STATEMENT
OF
JOHN NORTON MOORE

BEFORE THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

CONCERNING

"ENSURING LEGAL REDRESS FOR
AMERICAN VICTIMS OF STATE-SPONSORED TERORISM"

PRESENTED
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Concerning
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"*To no man will we . . . deny or delay right or justice."*
Magna Carta 1215

Chairman Conyers, Chair Cohen, Ranking Member Smith, and members of the Committee:

It is an honor to appear before the Judiciary Committee today as co-counsel representing seventeen American former prisoners of war (POWs) tortured by Iraq during the 1991 Gulf War and thirty-seven of their close family members. These courageous Americans, determined that future American POWs should not have to endure the horror they endured, joined together to enforce the rule of law against the torture of POWs. On July 7, 2003, they won a substantial judgment against Iraq for their torture during the Gulf War; a judgment which if enforced will clearly add deterrence against the future torture of American POWs. Because of the complications of the ongoing 2003 Iraq War, however, their federal court judgment has, as yet, gone unsatisfied.[1]

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[*] John Norton Moore is the Walter L. Brown Professor of Law at the University of Virginia and Director of the Center for National Security Law at Virginia. Formerly he served as the Counselor on International Law to the Department of State, as a United States Ambassador and Deputy Special Representative of the President and Chairman of the National Security Council Task Force on Law of the Sea and, under President Ronald Reagan as the first Chairman of the Board of the United States Institute of Peace, among seven Presidential appointments. He is also a four term Chairman of the American Bar Association Standing Committee on National Security Law and an adjunct professor at Georgetown Law Center. His testimony today is solely in his capacity as co-counsel for the POWs and family members in *Acree v. Republic of Iraq*, 271 F.Supp.2d 179 (D.D.C. 2003), and he is not speaking for the University of Virginia, Georgetown, or any other organization of which he is or has been a member.

I count it among the greatest honors of my life to represent these 54 wonderful Americans in their struggle to enforce the rule of law against the torture of POWs. And I would like to thank the countless members of Congress, and their staffs, who have understood the importance and justice of the POWs' non-partisan struggle, including Speaker Nancy Pelosi, House Majority Leader Steny H. Hoyer, Chairman John Conyers, Jr., Chairman Ike Skelton, Congressmen Bruce Braley, James P. Moran and Joseph A. Sestak, Jr., Senate Majority Leader Harry Reid, Chairman Joseph R. Biden, Jr., Chairman Robert C. Byrd, Chairman Edward M. Kennedy, Chairman Patrick J. Leahy, Chairman Carl Levin and Senators Susan M. Collins, Richard G. Lugar, Jeff Sessions and Arlen Specter.

[1] One of those complications was that the $1.7 billion in blocked Iraqi assets from the 1991 Gulf War, which had been earmarked by Congress to pay judgments such as those of the POWs, was seized on March 20, 2003, to fund the current Iraq War. Should members of the Committee be interested I would be pleased to describe the complex judicial track of the *Acree* case, including its current status before the Federal District Court.

The Braley/Sestak Bill before this Committee has the support of the affected POWs and family members, despite embodying a dramatic reduction in their court ordered judgment, including the effective waiver of all punitive damages and almost two-thirds of compensatory damages awarded them by the Federal District Court. It is understood that this Bill is carefully crafted both to ensure that America will live up to its word in ensuring accountability for the torture of American POWs and the kidnapping of American civilian hostages and that the War effort may be served by substantially compromising the overall claims against the new Government of Iraq. As such, this Bill achieves a balance of right against right. As Senator Susan M. Collins wrote in 2004: "[t]he protection of American POWs is a vital national security interest and the goal of rebuilding Iraq should not be viewed as inconsistent with the goal of protecting future American POWs from torture and abuse. We can and should meet both of these important goals."[2] The Braley/Sestak Bill does meet both goals.

Justice for American POWs, and taking effective action to implement the word of the Congress, the President and the Nation to ensure that future American POWs held by the enemy will not be tortured, is, of course, not a partisan matter. The POWs and their family members thank the members of this Committee and of the Congress of both parties and both Houses for that understanding.

Background of the Braley/Sestak Bill

The background of this Bill is instructive as to why it deserves the unanimous bi-partisan support of the Congress. In the 2008 Defense Authorization Act the Congress requested the Administration to resolve these claims with Iraq, as one of the conditions for providing Iraq a waiver from operation of the rule of law in American courts as embodied in that Act. Subsequently, in response to this request from the Congress, the Justice Department hosted a special interagency meeting with representatives of the POWs and their family members and then, on April 22, 2008, it hosted a second interagency meeting for representatives of all the claimant groups which subsequently have been included in the Braley/Sestak Bill with the POWs. At this Justice Department meeting representatives of the claimants indicated that in the interest of promptly resolving this matter they were prepared to deeply compromise their outstanding judgment awards and claims. Specifically, for the POWs an "illustrative settlement" indicated a waiver of all punitive damages (a court-awarded sum of $306 million) and a waiver of two-thirds of compensatory damages awarded by the court against Iraq (a waiver of a sum of over $435 million). The representatives of the POWs also pointed out at this Justice Department meeting that Iraq, with knowledge of the Administration, had already resolved a minimum of $20-32 billion in commercial claims of foreign corporations and was continuing to pay Gulf War damages to Kuwait and Saudi Arabia while it had not yet resolved the debt of honor owed tortured American POWs. They asked why the commercial claims of foreign corporations such as Mitsubishi of Japan and Hyundai of Korea were coming before the debt of honor owed to tortured American

[2] Letter of February 27, 2004, from Senators Collins & Allen to Attorney General Ashcroft in support of the POWs.

POWs and family members.[3] Representatives of the claimants were subsequently informed by an Administration spokesperson that while the Administration viewed these claims as valid, and believed that Iraq should pay, the Executive was not in a position to resolve these claims. The representatives of the claimants have interpreted this as an invitation by the Administration for Congress to directly resolve this matter, thus removing these valid claims as an additional complication for the Executive in negotiating a Status of Forces Agreement (SOFA), and a "Strategic Framework" Agreement with Iraq.[4]

Finally, with respect to the background of this Bill, let me emphasize that this Bill is not designed to remove the existing Presidential waiver put into place during Presidential consideration of the 2008 Defense Authorization Bill. Rather, it presents Iraq with a unique opportunity to once and for all dispose of these important valid claims of Americans against Iraq for deeply discounted amounts; amounts which are simply *de minimus* in relation to Iraqi assets. Payment of all of these claims as deeply discounted in the Braley/Sestak Bill, for example, will amount to considerably less even than 1% interest for a single year on Iraq's $50 billion in funds held in the United States, not even considering the $70 billion or more windfall to Iraq from the recent tripling of the price of oil, or that Iraq has at minimum the third largest oil reserves in the world.[5] It will thus be a simple matter for Iraq promptly to resolve these claims for the deeply discounted amounts as specified in the Braley/Sestak Bill and to keep fully in place the waiver authority it sought at the time of the 2008 Defense Authorization Act.

The Braley/Sestak Bill Supports the War Effort

The American POW and family member claimants are mindful that there is a new Government in Iraq and that America is fighting a new War there. The Braley/Sestak Bill, however, is strongly in the interest of Iraq and the War effort for many reasons. First, as has been discussed, it will dramatically reduce the outstanding debts against Iraq, resolving claims with strong legal and political backing on terms closely paralleling those

[3] *See Business Week* (Online Edition 7:00 p.m. ET Jan. 12, 2006), and "Bonds and Bombs," *Barron's* (March 20, 2006), at 53.

[4] My understanding is that the Administration, including both State and Justice Representatives, have declined to offer testimony at this hearing, a development which I would interpret, as a former Counselor on International Law to the Department of State, as an indication that the Administration will remain neutral on prompt Congressional resolution of these valid claims as deeply discounted in the Braley/Sestak Bill. For if the Administration opposed this Bill, or if the President were contemplating a veto, surely they would have taken the occasion of an invitation to testify to that effect.

[5] According to the *Washington Post* in April of this year, "the special U.S. auditor for Iraq released data showing that the government [of Iraq] could reap as much as $70 billion this year because of soaring oil prices. Oil prices neared a record $120 per barrel this week." International Briefing, Iraq, Oil Exports Increased in March, *Washington Post* at D5, col. 4, April 25, 2008 (note that most recently the price of oil was over $135 per barrel rather than the $120 figure reported by the *Post* as the basis for reaching the $70 billion windfall figure). Iraq is also estimated to have oil reserves of at least 110-120 billion barrels, triple those of the United States. Further, it has been reported that as Iraq's oil wealth is properly explored and developed under a government committed to the rule of law that Iraq could have proven reserves as high as 300 billion barrels, placing it ahead even of Saudi Arabia, with its proven reserves of 250 billion barrels. Certainly, unlike the early days of the War, today Iraq has far more in bank funds than it can spend on "reconstruction," not to mention its recent issuance of long-term bonds against future oil revenue.

which Iraq is using to settle its sovereign debts and its commercial debts with foreign corporations. Second, it would in one place decisively deal with recognized claims of Americans against Iraq,[6] thus freeing Iraq and our Executive from having to deal with these valid claims of injured Americans in what are otherwise difficult negotiations for the Status of Forces (SOFA) and "Strategic Framework" agreements, as well as freeing the Congress of any need for further consideration of this matter. Third, payment by Iraq of this debt of honor owed to Americans it tortured or took hostage during the 1991 Gulf War would, we believe, be greeted warmly by the American people. In contrast, we note that members of Congress who have written or spoken about this on a bi-partisan basis, and we are sure also the American people, are appalled when they hear that Iraq has settled approximately $20-32 billion in commercial claims of foreign corporations while not resolving this debt of honor to tortured Americans.[7] Fourth, resolution of this debt of honor with Iraq on terms approximating that used for its settlement of commercial debts could provide a powerful argument for Iraq to use in settling still outstanding sovereign and commercial claims on favorable terms. Finally, with Americans dying for the rule of law in Iraq we have an interest in encouraging Iraq to live up to its legal obligations. A wink and a nod to Iraq that its legal obligations, both in treaty form and in United States courts, can simply be ignored is not consistent with a core effort of the United States in Iraq, to assist in a broad rule-of-law transformation. Given these powerful reasons why the Braley/Sestak Bill also supports the interests of Iraq and the War effort I would urge Iraq, even acting purely in its own interest, to take the lead and resolve the claims included in this Bill as specified, even before this Bill enters into law.

The Braley/Sestak Bill Provides Justice for Tortured American POWs

On April 4, 2002, seventeen American Gulf War POWs who had been brutally tortured by Iraq during the 1991 Gulf War, and thirty seven of their family members, filed a suit in federal district court in the District of Columbia to hold their torturers accountable. The suit was brought under the 1996 amendments to the Foreign Sovereign Immunities Act (FSIA) which for the first time, as mandated by Congress, permitted suit against certain states which torture Americans abroad. At the time there was $1.7 billion

[6] The Braley/Sestak Bill before this Committee includes all claims against Iraq represented at an interagency meeting on April 22d chaired by the Department of Justice to vet claims against Iraq in response to the Congressional directive in the 2008 Defense Authorization Act that these claims be resolved. The claimant groups invited to this meeting were selected by the Department of Justice itself in hosting this meeting and to my knowledge all these claimant groups are recognized as holding valid claims against Iraq.

[7] The POWs and family members were most appreciative of the letter written on their behalf by the Ranking Member of the Senate Foreign Relations Committee, the Honorable Richard G. Lugar, to Stephen J. Hadley, the Assistant to the President for National Security Affairs, in which the Senator stated: "As the provisions in the 2008 Defense Authorization bill for these Gulf War victims demonstrate, these claims have strong Congressional support, consistent with numerous unanimous resolutions of the Senate and the House of Representatives that Iraq should be held accountable for their torture. It is particularly troubling to many in Congress . . . [that Iraq is seen to be settling] commercial claims of foreign corporations while . . . [not settling] the claims of the American POWs from the Gulf War." Letter from the Honorable Richard G. Lugar to the Honorable Stephen J. Hadley, Assistant to the President for National Security Affairs, March 4, 2008.

in blocked Iraqi assets in the United States that Congress subsequently earmarked as available to pay judgments of Americans against Iraq. Acting at the request of the district court the Department of State served process on Iraq and the principal witness for the American POWs was the then top law of war expert in the United States Army JAG Corps. The very day the complaint was filed it was couriered to the Vice President, the Deputy Secretary of Defense, and the Legal Advisers of the State and Defense Departments. Counsel in the case were Monroe Leigh, a former Legal Adviser to the Department of State and partner in the law firm of Steptoe & Johnson (his law firm has continued representation after Monroe's death), and John Norton Moore, a former United States Ambassador and Counselor on International Law to the Department of State. As required by the 1996 FSIA amendments, the case was brought only after Iraq refused to submit the claim to international arbitration. Liability of Iraq was then determined after a full review of the law and the facts by a federal judge, precisely as the law provides for claims brought against the United States itself. Because of complications from the ongoing Iraq War, however, for almost five years the POWs' federal court judgment has, as yet, gone unsatisfied. The Braley/Sestak Bill will promptly and decisively resolve this matter in a compromise, which while deeply favorable to Iraq, is supported by the POWs and their family members as a way of honorably resolving this matter.[8]

As the representative of these courageous *American* POWs tortured by Iraq, let me share with you the compelling story for recognizing their rights and the national security interest in protecting POWs from torture. That story simply reflects bedrock American values; America keeps its word; America supports the rule of law; America supports its troops; America is fair; America leads; and America defends its national honor. These core values are directly at stake in consideration of the Braley/Sestak Bill and suggest that this Bill, like the earlier pledges of the Congress to hold Iraq accountable for its torture of American POWs, should be adopted by both Houses of Congress unanimously.

America Keeps its Word

This House, as well as the Senate of the United States, repeatedly warned Iraq that it would be held accountable for the torture of American POWs. In three unanimously adopted Resolutions passed while our POWs were held by Iraq the House and the Senate condemned Iraq for its torture of American POWs in violation of the Third Geneva Convention (the POW Convention).[9] Over a decade later, on February 7, 2002, President George W. Bush issued an Executive Order directing that: "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." And, the Nation itself, by treaty obligation in the Third Geneva Convention of 1949 (the POW Convention) solemnly pledged, as a core deterrent mechanism built into that

[8] If this matter is not promptly resolved along the lines of the Braley/Sestak Bill the 54 POWs and close family members of the *Acree* case reserve all their legal rights against Iraq, including proceeding against Iraq for the full judgment of $959 million as awarded by the District Court in *Acree v. Republic of Iraq*, 271 F.Supp.2d 179 (D.D.C. 2003).

[9] *See* H.R. Con. Res. 48, 102d Cong. H663 (Jan. 23, 1991); S.Con. Res. 5, 102d Cong. S1146 (Jan. 24, 1991); S.Con. Res. 8, 102d Cong. S1453 (Jan. 31, 1991).

Convention for the protection of POWs, that it would never "absolve" a torturing state of "any liability" for the torture of POWs.[10] President Bush, during the current Iraq War, has reiterated to the American people that America will adhere fully to its obligations under this POW Convention.

The word of the Congress, of the President, and of the Nation is clear. Those who torture American POWs will be held accountable. There is no if, and, or but attached to these pledges. And, as a critical corollary of the importance of keeping the national word, were we not to do so, it would undermine the credibility of future Congressional Resolutions, Presidential Directives, and even the solemn treaty word of the Nation.

America Supports the Rule of Law

America as a Nation is built on the rule of law. Further, both Democratic and Republican Presidents have strongly incorporated the rule of law in our foreign policy. Internationally, the United States and Iraq, as well as every other nation in the World, are bound never to "absolve" a torturing state of "any liability" for the torture of POWs. America will not turn its back on this international treaty obligation; an obligation so crucial for the protection of American POWs held by the enemy. And domestically Congress will not enable suits in United States courts to deter the torture and hostage taking of Americans and then, once those suits are successful, permit the state held liable simply to completely waive the rule of law in our courts. Further, if a core objective of the United States in the current War in Iraq is to support a democratic rule-of-law government surely it does not serve that goal to remain silent while Iraq ignores its treaty obligation "never" to absolve a torturing state of "any liability" for the torture of POWs, or its obligations under U.S. law to both POWs and civilian hostages.

America Supports Its Troops

The POWs tortured by Iraq during the 1991 Gulf War were welcomed home by a grateful American people. Then Secretary of Defense Cheney said as he greeted them on their arrival at Andrews Air Force Base: "Welcome Home; your country is opening its arms to greet you." America will not countenance turning its back on these wonderful Americans and their family members, or silently siding with their torturers to effectively absolve them of liability. America will do all in its power to support these wonderful Americans and will take every opportunity to add deterrence against the future torture of American POWs held by the enemy. Those who go in harms way deserve no less. The need to keep the faith with our troops in seeking to deter future torture of American POWs held by the enemy is summarized well in a letter from Colonel, USMC (Ret.) Cliff

[10] This obligation is contained in Article 131 of the POW Convention. That is, Article 131 of The Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949. Article 131 provides in full: "No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article." Article 130, "the preceding Article," identifies "grave breaches" of the Convention and specifically lists "torture or inhuman treatment," and "willfully causing great suffering or serious injury to body or health" as among such "grave breaches" then referred to in Article 131 as "non-absolvable." Article 131 is one of the principal deterrent mechanisms built into the Convention for the protection of POWs; that is non-absolvable state liability.

M. Acree, and Cynthia B. Acree, the lead POW and his wife in the POWs' historic action. Colonel Acree and Cynthia write on January 25 of this year:

> We are privileged to be part of this historic effort to seriously deter the torture of Prisoners of War. As our experience in the 1991 Gulf War confirmed, American POWs continue to be brutally tortured by the enemy in war after war.
>
> It is past time for our Nation and all others to create serious incentives for full adherence to the Third Geneva Convention of 1949 (the POW Convention) which unequivocally bans all torture against POWs. One of the core deterrent mechanisms in that Convention is a provision in Article 131 that no nation may "absolve" a torturing state of "any liability" for the torture of POWs. Since the POW Convention is now in force for every nation in the world, it is past time the United States, and Iraq as well, take a leadership role in honoring this bedrock international law obligation. Our landmark judgment holding Iraq accountable for its torture must be honored and not erased. It serves the very purpose for which the Geneva Conventions were conceived—to shine the brightest light of accountability on torture to end this deplorable practice.
>
> While held captive, Cliff refused, under torture, to criticize his then Commander-in-Chief, George H. W. Bush, nor have any of the POWs in this unprecedented case sought to criticize the Commander-in-Chief. As former officers and enlisted personnel in the United States military, and their family members, we and our colleagues have the greatest respect for our Nation and its unparalleled military and veterans. It is our respect and concern for the United States military and its servicemen and women that morally obligates us to spotlight Iraq's cruel torture of POWs, and to underscore the importance of deterring future torture of our POWs and citizens held by the enemy. Our 2003 federal court judgment holds our torturers accountable and serves that purposes. To cavalierly set it aside greatly disserves this important national interest.[11]

If the record of a courageous action of tortured American POWs to enforce the rule of law against their torture, as expounded by Cliff and Cynthia Acree above, is erased because their own government now remains silent, future generations of American POWs held by the enemy will receive even more enthusiastic torture. And our POWs will be told by their puffed up torturers that America does not care and that Congressional Resolutions and Executive Orders are but meaningless paper. Perhaps

[11] Letter from Cliff M. Acree & Cynthia B. Acree of January 25, 2008. Cliff & Cynthia have written an inspiring memoir about the terrible torture Cliff endured, his struggle for recovery through repeated painful operations, and the hardship for his wife Cynthia. *See* CYNTHIA B. ACREE WITH COLONEL CLIFF ACREE, THE GULF BETWEEN US (2001). George and Barbara Bush wrote of this book: "This book is written in two voices and we are delighted to add our two voices to praise Cliff's devotion to duty and Cindy's quiet courage." General Walter E. Boomer, USMC (Ret.), the Commander of United States Marine Forces in the Gulf War, has added to this statement of former President and First Lady Bush: "Cliff Acree's story is one that needs to be told. He is one of the few real heroes of the Gulf War."

their torturers will even show our POWs the final judgment won by the American Gulf War POWs and point out the silence as that judgment was ignored. Perhaps also their torturers will ignore new warnings from the House and the Senate as American POWs again are tortured. With passage of the Braley/Sestak Bill this debacle will not happen.

America is Fair

Americans do not believe that POWs tortured by Iraq should personally pay for the "reconstruction" of the country which tortured them. Clearly any such expense of "reconstruction" is a public purpose to be borne by the Nation as a whole. Indeed, to ask our POWs and family members to pay with their legal rights for the "reconstruction" of the country which tortured them is morally repugnant. Similarly, Americans do not believe that it is right for Iraq to resolve a minimum of $20-32 billion in commercial claims of foreign corporations and continue to pay billions in Gulf War reparations to Kuwait and Saudi Arabia, while ignoring the valid claims of American POWs and American civilian hostages. Surely the debt owed to American POWs is a "debt of honor" which should come before commercial claims; and certainly should not be ignored while commercial claims are paid.

America Leads

The United States historically has led the world in efforts to protect prisoners of war from torture. America was one of the leaders in the development of the 1949 Geneva Conventions, including the Third Geneva Convention for the protection of POWs. Further, America, on a bi-partisan basis under both Democratic and Republican Presidents, has taken the lead in promotion of human rights generally. How can the United States credibly take the lead in the future in these important endeavors if we are willing to ignore a core deterrent mechanism against torture; that a torturing state will be accountable under law? Is ignoring the courageous and historic action of America's tortured Gulf War POWs to enforce the rule of law consistent with traditional American leadership against such torture? More broadly, is ignoring the courageous action of America's tortured Gulf War POWs consistent with traditional American leadership for human rights?

America Defends Its Honor

After the POWs had brought their action against Iraq twenty distinguished former high-level national security officials of this Nation wrote to the President about the historic opportunity provided by this case; an opportunity to add serious deterrence against future torture of American POWs. They wrote in support of the POWs' initiative that: "[n]ever before has . . . [America] had such an opportunity to strike a blow against the torture of our POWs. This is truly a unique opportunity to send a signal to all future tyrants that America values the rule of law and that we will hold nations that torture American POWs accountable." This letter was signed on a non-partisan basis by, among others, Admiral Thomas H. Moorer, a former Chairman of the Joint Chiefs of Staff; John Lehman, a member of the 9/11 Commission & former Secretary of the Navy; Governor Bill Richardson, a former Ambassador of the United States to the United Nations; Anthony Lake, a former Assistant to the President for National Security Affairs; Davis R. Robinson and Abraham D. Sofaer, two former Legal Advisers to the Department of State;

Ambassador Richard Schifter, a former Assistant Secretary of State for Human Rights and Humanitarian Affairs; Ambassador Max M. Kampelman, Chairman Emeritus of the American Academy of Diplomacy and, as the former CSCE and START negotiator for the United States, one of the premier United States diplomats; Vice-Admiral James H. Doyle, Jr., a former Deputy Chief of Naval Operations; and Rear Admiral Horace B. Robertson, Jr., a former Judge Advocate General of the Navy.

In discussions concerning this letter I have never forgotten the wise summary of this matter volunteered by Anthony Lake. He noted that supporting our POWs was simply "*A Matter of National Honor*." Surely he is correct, and perhaps this profound statement captures it all.

Thank you for the opportunity to appear before you and testify on this matter of national honor.