, Presidents sought to protect national secrets through broader or narrower delegation of classification authority, by expanding or contracting categories of classifiable information and by endorsing or opposing the use of automatic declassification deadlines.

The first post-Cold War policy on classification was issued by President Clinton in 1995. E.O. 12356 reset previous default settings, directing classifiers *not* to shield information of doubtful value and to classify information at the *lowest* rather than the highest possible level. With some exceptions, the order sets a ten year limit on classification markings and provides broadened opportunities for declassification of official materials. Reclassification is prohibited if the material has otherwise been properly put in the public domain. A new Interagency Security Classification Appeals Panel was established to make final decisions on certain classification challenges and declassification exemptions. **(Attachment 1, p5)** President Bush issued E.O. 13292, amending E.O. 12958, that reverts to a “when in doubt, classify” standard, expands classification authorities and categories and postponed automatic declassification of some records.

Security concerns after the September 11th attacks prompted some departments and agencies to increase the type and volume of information shielded from public view by *Confidential*, *Secret* or *Top Secret* markings. But executive classification of significant portions of congressional investigative reports revived the debate over the objectivity of information security standards and the potential for excessive, abusive or politically motivated classification. Some have called for appointment of an independent panel to review and settle disputes over classification and declassification. **(Attachment 2, p. 2)**

The Information Security Oversight Office (ISOO) within the National Archives and Records Administration is responsible for executive branch oversight of security classification matters. The ISOO 2003 Report to the President noted that 3,978 separate offices or individuals made 238,030 classification decisions in FY03 affecting more than 14 million documents. Agencies reported an eight percent increase in original classifications over the previous year, with most of the increase attributable to the Departments of Defense and Justice. **(Web Resources 2)**

The report acknowledged that, “many senior officials will candidly acknowledge that the government classifies too much information, although oftentimes the observation is made with respect to the activities of agencies other than their own. The potential use of excessive classification is supported, in part, by agency input indicating that overall classification activity is up over the past several years.” The report goes on to note the inevitable tendency to protect more information in times of war but notes the easy propensity to “err on the side of caution” concedes more error than a balanced system should tolerate, concluding that, “Too much classification unnecessarily impedes effective information sharing.”

DISCUSSION OF HEARING ISSUES

1. To what extent do current policies and practices permit the excessive or abusive classification, or delayed declassification, of federal materials?

Most concede it is impossible to quantify the extent of overclassification, noting it is difficult enough to determine how much information remains classified at any given time. The problem of assessing the true scope of what is classified or overclassified is compounded by the proliferation of information media. One classification decision may affect one page, one thousand pages, or one thousand computer discs each containing one thousand pages.

According to a 1997 report, "Given this uncertainty, it should not be surprising that there is little agreement on the extent of overclassification. For over a decade the ISOO has estimated that between one and ten percent of all classified documents are unnecessarily classified. In 1995, a White Paper prepared by the DoD Inspector General concluded that the classification process at the DoD is "fundamentally sound" and that "the present size of classified holdings is not the result of too much information being needlessly classified." In contrast, a 1985 preliminary study prepared by the staff of two House subcommittees proposed a classification system in which "roughly nine-tenths of what is now classified" would no longer qualify for classification. More recently, former NSC Executive Secretary Rodney B. McDaniel estimated that only ten percent of classification was for "legitimate protection of secrets." Given the uncertainty surrounding the breadth of classification, however, efforts to quantify with any precision the extent of unnecessary classification not only may be futile, but are unlikely to help in understanding its causes or possible remedies." (**Web Resources 3**)

The report further noted that despite being required to mark documents to indicate which portions are classified and which are not, employees in some agencies continue to mark materials "Entire Text

Classified,” increasing the difficulty of distinguishing which parts truly need protection and which might later be declassified.

The creation of classification safe harbors, or sacred cows, also contributes to the volume of information put into those categories and the set of documents that often remain beyond declassification review. Intelligence sources and methods, personnel levels and budgets have become classification icons into which very remotely related information can be secreted. The Cold War nuclear doctrine of “born classified, always classified” also encourages overclassification.

(Web Resources 4)

Over-classification is viewed by some as an inevitable political and cultural bureaucratic response to an exclusive “need to know” security standard. Such an environment breeds what has been called “the cult of classification” whose members have every incentive to increase their own importance by increasing the volume of information only they can see. **(Attachment 3)**

2. What is the impact of current classification policies and practices on efforts to enhance interagency and intergovernmental information sharing?

A far more horizontal world - characterized by transnational terrorism and the need to respond using multinational military coalitions – challenges Cold War paradigms and policies designed to protect official secrets in vertical organizational structures. The 9/11 Commission concluded that inability to integrate the intelligence in hand – both classified and unclassified – across agency lines contributed to the failure to detect or deter the attacks.

As an example, according to recently declassified 9/11 Commission staff reports, the Federal Aviation Administration (FAA) reviewed numerous intelligence reports that warned about al-Qaeda’s interest in airline hijackings and suicide operations prior to the New York World Trade Center

and Pentagon attacks. Although the FAA warned airport security officials about the possibility of suicide hijackings, the warnings “did not stimulate significant increases in security procedures.” **(Web Resources 5)** **(Attachment 4, p. 62)** Some are questioning whether the Administration abused the classification process to improperly withhold the 9/11 Commission findings from Congress and the public until now based on political rather than purely security considerations.

Homeland Security has become a national priority and as a result, there has been a proliferation of categories of information that are not classified but held from public disclosure. These categories include *Sensitive Homeland Security Information*, *Sensitive Security Information*, and *Critical Information* among others. These categories are not well understood and may be misused causing damage to homeland security, freedom of information and government transparency. The Congressional Research Service (CRS) witness will testify about the basis for such designations and the criteria the information must meet in order to be so designated.

Overclassification makes integration of federal agency watch lists and other data bases more complex and more expensive given the need to maintain separate systems and protocols for secure information.

Classified information is also more difficult to include in alerts to state and local officials since many do not have required clearances and cannot justify committing to costly responsive actions based only on scrubbed, generic information. In testimony before the Government Reform Committee on August 3, Comptroller General David Walker noted that the federal government did not generally consider the role of state and local officials in national security matters but that September 11th and the continuing threat of terrorism create a compelling “need to share” intelligence information at that level. **(Web Resources 6)**

In 1970, the Defense Science Board concluded that overclassification also undermines the credibility of government security decisions. **(Web Resource 4, Note 2)** Indiscriminate and

excessive classification also tends to mask the volume and utility of information now available from open sources.

Overclassification ultimately incurs avoidable fiscal costs and compromises national security. Adversarial, versus automatic, declassifications procedures are cumbersome and time consuming. Safeguards for voluminous classified material require costly security measures. And government officials confronted with dizzyingly complex rules for numerous categories of classified information often cannot or do not distinguish truly significant security matters from routine material market secret out of an excess of caution or zeal. It is often observed in this regard “he who defends everything defends nothing.”

ATTACHMENTS

1. CRS Report, *Security Classification Policy and Procedures: E.O. 12958, as Amended*, 97-771, January 7, 2005.
2. CRS Report, *Secrecy Versus Openness: Arrangements for Balancing Competing Needs*, RS21895, August 4, 2004.
3. "I Could Tell You, But I'd Have to Kill You: The Cult of Classification in Intelligence," STRATFOR Analysis, September 18, 2000.
4. 9/11 Commission staff report, August 26, 2004, *Part2. Civil Aviation Security and the 9/11 Attacks*

WEB RESOURCES

1. http://www.markle.org/downloadable_assets/nstf_report2_full_report.pdf
2. http://www.archives.gov/isoo/reports/2003_annual_report.html
3. <http://www.fas.org//sgp/library/moynihan/>
4. <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB90/index.htm>
5. <http://www.democrats.reform.house.gov/Documents/20050210162128-39627.pdf>
6. <http://reform.house.gov/UploadedFiles/GAO%20-%20Walker%209-11%20Testimony.pdf>

WITNESS LIST

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Mr. J. William Leonard, Director
Information Security Oversight Office
National Archives and Records Administration

RADM Christopher A. McMahon, USMS
Acting Director, Departmental Office of Intelligence, Security, and
Emergency Response
Department of Transportation

Mr. Harold Relyea
Specialist in American National Government
Congressional Research Service (CRS)
Library of Congress

Panel Two

The Honorable Richard Ben-Veniste, Commissioner
National Commission on Terrorist Attacks Upon the United States

Panel Three

Mr. Thomas Blanton, Executive Director
National Security Archive
George Washington University

Mr. Harry A. Hammitt, Editor and Publisher
Access Reports: Freedom of Information
Lynchburg, Virginia

EXHIBIT

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**EMERGING THREATS: OVERCLASSIFICATION AND
PSEUDO-CLASSIFICATION**

HEARING

BEFORE THE
SUBCOMMITTEE ON NATIONAL SECURITY,
EMERGING THREATS, AND INTERNATIONAL
RELATIONS

OF THE
COMMITTEE ON
GOVERNMENT REFORM
HOUSE OF REPRESENTATIVES

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CONTENTS

	Page
Hearing held on March 2, 2005	1
Statement of:	
Ben-Veniste, Richard, Commissioner, National Commission on Terrorist Attacks Upon the United States	88
Blanton, Thomas, executive director, National Security Archive, George Washington University; Harry A. Hammitt, editor and publisher, Access Reports: Freedom of Information; Sibel Edmonds, former Contract Linguist, Federal Bureau of Investigation	109
Blanton, Thomas	109
Edmonds, Sibel	147
Hammitt, Harry A.	128
Leonard, J. William, Director, Information Security Oversight Office, Na- tional Archives and Records Administration; Rear Admiral Christopher A. McMahon, U.S. Maritime Service, Acting Director, Departmental Office of Intelligence, Security and Emergency Response, Department of Transportation; and Harold C. Relyea, Specialist in National Govern- ment, Congressional Research Service, Library of Congress	44
Leonard, J. William	44
McMahon, Rear Admiral Christopher A.	53
Relyea, Harold C.	66
Letters, statements, etc., submitted for the record by:	
Ben-Veniste, Richard, Commissioner, National Commission on Terrorist Attacks Upon the United States:	
Letters dated February 11 and March 1, 2005	107
Prepared statement of	93
Blanton, Thomas, executive director, National Security Archive, George Washington University, prepared statement of	114
Edmonds, Sibel, former Contract Linguist, Federal Bureau of Investiga- tion:	
Letters dated June 19, 2002 and August 13, 2002	149
Prepared statement of	186
Report dated January 2005	154
Hammitt, Harry A., editor and publisher, Access Reports: Freedom of Information, prepared statement of	130
Higgins, Hon. Brian, a Representative in Congress from the State of New York, prepared statement of	42
Kucinich, Hon. Dennis J., a Representative in Congress from the State of Ohio, prepared statement of	9
Leonard, J. William, Director, Information Security Oversight Office, Na- tional Archives and Records Administration, prepared statement of	47
Maloney, Hon. Carolyn B., a Representative in Congress from the State of New York, prepared statement of	33
McMahon, Rear Admiral Christopher A., U.S. Maritime Service, Acting Director, Departmental Office of Intelligence, Security and Emergency Response, Department of Transportation, prepared statement of	55
Relyea, Harold C., Specialist in National Government, Congressional Re- search Service, Library of Congress, prepared statement of	68
Shays, Hon. Christopher, a Representative in Congress from the State of Connecticut, prepared statement of	3
Waxman, Hon. Henry A., a Representative in Congress from the State of California:	
Letter dated March 1, 2005	15
Prepared statement of	27

Mr. WAXMAN. Many of these new designations have been created out of thin air by the administration. They do not have a basis in Federal statute, and there are no criteria to guide their application. It appears that virtually any Federal employee can stamp a document "sensitive but unclassified" and there do not appear to be uniform procedures for removing these designations. The examples we discovered are alarming. The executive branch has been using these novel designations to withhold information that is potentially embarrassing, not to advance national security.

Last year I wrote a letter to Secretary Powell that revealed that the State Department's annual terrorism report was grossly inaccurate. This Government report claimed that terrorist attacks reached an all-time low in 2003. In fact, exactly the opposite was true. Significant attacks by terrorists actually reached an all-time high.

To his credit, Secretary Powell admitted that mistakes were made and required the issuance of a new report. Several months later, the inspector general prepared a report that examined what went wrong. The report was released to the public in one version. And another version, a "sensitive but unclassified" version, was sent to certain offices in Congress. My staff compared the two versions. They were identical except for one difference. The "sensitive but unclassified" version reported that the CIA played a significant role in preparing the erroneous report. This information was redacted in the public version.

I have a message for the administration. Admitting that the CIA made a mistake is not a national security secret. Another example involves the role that Under Secretary of State John Bolton played in preparing an infamous fact sheet that erroneously alleged that Iraq tried to import uranium from Niger. The State Department wrote me in September 2003 that Mr. Bolton "did not play a role in the creation of this document." But a "sensitive but unclassified" chronology, which has never been released to the public, shows that actually Mr. Bolton did direct the preparation of the fact sheet and received multiple copies of the draft.

Apparently, sensitive but unclassified is also a code word for embarrassing to senior officials. And here's an ironic example. The Department of Homeland Security used the sensitive but unclassified designation to withhold the identity of the ombudsman that the public is supposed to contact about airline security complaints. I suggested to Chairman Shays that this subcommittee should investigate the mis-use of these designations, and I am glad to report that he has agreed. In fact, we are signing letters today seeking information from several agencies about the way they use these new designations. With his support, I hope we can impose some restraints on this new form of government secrecy.

There are other issues I hope we can examine today. One involves the process that was used to declassify important 9/11 Commission documents. Last month, we learned about long delays in the declassification and release of key documents that called into question statements made by now-Secretary of State Condoleezza Rice and other senior administration officials. These embarrassing documents were not released until after the Presidential elections and 48 hours after Ms. Rice's confirmation as Secretary of State.

Today I hope we can learn more about the delay in the release of these documents and whether politics played any role.

Another important topic is the case of Sibel Edmonds, who will testify on the third panel. Ms. Edmonds joined the FBI in 2001 as a linguist. But she was fired just a few months later for warning her superiors about potential espionage occurring with the Bureau. Last month, the Justice Department Inspector General released an unclassified report that vindicated Ms. Edmonds, finding that her core allegations were clearly corroborated. Yet the Justice Department has repeatedly sought to prevent inquiries into her case by citing secrecy concerns. Indeed, government lawyers even argued that her legal efforts to obtain redress should be thrown out of court to avoid the risk of disclosing sensitive information.

Mr. Chairman, let me close by thanking you for holding this hearing, for investigating the problematic, sensitive but unclassified designation and for including Ms. Edmonds in the hearing. This hearing and your actions demonstrate that openness in government is not a partisan issue. The fact is, there is bipartisan concern in Congress that the pendulum is swinging too far toward secrecy. I look forward to the testimony of the witnesses today.

[The prepared statement of Hon. Henry A. Waxman follows.]

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Statement of Rep. Henry A. Waxman, Ranking Minority Member
Committee on Government Reform
Subcommittee on National Security, Emerging Threats, and International Relations
Hearing on
"Overclassification and Pseudo-classification"

March 2, 2005

Thank you, Mr. Chairman, for holding this hearing, and for your leadership in addressing the issue of government secrecy.

Incredibly, it seems necessary to state the obvious today — the government belongs to the people. The American people understand that some information must be kept secret to protect the public safety. But when the government systematically hides information from the public, government stops belonging to the people.

Unfortunately, there have been times in our nation's history when this fundamental principle of openness has come under direct attack. The Watergate era of the Nixon Administration was one of those times. We are now living through another.

Over the last four years, the executive branch has engaged in a systematic effort to limit the application of the laws that promote open government and accountability. Key open government laws such as the Freedom of Information Act, the Presidential Records Act, and the Federal Advisory Committee Act have been narrowed and misconstrued. At the same time, the Administration has greatly expanded its authority to classify documents, to conduct secret investigations, and to curtail Congress's access to information.

Last fall, I released a report entitled "Secrecy in the Bush Administration" that detailed many of these threats to the principle of open government. I ask unanimous consent that this report be made part of today's hearing record.

Yesterday, I wrote a letter to Chairman Shays that described a new threat to openness in government: the Administration's misuse of rapidly proliferating designations such as "sensitive but unclassified" and "for official use only" to block the release of important information. And I ask unanimous consent that this letter also be made part of today's hearing record.

Mr. SHAYS. I thank the gentleman for his statement and for the work of his staff. You have done a lot of work that you have reason to be very concerned about.

At this time the Chair would recognize Mr. Turner, the former vice chairman of the committee, now chairman of?

Mr. TURNER. Federalism and Census. Thank you, Mr. Chairman, and thank you for your leadership on this issue, and for your assistance in my continuing on this subcommittee. This obviously is a very important issue. Just this week I believe we had a reminder of the issue of classification when we were all receiving information from our news media about the possible communication between Osama bin Ladin and Moussaoui, and looking to possible potential attacks on the United States. I think we all heard, as we looked at the news, and read the news accounts, that we were informed that the Homeland Security Department issued a classified bulletin to officials over the weekend about the intelligence, which spokesman Brian—I'm not even going to guess at that one—described as credible but not specific. The indulgence was obtained over the past several weeks, officials said.

Clearly, we've gotten to the point where we have become desensitized to what is either classified or not. One of the dangers of overclassification is that people no longer handle the information sensitively. In this instance, within I believe a day or two of it being issued, it's national news on CNN and all of our newspapers, which of course means that our adversaries, in addition to our friends, are reading it.

This is an important hearing that you are holding, in that it will assist us in identifying what really is important and needs to be protected information and hopefully assist us in keeping it classified and confidential.

Thank you.

Mr. SHAYS. I thank the gentleman for his statement. At this time, the Chair would recognize the gentlelady from New York City.

Mrs. MALONEY. Clearly, for me, nothing highlights better the overclassification of government documents than the 9/11 Commission staff report dealing with civil aviation. The release of this report was delayed for months beyond all documents of the 9/11 Commission report, and is heavily redacted. It is the only document that the 9/11 Commission members received that had one word covered in ink. Every other document that they received in their investigation was not redacted, just the civil aviation one.

Not only is it ironic that the underlying 9/11 Commission report spoke to the need to move from a need to know environment to a need to share environment. I think it is absolutely an outrage that large portions and parts of this report are being kept from the American people, including the September 11 families who fought so very, very hard to get answers on why September 11 happened, and how we could work to prevent it in the future, another future attack.

Although the 9/11 Commission staff completed its report on August 26, 2004, the Bush administration refused to declassify the findings until January 28, 2005, less than 48 hours after Condoleezza Rice was confirmed as Secretary of State. During the

period between August 26th and January 28th, the Commission was reportedly reviewing the Commission's report to determine whether it contained any information that should be classified in the interest of national security.

Problems with this process have been raised previously by the 9/11 Commission. On February 9th, the New York Times reported that the monograph had been turned over to the National Archives nearly 2 weeks before it had been heavily redacted. No notice was provided to me or any of the 25 Members of Congress who had written the Justice Department for its release. To say the least, the contents of the monograph were troubling. It states that,

In the months before September 11, Federal aviation officials reviewed dozens of intelligence reports that warned about Osama bin Ladin and Al-Qaeda, some of which specifically discussed airline hijackings and suicide operations.

Fifty-two intelligence reports from the FAA mentioned bin Ladin or Al-Qaeda from April to September 10, 2001. Five of the intelligence reports specifically mentioned Al-Qaeda's training or capability to conduct hijackings. And two mentioned suicide operations, although not connected to aviation. Despite these warnings, the FAA, lulled into a false sense of security and intelligence that indicated a real and growing threat leading up to 9/11, did not stimulate significant increase in security procedures.

This is what we know from public parts of the report. That day Chairman Shays and I called on the Justice Department to release the full, unredacted report, just like all previous documents of the 9/11 Commission. The delayed release, the ultimate timing of the release, the contents and the heavy redactions raise very serious concerns to me. That is why I was so pleased to join with the full committee ranking member, Henry Waxman, calling for hearings on this matter. I look very much forward to hearing from 9/11 Commissioner Richard Ben-Veniste, who will be testifying on this, along with the other witnesses.

In our letter, we raise concerns on whether the administration mis-used the classification process to withhold, possibly for political reasons, and it questions the veracity of statements, briefings and testimony by then National Security Advisory Condoleezza Rice, regarding this issue. I have concerns that the administration abused the classification process to improperly withhold the 9/11 Commission findings from Congress and the public, until after the November elections and the confirmation of Condoleezza Rice as Secretary of State.

I really want to learn today what were the specific rationales for each redaction in the report, and were these redactions appropriate. I have one example that is on display right now, where no one can argue that it is not over-classification. On this board you can clearly see the public testimony of Mike Canavan, a top FAA official before the 9/11 Commission on May 23, 2003. On this board is the same testimony partially redacted. The testimony that is blacked out reads, "We are hearing this, this, and this from this organization. It was just a gain in the chatter piece, so to speak."

So I truly do not understand why public testimony that is released to the public could ever end up covered by black ink and officially redacted.

With regard to our questions surrounding Secretary Rice, during her tenure as President Bush's national security advisor, she made several categorical statements asserting that there were never any

warnings that terrorists might use airplanes and suicide attacks. One possibility is that Secretary Rice was unaware of the extensive FAA warnings when she appeared before the press and testified before the 9/11 Commission. This would raise serious questions about her preparation.

Another possibility is that Secretary Rice knew about the FAA warnings but provided misleading information to the Commission. Neither of these possibilities would reflect well on Secretary Rice. Perhaps there are other, more innocent explanations for these seeming inconsistencies.

I look forward to the testimony of our witnesses, and I hope to find out how, when and why this document was classified. Finally, I would like to thank Chairman Shays, in accommodating our request for including Sibel Edmonds as a witness. I would like to welcome her. She will be testifying publicly for the first time ever before Congress, despite the fact that she was wrongly fired by the FBI 3 years ago for trying to do her patriotic duty by raising concerns with possible espionage within the FBI.

Even though the Justice Department Inspector General found that her claims had merit, the administration to this day has not fully investigated these serious issues, and amazingly, has still not made Ms. Edmonds whole. I hope that this situation will change, and I look forward to understanding how new designations that have no basis in Federal law or statute came into existence. Secrecy in government, particularly on public policy issues, ones from which we want to learn in order to prevent such actions in the future, are very, very serious, and I welcome the chairman and the ranking member's efforts. I'm glad to join them in this effort.

Thank you.

[The prepared statement of Hon. Carolyn B. Maloney follows:]

EXHIBIT

VV



UNCLASSIFIED

THE WHITE HOUSE
WASHINGTON

February 7, 2002

MEMORANDUM FOR THE VICE PRESIDENT
THE SECRETARY OF STATE
THE SECRETARY OF DEFENSE
THE ATTORNEY GENERAL
CHIEF OF STAFF TO THE PRESIDENT
DIRECTOR OF CENTRAL INTELLIGENCE
ASSISTANT TO THE PRESIDENT FOR NATIONAL
SECURITY AFFAIRS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF

SUBJECT: Humane Treatment of al Qaeda and Taliban Detainees

1. Our recent extensive discussions regarding the status of al Qaeda and Taliban detainees confirm that the application of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (Geneva) to the conflict with al Qaeda and the Taliban involves complex legal questions. By its terms, Geneva applies to conflicts involving "High Contracting Parties," which can only be states. Moreover, it assumes the existence of "regular" armed forces fighting on behalf of states. However, the war against terrorism ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians, sometimes with the direct support of states. Our Nation recognizes that this new paradigm -- ushered in not by us, but by terrorists -- requires new thinking in the law of war, but thinking that should nevertheless be consistent with the principles of Geneva.
2. Pursuant to my authority as Commander in Chief and Chief Executive of the United States, and relying on the opinion of the Department of Justice dated January 22, 2002, and on the legal opinion rendered by the Attorney General in his letter of February 1, 2002, I hereby determine as follows:
 - a. I accept the legal conclusion of the Department of Justice and determine that none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva.
 - b. I accept the legal conclusion of the Attorney General and the Department of Justice that I have the authority under the Constitution to suspend Geneva as between the United States and Afghanistan, but I decline to

NSC DECLASSIFICATION REVIEW [E.O. 12958 as amended]
DECLASSIFIED IN FULL ON 6/17/2004
by R.Soubers

Reason: 1.5 (d)
Declassify on: 02/07/12

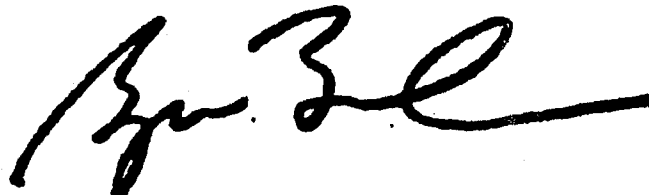
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exercise that authority at this time. Accordingly, I determine that the provisions of Geneva will apply to our present conflict with the Taliban. I reserve the right to exercise this authority in this or future conflicts.

- c. I also accept the legal conclusion of the Department of Justice and determine that common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to "armed conflict not of an international character."
 - d. Based on the facts supplied by the Department of Defense and the recommendation of the Department of Justice, I determine that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva. I note that, because Geneva does not apply to our conflict with al Qaeda, al Qaeda detainees also do not qualify as prisoners of war.
3. Of course, our values as a Nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment. Our Nation has been and will continue to be a strong supporter of Geneva and its principles. As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.
 4. The United States will hold states, organizations, and individuals who gain control of United States personnel responsible for treating such personnel humanely and consistent with applicable law.
 5. I hereby reaffirm the order previously issued by the Secretary of Defense to the United States Armed Forces requiring that the detainees be treated humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.
 6. I hereby direct the Secretary of State to communicate my determinations in an appropriate manner to our allies, and other countries and international organizations cooperating in the war against terrorism of global reach.



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EXHIBIT

WW

LEXSEE 548 U.S. 557

SALIM AHMED HAMDAN, Petitioner v. DONALD H. RUMSFELD, SECRETARY OF DEFENSE, et al.

No. 05-184

SUPREME COURT OF THE UNITED STATES*548 U.S. 557; 126 S. Ct. 2749; 165 L. Ed. 2d 723; 2006 U.S. LEXIS 5185; 19 Fla. L. Weekly Fed. S 452*

March 28, 2006, Argued

June 29, 2006, Decided

NOTICE:

[**1] The LEXIS pagination of this document is subject to change pending release of the final published version.

SUBSEQUENT HISTORY: Writ of habeas corpus denied *In re Hamdan*, 126 S. Ct. 2981, 165 L. Ed. 2d 990, 2006 U.S. LEXIS 5239 (U.S., 2006)

On remand at *Hamdan v. Rumsfeld*, 2006 U.S. App. LEXIS 20943 (D.C. Cir., Aug. 11, 2006)

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Hamdan v. Rumsfeld, 367 U.S. App. D.C. 265, 415 F.3d 33, 2005 U.S. App. LEXIS 14315 (2005)

DISPOSITION: Reversed and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner, a Yemeni national in custody at an American prison in Guantanamo Bay, Cuba, filed petitions for writs of habeas corpus and mandamus to challenge the Executive Branch's intended means of prosecuting a charge of conspiracy to commit offenses triable by military commission. The United Court of Appeals for the District of Columbia Circuit reversed a decision granting a writ of habeas corpus. Certiorari was granted.

OVERVIEW: The government's motion to dismiss was denied because Pub. L. No. 109-148, § 1005(e)(1), 119 Stat. 2739, 2740 (2005), did not repeal federal jurisdiction over pending habeas actions. Abstention was not warranted as petitioner was not an Armed Forces member and the tribunal convened to try him was not part of

the integrated system of military courts established by Congress. Review of the commission's procedures in advance of a final decision was appropriate as petitioner had no automatic right to review of the commission's decision before a federal court under the Detainee Treatment Act, Pub. L. No. 109-148, 119 Stat. 2739 (2005). The fact that petitioner already had been excluded from his own trial provided a basis to presume that the procedures employed would violate the law. On the merits, the military commission convened to try petitioner lacked power to proceed as its structure and procedures violated the Uniform Code of Military Justice. The President's practicability determination was insufficient to justify variances from the procedures governing courts-martial. The procedures also violated the Geneva Conventions as they did not meet common article 3's requirements.

OUTCOME: The judgment was reversed and the case was remanded for further proceedings.

LexisNexis(R) Headnotes

Military & Veterans Law > Military Justice > Appeals & Reviews > General Overview

[HN1] See Pub. L. No. 109-148, § 1005(e), 119 Stat. 2739, 2740 (2005).

Military & Veterans Law > Military Justice > Appeals & Reviews > General Overview

[HN2] Pub. L. No. 109-148, § 1005(e)(2), 119 Stat. 2739, 2740 (2005), vests in the United States Court of Appeals for the District of Columbia Circuit the exclusive jurisdiction to determine the validity of any final decision of a combatant status review tribunal that an

548 U.S. 557; 126 S. Ct. 2749, *;
165 L. Ed. 2d 723, **; 2006 U.S. LEXIS 5185, ***

The Court of Appeals relied on *Johnson v. Eisen-trager*, 339 U.S. 763, 70 S. Ct. 936, 94 L. Ed. 1255 (1950), to hold that Hamdan could not invoke the Geneva Conventions to challenge the Government's plan to prosecute him in accordance with Commission Order No. 1. *Eisen-trager* involved a challenge by 21 German nationals to their 1945 convictions for war crimes by a military tribunal convened in Nanking, China, and to their subsequent imprisonment in occupied Germany. The petitioners argued, *inter alia*, that the 1929 Geneva Convention rendered illegal some of the procedures [***120] employed during their trials, which they said deviated impermissibly from the procedures used by courts-martial to try American soldiers. See *id.*, at 789, 70 S. Ct. 936, 94 L. Ed. 1255. We rejected that claim on the merits because the petitioners (unlike Hamdan here) had failed to [**775] identify any prejudicial disparity "between the Commission that tried [them] and those that would try an offending soldier of the American forces of like rank," and in any event could claim no protection, under the 1929 Geneva Convention, during trials for crimes that occurred before their confinement as prisoners of war. *Id.*, at 790, 70 S. Ct. 936, 94 L. Ed. 1255.⁵⁶

56 As explained in Part VI-C, *supra*, that is no longer true under the 1949 Conventions.

[*2794] Buried in a footnote of the opinion, however, is this curious statement suggesting that the Court lacked power even to consider the merits of the Geneva Convention argument:

"We are not holding that these prisoners have no right which the military authorities are bound to respect. The United States, [***121] by the Geneva Convention of July 27, 1929, 47 Stat. 2021, concluded with forty-six other countries, including the German Reich, an agreement upon the treatment to be accorded captives. These prisoners claim to be and are entitled to its protection. It is, however, the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention." *Id.*, at 789, n. 14, 70 S. Ct. 936, 94 L. Ed. 1255.

The Court of Appeals, on the strength of this footnote, held that "the 1949 Geneva Convention does not confer upon Hamdan a right to enforce its provisions in court." 415 F.3d at 40.

Whatever else might be said about the *Eisen-trager* footnote, it does not control this case. We may assume that "the obvious scheme" of the 1949 Conventions is identical in all relevant respects to that of the 1929 Geneva Convention,⁵⁷ and even that that scheme would, absent some other provision of law, preclude Hamdan's invocation of the Convention's [***122] provisions as an independent source of law binding the Government's actions and furnishing petitioner with any enforceable right.⁵⁸ For, [HN22] regardless of the nature of the rights conferred on Hamdan, cf. *United States v. Rauscher*, 119 U.S. 407, 7 S. Ct. 234, 30 L. Ed. 425 (1886), they are, as the Government does not dispute, part of the law of war. See *Hamdi*, 542 U.S., at 520-521, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (plurality opinion). And compliance with the law of war is the condition upon which the authority set forth in *Article 21* is granted.

57 But see, e.g., 4 Int'l Comm. of Red Cross, Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of War 21 (J. Pictet gen ed. 1958) (hereinafter GCIV Commentary) (the 1949 Geneva Conventions were written "first and foremost to protect individuals, and not to serve State interests"); GCIII Commentary 91 ("It was not . . . until the Conventions of 1949 . . . that the existence of 'rights' conferred on prisoners of war was affirmed").

58 But see generally Brief for Louis Henkin et al. as *Amici Curiae*; 1 Int'l Comm. of Red Cross, Commentary: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 84 (1952) ("It should be possible in States which are parties to the Convention . . . for the rules of the Convention . . . to be evoked before an appropriate national court by the protected person who has suffered the violation"); GCIII Commentary 92; GCIV Commentary 79.

[***123] ii

For the Court of Appeals, acknowledgment [**776] of that condition was no bar to Hamdan's trial by commission. As an alternative to its holding that Hamdan could not invoke the Geneva Conventions at all, the Court of Appeals concluded that the Conventions did not in any event apply to the armed conflict during which Hamdan was captured. The court accepted the Executive's assertions that Hamdan was captured in connection with the United States' war with al Qaeda and that that war is distinct from the war with the Taliban in Afghani-

stan. It further reasoned [*2795] that the war with al Qaeda evades the reach of the Geneva Conventions. See *415 F.3d at 41-42*. We, like Judge Williams, disagree with the latter conclusion.

The conflict with al Qaeda is not, according to the Government, a conflict to which the full protections afforded detainees under the 1949 Geneva Conventions apply because Article 2 of those Conventions (which appears in all four Conventions) renders the full protections applicable only to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." 6 U. S. T., at 3318.⁵⁹ Since Hamdan was [***124] captured and detained incident to the conflict with al Qaeda and not the conflict with the Taliban, and since al Qaeda, unlike Afghanistan, is not a "High Contracting Party"--*i.e.*, a signatory of the Conventions, the protections of those Conventions are not, it is argued, applicable to Hamdan.⁶⁰

59 For convenience's sake, we use citations to the Third Geneva Convention only.

60 The President has stated that the conflict with the Taliban is a conflict to which the Geneva Conventions apply. See White House Memorandum, *Humane Treatment of Taliban and al Qaeda Detainees 2* (Feb. 7, 2002), available at http://www.justicescholars.org/pegc/archive/White_House/bush_memo_20020207_ed.pdf.

We need not decide the merits of this argument because there is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not one between signatories.⁶¹ [HN23] Article 3, often referred to as Common Article 3 because, like Article 2, it appears in [***125] all four Geneva Conventions, provides that in a "conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party⁶² to the conflict shall be bound to apply, as a minimum," certain provisions protecting "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by . . . detention." *Id.*, at 3318. One such provision prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted [**777] court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *Id.*, at 3320.

61 Hamdan observes that Article 5 of the Third Geneva Convention requires that if there be "any doubt" whether he is entitled to prisoner-of-war protections, he must be afforded those protections until his status is determined by a "competent tribunal." 6 U. S. T., at 3324. See also Headquar-

ters Depts. of Army, Navy, Air Force, and Marine Corps, *Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* (1997), App. 116. Because we hold that Hamdan may not, in any event, be tried by the military commission the President has convened pursuant to the November 13 Order and Commission Order No. 1, the question whether his potential status as a prisoner of war independently renders illegal his trial by military commission may be reserved.

[***126]

62 The term "Party" here has the broadest possible meaning; a Party need neither be a signatory of the Convention nor "even represent a legal entity capable of undertaking international obligations." GCIII Commentary 37.

The Court of Appeals thought, and the Government asserts, that Common Article 3 does not apply to Hamdan because the conflict with al Qaeda, being "international in scope," does not qualify as a "conflict not of an international character." *415 F.3d at 41*. That reasoning is erroneous. [HN24] The term "conflict not of an international character" is used here in contradistinction to a conflict between nations. So much is demonstrated by the "fundamental logic [of] the Convention's provisions on its [*2796] application." *Id.*, at 44 (Williams, J., concurring). Common Article 2 provides that "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." 6 U. S. T., at 3318 (Art. 2, P 1). High Contracting Parties (signatories) also must abide by all [***127] terms of the Conventions vis-a-vis one another even if one party to the conflict is a nonsignatory "Power," and must so abide vis-a-vis the nonsignatory if "the latter accepts and applies" those terms. *Ibid.* (Art. 2, P 3). Common Article 3, by contrast, affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory "Power" who are involved in a conflict "in the territory of" a signatory. The latter kind of conflict is distinguishable from the conflict described in Common Article 2 chiefly because it does not involve a clash between nations (whether signatories or not). In context, then, the phrase "not of an international character" bears its literal meaning. See, *e.g.*, J. Bentham, *Introduction to the Principles of Morals and Legislation* 6, 296 (J. Burns & H. Hart eds. 1970) (using the term "international law" as a "new though not inexpressive appellation" meaning "betwixt nation and nation"; defining "international" to include "mutual transactions between sovereigns as such"); Int'l Comm. of Red Cross Commentary on the Additional Protocols to the Geneva Conventions of 12 August 1949, p 1351 (1987) [***128] ("[A] non-

international armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other").

[HN25] Although the official commentaries accompanying Common Article 3 indicate that an important purpose of the provision was to furnish minimal protection to rebels involved in one kind of "conflict not of an international character," *i.e.*, a civil war, see GCIII Commentary 36-37, the commentaries also make clear "that the scope of application of the Article must be as wide as possible," *id.*, at 36.⁶³ In fact, limiting language that would have rendered Common Article 3 applicable "especially [to] cases of civil war, colonial conflicts, or wars of religion" was omitted from the final version of the Article, which coupled broader scope of [**778] application with a narrower range of rights than did earlier proposed iterations. See *Id.* at 42-43.

63 See also *id.*, at 35 (Common Article 3 "has the merit of being simple and clear . . . Its observance does not depend upon preliminary discussions on the nature of the conflict"); GCIV Commentary 51 ("[N]obody in enemy hands can be outside the law"); U.S. Army Judge Advocate General's Legal Center and School, Dept. of the Army, Law of War Workshop Deskbook 228 (June 2000)(reprint 2004) (Common Article 3 "serves as a 'minimum yardstick of protection 'in all conflicts, not just internal armed conflicts'" (quoting *Nicaragua v. United States*, 1986 I. C. J. 14, P 218, 25 I. L. M. 1023)); *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, P 102 (ICTY App. Chamber, Oct. 2, 1995) (stating that "the character of the conflict is irrelevant" in deciding whether Common Article 3 applies).

[**129] iii

[HN26] Common Article 3, then, is applicable here and, as indicated above, requires that Hamdan be tried by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." 6 U. S. T., at 3320 (Art. 3, P 1(d)). While the term "regularly constituted court" is not specifically defined in either Common Article 3 or its accompanying commentary, other sources disclose its core meaning. The commentary accompanying a provision of the Fourth Geneva Convention, for example, defines "regularly constituted" tribunals to include "ordinary military courts" and "definitely exclud[e] all special [*2797] tribunals." GCIV Commentary 340 (defining the term "properly constituted" in Article 66, which the commentary treats as identical to "regularly constituted");⁶⁴ see also *Yamashita*, 327 U.S., at 44, 66 S. Ct.

340, 90 L. Ed. 499 (Rutledge, J., dissenting) (describing military commission as a court "specially constituted for the particular trial"). And one of the Red Cross' own treatises defines "regularly constituted court" as used in Common Article 3 to mean "established and organized in accordance with the laws and procedures already in force in [***130] a country." Int'l Comm. of Red Cross, 1 Customary Int'l Humanitarian Law 355 (2005); see also GCIV Commentary 340 (observing that "ordinary military courts" will "be set up in accordance with the recognized principles governing the administration of justice").

64 The commentary's assumption that the terms "properly constituted" and "regularly constituted" are interchangeable is beyond reproach; the French version of Article 66, which is equally authoritative, uses the term "regulierement constitues" in place of "properly constituted." 6 U. S. T., at 3559.

The Government offers only a cursory defense of Hamdan's military commission in light of Common Article 3. See Brief for Respondents 49-50. As Justice Kennedy explains, that defense fails because "[t]he regular military courts in our system are the courts-martial established by congressional statutes." *Post*, at ____, 165 L. Ed. 2d, at 785 (opinion concurring in part). [HN27] At a minimum, a military commission "can be 'regularly constituted' by the standards of our military justice system only if some [***131] practical need explains deviations from court-martial practice." *Post*, at ____, 165 L. Ed. 2d, at 786. As we have explained, see Part VI-C, *supra*, no such need has been demonstrated here.⁶⁵

65 Further evidence of this tribunal's irregular constitution is the fact that its rules and procedures are subject to change midtrial, at the whim of the Executive. See Commission Order No. 1, § 11 (providing that the Secretary of Defense may change the governing rules "from time to time").

iv

Inextricably intertwined with the question of regular constitution is the evaluation of the procedures governing the tribunal and whether they afford "all the judicial guarantees which are recognized as indispensable by civilized peoples." 6 U. S. T., at 3320 (Art. 3, P 1(d)). Like the phrase "regularly constituted court," this phrase is not defined in the text of the Geneva Conventions. But it must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law. Many [***132] of these are [**779] described in Article 75 of Protocol I to the Geneva Conventions of 1949, adopted in 1977 (Protocol

EXHIBIT

XX



OFFICE OF THE SECRETARY OF DEFENSE
WASHINGTON, DC 20301

JUL 7 2006

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
COMMANDERS OF THE COMBATANT COMMANDS
ASSISTANT SECRETARIES OF DEFENSE
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
DIRECTOR, OPERATIONAL TEST AND EVALUATION
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, ADMINISTRATION AND MANAGEMENT
DIRECTOR, PROGRAM ANALYSIS AND EVALUATION
DIRECTOR, NET ASSESSMENT
DIRECTOR, FORCE TRANSFORMATION
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Application of Common Article 3 of the Geneva Conventions to the
Treatment of Detainees in the Department of Defense

The Supreme Court has determined that Common Article 3 to the Geneva Conventions of 1949 applies as a matter of law to the conflict with Al Qaeda. The Court found that the military commissions as constituted by the Department of Defense are not consistent with Common Article 3.

It is my understanding that, aside from the military commission procedures, existing DoD orders, policies, directives, execute orders, and doctrine comply with the standards of Common Article 3 and, therefore, actions by DoD personnel that comply with such issuances would comply with the standards of Common Article 3. For example, the following are consistent with the standards of Common Article 3: U.S. Army Field Manual 34-52, "Intelligence Interrogation," September 28, 1992; DoD Directive 3115.09, "DoD Intelligence Interrogation, Detainee Debriefings and Tactical Questioning," November 3, 2005; DoD Directive 2311.01E, "DoD Law of War Program," May 9, 2006; and DoD Instruction 2310.08E, "Medical Program Support for Detainee Operations," June 6, 2006. In addition, you will recall the President's prior directive that "the United States Armed Forces shall continue to treat detainees humanely," humane treatment being the overarching requirement of Common Article 3.

You will ensure that all DoD personnel adhere to these standards. In this regard, I request that you promptly review all relevant directives, regulations, policies, practices, and procedures under your purview to ensure that they comply with the standards of Common Article 3.

OSD 10735-06



7/7/2006 4:37:09 PM



Your reply confirming completion of this review should be submitted by a Component Head, General/Flag Officer, or SES member, including a reply of "reviewed and no effect" where applicable, to the Deputy Assistant Secretary of Defense (DASD) for Detainee Affairs, Office of the Under Secretary of Defense for Policy, no later than three weeks from the date of this memorandum. The DASD for Detainee Affairs may be reached at (703) 697-4602.

The text of Common Article 3 follows:

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

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

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

(b) taking of hostages;

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

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

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

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

A handwritten signature in black ink, appearing to read "Richard England". The signature is written in a cursive style with a long horizontal line extending to the right.

EXHIBIT

YY



July 12, 2006

White House Says Terror Detainees Hold Basic Rights

By MARK MAZZETTI and KATE ZERNIKE

WASHINGTON, July 11 — The White House conceded on Tuesday for the first time that terror suspects held by the United States had a right under international law to basic human and legal protections under the Geneva Conventions.

The statement reverses a position the White House had held since shortly after the Sept. 11 attacks, and it represents a victory for those within the administration who argued that the United States' refusal to extend Geneva protections to Qaeda prisoners was harming the country's standing abroad.

It said the White House would withdraw a part of an executive order issued by President Bush in 2002 saying that terror suspects were not covered by the Geneva Conventions.

The White House said the change was in keeping with the Supreme Court decision two weeks ago that struck down the military tribunals Mr. Bush established. A Defense Department memorandum made public earlier Tuesday concluded that the court decision also meant that terror suspects in military custody had legal rights under the Geneva Convention.

The new White House interpretation is likely to have sweeping implications, because it appears to apply to all Qaeda and Taliban terror suspects now in the custody of the Central Intelligence Agency or other American intelligence organizations around the world. From the outset, Mr. Bush declared that the battle against Al Qaeda would be a war like no other, but his administration has been forced to back away from its most forceful efforts to deny rights to terror suspects.

Mr. Bush's order of Feb. 7, 2002, issued shortly after American-led forces toppled the Taliban government in Afghanistan, specifically said that critical aspects of the Geneva Conventions do "not apply to either Al Qaeda or Taliban detainees."

In response to a question, the White House issued a statement late Tuesday, saying: "As a result of the Supreme Court decision, that portion of the order no longer applies. The Supreme Court has clarified what the law is, and the executive branch will comply."

The Pentagon memorandum, dated July 7, offered an unexpectedly conciliatory interpretation of the justices' ruling 12 days ago that struck down White House rules for military tribunals that would have granted detainees the barest of rights. Until late Tuesday, the White House and the C.I.A. had been silent on whether detainees in the custody of intelligence agencies must also be granted those rights.

The memorandum, written by Deputy Defense Secretary Gordon R. England, summarized the Supreme Court findings and reminded officials to "ensure that all D.o.D. personnel adhere to these standards."

The Pentagon currently holds approximately 1,000 Qaeda and Taliban detainees at the military prison at Guantánamo Bay, Cuba, and at bases in Afghanistan. An estimated three dozen additional terror suspects, including Khalid Sheikh Mohammed, who is considered the mastermind of the Sept. 11 attacks, are believed to be held by the C.I.A. at secret sites around the world.

Jennifer Millerwise Dyck, a C.I.A. spokeswoman, declined to comment on questions posed before the White House issued its statement.

Despite the new statements by the White House and the Pentagon, administration lawyers appearing on Capitol Hill on Tuesday urged Congress to approve military commissions similar to those that the court said the president did not have authority to set up on his own. The lawyers played down the Pentagon announcement as representing not a policy shift but simply an announcement of the Supreme Court decision.

"We would ask this body to render its approval for the system as currently configured," said Daniel J. Dell'Orto, the Pentagon's principal deputy general counsel. "It would be a very expeditious way to move these trials forward."

But the tribunal approach ran up against fierce resistance among Republicans as well as Democrats. Some lawmakers argued that the best way to set up a system to bring detainees to trial would be to start with the existing code of military justice, which grants wider rights to detainees, and adjust it to reflect the demands of prosecuting terrorists.

"If you fight that approach, it's going to be long hot summer," said Senator Lindsey Graham, Republican of South Carolina and a former military lawyer who is expected to play a leading role in the debate over bringing detainees to trial.

The new Bush administration statement addresses questions surrounding a key provision of

the 1949 Geneva Conventions known as Common Article 3, which prohibits cruel and inhumane treatment of prisoners and requires that detainees receive “all the judicial guarantees which are recognized as indispensable by civilized peoples.” Mr. Bush’s 2002 order came after a fierce debate about the rules for what the administration was calling a “different kind of war.”

In the new memorandum, Mr. England asserted that “the Supreme Court has determined that Common Article 3 to the Geneva Conventions of 1949 applies as a matter of law to the conflict with Al Qaeda.”

The memorandum by Mr. England was first reported in Tuesday’s online editions of The Financial Times.

Pentagon officials have long said that detainees in military custody are treated in accordance with Common Article 3, yet Mr. England’s memorandum went further in acknowledging that the court’s decision made mandatory what the Pentagon had said it was doing voluntarily.

The memorandum also appears to settle continuing battles within the administration over a long-awaited Pentagon directive on the treatment of detainees.

The directive, called “D.o.D. Program for Enemy Prisoners of War and Other Detainees,” has been held up for months because of wrangling over the types of treatment that ought to be prohibited.

In the past, Vice President Dick Cheney’s chief of staff, David S. Addington, pressed Pentagon officials to eliminate specific language from the document that cited the Geneva Conventions in prohibiting cruel and degrading treatment.

Since becoming the Pentagon’s No. 2 official in 2005, Mr. England has repeatedly expressed concerns about the detention of enemy combatants and has told colleagues that he advocates closing the military prison at Guantánamo Bay because of the negative impact it has on the United States’ reputation.

In a sign of the seriousness with which Mr. England took these issues, his memorandum reprinted the entire text of Common Article 3 and required military commanders to review all the directives and policies under their purview and report back to him within three weeks.

On Capitol Hill, Mr. Dell’Orto played down the England memorandum, testifying before the Senate Judiciary Committee that it was merely intended to “get the word out” about the court

decision.

“It doesn’t indicate a shift in policy,” Mr. Dell’Orto said. “It just announces the decision of the court and with specificity as to the decision as it related to the commission process.”

The hearing today, the first of three this week, formally opened the debate about how to bring Guantánamo detainees to trial, and it quickly showed the stark divide between the White House and Congress.

The White House believes the court did not so much rule out the military commissions as indicate that Mr. Bush should seek approval of them from Congress, administration officials have said.

Under such a system, the defendant could be excluded from the courtroom and could be denied the right to see some of the evidence against him. The military commission rules also allow evidence that is typically excluded from courts, including hearsay and statements obtained through coercion.

Many in Congress, including some Republican leaders who are expected to guide the debate in the Senate, believe that the court will strike down any new arrangement approved by Congress if it does not allow detainees broader rights.

But Mr. Dell’Orto said “it would be ludicrous” to go so far as allowing detainees protections like those granted in court-martial proceedings.

But Senator Graham told the administration lawyers they would be “well served to forget about” the commissions the president wanted.

David Sanger contributed reporting for this article.

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EXHIBIT

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THE WHITE HOUSE
PRESIDENT
GEORGE W. BUSH

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For Immediate Release
Office of the Press Secretary
September 15, 2006

Press Conference of the President

The Rose Garden

11:15 A.M. EDT

THE PRESIDENT: It's always a pleasure to be introduced into the Rose Garden. Thank you, Wendell. Thank you for coming. I'm looking forward to answering some of your questions.



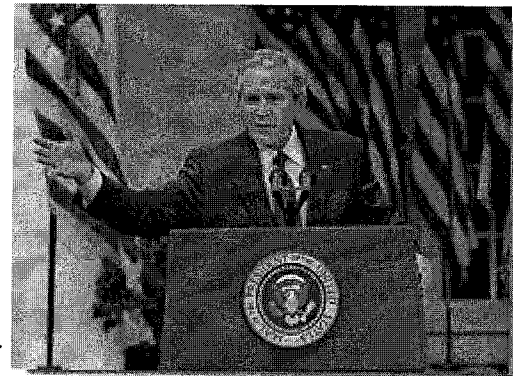
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President's Remarks

 [view](#)

This week our nation paused to mark the 5th anniversary of the 9/11 attacks. It was a tough day for a lot of our citizens. I was so honored to meet with family members and first responders, workers at the Pentagon, all who still had heaviness in their heart. But they asked me a question, you know, they kept asking me, what do you think the level of determination for this country is in order to protect ourselves, is what they want to know.

You know, for me, it was a reminder about how I felt right after 9/11. I felt a sense of determination and conviction about doing everything that is necessary to protect the people. I'm going to go back to New York to address the United Nations General Assembly. I'm going to talk to world leaders gathered there about our obligation to defend civilization and liberty, to support the forces of freedom and moderation throughout the Middle East. As we work with the international community to defeat the terrorists and extremists, to provide an alternative to their hateful ideology, we must also provide our military and intelligence professionals with the tools they need to protect our country from another attack. And the reason they need those tools is because the enemy wants to attack us again.



Right here in the Oval Office, I get briefed nearly every morning about the nature of this world, and I get briefed about the desire of an enemy to hurt America. And it's a sobering experience, as I'm sure you can imagine. I wish that weren't the case, you know. But it is the case. And, therefore, I believe it is vital that our folks on the front line have the tools necessary to protect the American people.

There are two vital pieces of legislation in Congress now that I think are necessary to help us win the war on terror. We will work with members of both parties to get legislation that works out of the Congress. The first bill will allow us to use military commissions to try suspected terrorists for war crimes. We need the legislation because the Supreme Court recently ruled that military commissions must be explicitly authorized by Congress. So we're working with Congress. The Supreme Court said, you must work with Congress; we are working with Congress to get a good piece of legislation out.

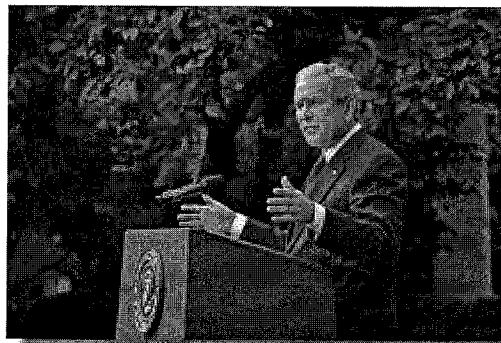
The bill I have proposed will ensure that suspected terrorists will receive full and fair trials, without revealing to them our nation's sensitive intelligence secrets. As soon as Congress acts on this bill, the man our intelligence agencies believe helped orchestrate the 9/11 attacks can face justice.

The bill would also provide clear rules for our personnel involved in detaining and questioning captured terrorists. The information that the Central Intelligence Agency has obtained by questioning men like Khalid Sheikh Mohammed has provided valuable information and has helped disrupt terrorist plots,

including strikes within the United States.

For example, Khalid Sheikh Mohammed described the design of planned attacks of buildings inside the U.S. and how operatives were directed to carry them out. That is valuable information for those of us who have the responsibility to protect the American people. He told us the operatives had been instructed to ensure that the explosives went off at a high -- a point that was high enough to prevent people trapped above from escaping.

He gave us information that helped uncover al Qaeda cells' efforts to obtain biological weapons.



We've also learned information from the CIA program that has helped stop other plots, including attacks on the U.S. Marine base in East Africa, or American consulate in Pakistan, or Britain's Heathrow Airport. This program has been one of the most vital tools in our efforts to protect this country. It's been invaluable to our country, and it's invaluable to our allies.

Were it not for this program, our intelligence community believes that al Qaeda and its allies would have succeeded in launching another attack against the American homeland. Making us -- giving us information about terrorist plans we couldn't get anywhere else, this program has saved innocent lives. In other words, it's vital. That's why I asked Congress to pass legislation so that our professionals can go forward, doing the duty we expect them to do. Unfortunately, the recent Supreme Court decision put the future of this program in question. That's another reason I went to Congress. We need this legislation to save it.

I am asking Congress to pass a clear law with clear guidelines based on the Detainee Treatment Act that was strongly supported by Senator John McCain. There is a debate about the specific provisions in my bill, and we'll work with Congress to continue to try to find common ground. I have one test for this legislation, I'm going to answer one question as this legislation proceeds, and it's this: The intelligence community must be able to tell me that the bill Congress sends to my desk will allow this vital program to continue. That's what I'm going to ask.

The second bill before Congress would modernize our electronic surveillance laws and provide additional authority for the terrorist surveillance program. I authorized the National Security Agency to operate this vital program in response to the 9/11 attacks. It allows us to quickly monitor terrorist communications between someone overseas and someone in the United States, and it's helped detect and prevent attacks on our country.

The principle behind this program is clear: when an al Qaeda operative is calling into the United States or out of the country, we need to know who they're calling, why they're calling, and what they're planning. Both these bills are essential to winning the war on terror. We will work with Congress to get good bills out. We have a duty, we have a duty to work together to give our folks on the front line the tools necessary to protect America. Time is running out. Congress is set to adjourn in just a few weeks. Congress needs to act wisely and promptly so I can sign good legislation.



And now I'll be glad to answer some questions. Terry.

Q Thank you, Mr. President. Mr. President, former Secretary of State Colin Powell says the world is beginning to doubt the moral basis of our fight against terrorism. If a former Chairman of the Joint Chiefs of Staff and former Secretary of State feels this way, don't you think that Americans and the rest of the

world are beginning to wonder whether you're following a flawed strategy?

THE PRESIDENT: If there's any comparison between the compassion and decency of the American people and the terrorist tactics of extremists, it's flawed logic. I simply can't accept that. It's unacceptable to think that there's any kind of comparison between the behavior of the United States of America and the action of Islamic extremists who kill innocent women and children to achieve an objective, Terry.

My job, and the job of people here in Washington, D.C., is to protect this country. We didn't ask for this war. You might remember the 2000 campaign. I don't remember spending much time talking about what it might be like to be a Commander-in-Chief in a different kind of war. But this enemy has struck us and they want to strike us again. And we will give our folks the tools necessary to protect the country; that's our job.

It's a dangerous world. I wish it wasn't that way. I wish I could tell the American people, don't worry about it, they're not coming again. But they are coming again. And that's why I've sent this legislation up to Congress, and that's why we'll continue to work with allies in building a vast coalition, to protect not only ourselves, but them. The facts are, is that after 9/11, this enemy continued to attack and kill innocent people.

I happen to believe that they're bound by a common ideology. Matter of fact, I don't believe that, I know they are. And they want to impose that ideology throughout the broader Middle East. That's what they have said. It makes sense for the Commander-in-Chief, and all of us involved in protecting this country to listen to the words of the enemy. And I take their words seriously. And that's what's going to be necessary to protect this country, is to listen carefully to what they say and stay ahead of them as they try to attack us.

Steve.

Q Can I just follow up?

THE PRESIDENT: No, you can't. Steve. If we follow up, we're not going to get -- I want Hillman to be able to ask a question. It's his last press conference -- not yet, Hillman. (Laughter.) Soon. You and Wendell seem --

Q Thank you very much, sir. What do you say to the argument that your proposal is basically seeking support for torture, coerced evidence and secret hearings? And Senator McCain says your plan will put U.S. troops at risk. What do you think about that?

THE PRESIDENT: This debate is occurring because of the Supreme Court's ruling that said that we must conduct ourselves under the Common Article III of the Geneva Convention. And that Common Article III says that there will be no outrages upon human dignity. It's very vague. What does that mean, "outrages upon human dignity"? That's a statement that is wide open to interpretation. And what I'm proposing is that there be clarity in the law so that our professionals will have no doubt that that which they are doing is legal. You know, it's -- and so the piece of legislation I sent up there provides our professionals that which is needed to go forward.

The first question that we've got to ask is, do we need the program? I believe we do need the program. And I detailed in a speech in the East Room what the program has yield -- in other words, the kind of information we get when we interrogate people, within the law. You see, sometimes you can pick up information on the battlefield; sometimes you can pick it up through letters; but sometimes you actually have to question the people who know the strategy and plans of the enemy. And in this case, we questioned people like Khalid Sheikh Mohammed, who we believe ordered the attacks on 9/11, or Ramzi Binalshibh, or Abu Zabda -- cold-blooded killers who were part of planning the attack that killed 3,000 people. And we need to be able to question them, because it helps yield information, the information necessary for us to be able to do our job.

Now, the Court said that you've got to live under Article III of the Geneva Convention, and the standards are so vague that our professionals won't be able to carry forward the program, because they don't want to be tried as war criminals. They don't want to break the law. These are decent, honorable citizens who are on the front line of protecting the American people, and they expect our government to give them clarity about what is right and what is wrong in the law. And that's what we have asked to do.

And we believe a good way to go is to use the amendment that we worked with John McCain on, called the Detainee Treatment Act, as the basis for clarity for people we would ask to question the enemy. In other words, it is a way to bring U.S. law into play. It provides more clarity for our professionals. And that's what these people expect. These are decent citizens who don't want to break the law.

Now, this idea that somehow we've got to live under international treaties, you know -- and that's fine, we do, but oftentimes the United States passes law to clarify obligations under international treaty. And what I'm concerned about is if we don't do that, then it's very conceivable our professionals could be held to account based upon court decisions in other countries. And I don't believe Americans want that. I believe Americans want us to protect the country, to have clear standards for our law enforcement intelligence officers, and give them the tools necessary to protect us within the law.

It's an important debate, Steve. It really is. It's a debate that really is going to define whether or not we can protect ourselves. I will tell you this, I've spent a lot of time on this issue, as you can imagine, and I've talked to professionals, people I count on for advice -- these are people that are going to represent those on the front line of protecting this country. They're not going forward with the program. They're not going -- the professionals will not step up unless there's clarity in the law. So Congress has got a decision to make: Do you want the program to go forward or not?

I strongly recommend that this program go forward in order for us to be able to protect America.

Hillman. This is Hillman's last press conference, so -- sorry, sorry, about that.

Q Thank you, Mr. President. On another of your top priorities, immigration, leaders of both parties have indicated that any chance of comprehensive immigration reform is dead before the election. Is this an issue you would like to revisit in a lame duck session after the election? Or would it be put off until the new Congress?

THE PRESIDENT: Bob, I strongly believe that in order to protect this border, Congress has got to pass a comprehensive plan that on the one hand provides additional money to secure the border, and on the other hand recognizes that people are sneaking in here to do jobs Americans aren't doing. It would be better that they not sneak in, that they would come on a temporary basis, in an orderly way to do work Americans aren't doing and then go home. And I will continue to urge Congress to think comprehensively about this vital piece of legislation.

I went up to the Hill yesterday, and of course this topic came up. It's exactly what I told the members of Congress. They wanted to know whether or not we were implementing border security measures that they had funded last January, and the answer is, we are. One of the key things I told them was we had ended what's called "catch and release." That was a -- you know, a Border Patrol agent would find somebody, particularly from -- not from Mexico, and would say, well, we don't have enough detention space, so why don't you come back and check in with the local person you're supposed to check in with, and then they'd never show back up. And that, of course, frustrated the Border Patrol agents, it frustrates American citizens, it frustrates me, and we ended it, because Congress appropriated money that increased the number of beds available to detain people when we get them sneaking into our country illegally.

The border has become modernized. And Secretary Chertoff here, later on this month, will be announcing further modernizations, as he had led a contract that will use all kinds of different technologies to make the border more secure. But in the long run, to secure this border, we've got to have a rational work plan.

And, finally, we're going to have to treat people with dignity in this country. Ours is a nation of immigrants, and when Congress gets down to a comprehensive bill, I would just remind them, it's virtually impossible to try to find 11 million folks who have been here, working hard -- and, in some cases, raising families -- and kick them out. It's just not going to work. But granting automatic citizenship won't work either. To me, that would just provide an additional incentive for people to try to sneak in, and so therefore there is a rational way forward. I'll continue working -- I don't know the timetable. My answer is, as soon as possible, that's what I'd like to see done.

Thank you. Let's see, Wendell. Coming your way. Everybody is going to get one.

Q My apologies, Mr. President, for talking too long at the start.

THE PRESIDENT: Don't worry. I'm not going to apologize for talking too long to your answer. (Laughter.)

Q Talk as long as you'd like, sir. (Laughter.)

When you go to New York next week, it's our thinking that one of the things you'll be trying to do is to get more international support for taking a tough stance against Iran. I wonder how much that is frustrated by two things: one, the war in Iraq and world criticism of that; and the other, the Iraqi Prime Minister going to Iran and basically challenging your administration's claim that Iran is meddling in Iraqi affairs.

THE PRESIDENT: First, Wendell, my decision, along with other countries, to remove Saddam Hussein, has obviously created some concern amongst allies, but it certainly hasn't diminished the coalitions we put together to deal with radicalism. For example, there's 70 nations involved with the Proliferation Security Initiative, and that's an initiative to help prevent weapons of mass destruction and/or component parts from being delivered to countries that could use them to hurt us; or the broad war on terror, the intelligence sharing or financial -- sharing of financial information; or Afghanistan, where NATO troops are there now, along with ours.

In other words, there's a broad coalition. Most nations recognize the threat of Iran having a nuclear weapon in the middle of the Middle East. And there's common consensus that we need to work together to prevent the Iranian regime from developing that nuclear weapons program.

I am pleased that there is strong consensus. And now the objective is to continue reminding the Iranian regime that there is unanimity in the world, and that we will move forward together. And we expect them to come to the table and negotiate with the EU in good faith. And should they choose to verifiably suspend their program, their enrichment program, we'll come to the table. That's what we have said; offer still stands.

During the Hezbollah attacks on Israel, the United Nations did pass a resolution with our European friends and ourselves, and, of course, Russia and China voting for the resolution. I think it passed 14 to 1; one nation voted against the resolution toward Iran. So there is common consensus. And you've heard me lament oftentimes, it takes a while to get diplomacy working. There's one nation of Iran and a bunch of nations like us trying to kind of head in the same direction. And my concern is that they'll stall, they'll try to wait us out.

So part of my objective in New York is to remind people that stalling shouldn't be allowed. In other words, we need to move the process, and they need to understand we're firm in our commitment, and if they try to drag their feet or get us to look the other way, that we won't do that -- that we're firmly committed in our desire to send a common signal to the Iranian regime.

It is important for the Iranian people to also understand we respect them; we respect their history; we respect their traditions; we respect the right for people to worship freely, we would hope that people would be able to express themselves in the public square; and that our intention is to make the world safer. And we'll continue to do so.

Suzanne. And then Martha.

Q Thank you, Mr. President. If I could follow up on that question.

THE PRESIDENT: Yes.

Q Mahmoud Ahmadinejad, the Iranian President, will actually be in the same building as you next week, in Manhattan for the United Nations General Assembly. You say that you want to give the message to the Iranian people that you respect them. Is this not an opportunity, perhaps, to show that you also respect their leader? Would you be willing to, perhaps, meet face-to-face with Ahmadinejad, and would this possibly be a breakthrough, some sort of opportunity for a breakthrough on a personal level?

THE PRESIDENT: No, I'm not going to meet with him. I have made it clear to the Iranian regime that we will sit down with the Iranians once they verifiably suspend their enrichment program. I meant what I said.

Martha.

Q Mr. President, you have said throughout the war in Iraq and building up to the war in Iraq that there was a relationship between Saddam Hussein and Zarqawi and al Qaeda. A Senate Intelligence Committee report a few weeks ago said there was no link, no relationship, and that the CIA knew this and issued a report last fall. And, yet, a month ago you were still saying there was a relationship. Why did you keep saying that? Why do you continue to say that? And do you still believe that?

THE PRESIDENT: The point I was making to Ken Herman's question was that Saddam Hussein was a state sponsor of terror, and that Mr. Zarqawi was in Iraq. He had been wounded in Afghanistan, had come to Iraq for treatment. He had ordered the killing of a U.S. citizen in Jordan. I never said there was an operational relationship. I was making the point that Saddam Hussein had been declared a state sponsor of terror for a reason, and, therefore, he was dangerous.

The broader point I was saying -- I was reminding people was why we removed Saddam Hussein from power. He was dangerous. I would hope people aren't trying to rewrite the history of Saddam Hussein -- all of a sudden, he becomes kind of a benevolent fellow. He's a dangerous man. And one of the reasons he was declared a state sponsor of terror was because that's what he was. He harbored terrorists; he paid for families of suicide bombers. Never have I said that Saddam Hussein gave orders to attack 9/11. What I did say was, after 9/11, when you see a threat, you've got to take it seriously. And I saw a threat in Saddam Hussein -- as did Congress, as did the United Nations. I firmly believe the world is better off without Saddam in power, Martha.

Dave. He's back.

Q Sorry, I've got to get disentangled --

THE PRESIDENT: Would you like me to go to somebody else here, until you -- (laughter.)

Q Sorry.

THE PRESIDENT: But take your time, please. (Laughter.)

Q I really apologize for that. Anyway --

THE PRESIDENT: I must say, having gone through those gyrations, you're looking beautiful today, Dave. (Laughter.)

Q Mr. President, critics of your proposed bill on interrogation rules say there's another important test -- these critics include John McCain, who you've mentioned several times this morning -- and that test is

this: If a CIA officer, paramilitary or special operations soldier from the United States were captured in Iran or North Korea, and they were roughed up, and those governments said, well, they were interrogated in accordance with our interpretation of the Geneva Conventions, and then they were put on trial and they were convicted based on secret evidence that they were not able to see, how would you react to that, as Commander-in-Chief?

THE PRESIDENT: David, my reaction is, is that if the nations such as those you named, adopted the standards within the Detainee Detention Act, the world would be better. That's my reaction. We're trying to clarify law. We're trying to set high standards, not ambiguous standards.

And let me just repeat, Dave, we can debate this issue all we want, but the practical matter is, if our professionals don't have clear standards in the law, the program is not going to go forward. You cannot ask a young intelligence officer to violate the law. And they're not going to. They -- let me finish, please -- they will not violate the law. You can ask this question all you want, but the bottom line is -- and the American people have got to understand this -- that this program won't go forward; if there is vague standards applied, like those in Common Article III from the Geneva Convention, it's just not going to go forward. You can't ask a young professional on the front line of protecting this country to violate law.

Now, I know they said they're not going to prosecute them. Think about that: Go ahead and violate it, we won't prosecute you. These people aren't going to do that, Dave. Now, we can justify anything you want and bring up this example or that example, I'm just telling you the bottom line, and that's why this debate is important, and it's a vital debate.

Now, perhaps some in Congress don't think the program is important. That's fine. I don't know if they do or don't. I think it's vital, and I have the obligation to make sure that our professionals who I would ask to go conduct interrogations to find out what might be happening or who might be coming to this country, I got to give them the tools they need. And that is clear law.

Q But sir, this is an important point, and I think it depends --

THE PRESIDENT: The point I just made is the most important point.

Q Okay.

THE PRESIDENT: And that is the program is not going forward. David, you can give a hypothetical about North Korea, or any other country, the point is that the program is not going to go forward if our professionals do not have clarity in the law. And the best way to provide clarity in the law is to make sure the Detainee Treatment Act is the crux of the law. That's how we define Common Article III, and it sets a good standard for the countries that you just talked about.

Next man.

Q No, but wait a second, I think this is an important point --

THE PRESIDENT: I know you think it's an important point. (Laughter.)

Q Sir, with respect, if other countries interpret the Geneva Conventions as they see fit -- as they see fit -- you're saying that you'd be okay with that?

THE PRESIDENT: I am saying that I would hope that they would adopt the same standards we adopt; and that by clarifying Article III, we make it stronger, we make it clearer, we make it definite.

And I will tell you again, David, you can ask every hypothetical you want, but the American people have got to know the facts. And the bottom line is simple: If Congress passes a law that does not clarify the rules, if they do not do that, the program is not going forward.

Q This will not endanger U.S. troops, in your --

THE PRESIDENT: Next man.

Q This will not endanger U.S. troops --

THE PRESIDENT: David, next man, please. Thank you. It took you a long time to unravel, and it took you a long time to ask your question.

Q Morning, sir. I'd like to ask you another question about Iraq. It's been another bloody day there. The last several weeks have been 40, 50, 60 bodies a day. We've been talking for the last several months about Iraq being on the brink of a civil war. I'd like to ask you if it's not time to start talking about Iraq as being in a civil war, and if it's not, what's the threshold?

THE PRESIDENT: Well, it seems like it's pretty easy to speculate from over here about the conditions on the ground. And so what I do is I talk to people like our Ambassador and General Casey, which I just did this morning. And they, and the Iraqi government, just don't agree with the hypothesis it is a civil war. They believe that there's, no question, violence; they believe that al Qaeda is still creating havoc; they know there's people taking reprisal; they're confident there are still Saddamists who are threatening people and carrying out attacks.

But they also believe that the Baghdad security plan is making progress. There was a lot of discussion about al-Anbar province recently, and I spent some time talking with our commanders. No question it's a dangerous place. It's a place where al Qaeda is really trying to root themselves; it's a place from which they'd like to operate. You know, this business about al Qaeda -- al-Anbar's loss is just not the case; it's not what our commanders think.

So to answer your question, there's no question it's tough. What I look for is whether or not the unity government is moving forward, whether or not they have a political plan to resolve issues such as oil and federalism, whether or not they're willing to reconcile, and whether or not Iraqi troops and Iraqi police are doing their jobs.

Q But how do you measure progress with a body count like that?

THE PRESIDENT: Well, one way you do it is you measure progress based upon the resilience of the Iraqi people; do they want there to be a unity government, or are they splitting up into factions of people warring with the head leaders, with different alternatives of governing styles and different philosophies. The unity government is intact. It's working forward. They're making tough decisions. And we'll stay with them. We'll stay with them because success in Iraq is important for this country. We're constantly changing our tactics. We're constantly adapting to the enemy. We're constantly saying, here's the way forward, we want to work with you. But this is really the big challenge of the 21st century, whether or not this country and allies are willing to stand with moderate people in order to fight off extremists. It is the challenge.

I said the other night in a speech, this is like the ideological war of the 21st century, and I believe it. And I believe that if we leave that region, if we don't help democracy prevail, then our children and grandchildren will be faced with an unbelievable chaotic and dangerous situation in the Middle East. Imagine -- imagine an enemy that can't stand what we believe in getting a hold of oil resources and taking a bunch of oil off the market in order to have an economic punishment. In other words, they say, you go ahead and do this, and if you don't, we'll punish you economically. Or imagine a Middle East with an Iran with a nuclear weapon threatening free nations and trying to promote their vision of extremism through Hezbollah.

I find it interesting that young democracies are being challenged by extremists. I also take great hope in the fact that, by far, the vast majority of people want normalcy and want peace, including in Iraq; that there is a deep desire for people to raise their children in a peaceful world; the desire for mothers to

have the best for their child. And it's not -- there isn't -- you know, Americans -- you've got to understand, this is universal. And the idea of just saying, well, that's not important for us, to me, or the future of the country, it's just not acceptable.

And I know it's tough in Iraq. Of course it's tough in Iraq, because an enemy is trying to stop this new democracy, just like people are trying to stop the development of a Palestinian state, which I strongly support; or people trying to undermine the Lebanese democracy. And the reason why is because the ideologues understand that liberty will trump their dark vision of the world every time. And that's why I call it an ideological struggle. And it's a necessary struggle, and it's a vital struggle.

Richard.

Q Mr. President, as you prepare to go up to the United Nations next week to address the General Assembly, Secretary Kofi Annan has been critical of some of U.S. policies, particularly in Afghanistan lately. How would you characterize the relationship between the United States and the United Nations at this point?

THE PRESIDENT: First of all, my personal relationship with Kofi Annan is good. I like him. And we've got a good relationship, personal relationship. I think a lot of Americans are frustrated with the United Nations, to be frank with you. Take, for example, Darfur. I'm frustrated with the United Nations in regards to Darfur. I have said, and this government has said, there's genocide taking place in the Sudan. And it breaks our collective hearts to know that.

We believe that the best way to solve the problem is there be a political track, as well as a security track. And part of the security track was for there initially to be African Union forces, supported by the international community, hopefully to protect innocent lives from militia. And the AU force is there, but it's not robust enough. It needs to be bigger. It needs to be more viable.

And so the strategy was then to go to the United Nations and pass a resolution enabling the AU force to become blue-helmeted -- that means, become a United Nations peacekeeping force -- with additional support from around the world. And I suggested that there also be help from NATO nations in logistics and support, in order to make the security effective enough so that a political process could go forward to save lives.

The problem is, is that the United Nations hasn't acted. And so I can understand why those who are concerned about Darfur are frustrated; I am. I'd like to see more robust United Nations action. What you'll hear is, well, the government of Sudan must invite the United Nations in for us to act. Well, there are other alternatives, like passing a resolution saying, we're coming in with a U.N. force, in order to save lives.

I'm proud of our country's support for those who suffer. We've provided by far the vast majority of food and aid. I'm troubled by reports I hear about escalating violence. I can understand the desperation people feel for women being pulled out of these refugee centers and raped. And now is the time for the U.N. to act.

So you asked if there are levels of frustration -- there's a particular level of frustration. I also believe that the United Nations can do a better job spending the taxpayer -- our taxpayers' money. I think there needs to be better management structures in place, better accountability in the organization. I hope the United Nations still strongly stands for liberty. I hope they would support my call to end tyranny in the 21st century.

So I'm looking forward to going up there to -- it's always an interesting experience, Richard, for a West Texas fellow to speak to the United Nations. And I'm going to have a strong message, one that's -- hope, based upon hope, and my belief that the civilized world must stand with moderate reformist-minded people and help them realize their dreams. I believe that's the call of the 21st century.

Let's see, who else? The front row people have all asked. Hutch.

Q Good morning.

THE PRESIDENT: Good morning. Thank you.

Q On both the eavesdropping program and the detainee issues --

THE PRESIDENT: We call it the terrorist surveillance program, Hutch.

Q That's the one.

THE PRESIDENT: Yes.

Q You're working with Congress sort of after the fact, after you established these programs on your own authority. And federal courts have ruled in both cases, you overstepped your authority. Is your willingness to work with Congress now an acknowledgment that that is a fact?

THE PRESIDENT: First of all, I strongly believe that the district court ruling on the terrorist surveillance program was flawed. And there's a court process to determine whether or not my belief is true. That's why it's on appeal. We're working with Congress to add certainty to the program.

In terms of the Hamdan decision, I obviously believed that I could move forward with military commissions. Other Presidents had. The Supreme Court didn't agree, and they said, work with Congress. And that's why we're working with Congress.

McKinnon.

Q Thank you, sir. Polls show that many people are still more focused on domestic issues, like the economy, than on the international issues in deciding how to vote in November. And I'd just like to ask you if you could contrast what you think will happen on the economy if Republicans retain control of Congress versus what happens on the economy if Democrats take over?

THE PRESIDENT: If I weren't here -- first of all, I don't believe the Democrats are going to take over, because our record on the economy is strong. If the American people would take a step back and realize how effective our policies have been, given the circumstances, they will continue to embrace our philosophy of government. We've overcome recession, attacks, hurricanes, scandals, and the economy is growing -- 4.7 percent unemployment rate. It's been a strong economy. And I've strongly believed the reason it is because we cut taxes, and at the same time, showed fiscal responsibility here in Washington with the people's money. That's why the deficit could be cut in half by 2009, or before.

And so I shouldn't answer your hypothetical, but I will. I believe if the Democrats had the capacity to, they would raise taxes on the working people. That's what I believe. They'll call it tax on the rich, but that's not the way it works in Washington, see. For example, running up the top income tax bracket would tax small businesses. A lot of small businesses are subchapter-S corporations or limited partnerships that pay tax at the individual level. And if you raise income taxes on them, you hurt job creation. Our answer to economic growth is to make the tax cuts permanent, so there's certainty in the tax code, and people have got money to spend in their pockets.

I've always felt the economy is a determinate issue, if not the determinate issue in campaigns. We've had a little history of that in our family -- (laughter) -- you might remember. But it's a -- I certainly hope this election is based upon economic performance.

Let's see here, kind of working my way -- yes, Mark.

Q Thank you, Mr. President. I'd also like to ask an election-related question. The Republican Leader in

the House this week said that Democrats -- he wonders if they are more interested in protecting the terrorists than protecting the American people. Do you agree with him, sir? And do you think that's the right tone to set for this upcoming campaign, or do you think he owes somebody an apology?

THE PRESIDENT: I wouldn't have exactly put it that way. But I do believe there's a difference of attitude. I mean, take the Patriot Act, for example -- an interesting debate that took place, not once, but twice, and the second time around there was a lot of concern about whether or not the Patriot Act was necessary to protect the country. There's no doubt in my mind we needed to make sure the Patriot Act was renewed to tear down walls that exist so that intelligence people could serve -- could share information with criminal people. It wasn't the case, Mark, before 9/11.

In other words, if somebody had some intelligence that they thought was necessary to protect the people, they couldn't share that with somebody who's job it was to rout people out of society to prevent them from attacking. It made no sense. And so there was a healthy debate, and we finally got the Patriot Act extended after it was passed right after 9/11. To me it was an indication of just a difference of approach.

No one should ever question the patriotism of somebody who -- let me just start over. I don't question the patriotism of somebody who doesn't agree with me. I just don't. And I think it's unwise to do that. I don't think that's what leaders do. I do think that -- I think that there is a difference of opinion here in Washington about tools necessary to protect the country -- the terrorist surveillance program -- or what did you call it, Hutcheson, yes, the illegal eavesdropping program -- (laughter) -- IEP, as opposed to TSP. (Laughter.) There's just a difference of opinion about what we need to do to protect our country, Mark. I'm confident the Leader, you know, meant nothing personal. I know that he shares my concern that we pass good legislation to get something done.

Ken.

Q Thank you, sir. I'd be interested in your thoughts and remembrances about Ann Richards, and particularly what you learned in running against her 12 years ago.

THE PRESIDENT: Obviously, Laura and I pray for her family. I know this is a tough time for her children. She loved her children and they loved her a lot.

Running against Ann Richards taught me a lot. She was a really, really good candidate. She was a hard worker. She had the capacity to be humorous and, yet, make a profound point. I think she made a positive impact on the state of Texas. One thing is for certain, she empowered a lot of people to be -- to want to participate in the political process that might not have felt that they were welcome in the process.

I'll miss her. She was a -- she really kind of helped define Texas politics in its best way. And one of the things we have done is we've -- in our history we've had characters, people larger than life, people that could fill the stage; when the spotlight was on them, wouldn't shirk from the spotlight but would talk Texan and explain -- explain our state. And she was really good at that.

And so I'm sad she passed away, and I wish her family all the best, and all her friends. She had a lot of friends in Texas. A lot of people loved Ann Richards.

And as I understand, they're working on the deal and how to honor her, and she'll be lying in state in the capitol, and --

Q Will you be sending anybody to --

THE PRESIDENT: Yes, I will send somebody to represent me. I don't know who it is going to be yet. Well, we're trying to get the details. Before I ask somebody, I've got to find out the full details.

Thanks for asking the question. Let's see, New York Times, Sheryl.

Q Hi, Mr. President.

THE PRESIDENT: Fine. How are you doing?

Q I'm well today, thank you. (Laughter.)

THE PRESIDENT: Did you start with, hi, Mr. President?

Q Hello, Mr. President.

THE PRESIDENT: Okay, that's fine. Either way, that's always a friendly greeting, thank you.

Q We're a friendly newspaper.

THE PRESIDENT: Yes. (Laughter.) Let me just say, I'd hate to see unfriendly. (Laughter.)

Q Mr. President --

THE PRESIDENT: Want me to go on to somebody else, and you collect your -- (laughter.) Sorry, go ahead, Sheryl.

Q Mr. President, your administration had all summer to negotiate with lawmakers on the detainee legislation. How is it that you now find yourself in a situation where you have essentially an open rebellion on Capitol Hill led by some of the leading members of your own party, very respected voices in military affairs? And, secondly, would you veto the bill if it passes in the form that the Armed Services Committee approved yesterday?

THE PRESIDENT: First, we have been working throughout the summer, talking to key players about getting a bill that will enable the program to go forward, and was pleased that the House of Representatives passed a good bill with an overwhelming bipartisan majority out of their committee, the Armed Services Committee. And I felt that was good progress. And, obviously, we've got a little work to do in the Senate, and we'll continue making our case. But, no, we've been involved -- ever since the Supreme Court decision came down, Sheryl, we've been talking about both the military tribunals and this Article III of the Geneva Convention.

Article III of the Geneva Convention is hard for a lot of citizens to understand. Let's see if I can put it this way for people to understand -- there is a very vague standard that the Court said must kind of be the guide for our conduct in the war on terror and the detainee policy. It's so vague that it's impossible to ask anybody to participate in the program for fear -- for that person having the fear of breaking the law. That's the problem.

And so we worked with members of both bodies and both parties to try to help bring some definition to Common Article III. I really don't think most Americans want international courts being able to determine how we protect ourselves. And my assurance to people is that we can pass law here in the United States that helps define our treaty -- international treaty obligations. We have done that in the past. It is not the first time that we have done this. And I believe it's necessary to do it this time in order for the program to go forward.

Peter.

Q Thank you, Mr. President. Sheryl's second question was whether you would veto the bill as it passed yesterday.

THE PRESIDENT: Oh, I don't -- that's like saying, can you work with a Democrat Congress, when I don't think the Democrat Congress is going to get elected. I believe we can get a good bill. And there is -- as you know, there's several steps in this process. The House will be working on a bill next week, the

Senate will be. Hopefully we can reconcile differences. Hopefully we can come together and find a way forward without ruining the program.

So your question was Sheryl's question?

Q No, sir.

THE PRESIDENT: Oh, you were following up on Sheryl's question?

Q Yes, sir.

THE PRESIDENT: That's a first. (Laughter.)

Q We're a friendly paper, too. (Laughter.)

Mr. President, you've often used the phrase "stand up, stand down," to describe your policy when it comes to troop withdrawals from Iraq -- as Iraqi troops are trained and take over the fight, American troops will come home. The Pentagon now says they've trained 294,000 Iraqi troops and expect to complete their program of training 325,000 by the end of the year, but American troops aren't coming home, and there are more there now than there were previously. Is the goal post moving, sir?

THE PRESIDENT: No, no. The enemy is changing tactics, and we're adapting. That's what's happening. I asked General Casey today, have you got what you need? He said, yes, I've got what I need.

We all want the troops to come home as quickly as possible. But they'll be coming home when our commanders say the Iraqi government is capable of defending itself and sustaining itself and is governing itself. And, you know, I was hoping we would have -- be able to -- hopefully, Casey would come and say, you know, Mr. President, there's a chance to have fewer troops there. It looked like that might be the case -- until the violence started rising in Baghdad, and it spiked in June and July, as you know -- or increased in June and July.

And so they've got a plan now, they've adapted. The enemy moves; we'll help the Iraqis move. So they're building a berm around the city to make it harder for people to come in with explosive devices, for example. They're working different neighborhoods inside of Baghdad to collect guns and bring people to detention. They've got a "clear, build and hold" strategy.

The reason why there are not fewer troops there, but are more -- you're right, it's gone from 135,000 to about 147,000, I think, or 140,000 something troops is because George Casey felt

he needed them to help the Iraqis achieve their objective.

And that's the way I will continue to conduct the war. I'll listen to generals. Maybe it's not the politically expedient thing to do, is to increase troops coming into an election, but we just can't -- you can't make decisions based upon politics about how to win a war. And the fundamental question you have to ask -- and Martha knows what I'm about to say -- is: Can the President trust his commanders on the ground to tell him what is necessary? That's really one of the questions.

In other words, if you say, I'm going to rely upon their judgment, the next question is, how good is their judgment; or is my judgment good enough to figure out whether or not they know what they're doing? And I'm going to tell you I've got great confidence in General John Abizaid and General George Casey. These are extraordinary men who understand the difficulties of the task, and understand there is a delicate relationship between self-sufficiency on the Iraqis' part, and U.S. presence.

And this is not a science, but an art form in a way, to try to make sure that a unity government is able to defend itself, and at the same time not be totally reliant upon coalition forces to do the job for them. And the issue is complicated by the fact that there are still al Qaeda or Saddam remnants or militias that are

still violent. And so to answer your question, the policy still holds. The "stand up, stand down" still holds, and so does the policy of me listening to our commanders to give me the judgment necessary for troop levels.

Richard, and then Allen.

Q Thank you, Mr. President. Earlier this week, you told a group of journalists that you thought the idea of sending special forces to Pakistan to hunt down bin Laden was a strategy that would not work.

THE PRESIDENT: Yes.

Q Now, recently you've also --

THE PRESIDENT: Because, first of all, Pakistan is a sovereign nation.

Q Well, recently you've also described bin Laden as a sort of modern day Hitler or Mussolini. And I'm wondering why, if you can explain why you think it's a bad idea to send more resources to hunt down bin Laden, wherever he is?

THE PRESIDENT: We are, Richard. Thank you. Thanks for asking the question. They were asking me about somebody's report, well, special forces here -- Pakistan -- if he is in Pakistan, as this person thought he might be, who is asking the question -- Pakistan is a sovereign nation. In order for us to send thousands of troops into a sovereign nation, we've got to be invited by the government of Pakistan.

Secondly, the best way to find somebody who is hiding is to enhance your intelligence and to spend the resources necessary to do that; then when you find him, you bring him to justice. And there is a kind of an urban myth here in Washington about how this administration hasn't stayed focused on Osama bin Laden. Forget it. It's convenient throw-away lines when people say that. We have been on the hunt, and we'll stay on the hunt until we bring him to justice, and we're doing it in a smart fashion, Richard. We are. And I look forward to talking to President Musharraf.

Look, he doesn't like al Qaeda. They tried to kill him. And we've had a good record of bringing people to justice inside of Pakistan, because the Paks are in the lead. They know the stakes about dealing with a violent form of ideological extremists. And so we will continue on the hunt. And we've been effective about bringing to justice most of those who planned and plotted the 9/11 attacks, and we've still got a lot of pressure on them. The best way to protect the homeland is to stay on the offense and keep pressure on them.

Last question. Allen.

Q Thank you, Mr. President. It was reported earlier this week that in a meeting with conservative journalists, you said you'd seen changes in the culture, you referred to it as a Third Awakening. I wonder if you could tell us about what you meant by that, what led you to that conclusion? And do you see any contradictory evidence in the culture?

THE PRESIDENT: No, I said -- Mike, thanks. I was just speculating that the culture might be changing, and I was talking about when you're involved with making decisions of historic nature, you won't be around to see the effects of your decisions. And I said that when I work the ropelines, a lot of people come and say, Mr. President, I'm praying for you -- a lot. As a matter of fact, it seems like a lot more now than when I was working ropelines in 1994. And I asked them -- I was asking their opinion about whether or not there was a Third Awakening, I called it.

I'd just read a book on Abraham Lincoln, and his presidency was right around the time of what they called the Second Awakening, and I was curious to know whether or not these smart people felt like there was any historical parallels. I also said that I had run for office the first time to change a culture -- Herman and Hutch remember me saying, you know, the culture that said, if it feels good, do it, and, if

you've got a problem, blame somebody else -- to helping to work change a culture in which each of us are responsible for the decisions we make in life. In other words, ushering in a responsibility era. And I reminded people that responsibility means if you're a father, love your child; if you're corporate America, be honest with the taxpayers; if you're a citizen of this country, love your neighbor.

And so I was wondering out loud with them. It seems like to me that something is happening in the religious life of America. But I'm not a very good focus group, either. I'm encapsulated here. But I'm able to see a lot of people, and from my perspective, people are coming to say, I'm praying for you. And it's an uplifting part of being the President; it inspires me. And I'm grateful that a fellow citizen would say a prayer for me and Laura.

Anyway, thank you all very much.

END 12:14 P.M. EDT

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For Immediate Release
Office of the Press Secretary
October 17, 2006

President Bush Signs Military Commissions Act of 2006

The East Room

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President's Remarks

[view](#)

9:35 A.M. EDT

THE PRESIDENT: Welcome to the White House on an historic day. It is a rare occasion when a President can sign a bill he knows will save American lives. I have that privilege this morning.

The Military Commissions Act of 2006 is one of the most important pieces of legislation in the war on terror. This bill will allow the Central Intelligence Agency to continue its program for questioning key terrorist leaders and operatives like Khalid Sheikh Mohammed, the man believed to be the mastermind of the September the 11th, 2001 attacks on our country. This program has been one of the most successful intelligence efforts in American history. It has helped prevent attacks on our country. And the bill I sign today will ensure that we can continue using this vital tool to protect the American people for years to come. The Military Commissions Act will also allow us to prosecute captured terrorists for war crimes through a full and fair trial.

Last month, on the fifth anniversary of 9/11, I stood with Americans who lost family members in New York and Washington and Pennsylvania. I listened to their stories of loved ones they still miss. I told them America would never forget their loss. Today I can tell them something else: With the bill I'm about to sign, the men our intelligence officials believe orchestrated the murder of nearly 3,000 innocent people will face justice.



I want to thank the Vice President for joining me today. Mr. Vice President, appreciate you. Secretary Don Rumsfeld, I appreciate your service to our country. I want to thank Attorney General Al Gonzales; General Mike Hayden, Director of the Central Intelligence Agency; General Pete Pace, Chairman of the Joint Chiefs of Staff.

I appreciate very much Senator John Warner, Chairman of the Senate Armed Services Committee, and Congressman Duncan Hunter, Chairman of the House Armed Services Committee, for joining us today. I want to thank both of these men for their leadership. I appreciate Senator Lindsey Graham, from South Carolina, joining us; Congressman Jim Sensenbrenner, Chairman of the House Judiciary Committee; Congressman Steve Buyer, of Indiana; Congressman Chris Cannon, of Utah. Thank you all for coming.

The bill I sign today helps secure this country, and it sends a clear message: This nation is patient and decent and fair, and we will never back down from the threats to our freedom.

One of the terrorists believed to have planned the 9/11 attacks said he hoped the attacks would be the beginning of the end of America. He didn't get his wish. We are as determined today as we were on the morning of September the 12th, 2001. We'll meet our obligation to protect our people, and no matter how

long it takes, justice will be done.

When I proposed this legislation, I explained that I would have one test for the bill Congress produced: Will it allow the CIA program to continue? This bill meets that test. It allows for the clarity our intelligence professionals need to continue questioning terrorists and saving lives. This bill provides legal protections that ensure our military and intelligence personnel will not have to fear lawsuits filed by terrorists simply for doing their jobs.



This bill spells out specific, recognizable offenses that would be considered crimes in the handling of detainees so that our men and women who question captured terrorists can perform their duties to the fullest extent of the law. And this bill complies with both the spirit and the letter of our international obligations. As I've said before, the United States does not torture. It's against our laws and it's against our values.

By allowing the CIA program to go forward, this bill is preserving a tool that has saved American lives. The CIA program helped us gain vital intelligence from Khalid Sheikh Mohammed and Ramzi Binalshibh, two of the men believed to have helped plan and facilitate the 9/11 attacks. The CIA program helped break up a cell of 17 southeastern Asian terrorist operatives who were being groomed for attacks inside the United States. The CIA program helped us uncover key operatives in al Qaeda's biological weapons program, including a cell developing anthrax to be used in terrorist attacks.

The CIA program helped us identify terrorists who were sent to case targets inside the United States, including financial buildings in major cities on the East Coast. And the CIA program helped us stop the planned strike on U.S. Marines in Djibouti, a planned attack on the U.S. consulate in Karachi, and a plot to hijack airplanes and fly them into Heathrow Airport and Canary Wharf in London.

Altogether, information from terrorists in CIA custody has played a role in the capture or questioning of nearly every senior al Qaeda member or associate detained by the United States and its allies since this program began. Put simply, this program has been one of the most vital tools in our war against the terrorists. It's been invaluable both to America and our allies. Were it not for this program, our intelligence community believes that al Qaeda and its allies would have succeeded in launching another attack against the American homeland. By allowing our intelligence professionals to continue this vital program, this bill will save American lives. And I look forward to signing it into law.

The bill I'm about to sign also provides a way to deliver justice to the terrorists we have captured. In the months after 9/11, I authorized a system of military commissions to try foreign terrorists accused of war crimes. These commissions were similar to those used for trying enemy combatants in the Revolutionary War and the Civil War and World War II. Yet the legality of the system I established was challenged in the court, and the Supreme Court ruled that the military commissions needed to be explicitly authorized by the United States Congress.

And so I asked Congress for that authority, and they have provided it. With the Military Commission Act, the legislative and executive branches have agreed on a system that meets our national security needs. These military commissions will provide a fair trial, in which the accused are presumed innocent, have access to an attorney, and can hear all the evidence against them. These military commissions are lawful, they are fair, and they are necessary.

When I sign this bill into law, we will use these commissions to bring justice to the men believed to have planned the attacks of September the 11th, 2001. We'll also seek to prosecute those believed responsible for the attack on the USS Cole, which killed 17 American sailors six years ago last week. We will seek to prosecute an operative believed to have been involved in the bombings of the American embassies in Kenya and Tanzania, which killed more than 200 innocent people and wounded 5,000 more. With our actions, we will send a clear message to those who kill Americans: We will find you and

we will bring you to justice.

Over the past few months the debate over this bill has been heated, and the questions raised can seem complex. Yet, with the distance of history, the questions will be narrowed and few: Did this generation of Americans take the threat seriously, and did we do what it takes to defeat that threat? Every member of Congress who voted for this bill has helped our nation rise to the task that history has given us. Some voted to support this bill even when the majority of their party voted the other way. I thank the legislators who brought this bill to my desk for their conviction, for their vision, and for their resolve.

There is nothing we can do to bring back the men and women lost on September 11th, 2001. Yet we'll always honor their memory and we will never forget the way they were taken from us. This nation will call evil by its name. We will answer brutal murder with patient justice. Those who kill the innocent will be held to account.

With this bill, America reaffirms our determination to win the war on terror. The passage of time will not dull our memory or sap our nerve. We will fight this war with confidence and with clear purpose. We will protect our country and our people. We will work with our friends and allies across the world to defend our way of life. We will leave behind a freer, safer and more peaceful world for those who follow us.

And now, in memory of the victims of September the 11th, it is my honor to sign the Military Commissions Act of 2006 into law. (Applause.)

(The bill is signed.)

END 9:47 A.M. EDT

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[DOCID: f:publ366.109]

[[Page 2599]]

MILITARY COMMISSIONS ACT OF 2006

[[Page 120 STAT. 2600]]

Public Law 109-366
109th Congress

An Act

To authorize trial by military commission for violations of the law of war, and for other purposes. <<NOTE: Oct. 17, 2006 - [S. 3930]>>

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, <<NOTE: Military Commissions Act of 2006.>>

SECTION 1. <<NOTE: 10 USC 948a note.>> SHORT TITLE; TABLE OF CONTENTS.

(a) Short Title.--This Act may be cited as the ``Military Commissions Act of 2006''.

(b) Table of Contents.--The table of contents for this Act is as follows:

- Sec. 1. Short title; table of contents.
- Sec. 2. Construction of Presidential authority to establish military commissions.
- Sec. 3. Military commissions.
- Sec. 4. Amendments to Uniform Code of Military Justice.
- Sec. 5. Treaty obligations not establishing grounds for certain claims.
- Sec. 6. Implementation of treaty obligations.
- Sec. 7. Habeas corpus matters.
- Sec. 8. Revisions to Detainee Treatment Act of 2005 relating to protection of certain United States Government personnel.
- Sec. 9. Review of judgments of military commissions.
- Sec. 10. Detention covered by review of decisions of Combatant Status Review Tribunals of propriety of detention.

SEC. 2. <<NOTE: 10 USC 948a note.>> CONSTRUCTION OF PRESIDENTIAL AUTHORITY TO ESTABLISH MILITARY COMMISSIONS.

The authority to establish military commissions under chapter 47A of title 10, United States Code, as added by section 3(a), may not be construed to alter or limit the authority of the President under the Constitution of the United States and laws of the United States to establish military commissions for areas declared to be under martial law or in occupied territories should circumstances so require.

SEC. 3. MILITARY COMMISSIONS.

(a) Military Commissions.--

(1) In general.--Subtitle A of title 10, United States Code, is amended by inserting after chapter 47 the following new chapter:

`CHAPTER 47A--MILITARY COMMISSIONS

``Subchapter	
``I. General Provisions.....	948a
``II. Composition of Military Commissions.....	948h
``III. Pre-Trial Procedure.....	948q
``IV. Trial Procedure.....	949a
``V. Sentences.....	949s

[[Page 120 STAT. 2601]]

``VI. Post-Trial Procedure and Review of Military Commissions.....	950a
``VII. Punitive Matters.....	950p

``SUBCHAPTER I--GENERAL PROVISIONS

``Sec.	
``948a. Definitions.	
``948b. Military commissions generally.	
``948c. Persons subject to military commissions.	
``948d. Jurisdiction of military commissions.	
``948e. Annual report to congressional committees.	

``Sec. 948a. Definitions

``In this chapter:

``(1) Unlawful enemy combatant.--(A) The term 'unlawful enemy combatant' means--

``(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or

``(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

``(B) Co-belligerent.--In this paragraph, the term 'co-belligerent', with respect to the United States, means any State or armed force joining and directly engaged with the United States in hostilities or directly supporting hostilities against a common enemy.

``(2) Lawful enemy combatant.--The term 'lawful enemy combatant' means a person who is--

``(A) a member of the regular forces of a State party engaged in hostilities against the United States;

``(B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or

``(C) a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.

``(3) Alien.--The term 'alien' means a person who is not a citizen of the United States.

``(4) Classified information.--The term 'classified

regulations.--Section 836 (article 36) is amended--

(A) in subsection (a), by inserting `` , except as provided in chapter 47A of this title, '' after ``but which may not''; and

(B) in subsection (b), by inserting before the period at the end `` , except insofar as applicable to military commissions established under chapter 47A of this title''.

(b) Punitive Article of Conspiracy.--Section 881 of title 10, United States Code (article 81 of the Uniform Code of Military Justice), is amended--

(1) by inserting ``(a)'' before ``Any person''; and

(2) by adding at the end the following new subsection:

``(b) Any person subject to this chapter who conspires with any other person to commit an offense under the law of war, and who knowingly does an overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a court-martial or military commission may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a court-martial or military commission may direct.''

SEC. 5. <<NOTE: 28 USC 2241 note.>> TREATY OBLIGATIONS NOT ESTABLISHING GROUNDS FOR CERTAIN CLAIMS.

(a) In General.--No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.

[[Page 120 STAT. 2632]]

(b) Geneva Conventions Defined.--In this section, the term ``Geneva Conventions'' means--

(1) the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, done at Geneva August 12, 1949 (6 UST 3114);

(2) the Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, done at Geneva August 12, 1949 (6 UST 3217);

(3) the Convention Relative to the Treatment of Prisoners of War, done at Geneva August 12, 1949 (6 UST 3316); and

(4) the Convention Relative to the Protection of Civilian Persons in Time of War, done at Geneva August 12, 1949 (6 UST 3516).

SEC. 6. <<NOTE: 18 USC 2441 note.>> IMPLEMENTATION OF TREATY OBLIGATIONS.

(a) Implementation of Treaty Obligations.--

(1) In general.--The acts enumerated in subsection (d) of section 2441 of title 18, United States Code, as added by subsection (b) of this section, and in subsection (c) of this section, constitute violations of common Article 3 of the Geneva Conventions prohibited by United States law.

(2) Prohibition on grave breaches.--The provisions of

section 2441 of title 18, United States Code, as amended by this section, fully satisfy the obligation under Article 129 of the Third Geneva Convention for the United States to provide effective penal sanctions for grave breaches which are encompassed in common Article 3 in the context of an armed conflict not of an international character. No foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions enumerated in subsection (d) of such section 2441.

(3) Interpretation by the president.--

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

(B) <<NOTE: President. Federal Register, publication.>> The President shall issue interpretations described by subparagraph (A) by Executive Order published in the Federal Register.

(C) Any Executive Order published under this paragraph shall be authoritative (except as to grave breaches of common Article 3) as a matter of United States law, in the same manner as other administrative regulations.

(D) Nothing in this section shall be construed to affect the constitutional functions and responsibilities of Congress and the judicial branch of the United States.

(4) Definitions.--In this subsection:

(A) Geneva conventions.--The term ``Geneva Conventions'' means--

(i) the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, done at Geneva August 12, 1949 (6 UST 3217);

[[Page 120 STAT. 2633]]

(ii) the Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, done at Geneva August 12, 1949 (6 UST 3217);

(iii) the Convention Relative to the Treatment of Prisoners of War, done at Geneva August 12, 1949 (6 UST 3316); and

(iv) the Convention Relative to the Protection of Civilian Persons in Time of War, done at Geneva August 12, 1949 (6 UST 3516).

(B) Third Geneva Convention.--The term ``Third Geneva Convention'' means the international convention referred to in subparagraph (A) (iii).

(b) Revision to War Crimes Offense Under Federal Criminal Code.--

(1) In general.--Section 2441 of title 18, United States Code, is amended--

(A) in subsection (c), by striking paragraph (3) and inserting the following new paragraph (3):

``(3) which constitutes a grave breach of common Article 3

EXHIBIT
CCC

[Federal Register: July 24, 2007 (Volume 72, Number 141)]
[
Presidential Documents]
[Page 40705-40709]
From the Federal Register Online via GPO Access [wais.access.gpo.gov]
[DOCID:fr24jy07-167]

[[Page 40705]]

Part III

The President

Executive Order 13440--Interpretation of the Geneva Conventions Common
Article 3 as Applied to a Program of Detention and Interrogation
Operated by the Central Intelligence Agency

Presidential Documents

Title 3--
The President

[[Page 40707]]

Executive Order 13440 of July 20, 2007

Interpretation of the Geneva Conventions Common
Article 3 as Applied to a Program of Detention and
Interrogation Operated by the Central Intelligence
Agency

By the authority vested in me as President and
Commander in Chief of the Armed Forces by the
Constitution and the laws of the United States of
America, including the Authorization for Use of
Military Force (Public Law 107-40), the Military
Commissions Act of 2006 (Public Law 109-366), and
section 301 of title 3, United States Code, it is
hereby ordered as follows:

Section 1. General Determinations. (a) The United
States is engaged in an armed conflict with al Qaeda,
the Taliban, and associated forces. Members of al Qaeda

were responsible for the attacks on the United States of September 11, 2001, and for many other terrorist attacks, including against the United States, its personnel, and its allies throughout the world. These forces continue to fight the United States and its allies in Afghanistan, Iraq, and elsewhere, and they continue to plan additional acts of terror throughout the world. On February 7, 2002, I determined for the United States that members of al Qaeda, the Taliban, and associated forces are unlawful enemy combatants who are not entitled to the protections that the Third Geneva Convention provides to prisoners of war. I hereby reaffirm that determination.

(b) The Military Commissions Act defines certain prohibitions of Common Article 3 for United States law, and it reaffirms and reinforces the authority of the President to interpret the meaning and application of the Geneva Conventions.

Sec. 2. Definitions. As used in this order:

(a) ``Common Article 3'' means Article 3 of the Geneva Conventions.

(b) ``Geneva Conventions'' means:

(i) the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, done at Geneva August 12, 1949 (6 UST 3114);

(ii) the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, done at Geneva August 12, 1949 (6 UST 3217);

(iii) the Convention Relative to the Treatment of Prisoners of War, done at Geneva August 12, 1949 (6 UST 3316); and

(iv) the Convention Relative to the Protection of Civilian Persons in Time of War, done at Geneva August 12, 1949 (6 UST 3516).

(c) ``Cruel, inhuman, or degrading treatment or punishment'' means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

Sec. 3. Compliance of a Central Intelligence Agency Detention and Interrogation Program with Common Article 3. (a) Pursuant to the authority of the President under the Constitution and the laws of the United States, including the Military Commissions Act of 2006, this order interprets the meaning and application of the text of Common Article 3 with respect to certain detentions and interrogations, and shall be treated as authoritative for all

[[Page 40708]]

purposes as a matter of United States law, including satisfaction of the international obligations of the United States. I hereby determine that Common Article 3 shall apply to a program of detention and interrogation operated by the Central Intelligence Agency as set forth in this section. The requirements set forth in this section shall be applied with respect to detainees in such program without adverse distinction as to their

race, color, religion or faith, sex, birth, or wealth.

(b) I hereby determine that a program of detention and interrogation approved by the Director of the Central Intelligence Agency fully complies with the obligations of the United States under Common Article 3, provided that:

(i) the conditions of confinement and interrogation practices of the program do not include:

(A) torture, as defined in section 2340 of title 18, United States Code;

(B) any of the acts prohibited by section 2441(d) of title 18, United States Code, including murder, torture, cruel or inhuman treatment, mutilation or maiming, intentionally causing serious bodily injury, rape, sexual assault or abuse, taking of hostages, or performing of biological experiments;

(C) other acts of violence serious enough to be considered comparable to murder, torture, mutilation, and cruel or inhuman treatment, as defined in section 2441(d) of title 18, United States Code;

(D) any other acts of cruel, inhuman, or degrading treatment or punishment prohibited by the Military Commissions Act (subsection 6(c) of Public Law 109-366) and the Detainee Treatment Act of 2005 (section 1003 of Public Law 109-148 and section 1403 of Public Law 109-163);

(E) willful and outrageous acts of personal abuse done for the purpose of humiliating or degrading the individual in a manner so serious that any reasonable person, considering the circumstances, would deem the acts to be beyond the bounds of human decency, such as sexual or sexually indecent acts undertaken for the purpose of humiliation, forcing the individual to perform sexual acts or to pose sexually, threatening the individual with sexual mutilation, or using the individual as a human shield; or

(F) acts intended to denigrate the religion, religious practices, or religious objects of the individual;

(ii) the conditions of confinement and interrogation practices are to be used with an alien detainee who is determined by the Director of the Central Intelligence Agency:

(A) to be a member or part of or supporting al Qaeda, the Taliban, or associated organizations; and

(B) likely to be in possession of information that:

(1) could assist in detecting, mitigating, or preventing terrorist attacks, such as attacks within the United States or against its Armed Forces or other personnel, citizens, or facilities, or against allies or other countries cooperating in the war on terror with the United States, or their armed forces or other personnel, citizens, or facilities; or

(2) could assist in locating the senior leadership of al Qaeda, the Taliban, or associated forces;

(iii) the interrogation practices are determined by the Director of the Central Intelligence Agency, based upon professional advice, to be safe for use with each detainee with whom they are used; and

(iv) detainees in the program receive the basic necessities of life, including adequate food and water, shelter from the elements, necessary clothing, protection from extremes of heat and cold, and essential medical care.

(c) The Director of the Central Intelligence Agency

shall issue written policies to govern the program, including guidelines for Central Intelligence Agency personnel that implement paragraphs (i)(C), (E), and (F) of subsection 3(b) of this order, and including requirements to ensure:

[[Page 40709]]

- (i) safe and professional operation of the program;
- (ii) the development of an approved plan of interrogation tailored for each detainee in the program to be interrogated, consistent with subsection 3(b)(iv) of this order;
- (iii) appropriate training for interrogators and all personnel operating the program;
- (iv) effective monitoring of the program, including with respect to medical matters, to ensure the safety of those in the program; and
- (v) compliance with applicable law and this order.

Sec. 4. Assignment of Function. With respect to the program addressed in this order, the function of the President under section 6(c)(3) of the Military Commissions Act of 2006 is assigned to the Director of National Intelligence.

Sec. 5. General Provisions. (a) Subject to subsection (b) of this section, this order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

(b) Nothing in this order shall be construed to prevent or limit reliance upon this order in a civil, criminal, or administrative proceeding, or otherwise, by the Central Intelligence Agency or by any individual acting on behalf of the Central Intelligence Agency in connection with the program addressed in this order.

(Presidential Sig.)

THE WHITE HOUSE,

July 20, 2007.

[FR Doc. 07-3656
Filed 7-23-07; 10:16 am]

Billing code 3195-01-P

EXHIBIT

DDD

Press Releases & Statements

Director's Statement on Lawful Interrogation

Statement to Employees by Director of the Central Intelligence Agency, General Mike Hayden on Lawful Interrogation

February 13, 2008

In Congressional testimony last week, I confirmed publicly that waterboarding had been used on three hardened terrorists in our high-value interrogation program. That tactic, which has not been employed since 2003, was deemed legal by the Department of Justice when it was used. Beyond those two facts, I also shared with the Congress my view of changes in the legal landscape over the past five years, and the need to take those changes into account should waterboarding ever be considered for use again.

My testimony attracted a fair amount of public attention and comment, not all of it accurate. Before both the Senate and the House, I emphasized that our program has operated within a strict legal framework, subject to review and oversight. Indeed, CIA has over time and at its own initiative modified the methods it has applied, in keeping with—or in anticipation of—modifications to the law.

The Agency's decision to employ waterboarding in the wake of 9/11 was not only lawful, it reflected the circumstances of the time. In reply to a question at the Senate hearing, I said: "Very critical to those circumstances was the belief that additional catastrophic attacks against the homeland were imminent. In addition to that, my Agency and our Community writ large had limited knowledge about al-Qa'ida and its workings. Those two realities have changed."

Two days later, at the House hearing, I was asked whether waterboarding is prohibited under current law. My response was: "It's not a technique that I've asked for. It is not included in the current program, and in my own view, the view of my lawyers and the Department of Justice, it is not certain that the technique would be considered lawful under current statute." Put bluntly, I could not—and would not—presume to prejudge the outcome of a legal assessment that has not even been requested. It was as simple as that.

CIA's terrorist interrogation program, lawful and effective, was born of necessity. As President Bush told the nation in September 2006, the Agency applied its methods of questioning when other techniques did not work and when a captured terrorist "had more information that could save innocent lives." Unlike traditional law enforcement, the CIA's chief objective in interrogations is not forensics on past events, but actionable, forward-looking intelligence.

My testimony was in accord with recent statements from the White House and Department of Justice. The Attorney General, in particular, told Congress that his Department had authorized the Agency's use of specific interrogation methods and that there is a process in place to review the legality of any technique that might in the future be proposed for inclusion in the CIA program. As befits a Republic of laws, this vital counter-terror initiative rests on a strong legal foundation.

Mike Hayden

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EXHIBIT

EEE

A Review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq



Oversight and Review Division
Office of the Inspector General
May 2008

UNCLASSIFIED

CHAPTER FOUR

THE EARLY DEVELOPMENT OF FBI POLICIES REGARDING DETAINEE INTERVIEWS AND INTERROGATIONS

In this chapter we describe the early development of the FBI's policies governing the conduct of its agents who participated in interviews or interrogations in foreign military zones. This process began in 2002, when FBI Director Mueller decided that the FBI would not participate in interrogations involving aggressive techniques that were approved for other agencies in military zones. The issue came to a head when the FBI sought to participate in the interrogation of a high value detainee, Abu Zubaydah, who was under the control of the CIA.

I. The Interrogation of Abu Zubaydah

The first major incident involving the use of aggressive interrogation techniques on a detainee that was reported to senior executives at FBI Headquarters was the case of a detainee known as Abu Zubaydah. Zubaydah was suspected of being a principal al Qaeda operational commander. In late March 2002, he was captured in Faisalabad, Pakistan. There was a gunfight during the arrest operation and Zubaydah was severely wounded. He was then taken to a secret CIA facility for medical treatment and interrogation.

Initially, the FBI and the CIA planned a joint effort to obtain intelligence from Zubaydah regarding potential future terrorist attacks. The FBI selected SSAs Gibson and Thomas to travel to the CIA facility to interview Zubaydah.⁴¹ Gibson and Thomas were selected for the assignment because they were familiar with al-Qaeda and the Zubaydah investigation, were skilled interviewers, and spoke Arabic.

A. FBI Agents Interview Zubaydah and Report to FBI Headquarters on CIA Techniques

Gibson and Thomas were instructed by their FBI supervisor, Charles Frahm (Acting Deputy Assistant Director for the section that later became the Counterterrorism Division), that the CIA was in charge of the Zubaydah matter and that the FBI agents were there to provide assistance. Frahm told the agents that Zubaydah was not to be given any *Miranda* warnings. Frahm told the OIG that he instructed Thomas and Gibson to leave the

⁴¹ Thomas and Gibson are pseudonyms.

facility and call Headquarters if the CIA began using techniques that gave the agents discomfort.

Gibson said that he and Thomas initially took the lead in interviewing Zubaydah at the CIA facility because the CIA interrogators were not at the scene when Zubaydah arrived. Gibson said he used relationship-building techniques with Zubaydah and succeeded in getting Zubaydah to admit his identity. When Zubaydah's medical condition became grave, he was taken to a hospital and Gibson assisted in giving him care, even to the point of cleaning him up after bowel movements. Gibson told us he continued interviewing Zubaydah in the hospital, and Zubaydah identified a photograph of Khalid Sheik Muhammad as "Muktar," the mastermind of the September 11 attacks.

Within a few days, CIA personnel assumed control over the interviews, although they asked Gibson and Thomas to observe and assist. Gibson told the OIG that the CIA interrogators said Zubaydah was only providing "throw-away information" and that they needed to diminish his capacity to resist.

Thomas described for the OIG the techniques that he saw the CIA interrogators use on Zubaydah after they took control of the interrogation.

[REDACTED] Thomas said he raised objections to these techniques to the CIA and told the CIA it was "borderline torture."⁴² He stated that Zubaydah was responding to the FBI's rapport-based approach before the CIA assumed control over the interrogation, but became uncooperative after being subjected to the CIA's techniques.

During his interview with the OIG, Gibson did not express as much concern about the techniques used by the CIA as Thomas did. Gibson stated, however, that during the period he was working with the CIA, [REDACTED]

42 [REDACTED]

[REDACTED] Gibson said that the CIA personnel assured him that the procedures being used on Zubaydah had been approved "at the highest levels" and that Gibson would not get in any trouble. [REDACTED]

Thomas communicated his concerns about the CIA's methods to FBI Counterterrorism Assistant Director Pasquale D'Amuro by telephone. D'Amuro and Thomas told the OIG that D'Amuro ultimately gave the instruction that Thomas and Gibson should come home and not participate in the CIA interrogation. However, Gibson and Thomas provided the OIG differing accounts of the circumstances of their departure from the CIA facility where Zubaydah was being interrogated. Thomas stated that D'Amuro instructed the agents to leave the facility immediately and that he complied.

However, Gibson said he was not immediately ordered to leave the facility. Gibson said that he remained at the CIA facility until some time in early June 2002, several weeks after Thomas left, and that he continued to work with the CIA and participate in interviewing Zubaydah. Gibson stated that he kept Frahm informed of his activities with the CIA by means of several telephone calls, which Frahm confirmed. Gibson stated the final decision regarding whether the FBI would continue to participate in the Zubaydah interrogations was not made until after Gibson returned to the United States for a meeting about Zubaydah.

Gibson stated that after he returned to the United States he told D'Amuro that he did not have a "moral objection" to being present for the CIA techniques because the CIA was acting professionally and Gibson himself had undergone comparable harsh interrogation techniques as part of U.S. Army Survival, Evasion, Resistance, and Escape (SERE) training. Gibson said that after a meeting with the CIA, D'Amuro told him that he would not be returning to the Zubaydah interview.

B. FBI Assistant Director D'Amuro Meets with DOJ Officials Regarding the Zubaydah Interrogation

D'Amuro said he discussed the Zubaydah matter with Director Mueller and later met with Michael Chertoff (then the Assistant Attorney General for the Criminal Division), Alice Fisher (at the time the Deputy Assistant Attorney General for the Criminal Division), and possibly David Kelley (who was then the First Assistant U.S. Attorney for the Southern

District of New York), in Chertoff's office in the Justice Department. D'Amuro said his purpose was to discuss how the FBI could "add value" by participating in the interviews of "highvalue detainees" because the FBI already knew the subjects so well. D'Amuro told the OIG that during the meeting he learned that the CIA had obtained a legal opinion from DOJ that certain techniques could legally be used, including [REDACTED]

[REDACTED]. D'Amuro stated that Chertoff and Fisher made it clear that the CIA had requested the legal opinion from Attorney General Ashcroft.

Based on DOJ and CIA documents, we believe that the meeting that D'Amuro described took place in approximately late July or August 2002. DOJ documents indicated that the CIA requested an opinion from the DOJ Office of Legal Counsel (OLC) regarding the proposed use of [REDACTED]

[REDACTED]

Fisher told the OIG that it is possible that she attended a meeting in Chertoff's office with Kelley, D'Amuro, and Chertoff, which concerned who would take the lead (FBI versus another agency) on the interviews of a high value detainee. However, she said she had no specific recollection of such a meeting. Fisher also stated that she did not recall discussing with the FBI specific techniques for use with detainees. Fisher said she vaguely remembered a meeting with then FBI General Counsel Kenneth Wainstein in which they discussed the FBI not being present at CIA interrogations, and she stated that the meeting would have related to interrogation tactics, but she said she did not recall any specific techniques being discussed.⁴³ Wainstein, who joined the FBI in July 2002, told us he recalled a number of discussions relating to the issue of FBI participation in CIA interrogations,

⁴³ Fisher stated that at some point she became aware that the CIA requested advice regarding specific interrogation techniques, and that OLC had conducted a legal analysis. She also said she was aware of two OLC memoranda on that topic, but they did not relate to the FBI. Fisher also told the OIG that Chertoff was very clear that the Criminal Division was not giving advice on which interrogation techniques were permissible and was not "signing off" in advance on any techniques.

but he did not recall this issue arising in connection with a particular detainee.

Kelley told the OIG that he had numerous conversations with Fisher, Nahmias, and other DOJ attorneys about topics relating to the September 11 investigation, but that he could not recall any specific meetings or conversations regarding the interrogation methods to be used on high value detainees. Kelley stated that D'Amuro was present during one or more of these discussions.

Chertoff told us that he could not recall specific conversations about Zubaydah, but that he did generally recall discussions about whether the FBI could preserve the admissibility of detainee statements by interviewing detainees some period after other agencies had completed their interrogations using non-FBI techniques. Chertoff also told us that he did not think this approach would successfully prevent the statement from being "tainted" by any prior enhanced interview techniques.

C. D'Amuro Meets with the FBI Director, Who Decides that the FBI Will Not Participate

D'Amuro told the OIG that after his meeting at Chertoff's office he met with Director Mueller and recommended that the FBI not get involved in interviews in which aggressive interrogation techniques were being used. He stated that his exact words to Mueller were "we don't do that," and that someday the FBI would be called to testify and he wanted to be able to say that the FBI did not participate in this type of activity. D'Amuro said that the Director agreed with his recommendation that the FBI should not participate in interviews in which these techniques were used. Based on D'Amuro's description of events and the dates of contemporaneous documents relating to the CIA's request for a legal opinion from the OLC, we believe that D'Amuro's meeting with Mueller took place in approximately August 2002. This time frame is also consistent with Gibson's recollection that the final decision regarding whether the FBI would participate in the Zubaydah interrogations occurred some time after Gibson left the location where Zubaydah was being held and returned to the United States in June 2002.

D'Amuro gave several reasons to the OIG for his recommendation that the FBI refrain from participating in the use of these techniques. First, he said he felt that these techniques were not as effective for developing accurate information as the FBI's rapport-based approach, which he stated had previously been used successfully to get cooperation from al-Qaeda members. He explained that the FBI did not believe these techniques would provide the intelligence it needed and the FBI's proven techniques would. He said the individuals being interrogated came from parts of the world

where much worse interview techniques were used, and they expected the United States to use these harsh techniques. As a result, D'Amuro did not think the techniques would be effective in obtaining accurate information. He said what the detainees did not expect was to be treated as human beings. He said the FBI had successfully obtained information through cooperation without the use of "aggressive" techniques. D'Amuro said that when the interrogator knows the subject matter, vets the information, and catches an interviewee when he lies, the interrogator can eventually get him to tell the truth. In contrast, if "aggressive" techniques are used long enough, detainees will start saying things they think the interrogator wants to hear just to get them to stop.

Second, D'Amuro told the OIG that the use of the aggressive techniques failed to take into account an "end game." D'Amuro stated that even a military tribunal would require some standard for admissibility of evidence. Obtaining information by way of "aggressive" techniques would not only jeopardize the government's ability to use the information against the detainees, but also might have a negative impact on the agents' ability to testify in future proceedings. D'Amuro also stated that using the techniques complicated the FBI's ability to develop sources.

Third, D'Amuro stated that in addition to being ineffective and short-sighted, using these techniques was wrong and helped al-Qaeda in spreading negative views of the United States. In contrast, D'Amuro noted, the East Africa bombing trials were public for all the world to see. He said they were conducted legally and above board and the world saw that the defendants killed not only Americans but also innocent Muslims. D'Amuro said he took some criticism from FBI agents who wanted to participate in interviews involving "aggressive" techniques, but he felt strongly that they should not participate, and the Director agreed.

Andrew Arena, the Section Chief of the FBI's International Terrorism Operations Section 1 (ITOS-1), confirmed that D'Amuro argued against the use of aggressive procedures. Arena told the OIG that he attended a meeting involving Mueller, D'Amuro, and other FBI employees in 2002 regarding the FBI's participation in aggressive interrogation techniques. Arena stated that the issue arose when FBI agents became aware that another government agency was using specific techniques on high value detainees. Arena stated that there were discussions within the FBI regarding "should we also go down that track?" Arena told the OIG that during the meeting D'Amuro predicted that the FBI would have to testify before Congress some day and that the FBI should be able to say that it did not participate. Arena said he was present when Director Mueller stated

that the FBI was not going to get involved with other agencies in using these techniques at any location.⁴⁴

We interviewed Director Mueller, who recalled that the FBI wanted to interrogate someone held by the CIA because the FBI's agents were knowledgeable about the detainee from prior investigations. Director Mueller told us he did not know what techniques the CIA would be using but that he understood they would go beyond techniques that FBI agents were authorized to use. He stated that he and D'Amuro discussed the fact that the FBI could not control the interrogation, and they decided that the FBI would not participate under these circumstances. Director Mueller told the OIG that although his decision initially did not contemplate other detainee interrogations, it was carried forward as a bright-line rule when the issue arose again.

Director Mueller's former Chief of Staff, Daniel Levin, told the OIG that in the context of the Zubaydah interrogation, he attended a meeting at the National Security Council (NSC) at which CIA techniques were discussed. Levin stated that a DOJ Office of Legal Counsel (OLC) attorney gave advice at the meeting about the legality of CIA interrogation techniques. Levin stated that in connection with this meeting, or immediately after it, FBI Director Mueller decided that FBI agents would not participate in interrogations involving techniques the FBI did not normally use in the United States, even though OLC had determined such techniques were legal. Levin stated he agreed with this decision because FBI agents were not trained to use such techniques, using such techniques might create problems for FBI agents who needed to testify in court, and other agencies were available to do it.

D'Amuro also described another meeting after the Zubaydah incident among himself, Director Mueller, a CIA agent, and CIA Director George Tenet. D'Amuro said that during this meeting, an effort was made to find a solution that would permit the FBI to interview detainees in CIA custody. D'Amuro proposed that the FBI be permitted to interview the detainees first, before the CIA would use its "special techniques." D'Amuro said that the FBI recognized that it would have a "taint problem" if the FBI conducted its interviews after the CIA had used the more aggressive techniques. However, no agreement was reached with the CIA at that time. Director Mueller told us that he did not specifically recall such a meeting, but that such a

⁴⁴ Arena stated that FBI Deputy Director Bruce Gebhardt also attended this meeting. Gebhardt told us he did not recall specific discussions regarding the use of non-FBI interview methods but stated that neither he nor the Director would have ever allowed agents to use such techniques.

discussion may have happened in connection with some lower-level detainees.

II. Subsequent Decisions Regarding FBI Involvement with High Value Detainees

The issue of whether the FBI would participate in interviews in which other agencies used non-FBI interrogation techniques arose again repeatedly, as new high value detainees were captured. For example, D'Amuro said that the FBI wanted to participate in the interrogations of these detainees because its agents had been investigating them for a long time and had a lot of knowledge and experience that would be useful in gaining information from the detainees. Each time, however, the result was the same: the FBI decided that it would not participate.

We determined that the issue arose again in late 2002 and early 2003, in connection with efforts to gain access to Ramzi Binalshibh. Binalshibh was captured in September 2002. According to the, Assistant Chief for the FBI's Counterterrorism Operational Response Section (CTORS), he and several agents, including Thomas, traveled to a CIA-controlled facility to conduct a joint interview of Binalshibh [REDACTED] with the CIA.

[REDACTED]

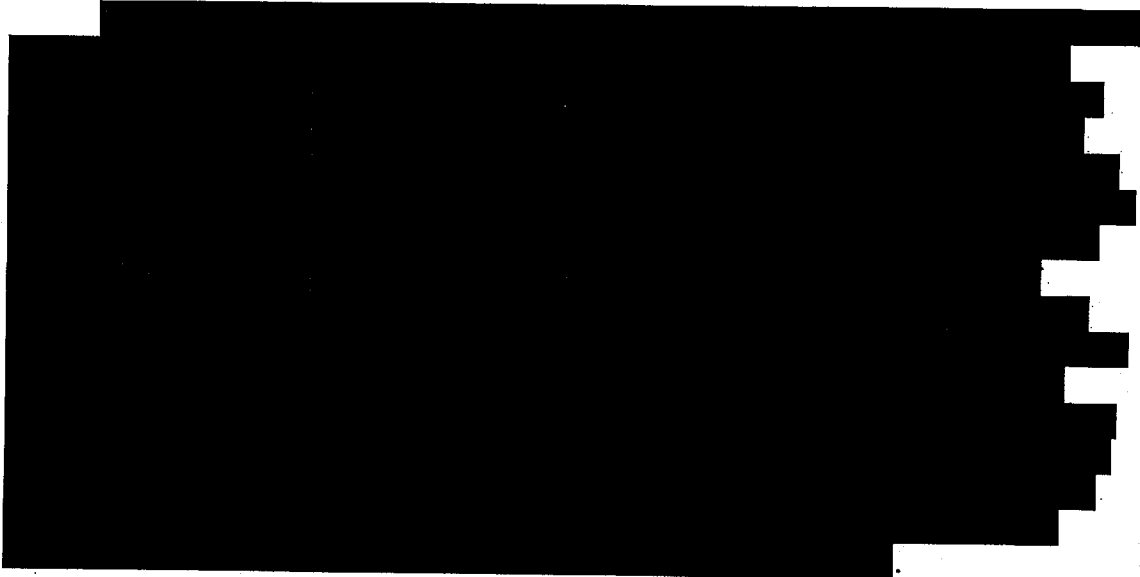
According to the notes of FBI General Counsel Valerie Caproni, Deputy Assistant Director T.J. Harrington told her that the FBI agents who went to the CIA site saw Binalshibh [REDACTED]

[REDACTED]

[REDACTED]

The [REDACTED] matter indicates that a "bright line rule" against FBI participation in or assistance to interrogations in which other investigators used non-FBI techniques was not fully established or followed as of September 2002. FBI agents assisted others to question [REDACTED] during a period when he was being subjected to interrogation techniques that the FBI agents would not be allowed to use. According to former FBI General

Counsel Wainstein, the FBI ultimately decided that its agents could not interview detainees without a “clean break” from other agencies’ use of non-FBI techniques. Wainstein told us he thought this conclusion was reached in 2003.



As discussed in subsequent chapters of this report, the FBI continued to wrestle with interpreting the mandate not to “participate” in interrogations involving non-FBI techniques, particularly with respect to the circumstances under which FBI agents wanted to interview detainees who had previously been subjected to coercive interrogations by other agencies. The disagreements between the FBI and the military focused in particular on the treatment of another high value detainee, Muhammad Ma’ana Al-Qahtani, which we describe in the next chapter.

EXHIBIT

FFF

A Review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq



Oversight and Review Division
Office of the Inspector General
May 2008

UNCLASSIFIED

the OSC at GTMO at the time or describe it in his FD-302 interview summaries for Al-Shihri.¹⁴⁷

Other FBI employees told us they heard rumors of the use of women's clothing on detainees. An FBI Investigative Support Specialist said that while at GTMO he heard rumors that a detainee was forced to wear women's clothing and makeup during an interrogation and that this same detainee was also given a "lap-dance" by a female guard. An FBI Intelligence Analyst told us that while at a social function at GTMO she was told that a female military interrogator placed women's undergarments on a detainee during an interrogation. The analyst said that it was obvious to her that this was done to humiliate and demean the detainee. The analyst was also told that the female military interrogator performed a lap dance on this same detainee during the same interrogation.¹⁴⁸

O. Transfer to Another Country for More Aggressive Interrogation

A few FBI agents who served at GTMO reported hearing about claims that detainees had been sent to another country for more aggressive interrogation by foreign interrogators.¹⁴⁹ However, it appears that these agents were likely describing an allegation relating to the same detainees.

One agent stated in his survey response that detainees Mohamadou Ould Slahi (#760) and Mahmdouh Habib (#661) told him that they had been sent to different countries before they were sent to GTMO: Slahi from Mauritania to Jordan, and Habib from Afghanistan to Egypt.¹⁵⁰ Another agent told the OIG that Habib told her that when he was in Afghanistan he was turned over to Egyptian authorities. The agent said that although Habib had been born in Egypt, he was a citizen of Australia. Habib told her that prior to his transfer to Egypt he met with both Australian and U.S. Government officials, and that while he was in Egypt he was subjected to several forms of torture. A third agent described hearing a second-hand report about an Australian detainee (likely Habib) who had been sent to

¹⁴⁷ Another detainee told us that an FBI agent made him put on a woman's coat that had perfume on it, and that when he took it off he smelled like the perfume. We address this matter in Part IV of Chapter Eleven.

¹⁴⁸ As noted in Chapter Five and confirmed in the *Schmidt-Furlow Report*, in late 2002 military interrogators forced Al-Qahtani to wear women's clothing in an attempt to humiliate and embarrass him.

¹⁴⁹ The military policies for GTMO did not explicitly address actual or threatened rendition.

¹⁵⁰ Military and FBI documents indicate that Slahi was arrested in Mauritania and interrogated in Jordan for several months before he was transferred to GTMO.

Egypt and interrogated by the Egyptian intelligence service prior to being transferred to GTMO.

P. Threatened Transfer to Another Country

Several FBI agents told the OIG that they had information about threats to send detainees to another country for detention or more aggressive interrogation. According to the *Church Report*, threat of transfer to another country was never specifically listed as a pre-approved interrogation technique under military policy for GTMO, and beginning in January 2003 prior notice to the Secretary of Defense was required before using it. The Church investigators identified one incident involving the use of this technique in a June 2003 interrogation of a high value detainee. *Church Report* at 168-69, 173.

SSA Lyle stated in his OIG survey response that military interrogators threatened Al-Qahtani using this technique.¹⁵¹ Lyle said that at some point during the military's interrogation of Al-Qahtani at Camp X-Ray military interrogators threatened to send him to another country. Lyle believes that the country they threatened him with was Jordan. Lyle paraphrased what the interrogators said to Al-Qahtani as "we are going to send you to a place where the people aren't as nice as we are."

An SSA who served at GTMO in 2002 told the OIG that he was present at a GTMO staff meeting where this technique was discussed concerning Al-Qahtani and other detainees. The SSA said that the military wanted to handcuff Al-Qahtani, put a hood over his head, and fly him around in a helicopter and then an airplane. The plan was to return Al-Qahtani to GTMO but completely isolate him so that he would believe he was somewhere else. The agent said the goal was to make Al-Qahtani believe that they were just about to turn him over to officials from another country. We believe that this SSA may have in fact have been referring to interrogation plan for Slahi (#760) rather than Al-Qahtani. This plan is discussed in Section XV of Chapter Five. The SSA said that after he objected to this plan, he was not invited to any more staff meetings.

Another FBI agent who served at GTMO from December 2003 until September 2004 said that some detainees at GTMO were threatened with the prospect of being returned to their home countries which could go badly for the detainee. She indicated that this could be threatening to some detainees depending on where they were from, and that she probably used this technique herself. She stated that she did not consider this a threat because it was a real possibility for some of the detainees. As an example,

¹⁵¹ Lyle is a pseudonym.

she said that the Russian detainees did everything they could to be as valuable as possible in order to avoid returning to Russia. However, the agent stated that eventually these detainees were repatriated to Russia despite their cooperation.

Another FBI agent stated in his survey response that he asked certain uncooperative detainees if they would like to be sent back to their home countries for interrogation. He stated that some of the detainees may have perceived this as a threat and that some of them acknowledged that they were being treated better at GMTO than they would be in their home countries.

Other agents reported that they heard about the use of this technique from others. One agent reported that he heard that some detainees were threatened with being sent to Israel for interrogation. In addition, a Detective from the Phoenix Police Department who was deployed to GTMO as part of the FBI's Joint Terrorism Task Force stated in his survey response that a New York City Detective posed as an Egyptian Intelligence Officer, and the detainee involved was told that he would go back to Egypt with this Intelligence Officer unless he was cooperative.

Q. Threatening a Detainee's Family

Four agents told the OIG that they were aware of threats to take action against a detainee's family. According to the *Church Report*, threatening harm to others was a prohibited technique for military interrogators at GTMO. The Church investigators found one incident of threats made against the family of detainee Slahi (#760). *Church Report* at 174.

A police officer from California who served at GTMO as a member of the FBI's Joint Terrorism Task Force stated in his survey response that detainee Ahmed Esmatullah Fedah refused to give truthful answers in his interviews and that the officer told Fedah that he would attempt to deport any of Fedah's relatives living illegally in the United States.

Several FBI agents indicated that they had second-hand information about threats to detainees' families. Two FBI employees reported that they read or heard from others that military interrogators threatened detainee Slahi (#760) with the possible mistreatment of his family, including his mother, unless he cooperated with interrogators.¹⁵²

¹⁵² The military's use of threats with Slahi is discussed in more detail in Section XV of Chapter Five.

EXHIBIT

GGG

Rhodes, Barry A

From: Zolper, Peter C
Sent: Wednesday, August 27, 2003 4:02 PM
To: Fallon, Mark
Cc: Rhodes, Barry A
Subject: (U) RE: Counter Resistance Strategy Meeting Minutes

Classification: UNCLASSIFIED//FOR OFFICIAL USE ONLY

Barry

-----Original Message-----

From: Fallon, Mark
Sent: Wednesday, August 27, 2003 12:46 PM
To: Zolper, Peter C
Subject: FW: Counter Resistance Strategy Meeting Minutes

R/Mark Fallon
Deputy Commander/SAC

[Redacted]

-----Original Message-----

From: Fallon Mark
Sent: Monday, October 28, 2002 4:52 PM
To: McCahon Sam
Cc: Malloiw Brittain; Thomas Blaine; Johnson Scott; Smith David
Subject: RE: Counter Resistance Strategy Meeting Minutes

Sam:

We need to ensure seniors at OGC are aware of the 170 strategies and how it might impact CITF and Commissions. This looks like the kinds of stuff Congressional hearings are made of. Quotes from LTC Beaver regarding things that are not being reported give the appearance of impropriety. Other comments like "It is basically subject to perception. If the detainee dies you're doing it wrong" and "Any of the techniques that lie on the harshest end of the spectrum must be performed by a highly trained individual. Medical personnel should be present to treat any possible accidents." seem to stretch beyond the bounds of legal propriety. Talk of "wet towel treatment" which results in the lymphatic gland reacting as if you are suffocating, would in my opinion; shock the conscience of any legal body looking at using the results of the interrogations or possibly even the interrogators. Someone needs to be considering how history will look back at this.

R/Mark Fallon
Deputy Commander
Criminal Investigation Task Force

Counter Resistance Strategy Meeting Minutes

-----Original Message-----

From: Thomas Blaine

Sent: Thursday, October 24, 2002 7:57 PM

To: McCahon Sam; Johnson Scott; Fallon Mark

Subject: FW: Counter Resistance Strategy Meeting Minutes

Sam,

Very interesting reading on how detainees are being treated for info.

Scott, Mark,

FYI

Blaine

Counter Resistance Strategy Meeting Minutes

Persons in Attendance:

COL Cummings, LTC Phifer, CDR Bridges, LTC Beaver, MAJ Burney, MAJ Leso, Dave Becker, John Fredman, 1LT Seck, SPC Pimentel

The following notes were taken during the aforementioned meeting at 1340 on October 2, 2002. All questions and comments have been paraphrased:

BSCT Description of SERE Psych Training (MAJ Burney and MAJ Leso)

- Identify trained resisters
 - Al Qaeda Training
- Methods to overcome resistance
 - Rapport building (approach proven to yield positive results)
 - Friendly approach (approach proven to yield positive results)
 - Fear Based Approaches are unreliable, ineffective in almost all cases
- What's more effective than fear based strategies are camp-wide, environmental strategies designed to disrupt cohesion and communication among detainees.
 - Environment should foster dependence and compliance

LTC Phifer Harsh techniques used on our service members have worked and will work on some, what about those?

MAJ Leso Force is risky, and may be ineffective due to the detainees' frame of reference. They are used to seeing much more barbaric treatment.

Becker Agreed

→ At this point a discussion about ISN 63 ensued, recalling how he has responded to certain types of deprivation and psychological stressors. After short discussion the BSCT continued to address the overall manipulation of the detainees' environment.

BSCT continued:

- Psychological stressors are extremely effective (ie, sleep deprivation, withholding food, isolation, loss of time)

COL Cummings We can't do sleep deprivation
 LTC Beaver Yes, we can - with approval.

- Disrupting the normal camp operations is vital. We need to create an environment of "controlled chaos"

LTC Beaver We may need to curb the harsher operations while ICRC is around. It is better not to expose them to any controversial techniques. We must have the support of the DOD.

Becker We have had many reports from Bagram about sleep deprivation being used.

LTC Beaver True, but officially it is not happening. It is not being reported officially. The ICRC is a serious concern. They will be in and out, scrutinizing our operations, unless they are displeased and decide to protest and leave. This would draw a lot of negative attention.

COL Cummings The new PSYOP plan has been passed up the chain
 LTC Beaver It's at J3 at SOUTHCOM.

Fredman The DOJ has provided much guidance on this issue. The CIA is not held to the same rules as the military. In the past when the ICRC has made a big deal about certain detainees, the DOD has "moved" them away from the attention of ICRC. Upon questioning from the ICRC about their whereabouts, the DOD's response has repeatedly been that the detainee merited no status under the Geneva Convention. The CIA has employed aggressive techniques on less than a handful of suspects since 9/11.

Under the Torture Convention, torture has been prohibited by international law, but the language of the statutes is written vaguely. Severe mental and physical pain is prohibited. The mental part is explained as poorly as the physical. Severe physical pain described as anything causing permanent damage to major organs or body parts. Mental torture described as anything leading to permanent, profound damage to the senses or personality. It is basically subject to perception. If the detainee dies you're doing it wrong. So far, the techniques we have addressed have not proven to produce these types of results, which in a way challenges what the BSCT paper says about not being able to prove whether these techniques will lead to permanent damage. Everything on the BSCT white paper is legal from a civilian standpoint. [Any questions of severe weather or temperature conditions should be deferred to medical staff.] Any of the techniques that lie on the harshest end of the spectrum must be performed by a highly trained individual. Medical personnel should be present to treat any possible accidents. The CIA operates without military intervention. When the CIA has wanted to use more aggressive techniques in the past, the FBI has pulled their personnel from theatre. In those rare instances, aggressive techniques have proven very helpful.

LTC Beaver We will need documentation to protect us

- Fredman** Yes, if someone dies while aggressive techniques are being used, regardless of cause of death, the backlash of attention would be severely detrimental. Everything must be approved and documented.
- Becker** LEA personnel will not participate in harsh techniques
- LTC Beaver** There is no legal reason why LEA personnel cannot participate in these operations
- At this point a discussion about whether or not to video tape the aggressive sessions, or interrogations at all ensued.
- Becker** Videotapes are subject to too much scrutiny in court. We don't want the LEA people in aggressive sessions anyway.
- LTC Beaver** LEA choice not to participate in these types of interrogations is more ethical and moral as opposed to legal.
- Fredman** The videotaping of even totally legal techniques will look "ugly".
- Becker** (Agreed)
- Fredman** The Torture Convention prohibits torture and cruel, inhumane and degrading treatment. The US did not sign up on the second part, because of the 8th amendment (cruel and unusual punishment), but we did sign the part about torture. This gives us more license to use more controversial techniques.
- LTC Beaver** Does SERE employ the "wet towel" technique?
- Fredman** If a well-trained individual is used to perform this technique it can feel like you're drowning. The lymphatic system will react as if you're suffocating, but your body will not cease to function. It is very effective to identify phobias and use them (ie, insects, snakes, claustrophobia). The level of resistance is directly related to person's experience.
- MAJ Burney** Whether or not significant stress occurs lies in the eye of the beholder. The burden of proof is the big issue. It is very difficult to disprove someone else's PTSD.
- Fredman** These techniques need involvement from interrogators, psych, medical, legal, etc.
- Becker** Would we get blanket approval or would it be case by case?
- Fredman** The CIA makes the call internally on most of the types of techniques found in the BSCT paper, and this discussion. Significantly harsh techniques are approved through the DOJ.
- LTC Phifer** Who approves ours? The CG? SOUTHCOM CG?
- Fredman** Does the Geneva Convention apply? The CIA rallied for it not to.
- LTC Phifer** Can we get DOJ opinion about these topics on paper?
- LTC Beaver** Will it go from DOJ to DOD?
- LTC Phifer** Can we get to see a CIA request to use advanced aggressive techniques?
- Fredman** Yes, but we can't provide you with a copy. You will probably be able to look at it.
- An example of a different perspective on torture is Turkey. In Turkey they say that interrogation at all, or anything you do to that results in the subject betraying his comrades is torture.
- LTC Beaver** In the BSCT paper it says something about "imminent threat of death", ...
- Fredman** The threat of death is also subject to scrutiny, and should be handled on a case by case basis. Mock executions don't work as well

as friendly approaches, like letting someone write a letter home, or providing them with an extra book.

Becker I like the part about ambient noise.

→ At this point a discussion about ways to manipulate the environment ensued, and the following ideas were offered:

- Medical visits should be scheduled randomly, rather than on a set system
- Let detainee rest just long enough to fall asleep and wake him up about every thirty minutes and tell him it's time to pray again
- More meals per day induce loss of time
- Truth serum; even though it may not actually work, it does have a placebo effect.

Meeting ended at 1450.

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EXHIBIT

HHH

FOR EDUCATIONAL USE ONLY
42 U.S.C.A. § 2000dd

United States Code Annotated Currentness

Title 42. The Public Health and Welfare

*Chapter 21D. Detainee Treatment

→§ 2000dd. Prohibition on cruel, inhuman, or degrading treatment or punishment of persons under custody or control of the United States Government

(a) In general

No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.

(b) Construction

Nothing in this section shall be construed to impose any geographical limitation on the applicability of the prohibition against cruel, inhuman, or degrading treatment or punishment under this section.

(c) Limitation on supersedure

The provisions of this section shall not be superseded, except by a provision of law enacted after January 6, 2006, which specifically repeals, modifies, or supersedes the provisions of this section.

(d) Cruel, inhuman, or degrading treatment or punishment defined

In this section, the term “cruel, inhuman, or degrading treatment or punishment” means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.

CREDIT(S)

(Pub.L. 109-148, Div. A, Title X, § 1003, Dec. 30, 2005, 119 Stat. 2739; Pub.L. 109-163, Div. A, Title XIV, § 1403, Jan. 6, 2006, 119 Stat. 3475.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2005 Acts. House Conference Report No. 109-359, see 2005 U.S. Code Cong. and Adm.

News, p. 1446.

Statement by President, see 2005 U.S. Code Cong. and Adm. News, p. S50.

2006 Acts. House Conference Report No. 109-360, see 2005 U.S. Code Cong. and Adm. News, p. 1678.

Statement by President, see 2005 U.S. Code Cong. and Adm. News, p. S54.

References in Text

January 6, 2006, referred to in subsec. (c), originally read “the date of enactment of this Act”, probably meaning the date of enactment of the Detainee Treatment Act of 2005, Pub.L. 109-163, Div. A, Title XIV, § 1401 et seq., which was enacted as part of the National Defense Authorization Act for Fiscal Year 2006, both of which were approved Jan. 6, 2006.

Codifications

Pub.L. 109-163, § 1403, re-enacted this section without reference to prior identical enactment by Pub.L. 109-148, Div. A, Title X, § 1003, Dec. 30, 2005, 119 Stat. 2739. See 2006 Amendments note under this section.

Amendments

2006 Amendments. Pub.L. 109-163, § 1403, re-enacted this section without substantive change. Prior thereto, section read:

“§ 2000dd. Prohibition on cruel, inhuman, or degrading treatment or punishment of persons under custody or control of the United States Government

“(a) In general

“No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.

“(b) Construction

“Nothing in this section shall be construed to impose any geographical limitation on the applicability of the prohibition against cruel, inhuman, or degrading treatment or punishment under this section.

“(c) Limitation on supersedure

“The provisions of this section shall not be superseded, except by a provision of law

enacted after December 30, 2005, which specifically repeals, modifies, or supersedes the provisions of this section.

“(d) Cruel, inhuman, or degrading treatment or punishment defined

“In this section, the term ‘cruel, inhuman, or degrading treatment or punishment’ means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.”

Short Title

2006 Acts. Pub.L. 109-163, Div. A, Title XIV, § 1401, Jan. 6, 2006, 119 Stat. 3474, provided that: “This title [re-enacting this section and 42 U.S.C.A. § 2000dd-1, amending 28 U.S.C.A. § 2241, and enacting provisions set out as a note under 10 U.S.C.A. § 801] may be cited as the “Detainee Treatment Act of 2005”. Pub.L. 109-148, Title X, § 1001, also enacted a “Detainee Treatment Act of 2005”, see Short Title note under this section and Tables.

2005 Acts. Pub.L. 109-148, Div. A, Title X, § 1001, Dec. 30, 2005, 119 Stat. 2739, provided that: “This title [enacting this chapter, amending 28 U.S.C.A. § 2241, and enacting provisions set out as notes under this section and 10 U.S.C.A. § 801] may be cited as the ‘Detainee Treatment Act of 2005’.” Pub.L. 109-163, Div. A, Title XIV, § 1401, also enacted a “Detainee Treatment Act of 2005”, see Short Title note under this section and Tables.

United States Policy Toward Detainees

Pub.L. 110-53, Title XX, § 2034, Aug. 3, 2007, 121 Stat. 517, provided that:

“(a) Findings.--Congress finds the following:

“(1) The National Commission on Terrorist Attacks Upon the United States (commonly referred to as the ‘9/11 Commission’) declared that the United States ‘should work with friends to develop mutually agreed-on principles for the detention and humane treatment of captured international terrorists who are not being held under a particular country’s criminal laws’ and recommended that the United States engage its allies ‘to develop a common coalition approach toward the detention and humane treatment of captured terrorists’.

“(2) A number of investigations remain ongoing by countries that are close United States allies in the war on terrorism regarding the conduct of officials, employees, and agents of the United States and of other countries related to conduct regarding detainees.

“(3) The Secretary of State has launched an initiative to try to address the differences between the United States and many of its allies regarding the treatment of detainees.

“(b) Sense of Congress.--It is the sense of Congress that the Secretary, acting through the Legal Adviser of the Department of State, should continue to build on the Secretary's efforts to engage United States allies to develop a common coalition approach, in compliance with Common Article 3 of the Geneva Conventions and other applicable legal principles, toward the detention and humane treatment of individuals detained during Operation Iraqi Freedom, Operation Enduring Freedom, or in connection with United States counterterrorist operations.

“(c) Reporting to Congress.--

“(1) Briefings.--The Secretary of State shall keep the appropriate congressional committees fully and currently informed of the progress of any discussions between the United States and its allies regarding the development of the common coalition approach described in subsection (b) [of this note].

“(2) Report.--Not later than 180 days after the date of the enactment of this Act [Aug. 3, 2007], the Secretary of State, in consultation with the Attorney General and the Secretary of Defense, shall submit to the appropriate congressional committees a report on any progress towards developing the common coalition approach described in subsection (b) [of this note].

“(d) Definition.--In this section [this note], the term ‘appropriate congressional committees’ means--

“(1) with respect to the House of Representatives, the Committee on Foreign Affairs, the Committee on Armed Services, the Committee on the Judiciary, and the Permanent Select Committee on Intelligence; and

“(2) with respect to the Senate, the Committee on Foreign Relations, the Committee on Armed Services, the Committee on the Judiciary, and the Select Committee on Intelligence.”

LAW REVIEW COMMENTARIES

The future of Lou Henkin's human rights movement. Harold Hongju Koh, 38 Colum. Hum. Rts. L. Rev. 487 (2007).

NOTES OF DECISIONS

Judicial review 1

1. Judicial review

Possibility that, if motion pending in lower courts were granted, or if certain other actions were taken by lower courts, then this might have adverse effect on review otherwise available to parties under the Detainee Treatment Act was insufficient basis for suspending prior order of the Supreme Court denying parties' petition for writ of certiorari, pending disposition of petition for rehearing. (Per Chief Justice Roberts, as

Circuit Justice.) Boumediene v. Bush, U.S.2007, 127 S.Ct. 1725. Federal Courts 462

42 U.S.C.A. § 2000dd, 42 USCA § 2000dd

Current through P.L. 110-244 (excluding P.L. 110-234) approved 6-6-08

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EXHIBIT

III

Congress of the United States

Washington, D.C. 20515

June 6, 2008

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 to request that you appoint a special counsel to investigate whether the Bush Administration's policies regarding the interrogation of detainees have violated federal criminal laws. There is mounting evidence that the Bush Administration has sanctioned enhanced interrogation techniques against detainees under the control of the United States that warrant an investigation.

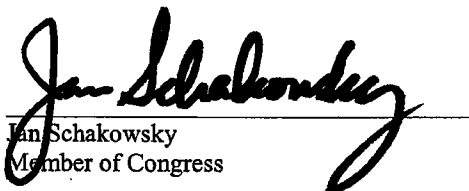
Congress is already aware of the pattern of abuse against detainees under the control of the United States and the Bush Administration. In 2004, prisoners being held at Abu Ghraib prison were subjected to abuse, sexual exploitation and torture. At the Guantanamo Bay Detention facility, prisoners have been held indefinitely, subjected to sleep deprivation, and drugged against their will. An independent investigation by the International Committee of the Red Cross documented several instances of acts of torture against detainees, including soaking a prisoner's hand in alcohol and lighting it on fire, subjecting a prisoner to sexual abuse, and forcing a prisoner to eat a baseball. In October 2005, the New York Times reported that three detainees were killed during interrogations in Afghanistan and Iraq by CIA agents or CIA contractors.

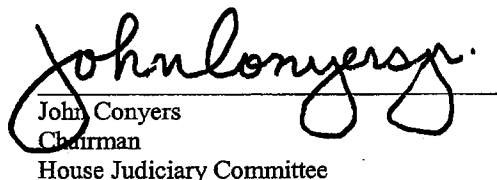
We believe that these events alone warrant action, but within the last month additional information has surfaced that suggests the fact that not only did top Administration officials meet in the White House and approve the use of enhanced techniques including waterboarding against detainees, but that President Bush was aware of, and approved of the meetings taking place. This information indicates that the Bush Administration may have systematically implemented, from the top down, detainee interrogation policies that constitute torture or otherwise violate the law. We believe that these serious and significant revelations warrant an immediate investigation to determine whether actions taken by the President, his Cabinet, and other Administration officials are in violation of the War Crimes Act (18 U.S.C. 2441), the Anti-Torture Act, (18 U.S.C. 2340-2340A), and other U.S. and international laws.

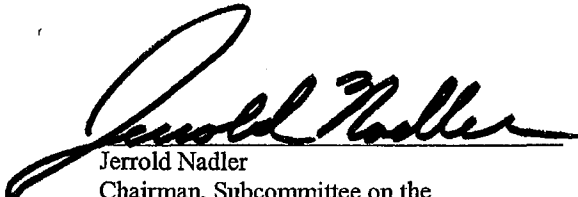
Despite the seriousness of the evidence, the Justice Department has brought prosecution against only one civilian for an interrogation-related crime. Given that record, we believe that it is necessary to appoint a special counsel in order to ensure that a thorough and impartial investigation occurs, and that the prosecution of anyone who violated federal criminal statutes prohibiting torture and abuse is pursued if warranted by the facts.

Again, we strongly urge that you act in a timely manner to appoint a special counsel. We look forward to hearing from you in response to our request.

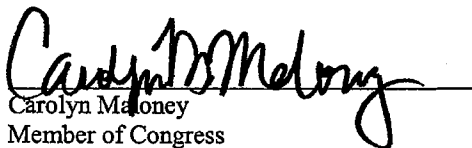
Sincerely,

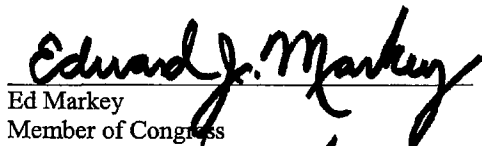

Jan Schakowsky
Member of Congress

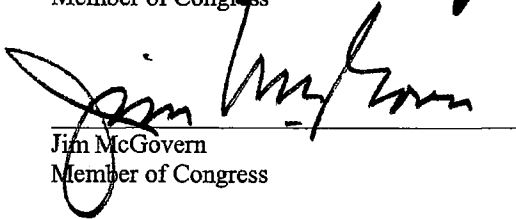

John Conyers
Chairman
House Judiciary Committee

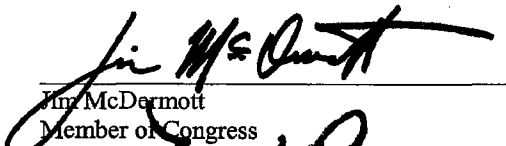

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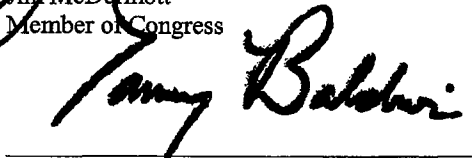

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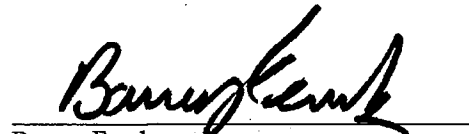

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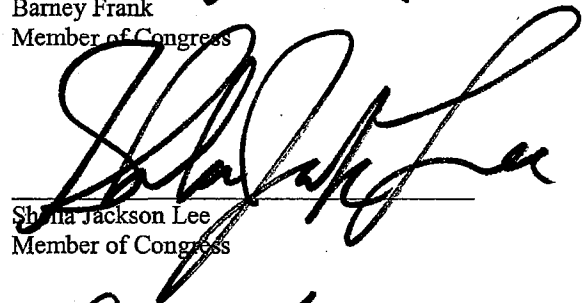

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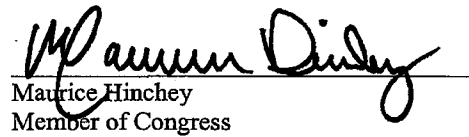

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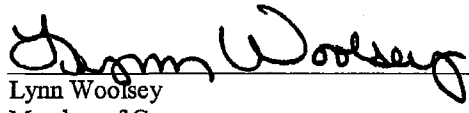

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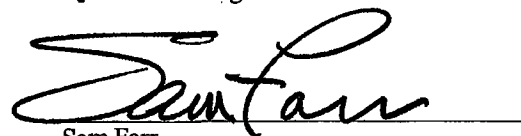

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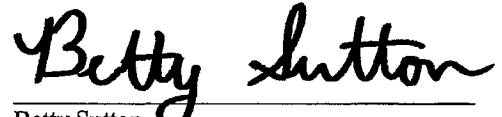

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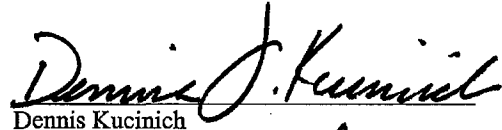

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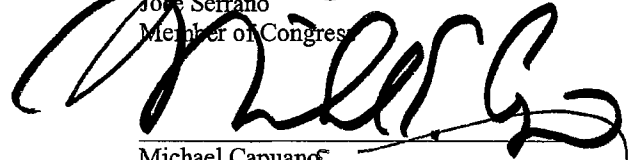

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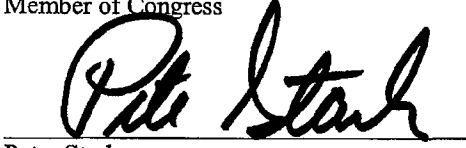

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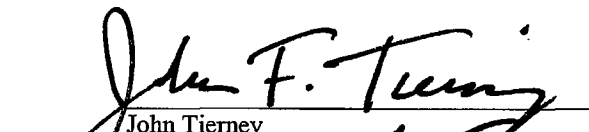

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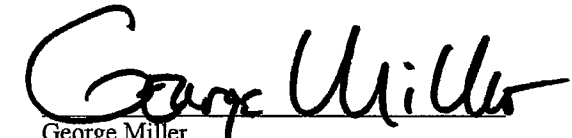

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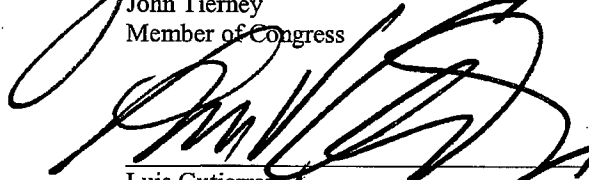

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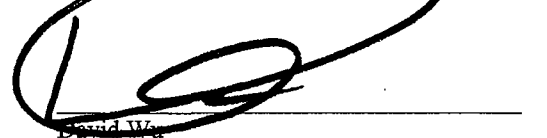

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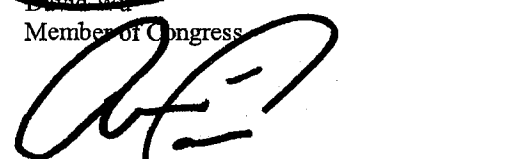

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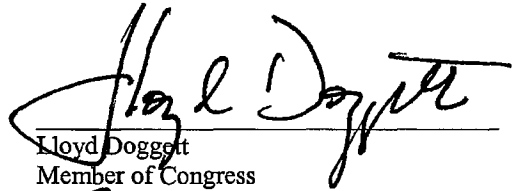

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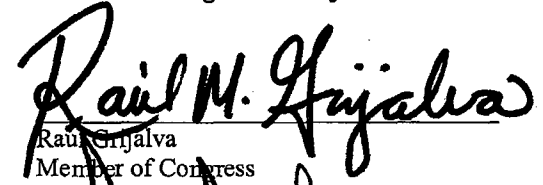
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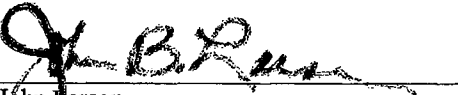
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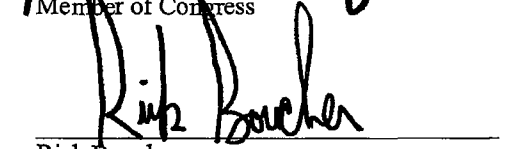
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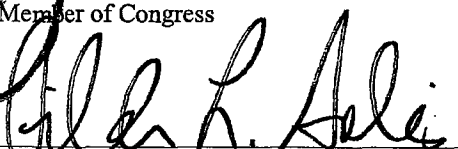
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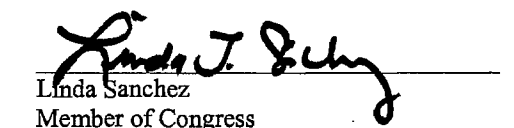
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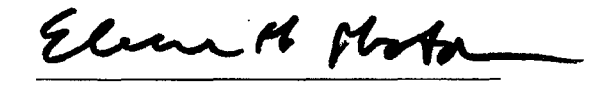
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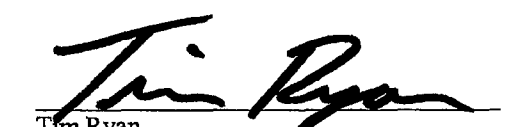
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Eleanor Holmes Norton
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Peter Welch
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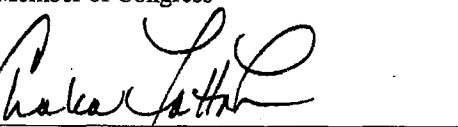
Tim Ryan
Member of Congress



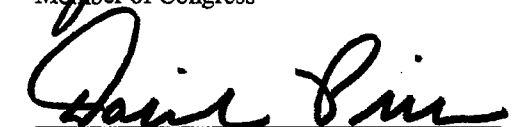
Barbara Lee
Member of Congress



Zoe Lofgren
Member of Congress



Chaka Fattah
Member of Congress



David Price
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Statement by Attorney General Michael B. Mukasey Regarding the Opening of an Investigation Into the Destruction of Videotapes by CIA Personnel

"Following a preliminary inquiry into the destruction by CIA personnel of videotapes of detainee interrogations, the Department's National Security Division has recommended, and I have concluded, that there is a basis for initiating a criminal investigation of this matter, and I have taken steps to begin that investigation as outlined below.

"This preliminary inquiry was conducted jointly by the Department's National Security Division and the CIA's Office of Inspector General. It was opened on December 8, 2007, following disclosure by CIA Director Michael Hayden on December 6, 2007, that the tapes had been destroyed. A preliminary inquiry is a procedure the Department of Justice uses regularly to gather the initial facts needed to determine whether there is sufficient predication to warrant a criminal investigation of a potential felony or misdemeanor violation. The opening of an investigation does not mean that criminal charges will necessarily follow.

"An investigation of this kind, relating to the CIA, would ordinarily be conducted under the supervision of the United States Attorney for the Eastern District of Virginia, the District in which the CIA headquarters are located. However, in an abundance of caution and on the request of the United States Attorney for the Eastern District of Virginia, in accordance with Department of Justice policy, his office has been recused from the investigation of this matter, in order to avoid any possible appearance of a conflict with other matters handled by that office.

"As a result, I have asked John Durham, the First Assistant United States Attorney in the United States Attorney's Office for the District of Connecticut, to serve as Acting United States Attorney for the Eastern District of Virginia for purposes of this matter. Mr. Durham is a widely respected and experienced career prosecutor who has supervised a wide range of complex investigations in the past, and I am grateful to him for his willingness to serve in this capacity. As the Acting United States Attorney for purposes of this investigation, Mr. Durham will report to the Deputy Attorney General, as do all United States Attorneys in the ordinary course. I have also directed the FBI to conduct the investigation under Mr. Durham's supervision.

"Earlier today, the Department provided notice of these developments to Director Hayden and the leadership of the Judiciary and Intelligence Committees of the Congress."

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March 16, 2005- Congress Passes Markey Amendment to Prevent Funds for Torture



WASHINGTON, D.C.- Congress took a critical step towards ending the U.S. policy of outsourcing torture today, passing an amendment, offered by Representative Edward J. Markey (D-MA), prohibiting the use any funds included in the supplemental bill to be used to the contravention of legal obligations under the Convention Against Torture, with a virtually unanimous bipartisan vote (420-Yays, 2-Nays, 3-Present).

"Today, we moved one step closer to ending the U.S. practice of 'outsourcing torture.' The passage of this amendment reaffirms our commitment to upholding the Convention Against Torture," said Rep. Markey.

The resounding bipartisan support for this amendment comes in the wake of public outrage at the CIA practice of sending suspects to prisons in countries around the world that are known to violate human rights. Fifty three Members of Congress and numerous

human rights and law associations are endorsing H. R. 952, the Torture Outsourcing Prevention Act – authored by Rep. Markey, a bill that would permanently end the current practice of rendering prisoners to countries that have been determined by the U.S. State

Department to routinely engage in torture, and bar reliance on "diplomatic assurances" from countries that practice torture as the basis for rendering persons to that country.

Today's amendment offered by Rep. Markey only affects funding in the Supplemental Appropriations bill, a critical first step towards ending U.S. tacit endorsement of torture, but the next step would be to end the use of "diplomatic assurances" in order to send prisoners into the hands of known torturers.

Amnesty International, Human Rights Watch and Human Rights First issued a joint statement supporting the Markey amendment opposing the outsourcing of torture.

"The current U.S. program to transfer detainees to countries outside of any lawful process through "renditions" places individuals in direct threat of torture and other forms of cruel, inhuman or degrading treatment in contravention of federal and international law. This practice is inhumane and unacceptable. Several individuals who were transferred by the United States into the hands of foreign officials were reportedly tortured during detention and interrogation and have since been released without charge. The passage of the Markey amendment is an important step in the process of ending torture, and we look forward to working with Representative Markey and Congress to pass the Torture Outsourcing Prevention Act."

This Congressional commitment to ending torture comes as the NY Times reported on U.S. failures to address torture in military prisons in several countries and new Bush Administration plans to render thousands of prisoners from Guantanamo Bay. Prisoners

rendered to other countries from Guantanamo Bay would be covered under the funding restrictions set forth in Rep. Markey's amendment, if supplemental appropriations funds were used for that purpose and would also be addressed by the standards set in the proposed under the Torture Outsourcing Prevention Act.

"The war against terrorism includes a war against those who engage in torture. If we fight our enemy using the same inhumane and morally bankrupt techniques that we are trying to stop, we will simply become what we have beheld. This amendment reaffirming our commitment to end the practice of torture is just the beginning. We are not going to stop until we have closed the hypocritical chapter in American history where we participate in torture by proxy. Torture is unacceptable and the U.S. has a responsibility to take the lead in ending this practice," said Rep. Markey.

Rep. Markey Floor Speech, March 15, 2005

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March 16, 2005

CONTACT: Tara McGuinness
202.225.2836

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LLL

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The Washington Times

March 21, 2005 Monday

SECTION: OPED; SWEET LAND OF LIBERTY; Pg. A17

LENGTH: 891 words

HEADLINE: Torture doublespeak

BYLINE: by Nat Hentoff, THE WASHINGTON TIMES

BODY:

Secret orders and 'renditions' cast their shadow

This is the second in a series of columns on America's rendition of suspected terrorists to countries known for torturing prisoners.

The word "covert" has long been associated with the CIA's use of "extraordinary renditions" by which suspected terrorists, believed to have essential information, are sent to countries our own State Department condemns for torturing prisoners. This is no longer a secret, as shown March 6 on CBS -TV's "60 Minutes," which began with: "Witnesses tell the same story: masked men in an unmarked jet seize their target, cut off his clothes...Tranquilize him and fly him away."

The next night, on ABC-TV's "World News Tonight," chief investigative correspondent Brian Ross reported: "Flight logs shown to ABC News detail trips to Morocco, Egypt, Jordan, Iraq, Afghanistan and Uzbekistan." And on "60 Minutes," Scott Pelley had noted that one of these kidnapping planes "made at least 600 flights to 40 countries... after 9/11." And on March 7, on Fox News, a network not notable for criticizing the Bush administration, Senior Judicial Analyst Judge Andrew Napolitano emphasized that "the United States signed over four treaties prohibiting this practice of extraordinary rendition. And the treaties required that the signing countries enact criminal statutes prohibiting them.

"They carry 20-year penalties for anybody having anything to do with... planning it (and) supplying planes." Mr. Napolitano added: "The president... can't change a treaty, he can't change a law... the most he can say to his CIA operatives is: 'On my watch, you won't be prosecuted.'" But there is a growing disquiet among certain CIA operatives that despite the "special rules" the administration has given the CIA, there might be consequences for those agents who have broken both our laws and the international treaties we have signed.

On "60 Minutes," Mr. Pelley interviewed Michael Scheuer, who helped begin the rendition program under Bill Clinton and, until recently, was a senior CIA counterterrorist official. Mr. Scheuer said: "Basically, the National Security Council gave us the mission... take people off the streets so they can't kill Americans." Mr. Scheuer, who still believes these renditions are productive, characterizes them as "finding someone else to do your dirty work."

Or, as one Bush administration official told the Washington Post (Dec. 26, 2002): "If we're not there in the room, who is to say?" However, Mr. Scheuer candidly told Mr. Pelley: "Oh, I think from the first day we ever did it there was a certain macabre humor that said sooner or later this this this sword of Damocles is going to fall, because if something goes wrong, the policy maker, the politicians and the congressional committees aren't going to belly up to the bar and say, 'We authorized this.'" On March 6, in the House of Representatives, Rep. Edward Markey, Massachusetts Democrat, held the sword of Damocles over the head of President Bush when he declared that "the president needs to rescind his extraordinary rendition 'outsourcing torture' directive... I call on the President to declassify this secret order of his immediately.

"The war against terrorism," Mr. Markey continued, "is a war against those who engage in torture. If we fight our enemy using the same inhumane and morally bankrupt techniques that we are trying to stop, we will simply become

what we have beheld. I call on President Bush to stop the outsourcing of torture immediately, in deed as well as word." On ABC-TV's "World News Tonight," Mr. Markey said hopefully: "Like Abu Ghraib, it took a while for the outrage to build. The more the American people find out we are allowing other countries to torture in our name, there is going to be an outcry in this country."

I am listening hard, but I don't hear that outcry yet, certainly not among the Republican leadership in Congress, which refuses to authorize an independent investigation of the CIA's "renditions." One of the CIA's jets transporting suspected terrorists made 10 trips to Uzbekistan. Craig Murray, the former British ambassador to that country, told Mr. Pelley about the techniques of Uzbek interrogators: "drowning and suffocation, rape was used... also the insertion of limbs in boiling liquid... it's quite common." Mr. Murray also told Brian Ross of ABC News that he received photos of one prisoner who was actually boiled to death.

That corpse may not have been a person the CIA kidnapped, but how do we know? In a March 6 New York Times story on these horrifying renditions, a CIA official "would not discuss any legal directive under which the agency operated, but said that the CIA has existing authorities to lawfully conduct these operations."

The authority came directly from the president in a Sept. 17, 2001 "memorandum of notification." Then why doesn't the president let us and Congress see this directive? Meanwhile, Fox News reports that Attorney General Alberto Gonzales says "the United States would never send terrorism suspects to countries where they would be tortured." But he did admit that once they had been sent, "the U.S. government didn't have control over how they were tortured." Isn't this manipulation of words what George Orwell chillingly called "doublespeak"?

* Nat Hentoff's column for The Washington Times appears Mondays.

LOAD-DATE: March 21, 2005

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Deleted by SSA [REDACTED] FBI (BAU) at Guantanamo Bay and forwarded to Marian Bowman, Legal Counsel, FBIHQ, on 11/27/2002.

LEGAL ANALYSIS OF INTERROGATION TECHNIQUES:

Interrogation Techniques

Category I -

1. Gagging with gauze.
2. Yelling at detainee.
3. Deception
 - a. Multiple Interrogators
 - b. Interrogator posing as an interrogator from a foreign nation with a reputation of harsh treatment of detainees.

Category II-

1. Use of stress positions (such as standing) for a maximum of 4 hrs.
2. Use of falsified documents or reports.
3. Isolation facility for 30 day increments.
4. Non-standard interrogation environment/booth.
5. Hooding detainee.
6. Use of 20-hour interrogation segments.
7. Removal of all comfort items (including religious items).
8. Switching detainee from hot rations to MRE's.
9. Removal of all clothing.
10. Forced grooming (shaving of facial hair etc..)
11. Use of individual phobias (such as fear of dogs) to induce stress.

Category III-

1. Use of scenarios designed to convince detainee that death or severe pain is imminent for him or his family.
2. Exposure to cold weather or water (with medical monitoring).
3. Use of wet towel and dripping water to induce the misperception of drowning.
4. Use of mild physical contact such as grabbing, light pushing and poking with finger.

Category IV-

1. Detainee will be sent off GTMO, either temporarily or permanently, to Jordan, Egypt, or another third country to allow those countries to employ interrogation techniques that will enable them to obtain the requisite information.

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Legal Analysis

The following techniques are examples of coercive interrogation techniques which are not permitted by the U.S. Constitution:

Category I -

3. b. Interrogator posing as an interrogator from a foreign nation with a reputation of harsh treatment of detainees.

Category II -

1. Use of stress positions (such as standing) for a maximum of 4 hrs.
2. Use of falsified documents or reports.
5. Hooding detainee.
6. Use of 20-hour interrogation segments.
9. Removal of all clothing.
11. Use of individual phobias (such as fear of dogs) to induce stress.

Category III -

1. Use of scenarios designed to convince detainee that death or severe pain is imminent for him or his family.
2. Exposure to cold weather or water (with medical monitoring).
3. Use of wet towel and dripping water to induce the misperception of drowning.

Information obtained through these methods will not be admissible in any Criminal Trial in the U.S. Although, information obtained through these methods might be admissible in Military Commission cases, the Judge and or Panel may determine that little or no weight should be given to information that is obtained under duress.

The following techniques are examples of coercive interrogation techniques which may violate 18 U.S.C. s. 2340, (Torture Statute):

Category II -

5. Hooding detainee.
11. Use of individual phobias (such as fear of dogs) to induce stress.

Category III -

1. Use of scenarios designed to convince detainee that death or severe pain is imminent for him or his family.
2. Exposure to cold weather or water (with medical monitoring).
4. Use of wet towel and dripping water to induce the misperception of drowning.

In 18 U.S.C. s. 2340, (Torture Statute), torture is defined as "an act committed by a person acting under color of law specifically intended to inflict severe physical or mental pain or suffering upon another person within his custody or control." The torture statute defines "severe mental pain or suffering" as "the prolonged, mental harm caused by or resulting from the intentional infliction or threatened infliction of severe physical pain or suffering; or the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses of the personality; or the threat of imminent death; or the threat that another person will imminently be subject to death, severe physical pain or suffering, or the administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses of the personality."

Although the above interrogation techniques may not be per se violations of the United States Torture Statute, the determination of whether any particular use of these techniques is a violation of this statute will hinge on the intent of the user. The intent of the user will be a question of fact for the Judge or Jury to decide. Therefore, it is possible that those who employ these techniques may be indicted, prosecuted, and possibly convicted if the trier of fact determines that the user had the requisite intent. Under these circumstances it is recommended that these techniques not be utilized.

The following technique is an example of a coercive interrogation technique which appears to violate 18 U.S.C. s. 2340, (Torture Statute):

Category IV-

1. Detainees will be sent off GTMO, either temporarily or permanently, to Jordan, Egypt, or another third country to allow those countries to employ interrogation techniques that will enable them to obtain the requisite information.

In as much as the intent of this category is to utilize, outside the U.S., interrogation techniques which would violate 18 U.S.C. s. 2340 if committed in the U.S., it is a per se violation of the U.S. Torture Statute. Discussing any plan which includes this category, could be seen as a conspiracy to violate 18 U.S.C. s. 2340. Any person who takes any action in furtherance of implementing such a plan, would inculpate all persons who were involved in creating this plan. This technique can not be utilized without violating U. S. Federal law.

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The Globe and Mail (Canada)

April 14, 2008 Monday

'Extraordinary-rendition' procedure unreliable, says CIA vet who created it

BYLINE: COLIN FREEZE

SECTION: NATIONAL NEWS; TERRORISM: INTERROGATION; Pg. A7

LENGTH: 813 words

DATELINE: DURHAM, N.C.

The creator of the CIA's "extraordinary-rendition" program says he has always distrusted interrogation intelligence flowing from the controversial practice, given that the admissions it produced were usually "very tainted" by foreign agencies who jailed suspects at the behest of the United States.

Michael Scheuer, an outspoken anti-terrorism crusader, took part in a Duke University law-school panel on Friday. There, experts debated the future of the highly controversial snatch, jail and interrogate program that he created, and whether it should survive beyond the administration of U.S. President George W. Bush, which has often justified rendition as an intelligence gold mine.

In Canada, rendition has become synonymous with the process that resulted in Ottawa's Maher Arar spending a year in a Syrian jail, where he was beaten with electric cables during the first phases of his captivity. Canadian officials have apologized to the telecommunications engineer and compensated him with \$10-million (U.S.), upholding that he was wrongly smeared in intelligence exchanges emanating from Canada, prior to the U.S. decision to render him.

The Bush administration has proven far less contrite in the Arar affair and similar cases, blocking lawsuits on the grounds that probing rendition would illegally spill state secrets.

An estimated 100 to 150 people have been rendered to foreign prisons by the U.S. program, of which Mr. Scheuer remains a big booster. Now retired, he created the program when he was a Central Intelligence Agency analyst tasked with hunting down Osama bin Laden. He said the program has been enormously valuable, at least in terms of taking high-level terrorists off the streets and seeing what documents they carried.

But he added that resulting interrogations proved dubious once suspects were sent to third-country prisons, such as Syria or Egypt. "You could bet on the testimony given to you, it was altered in a way that would serve the interests of the country that was giving it," he said. "So, it was very tainted, in the sense that if Country X or Country Y interrogated these people, you would really have some information, but it would be far from coupled with what was actually being said."

Mr. Scheuer didn't dispute that torture has occurred in foreign jails where the United States sent suspects - "You'd have to assume that 80 per cent [of prisoners rendered to Egypt] are not going to have a good time," he said - but said simply that he didn't particularly care. "I'm perfectly happy to do anything to defend the United States, so long as the lawyers sign off on it," he said.

After 9/11, the Bush administration decided to enhance Mr. Scheuer's pre-existing rendition program with international "black-site" prisons where U.S. officials would lead interrogations in secret CIA jails. "I am much less experienced in the Bush administration," Mr. Scheuer conceded. "I ran rendition operations from July '95 until June of '99."

Speaking at Duke, Mr. Scheuer did put some distance between the program he hatched in 1995 and events that occurred after 2001. "The bar was lowered after 9/11," he said.

'Extraordinary-rendition' procedure unreliable, says CIA vet who created it The Globe and Mail (Canada) April 14, 2008 Monday

In addition to Mr. Arar's case in Canada, high-profile renditions controversies have arisen in Germany and Italy. Mr. Scheuer made a point of saying he would personally put the German suspect back on a rendition plane, but did not say the same that about the other two cases. The program he conceived was restricted to targeting only the highest level terrorism suspects, he said.

Questioned about the Arar affair, Mr. Scheuer asserted that that rendition was not technically a CIA job, but rather an FBI initiative, by agents working in cahoots with unspecified agencies north of the border.

That prompted a response from Canadian lawyer Ron Atkey, who was in attendance to give a speech about the years he spent inside the Arar Commission battling government secrecy to reveal what Canada knew about the CIA rendition program.

Mr. Atkey pointed out Canadian agencies were found to have had no foreknowledge of the U.S. decision to put Mr. Arar on a Gulfstream jet and fly him to the Middle East, after his 2002 arrest in a New York airport.

"The biggest piece of baloney," Mr. Scheuer said. "They [the Canadians] were totally surprised like Captain Renault in *Casablanca*," he quipped.

The allusion referred to a scene in the 1942 film, where a duplicitous French gendarme shuts down an illegal casino operation in Morocco - saying "I'm shocked, shocked to find out that gambling is going on in here!" even as he is handed a big win from the roulette wheel.

Mr. Scheuer went on to describe certain U.S. newspaper reporters as "scurrilous" traitors for revealing details of the rendition program.

After the panel, however, he said he wasn't necessarily familiar with the domestic investigations that led to the Arar affair.

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