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before he

House Committee on the Judiciary

"Applicability of Federal Criminal Laws to the Interrogation of Detainees"

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

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

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

(2005); P.L. 109-163, Title XIV, § 1402 (2006). I note that "waterboarding" is not authorized by the Manual.

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

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

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

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

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

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

I would like to make two further points.

First, given that the legal parameters within which the United States government conducts interrogations of terrorist detainees are relatively flexible, the real question for the Committee is one of policy. In this regard, we must first ask ourselves whether coercive interrogation methods are actually useful. Some critics argue that, while building rapport with captured unlawful enemy combatants invariably produces success, by contrast, coercive methods are inherently unreliable, that they produce lies. This is overly simplistic. I hope our government takes nothing that al-Qaida operatives say at

face value, whether the fruit of milder or more coercive interrogation methods. Every bit of the intelligence "take" must be carefully vetted and cross-checked, regardless of the interrogation method used.

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

Second, I find it unfortunate that so much of our discussion has focused on "waterboarding." This is just one coercive interrogation technique. There are many other "coercive techniques" that are much milder, but still beyond the narrow scope of the Army Field Manual. And that scope is very narrow, indeed. In fact, the toughest technique authorized by the Manual is called the "Mutt and Jeff." This is a good cop / bad cop routine in which one interrogator may go so far as to "convey an unfeeling

attitude" while being "careful not to threaten or coerce the source," while the other adopts a more friendly tone.[1] Let us remember that, for better or worse, more aggressive treatment is daily meted out in police interrogations of criminal suspects.

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

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

[1] Headquarters, Department of the Army, Field Manual 2-223 (FM 34-52), Human Intelligence Collector (continue)

(continued)
Operations ch. 8, 17 (2005).