TESTIMONY OF STEPHEN A. SALTZBURG
WALLACE AND BEVERLEY WOODBURY UNIVERSITY PROFESSOR
GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

BEFORE THE HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
December 20, 2007

Chairman Conyers, Ranking Member Smith, Members of the Committee, it is always an honor and a privilege to appear before you. Today, it is also an opportunity, an opportunity to discuss with you the importance of Congress investigating without delay the destruction of interrogation tapes by the Central Intelligence Agency (C.I.A.).

We know very little about the tapes that were admittedly destroyed in 2005, and even less about the decision-making process that led to their destruction. News reports indicate that lawyers in the White House and possibly in other parts of the Administration advised the C.I.A. not to destroy the tapes, and that despite this advice lawyers within the C.I.A. signed off on the legality of the destruction before it was approved by a high agency official.

The only justification offered thus far for destroying the tapes – i.e., to protect the identity of interrogators – is completely unpersuasive. Indeed, the explanation is almost as embarrassing as the destruction. Consider these facts:

1. The tapes could have been modified to make the faces and voices of the interrogators unrecognizable.

2. One copy of the tapes could have been maintained in a secure place with limited access.

3. The C.I.A. must keep a record of who interrogated whom for various reasons, so that even with the tapes destroyed there is a record of who the interrogators were.

4. The interrogators and others within the C.I.A. know who conducted the interrogations, and as long as they are alive there is the possibility that the identity of an interrogator will be revealed.

In sum, the explanation offered for the destruction of the tapes does not pass the straight-face test. It is flawed in two fundamental ways. First, the destruction was unnecessary to prevent the tapes from revealing the identities of interrogators. Second, the destruction does not prevent the disclosure of identities.

When an agency's explanation for its actions is plainly frivolous, one must consider what the real explanation for that action must be and why the agency is desperate to conceal this explanation. In my judgment, the only plausible explanation for the destruction of the tapes is

that they were destroyed to assure that they would never be viewed by any judicial tribunal, not even a military commission, or by a congressional oversight committee.

Over the last several years, Congress has debated whether certain forms of interrogation constitute torture. But, the debate has been at a certain level of abstraction. Both this House and the Senate in various hearings have asked witnesses whether techniques like waterboarding constitute torture, but the testimony has assumed that members of Congress and witnesses share a common understanding of how techniques were and are actually employed. Videotapes of interrogations – particularly interrogations of "high value" detainees – would provide concrete details and permit members of Congress to see how techniques are employed against actual human beings.

It is probable that during military commission trials and perhaps future proceedings in federal civilian courts, issues will arise as to whether confessions were coerced and whether they are reliable enough to be used as evidence. It will not be surprising if conflicting testimony arises as to what interrogators did, how long they did it, the frequency of their actions, and the physical and mental hardships inflicted upon detainees. A videotape of an interrogation of one detainee might provide circumstantial evidence as to how other detainees were interrogated, especially if they were interrogated by the same individuals or individuals trained by the same agency.

Destruction of the videotapes assured that what might have been incontrovertible evidence of what occurred during interrogation sessions will never be available to any court, congressional committee, or government investigator. It is the ultimate cover-up. With the tapes destroyed, anyone seeking to determine with precision what occurred during an interrogation will be forced to depend on testimony from witnesses who have different perspectives and biases and whose recollections are virtually guaranteed to differ.

Now that the tapes have been destroyed, the Attorney General has asked Congress not to investigate their destruction for some period of time and to defer to the Department of Justice's own investigation. I applaud the Department's immediate reaction to learning that the tapes were destroyed and its initiation of an investigation. But, I believe it would not only be a mistake for Congress to do nothing at this point; it would be an abdication of responsibility.

The Administration persuaded Congress to address the treatment of detainees and interrogation methods in two major pieces of litigation: the Detainee Treatment Act of 2005, and the Military Commission Act of 2006. This legislation restricted the interrogation methods that may be employed by the Department of Defense and its components, but did not restrict the methods used by the C.I.A. Moreover, Congress has provided that statements obtained from detainees through coercive methods may be admitted in military commission trials. Congress therefore has both declined to impose upon the C.I.A. the same interrogation restrictions it imposed upon DOD, and Congress has adopted evidence rules for military commission proceedings based upon its understanding of the types of interrogation actually conducted by United States officers.

The destruction of the videotapes surely requires Congress to ask itself what it might have learned had its intelligence committees been aware of the tapes and been permitted to review them. For several years now, Congress has debated whether interrogation techniques constitute torture, how torture should be defined, and how it should be punished. Congress enacted legislation based upon assumptions. The videotapes might well have informed the debate by replacing assumptions with undisputed facts. So, Congress has an obligation to ask what it might have learned from those tapes, and there is no time to waste and no reason to wait to decide whether the legislation previously passed needs reconsideration.

The Department of Justice investigation will focus on whether laws were broken when the tapes were destroyed, and perhaps that inquiry will lead to an inquiry into whether the tapes reveal criminal acts (which might well not be prosecuted as a result of the Military Commission Act of 2006). The inquiry by Congress ought to focus on other, equally important issues. These include, but are not limited to, the following:

Who was alerted to the fact that the C.I.A. was considering destroying the tapes? When were they alerted? And what advice, if any, did the knowledgeable individuals give to the C.I.A.? The reason for asking these questions is to determine how decisions were made, which agencies were involved, and the quality of advice, both legal and practical, that was provided. I note that the New York Times reported last week that the Department of Justice has refused to indicate to Congress what role it might have played in the destruction of the tapes. This refusal is all the more reason for Congress to investigate and to investigate now. It is important for Congress to know which agencies were consulted before the tapes were destroyed and the nature and quality of any counsel provided by these agencies.

What specific reasons were advanced for their destruction at the time the tapes were destroyed? Are those reasons set forth in writing, and if so, by whom? Were those reasons vetted inside and outside the agency, and if so, what were the responses? Since it is inconceivable that anyone could truly believe that the destruction was either necessary or sufficient to protect identities, the question that naturally arises is whether the explanation given in 2007 squares with the reasons set forth in 2005. If it should turn out that a deliberate decision was made to deny courts and Congress "evidence," Congress might well decide that new legislation on record preservation is required.

Why was the destruction kept secret for as long as it was? A delay between an action and review of that action means that memories will fade, and reconstruction of events will be more difficult. It will be hard enough for Congress to obtain accurate, complete answers concerning events that are now more then two years old, but it becomes more difficult with the passage of time.

Should the restrictions on interrogation imposed on the Department of Defense be extended to the C.I.A.? This question has been debated over several years, but the destruction of the tapes is a reason to revisit it. I do not mean to suggest that the answer will suddenly be agreed upon by all. But, destruction of the tapes may suggest that there are reasons why the

C.I.A. did not want them to be seen by a Congress that has considered imposing interrogation limits.

Should there be prohibitions on destruction of videotaped interrogation sessions and possibly other evidence gathered in the "war on terror"? Perhaps the answer is no, but the question is important and requires some careful thought – now, not tomorrow, and not next year. It is possible, despite the adverse public reaction to the disclosure of the destruction of the tapes, that C.I.A., the Department of Defense or some other federal agency will destroy additional material in months to come. Congress needs to know sooner rather than later the advice that was given to the C.I.A., the true rationale for its action, and whether destruction of additional evidence is planned or possible. Only with knowledge can Congress decide whether legislation is needed to protect and preserve evidence.

Congress was effectively absent after the attacks of 9/11 for years while it gave almost complete deference to the Executive to detain and interrogate those deemed "suspected terrorists." Congress watched as Guantanamo unfolded and did nothing to restrain an Administration committed to creating a new detention regime and system of justice if that term may be used to describe Guantanamo.

Congress finally awoke and enacted two major statutes in 2005 and 2006. These statutes ratified rather than restricted much of what the Administration had put in place. Congress therefore shares responsibility for the types of interrogation that United States officers may utilize and for the evidentiary use that may be made of the results. That responsibility should require Congress to find out what was lost when the videotapes were destroyed and to consider whether changes in United States law should be made with respect to interrogation and use of evidence in military commission proceedings. Congress also should consider whether, in its oversight of the Executive it is necessary to prevent destruction of evidence that might inform the oversight function. Congress might even consider whether new laws are needed to assure that Executive agencies do not inhibit congressional inquiry or reduce the reliability of judicial proceedings.

Congress can exercise its oversight role without interfering with or damaging the investigation by the Department of Justice. Congress can utilize its intelligence committees to consider certain sensitive information in secure settings. It can hold closed hearings on matters that are less sensitive but cannot be publicly disclosed without risk of compromising important governmental interests. And Congress can hold public hearings on broad questions such as whether governmental agencies should be required to maintain certain types of evidence for specified periods of time and whether notice to Congress should be provided before certain types of evidence are destroyed.

Back in the 1980's, I served as Associate Independent Counsel in the Iran-Contra investigation. Later, I served as Deputy Assistant Attorney General in the Criminal Division of the Department of Justice and was responsible for handling classified information on behalf of the United States as Independent Counsel Lawrence Walsh prosecuted Lt. Col. Oliver North,

Admiral John Poindexter and others. Judge Walsh asked Congress to delay its inquiry into Iran-Contra while he investigated, and Congress acceded to his request by postponing for several months its public inquiry. We learned that Congress can damage the ability of a prosecutor to prosecute a case successfully if Congress grants immunity to witnesses and forces their testimony in public. But we also learned that Congress has a role to play in boosting public confidence that the rule of law is alive and well in America through its investigative function.

There is no reason to believe that an investigation into the destruction of the tapes would require Congress to immunize witnesses or to conduct all of its proceedings in open session. As I have indicated, there exist a range of options for Congress to protect classified and sensitive information while satisfying itself that it is meeting its responsibilities as a co-equal branch of government. Assistant Attorney General Kenneth L. Wainstein and John L. Helgerson, the C.I.A.'s inspector general, have written to Congress and have claimed that "[o]ur ability to obtain the most reliable and complete information would likely be jeopardized if the C.I.A. undertakes the steps necessary to respond to your requests in a comprehensive fashion at this time." There is reason for concern here. It would be an unnecessary drain on resources and distraction for the C.I.A. to respond to overlapping inquiries by this Committee, the House Intelligence Committee and other committees of the House and Senate. This is a time for the House and the Senate to exercise leadership and allocate the oversight responsibility so that the C.I.A. is not required to repeatedly answer the same questions. It is possible to have oversight that is tailored, efficient and respectful of national security concerns. It is that oversight that I encourage Congress to undertake.

Earlier this year, in an article which I attach entitled *A Different War: Ten Key Questions About the War on Terror*, I wrote the following about the Detainee Treatment Act and the Military Commission Act: "As a result, it may well be that the judiciary will find that its ability to serve as a check on executive power is weakened, and that Congress has given the President the virtual blank check to act that he previously did not have. If this is so, the above questions, which contend are vital, lead me, and may well lead many others, to wonder whether our cherished system of checks and balances now provides inadequate checks and too little balance . . . ." Congress needs to exert itself to demonstrate that it is an adequate check on executive excess and arrogance.