

AMERICAN BAR ASSOCIATION

**ASSOCIATION OF THE CITY OF THE BAR OF NEW YORK
STANDING COMMITTEE ON LAW AND NATIONAL SECURITY
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES
TASK FORCE ON TREATMENT OF ENEMY COMBATANTS
NEW YORK STATE BAR ASSOCIATION**

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1 RESOLVED, That the American Bar Association urges Congress to enact legislation that
2 would:

- 3
- 4 (a) Supersede the Executive Order of July 20, 2007, which authorizes the
5 Central Intelligence Agency to operate a program of detention and
6 interrogation that is inconsistent with U.S. obligations under Common
7 Article 3 of the Geneva Conventions of August 12, 1949 (Common Article
8 3); and
9
- 10 (b) Ensure that whenever foreign persons are captured, detained, interned or
11 otherwise held within the custody or under the physical control of the
12 United States, or interrogated in any location by agents of the United
13 States (including private contractors), they are treated in accordance with
14 the minimum protections afforded by Common Article 3 and in a manner
15 fully consistent with the provisions of FM 2-22.3, the U.S. Army Field
16 Manual on Intelligence Interrogation of September 2006.

REPORT

INTRODUCTION

The use of torture and other cruel, inhuman or degrading treatment by United States personnel in the interrogation of prisoners captured in the conflicts in Afghanistan and Iraq, as well as in locations outside of zones of armed conflict, violates U.S. and international law. These actions also have damaged the standing of the United States in the world and undermined U.S. national security.

The U.S. military has moved to correct the policies and practices that had resulted in official cruelty, most notably with the adoption in September 2006 of the U.S. Army Field Manual on Human Intelligence Collector Operations (FM 2-22.3).¹ However, the Administration continues to assert authority for other federal agents, especially the Central Intelligence Agency, to engage in “enhanced interrogation techniques” which violate the letter and spirit of the law.²

On July 20, 2007 President Bush issued an Executive Order³ which purports to define the CIA’s obligations to provide humane treatment under Common Article 3 of the Geneva Conventions. In fact the new Executive Order appears to do just the opposite, purporting to grant the CIA authority to engage in cruel and abusive practices, in direct violation of the law.

In 2004 the American Bar Association adopted a comprehensive policy condemning the use of torture and cruel inhuman or degrading treatment of prisoners⁴. It called upon the U.S. government to ensure that its interrogation policies and treatment of detainees comports fully with the requirements of the law⁵.

Consistent with that resolution and the ABA’s dedication to the rule of law, we urge the ABA to ask Congress to override the July 2007 Executive Order and to require anyone acting under the color of U.S. authority to abide by an interrogation standard that is fully consistent with both the

¹ Dep’t of the Army, Field Manual 2-22.3 (FM 34-52) Human Intelligence Operators Sept. 6, 2006.

² E.O. 13440, Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency, July 20, 2007, Fed. Reg. Vol. 72, No. 141, 40705-09 (July 24, 2007). See also Statement to Employees by Director of the Central Intelligence Agency, General Michael V. Hayden on the Executive Order on Detentions and Interrogations, July 20, 2007, available at <https://www.cia.gov/news-information/press-releases-statements/statement-on-executive-order.html>; Greg Miller, “Bush Signs New CIA Interrogation Rules,” L.A. Times, July 21, 2007, available at <http://www.latimes.com/news/nationworld/nation/la-na-detainees21jul21,1,2118187.story?coll=la-headlines-nation>.

³ E.O. 13440, Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency, July 20, 2007, Fed. Reg. Vol. 72, No. 141, 40705-09 (July 24, 2007).

⁴ American Bar Association Resolution 10-B (2004).

⁵ Thomas Jefferson letter to President James Madison, April 19, 1809, reprinted in 12 Writings of Thomas Jefferson 273, 274 (Mem. Ed. 1903).

principles of humane treatment contained in Common Article 3 of the Geneva Conventions, and the U.S. Army Field Manual on Human Intelligence Collector Operations.

BACKGROUND

The United States has a proud history of requiring the humane treatment of enemy prisoners, a tradition that dates back to the founding of the nation. At the battle of Trenton in December 1776, General George Washington directed his troops to treat captured British soldiers “with humanity.”⁶ He said “Let them have no reason to complain of our copying the brutal example of the British Army.”⁷ These orders reflected the fundamental values of our new nation. As Thomas Jefferson wrote “it has great effect on the opinion of our people and the world to have the moral right on our side.”⁸

During the Civil War the U.S. military developed the Lieber Code, which was guided by principles of justice, honor and humanity.⁹ This Code set minimum standards for soldiers, forbidding “suffering, disgrace, cruel imprisonment, want of food, mutilation, death or other barbarity. It required U.S. soldiers to treat captured soldiers “with humanity.”¹⁰

The Lieber Code served as the basis for the development of the Law of Armed Conflict, which the United States Government has taken a lead role internationally in developing and shaping.

The four Geneva Conventions, adopted in 1949, include a Common Article 3, which prohibits cruel treatment and torture, as well as all “humiliating and degrading treatment” of detainees, regardless of their legal status.¹¹

The Administration has previously asserted that that the Third Geneva Convention does not apply to the Taliban, Al Qaeda, or to foreign fighters in Iraq. The Administration has also asserted that Common Article 3 does not apply to al Qaeda and Taliban detainees. It has acknowledged that detainees should be treated “humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Third Geneva Convention of 1949,” and that the detainees “will not be subjected to physical or mental abuse or cruel treatment.”¹² However, the Administration has never provided an explanation as to how it

⁶ General George Washington’s order to give refuge to hundreds of surrendering Hessian soldiers following the Battle of Trenton (December 25, 1776).

⁷ *Ibid.*

⁸ Thomas Jefferson letter to President James Madison (March 1809).

⁹ The Lieber Code (1863), General Orders No. 100.

¹⁰ The Lieber Code.

¹¹ Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 3, 6 U.S.T. 3316, 1949 U.S.T. LEXIS 483 (“Geneva III”); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, art. 3, 6 U.S.T. 3516, 1949 U.S.T. LEXIS 434 (“Geneva IV”).

¹² See *White House Fact Sheet: Status of Detainees at Guantánamo* (Feb. 7, 2002) (available at

determines whether interrogation techniques are “appropriate” or “consistent with military necessity,” or how it squares that determination with U.S. obligations under human rights and customary international law.

This position is inconsistent with the manner in which the Geneva Conventions have been applied by the military since 1949. In 1950 Secretary of Defense General George C. Marshall set the tone for this application in a book entitled The Armed Forces Officer. In it, he lists 29 general propositions which govern the conduct of Americans in War.¹³

Number XXV Reads as follows:

“The United States abides by the laws of war. Its armed forces, in their dealing with all other peoples, are expected to comply with the laws of war, in the spirit and the letter. In waging war, we do not terrorize helpless non-combatants, if it is within our power to avoid doing so. Wanton killing, torture, cruelty or the working of unusual hardship on enemy prisoners or populations is not justified under any circumstance. Likewise, respect for the reign of law, as that term is understood in the United States, is expected to follow the flag wherever it goes.”¹⁴

Consistent with General Marshall’s admonition, the United States has applied the humane treatment standard of Common Article 3 to all prisoners in its custody, even those, like the Viet Cong guerrillas, who neither recognized nor abided by these international standards, and who did not qualify as prisoners of war under the Geneva Convention Relative to the Treatment of Prisoners of War.

In recent years, a number of senior retired U.S. military leaders have weighed in publicly in favor of strict adherence to the Common Article 3, guaranteeing the humane treatment of all detainees in U.S. custody. In September 2006, a group of almost 50 retired military and defense department leaders wrote, “the framers of the [Geneva] Conventions, including the American representatives in particular, wanted to ensure that Common Article 3 would apply in situations where a state party to the treaty, like the United States, fights an adversary that is not a party, including irregular forces like al Qaeda. The United States military has abided by the basic requirements of Common Article 3 in every conflict since the Conventions were adopted. In each case, it applied the Geneva Conventions –including, at a minimum, Common Article 3—even to enemies that systematically violated the Conventions themselves.”

U.S. Interrogation Policy Since 2002

Unfortunately, in conducting its military operations in Afghanistan and Iraq the United States Government has departed from this noble tradition. It has crafted new rules which have encouraged and directed U.S. agents to engage in cruel and inhumane treatment of those in U.S.

<http://www.whitehouse.gov/news/releases/2002/02/print/20020207-13.html>).

¹³ See Letter from General John W. Vessey, USA (Ret.) to Senator John McCain (September 12, 2006) (available at: <http://www.humanrightsfirst.info/pdf/06914-etn-vessey-geneva-ltr.pdf>) .

¹⁴ *Ibid.*

custody in Iraq, Afghanistan, and at other places of detention including Guantanamo Bay, Cuba, and secret detention facilities operated by the Central Intelligence Agency.¹⁵

As these policies evolved there has been an internal debate within the U.S. Government about the lengths to which United States personnel could go to extract information from detainees.¹⁶ High-level legal memoranda dating from early 2002¹⁷ sketched out legal positions which could be advanced to defend interrogation techniques which had not previously been considered legal or appropriate for use by U.S. personnel and which did not accord with well established military doctrine.¹⁸

Specifically, in December 2002, Secretary of Defense Rumsfeld approved a series of harsh questioning techniques for use in Guantanamo- novel techniques, including the use of dogs to intimidate detainees. These harsh and often illegal techniques subsequently migrated to Afghanistan and Iraq.¹⁹

As the Department of Defense and the CIA were preparing and implementing their approach toward interrogations, a series of memoranda seeking to provide a legal basis for the use of “alternative interrogation techniques” that went far beyond the scope of established detainee treatment and interrogation doctrine, were prepared by high-ranking legal officials in the Executive Branch. These memoranda set out a series of arguments for an interpretation of the relevant U.S. and international law so restrictive in nature that it ran contrary to the clear meaning and intent of both the U.S. statutory provisions and international agreements concerned.

One example was an August 1, 2002 memorandum from the Department of Justice Office of Legal Counsel to Alberto R. Gonzales, Counsel to the President, (subsequently rescinded by the Justice Department) which concluded that for an act to constitute torture as defined in 18 U.S.C. §2340, “...it must inflict pain that is difficult to endure...equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.”²⁰

¹⁵ See Mark Danner, *Torture and Truth*, The New York Review of Books, June 10, 2004 (available at: http://www.nybooks.com/articles/article-preview?article_id=17150). See, e.g., THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

¹⁶ See, e.g., Dana Priest & Bradley Graham, *U.S. Struggled over How Far to Push Tactics*, WASH. POST, June 24, 2004, at A01 (hereinafter “*U.S. Struggled*”).

¹⁷ See Memorandum from John Yoo, Deputy Assistant Attorney General, to William J. Haynes, General Counsel, DOD (January 9, 2002).

¹⁸ See Douglas Jehl, *Detainee Treatment; U.S. Rules on Prisoners Seen as a Back and Forth of Mixed Messages to G.I.'s*, N.Y. TIMES, June 22, 2004 at A1 (hereinafter, “*Detainee Treatment*”); *U.S. Struggled*, supra note 1.

¹⁹ Memorandum of William J. Haynes II, General Counsel to Secretary of Defense Donald Rumsfeld, *Re: Counter-Resistance Techniques* [hereinafter “Haynes memo”] (Nov. 27, 2002). See, e.g., THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

²⁰ Memorandum, at 1. It should be noted there were JAG officers who expressed concerns regarding the approach of DOD and that outlined in these internal memoranda with regard to compliance with the Geneva Conventions and the

Over the last five years, the Central Intelligence Agency (“CIA”) has developed a set of interrogation rules and procedures that differ substantially from the rules currently governing interrogations conducted by DOD personnel. President Bush has referred to these as “an alternative set of procedures.”²¹ These rules are intended to give the CIA greater latitude in handling so-called high value security suspects, including the use of more aggressive and often abusive interrogation techniques and the maintenance of secret detention operations.²²

These new rules have resulted in a range of coercive techniques, including: waterboarding (submersion in water of a bound prisoner resulting in an overwhelming sensation of drowning), prolonged painful stress positions, temperature manipulation and hypothermia, use of dogs to terrorize, nakedness and sexual humiliation, sleep deprivation, punching, striking, violent shaking, and beatings.²³

In addition, the U.S. is reportedly “rendering” suspects to the custody of foreign intelligence services in countries where the practice of torture and cruel, inhuman, or degrading treatment during interrogation is well-documented.²⁴

methods used to interrogate detainees. *See, e.g.,* Adam Liptak, *U.S. Barred Legal Review of Detentions*, *Lawyer Says*, N.Y. TIMES, May 19, 2004, at A14.

²¹ President Discusses Creation of Military Commissions to Try Suspected Terrorists, Sept. 6, 2006, available at <http://www.whitehouse.gov/news/releases/2006/09/print/20060906-3.html>. The President described the process of crafting and implementation of the procedures for the first time in September 2006: “These procedures were designed to be safe, to comply with our laws, our Constitution, and our treaty obligations. The Department of Justice reviewed the authorized methods extensively and determined them to be lawful. I cannot describe the specific methods used -- I think you understand why -- if I did, it would help the terrorists learn how to resist questioning, and to keep information from us that we need to prevent new attacks on our country. But I can say the procedures were tough, and they were safe, and lawful, and necessary.” These techniques have also been referred to as “enhanced interrogation techniques.” *See* Brian Ross and Richard Esposito, “CIA’s Harsh Interrogation Techniques Described,” ABC News, Nov. 18, 2005, available at <http://abcnews.go.com/WNT/Investigation/story?id=1322866>.

²² *See* Dana Priest & Joe Stephens, *Secret World of U.S. Interrogation; Long History of Tactics in Overseas Prisons in Coming to Light*, WASH. POST, May 11, 2004, at A01; Seymour M. Hersh, *Annals of National Security; The Gray Zone*, NEW YORKER, May 24, 2004 (www.newyorker.com/printable/?fact/040524fa_fact).

²³ *See, e.g.,* Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations; “Stress and Duress” Tactics used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A01 (hereinafter “*U.S. Decries Abuse*”); Eric Lichtblau & Adam Liptak, *Questioning to Be Legal, Humane and Aggressive*, *The White House Says Now*, N.Y. TIMES, Mar. 4, 2003, at A13; Jess Bravin & Gary Fields, *How do U.S. Interrogators Make A Captured Terrorist Talk*, WALL ST. J., Mar 4, 2003, at B 1; Tania Branigan, *Ex-Prisoners Allege Rights Abuses By U.S. Military*, WASH. POST, Aug. 19, 2003, at A02.

²⁴ Council of Europe Report; Cite UK Intelligence and security Committee's report on Rendition: http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/25_07_07_isc_final.pdf. Captives have been “rendered” by the U.S. to Jordan, Egypt, Morocco, Saudi Arabia and Syria, in secret and without resort to legal process. *See, e.g.,* Peter Finn, *Al Qaeda Recruiter Reportedly Tortured; Ex- Inmate in Syria Cites Others’ Accounts*, WASH. POST, Jan. 31, 2003, at A14; *U.S. Decries Abuse*, *supra* note 8; Rajiv Chandrasekaran & Peter Finn, *US. Behind Secret Transfer of Terror Suspects*, WASH. POST, Mar. 11, 2002, at A01.

The combination of illegal interrogation rules and secret detentions has led to serious abuses. The abusive treatment of detainees became front-page news in April 2004, when photographs circulated showing exceptionally abusive treatment by United States personnel of detainees in the Abu Ghraib prison in Baghdad. These disclosures were followed by additional charges of severe mistreatment by former detainees in Afghanistan, Iraq, and the Guantanamo Naval Base.²⁵

Since 2002, more than 100 people have died in U.S. custody in Iraq, Afghanistan and other places.²⁶ The Pentagon has classified 34 of those cases as criminal homicides.²⁷ Of the 34 cases being investigated as criminal homicides, none occurred at Guantanamo, and one occurred at Abu Ghraib.²⁸ Of those who died in U.S. custody at least eight people were allegedly “tortured to death”.²⁹

Both Congress and the U.S. Courts have sought to end these practices and to bring U.S. interrogation policies in line with the traditional U.S. commitment to its legal obligations to treat detainees humanely. In the fall of 2005, Congress passed the Detainee Treatment Act,³⁰ which contains a provision which explicitly prohibits any cruel, inhuman and degrading treatment of detainees in U.S. custody.³¹

In June 2006, in *Hamdan v. Rumsfeld*,³² the United States Supreme Court ruled that the humane treatment provisions of Common Article 3 of the Geneva Conventions applies to all individuals in U.S. custody, regardless of their status.³³

Following the Court’s decision, the U.S. military took a number of steps to implement the Court’s requirements. In September 2006, the Army issued a new Field Manual on Intelligence Interrogations-- FM 2-22.3 (FM 34-52), a document that embraces the Geneva Convention humane treatment standard.³⁴ In announcing this new Field Manual the Army’s Deputy Chief of

²⁵ Editorial, *Remedies for Prisoner Abuse*, WASH. POST, June 7, 2004, at A18.

²⁶ Hina Shamsi, *Command’s Responsibility 1* (Deborah Pearlstein ed., Human Rights First 2006) (2006).

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ The Detainee Treatment Act of 2005, Pub. L. No. 109-148, enacted as title X of the Defense Appropriation Act, Sec. 1003, H.R. 2863, 109th Cong., 1st Sess. (Dec. 30, 2005) [hereinafter Detainee Treatment Act of 2005], § 1005(e) (3) (C)-(D).

³¹ *Ibid.*

³² *Hamdan v. Rumsfeld* 126 S. Ct. 2749 (2006).

³³ 126 S. Ct. 2749 at 6.

³⁴ Dept’t of the Army, Field Manual 2-22.3 (34-52), *Intelligence Interrogations* (Sept. 6, 2006), available at <http://www.fas.org/irp/doddir/army/fm2-22-3.pdf> (accessed Jul. 31, 2007).

Staff for Intelligence, Lt. Gen. John F. Kimmons, emphasized that “No good intelligence is going to come from abusive practices.”³⁵

During this same period, the Administration sought to circumvent the Court’s finding, in terms of its application to the CIA, by attempting to reinterpret the Geneva Conventions’ humane treatment standard in its initial draft text of the Military Commission’s Act.³⁶ Congress rejected this attempt, reaffirming the sanctity of the Common Article 3 standard.³⁷

Mindful of the Administration’s continued resistance to applying an interrogation standard that comported with the requirements of Common Article 3, Congress included language in the Military Commission’s Act which required the President to promulgate an Executive Order elaborating on the meaning of the Common Article 3 standard with respect to those interrogation techniques to be employed by the Central Intelligence Agency.³⁸

On July 20, 2007, the President issued an Executive Order, entitled “Interpretation of the Geneva Conventions Common Article 3 as applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency,”³⁹ in response to this legislative requirement. This Executive Order fails to comport with the legislative history that prompted it. The approach it takes is in stark contrast to the approach recently taken by the Department of Defense. While it asserts that the CIA’s program “fully complies” with Common Article 3, it significantly limits those circumstances in which acts of abuse are strictly prohibited.⁴⁰

Commenting on this provision, Retired Marine Commandant P.X. Kelley and Professor Robert Turner wrote:

“As long as the intent of the abuse is to gather intelligence or to prevent future attacks, and the abuse is not ‘done for the purpose of humiliating or degrading the individual’ – even if that is an inevitable consequence—the President has given the CIA Carte Blanche to engage in ‘willful and outrageous acts of personal abuse.’”⁴¹

³⁵ DOD News Briefing with Deputy Assistant Secretary Stimson and Lt. Gen. Kimmons from the Pentagon, Sept. 6, 2006, available at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3712>.

³⁶ See, e.g., R. Jeffrey Smith, *White House Proposal Would Expand Authority of Military Courts*, The Washington Post, August 2, 2006, at A04. Draft proposal available at <http://balkin.blogspot.com/PostHamdan.Bush.Draft.pdf>.

³⁷ Pub. L. No. 109-366, §6, 120 Stat. 2600, 32-35 (2006).

³⁸ Exec. Order No. 13,440 (Jul. 20, 2007).

³⁹ *Ibid.*

⁴⁰ See P.X. Kelley & Robert F. Turner, *War Crimes and the White House: The Dishonor in a Tortured New 'Interpretation' of the Geneva Conventions*, WASH. POST, Jul. 26, 2007, at A21.

⁴¹ American Bar Association Resolution 10-B (2004).

Additionally, in this same context, the Executive order stated that the CIA program fully complies with the obligations of Common Article 3, provided that the humiliating and degrading abuse referenced above is not done in a manner "...so serious that any reasonable person, considering the circumstances, would deem the acts to be beyond the bounds of human decency..." . In other words, abuse will be allowed, so long as this abuse is not "so serious" that a "reasonable" person (of ordinary sense and understanding), "considering the circumstances"(that is, considering that a terrorist attack has just occurred-or that the CIA agents are attempting to prevent a future terrorist attack), would deem our methods to be unreasonable. These transparent caveats to the Common Article 3 standard of humane treatment acutely contravene the clear mandate of both Congress and the Supreme Court that all U.S. Government agencies comply with this standard.

The position of the American Bar Association

In August 2004, the American Bar Association adopted a comprehensive policy position condemning the use of torture or other cruel inhuman or degrading treatment.⁴² One aspect of this position was a recommendation that the U.S. Government fully comply with the Geneva Conventions, including the protections afforded to detainees in Common Article 3.⁴³

The resolution also urges the U.S. government to "take all measures necessary to ensure that all foreign persons captured, detained, interned or otherwise held within the custody or under the physical control of the United States are treated in accordance with standards that the United States would consider lawful if employed with respect to an American captured by a foreign power."⁴⁴

RECOMMENDATIONS

The above facts and law support the Recommendations, which address the following issues:

1. The United States must condemn the torture and abusive treatment of all detainees within the custody or under the physical control of any agents of the U.S. government.
2. The U.S. government must ensure compliance with Common Article 3 of the Geneva Conventions, requiring humane treatment for all detainees in U.S. custody. The U.S. government should adopt and follow interrogation practices consistent with Common Article 3. It should recognize its responsibility to treat detainees in accordance with standards it would consider legal if employed against an American prisoner. Before adopting restrictive interpretations of binding prohibitions against torture or other cruel, inhuman or degrading treatment, it should consider how such interpretations would affect captured U.S. service members or others serving abroad were such interpretations to be adopted by our adversaries.

⁴² American Bar Association Resolution 10-B (2004).

⁴³ *Ibid.*

⁴⁴ American Bar Association Resolution 10-B (2004).

3. The actions urged by these recommendations are necessary to protect American troops who may be detained by other nations that would be disinclined to honor their treaty commitments in light of the U.S. government's failure to honor its own. Furthermore, these actions are necessary to re-establish the nation's credibility in asserting the rights of people everywhere. The world's most powerful nation must exercise its power while demonstrating its respect for the rule of law.

CONCLUSION

Al Qaeda and other terrorist organizations pose a significant threat to the United States and other nations. That threat necessitates a vigilant pursuit of human intelligence as an essential element of U.S. national Security policy. But, as a nation long pledged to the rule of law, we cannot sanction interrogation rules or practices that constitute official cruelty. Condoning such abuses under any circumstances erodes one of the most basic principles of international law and human rights, places captured U.S. personnel at inordinate risk, and contradicts the basic values of a democratic state. Moreover, these violations feed terrorism by painting the United States as an arrogant nation, above the law. The American Bar Association must go on record as supporting adherence to the rule of law as a fundamental principle, for, when the rule of law is subjugated to a claim of "necessity", all who claim its benefits are less secure.

Respectfully submitted,

Barry M. Kamins
August 2007

EXECUTIVE SUMMARY

a) Summary of the recommendation:

The recommendation urges Congress to supersede the President's Executive Order of July 20, 2007, which authorizes the Central Intelligence Agency to operate a program of detention and interrogation that is inconsistent with U.S. obligations under Common Article 3 of the Geneva Conventions of August 12, 1949 (Common Article 3).

b) Summary of the issue which the recommendation addresses:

The recommendation seeks to ensure that the United States continues to stand by its international commitments not to engage in interrogation techniques that violate Common Article 3 of the Geneva Conventions. The central premise of the recommendation is that the President's July 20 Executive Order is contrary to these obligations and therefore undermines the rule of law.

c) Explanation of how the proposed policy position will address the issue:

The proposed policy will address this issue by urging Congress to supersede the July 2007 Executive Order and to require anyone acting under the color of U.S. authority to abide by an interrogation standard that is fully consistent with both the principles of humane treatment contained in Common Article 3 of the Geneva Conventions, and the U.S. Army Field Manual on Human Intelligence Collector Operations.

d) Summary of any minority views or opposition which have been identified:

There is no known opposition to this proposal.

GENERAL INFORMATION FORM

Submitting Entities: Association of the Bar of the City of New York
Standing Committee on Law and National Security
Section of Individual Rights and Responsibilities
Task Force on the Treatment of Enemy Combatants
New York State Bar Association

Submitted by: Barry Kamins, President
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Albert C. Harvey, Chair
Standing Committee on Law and National Security

Robert E. Stein, Chair
Section of Individual Rights and Responsibilities

Neal R. Sonnett, Chair
Task Force on the Treatment of Enemy Combatants

Kathryn Madigan, President
New York State Bar Association

1. Summary of Recommendation

The recommendation urges Congress to override the President's Executive Order of July 20, 2007, which alters the U.S. government's international obligations under the Geneva Conventions of August 12, 1949, regarding the treatment and interrogation of detainees under its authority or control, and to reaffirm those obligations.

2. Approval by Submitting Entity

The President and relevant committees of the Association of the Bar of the City of New York approved the filing of this Report with Recommendation on July 31, 2007.

The Standing Committee on Law and National Security approved co-sponsorship of this Report with Recommendation on Aug. 3, 2007.

The Executive Committee of the Section of Individual Rights and Responsibilities approved co-sponsorship of this Report with Recommendation on Aug. 3, 2007.

The Task Force on the Treatment of Enemy Combatants approved co-sponsorship of this Report with Recommendation on Aug. 1, 2007.

The President and relevant committees of the New York State Bar Association approved co-sponsorship of this Report with Recommendation on Aug. 1, 2007.

3. Has This or a Similar Recommendation Been Submitted to the House of Delegates Board of Governors Previously?

In 2004 the American Bar Association adopted a comprehensive policy condemning the use of torture and cruel inhuman or degrading treatment of prisoners. (American Bar Association Resolution 10-B). It called upon the U.S. government to ensure that its interrogation policies and treatment of detainees comports fully with the requirements of the law.

4. What Existing Association Policies Are Relevant to This Recommendation and Would They Be Affected by Its Adoption?

See answer to #3 above.

5. What Urgency Exists That Requires Action at This Meeting of the House?

The July 20, 2007 Executive Order purports to authorize the use of interrogation techniques that violate U.S. obligations and will have an immediate and harmful effect on the wellbeing of foreign detainees and the safety of captured U.S. troops. This meeting of the ABA House of Delegates represents a critical opportunity to permit the Association to actively participate in deliberations regarding this issue.

6. Status of Legislation

A number of bills have been introduced in Congress to address these issues, including, for example, S. 1876, the National Security with Justice Act of 2007, introduced by Sen. Joseph R. Biden (D-DE), which would, among other things, provide for uniform standards consistent with the U.S. Army Field Manual 2-22.3 for the interrogation of individuals detained by the Government of the United States; S. 576, Restoring the Constitution Act of 2007, introduced by Senator Christopher J. Dodd (D-CT) and its companion H.R. 1415, introduced by Rep. Jerrold Nadler (D-NY); and H.R. 1352, which would, among other things amend the Foreign Affairs Reform and Restructuring Act of 1998 to direct the appropriate government agencies to prescribe regulations to implement U.S. obligations under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

7. Cost to the Association (both direct and indirect costs)

Adoption of this Recommendation would result only in minor indirect costs associated with Governmental Affairs and Section staff time devoted to the policy subject matter as part of the staff members' overall substantive responsibilities.

8. Disclosure of Interest

There are no known conflicts of interest.

9. Referrals

By copy of this form, the Report with Recommendation will be referred to all ABA Sections and Divisions.

10. Contact Persons (prior to meeting)

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