TESTIMONY OF
ELISA MASSIMINO

WASHINGTON DIRECTOR
HUMAN RIGHTS FIRST

HEARING ON

THE APPLICABILITY OF FEDERAL CRIMINAL LAW TO THE INTERROGATION OF DETAINEES

BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY

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Introduction

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

We have heard quite a bit this week from Attorney General Mukasey and others about the need to modernize outdated surveillance laws to reflect 21st century technologies.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

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

The Administration now appears willing to acknowledge the legitimate role of Congress in investigating these matters, and we welcome its decision late yesterday to permit CIA acting general counsel John Rizzo to testify about the decision to destroy the tapes. He and others have much to answer for, not only with respect to the destruction of the tapes, but also about who authorized the acts depicted on those tapes. Throughout the torture scandal, beginning with the revelations of abuses at Abu Ghraib, accountability for these policies has come only at the lowest level. As Human Rights First reported last year in Command's Responsibility, the deaths in custody of nearly 100 people, including 34 confirmed or suspected homicides, at least 8 of which are prisoners

who were literally tortured to death.[1] This, along with the stain on America's reputation and honor, is the cost of a policy of official cruelty. I hope as Congress begins this investigation it will break the pattern which has held so far: punish the monkey, and let the organ grinder go.

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 statute that makes torture a felony and for passage of the 2005 McCain Amendment, which reinforces the ban on cruel, inhuman or degrading treatment of all detainees in U.S. custody, regardless of their location or legal status. We successfully fought efforts by the administration to weaken the humane treatment requirements of the Geneva Conventions during debate over the Military Commissions Act last year. In June 2007, Human Rights First published a joint report with Physicians for Human Rights entitled *Leave No Marks: Enhanced Interrogation Techniques and the Risk of Criminality*, the first comprehensive evaluation of the nature and extent of harm likely to result from "enhanced" interrogation techniques and the legal risks faced by interrogators who employ them. I hope my testimony today, which draws heavily from the analysis and conclusions of that report, can help shed some light on the legal standards governing interrogation which the administration has sought for so long to distort, obscure and evade.

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

You have asked me to address the applicability of federal criminal law to the interrogation of detainees. I start from the premise that intelligence gathering is a necessary – and perhaps the most important – tool in disrupting terrorist networks. Effective interrogations designed to produce actionable intelligence are a legitimate and important part of this effort. Such interrogations can and must be conducted consistent with the laws and values of the United States.

[1] Hina Shamsi, Human Rights First, *Command's Responsibility: Detainee Deaths in U.S. Custody in Iraq and Afghanistan*, 5 (Deborah Pearlstein ed. 2006).

But that has not been the case. The administration's approach to interrogations after 9/11 was to assert broad executive power and seek to redefine the rules governing treatment of prisoners. This approach is epitomized by the Justice Department's infamous "torture memo," which construed the domestic criminal statute prohibiting torture so narrowly that much of what the United States has condemned as torture when done by other governments would not be prohibited. That same memo, which was publicly embraced as "reasonable" by the CIA's acting general counsel John Rizzo in testimony before the Senate Intelligence Committee just six months ago, also sought to reassure interrogators that, even if their conduct constituted torture under the memo's narrow definition, they need not worry about being prosecuted under the statute because the President could authorize violations of the law in his power as commander in chief.

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

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

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

cautioned when the Act was passed that the President remains bound by the conventions themselves and that "[n]othing in this bill gives the President the authority to modify the conventions or our obligations under those treaties."

Two days after the President issued the Executive Order authorizing the CIA program to resume, Director of National Intelligence Admiral Mike McConnell appeared on *Meet the Press* to defend the program. When asked whether Americans would be troubled if measures permitted under the CIA program were used by the enemy against captured U.S. personnel, McConnell was evasive, simply reiterating the claim that "it's not torture." Finally, under pressure to say whether the CIA standard was one the United States could live with in the treatment of its own people, McConnell admitted that he would not be comfortable having the CIA techniques used against Americans. All he could say by way of reassurance was that those subjected to these methods would not suffer "permanent damage."[2]

But these techniques need not inflict permanent damage in order to violate the law and potentially result in very serious criminal sanctions for those who authorize or employ them. Federal law prohibits not only torture but any cruel, inhuman or degrading treatment of detainees, regardless of who they are, where they are held, or which U.S. agency holds them. Under U.S. law, the severity of physical pain or mental harm caused by an interrogation technique is central to determining whether the technique is criminal.[3]

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

Judge Mukasey seems to have missed the most fundamental point about U.S. interrogation policy after *Hamdan*, a point that he should bear foremost in mind during his deliberations about the legality of waterboarding and other "enhanced" techniques: if the U.S. government does not want American citizens or soldiers to be subjected to these techniques, then it may not employ them itself. The Supreme Court ruled that Common Article 3 of the Geneva Conventions governs U.S. treatment of al Qaeda detainees, including all interrogations conducted anywhere by any U.S. agency. If the CIA is authorized to use a particular interrogation method under the July Executive Order, it means the U.S. government considers that method to be compliant with Common Article

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

3. And if it is compliant with Common Article 3, then U.S. enemies can use it against captured Americans in any situation governed by Common Article 3.

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

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

I would note, however, that the recent report of the Intelligence Science Board published by the National Defense Intelligence College raises serious questions about the supposed effectiveness of abusive interrogations.[4] As this Committee explored in a hearing held last month, there is a substantial body of opinion among serving senior officers and career interrogators that such techniques are not only illegal but ineffective as well, and undermine our ability to elicit reliable intelligence. In the case of Abu Zubaida, tapes of whose interrogation were among those destroyed by the CIA, the FBI claims that the use of "enhanced" techniques, rather than producing reliable intelligence, interrupted and corrupted the flow of intelligence they were getting from Zubaida.

That assertion comports with mainstream military opinion. For example, in releasing the new U.S. Army Field Manual on interrogations last year, Lieutenant General John F. Kimmons, deputy chief of staff for Army intelligence, said that "no good intelligence is going to come from abusive practices. I think history tells us that. I think the empirical evidence of the last five years, hard years, tells us that."[5] Likewise, General David Petraeus, the commander of U.S. forces in Iraq, wrote earlier this year in an open letter to U.S. troops serving there: "Some may argue that we would be more effective if we sanctioned torture or other expedient methods to obtain information from the enemy. They would be wrong. Beyond the basic fact that such actions are illegal,

[4] Intelligence Science Board, *Educing Information – Interrogation: Science and Art – Foundations for the Future*, National Defense Intelligence College 2007.
[5] News Transcript, U.S. Department of Defense, Sept. 6, 2006 *available at* http://www.defenselink.mil /Transcripts/Transcript.aspx?TranscriptID=3712.

history shows that they also are frequently neither useful nor necessary."[6] Moreover, military officers have said any suggestion by the White House that such techniques can be used by the CIA will undermine the authority of military commanders in the field, where troops face "ticking time bombs" every day in the form of improvised explosive devices, but are told by their commanding officers that such techniques are never acceptable.

II. Laws Governing Interrogation of Prisoners

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

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

B. Congress Intended to "Rein In" the CIA's Use of "Enhanced" Interrogation Techniques in the MCA's Amendment to the War Crimes Act.

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." [7]

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[6] 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.

[7] "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

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…."[8]

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."[9] 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:[10]

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

Congress made it clear that these techniques – at a minimum – are felonies under the MCA amendments to the War Crimes Act.[11] 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.

During debate on these provisions here in the House, senior Republican Representative Christopher Shays, Vice Chairman of the Government Reform Committee and a member of the Homeland Security Committee, also said that "any reasonable person" would conclude that the CIA "enhanced interrogation techniques" clearly cause serious mental and physical suffering.[12] Another senior Republican, Representative John

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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.

[8] 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.

[9] 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.

[10] *Id.*

[11] 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.

[12] 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

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.[13]

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

The Military Commissions Act recognizes both "torture" and "cruel or inhuman treatment" as felonies. It draws a distinction between the two offenses in the following manner: "torture" is defined — as it is in the federal anti-torture statute — as an act intended to cause "severe physical or mental pain or suffering," while "cruel or inhuman treatment" involves acts which cause "severe or *serious* physical or mental pain or suffering." "Severe" physical pain or suffering is not explicitly defined by statute, but U.S. federal courts have found mistreatment to constitute torture when it involved methods such as stress positions,[14] exposure to extreme cold and heat[15] and waterboarding.[16]

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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…."

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

[14] 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).

[15] 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").

[16] 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

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

Medical experts have concluded that the "enhanced" techniques can have "a devastating impact on a victim's physical and mental health."[17] Indeed, there is a large body of peer-reviewed medical and psychological literature and clinical experience with the "severe" mental and physical pain and suffering they can cause. But that is not required in order for an act to constitute a felony – "serious" suffering is sufficient. Likewise, clinicians with years of experience treating torture victims provide ample testimony that these techniques cause "prolonged" mental harm, as I describe below. But that is also not required in order for an act to constitute a felony if the interrogation occurred after the MCA was adopted.

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

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

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

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

> *1. **The Attention Grab**: The interrogator forcefully grabs the shirt front of the prisoner and shakes him.*
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> *2. **Attention Slap**: An open-handed slap aimed at causing pain and triggering fear.*

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toilet bowl full of excrement;" and "the 'dry submarine', where a plastic bag was placed over the detainee's head producing suffocation.")

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

> *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….[18]

Medical literature and legal precedent overwhelming support the conclusion that these techniques are unlawful and are known to cause the severe or serious mental or physical pain that must be intended for such acts a felony under either the War Crimes Act or the anti-torture Act. Furthermore, we know that these techniques are almost always used in combination, amplifying the risk of physical and psychological harm described below.[19]

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[18] 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).

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

- **"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…."[20] U.S. federal courts of appeals have long held that assault during an interrogation violates the Fifth and Fourteenth Amendments regardless of whether the subject suffered physical injury.[21]

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

- **"Long time standing"** is extremely painful and dangerous. It is known to cause blood clots, which can travel to the lungs as potentially fatal pulmonary embolisms, as well as peripheral nerve damage. Just as passengers on transcontinental flights are warned of the dangers of swelling and blood clots in the legs if they do not move around during the flight, forcing manacled prisoners to stand motionless for literally days on end is not only painful, but life-threatening. It has long been considered a form of torture.

  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."[22] 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

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[20] 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…."

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

[22] United States v. Tetsuo Ando, Yokahama, May 8, 1947.

straight above his head, and stay in this position anywhere from five to fifteen minutes at a time" – treatment the commission termed "torture."[23]

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

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

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

This technique has been employed by some of the world's most repressive states, including, according to the U.S. State Department, Burma, Iran and Libya. The *Washington Times* reported in 2004 that "some of the most feared forms of torture" cited by survivors of the North Korean gulag "were surprisingly mundane: Guards would force inmates to stand perfectly still for hours at a time, or make them perform exhausting repetitive exercises such as standing up and sitting down until they collapsed from fatigue."[24]

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

[23] United States v. Chikayoshi Sugota, Yokahama, April 4, 1949.
[24] Benjamin Hu, "Nightmares from the North," *Washington Times*, April 30, 2004.

> 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.[25]

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.[26]

- **Sleep deprivation**, often used in combination with standing as is reportedly the case in CIA interrogations, is a classic form of torture. It is one of the most efficient means of inflicting mental pain, and medical studies have established a relationship between sleep deprivation and psychiatric disorders such as major depression. The *tormentum insomniae* was a recognized form of judicial torture in the Middle Ages. Six decades ago the U.S. Supreme Court cited with approval an American Bar Association report that made the following observation: "It has been known since 1500 at least that deprivation of sleep is the most effective torture and certain to produce any confession desired."[27]

  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....

  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.

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[25] 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).
[26] *Id*.
[27] Ashcraft v. Tennessee, 322 US 143, 149 (1944).

- **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.[28] Exposure to cold can cause, amnesia, cardiac arrest, organ failure, and long term mental slowing and diminished reflexes. The Fifth Circuit has specifically held that "turning the fan on inmates while naked and wet" constitutes cruel and unusual punishment.[29]

- **Waterboarding.** Medical complications from the asphyxiation caused by waterboarding include: acute or chronic respiratory problems; chronic pain in the back and head; panic attacks; depressive symptoms; and prolonged posttraumatic stress disorder. Waterboarding was used extensively during the Spanish Inquisition, has been used by the most brutal regimes in the world, including the Khmer Rouge and the military junta in Argentina, was prosecuted repeatedly after World War II as a war crime and is explicitly banned by the U.S. Army Field Manual. Although the administration recently leaked to the press that it ceased the use of this form of torture last year, it has never repudiated waterboarding as unlawful. So while waterboarding may be "off the table," it is still "in the room." What is needed is an affirmative, unequivocal statement from the Administration that this technique is illegal and will *not* be used under any circumstances. Even the now-discredited Bybee Memorandum notes that certain acts "are of such a barbaric nature" that a U.S. court would likely find that they constitute torture.[30] 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.[31] It is prohibited by the Field Manual and, according to Senator Warner, clearly constitutes a "grave breach" of Common Article 3 punishable under the War Crimes Act.

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

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

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[28] See United States v. Matsukichi Muta, Yokahama, April 15-25, 1947.
[29] Gates v. Collier, 501 F.2d 1291, 1306 (5th Cir. 1974).
[30] Jay S. Bybee, Memorandum for Alberto Gonzales, August 1, 2002.
[31] 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.

The Special Maritime and Territorial Jurisdiction (SMTJ) Act, 18 U.S.C. § 7, is based on the concept that the jurisdiction of U.S. courts can be constitutionally expanded to fill a vacuum wherever "American citizens and property need protection, yet no other government effectively safeguards those interests."[32] In 2001, Congress through the USA PATRIOT Act expanded SMTJ jurisdiction to cover certain listed offenses committed against *or by* a U.S. national in (among other things) "buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of [U.S. diplomatic, consular, military or other] missions or entities, irrespective of ownership" in a foreign state. For purposes of detainee interrogations, among the approximately thirty listed SMTJ offenses the most relevant include murder, maiming and assault.

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

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

After conducting hearings into the Abu Ghraib abuses – including by civilian contractor interrogators and interpreters for U.S. government agencies *other than* DoD – Congress in 2004 expanded the MEJA to include employees and contractors of *all* government agencies (including the CIA) – "to the extent such employment relates to supporting the mission of the Department of Defense." MEJA thus could be used to prosecute acts of detainee abuse in interrogation amounting to (among other crimes) assault, murder, manslaughter, kidnapping, sexual abuse, and conspiracy. To date, however, this post-Abu Ghraib expansion of MEJA jurisdiction has remained completely unexercised by the Justice Department: not one CIA agent *or any other civilian* has yet been prosecuted under MEJA for detainee abuse.

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

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

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

It is imperative that Congress continue to investigate all allegations of torture and cruel treatment and I applaud your efforts, Mr. Chairman, to obtain – by subpoena if necessary – any evidence of CIA prisoner abuse that has not yet been destroyed or of the destruction of any evidence of such wrongdoing. All evidence of criminal acts committed by U.S. personnel in the course of interrogations must be preserved for purposes of congressional oversight and potential future prosecution.

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

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

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

Conclusion

There was a time not that long ago when the President declared that the demands of human dignity were "non-negotiable," when no one in the U.S. government questioned the meaning and scope of the humane treatment provisions of the Geneva Conventions,

and when the rest of the world viewed with great skepticism claims by U.S.-held prisoners that they had been abused.

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

Thank you.