THE FIRST THOMAS J. ROMIG LECTURE IN PRINCIPLED LEGAL PRACTICE*

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Thank you, Colonel (COL) [Randolph] Swansiger, for your gracious introduction. Before I get started, let me add my thanks to you, Brigadier General [Patrick] Huston, for your very welcome invitation to visit the School and present this lecture, and to you, Lieutenant General [Charles] Pede, for your presence today. I also want to recognize Mr. Moe Lescault, for all his help and patience with me as we coordinated all the logistical details of this visit.

Most of all, let me acknowledge my admiration, friendship, and gratitude to Major General Tom Romig, the 36th Judge Advocate General of the Army in whose honor this lecture series is named. Tom and I got to work closely together at the Pentagon after 9/11 until his retirement from the Army in 2005. We formed part of what I came to view as a band of brothers – the band being composed of Tom, the other service Judge Advocate Generals, and I – who came to work as a unit, shoulder-to-shoulder, back-to-back, on detainee, Geneva Conventions, and other complex legal issues that arose in the immediate aftermath of 9/11. These are issues, we all recognized, that were foundational to the rule of law, to the ethos of the military, and to the character of our nation. Like everyone who has worked with Tom, I, too, have come to recognize that his name is synonymous with the term "principled," which is why the establishment of this series is so fitting.

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Tom and Mrs. Romig, I regard this invitation to present the inaugural Thomas J. Romig Lecture in the Principled Practice of Law as a signal of honor, and I'm doubly honored and touched to learn that you had a hand in selecting me as the first speaker.

I propose to explore with you this evening the Bush administration's use torture as a weapon of war, starting with my own involvement in the matter as Navy General Counsel. Although I was not part of the initial decision to adopt torture, I learned about it – or, as they euphemistically called it, "Enhanced Interrogation Techniques" – relatively early and became deeply engaged in the opposition to it. And, though the Bush administration largely abandoned the use of torture before the end of the administration and President Obama formally outlawed it in his second day in office, the allure of torture is still with us. Like a low-grade fever that threatens to flare up, whether to use of torture is an issue that has been the subject of discussion and debate almost continuously since the terrorist attacks on 9/11. As many of you may know, it is very much a matter of controversy in the Trump administration. President Trump has repeatedly declared himself to be a supporter of torture both during the electoral campaign and after his inauguration. Sadly, he is not an American outlier or oddity: recent polling indicates that more than sixty-two percent of the American public supports the use of torture. Also, every one of the recent Republican candidates for president, with the exception of Sen. Lindsay Graham, either openly supported torture or refused to condemn it. Same thing. My sense is that if President Trump serves out his entire term – now a very big if – he will openly or secretly attempt to reinstate torture, most likely after the next terrorist attack.

Most of us when we think of torture probably view it through a moral and cinematic frame. We tend to think of it episodically: We recall the scene of torture that we have seen in movies or television and apply our moral judgment to it. But the Bush administration's decision to use torture had implications that went well beyond these two factors and any government's decision to use torture has policy and systemic implications that go well beyond what happens in a single torture chamber. Note that the US norm against torture originated with George Washington even before the triumph of the American Revolution and the legal prohibition traces its roots to the British prohibition of torture of around 1640. By 2002, these norms and laws had been deeply and broadly imbedded in U.S. policy and practices. Thus, when the United States adopted and implemented its torture policy, that decision came to have implications – adverse implications – not only for morality and law, but also U.S. values

and the American character, the rule of law, our constitutional order, the architecture of human rights and international human rights law, U.S. foreign policy, U.S. national security and our security strategy, our military alliance structure, combat operations, intelligence relationships, and the War on Terror. Torture damaged the professional norms of doctors, psychologists, and lawyers; distorted congressional oversight of the executive branch; and compromised judicial independence. As an example of how it affected U.S. foreign policy, in one way or another torture harmed our relationship with probably every democratic country, including Canada.

In his work, *Algerian Chronicles*, Albert Camus – reflecting in part on French torture in Algeria -- noted that countries at war need to take care that they not use weapons that would destroy what they are trying to protect. Torture is such a weapon and the U.S. experience with it demonstrates the wisdom of Camus's insight.

I'll touch on some of these factors in a few moments, but let me take you back to how I first got involved with the torture issue.

In the U.S., the Navy General Counsel is the chief legal officer of the Department of the Navy, which includes both the Navy and Marine Corps, and reports directly to the Secretary of the Navy. The two of us, along with the Under Secretary and four Assistant Secretaries constitute the senior civilian leadership team of the Department and embody the constitutional principle of civilian leadership of the military. Each of us was appointed by the President, confirmed by the Senate, and carries the equivalent military rank of four stars. On the legal side, I worked very closely with the Judge Advocate General of the Navy and the Staff Judge Advocate of the Marine Corps. My direct reports included the more than 640 civilian attorneys in the Navy Office of General Counsel and the Naval Criminal Investigative Service, or NCIS. Before 9/11, NCIS was already deeply involved in the fight against Al Qaeda due to their involvement in the response to the USS Cole bombing in 2000; after 9/11 NCIS moved the front lines in the fight against terrorism and, as a consequence, so did I, to a larger extent than most Pentagon civilians.

In November of 2002, then-NCIS director David Brant took me aside after a meeting on an unrelated issue and said to me, in a low voice: "We [meaning NCIS] are hearing rumors that detainees are being abused in Guantanamo. Do you want to hear more?" The question was cryptic, but

my response to him was instantaneous: Of course I did. He nodded and said he'd be back the following day with his team to give me a brief.

Now, there are a couple of contextual things to bear in mind. The first is that in 2002 neither the Department of the Navy nor I had any official responsibility for detention operations in Guantanamo or anywhere else. The mission of each military department is to train, organize, and equip combat ready forces and to furnish them to the combatant commands. With the exception of the Army Department, detention operations and interrogation tactics were operational matters within the purview of the operational chain of command, not the military departments. Although Guantanamo was a Navy base, the detention facilities on the base reported to Southern Command, not to the Navy.

At the moment that Director Brant asked me his question, I had had zero involvement in detention matters – not a single conversation or meeting and no knowledge of any aspect of detainee treatment. Dave's question was subtly phrased. He was offering me the opportunity to get involved, but also the opportunity to not get involved before hearing details that would give me actual knowledge of the problem. It was, in a way, a courtesy. But for me not getting involved simply never crossed my mind.

Director Brant came back the following day with a number of his NCIS agents assigned to Guantanamo. At Guantanamo, the NCIS agents explained, there were two interrogation task forces operating at the time, an intelligence task force and a criminal investigation task force. NCIS was assigned to the second. The agents had not personally witnessed any abuse, but Guantanamo was a small place and they had heard from personnel assigned to the intelligence task force that coercive interrogation tactics were being used.

Then NCIS went snooping. Without authorization, they tapped into the intelligence task force's computers and extracted interrogation transcripts, one of which they pushed across the conference table to me. The transcript detailed the sexual taunting of an unidentified detainee (whom years later I would learn was Mohammed Al-Qahtani, the so-called "Twentieth Hijacker") by female Army personnel, who were straddling him and placing women's underwear on his head. While this did not constitute cruel treatment, much less torture, it was evidence of abusive and degrading treatment and helped substantiate the NCIS concerns.

Director Brant and his NCIS colleagues were worried that the phenomenon known as "force creep" was already at play in Guantanamo. This is the situation common in the history of interrogation that occurs when the use of cruelty is authorized. In this setting, the interrogators tend to ratchet up the level of cruelty because, they figure, if cruelty is an effective tool, then twice the level of cruelty is twice as effective, and so on. Abuse inevitably segues into cruelty, and cruelty into torture. Brant closed the brief by saying that NCIS did not know how many of the detainees were being abusively interrogated, but thought it was a few of them. Also, they had heard that the use of abusive interrogation techniques had been approved "at the highest levels" of the Pentagon, but had not seen any documents to corroborate that.

I was appalled by the NCIS account because any abuse of detainees in Guantanamo was presumptively unlawful. However, the degree of abuse I had been shown, while unacceptable, was still relatively mild; the number of prisoners being abused appeared to be low; and this had to be rogue activity – no American service member, I thought, would purposefully authorize the abuse of any enemy prisoner. Still, my duty was clear: if there was any prisoner abuse in Guantanamo, my duty as Navy General Counsel, as a lawyer, as a member of the Bush Administration, and as a citizen was to uncover it and stop it. I was confident in my ability to do that. I promised my colleagues that I would investigate.

The next day after Director Brant's briefing I called the Army General Counsel, Steve Morello. To my shock, he acknowledged that he had information about the detainee abuse in Guantanamo and offered to share it. This was day two.

The following day, day three, I met with the Steve. He handed me a copy of a memorandum signed by Secretary of Defense Donald Rumsfeld authorizing the use of "Counter-Resistance Interrogation Techniques" against the detainees in Guantanamo. Among these techniques were the use of sensory deprivation, detainee-specific phobia techniques, stress positions, and the use of some force. To the memo, which had been authored by the DOD General Counsel, Jim Haynes, there was also attached the initial memo from the Guantanamo base commander requesting the authority to use the techniques and a legal memo from his SJA, an Army lawyer, concluding that their use would be legal. Other parts of the composite memo indicated that the commander of SOUTHCOM had endorsed the request, and that the Chairman and Vice-

Chairman of the JCS, GEN Richard Myers and GEN Peter Pace, had given verbal approval.

When I reviewed the composite memorandum, it was clear that its effect, even if nowhere stated, was to authorize torture. The legal memo itself was an incompetent treatment of the law, particularly given that some of the proposed techniques could easily rise to the level of torture whether applied singly or in combination, depending on severity. Also, nowhere in the memorandum could one find words of limitation, that is, an instruction that the techniques could be applied, but only to the point that their effect did not reach the level of "cruel, inhuman, or degrading treatment". Had abuse at and beyond that limit had been prohibited, the memo would have arguably complied with all legal standards. But it didn't, and thus the memo authorized unlawful conduct. Despite this fatal deficiency in the memo, it did not occur to me at that moment that anyone in the chain of approval, including Secretary Rumsfeld, had acted knowingly or in bad faith. This was, I felt, a case of simple error, no more: the lawyers had made a mistake and the principals had predictably relied on the poor advice. All parties had failed to think through the full implications of their decisions. This would be a simple matter to correct once it was pointed out.

The next day, day three, I was in Jim Haynes' office, memo in hand. I told him that his memo authorized torture. "No it doesn't," he responded. I then spent the next hour walking him through its language and explaining to him why it did. Although Jim was almost completely silent during the rest of the meeting, I was confident that he saw the problem and that the interrogation authorization would be rescinded within a few hours. Problem solved, I thought.

But it wasn't. About ten days later I was at my Mother's home in Miami on Christmas vacation with my family when I was called to the phone. It was Dave Brant, calling from the Pentagon to tell me that the detainee abuse at Guantanamo was still going on. This was a shocking and even bizarre moment. People I liked and trusted, fellow colleagues, had been cautioned about potentially unlawful activity involving the abuse of human beings but had not changed their behavior. The abuse was no longer a matter of simple error or inadvertent -- it was clearly deliberate. This matter had just become much more serious.

I returned to the Pentagon and broadened my effort to overturn the interrogation policy. Over the next two weeks, I met with the Secretary of

the Navy and senior members of the Commandant and CNO's staffs. All were completely supportive. I met with the senior JAGs and the GCs of all the services and the Chairman's Legal Adviser. From that point forward until the end of my tenure at Navy, the JAGs of the Navy, Marine Corps, Army, and Air Force and I always acted as a team on this issue. I also met with a number of Rumsfeld's senior advisors and met with Haynes again.

Despite all this activity, I was not making any progress in getting the authorization rescinded, so after about ten days I decided to put my concerns in writing. I wrote a memo to Haynes analyzing the flawed Guantanamo legal memo and characterizing it as an incompetent piece of legal analysis that authorized the unlawful use of torture. I predicted that any abuse of prisoners would not only produce legal fallout, but also significant adverse policy and political consequences, including damage to any person authorizing or involved in the abuse, damage to the effective prosecution of the war on terror, and potentially damage to the Presidency itself. It was the first time I had written anything on the issue. I had the memo delivered to Haynes in draft form early one morning and indicated to him that I would sign it out by close of business that day unless there was a reason not to.

By 3:00 o'clock that afternoon and after another meeting with him, Haynes called me to say that Secretary Rumsfeld had rescinded the authorization to use counter-resistance techniques. All of us opposed to the use of cruelty were elated. It had taken longer than we had wished, but in the end reason had prevailed and we had conformed back to our values and laws. About ten days later, Dave Brant called to say that NCIS could then confirm that the abuse of detainees in Guantanamo had stopped.

Or so we thought. On April 28, 2004, or about a year-and-a-half later, the CBS news program "60 Minutes II" broadcast the revolting and now iconic photographs of the sexual and physical abuse of Iraqi prisoners by American soldiers at the Abu Ghraib prison in Iraq. The ensuing investigations, reporting, and hearing revealed that Abu Ghraib and Guantanamo were not isolated events, but the metastasis of a conscious and deliberate US policy to use torture in the interrogation of so-called "unlawful combatants" captured in the war on terror.

As we now know, the CIA initially conceived the torture program in the summer of 2002. The Agency advised the White House and the Justice Department that, because of legal limits, the standard interrogation

techniques then commonly in use would be inadequate to extract from prisoners the intelligence that could be vital in helping save lives from future terrorist attacks. The Agency – which at the time had zero institutional experience or capability in the field of interrogation -- proposed that it be authorized to employ what it termed "Enhanced Interrogation Techniques". These were, in the main, reverse-engineered from North Korean torture techniques used against Americans during the Korean War. Despite the opposition of Secretary of State Colin Powell, who opposed the suspension of the Geneva Conventions for legal, foreign policy, and practical reasons, and, later, the FBI, which regarded torture not only as unlawful but as an inferior interrogation method as compared to time-tested, non-coercive interrogation techniques, the President approved the use of the Enhanced Interrogation Techniques. He was strongly supported in this by the Vice President, Dick Cheney, by the Attorney General, John Ashcroft, and by White House Counsel, Alberto Gonzalez. At Ashcroft's direction, the DOJ Office of Legal Counsel prepared legal memos – all of which have since been discredited and withdrawn – that disregarded and distorted the clear body of law prohibiting torture for the purpose of providing both legal clearance for the use of torture and the foundation for a legal shield that would immunize those who authorized and executed the program from future legal accountability for the commission of war crimes.

With this authority in hand and CIA Director George Tenet as the lead manager, the CIA established a program that became known as the Rendition, Detention, and Interrogation (RDI) Program. Dozens of victims – some completely innocent of any combatant activity – were tortured in this program either directly by CIA officers or contractors at "black sites" established in half-a-dozen or so countries around the world or by cooperative third countries (including Syria and Egypt) that applied the torture at our request. And the U.S. military, too, as we have seen, also participated in the abuse. At Guantanamo, Abu Ghraib, and multiple other locations in Afghanistan, Iraq, and in the field, U.S. soldiers -- acting either under orders or on the widespread belief that the "gloves had comes off" and that abuse could be applied with impunity – inflicted cruelty on hundreds of prisoners.

And what happened to Al-Qahtani, the prisoner held in Guantanamo? Here is how journalist Jane Mayer described his treatment:

> Qahtani had been subjected to a hundred and sixty days of isolation in a pen perpetually flooded with artificial light. He was interrogated on forty-eight of fifty-

> four days, for eighteen to twenty hours at a stretch. He had been stripped naked; straddled by taunting female guards; …forced to wear women's underwear on his head and to put on a bra; threatened by dogs; placed on a leash; and told that his mother was a whore. [He] had been subjected to a phony kidnapping, deprived of heat, given large quantities of intravenous liquids without access to a toilet, and deprived of sleep for three days. [At one point,] Qahtani's heart rate had dropped so precipitately, to thirty-five beats a minute, that he required cardiac monitoring.[2]

Make no mistake – this was torture, and it was acknowledged as such by the Department of Defense in 2009. Three years ago, Qahtani's civilian lawyer told me that it was her belief that had Secretary Rumsfeld not rescinded his interrogation authorization when he did, Qahtani would have died after another one or two weeks of such abuse. He has, she added, suffered permanent physical and psychological damage.

How did the U.S. come to use torture in this war? Clearly, the fear and fury we all felt after 9/11 was the critical factors, as was the belief that those who belonged to Al Qaeda had self-selected to opt out of the human race through their savagery. But the authorization to apply torture rested on six implicit policy assumptions. The first five assumptions are clearly false but the sixth is, so far, still quite correct. I'll list and discuss them:

First, torture is uniquely effective in producing information and its use was necessary if our nation was to be protected against further loss of life. This is assumption is categorically false and, in fact, the clear failure record of torture during the Bush administration proves this. Despite the folklore that torture is effective in eliciting truthful information rapidly, this was not only not the case, but also the use of torture was both counter-productive and distracted from the use of non-brutal interrogation techniques that were more effective. In December 2008, the Senate Committee on the Armed Services concluded in a report entitled "Inquiry into the Treatment of Detainees in U.S. Custody," which was issued without dissent, that brutal interrogation techniques "damaged our ability to collect accurate intelligence that could save lives, strengthened the hand of our enemy, and compromised our moral authority." Similarly, in 2015 the Senate Select Committee on Intelligence examined the CIA's 20 major claims of success in the RDI Program after reviewing the totality of the Agency's internal records and documents and concluded, in its final report, that 1) The CIA's use of its enhanced interrogation techniques was

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[2] Jane Mayer, *The Memo: How an internal effort to ban the abuse and torture of detainees was thwarted*, THE NEW YORKER, February 19, 2006, https://www.newyorker.com/magazine/2006/02/27/the-memo.

not an effective means of acquiring intelligence or gaining cooperation from detainees; and 2) The CIA's justification for the use of its enhanced interrogation techniques rested on inaccurate claims of their effectiveness.

I should note that in 2005 General Stanley McChrystal, when he was commanding U.S. troops in Iraq, turned down an offer by President Bush in 2005 to confer upon him authority to use "EITs in theater. By then, General McChrystal had seen data indicating that units that did not use brutality obtained better intelligence and had better relations with the local communities, and thus as a rule had better combat records.

Second, no law prohibited the application of cruelty. Thus, the government could direct the use of cruelty as a matter of policy depending on the dictates of perceived military necessity. This, too, was false. United States law in 2002 and before – including the Constitution and constitutional jurisprudence, statutes, and treaties -- categorically prohibited the use of cruelty on captives. The proof of this extensive, but the Supreme Court held as such when it proclaimed in its 2006 *Hamdan* decision that the Geneva Conventions applied in the war on terror, thus declaring President Bush's 2001 declaration that Geneva did not apply invalid.

Third, even if such a law were to exist, the President's constitutional commander-in-chief authorities included the unabridged discretion to order torture and other forms of abuse. Any existing or proposed law or treaty that would purport to limit this discretion would be an unconstitutional limitation of his powers. This was utterly false as well. No person, including the President, is above the law. The constitutional limitations on the commander-in-chief authorities are well established, as evidenced, for example, in the Supreme Court's 1952 *Youngstown Sheet & Tube* decision, which invalidated President Truman's assertion of that authority to seize steel mills during the Korean War.

Fourth, the use of cruelty in the interrogation of unlawful detainees held abroad would not implicate or adversely affect our values, our domestic legal order, our international relations, or our security strategy. This constituted a major miscalculation by the Bush administration, but the truth is that the administration appears never to have conducted a full policy analysis of the second-order policy consequences of the use of torture. In fact, the adverse consequences were massive, as I'll describe in a moment.

Fifth, if this abuse were disclosed or discovered, virtually no one would care. While in truth some citizens don't care, actually many did. This is why the controversy continues and the issue will not go away.

Sixth and last, if the abuse were discovered, no one responsible would be held accountable. This could be true, and it would be tragic because accountability should be central to our law and government, but it's still too early to tell. The gravitational pull of the law towards accountability is powerful and it is difficult to envisage that our system of justice would completely fail to respond to a crime such as torture. But so far it hasn't.

I wish to do two more things. First, I've mentioned the adverse policy consequences of our use of torture, and I wish to expand on that. And, second, let's turn to the issue of policy. Many Americans are less concerned by law and morality than by what could make them safer. If torture can make them safer, these people ask, why should the law prohibit torture? Why should we not disregard the law? They've heard the repeated claims of President Cheney and some of the other architects of the Bush-era torture policy – and now the similar claims of President Trump – that torture is effective and helps keep the country safe. They now ask – as they have a right to – why not torture? They are entitled to an answer.

And here it is: we don't torture on moral, legal, and policy grounds. We don't torture because we are Americans and torture is antithetical to our commitment to human dignity and is illegal. Beyond that, we don't torture because the evidence shows that torture is not effective; because it makes us weaker, not stronger, and less safe; and because it is contrary to our strategic interest. The application of cruelty and torture harmed and continues to harm our nation's legal, foreign policy, and national security interests in multiple ways. I'll discuss each of these harms.

A. The Legal Harm

The first harm was to our laws. The acceptance of cruelty is contrary to and damages our values and legal system by discarding the basic principle that the highest purpose of law is to protect human dignity. As Professor Lou Henkin wrote: "Every man and woman between birth and death counts, and has a claim to an irreducible core of integrity and dignity."[3]

[3] LOUIS HENKIN, THE AGE OF RIGHTS 193 (1990).

Cruelty damages and ultimately would transform our constitutional structure because cruelty is incompatible with the philosophical premises upon which the Constitution is based. Our Founders drafted the Constitution inspired by the belief that law could not create, but only recognize, certain inalienable rights – rights vested in every person, not just citizens, and not just here, but everywhere. These rights are the shields that protect core human dignity.

To have adopted and applied a policy of cruelty anywhere within this world was to say that our Founders and the successor generations were wrong about their belief in the rights of the individual, because there is no right more fundamental than the right to be safe from cruel and inhumane treatment.

If we can lawfully abuse Qahtani and others the way they were abused – however reprehensible their acts may have been – it is because they did not have the inalienable right to be free from cruelty. And if that is the case, then the foundation upon which our own rights are based starts to crumble, because it would then ultimately be left to the discretion of the state whether and how much cruelty may be applied to each of us or to any person.

The infliction of cruelty damages not only the victims, but also the fabric of the law itself in two ways. It does so, first, because if cruelty is taken out of the law's ambit and placed within the realm of policy, the scope of the law is then by definition diminished. Also, cruelty violates the important principle of law that Professor Jeremy Waldron terms the "principle of non-brutality." He writes:

> Law is not savage. Law does not rule through abject fear and terror, or by breaking the will of those whom it confronts…. [There is] an enduring connection between the spirit of the law and respect for human dignity – respect for human dignity even in extremis, where law is at its most forceful and its subjects at their most vulnerable. [T]he rule against torture … is vividly emblematic of our determination to sever the link between the law and brutality, between the law and terror, and between law and the enterprise of breaking a person's will.[4]

[4] JEREMY WALDRON, TORTURE, TERROR AND TRADE OFFS: PHILOSOPHY FOR THE WHITE HOUSE 232-33 (2010).

B. The Harm to U.S. Foreign Policy Interests

The second category of the harm from torture is to our foreign policy interests. In sum, the effects and consequences of cruelty were contrary to our long-term and over-arching strategic foreign policy interests, including many of the principal institutions, alliances, and rules that we have nurtured and fought for over the past sixty years.

America's international standing and influence stems in no small measure from the effectiveness of a foreign policy that harmonized our policy ends and means with our national values. The employment of cruelty not only betrayed our values, thus diminishing the strength of our example and our appeal to others, it impaired our foreign policy by adopting means inimical to our traditional national objective of enhancing our security through the spread of human rights protected by the rule of law.

From World War II until today, American foreign policy has been grounded in strong measure on a human rights strategy. We have fought tyranny and promoted democracy not only, or even primarily, because it was the right thing to do, but because the spread of democracy made us safer and protected our freedoms. In ways that echoed the development of our own domestic legal system, we successfully promoted the development of a rules-based international order based on the rule of law. Across the world, human rights principles, international treaties and laws (particularly humanitarian and international criminal law) and many domestic constitutions and legal systems owe their character, acceptance, and relevance to our inspiration, efforts, or support.

Let's look at three examples, out of many, of these foreign policy achievements:

1) The Geneva Conventions, as do most of the major human rights treaties adopted and ratified by our country during the last century, forbid the application of cruel, inhuman, and degrading treatment to all captives. Thousands of American soldiers have benefited from these conventions;

2) The Nuremberg Trials, a triumph of American justice and statesmanship that launched the modern era of human rights and international criminal law, treated prisoner abuse as an indictable crime,

helped cement the principle of command responsibility, and started the process whereby national sovereignty no longer served as a potential shield to protect the perpetrator of crimes against humanity from the long arm of justice; and

3) The German Constitution has helped transform a country that helped launch two of the most destructive wars in history into the responsible society it is today. Its Article one, Section one, states: "The dignity of man is inviolable. To respect and protect it is the duty of all state authority." That this should be an element of the German Constitution today reflects credit only on the German nation and its citizens. However, that it should have been adopted by Germany in 1949, the year the constitution was first ratified, also reflects credit on an American foreign policy that had integrated our national focus on human dignity as an operational objective.

Each of these three achievements has returned massive dividends to the U.S. We are all the better for them. However imperfectly these precedents, rules, or laws may be observed or enforced, they have helped shape public opinion worldwide, created global standards of conduct, and influenced the conduct of foreign individuals, groups, and nations in ways that are overwhelmingly supportive of our national interest and objectives.

When we adopted our policy of cruelty we sabotaged these policies and achievements. Consider the following. When we tortured, We rendered incoherent a core element of our foreign policy -- the protection of human dignity through the rule of law; we violated the letter and spirit of the Geneva Conventions; we weakened the Nuremberg principle of command responsibility; we damaged he very fabric of human rights and international law and fostered a spirit of non-compliance with both; we fostered the incidence of prisoner abuse around the world; we created a deep legal and political fissure between ourselves and our traditional allies; and we fueled public disrespect for and opposition to our country around the world, thus hampering the achievement of our foreign policy objectives and compromising our ability to provide human rights leadership;

None of this has been to our benefit, yet all of these harms were among the costs we suffered when we adopted the policy of cruelty and transformed our foreign policy into incoherency.

C. The Harm to U.S. National Security

Let me now turn to the third category of harm, the harm to U.S. national security. Simply stated, the use of torture is a quintessential example of allowing tactical considerations to override strategic objectives. Our nation's defenses were materially and demonstrably weakened, not strengthened, by the practice of torture. Cruelty made the U.S. weaker, not stronger. Not only did it blunt our moral authority, it sabotaged our ability to build and maintain the broad alliances needed to prosecute the war effectively, it diminished our military's operational effectiveness, it had adverse consequences on the battlefield, and it presented our enemies with a strategic gift.

In the fight against terror, U.S. national security is achieved not solely through military action, but also through the simultaneous use of ideas and communications, political persuasion, intelligence and law enforcement, and diplomacy. The attacks on the World Trade Center, the Madrid railway station, and Charlie Hebdo, among many others, evidence a terrorist ideology that would obliterate human dignity. Our defense to this assault cannot be solely military. These terrorist acts emanated from specific ideas that fostered and propagated this cycle of hate -- ideas that must be combated by our own ideas and ideals. Our defense must also consist of rallying to our mutual defense those who share our values and our vision of a humane civilization.

The fight against terror is not a war the U.S. can fight alone. Our political and military strategy must be geared to building and sustaining a large, unified alliance that cooperates across the spectrum of the conflict. Yet we will not be able to build this alliance unless we are able to articulate a clear set of political objectives and prosecute the war using methods consistent with those objectives; we will not be able to build this alliance unless we construct with our leading allies a common legal architecture that is true to our shared values; and we will not be able to establish that common legal architecture if were to insist, as we once did, on the discretionary right to apply cruel treatment to detainees.

When the U.S. adopted our policy of cruelty we compromised our ability to accomplish these national security objectives. Here are four examples of the strategic damage to our national security that we suffered:

First, because the cruel treatment of prisoners constitutes a criminal act in every European jurisdiction, European cooperation with the United States across the spectrum of activity -- including military, intelligence,

and law enforcement – diminished once this practice became apparent;

Second, almost every European politician who sought to fully ally his country with the U.S. effort in the fight on terror incurred a political penalty as a consequence, as the political difficulties of former Prime Ministers Tony Blair and Jose Maria Aznar demonstrated;

Third, our abuses at Abu Ghraib, Guantanamo, and elsewhere perversely generated sympathy for the terrorists and eroded the international good will and political support that we had enjoyed after September 11; and

Fourth, we lost the ability to draw the sharpest possible distinction between our adversaries and ourselves and to contrast our two antithetical ideals. By doing so, we compromised our ability to prosecute this aspect of the war – the war of ideas – from the position of full moral authority.

All of these factors contributed to the difficulties the U.S. has experienced in forging the strongest possible coalition in the fight on terror. But the damage to our national security also occurred not only at the strategic, but also at the operational and tactical military levels. Consider these following four points: 1) Senior U.S. officers maintain that the first and second identifiable causes of U.S. combat deaths in Iraq were, respectively, Abu Ghraib and Guantanamo, because of the effectiveness of these symbols in helping attract and field insurgent fighters into combat; 2) At various different points, some allied nations – including New Zealand -- refused to participate in combat operations with us out of fear that, in the process, enemy combatants captured by their forces could be abused by U.S. or other forces; 3) At other times, allied nations refused to train with us in joint detainee capture and handling operations, also because of concerns about U.S. detainee policies; and 4) Our policy of treating detainees harshly could have stiffened our adversaries' resolve on the battlefield by inducing them to fight harder rather than surrender, and this too could have led to loss of American lives.

Whatever intelligence obtained through our use of harsh interrogation tactics may have been, on the whole the military costs of these policies and practices greatly damaged our overall efforts and impaired our effectiveness in the war.

Let me say a word about the role of Canada and how the U.S. torture policy affected the Canada-U.S. relationship. This is an issue that my

colleagues and I intend to research more deeply.

Obviously, the relationship is one of the strongest bilateral relationships for either country. The two countries are economically integrated and have the closest possible relationship in many realms of activities, including in the military, intelligence, and law enforcement realms. When the U.S. was attacked on 9/11, Canada stood by the U.S. in Afghanistan.

But U.S. decisions in the war on terror strained that relationship. Guantanamo, military commissions, interrogation policies, indefinite detention, and the invasion of Iraq all caused strains. And here are some more specific aspects of the relationship in these areas: the U.S. detention of Omar Khadr, a 15-year-old Canadian citizen, at Guantanamo was a point of conflict; the U.S. abduction of Maher Arar, another Canadian citizen, and his rendition to Syria, where he was tortured, was another; because of Canadian legal concerns with U.S. detention policies, it has been reported that Canada refused to turn detainees over to U.S. forces in Afghanistan during a period of time out of concern that Canada might be accused of complicity with the commission of war crimes; and but more significantly, I was the subject of a demarche by the Canadian military in 2005.

Let's give the last word to Senator John McCain, who took to the floor of the Senate on December 9, 2014, to reflect on torture and what it means to be an American. He said:

> In the end, torture's failure to serve its intended purpose isn't the main reason to oppose its use. I have often said, and will always maintain, that this question isn't about our enemies; it's about us. It's about who we were, who we are and who we aspire to be. It's about how we represent ourselves to the world.
>
> We have made our way in this often dangerous and cruel world, not by just strictly pursuing our geopolitical interests, but by exemplifying our political values, and influencing other nations to embrace them. When we fight to defend our security we fight also for an idea, not for a tribe or a twisted interpretation of an ancient religion or for a king, but for an idea that all men are endowed by the Creator with inalienable rights. How much safer the world would be if all nations believed the same. How much more dangerous it can become when we forget it ourselves even momentarily.
>
> Our enemies act without conscience. We must not…. [A]cting without

> conscience isn't necessary, it isn't even helpful, in winning this strange and long war we're fighting.

And McCain continues:

> Now, let us reassert the contrary proposition: that is it essential to our success in this war that we ask those who fight it for us to remember at all times that they are defending a sacred ideal of how nations should be governed and conduct their relations with others – even our enemies.
>
> Those of us who give them this duty are obliged by history, by our nation's highest ideals and the many terrible sacrifices made to protect them, by our respect for human dignity to make clear we need not risk our national honor to prevail in this or any war. We need only remember in the worst of times, through the chaos and terror of war, when facing cruelty, suffering and loss, that we are always Americans, and different, stronger, and better than those who would destroy us.[5]

By defending the accused, you on the defense team are defending the beating moral heart of our nation – the concept that every single person matters, without exception, and that consequently the dignity of every single individual is to be protected through the agency of justice under law. As Professor Lou Henkin wrote: "Every man and woman between birth and death counts, and has a claim to an irreducible core of integrity and dignity."[6] By defending that claim to dignity that everyone possesses, including those detained at Guantanamo, you help protect us all.

On January 21, 1961 – Inauguration Day – John F. Kennedy stood on the Capitol steps less than two miles from here and gave one of the greatest speeches in American history, great because it constituted one of the purest expressions of American character, purpose, and idealism. In paragraph two of his address, almost his first words, he set his theme by associating himself and his new presidency with the guiding belief of the American Revolution, that "the rights of man come not from the generosity of the state, but from the hand of God." Note that he did not refer to the rights of only "citizens." In the very next paragraph, he spoke about how a torch had passed to a new generation of Americans "tempered by war,

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[5] Senator John McCain, Floor Statement on Senate Intelligence Committee Report on CIA Interrogation Methods (Dec. 9, 2014), https://www.justsecurity.org/wp-content/uploads/2014/12/STATEMENT-BY-SENATOR-JOHN-McCAIN-ON-SENATE-INTELLIGENCE-COMMITTEE-REPORT-ON-CIA-INTERROGATION-METHODS.pdf.

[6] LOUIS HENKINS, THE AGE OF RIGHTS 193 (1990).

disciplined by a hard and bitter peace, proud of our ancient heritage…." And those Americans, he then confidently pledged, are "unwilling to witness or permit the slow undoing of those human rights to which this nation has always been committed, and to which we are committed today at home and around the world."

Let's dwell on this for a moment: "unwilling to witness or permit the slow undoing of those human rights to which this nation has always been committed, and to which we are committed today at home and around the world."[7] Today, fifty-six years later, we are led by an unapologetic, pro-torture president who does not subscribe to a single word of this sentence. Indeed, it would not be unfair or an exaggeration to say that by words and acts he has already put in place policies to distance our nation from our historic commitment to human rights at home and abroad and to do so not slowly, but rapidly. Acting in conformity with presidential guidance, the secretary of state has already declared that the United States is abandoning our human rights leadership, reducing our advocacy efforts, and is stripping the department of much of its capability in the area. In all of this, the president and his cabinet are supported by millions of Americans and yet acts with scant opposition or dissent from Congress.

Which president has the better grasp of the real national interest, John Kennedy or Donald Trump? And what happened between Kennedy and Trump to have brought us to this state of events, this sea change in our national purpose? My vote is with JFK, but to attempt to answer these questions, let's turn back the clock a few years.

Four days ago our nation remembered and reflected on the anniversary of 9/11. It seems incredible that it has been 16 years since that day. For me – as I suspect is the case with most of us here – 9/11 could have occurred yesterday. I was in my Navy office in the Pentagon that day, and I remember vividly the momentary shudder that went through the building at 9:37 a.m. when American Airlines flight 77 struck it. Of course, I did not know at first that this is what had occurred; it felt as if a large, heavy safe had been dropped on the floor above me. But in the impact that had caused that shudder, as we would all learn later, 64 passengers and crew died, as did 125 other Americans who were working in the Pentagon that day.

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[7] John F. Kennedy, U.S. President, Inaugural Address (January 20, 1961).

Of all those deaths in the Pentagon, the one that stays with me most was that of LCDR Otis Tolbert, a Navy intelligence officer. Before 9/11, LCDR Tolbert would leave the Pentagon and go home to his wife and three infant children. One of his children was a daughter, Brittany, who was severely afflicted with cerebral palsy. As a victim of that disease, she did not have the strength to hold her head up, but Otis would help her with that when he would care and play with her after he came home from the day's duty. That Brittany would lose her father – whom she would never really come to know – and that he did not come home that day, or any other day ever after, to help her hold her head up has always struck me as one of the most tragic and cruel events of a day filled with tragedy and cruelty.

That is where it started. Otis, the murdered Navy father, is representative of the almost 3,000 deaths that day and Brittany, his disabled daughter, is one of the tens of thousands who directly experienced loss and grief as a result. Having been attacked and wounded, our nation went to war. We did so out of fury – to avenge the dead – and out of fear, to protect the living. Sixteen years later, the fear and fury are still coursing through the national bloodstream. These emotions partially help explain the emergence of Trump. And they largely explain, I think, why our nation – mistakenly and I hope temporarily – seems prepared at this point to permit the unwinding of those human rights at home and abroad to which we have been committed our entire history. The fear has distorted our judgment and our values.

We are now sixteen years after 9/11, and we are still at war – the longest in American history. More precisely, we are engaged in various wars: the incursion into Afghanistan to destroy Al-Qaeda and the Taliban, its host and protector, segued into the invasion of Iraq, what military historian Thomas Ricks correctly has called one of the "most profligate actions in the history of American foreign policy."[8] And these, in turn, led to military or paramilitary engagements in scores of other countries, all under the badly conceived and ill-defined rubric of the "War on Terror." What started and should have remained as a tightly focused political and military effort against Al-Qaeda and its direct supporters metastasized into something quite different, diffuse, undisciplined, and vague. At the moment that we called out our enemy to be "terror", which is a tactic, not a tangible entity like Al-Qaeda, we lost the clear understanding of who the enemy is, a cardinal sin in any military undertaking. As a consequence, we inevitably lost our strategic objective, grasp, and direction for, as the

[8] THOMAS RICKS, FIASCO (2006).

saying goes, "If you don't know where you're going, any road will take you there"[9] These mistakes were compounded by a series of other interrelated mistakes: forgetting that all military action should be guided by and subordinated to overarching, clearly defined political objectives; over-militarizing our efforts in the fight against terrorism; and losing sight in the advantages of coalition warfare in this type of conflict as we fell prey to the temptation to go-it-alone militarily. And all of this was in part fueled, we can now recognize, by what was at the time a toxic dose of military hubris created by the collapse of the Soviet Union, the absence of a peer military competitor, the easy victory over Iraq in Gulf War I, the success of the all-volunteer military, and the so-called Revolution in Military Affairs brought about by precision guided munitions.

Given this matchless military power, perhaps it is understandable that our nation's real military objective after the initial invasion of Afghanistan, although one never openly articulated to the American public by the Bush administration, came to be not primarily to crush Al-Qaeda – an organization, as has been noted somewhere, whose membership in 2001 would not have filled a good-sized basketball gym in an average small town – but to figuratively "drain the swamp" of the Middle East and transform the region politically, a much more ambitious but, it was felt, a worthier and attainable objective given the perceived invincibility of American power. This breathtaking logic was a major contributor to the decision to invade Iraq, which has proven to be an exercise in strategic overreach of staggering dimensions with disastrous human, economic, foreign policy, and military consequences.

But these were not the only mistakes of American post-9/11 statecraft and military strategy. Perhaps an even greater mistake was this: We failed to give proper weight to our values and ideals and to recognize the role that law and human rights should play and must play in the defense of our nation and in the projection of our military strength. We knew all too well what we were against – that would be Al-Qaeda and everything, however nebulous, having to do with "terror" – but we started forgetting what we stood for. Outraged by Al-Qaeda's suicidal savagery, fearful of its declared intent to kill again if given the chance, and uncertain of its residual capability to do so, the Bush administration adopted a basket of measures that Mark Danner has termed a "state of exception."[10] They may

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[9] GEORGE HARRISON, ANY ROAD (2002), almost certainly inspired by a comment by Cheshire Cat in LEWIS CAROLL'S ALICE IN WONDERLAND.

[10] MARK DANNER, SPIRAL (2016).

have been adopted mainly out of the sincere belief that they were required by military and security necessities, but they departed from our legal order. These measures included the use of Guantanamo as a detention center exempt from judicial oversight and jurisdiction; the establishment of military commissions lacking fundamental due process protections; the implementation of indefinite detention; the disregard of the Geneva Conventions as governing laws of war; the extensive use of domestic wiretap and communications intercepts in violation of clear legal restraints; the adoption of torture as a weapon of war; the outsourcing of torture through use of extraordinary rendition; and the exclusion of the public and even Congress from meaningful participation in the adoption and oversight of many of these measures. Each of these measures violated our values, existing law, the structure and principles of the rule of law, and the norms of democratic governance. At the time, however, the Bush administration chose to regard the legal constraints that applied as inconvenient barriers to be brushed aside and gave little or no attention to the broader domestic or international policy consequences of adopting these measures. Our blood was up, and the gloves were off.

Almost all of the former senior members of the administration continue to defend the security measures. Referring to President Obama's opposition to the Bush-era torture policies, Vice President Dick Cheney, the most energetic apostle of the administration's security policies, said in 2009 that to abandon "enhanced interrogation" (as he puckishly insists in calling torture) would be "recklessness cloaked in righteousness, and would make the American people less safe". If asked today, he would probably extend that statement to any opposition to the other policies as well.

Was he right? No, demonstrably not. If there is "recklessness cloaked in righteousness" (a wonderfully crafted phrase, by the way), the original recklessness was on the part of the Bush administration in first departing from the law and our values, not on the part of its critics in calling them out and demanding that our nation revert to what the law required. The Bush administration not only was wrong in adopting these measures, it was wrong in misleading the nation in its description of them, in making false claims of their necessity, legality, and effectiveness, and by failing to disclose or even examine their adverse policy consequences.

Let's take the example of the use of torture or, to use the administration's euphemism, "enhanced interrogation"; it helps illustrate the larger issues.

During their tenures, the principal architects of the enhanced interrogation program – President Bush, Vice President Cheney, Attorneys General Ashcroft and Gonzalez, Defense Secretary Rumsfeld, and CIA Director Tenet – emphatically and frequently denied that the program had resulted in torture. And, in an eloquent and passionate speech in 2009, Vice President Cheney went further: he charged that those who dared asserted that the U.S. had tortured were casting libel.[11]

Today, the facts prove otherwise. We now know, from the Senate Intelligence Committee's Torture Report[12] and many other sources that the administration's claim that "enhanced interrogation" was grounded on some sort of scientific basis and constituted a uniquely effective method of gaining access to terrorist confessions was completely bogus. We know that there was no scientific basis at all behind the techniques; we know that the only thing "enhanced" about them was their level of brutality; and we know that their effectiveness in yielding actual intelligence, to judge from the CIA's own internal records on their 20 principal claims of success, was close to nil.

Even more importantly, we now also know that the administration's vehement claims of legal innocence – i.e., that the level of brutality never crossed the legal threshold of "severe physical and mental pain or suffering," the legal definition of torture –are verifiably false and constitute no more than empty posturing. Such claims were always suspect because they would have required something that doesn't exist, which is a method to precisely calculate the level of pain and suffering inflicted. Now we don't have to guess or accept the administration's self-serving representations as accurate. Even a cursory read of the accounts of detainee treatment in the Senate Torture Report demonstrates that each of the thirty-nine individuals subjected to the CIA's "enhanced interrogation" program were tortured over extensive periods of time. And, although the Report did not cover CIA rendition, it would now be naïve to presume anything other than that many and perhaps all of the estimated 136 individuals rendered by the CIA[13] to third countries were also tortured. No wonder that a unanimous European Court of Human Rights

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[11] Richard Cheney, Speech at the American Enterprise Institute (May 21, 2009), http://www.politico.com/story/2009/05/full-transcript-dick-cheneys-speech-022823?o=2.

[12] Senate Select Committee on Intelligence, *Study of the CIA's Detention and Interrogation Program – Foreword, Findings, and Conclusions, and Executive Summary* (released Dec. 10, 2014).

[13] *See* AMRIT SINGH, GLOBALIZING TORTURE: CIA SECRET DETENTION AND EXTRAORDINARY RENDITION 6 (Open Society Foundations, 2013).

in the two cases in which it considered the treatment of detainees in European CIA black sites held in 2014 that the abuse amounted to torture.[14] And no wonder why President Obama acknowledged on August 1, 2014, that our treatment of some detainees constituted torture.

The plain fact, simply stated, is that the U.S. tortured and that we did so despite and in violation of our laws, values, and traditions, with specific intent, and as a desired result of express state policy. That question is now settled and is no longer a matter of reasonable debate, dispute, or opinion. Our nation is responsible for the torture of certainly dozens and more likely hundreds of individuals at CIA black sites around the world; at Abu Ghraib, Guantanamo, and dozens of other military locations; and at multiple foreign government locations where prisoners were subjected to outsourced brutality as a result of the CIA's extraordinary rendition program. And, lest we forget, many more victims were subjected to lesser forms of brutality that constituted cruel, inhuman, and degrading treatment that could be as destructive of human dignity as torture.

But we also know more than this. We know that the damage from the torture extended well beyond that inflicted on the individual victims – there was damage to our country as well. Torture damaged and the legacy of torture continues to cause damage in three principal areas: domestically, to our values, societal norms, laws and legal system, and to our governmental integrity; internationally, to our standing abroad, to the architecture of international law and human rights, to many bilateral relationships, to the support for U.S. goals and policies in the fight against terrorism, and to the coherency of our foreign policy and our ability to achieve our foreign policy objectives; and lastly, to our national security, by weakening our alliance structure, disrupting and reducing military and intelligence cooperation, producing adverse military impacts at the tactical, operational, and strategic levels, degrading U.S. military integrity and ethos, enhancing enemy propaganda, recruiting, and combat effectiveness, and contributing to U.S. combat deaths.

Let's look into each of these three areas of damage in a bit more detail. First, at home, the damage was massive. As Sen. John McCain has said, "In the end, torture's failure to serve its intended purpose isn't the main reason to oppose its use…. [T]his question isn't about our enemies; it's

[14] Al Nashiri v. Poland, App. No. 28761/11, Eur. Ct. H. R. (2014), Husayn (Abu Zubaydah) v. Poland, App. No. 7511/13, Eur. Ct. H. R. (2014).

about us. It's about who we were, who we are and who we aspire to be."[15] The norm against torture has been shattered, causing major damage to the foundational belief that cruelty is incompatible with the American ideal. Now, almost half of all Americans are of the view that the use of torture is permissible under "some circumstances"[16]; almost all of the Republican candidates for president in the last election cycle, most notably Donald Trump, pledged to restore "enhanced interrogations" if elected; the corrupt Bush-era Office of Legal Counsel memoranda on torture will continue to plague legal discourse and judicial deliberations for years to come; and we have chosen to disregard a critical requirement for any legal system, which is accountability for crimes. The net result, among others, is that the zone of individual protection from cruelty has shrunk, personal rights and liberty have been diminished, and the United States has established the strongest and most formidable precedent among democratic nations for the proposition that immunity from accountability from torture is acceptable and that impunity for crimes committed in the pursuit of security is a viable option. The damage to fundamental values, individual liberty, and the rule of law is severe.

When we as a nation adopted and implemented our torture program in 2002, we simultaneously and necessarily discarded the belief that every individual is vested with the inalienable right to be free from cruelty. When we tortured Abu Zubaydah and Mohammed Al-Qahtani and Khalid Sheik Mohammed (and many others) the way we did, it was only because they did not have the right to be free from cruelty. And, if that's true, then neither you nor I have that right, either, because we took the right to be free from torture out of the basket of protected and inviolable personal rights – where it had previously been under American laws and values and international law – and put it into the realm of state discretion. Thus, no longer would our decision or any state's decision to use cruelty be constrained by the victim's assertion of his or her judicially cognizable individual rights; now it would be left to the discretion of state policy. The United States might be more restrained in its use of cruelty, but if Syria, North Korea, or Cuba decided to be completely unconstrained, who could object? The answer is, of course, no one.

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[15] Senator John McCain, "Floor Statement on Senate Intelligence Committee Report on CIA Interrogation Methods," (Dec. 9, 2014).

[16] PEW RESEARCH CENTER, *2016 Pew Research Center's American Trends Panel Wave 22 October Final Topline*, https://assets.pewresearch.org/wp-content/uploads/sites/12/2017/01/26122359/Torture-topline-for-release-CHECKED.pdf. In this poll, 48% responded that torture may be used and 49% responded that it may never be used.

The second category of the harm from torture is to our foreign policy interests. By torturing, the United States acted contrary to our long-term and over-arching strategic foreign policy interests, including many of the principal institutions, alliances, and rules that we have nurtured and fought for over the past sixty years. Let us look at three examples, out of thousands, of these foreign policy achievements. First, the Geneva Conventions. As do most of the major human rights treaties adopted and ratified by our country during the last century forbid the application of cruel, inhuman, and degrading treatment to all captives, thousands of American soldiers have benefited from these conventions. Second, the Nuremberg Trials, a triumph of American justice and statesmanship that launched the modern era of human rights and international criminal law, treated prisoner abuse as an indictable crime, helped cement the principle of command responsibility, and started the process whereby national sovereignty no longer served as a potential shield to protect the perpetrator of crimes against humanity from the long arm of justice; and third, the German Basic Law, which is the name for the German constitution, has helped transform a country that was instrumental in launching two of the most destructive wars in history into the responsible society it is today. Article one, Section one, states: "The dignity of man is inviolable. To respect and protect it is the duty of all state authority." That this should be an element of the German Basic Law today reflects credit only on the German nation and its citizens. However, that it should have been adopted by Germany in 1949, the year the constitution was first ratified, also reflects credit on an American foreign policy that had integrated our national focus on human dignity as an operational objective.

Each of these three achievements has returned massive dividends to our nation. We are all the better for them. However imperfectly these precedents, rules, or laws may be observed or enforced, they have helped shape public opinion worldwide, created global standards of conduct, and influenced the conduct of foreign individuals, groups, and nations in ways that are overwhelmingly supportive of our national interest and objectives. And yet, when we adopted our policy of cruelty we sabotaged these policies and achievements. When we tortured, we rendered incoherent a core element of our foreign policy: the protection of human dignity through the rule of law; we violated the letter and spirit of the Geneva Conventions; we weakened the Nuremberg principle of command responsibility; we damaged the very fabric of human rights and international law and fostered a spirit of non-compliance with both; we fostered the incidence of prisoner abuse around the world; we created a deep legal and political fissure between ourselves and our traditional

allies; and we fueled public disrespect for and opposition to our country around the world, thus hampering the achievement of our foreign policy objectives and compromising our ability to provide human rights leadership.

Let me now turn to the third category of harm, that to our national security. Simply stated, the use of torture is a quintessential example of allowing tactical considerations to override vastly more important strategic objectives. Our nation's defenses were materially and demonstrably weakened, not strengthened, by the practice of torture. Not only did it blunt our moral authority, it sabotaged our ability to build and to maintain the broad alliances needed to prosecute the war effectively, it diminished our military's operational effectiveness, it had adverse consequences on the battlefield, and it presented our enemies with a strategic gift.

This is why in 2005 General Stanley McChrystal, when he was commanding U.S. troops in Iraq, turned down an offer by President Bush to confer upon him authority to use "Enhanced Interrogation Techniques" in theater. By then, General McChrystal had seen data indicating that units that did not use brutality obtained better intelligence and had better relations with the local communities, and thus as a rule had better combat records. And this is why on November 20, 2008, the Senate Committee on the Armed Services concluded in a report entitled "Inquiry into the Treatment of Detainees in U.S. Custody," which was issued without dissent, that brutal interrogation techniques "damaged our ability to collect accurate intelligence that could save lives, strengthened the hand of our enemy, and compromised our moral authority."[17]

When our nation adopted our policy of cruelty, we compromised our ability to accomplish critical national security objectives in the fight against terror. Here are a few examples:

1) Because the cruel treatment of prisoners constitutes a criminal act in every European jurisdiction, European cooperation with the United States across the spectrum of activity -- including military, intelligence, and law enforcement – diminished once this practice became apparent;

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[17] INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY, S.REP. NO. 110-2 at xii (2008), https://www.armed-services.senate.gov/imo/media/doc/Detainee-Report-Final_April-22-2009.pdf.

2) Almost every European politician who sought to fully ally his country with the U.S. effort in the fight on terror incurred a political penalty as a consequence, as the political difficulties of Prime Ministers Tony Blair and Jose Maria Aznar demonstrated;

3) Our abuses at Abu Ghraib, Guantanamo, and elsewhere perversely generated sympathy for the terrorists and eroded the international good will and political support that we had enjoyed after September 11; and

4) We lost the ability to draw the sharpest possible distinction between our adversaries and ourselves and to contrast our two antithetical ideals. By doing so, we compromised our ability to prosecute this aspect of the war – the war of ideas – from the position of full moral authority.

All of these factors contributed to the difficulties our nation has experienced in forging the strongest possible coalition in the fight on terror. But the damage to our national security also occurred not only at the strategic, but also at the operational and tactical military levels. Consider these following five points:

1) Senior U.S. officers have stated that the first and second identifiable causes of U.S. combat deaths in Iraq were, respectively, Abu Ghraib and Guantanamo, because of the effectiveness of these symbols in helping attract and field insurgent fighters into combat;

2) Some allied nations – including New Zealand -- refused to participate in combat operations with us out of fear that, in the process, they enemy combatants captured by their forces, but transferred to U.S. custody and abused by the U.S. could create war crime liability for New Zealand;

3) The U.K. limited intelligence sharing with the U.S. in instances when it was feared that the intelligence could prompt or be used in U.S. torture of detainees, thus potentially creating accomplice liability for the UK in the commission of war crimes;

4) Some allied nations (reportedly Australia) refused to train with us in joint detainee capture and handling operations, also because of concerns about U.S. detainee policies; and

5) Our policy of treating detainees harshly could

have stiffened our adversaries' resolve on the battlefield by inducing them to fight harder rather than surrender, and this too could have led to loss of American lives.

Looking back at our nation's adoption of the use of torture as a weapon of war, we can now see the Bush administration made five fundamental errors in attempting to fight terrorism without conforming to human rights values.

The first error consisted in failing to recognize that torture and other human rights violations were inimical to our national character, identity, and purpose, as John Kennedy and John McCain warned.

The second error lay in failing to adequately define what the core national interest was in the defense of our nation after 9/11. Throughout its tenure, the Bush administration identified that core national interest as that of "saving lives," with the prevention of further terrorist attacks being accorded the highest priority. This was not wrong, of course, and the administration cannot be faulted for this; the protection of lives is always a core responsibility of our state and all states. The mistake lay in not recognizing that the United States has two core national interests in the defense of the nation, not just one: We protect lives and we protect those values and individual rights that define our nation and ensure individual human dignity. These two objectives are of equal weight and importance and are pursued simultaneously. In practical terms, what this means is that the nation is prepared to risk lives, if need be, to protect our liberties. This is not new or novel. It has always been thus, as the War of Independence, the Civil War, World War II, and the Cold War demonstrates. What Vice President Cheney and his colleagues failed to recognize when they authorized torture and other illegalities is that they were damaging our nation in a fundamental way. American courage is meant to be deployed not only in protecting lives, but also in protecting our liberties.

The third Bush administration error consisted in not recognizing the truth in Albert Camus's observation (to paraphrase) that when fighting a war it is important not to employ weapons whose use would destroy what you're trying to protect.[18] This error is closely related to the second, the

[18] ALBERT CAMUS, ALGERIAN CHRONICLES (1958). In the book's preface, Camus states that while it is sometimes necessary to fight a war, the war must be justified in terms of values. "One must fight for one's truth while making sure not to kill that truth with the very arms employed to defend it…."

distinction being in that one can profess to be attempting to defend one's values and still unwittingly adopt methods that will be destructive of the very values one is trying to protect. The specific example of the weapon that Camus warns us of is torture.

The fourth mistake made by the Bush administration was to fail to recognize that U.S. did not have the power to unilaterally abrogate the settled international architecture of human rights, regardless of any claim of necessity, and that any attempt to do so would yield adverse consequences. Thus, it was illusory in the international context for the administration's to pretend that torture wasn't torture, or that the use of torture could be justified this time under allegedly exigent circumstances, or that other nations would not look to their own laws, not U.S. legal interpretations, in governing their relationship with American torture practices, or that these same nations would not conclude that they were precluded, as a matter of law and policy, from aiding and abetting what were transparently American war crimes. Other nations did not follow American leadership into the swamp of torture because they could not and, more importantly, would not.

And the fifth mistake is in failing to recognize the fundamental truth that the our long-term national strategic interest lies in helping foster a world that is less cruel, not more cruel, and that shares our vision of the importance of human dignity and of individual rights protected by the rule of law. Needless to say, the use and normalization of torture, a policy adopted by the Bush administration, would always be counterproductive from this standpoint.

The Trump administration, which stands on the shoulders of the Bush administration's security policies, is repeating the same mistakes, but in a more extensive, radical, and possibly damaging fashion. At home, the president threatens our liberties by attacking the freedom of the press, seeming to condone police brutality, disparaging our judges and judiciary, casting suspicion on refugees and immigrants, adopting policies that appear to target ethnic and religious minorities, and fostering a climate of fear, policies never countenanced by the Bush administration. These Trump actions and statements reveal, at best, a lack of understanding in the nature and value of our fundamental rights and for the law and, at worst, a dangerous lack of respect for them. They seem to have been motivated, in part, by the belief that they demonstrate toughness and help make us safer. In fact, they demonstrate a lack of understanding as to what

makes America great, what we should protect when we defend our country, and how we go about doing that.

Abroad, in addition to other aberrant actions, the president has communicated his disdain for human rights and has signaled that the U.S. would no longer seek to lead in this area or conduct our foreign policy consonant with foreign policy interest. He is not torturing, but has exhibited his support for torture and has suggested that international law and the laws of war should not bind U.S. military operations. He has signaled his preference for autocrats, such as Vladimir Putin, and a disdain for committed democrats, like Angela Merkel. He has disparaged NATO, the leading alliance of democratic states. He prioritizes a military approach to international problems while discounting diplomacy and, consistent with this tendency, is dismantling the State Department and AID. And he is pursuing a strategy he calls "America First", but which has been described as "America Only" or "America Alone" and has fostered widespread distrust of U.S. intentions, values, objectives, reliability, and credibility.

These are not the correct policies, either domestically or internationally. They don't represent who we are or who we wish to be. They will not make the U.S. a better country or the world a safer place. We should, instead, to heed the counsel of Senator McCain, who said: "We have made our way in this often dangerous and cruel world, not by just strictly pursuing our geopolitical interests, but by exemplifying our political values, and influencing other nations to embrace them."[19] And as to what those guiding values are, we can do not better than to turn to, again, President Kennedy, whose credo we should adopt as our own. He said, "I believe in human dignity as the source of national purpose, in human liberty as the source of national action, in the human heart as the source of national compassion…."[20]

Thank you all again for helping defend our country and our values.

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[19] McCain, *supra* note 5.

[20] President John F. Kennedy, Address accepting the Liberal Party's Nomination for President (Sept. 14, 1960), https://www.jfklibrary.org/archives/other-resources/john-f-kennedy-speeches/liberal-party-nomination-nyc-19600914.