**TESTIMONY OF**
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**HEARING ON**

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

**BEFORE THE**

**UNITED STATES SENATE**
**SELECT COMMITTEE ON INTELLIGENCE**

**SEPTEMBER 25, 2007**

## Introduction

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

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

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

## I. Intelligence Interrogations and the Law

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

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

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

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

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

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

## II. Evaluating Executive Order 13440

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[11] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

down until they collapsed from fatigue."[19]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## III. The Way Forward

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

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

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

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

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

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

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

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

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

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

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

Thank you.