What Went Wrong?:

Torture and the Office of Legal Counsel in the Bush Administration

Prepared Statement of

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About the Witness

Professor Robert F. Turner holds both professional and academic doctorates from the University of Virginia School of Law, where in 1981 he co-founded the Center for National Security Law. He has also served as the Charles H. Stockton Professor of International Law at the Naval War College and a Distinguished Lecturer at the U.S. Military Academy at West Point. In addition to teaching seminars on Advanced National Security Law at the law school, for several years he taught International Law, U.S. Foreign Policy, and seminars on the Vietnam War and Foreign Policy and the Law in what is now the Woodrow Wilson Department of Politics at Virginia.

His academic expertise is supplemented by many years of governmental service, including five years during the mid-1970s as national security adviser to Senator Robert P. Griffin with the Senate Foreign Relations Committee and subsequent Executive Branch service as Special Assistant to the Under Secretary of Defense for Policy, Counsel to the President's Intelligence Oversight Board at the White House, and Acting Assistant Secretary of State for Legislative and Intergovernmental Affairs in 1984-85. His last government service was as the first President of the U.S. Institute of Peace, which he left in 1987 to return to the University of Virginia.

A veteran of two voluntary tours of duty as an Army officer in Vietnam, Dr. Turner has spent much of his professional life studying the separation of national security powers under the Constitution. Senator John Tower wrote the foreword to his 1983 book *The War Powers Resolution: Its Implementation in Theory and Practice*; and former President Gerald Ford wrote the foreword to *Repealing the War Powers Resolution: Restoring the Rule of Law in U.S. Foreign Policy* (1991). Dr. Turner authored the separation-of-powers and war powers chapters of the 1400-page law school casebook, *National Security Law,* which he co-edits with Professor John Norton Moore. Turner's most comprehensive examination of these issues, *National Security and the Constitution,* has been accepted for publication as a trilogy by Carolina Academic Press and is based upon his 1700-page, 3000-footnote doctoral dissertation by the same name. On July 26, 2007, he co-authored a *Washington Post* op-ed (with former Marine Corps Commandant General P.X. Kelley) entitled "War Crimes and the White House" that was highly critical of an executive order authorizing extraordinary CIA interrogation techniques.

Professor Turner served for three terms as chairman of the prestigious ABA Standing Committee on Law and National Security in the late 1980s and early 1990s and for many years was editor of the ABA *National Security Law Report*. He has also chaired the Committee on Executive-Congressional Relations of the ABA Section of International Law and Practice and the National Security Law Subcommittee of the Federalist Society.

The views expressed herein are personal and should not be attributed to the Center or any other entity with which the witness is or has in the past been affiliated.

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MR. CHAIRMAN, it is a distinct honor to once again appear before a subcommittee of the Senate Committee of the Judiciary – all the more so given the strong representation of the University of Virginia at this morning's hearing.[1] I doubt you will recall it, but thirty-five years ago this month I believe we shared an Air Laos *Electra* aircraft on a flight from Vientiane, Laos, to Hong Kong in a rather severe storm. I was a Senate staff member and your very distinguished father, our Ambassador to Laos at the time, was on the flight with his teenaged son. We also overlapped two years at law school in Charlottesville. It is good to see you again.

Holding Wrongdoers Accountable is Generally Desirable

The question of holding wrongdoers accountable for "war crimes" is not a new one for me. When Saddam Hussein sent much of the Iraqi army into neighboring Kuwait on August 2, 1990, my colleague Professor John Norton Moore and I immediately sat down and penned an op-ed that was ultimately published[2] in the *International Herald Tribune* under the title "Apply the Rule of Law."[3] I have been assured by several experts in the field – including Professors Michael Scharpf of Case Western University and Michael Newton of Vanderbilt – that this was the first public call for a war crimes trial for Saddam. In August of the following year, as chairman of the American Bar Association's Standing Committee on Law and National Security, I wrote the first

[1] The University of Virginia School of Law takes great pride in having more of our alumni serving in the Senate than those of any other law school. Although in the past two elections we lost Senators John Warner and George Allen, we still have six alumni in the Senate. In addition to Chairman Whitehouse, currently serving senators who are graduates of the University of Virginia School of Law include Senator Edward Kennedy, Senator Kit Bond, Senator Evan Bayh (my friend and classmate), Senator John Cornyn, and Senator Bill Nelson. I am pleased as well to see my old friend Dr. Jeffrey Addicott (who received his SJD from our Law School) and more recent friend Dr. Philip Zelikow (who teaches in the UVA History Department) also on this morning's panel.

[2] We initially submitted the article to the *New York Times*, which delayed publication several weeks.

[3] John Norton Moore & Robert F. Turner, *Apply the Rule of Law*, INT'L HERALD TRIB., Sept. 12, 1990.

resolution and report endorsing a war crimes trial ever approved by the ABA House of Delegates. It was approved without a single voice of opposition. I also worked with both houses of Congress to get unanimous resolutions approved endorsing the idea of such a trial, and in this process I served at the request of Chairman Tom Lantos as informal counsel to the Congressional Human Rights Caucus during a hearing on the issue.

Even earlier, in 1986, it was my great honor to be selected as the first President of the United States Institute of Peace, which was established by Congress to study and promote the peaceful resolution of international conflicts. Professor Moore served as the first Chairman of the Board. We both became interested in the role of incentive structures in the deterrence of international aggression, and in 1995 we began co-teaching a seminar at the Law School on "War and Peace: New Thinking About the Causes of War and War Avoidance." In 2004, John published a landmark book entitled *Solving the War Puzzle*[4] that has been favorably compared with the writings of Clausewitz in its importance.[5]

Put simply, *incentives matter* – and if we want to discourage armed international aggression, war crimes, and other undesirable behavior we must attach costs to such conduct so that rational decision-makers will make other choices. This is one of the reasons that I have long defended the legality of intentionally targeting regime elites who have committed armed international aggression.[6]

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[4] JOHN NORTON MOORE, SOLVING THE WAR PUZZLE: BEYOND THE DEMOCRATIC PEACE (2004).

[5] James P. Terry, Book Review, 58(2) NAVAL WAR COLLEGE REV. 149 (Spring 2005), ("*Solving the War Puzzle* may be the most insightful and important examination of the causes of war since Clausewitz published *On War* in 1832.")

[6] Lest I be misunderstood, I have not defended something I believe not to be lawful because I like the policy implications of the act. But I have chosen to spend the time to explain why it is lawful because I believe it sends a useful message to aspiring aggressors. *See, e.g.,* Robert F. Turner, *Killing Saddam: Would It Be a Crime?*, WASH. POST, Oct. 7, 1990 at D1; and Robert F. Turner, In Self-Defense, U.S. Has Right to Kill Terrorist bin Laden, USA Today, Oct. 26, 1998, at 17A.

In principle I'm a big believer in holding wrongdoers accountable. I think the decision to authorize waterboarding in the current conflict was a tremendous blunder that was clearly contrary to our treaty obligations and has contributed to seriously undermining the coalition against al Qaeda and its allies. Indeed, in July 2007, I co-authored a powerful indictment of an Executive order approving non-traditional CIA interrogation techniques in the *Washington Post* entitled "War Crimes and the White House"[7] that, according to the *Post's* Web site, was the most frequently e-mailed article in the *Post* for nearly twenty-four hours. Late last year, I had the honor of serving on a drafting committee to prepare a new Executive order banning torture and other acts of detainee abuse under the auspices of the Center for Victims of Torture. Nevertheless, I am opposed to either a "truth commission" inquiry or the prosecution of those involved at any level in this tragic decision. Let me explain some of the reasons why.

Good People Sometimes Make Horrible Mistakes: A Parallel

I submit there is a useful parallel to the issue before us that occurred on February 19, 1942, when President Franklin D. Roosevelt signed Executive Order 9066 authorizing the apprehension and detention in "War Relocation Camps" of well over 100,000 people living lawfully and peacefully in this country. More than sixty percent of those detained were U.S. citizens, and many of them had never even *visited* Japan – their only "crime" being that they were descendants of people who had once lived in Japan.

Sadly, some of the most famous civil libertarians of the twentieth century approved this horrendous abuse of the rights of innocent American citizens. In addition to President Roosevelt, California Attorney General (and later Supreme Court Chief Justice) Earl Warren argued strongly for the detention, and Justice Hugo Black wrote the majority

[7] P.X. Kelley & Robert F. Turner, *War Crimes and the White House*, WASH. POST, July 26, 2007, at A21.

opinion for the Supreme Court in the *Korematsu* case upholding the detention.[8] It was not until 1988, when former California Governor Ronald Reagan was president, that Senator Alan Simpson took the lead in this chamber in enacting legislation to formally apologize to the victims of that policy, which had been broadly supported within the government at the time. Ironically given the way in which he is perceived by many today, one of the most determined critics of the incarceration was Federal Bureau of Investigation Director J. Edgar Hoover. Hoover wrote to Attorney General Biddle that "Every complaint in this regard has been investigated, but in no case has any information been obtained which would substantiate the allegation," and argued it would be unconstitutional to detain American citizens without probable cause and due process in any event.[9]

To the best of my knowledge, when World War II ended, the Senate Judiciary Committee did not hold a "What Went Wrong?" hearing investigating those horrible decisions – not even when Republican Dwight Eisenhower became president and the Republicans briefly controlled both chambers of Congress. Surely by 1953, in hindsight, many Americans realized that a terrible wrong had been done to our fellow citizens. But most had the common sense to realize that good people had made a horrible decision because they honestly believed that a failure to act might cost a large number of American lives. It is true that they didn't violate the Geneva Conventions (which in their current form had not yet been written), but they clearly violated the U.S. Constitution – and surely no one will deny that their decision to incarcerate more than 100,000 Americans without the slightest probable cause or individualized suspicion was a greater offense than what was done to a small number of foreign terrorists following 9/11.

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[8] *Korematsu v. United States,* 323 U.S. 214 (1944).

[9] For an excellent discussion of Hoover's views and actions, see GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 293 (2004). *See also* CONRAD BLACK, FRANKLIN DELANO ROOSEVELT: CHAMPION OF FREEDOM 721 (2003).

Those who planned, authorized, and carried out the detention policies acted out of *fear*, and their motive was not cruelty or evil minds, but rather a sincere belief that subjecting more than 100,000 "U.S. persons" (to use the modern vernacular) to temporary detention was a lesser moral evil than permitting a small number of possible saboteurs within their ranks to engage in terrorist attacks or otherwise undermine the war effort that might ultimately jeopardize the freedom of all Americans.

It is easy to forget that less than three months before the decision to incarcerate Americans of Japanese ancestry was made, the Japanese Navy had sunk a good part of our Pacific Fleet, and it was far from clear that we were going to emerge from the war victorious. People were afraid – very afraid – and those entrusted with the national security were particularly anxious to do everything reasonably possible within their powers to protect the lives and freedom of the American people. Their motives were admirable and honorable; the decision they made was neither.

And I submit the same is true of the OLC lawyers who are under fire this morning. The only one that I know personally is Professor John Yoo, with whom I have shared a few panels at law schools and legal conferences since 9/11. I doubt I've ever spent more than two or three minutes in conversation with him, and I've written one law review article that was more than a little critical of one of his books.[10] But my strong sense is he is an exceptionally able legal scholar and an honorable man of principle. And I have no reason to believe the other lawyers involved in drafting and approving these memoranda were otherwise.

Did they provide perfectly balanced, objective, sterile legal opinions – or is it likely they very much wanted to reach a particular outcome and they let their interest in that outcome color their scholarship? I don't know. But my strong guess is that they were not in the

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[10] *See* Robert F. Turner, *An Insider's Look at the War on Terrorism*, 93 CORNELL L. REV. 471 (2008).

least neutral or objective in their approach to these issues. They were dedicated patriots who dearly loved this country, watched the horrors of the 9/11 attacks replay on television time and again, and felt very strongly that the United States ought to do everything reasonably possible and appropriate to prevent future such attacks. That is to say, their mindset was probably very much like that of FDR, Earl Warren, and Hugo Black in the aftermath of Pearl Harbor (which actually claimed fewer lives than the 9/11 attacks).

As I stated, I don't know most of the individuals who worked at OLC when these memoranda were written at all, and the one I do know I don't know well. I am therefore a bit reticent to speculate about their motives. But my guess is they did want to reach a certain outcome – one that would allow America to get the intelligence information they felt necessary to reduce the chances of another 9/11 attack or an even greater slaughter of their fellow citizens by a fanatical enemy that had repeatedly proven itself unwilling to abide by the most fundamental principles of civilized behavior. And, as I will discuss, I doubt seriously they understood at the time that some of their recommendations were contrary to America's domestic law or our obligations under international law.

The Importance of Good Intelligence in the Struggle Against Al Qaeda

This is an unusual if not unique armed conflict. From the American Revolution through both World Wars to Operation Desert Storm, intelligence has throughout our history been an important element in the struggle for victory. Through intelligence sources and methods we learn the enemy's locations and intentions, and then we call upon our own military establishment – our infantry, armor, naval vessels and aircraft – to close with and destroy that enemy. But in the struggle against al Qaeda, intelligence is by far the single most important factor in achieving victory and preventing attacks. One day, if we don't prevail in this struggle, al Qaeda may be armed with biological toxins or primitive nuclear or radiological weapons. But at present they have no tanks, no warships, and no

airplanes. If our intelligence assets can locate them, a big city police force could either destroy them or apprehend them for trial.

The importance of the intelligence function in this conflict was no secret, and when the CIA—to its credit—sought legal guidance on the limits to which they could subject captured high-value enemy leaders in their quest for actionable intelligence, the lawyers charged with responding almost certainly knew that their answers might affect whether hundreds, thousands, or even tens of thousands of their fellow Americans might live or die in future al Qaeda terrorist attacks.

Had they advocated incarcerating tens of thousands of American Muslims in "War Relocation Camps," or authorized beheadings, branding, maiming, severe beatings, or other traditional techniques of "torture" – many used regularly by our enemies in this conflict – I hope and assume that all Americans would have voiced their disgust. Had I been on Lieutenant William Calley's Courts Martial board following My Lai, I would have favored the death penalty. That same year I was a reconnaissance platoon leader in an Army infantry unit, and indeed I was responsible for training my men (which in those days they all were) about our obligations under the Geneva POW Convention. We knew the rules, and they didn't include waterboarding.

But like virtually every other national security lawyer, after the 9/11 attacks I told everyone who asked that the protections of the Geneva Conventions did not apply to al Qaeda. Like pirates and slave-traders, international terrorists were *hostis humani generis* (common enemies of mankind). But I also would usually note that, once apprehended, even pirates were entitled to humane treatment and fundamental international standards of due process of law.

It is interesting to note the detail in which some of the authorized "enhanced" interrogation procedures were spelled out – exactly how a slap could be administered, how long a detainee could be exposed to cold water of a certain temperature, and the like. Even for the interrogations of Abu Zubaydah – believed by the CIA to be "one of the highest ranking members of the al Qaeda organization"[11] – interrogations were to be monitored by medical experts,[12] "facial slaps" were not to be used "to inflict physical pain that is severe or lasting,"[13] and "a rolled hood or towel" had to be used "to help prevent whiplash" if Zubaydah was to be pushed against a wall.[14]

These detailed restrictions strongly suggest that the authors of these instructions were trying very hard to walk the difficult line between what Judge Gonzales recently admitted were "harsh" interrogations intended to elicit actionable intelligence that might save lives, on the one hand, and prohibited "torture" on the other. (I don't think they realized that the proper legal standard here was not "torture" but the humane treatment requirements of Common Article 3.) Let me make it clear – I believe that waterboarding crosses the line and is "torture" by any reasonable interpretation – but as a close colleague who has been outraged by these activities has put it, it is "torture lite." Clearly, the officials who wrote these memoranda were trying to draw an admittedly difficult bright line and prohibit acts they felt were clearly across that line. These were not memos that intentionally advocated "torture" in my judgment – they simply got the answer tragically wrong.

I personally am very fond of the Army's "Golden Rule" for interrogation: If you would be offended to learn our enemies were treating our POWs in this manner, don't do it to

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[11] Memorandum from Jay S. Bybee, Assistant Attorney General, Dep't of Justice, to John Rizzo, Acting General Counsel, Central Intelligence Agency, Interrogation of al Qaeda Operative (Aug. 1, 2002), at 1.

[12] *Id*. at 4.

[13] *Id*. at 2.

[14] *Id*.

them. I must confess that I have not greatly focused on the precise meaning of "torture," because in my view Common Article 3 requires us to treat all detainees "humanely" – a much higher standard.

By far the most extreme measure approved was waterboarding. Until recently I had the impression that large numbers of al Qaeda suspects had been waterboarded by the CIA. But, according to the recently released once top-secret OLC memos, waterboarding was used on only three individuals – Khalid Sheikh Mohammed, Zubaydah, and 'Abd Al-Rahim Al-Nashiri – and the practice was ended in March 2003.[15] An OLC memorandum of May 10, 2005, noted:

> You have previously explained that the waterboard technique would be used only if: (1) the CIA has credible intelligence that a terrorist attack is imminent; (2) there are "substantial and credible indicators the subject has actionable intelligence that can prevent, disrupt or delay this attack"; and (3) other interrogation methods have failed or are unlikely to yield actionable intelligence in time to prevent the attack.

This doesn't sound too far off from the "ticking bomb" scenario that Professor Alan Dershowitz argued might justify resorting to torture.[16] I am not defending it. I think it was wrong, and the resulting publicity has done very serious harm to our national security by costing us public support both within the United States and among people of

[15] Memorandum from Steven G. Bradbury, Assistant Attorney General, Dep't of Justice, to John Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees (May 30, 2005), at 6.

[16] *See* Alan M. Dershowitz, "Want to torture? Get a warrant," *San Francisco Chronicle* January 22, 2002.

good will around the world. But I have no reason to doubt the assertions by those in the know who say it probably saved American lives.

The fact that I believe the use of waterboarding was a tragic mistake does not mean I don't understand how a reasonable person might conclude that such conduct was morally justified as the lesser evil. If confronted with a moral hypothetical requiring one to either kill a known wrongdoer whom one is convinced is about to murder hundreds or thousands of innocent people, or to sit quietly and watch the resulting slaughter unfold, no mater how many times I try I can't come down on the side of preserving the wrongdoer's rights.

Under American law, depending upon the specific facts, such an act might well be found totally justified under the doctrine of self-defense/defense of others. But even if one were certain that preventing the slaughter would be breaching the law, moral principles might counsel violating the law.

In a September 20, 1810, letter to John Colvin, Thomas Jefferson observed:

> A strict observance of the written laws is doubtless one of the highest duties of a good citizen, but it is not *the highest*. The laws of necessity, of self-preservation, of saving the country when in danger are of higher obligation. To lose our country by a scrupulous adherence to written laws, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.[17]

Candidly, I don't think we are there yet. We didn't have to resort to torturing POWs during World War II, and I don't sense the al Qaeda threat to be even close to that level of threat. But a Gallup Poll conducted within the past month reports that by a margin of

[17] *Jefferson to Colvin,* Sept. 20, 1810, *reprinted in* 11 WRITINGS OF THOMAS JEFFERSON 146 (Paul Leicester Ford ed., Fed. Ed. 1905).

fifty-five to thirty-six percent – and an even larger split of sixty-one to thirty-seven percent among those polled who claimed to have followed the story closely – the American people believe the harsh interrogation techniques were justified.[18] My guess is that had we experienced more terrorist attacks within the United States in recent years, those figures in support of enhanced interrogation techniques would be much larger.

However, when one steps back from trying to balance the relative evils of killing (or torturing) one terrorist leader versus permitting that terrorist to detonate a weapon of mass destruction in a major American city, and looks at the big picture, the benefits of breaking the law to eliminate the terrorist are less compelling. Among other considerations, it is imperative for a democracy to maintain the moral high ground if it wishes to maintain the support of its people. Foreign governments we traditionally consider among our strongest allies have reportedly instructed their intelligence services not to cooperate with U.S. intelligence agencies in several key areas because of outrage over waterboarding and allegations of misconduct. America's ability to pressure Iran and North Korea to comply with their legal obligations has also suffered with perceptions that we have violated our own obligations. And it is likely that American POWs in future armed conflicts will pay an extra price as our enemies rely upon our own behavior and public statements about the scope of the Geneva Conventions.

Put simply, I think we erred horribly on this issue. The mistakes have made me at times very angry. Yet, even in my anger, as I look at these decisions I don't see evil people at OLC, in the uniformed military, or at CIA. I see good and able people who in my view made mistakes.

[18] Jeffrey M. Jones, Slim Majority Wants Bush-Era Interrogations Investigated: Majority Says Use of Harsh Techniques on Terrorism Suspects Was Justified (Apr. 27, 2009), http://www.gallup.com/poll/118006/Slim-Majority-Wants-Bush-Era-Interrogations-Investigated.aspx.

What Went Wrong?

Mr. Chairman, the title of this morning's hearing is "What went wrong?" – how could some obviously very able and honorable lawyers approve the use of waterboarding against defenseless human beings held in United States custody? I think the short answer is a simple one – a tragic ignorance about the important field of "national security law" among most lawyers trained before at least 1991. I may have been the first individual to enter an American law school for the express purpose of studying "law and national security" (as national security law was then known at the one law school in the Nation where it was taught – the University of Virginia School of Law). I had worked as the national security adviser to a member of the Senate Foreign Relations Committee for five years, and during that time I had frequently encountered issues of constitutional and international law that I did not feel competent to address. I had studied aspects of treaty law and the separation of powers between Congress and the Executive at considerable length on my own by reading treatises, law review articles, and getting to know some of the preeminent legal scholars that appeared before our Committee. (I am especially indebted to Professor Myres McDougal at Yale, who became a cherished friend for decades; and to Richard Baxter at Harvard and William Bishop at the University of Michigan School of Law – both of whom proved patient and willing to assist me in my independent studies.) Indeed, I take great pride in the fact that, seven years before the Supreme Court struck down "legislative vetoes" as unconstitutional, I wrote a lengthy floor statement for Senator Griffin making the same point for the same reasons.[19] I had first become interested in these issues listening to a lecture by the great Professor Quincy Wright in 1966, and by the time I actually entered law school I was already a pretty good national security lawyer on some issues.

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[19] The statement appears in the *Congressional Record* of June 11, 1976, from page 17,643 to 17,646, and can be found on line at: http://www.virginia.edu/cnsl/pdf/Griffin-Congressional-Record_6-11-1976.pdf .

But, at that time, Virginia was the only law school in America even offering a course in national security law, which was first taught by my colleague John Norton Moore in 1969 under the title "International Law II – Law and National Security." When I graduated, John and I co-founded the Center for National Security Law in order to promote interdisciplinary advanced scholarship in the field. Our first major project was to prepare a major law school casebook on *National Security Law*,[20] which in its most recent (2005) edition is more than 1400 pages long. In 1991, we began teaching a National Security Law Institute each summer to help train law professors to teach in this rapidly growing field, and today national security law is taught at most American law schools. But most such courses began in response to the 9/11 attacks and were probably not available for most of the lawyers working at OLC during the Bush Administration, and my guess is that none of the lawyers who helped write or signed the so-called "torture memos" that have recently been released had any significant knowledge of Common Article 3 of the 1949 Geneva Conventions prior to the attacks of September 11, 2001.

This general lack of understanding of *jus in bello* and other aspects of national security law has caused a great deal of confusion and helped divide our country over the past eight years. Some very able lawyers, trained to believe that if the government detains a citizen it must charge that individual with a crime and take the evidence to federal court, simply assumed that the last administration was betraying the most fundamental principles of due process – totally oblivious to the firmly-established international law norm that enemy combatants captured during armed conflict may be detained (under humane conditions) for the duration of hostilities. During World War II, more than 400,000 German POWs were detained at POW camps spread across more than forty American states. And as for the hated idea of "military commissions," Article 84 of the POW Convention sets forth the general rule that "A prisoner of war shall be tried only by a military court . . . ." This is not the time to start a major debate about the President's

[20] JOHN NORTON MOORE & ROBERT F. TURNER, NATIONAL SECURITY LAW (2d. ed. 2005).

independent constitutional power to authorize warrantless foreign intelligence surveillance, but Congress itself acknowledged that power when it enacted the first wiretap statute and every appellate court to decide the issue has affirmed such a power.[21] I think there would have been a lot less criticism of the previous administration had more Americans understood national security law.

Common Article 3 – Did It Really Apply?

On the morning of June 29, 2006, I was making a presentation at the Naval War College during which I argued that, while the general provisions of the Third 1949 Geneva Convention (the POW Convention) did not apply in the struggle against al Qaeda, we were nevertheless constrained by Common Article 3 of those conventions to treat all detainees "humanely." [22] After my talk was over I learned the Supreme Court had just

[21] This is an issue I have addressed at great length both before this Committee and its counterpart in the House of Representatives. *See, e.g., Congress, Too, Must "Obey the Law": Why FISA Must Yield to the President's Independent Constitutional Power to Authorize the Collection of Foreign Intelligence: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Robert F. Turner), *available at* http://www.virginia.edu/cnsl/pdf/TURNER-SJC-28Feb06 FINAL.pdf; *Is Congress the Real "Lawbreaker?": Reconciling FISA with the Constitution: Hearing Before the H. Comm. on the Judiciary,* 110th Cong. (2007) (statement of Robert F. Turner), *available at* http://www.virginia.edu/cnsl/pdf/Turner-HJC-5Sept07-(final).pdf.

[22] Common Article 3 provides:

> ***Article 3***
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> In the case of *armed conflict not of an international character occurring in the territory of one of the High Contracting Parties*, each party to the conflict shall be bound to apply, as a minimum, the following provisions:
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> 1. *Persons taking no active part in the hostilities, including members of armed forces* who have laid down their arms and those *placed hors de combat by* sickness, wounds, *detention*, or any other cause, *shall in all circumstances be treated humanely*, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel

handed down its opinion in *Hamdan v. Rumsfeld*, in which it declared: "[T]here is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not between signatories[:] Common Article 3 [which] appears in all four Conventions . . . ."[23]

But it is important to understand that, before the Supreme Court resolved the issue, not everyone was in agreement that Common Article 3 applied to this struggle. Under international law, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[24] There is obvious ambiguity in the first sentence of Common Article 3, which reads: "In the case of armed conflict not of an international character

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> treatment and *torture*;
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> (b) Taking of hostages;
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> (c) Outrages upon personal dignity, in particular, *humiliating and degrading treatment*;
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> (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
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> 2. The wounded and sick shall be collected and cared for.
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> An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
>
> The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
>
> The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

See, e.g., Geneva Convention Relative to the Treatment of Prisoners of War art, 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 135 (emphasis added).

[23] *Hamdan v. Rumsfeld*, 548 U.S. 557, 562 (2006).

[24] Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331. The U.S. is not a party to this treaty but considers the quoted portion to be declaratory of customary international law.

occurring in the territory of one of the High Contracting Parties . . . ." Was the struggle against al Qaeda (the "Global War on Terrorism"), that had something like seventy-five sovereign States (all Parties to the Geneva Conventions) participating in one form or another, an "armed conflict not of an international character," or was it an international conflict? Keep in mind that Senate Joint Resolution 23, overwhelmingly approved by this body on September 14, 2001 and later signed into law, clearly authorized an "international" conflict by empowering the President to use force against other "nations." Section 2 provided:

> **Section 2 - Authorization For Use of United States Armed Forces**
> (a) IN GENERAL- That the President is authorized to use all necessary and appropriate force against those *nations*, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[25]

Nor can it be said that the struggle against al Qaeda was clearly "occurring in the territory of *one* of the High Contracting Parties" (my emphasis), as al Qaeda had attacked the United States in our own country, in Tanzania and Kenya by bombing our embassies in 1998, in Saudi Arabia (Khobar Towers bombing), and in Yemen (*U.S.S. Cole*). Other attacks have occurred in Europe and elsewhere. Obviously, "occurring in the territory of one of the High Contracting Parties" could merely be a jurisdictional clause making it clear that the Geneva Conventions did not pretend to establish legal rules for conflicts entirely between non-Parties to the treaties, but it could equally as easily be interpreted as excluding from the coverage of Common Article 3 armed conflicts involving more than one state Party to the Conventions.

[25] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (emphasis added).

It was my pleasure to testify on these issues before the Senate Select Committee on Intelligence in September 2007, and at that time I noted that the *travaux préparatoires* (preparatory works or negotiating history) of Common Article 3 clearly reveal that it was originally designed to deal with "civil wars" or "rebellions" within the territory of a single state. [26] Indeed, it is clear that well after the Conventions had entered into force prominent legal scholars continued to view Common Article 3 as a set of minimal guarantees for civil wars and rebellions within a single state. With the permission of the Committee, I will append a portion of my prepared statement for the Senate Select Committee on Intelligence at the end of this testimony for those who might wish a more detailed discussion of Common Article 3.

My conclusion is that, because the struggle against al Qaeda and its allies does not clearly involve sovereign states openly taking part on both sides, the Supreme Court in *Hamdan* got it right – and this is the view of most *jus in bello* specialists with whom I have spoken. I would note that the majority view of the specialists with whom I have communicated is that a violation of Common Article 3 is not a "grave breach" of the Conventions and thus technically not a "war crime." That was not my own interpretation of the Conventions, but it was supported by a strong majority of experts with whom I communicated in this country and abroad. As a technical matter, however, for purposes of U.S. law that is clearly not the rule. For the War Crimes Act of 1996 includes within its definition of "war crimes" any conduct "(3) which constitutes a grave breach of common Article 3 . . . ."[27]

[26] A copy of my prepared statement is available on line at: http://www.virginia.edu/cnsl/pdf/Turner-SSCI-testimony-9-25-07.pdf .

[27] War Crimes Act of 1996, 18 U.S.C. § 2441, *available at* http://www.law.cornell.edu/uscode/18/usc_sec_18_00002441----000-.html .

Why Not a Truth Commission?

In some ways having a national inquiry into what really happened in connection with these enhanced interrogation techniques is appealing. If we could get Lee Hamilton, George Mitchell, Howard Baker, Larry Eagleburger, Jim Schlesinger, and the like to take on the task independent of outside pressures, we might even learn what Speaker Pelosi knew and when she knew it.

But my guess is we would instead wind up with more partisan commissioners, or even something like the 1975-76 Church Committee that investigated intelligence abuses in a very partisan and sensational manner – in the process doing serious damage to our national security and our Intelligence Community that continues to haunt us today. As a Senate staff member at the time I sat through some of those hearings, as senators of both parties competed to see who could make the front pages of the next day's newspapers with the more sensational allegations. (In the end, I would note, the Church Committee admitted that it has been unable to find a single instance in which the CIA had "assassinated" anyone; and Directors of Central Intelligence Richard Helms and William Colby had each issued internal CIA regulations prohibiting any involvement with assassination years before the Church hearings began.) Last month, a former Commandant of the Marine Corps and a former supervisor of FBI counter-terrorism activities joined me in signing an op-ed that opposed the idea of a "truth commission."[28] We are still engaged in a dangerous war, and President Obama is right when he says we ought to move forward.

Should We Prosecute Anyone?

Nor do I believe it would be useful to bring criminal charges against CIA or military interrogators who carried out their orders and were told the Attorney General had

[28] P.X. Kelley, Oliver Revell & Robert F. Turner, *"Truth Commission" Duplicity*, WASH. TIMES, Mar. 3, 2009.

determined that these techniques were lawful. Indeed, I can think of few steps more calculated to impose a chilling effect on those who go into harm's way on our behalf. If interrogators who in good faith engaged in rough treatment of detained enemy combatants are subjected to criminal trials upon the election of a president from a different political party, what message are we sending to the young infantrymen we train and then send out to kill and perhaps die for us? If shoving and slapping a terrorist leader is impermissible even when the orders come from the very top, what soldier is likely to risk killing an enemy soldier without at least a court order? Who knows? Perhaps the angry looking man carrying the AK-47 across the battlefield was actually just heading over to the local rod and gun club for a turkey shoot. Without federal judges on the scene to review the evidence and determine the existence of probable cause, only a fool will actually try to engage the enemy. Mistakes were in my view clearly made by some very able and honorable individuals who, in their quest to save American lives, drew the line in the wrong place. If we now punish them for giving too much attention to trying to protect American lives, they will be unlikely to miss the lesson.

Some agree we ought not go after the small fish, but rather the lawyers like John Yoo, Jay Bybee, and David Addington; or even go for bigger game like Secretary Rumsfeld, Vice President Cheney, and President Bush. But I don't see evidence that the lawyers lied – at worst they tried too hard to prevent another 9/11. As for Bush, Cheney, and Rumsfeld – as non-lawyers they presumably followed the advice of the lawyers around them. These were not simple issues, and few of the lawyers involved fully understood them well. We should learn from our mistakes, but having show trials of people from the previous administration is not going to solve our problems.

Indeed, that was tried in 1977 when the Carter Justice Department decided it should make examples of two senior FBI officials named Mark Felt and Edward Miller.[29] They had

[29] Felt, of course, was later unmasked as "Deep Throat."

authorized counter-terrorism FBI agents to cross the line in trying to prevent a major terrorist attack by members of the Weather Underground. Both were convicted at great personal expense. The message was not lost, and for years thereafter it was almost impossible to get FBI agents to volunteer for counter-terrorism/counter-intelligence duty. Years later, Griffin Bell declared that his biggest mistake as the nation's Attorney General during the Carter Administration was in approving those prosecutions.

Candidly, another reason for not prosecuting those involved in this matter is that the odds of getting a conviction are very slim. I've already noted that the latest Gallup Poll shows that roughly two-thirds of those polled approve of the use of enhanced interrogation techniques. When a jury hears testimony that the motive for these techniques was to save American lives during wartime, and the only people waterboarded were the three most senior al Qaeda terrorists in U.S. custody, the odds of finding a jury of twelve Americans willing to convict anyone involved in this matter are extremely slim.

Mr. Chairman, this concludes my prepared statement. I will be delighted to take questions at the appropriate time.

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APPENDIX

Excerpts from Professor Turner's September 25, 2007, Prepared Statement to the Senate Select Committee on Intelligence[30]

. . . .

A Brief History of *Jus in Bello* and Common Article 3

The "law of war"[31] (today often referred to as the "law of armed conflict" or LOAC) has developed over centuries as States began in their own self-interest to find ways to mitigate the horrors of war. The first multinational treaty dealing with these issues was the 1856 Declaration of Paris, which among other things outlawed privateers and ultimately made the power of Congress to "grant Letters of Marque and Reprisal"[32] an anachronism.

American specialists in this field take pride in the fact that the first effort to codify the customary rules of warfare was in this country during the Civil War. General order No. 100, entitled "Instructions for the Government of Armies of the United States in the Field" and written by former Columbia University legal scholar Francis Lieber, was issued by President Abraham Lincoln in 1863. The "Lieber Code" is still cited today for its landmark effort to collect in one place the customary law of war.

The first Geneva Convention dealing with humanitarian principles of armed conflict was concluded in 1864. It provided that members of armed forces during war who

[30] The full text of this statement is available on line at: http://www.virginia.edu/cnsl/pdf/Turner-SSCI-testimony-9-25-07.pdf .

[31] For a good overview of the history and modern law of armed conflict, see generally Howard S. Levie & Jack Grunawalt, *The Law of War and Neutrality*, in NATIONAL SECURITY LAW (John Norton Moore & Robert F. Turner, eds. 2d ed. 2005).

[32] U.S. CONST., Art. I, Sec. 8, cl. 11.

were wounded, sick, or "harmless" were to be respected and cared for. By 1867, all of the great powers except the United States had ratified it, and we did in 1882. Another Geneva Convention followed in 1906.

Historically, conflicts within a single State – armed revolutions or civil wars – were viewed as outside the scope of the law of nations. Indeed, even inquiring about how a sovereign State treated its own nationals was viewed as wrongful interference in that State's internal affairs. However, in 1756, Emerich de Vattel wrote in *The Law of Nations* that parties to a civil war had a duty to observe the established customs of war.[33] In 1912 the International Committee of the Red Cross (ICRC) sought to interest States in a draft convention on the role of the Red Cross in civil wars and insurrections, but there was no interest.

The first convention to provide humane treatment for prisoners of war came in 1929 but was limited to international armed conflicts. In 1938, at the Sixteenth International Red Cross Conference, a resolution was passed urging the application of the "essential principles" of the Geneva Convention to "civil wars."[34]

The horrors of World War II led to demands for a new multilateral treaty regime. At a preliminary Conference of National Red Cross Societies in 1946, the ICRC recommended that "in the event of civil war in a country, the parties should be invited to state that they were prepared to apply the principles of the Convention on a basis of reciprocity." The conference went even further, and recommended inserting a new article at the beginning of the Convention to the effect that: "In the case of armed conflict within the borders of a State, the Convention shall also be applied by each of the adverse parties, unless one of them announces expressly its intention to the contrary."[35] In 1947, the ICRC convened a Conference of Government Experts that drafted an article providing that "the principles of the Convention" were to be applied in civil wars by contracting parties "provided the adverse Party did the same."[36]

This principle of "reciprocity" was a key element in international law, as nations

[33] G. I. A. D. Draper, *Humanitarian Law and Internal Armed Conflicts*, 13 GA. J. INT'L & COMP. L. 253, 256-57 (1983).

[34] Much of this historical material can be found in 1 JEAN S. PICTET, COMMENTARY ON THE GENEVA CONVENTIONS 39-43 (1952).

[35] *Id*. at 41-42.

[36] *Id*. at 42.

agreed to surrender rights in return for assurances that their treaty partners would obey the same constraints. If one country abused prisoners of war, its adversary in the conflict would reciprocate – in the process providing an incentive for the first violator to adjust its behavior in order to protect its own soldiers from abuse. Indeed, Thomas Jefferson – an early champion of the humane treatment of prisoners of war[37] – argued that engaging in reprisals in response to mistreatment of prisoners of war was the most humane approach,[38] as it would promote compliance with the law by both sides. As international humanitarian and human rights law rapidly developed in the years following World War II and the birth of the United Nations, a different view emerged asserting that no State had a "right" to engage in torture or inhumane treatment in the first place, so no derogation should be permitted from these rules. This is logically true, but it undermines the incentives by which much of international law is routinely enforced.

Pictet asserts that the reciprocity clause was ultimately omitted because "doubt was expressed as to whether insurgents could be legally bound by a convention which they had not themselves signed.[39] If the insurgents claimed to be the lawful government of the country, they would then be bound by the country's treaties. Besides, there was no harm to the *de jure* government, "for no Government can possibly claim that it is *entitled* to make use of torture and other inhumane acts prohibited by the Convention, as a means of combating its enemies."[40]

The ICRC drafted a new article for submission to the 17th International Red Cross Conference in Stockholm, which read in part:

> In all cases of armed conflict which are *not of an international character,* especially cases of civil war, colonial conflicts, or wars of religion, which may occur *in the territory of one or more of the High Contracting parties*, the implementing of the principles of the present Convention shall be obligatory on each of the adversaries.[41]

This was the first time the idea of extending what became Common Article 3 beyond "civil wars" was suggested. But the language "especially in cases of civil war, colonial conflicts, or wars of religion" was objected to and omitted by conference

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[37] *See, e.g., Jefferson to William Phillips,* July 22, 1779, in 3 PAPERS OF THOMAS JEFFERSON 44 (Julian P. Boyd, ed., 1951).

[38] "When a uniform exercise of kindness to prisoners on our part has been returned by as uniform severity on the part of our enemies, you must excuse me for saying it is high time, by other lessons, to teach respect to the dictates of humanity; in such a case, retaliation becomes an act of benevolence." *Id*. at 45-46.

[39] 1 PICTET, *supra* note 34, at 51.

[40] *Id*. at 52.

[41] *Id*. at 42-43 (emphasis added).

delegates, as were the words "or more."

Pictet asserts that this deletion had the effect of enlarging the scope of the provision,[42] which is a reasonable but hardly the only reasonable interpretation. He notes that the principal objections to the Stockholm draft involved concerns that "it would cover in advance all forms of insurrection, rebellion, anarchy, and the break-up of States, and even plain brigandage."[43] In response, he notes:

> Others argued that the behaviour of the insurgents in the field would show whether they were in fact mere brigands, or, on the contrary, genuine soldiers deserving of the benefit of the Conventions. Again, it was pointed out that the inclusion of the reciprocity clause in all four Conventions . . . would be sufficient to allay the apprehensions of the opponents of the Stockholm proposals. It was not possible to talk of "terrorism", "anarchy" or "disorders" in the case of rebels who complied with humanitarian principles.[44]

Specifically deleting the words "or more" in the sentence "which may occur in the territory of one or more of the High Contracting parties" could reasonably be interpreted as a *narrowing* of the scope of Common Article 3 to cover only conflicts occurring within the territory of a single State, such as a civil war or internal revolution. As will be discussed, this was the understanding of the language by several prominent international experts on the Geneva Conventions.

The lack of agreement on the Stockholm draft led to the appointment of a Working Party to prepare new drafts. The second of these provided in part: "This obligation presupposes, furthermore, that the adverse party likewise recognizes its obligation in the conflict at issue to comply with the present Convention and the other laws and customs of war."[45] Pictet observes that that there was "almost universal opposition to the application of the Convention, with all its provisions, to all cases of non-international conflict."[46]

A second Working Party was established to attempt to find a solution, and the final language is largely a product of this effort. It dropped the requirement for reciprocity.[47] In 1949, delegates from fifty-nine countries took part in a diplomatic

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[42] *Id*. at 43.

[43] *Id*.

[44] *Id*. at 44.

[45] *Id*. at 45.

[46] *Id*. at 46.

[47] *Id*. at 47-48.

conference that produced four Geneva Conventions dealing with the humanitarian law of armed conflict. The United States ratified all four in 1955, and today all 194 sovereign States are parties to all four conventions. Indeed, more States are parties to the 1949 Geneva Conventions than to any other treaty in the history of the world.

The Text and Meaning of Common Article 3

Initial plans to have a formal preface to the Geneva Conventions were scrapped, and instead all four Conventions began with the same first three articles. Pictet asserts that the purpose was to place at the beginning of all four conventions "the principal provisions of a general character, in particular those which enunciated fundamental principles"[48] of international law. He adds that Article 3 was viewed by the ICRC as "one of the most important articles" of the Conventions, and also one of the most controversial. Twenty-five meetings were devoted to it.[49]

In the end, Common Article 3 (called "Common" because it appears as the third article of each of the four treaties) provided:

Article 3

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, *each Party* to the conflict shall be bound to apply, as a *minimum*, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, *detention*, or any other cause, *shall in all circumstances be treated humanely*, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain *prohibited at any time and in any place whatsoever* with respect to the above-mentioned persons:

[48] *Id*. at 36.

[49] *Id*. at 38.

(a) *violence to life and person*, in particular murder of all kinds, mutilation, *cruel treatment* and *torture*;

(b) taking of hostages;

(c) *outrages upon personal dignity*, in particular *humiliating* and *degrading* treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.[50]

There are several points to note here:

- The article attempts to set "minimum standards" for all parties to the conflict;

- Everyone detained who is no longer taking an active part in the conflict is entitled to be "treated humanely";

[50] Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 22, art. 3 (emphasis added).

- All "violence to life and person," especially including "cruel treatment" and "torture," is prohibited;

- "Outrages upon personal dignity" and "humiliating" and "degrading" treatment are expressly outlawed.

Many scholars have observed that the *travaux préparatoires* (negotiating history) provide very little clarity on the meaning of these terms.[51] Indeed, Pictet writes that it was viewed as "dangerous" to try to enumerate all of the rights of protected persons under Common Article 3, because it would be difficult to anticipate every conceivable form of abuse, and a detailed list of specific examples might be interpreted as the exclusion of others (*expressio unius est exclusio alterius*) that should be covered.[52]

The interpretation of treaties and other international agreements is government by the 1969 Vienna Convention on the Law of Treaties. Although the treaty has been in force for most of the world since 1980 and was signed and submitted to the Senate by President Nixon in 1976, the United States is still not a Party. While serving as Acting Assistant Secretary of State for Legislative and Intergovernmental Affairs in 1984-85 I attempted without success to urge the Senate to take action on the Vienna Convention, but my efforts were halted when I was informed by staff members to Senator Helms that the Senator was not going to permit the treaty to be "railroaded through" the Senate. I was already working hard to obtain Senate consent to the ratification of the Genocide Convention, and elected to expend my energies in that direction.

Although not a Party, the United States has repeatedly acknowledged that most of the provisions of the Vienna Convention on the Law of Treaties were binding on all States as customary international law. Theses include Article 31, governing the interpretation of treaties. The basic rule is that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[53] Recourse may be had to the *travaux* and other supplemental means of interpretation only when the "ordinary meaning" test leaves the meaning of the treaty "ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable."

[51] David A. Elder, *The Historical Background of Common Article 3 of the Geneva Convention of 1949,* 11 CASE W. RES. J. INT'L L. 37, 59 (1979).

[52] 1 PICTET, *supra* note 34, at 52-53.

[53] Vienna Convention on the Law of Treaties, *supra* note 24, art. 31.

Obviously, terms like "humane treatment" are not only ambiguous but also contextual. During the Vietnam War, for example, it would not have been reasonable to demand that North Vietnam – whose own people were subsisting on rations of rice and small servings of fish – feed American POWs the kinds of meals to which they were accustomed in the United States or on Navy aircraft carriers. (But this was no excuse for striking POWs with rifle butts and hanging them from the ceiling with their arms painfully bound with ropes – behavior that outraged Americans and led to sufficient international criticism that torture was largely stopped by the end of 1969.)

Does Common Article 3 Apply to the War Against Al Qaeda?

The White House and Department of Justice have argued that Common Article 3 was intended only to apply 'to internal conflicts between a State and an insurgent group,"[54] and the conflict with al Qaeda is clearly taking place in several nations. Thus, the argument goes, it is an international conflict and not an "armed conflict not of an international character" so as to be covered by Common Article 3. Like most legal scholars,[55] I have always dismissed this argument, for the same reason the Supreme Court did in *Hamdan* – the test is not where the conflict takes place but whether there are sovereign States on both sides. True, the Conventions say "occurring in the territory of *one* of the High Contracting Parties," but I have explained this away on the theory that if a conflict occurred on the territory of one (or more) States that were not Parties to the Conventions, that State could not be bound by a treaty it had never accepted. Thus, to be applicable, the non-international conflict had to occur within the territory of (at least) one Party State.

However, in candor, while researching the issue further in preparation for this hearing, it became clear to me that the argument that Common Article 3 was intended to apply only to civil wars and internal conflicts has some support for it both in *travaux* and the scholarly literature. Pictet's *Commentary* on the 1949 Geneva Conventions – published by the ICRC – are replete with references to Common Article 3 as addressing "civil wars, " "insurrections," and armed conflicts "of an internal character."[56]

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[54] *Quoted in* A. John Radsan, *The Collision Between Common Article Three and the Central Intelligence Agency,* 56 CATH. U. L. REV. 959, 972 (2007).

[55] Fionnuala Ní Aoláin, *Hamdan and Common Article 3*, 91 MINN. L. REV. 1523, 1556 (2007) ("Because of the apparent absence of a nexus between al Qaeda and any sovereign State, most legal scholars seem to have viewed this as a conflict not of an international character.")

[56] *See, e.g.*, 1 PICTET, *supra* note 34, at 38-43 (where "civil war" is used well over a dozen times, along with "armed conflicts . . . of an internal character," "insurrections," "social or revolutionary disturbances," and conflicts "within the borders of a state.").

Pictet notes this is a "general" and "vague" expression, and discusses the various amendments that were proposed in an effort to explain the intentions of the delegates. All of them referred to "revolt" or "insurgents" – strongly suggesting that this was viewed as a provision addressing *internal* conflicts or civil wars.[57] And in discussing the Article, Pictet himself repeatedly refers to "cases where armed strife breaks out in a country," "civil disturbances," and conflicts involving "internal enemies."[58] But the actual language adopted was broader, and the "ordinary meaning" of "armed conflicts not of an international character" would seem to encompass transnational conflicts in which there are not sovereign States on both sides. Further, in the *Paramilitary Activities Case* in 1986, the International Court of Justice concluded that Common Article 3 provided a "minimum yardstick" for international and non-international conflicts alike.[59] However, this view is rejected by some of the world's foremost scholars of international law.[60]

Writing in a special issue of the *Georgia Journal of International and Comparative Law* honoring former Secretary of State Dean Rusk, the late and legendary British scholar Col. G.I.A.D. Draper, OBE – who served as Director of Legal Services for the British Army and participated in the Nuremberg War Crimes Trials – introduced his discussion of Common Article 3 by asserting: "This is the sole article in each of the four Conventions that deals exclusively with so-called 'internal armed conflicts.'"[61] Other scholars make similar points.[62]

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[57] *Id*. at 49-50.

[58] *Id*.

[59] *Nicaragua v. United States* (*Paramilitary Activities Case*), 1986 I.C.J. 14, 113-14. This has been among the World Court's most criticized opinions, including in my own writing. *See* Robert F. Turner, *Peace and the World Court: A Comment on the Paramilitary Activities Case,* 20 VAND. J. TRANSNAT'L. L. 53, 56-69 (1987).

[60] Included in this group would be Professor Yoram Dinstein, former President of the University of Tel Aviv and Dean of its Law School. We share the common bond of having both occupied the Charles H. Stockton Chair of International Law at the Naval War College, and I took the liberty of communicating with him in preparation for this hearing.

[61] Draper, *supra* note 33, at 268. Elsewhere in the same article he added: "No convention dealing with the law of war made any reference to conduct in *internal armed conflicts* until the four Geneva Conventions of 1949." *Id*. at 259.

[62] *See, e.g*., Fionnuala Ní Aoláin, *Hamdan and Common Article 3*, *supra* note 55, at 1558 (2007). ("[A] 'formal' legal application issue arises when applying Common Article 3: the provision only textually applies to armed conflicts occurring in the territory of a state party. This issue raises the question of whether Common Article 3 applies in transnational contexts. A formalistic approach would suggest that a conflict must be either an interstates (international) conflict or an internal conflict taking place in the territory of a specific state.") *See also* ALBERTO T. MUYOT & ANA THERESA B. DEL ROSARIO, THE HUMANITARIAN LAW ON NON-INTERNATIONAL ARMED CONFLICTS 14-15, 27-28 (1994).

It may or may not be of interest to the Committee that the International Criminal Tribunal for the Former Yugoslavia also applied Common Article 3 in a non-civil war setting in its 1997 *Tadic* case.[63] Ultimately, for our purposes, the issue is arguably moot because the Supreme Court in *Hamdan* declared that Common Article 3 does apply. However, that was based upon an interpretation of the 1949 Conventions, and, under *Whitney v. Robertson*, the Court will be bound by an inconsistent statute of more recent date.

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[63] *Prosecutor v. Tadic,* Case No. IT-94-1-T, Opinion and Judgment (ICTY App. Chamber, May 7, 1997).