



**CONSTITUTIONAL AND INTERNATIONAL LAW
IMPLICATIONS OF EXECUTIVE ORDER 13440
INTERPRETING COMMON ARTICLE 3 OF THE
1949 GENEVA CONVENTIONS**

Prepared Statement of

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Before the

**Select Committee on Intelligence
United States Senate**

Tuesday, September 25, 2007 • 3:30 PM

219 Hart Senate Office Building

About the Witness

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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 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 twenty years ago 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. His 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.

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. Over the years he has testified before more than a dozen different committees of the U.S. Congress.

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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Good afternoon, Chairman Rockefeller, Vice Chairman Bond, and members of this distinguished Committee. I welcome your invitation to come before you and discuss the President's interpretation of Common Article 3 of the 1949 Geneva Conventions in Executive Order 13440.

Although in the mid-1980s I accompanied senior State Department witnesses before this Committee while I was serving as Acting Assistant Secretary of State for Legislative and Intergovernmental Affairs – and although as national security adviser to Senator Robert P. Griffin in 1976 I played a small role in drafting Senate Resolution 400 that set up this Committee – this is my first appearance as an academic before you. When I left the State Department in 1985 I was approached by Chairman Durenberger's staff about possibly serving as Staff Director of the Committee, but I was anxious to return to academic life and declined. I am honored to be here this afternoon.

From my perspective there are three aspects to this issue. I will first talk about what might be thought of as domestic legal considerations – the Constitution, statutes, and Executive Order 13440. I will then turn to issues of international law, focusing primarily on Common Article 3 to the 1949 Geneva Conventions. My final remarks will address issues of wise public policy.

I. Constitutional and Statutory Considerations

Much of the world views international law and domestic law as integral parts of a monist system of laws in which national governments are free to act so long as they do not violate their nation's obligations under treaties and customary international law. In the United States, we follow a dualist approach, with our Constitution being supreme to both statutes and rules of international law. Treaties can create rights and obligations under our domestic law, and when they do they are considered equal but not superior to acts of Congress as the "supreme Law of the Land."¹ (To have any domestic legal effect, many treaties must first be implemented by legislation,² which similarly replaces incompatible prior legislation and is subject to being changed by future legislation or treaty.) Congress has the power to enact legislation inconsistent with treaty obligations, and when that happens – assuming the courts are not capable of reconciling the two obligations – for purposes of domestic United States law the statute will prevail over the treaty. As the Supreme Court explained in *Whitney v. Robertson*:

[W]hen a law is clear in its provisions, its validity cannot be assailed before the courts for want of conformity to stipulations of a previous treaty not already executed. Considerations of that character belong to another department of the government. The duty of the courts is to construe and give effect to the latest expression of the sovereign will. In *Head-Money*

¹ U. S. CONST., Art. VI, cl. 2.

² See *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).

Cases, . . . it was objected to an act of congress that it violated provisions contained in treaties with foreign nations, but the court replied that, so far as the provisions of the act were in conflict with any treaty, they must prevail in all the courts of the country; and, after a full and elaborate consideration of the subject, it held that, “so far as a treaty made by the United States with any foreign nation can be the subject of judicial cognizance in the courts of this country, it is subject to such acts as congress may pass for its enforcement, modification, or repeal.”³

Of course, despite the Court’s language, Congress may not by its own actions actually “repeal” a treaty.⁴ Only the President or his agents can act internationally for the United States, and if Congress enacts clearly inconsistent legislation the President will normally give notice of withdrawal or denunciation pursuant to the terms of the treaty. If that can’t be done – for example, under Article 142 of the 1949 Geneva Convention Related to the Treatment of Prisoners of War, a denunciation can not take effect during a conflict that was ongoing at the time of denunciation⁵ — American courts would still apply the more recent statute, and in consequence the United States would become an international “lawbreaker” and may be liable to other treaty parties for any resulting injury.

By this same theory that “the latest expression of the sovereign will” prevails, if the President ratifies a treaty with the advice and consent of at least two-thirds of the Senate, American courts will give effect to the treaty to the extent that its provisions create justiciable rights or duties within this country.⁶ Treaties and statutes are co-equal under U.S. law, and the Constitution is supreme to both.

This last point is extremely important: The Constitution is supreme to both treaties and statutes. And a great deal of the recent controversy over presidential actions that has resulted in charges of an “Imperial President” and presidential “lawbreaking” is founded in either a failure to understand that principle, or more likely a failure to understand that under our Constitution the president is granted a great deal of unchecked discretion

³ *Whitney v. Robertson*, 124 U.S. 190, 195 (1888).

⁴ *See, e.g.*, LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 164 (“Such legislation does not affect the validity of the treaty and its abiding international obligations, though it compels the United States to go into default.”); and QUINCY WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* 261 (1922).

⁵ Geneva Convention Relative to the Treatment of Prisoners of War, Art. 142 adopted Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 13. (“The denunciation shall take effect one year after the notification thereof has been made to the Swiss Federal Council. However, a denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict shall not take effect until peace has been concluded, and until after operations connected with release and repatriation of the persons protected by the present Convention have been terminated.”)

⁶ Even if in a case before it the Supreme Court does interpret a treaty for purposes of domestic law, the President is not bound by that interpretation in his dealings with other sovereign States. *See*, LORI FISLER DAMROSCH *et al*, *INTERNATIONAL LAW: CASES AND MATERIALS* 178 (4th ed., 2001) (“Since, in deciding cases, the Supreme Court is the final arbiter of United States law . . . , a determination or interpretation of international law by the Supreme Court would also bind the executive branch in a case to which the United States is a party for purposes of that case, and effectively for other purposes of domestic law. The president may, however, be free to take a different view of the law vis-à-vis other nations.”)

regarding foreign affairs. I have in the past year or two discussed these issues extensively before the Senate⁷ and House⁸ Judiciary Committees, and don't want to repeat that here. Because this Committee by its mandate works on very thin constitutional ice, it is probably worthwhile to briefly review the separation of powers between the political branches regarding the collection of intelligence and other aspects of our foreign affairs.

The Constitution and Foreign Affairs

To begin with, it is useful to understand that, as a group, the men who wrote our Constitution were remarkably well-read individuals. They were familiar with the writings of John Locke, Montesquieu, William Blackstone, and others who had thought and written much about the separation of powers. In *Federalist* No. 47, for example, James Madison wrote that the “oracle who is always consulted and cited” on the subject of separation of powers was “the celebrated Montesquieu.”⁹ And like Locke,¹⁰ Blackstone,¹¹ and many other writers of their time, Montesquieu viewed the control of foreign relations to be an exclusive “executive” power: “In every government there are three sorts of power: the legislative; *the executive in respect to things dependent on the law of nations*; and the executive in regard to matters that depend on the civil law.” Montesquieu explained that by the first of these “executive” powers, the prince or magistrate “makes peace or war, sends or receives embassies, establishes the public security, and provides against invasion.”¹²

In his *Second Treatise on Civil Government* (which Thomas Jefferson described as “perfect”¹³) Locke argued that relations with foreign powers, which depended greatly upon changing circumstances that could not be anticipated by law, had to be entrusted to the Executive “to be managed for the public good.”¹⁴ John Jay paraphrased Locke’s argument when in *Federalist* No. 64 he wrote:

The loss of a battle, the death of a Prince, the removal of a minister, or other circumstances intervening to change the present posture and aspect of affairs, may turn the most favorable tide into a course opposite to our wishes. As in the field, so in the cabinet, there are moments to be seized

⁷ Links to my three most recent prepared statements to the Senate Judiciary Committee can be found online at: <http://www.virginia.edu/cnsl/pdf/Turner-testimony.pdf>.

⁸ A link to my prepared statement on September 5, 2007, can be found online at: <http://www.virginia.edu/cnsl/pdf/Turner-testimony.pdf>.

⁹ THE FEDERALIST NO. 47 at 324 (Jacob E. Cooke, ed. 1961) (Madison).

¹⁰ See, JOHN LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT §147 (1689).

¹¹ See, 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 242-45 (1765).

¹² 1 BARON DE MONTESQUIEU (CHARLES DE SECONDAT), SPIRIT OF THE LAWS 151 (Thomas Nugent, ed. 1900).

¹³ *Jefferson to Thomas Mann Randolph*, 8 WRITINGS OF THOMAS JEFFERSON 29 (Mem. ed. 1903). (“Locke’s little book on Government, is perfect as far as it goes.”)

¹⁴ LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT §147. (“[W]hat is to be done in reference to Foreigners, depending much upon their actions, and the variations of designs and interest, must be left in great part to the Prudence of those who have this Power committed to them, to be managed by the best of their Skill, for the advantage of the Commonwealth.”)

as they pass, and those who preside in either, should be left in capacity to improve them. So often and so essentially have we heretofore suffered from the want of secrecy and dispatch, that the Constitution would have been inexcusably defective if not attention had been paid to those objects.¹⁵

I submit you could devote a series of hearings to examining ways in which the post-Vietnam Congress has harmed the nation by violating these principles. When Congress in 1973 snatched defeat from the jaws of victory in Indochina by prohibiting the use of appropriated funds “to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of north Vietnam, South Vietnam, Laos or Cambodia,”¹⁶ it is likely that not a single member of either chamber considered that the President might two years later need to use the military to rescue the crew of the *S.S. Mayaguez* after they were seized on the high seas and taken to a Cambodian island. President Ford flagrantly violated this (in my view clearly unconstitutional) statute, and when the merchant seamen had been rescued through “combat activities” “in” and “over” and “from off the shores” of Cambodia, the Foreign Relations Committee quickly passed a unanimous resolution praising the rescue.¹⁷ Senator Frank Church – one of the primary co-sponsors of the May 1973 statute that banned the use of force for this purpose – told the media that President Ford “had my full support” from “beginning the end.”¹⁸ Senator Clifford Case, the Ranking Republican on the Foreign Relations Committee and another sponsor of the statutory prohibition, added: “I don’t want anyone saying that we liberals or doves would prevent the President from protecting American lives in a piracy attack.”¹⁹ (Presciently, in vetoing the 1973 War Powers Resolution, which was also violated by the *Mayaguez* rescue, President Nixon had specifically warned that it might impair the President’s power to deal with ship “hijackings.”²⁰)

Another example can be found in the current debate over the Protect America Act. I worked in the Senate when FISA was enacted in 1978, and it is absolutely clear from the reports and other legislative history that Congress did not intend to limit the President’s constitutional power to intercept foreign-to-foreign communications. For example, time and again, the 1998 HPSCI report on FISA emphasized that the new statute would only regulate “electronic surveillance conducted *within the United States* for foreign intelligence purposes.”²¹ The report explained: “The committee has explored the feasibility of broadening this legislation to apply overseas, but has concluded that certain problems and unique characteristics involved in overseas surveillance preclude the simple extension of this bill to overseas surveillance.”²²

¹⁵ THE FEDERALIST NO. 47 at 435 (Jacob E. Cooke, ed. 1961) (Madison).

¹⁶ Continuing Appropriations Act for 1974, Pub. Law No. 93-52, 87 Stat. 130.

¹⁷ ROBERT F. TURNER, THE WAR POWERS RESOLUTION: ITS IMPLEMENTATION IN THEORY AND PRACTICE 63 (1983).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 61.

²¹ H. REP’T NO. 95-1283 at 24. *See also, id.* at 26, 36, and other references.

²² *Id.* at 27.

But Congress did not anticipate that technology might change over the years, and it left the President no discretion to protect the nation if unforeseen changes did occur. In 1978, virtually all telephone conversations were transmitted by wire. Today, they are largely wireless. The FISA Court has reportedly concluded that the technical language of the 1978 statute makes it unlawful for our government to even monitor a communication between Osama bin Laden in Pakistan if he communicates with a top al Qaeda lieutenant in Afghanistan – and Congress was therefore responsible for denying our Intelligence Community at least twenty-five percent of the vital intelligence we should have been getting to protect the people of this country from another 9/11 attack. When you add to this the reality that FISA was almost certainly unconstitutional,²³ and that a large number of the majority party reportedly want to turn this into an election issue and deny our government the power to monitor such conversations, I can only suggest that if the truth gets out the American people are going to be outraged. My greatest fear is that the partisanship of the past few years will encourage al Qaeda to try to carry out additional attacks within this country – attacks which might well dwarf what we witnessed on 9/11 – just as congressional partisanship over the deployment of peacekeepers to Beirut in 1983 contributed substantially to the murder of 241 sleeping Marines.²⁴

That this control over the new nation’s foreign affairs was understood as a component of the grant of “executive Power” vested in the President by Article II, Section 1, of the Constitution, is absolutely clear. It was repeatedly discussed by Madison, Jefferson, Washington, Jay, Hamilton, Marshall, and others. Thus, in 1790, Jefferson cited this grant of the nation’s “executive power” in a memorandum to President Washington and explained: “The transaction of business with foreign nations is executive altogether; it belongs, then to the head of that department, except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly.”²⁵ Sharing Jefferson’s memo with Chief Justice John Jay and House Republican leader James Madison (often described as the “Father of Our Constitution”), Washington recorded in his diary that they agreed that the Senate “had no constitutional right to interfere”²⁶ with the business of diplomacy save for what Jefferson in his Senate rules manual had termed the Senate’s “negative” over treaties and nominations.²⁷ Three years later, Jefferson’s

²³ Every President from FDR to Carter took the position that the President has independent constitutional power to authorize warrantless foreign intelligence wiretaps, Congress itself recognized this power by statute in 1968, the Supreme Court has twice had the opportunity and refused to prohibit such electronic surveillance, every federal court of appeals to decide the issue has held the President has such power, and even the appellate Court of Review established by FISA itself has unanimously declared that FISA could not usurp the President’s constitutional power in this area. See my September 5, 2007, prepared statement to the House Judiciary Committee, available on line at: [http://www.virginia.edu/cnsl/pdf/Turner-HJC-5Sept07-\(final\).pdf](http://www.virginia.edu/cnsl/pdf/Turner-HJC-5Sept07-(final).pdf).

²⁴ ROBERT F. TURNER, REPEALING THE WAR POWERS RESOLUTION: RESTORING THE RULE OF LAW IN U.S. FOREIGN POLICY 138-44 (1991); P.X. Kelley & Robert F. Turner, *Out of Harm’s Way*, WASH. POST, Oct. 23, 1995, at C2.

²⁵ *Jefferson’s Opinion on the powers of the Senate Respecting Diplomatic Appointments*, April 24, 1790, in 3 THE WRITINGS OF THOMAS JEFFERSON 16, 17 (Mem. ed. 1903) (bold italics added).

²⁶ 4 DIARIES OF GEORGE WASHINGTON 122 (Regents’ Ed. 1925).

²⁷ The great Professor Quincy Wright, who first inspired my own interest in these issues more than forty years ago, wrote in 1922: “In foreign affairs, therefore, the controlling force s the reverse of that in domestic legislation. The initiation of development of details is with the president, checked only by the

arch rival, Alexander Hamilton, took the same position in his first *Pacificus* letter, reasoning that:

[A]s the participation of the Senate in the making of treaties, and the power of the Legislature to declare war, are exceptions out of the general “executive power” vested in the President, they are to be construed strictly, and ought to be extended no further than is essential to their execution.²⁸

The judiciary, as well, recognized the President’s special responsibilities in the field of foreign affairs – including a great deal of power that was not intended to be “checked” either by Congress or the courts. In the most famous of all Supreme Court cases, Chief Justice John Marshall (a political foe of incumbent President Thomas Jefferson) explained:

By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . . [A]nd *whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion.* The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, *the decision of the executive is conclusive.*²⁹

To emphasize that he was talking especially about the field of foreign affairs, Marshall continued:

The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the president. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.³⁰

Similarly, in the most frequently cited Supreme Court case on the separation of foreign affairs powers, the Supreme Court explained in 1936:

Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but

veto of the Senate or Congress upon completed proposals.” THE CONTROL OF AMERICAN FOREIGN RELATIONS 149-50.

²⁸ 15 THE PAPERS OF ALEXANDER HAMILTON 39 (Harold C. Syrett ed., 1969) (bold emphasis added).

²⁹ *Marbury v. Madison*, 5 U.S. [1 Cranch] 137, 165-66 (1803) (emphasis added).

³⁰ *Id.* at 166.

*participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude, and Congress itself is powerless to invade it.*³¹

This view was also accepted by Congress until about the time of the Vietnam War. In 1906, for example, Senator John Coit Spooner arose to criticize an effort by Senator Augustus Bacon to demand negotiation documents pertaining to a treaty from President Roosevelt. Senator Spooner held a Ph.D. and was “one of the best constitutional lawyers of his time.”³²

From the foundation of the Government it has been conceded in practice and in theory that the Constitution vests the power of negotiation and the various phases – and they are multifarious – of the conduct of our foreign relations exclusively in the President. And, Mr. President, he does not exercise that constitutional power, nor can he be made to do it, under the tutelage or guardianship of the Senate or of the House or of the Senate and House combined.³³

When Senator Spooner had completed his extensive remarks, Senator Henry Cabot Lodge of Massachusetts took the floor. This Harvard Law School graduate, who had earlier received Harvard’s first Ph.D. in Political Science – and whose six terms in the Senate included subsequent service as Majority Leader – commented: “Mr. President, I do not think that it is possible for anybody to make any addition to the masterly statement in regard to the powers of the President in treaty making, or as to the condition of the Santo Domingo question, which we have heard from the Senator from Wisconsin [Mr. Spooner] this afternoon.”³⁴ Senator Lodge is well known as a champion of the powers of the Senate in leading the successful effort to defeat ratification of the League of Nations Covenant following World War I.

I once wrote a 1700-page doctoral dissertation on the separation of constitutional national security powers, but in the interest of time let me limit myself to one more example. The late Senator J. William Fulbright is well known as a champion of legislative powers during the Vietnam War. But as Chairman of the Senate Foreign Relations Committee in 1959, he delivered an address at Cornell Law School in which he presented the traditional understanding of the separation of foreign affairs powers:

³¹ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (emphasis added).

³² Arthur Bestor, *Separation of Powers in the Domain of Foreign Affairs*, 5 SETON HALL L. REV. 661 (1974). Senator Spooner declined an invitation to serve as Attorney General in the McKinley administration, as well as a similar request from President Taft to serve as Secretary of State. BIOGRAPHICAL DICTIONARY OF THE AMERICAN CONGRESS 1774-1971 at 1737, S. Doc. No. 8, 92d Cong., 1st Sess. 1048 (1971).

³³ 40 CONG. REC. 1418 (1906).

³⁴ *Id.* at 1431.

The pre-eminent *responsibility* of the President for the formulation and conduct of American foreign policy is clear and unalterable. He has, as Alexander Hamilton defined it, all powers in international affairs “which the Constitution does not vest elsewhere in clear terms.” He possesses sole authority to communicate and negotiate with foreign powers. He controls the external aspects of the Nation’s power, which can be moved by his will alone—the armed forces, the diplomatic corps, the Central Intelligence Agency, and all of the vast executive apparatus.³⁵

Note that Senator Fulbright was not describing the President as the “agent” of Congress or the Senate – charged with communicating policy views to foreign States as instructed by the sovereign authorities on Capitol Hill. He was responsible both for the conduct of foreign policy and the *formulation* of that policy (subject, of course, to the Senate’s negative over treaties and the similar power of Congress to block a declaration of war).

Relevant “Exceptions” to the Grant of “Executive Power to the President”

I have quoted Jefferson and Hamilton as referring to a general presidential control over foreign affairs, subject to certain, narrowly construed, “exceptions” vested in the Senate or Congress. (This view was also shared by Madison and others.) A full discussion of those exceptions is beyond the scope of this presentation, but two are worth mentioning. Under Article I, Section 8, Congress is given the power to “make Rules for the Government and Regulation of the land and naval Forces,”³⁶ and to “*define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations . . .*”³⁷ The first of these authorized Congress to legislate Articles of War (or what we now call the Uniform Code of Military Justice) prohibiting and establishing punishments for the commission of war crimes and other wrongful acts by our military. The second is even broader, and clearly empowers Congress to both define (for purposes of United States criminal law) the content of Common Article 3 and provide criminal sanctions governing all Americans and foreigners who come within the lawful jurisdiction of our courts – keeping in mind that under international law there is universal jurisdiction for war crimes.³⁸

Congress also has the power to “make Rules concerning *Captures on Land and Water*,”³⁹ which might at first glance convey authority to regulate detainees “captured” on either land or water. But the history of this clause is clear – it refers only to a power to authorize the capture of enemy property.⁴⁰

³⁵ J. William Fulbright, *American Foreign Policy in the 20th Century Under an 18th-Century Constitution*, 47 CORNELL L. Q. 1, 3, (1961) (emphasis added).

³⁶ U.S. CONST., Art. I, Sec. 8, cl. 14.

³⁷ *Id.* cl. 10 (emphasis added).

³⁸ *See, e.g.*, AMERICAN LAW INSTITUTE, RESTATEMENT (3D) ON THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987).

³⁹ *Id.* cl. 11 (emphases added).

⁴⁰ For an excellent discussion of the history and content of this power, *see* John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1201-02 (2004).

The Constitution and “the Business of Intelligence”

Long before the Constitution was written, American leaders realized that large legislative assemblies could not be trusted to keep secrets. Indeed, because this was true the Continental Congress in 1775 established a five-member Committee of Secret Correspondence to negotiate with foreign governments, run spies, and perform similar functions necessitated by the absence of any federal executive. It instructed the Committee to delete the names of intelligence agents in any reports it sent to the full Congress.⁴¹

The following year, when secret agent Thomas Story reported to the Committee that France had agreed to a covert operation by which it would provide support to the American rebels, Benjamin Franklin and the four other men on the Committee he chaired decided they could not share this information with the rest of the Continental Congress, because: “We find by fatal experience that Congress consists of too many members to keep secrets.”⁴²

The most valuable single source of information about the new Constitution to those who would finally ratify it were the *Federalist Papers*, since Madison’s Notes and the official Journal of the convention were not made public for many decades. While some assume that the issue of protecting sources and methods of intelligence is a product of the post-World War II CIA era – or perhaps a product of the Nixon or Reagan years – the Founding Fathers were in reality very conscious of this problem. Writing in *Federalist* No. 64, John Jay (who was offered the post of Secretary of Foreign Affairs [State] before it was given to Thomas Jefferson because of Jay’s unmatched experience in this area) explained:

It seldom happens in the negotiation of treaties, of whatever nature, but that perfect SECRECY and immediate DESPATCH are sometimes requisite. *There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery.* Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives; and there doubtless are many of both descriptions, who would *rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular Assembly.* The convention have done well, therefore, in so disposing of the power of making treaties, that although *the President* must, in forming them, act by the advice and consent of the Senate, yet he will be *able to manage the business of intelligence in such a manner as prudence may suggest.*⁴³

⁴¹ 4 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789 at 345 (Worthington C. Ford, et al. eds, 1905).

⁴² “Verbal statement of Thomas Story to the Committee,” 2 PAUL FORCE, AMERICAN ARCHIVES: A DOCUMENTARY HISTORY OF THE NORTH AMERICAN COLONIES, 5th Ser., 819 (1837-53).

⁴³ FEDERALIST NO. 64 at 434-35 (Jacob E. Cooke, ed. 1961) (emphasis added).

The idea that intelligence and diplomacy were exclusive presidential concerns was reflected in the first appropriations legislation for foreign affairs, which permitted the President to report to Congress merely the *amount* of sensitive expenditures, keeping the secret details to himself.⁴⁴ The consistent practice from the administration of George Washington, through John Adams and Thomas Jefferson (and for many years thereafter) was captured by President Jefferson in a note to his treasury secretary:

The Constitution has made the Executive the organ for managing our intercourse with foreign nations. . . .

From the origin of the present government to this day . . . it has been the uniform opinion and practice that the whole foreign fund was placed by the Legislature on the footing of a contingent fund, in which they undertake no specifications, but leave the whole to the discretion of the President.⁴⁵

During an 1818 debate on the floor of the House of Representatives, the legendary Henry Clay declared that it would “not be a proper subject for inquiry” by Congress to investigate expenditures from the President’s foreign affairs fund.⁴⁶ This congressional deference – premised upon the understanding that the Constitution had confided the business of intelligence exclusively in the Executive branch – continued until the 1970s.

I know you have all heard that the National Security Act of 1947 expressly provides for legislative oversight of intelligence programs, but only thanks to a 1974 amendment does it now do so. The original National Security Act in 1947 made absolutely no provisions for congressional involvement in intelligence operations. Like the Founding Fathers, the authors of that statute understood that intelligence was exclusively presidential business. I might add that when Hughes-Ryan was first enacted, Congress acknowledged that it was making an unprecedented incursion into presidential constitutional power by prefacing the requirement with this language:

To the extent consistent with all applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches of the Government, and to the extent consistent with due regard for the protection from unauthorized disclosure of classified information and information relating to intelligence sources and methods, the Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States involved in intelligence activities shall: (1) keep the. . . [intelligence committees] fully and

⁴⁴ U.S. STATUTES AT LARGE, vol. 1, p. 129 (1790). (“[T]he President shall account specifically for all such expenditures of the said money as in his judgment may be made public, and also for the amount of such expenditures as he may think it advisable not to specify, and cause a regular statement and account thereof to be laid before Congress annually.”)

⁴⁵ 11 THE WRITINGS OF THOMAS JEFFERSON 5, 10 (Mem. ed. 1903).

⁴⁶ 32 ANNALS OF CONG. 1466 (1818).

currently informed of all intelligence activities.⁴⁷

Sadly – as someone who has followed this field professionally first as a Senate staff member, later as Acting Assistant Secretary of State for Legislative Affairs, and for twenty years as a scholar and educator – I have watched for more than three decades as both houses of Congress have leaked the nation’s secrets. In 1976, while the House was debating whether to make the Pike Committee report on intelligence abuses public, it was leaked to the media. I was present in a closed session of the Senate Foreign Relations Committee when the committee voted to make public a classified annex to an international agreement with Saudi Arabia. The next day, after the document had appeared in the *Washington Post*, a sheepish committee met again and reversed its decision to release classified information to the press – which just happened to violate Senate rules.

During the early dispute over U.S. support for the Nicaraguan “Contras,” I was following that program closely as Counsel to the President’s Intelligence Oversight Board at the White House. Time and again I would get calls from the CIA Inspector General’s office advising me that a classified document was being delivered to the House and Senate intelligence committees. It was rare for it to take more than two days for the content of each document to make it into the *Washington Post*. Then there was the conservative Republican legislator who, believing he was just being courteous, compromised the identity of an important CIA station chief by mentioning his name and position in a trip report published in the *Congressional Record*.

More recently, “congressional sources” who have asked not to be identified have been cited in news stories about NSA “data mining” and an alleged classified decision by the FISA Court.⁴⁸ It is difficult not to recognize the wisdom of the Framers of our Constitution.

I would only add that I worked in the Senate when FISA was enacted in 1978 and believed it to be unconstitutional at the time. Every president from FDR to Jimmy Carter conducted warrantless foreign intelligence surveillance in the belief that it was lawful, Congress itself recognized that the President has independent constitutional power to authorize warrantless foreign intelligence wiretaps just a decade earlier, and every federal court to decide the issue in American history (that was not subsequently reversed⁴⁹) has found such a power. As I pointed out in testimony earlier this month before the House Judiciary Committee, when Attorney General Griffin Bell testified on the pending FISA legislation he observed that Congress could not take away a presidential power by statute,

⁴⁷ National Security Act of 1947, § 501; 50 U.S.C. § 413 (1982) (emphasis added). (This language has subsequently been *repealed*). For a discussion of congressional duplicity regarding this statute during the Iran-Contra Affair, see Robert F. Turner, *The Constitution and the Iran-Contra Affair*, 11 HOU. J. INT’L L. 83, 113-14 (1988).

⁴⁸ See, e.g., Eric Lichtblau, James Risen & Mark Mazzetti, Reported Drop in Surveillance Spurred a Law, *N.Y. Times*, Aug. 11, 2007 at A1 (“Intelligence Committee members acknowledged that they learned in May that the secret court ruling . . .”).

⁴⁹ This qualification excludes the 2006 Detroit district court opinion in *ACLU v. NSA*.)

but declared that FISA could still work because President Carter was willing to comply with it:

[C]landestine intelligence activities, by their very nature, must be conducted by the executive branch with the degree of secrecy that insulates them from the full scope of these review mechanisms. Such secrecy in intelligence operations is essential if we are to preserve our society, with all its freedoms, from foreign enemies. . . .

[T]he current bill recognizes no inherent power of the President to conduct electronic surveillance, and I want to interpolate here to say that *this does not take away the power of the President under the Constitution*. It simply, in my view, is not necessary to state that power, so there is no reason to reiterate or iterate it as the case may be. It is in the Constitution, whatever it is. *The President, by offering this legislation, is agreeing to follow the statutory procedure.*⁵⁰

Obviously, a sitting President has the prerogative to comply with the terms of a statute that clearly usurps his constitutional authority. But equally obviously, through that process one President does not have the power to surrender the constitutional authority of his successors in office.

I respectfully suggest that those who keep attacking the Executive branch for making broad claims of “executive power” on the grounds that the President thinks he is “King George” ought to take a serious look at the problems of legislative lawbreaking. As I pointed out in my recent House testimony, FISA clearly contributed to the success of the 9/11 attacks in several ways. The clearly unconstitutional 1973 War Powers Resolution played a major role in getting 241 sleeping Marines killed on October 23, 1983⁵¹; and as former Senate Majority Leader George Mitchell has observed, the 1973 statute “threatens not only the delicate balance of power established by the Constitution. It potentially undermines America’s ability to effectively defend our national security.”⁵²

As still further evidence of outrageous legislative lawbreaking, consider the 1983 Supreme Court decision in *I.N.S. v. Chadha*, which declared “legislative vetoes” to be unconstitutional. Ironically, as a Senate staff member seven years earlier I had drafted remarks for my Senator making exactly the same point for the same reasons.⁵³ Yet, despite this clear and constitutionally binding decision from the U. S. Supreme Court,

⁵⁰ Testimony of Attorney General Griffin Bell, FOREIGN INTELLIGENCE ELECTRONIC SURVEILLANCE, HEARINGS BEFORE THE SUBCOMMITTEE ON LEGISLATION OF THE PERMANENT SELECT COMMITTEE ON INTELLIGENCE, HOUSE OF REPRESENTATIVES, January 10, 1978 at 14-15 (emphasis added).

⁵¹ See, P.X. Kelley & Robert F. Turner, *Out of Harm’s Way*, WASH. POST, Oct. 23, 1995, at C2.

⁵² CONGRESSIONAL RECORD, May 19, 1988, *quoted in* ROBERT F. TURNER, REPEALING THE WAR POWERS RESOLUTION 162-63.

⁵³ Hon. Robert P. Griffin, *International Security Assistance and Arms Export Control Act of 1976-1977*, 122 CONG. REC. S 9026 (daily ed., June 11, 1976.)

since *Chadha* was decided Congress has enacted more than 500 new legislative vetoes – thumbing its nose at the Supreme Court, the Constitution, and the rule of law.⁵⁴

The Constitution and the Interpretation or Termination of Treaties

I have already noted that both Congress and the President have constitutional authority to act inconsistent with treaties – but in so doing they could leave the nation in breach of solemn international obligations. Given the contemporary practice of accusing the President of lawbreaking of being an “imperial president” when he exercises powers clearly belonging to his office in the foreign affairs realm, it may be useful to emphasize that his power to violate international treaties is firmly established. For example, Professor Henkin writes in *Foreign Affairs and the Constitution*:

A treaty, moreover, does not dispose of constitutional power: internationally the United States retains the power (the right) to violate its treaty obligations; constitutionally, the President and Congress can exercise their powers even in violation of a treaty undertaking. . . .

In any event, since the President acts for the United States internationally he can effectively terminate or violate treaties, and the Senate has not established its authority to join or veto him.⁵⁵

A classic example of an American President violating international law occurred in October 1962, when President John F. Kennedy elected to ignore the clear prohibition against “the threat or use of force” found in Article 2(4)⁵⁶ of the UN Charter in order to deter the Soviet Union from delivering more nuclear missiles to Cuba. Interestingly, Kennedy’s explanation was that the advent of nuclear weapons justified what very much appears to have been a policy of “preemption.”⁵⁷

Let me turn now to the important issue of treaty interpretation, which is of course at the core of the issue of this hearing. By Executive Order No. 13440, President Bush has “interpreted” Common Article 3. Does he have a constitutional right to do this? Is he

⁵⁴ LOUIS FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* 152 (5th ed. 2007). (“From the day that *Chadha* was issued on June 23, 1983, to the end of 2006, more than 500 new legislative vetoes had been enacted into law.”)

⁵⁵ HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 151, 169. *See also*, 1 AMERICAN LAW INSTITUTE, *RESTATEMENT (3D) ON THE FOREIGN RELATIONS LAW OF THE UNITED STATES* (1987) at § 111; LORI FISLER DAMROSCH *et. al*, *INTERNATIONAL LAW: CASES AND MATERIALS* 175-77 (4th ed., 2001).

⁵⁶ U.N. CHARTER, Art 2(4) (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”)

⁵⁷ President John F. Kennedy, Address to the Nation, Oct. 22, 1962 (“We no longer live in a world where only the actual firing of weapons represents a sufficient challenge to a nation’s security to constitute maximum peril. Nuclear weapons are so destructive and ballistic missiles are so swift, that any substantially increased possibility of their use or any sudden change in their deployment may well be regarded as a definite threat to peace.”)

infringing upon powers of the Senate or Congress? May Congress impose its own interpretation on the treaty against the President's will? These are important issues.

It is well established that once the Senate consents to the ratification of a treaty, its limited constitutional function is done.⁵⁸ It is useful to keep in mind that when the Senate considers treaties and diplomatic appointments, it goes into "executive session" and considers items from the "executive calendar." It is not acting as a part of the legislative branch, but is joined with the President in what Columbia Law School Professor Louis Henkin has described as the "fourth branch of government."⁵⁹

Early in the administration of George Washington the role of the Senate in interpreting an existing treaty arose. Secretary of State Thomas Jefferson provides this account of his July 10, 1793, conversation with "Citizen Genet," the French Minister to Washington:

He asked me if they [Congress] were not the sovereign. I told him no, they were sovereign in making laws only, the executive was sovereign in executing them, and the judiciary in construing them where they related to their department. 'But,' said he, 'at least, Congress are bound to see that the treaties are observed.' I told him no, there were very few cases indeed arising out of treaties, which they could take notice of; that the President is to see that treaties are observed. 'If he decides against the treaty, to whom is a nation to appeal?' I told him the Constitution had made the President the last appeal.⁶⁰

It is firmly established that Jefferson was correct. Professor Henkin writes:

Attempts by the Senate to withdraw, modify or interpret its consent after a treaty is ratified have no legal weight; nor has the Senate any authoritative voice in interpreting a treaty or in terminating it. . . .

The obligation and authority to implement or enforce a treaty involve also the obligation and authority to interpret what the treaty requires. For international purposes, no doubt, the President determines the United States position as to the meaning of a treaty.⁶¹

The lack of any Senate role in the interpretation of treaties has been clearly established by the Supreme Court.⁶²

I should add that – as Chief Justice Marshall explained in *Marbury v. Madison*⁶³ – the courts do not have a role in second-guessing presidential interpretations of America's

⁵⁸ Obviously, if the treaty calls for the expenditure of treasury funds or other action that requires legislation, the Senate will play its normal legislative role at the appropriate time.

⁵⁹ HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 148.

⁶⁰ Quoted in 4 JOHN BASSETT MOORE, DIGEST OF INTERNATIONAL LAW 680-81 (1906).

⁶¹ Henkin, Foreign Affairs and the Constitution 136, 167; See also, Wright, The Control of American Foreign Relations 23-25, 39.

⁶² *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901).

international obligations under treaties. Interpreting and terminating treaties are among those “political powers” Marshall was talking about. Professor Henkin explains:

If issues as to who has power to terminate treaties arise again, however, it seems unlikely that Congress will successfully assert the power. . . .

The power to terminate a treaty is a political power: courts do not terminate treaties, though they may interpret political acts or even political silence to determine whether they implied or intended termination. If there is a breach of a treaty by the other party, it is the President not the courts who will decide whether the United States will denounce the treaty, consider itself liberated from its obligations, or seek other relief or none at all.

Nor do courts sit in judgment on the political branches to prevent them from terminating or breaching a treaty.⁶⁴

This is in accord with the American Law Institute’s *Restatement on Foreign Relations Law of the United States*, which provides:

**§ 339. Authority to Suspend or Terminate international Agreements:
Law of the United States**

Under the law of the United States, the President has the power

- (a) to suspend or terminate an agreement in accordance with its terms;
- (b) to make the determination that would justify the United States in terminating or suspending an agreement because of its violation by another party or because of supervening events, and to proceed to terminate or suspend the agreement on behalf of the United States; or
- (c) to elect in a particular case not to suspend or terminate an agreement.⁶⁵

Of course, even if the President’s constitutional authority to interpret treaties were not so well established, in this instance there would not be a problem. Congress by statute directed him last year to issue this particular Executive Order:

SEC. 6. IMPLEMENTATION OF TREATY OBLIGATIONS.

(a)

(3) INTERPRETATION BY THE PRESIDENT.—

(A) As provided by the Constitution and by this section, the President has

⁶³ See *supra*, notes 28 & 29 and accompanying text. CHECK XXXAA

⁶⁴ Henkin, *Foreign Affairs and the Constitution* 170-71. WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* 173.

⁶⁵ 1 AMERICAN LAW INSTITUTE, *RESTATEMENT (3D) ON THE FOREIGN RELATIONS LAW OF THE UNITED STATES* (1987) at § 339.

the authority for the United States to interpret the meaning and application of the Geneva Conventions and to promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches of the Geneva Conventions.

(B) The President shall issue interpretations described by subparagraph (A) by Executive Order published in the Federal Register.⁶⁶

Statutes of Relevance to the Controversy Over Common Article 3

I have already mentioned that, under the American legal system, acts of Congress are equal in stature to international treaties. Thus, like the President, Congress has the *power* to violate Common Article 3 and any provision of any other treaty – for purposes of domestic U.S. law. I would emphasize that a more recent and incompatible act of Congress does not release the United States from its international duties under a treaty or immunize the nation (or even members of Congress⁶⁷) from international responsibility or accountability under the treaty. But for purposes of domestic U.S. law, a more recent statute will be given effect over a prior treaty.

There are four or five statutes that seem especially relevant to today’s hearing. I will briefly examine them chronologically.

The Torture Convention Implementation Act of 1994⁶⁸ implements the Convention Against Torture, which the United States ratified in 1990. It makes it a federal offense for any American to commit an act of “torture,” as that term was defined by the Senate in consenting to ratification of the treaty. (To constitute torture, an act must violate the protections guaranteed by the Fifth, Eighth, or Fourteenth Amendments of the U.S. Constitution). This statute also provides jurisdiction over acts of torture committed by foreigners who later enter the United States. It applies alike to military and civilians, during both war and peace.

The War Crimes Act of 1996⁶⁹ provides federal jurisdiction for “war crimes” (defined as “grave breaches” of the 1949 Geneva Conventions, violations of Common Article 3,

⁶⁶ Military Commissions Act of 2006, Pub. L. No. 109–366, 120 STAT. 2600, § 6(a)(3)(B).

⁶⁷ As I will discuss, were Congress by law to authorize grave breaches of the law of armed conflict, individual members might be at risk for prosecution under the 1949 Geneva Conventions. Within the United States the Constitution is supreme, and the Speech or Debate Clause absolutely protects legislators from liability for any vote or other legislative act, U.S. CONST., Art. I, Sec. 6, cl. 1 (“They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and *for any Speech or Debate* in either House, *they shall not be questioned in any other Place.*” [Emphasis added.]) But war crimes are subject to universal jurisdiction, and there are presently 193 other Parties to the Conventions who have a duty to investigate and either try or extradite accused war criminals.

⁶⁸ Torture Convention Implementation Act of 1994, 18 U.S.C. §§ 2340, 2340A, & 2340B.

⁶⁹ War Crimes Act of 1996, Pub. L. No. 104-192, §2, 110 Stat. 2104 (1996).

and some other offenses) and applies only to American nationals whether civilians or members of the military.

I should perhaps at least briefly mention the **Military Extraterritorial Jurisdiction Act of 2000**,⁷⁰ which I believe was required to comply with our obligations under the 1949 Conventions. It provides for federal court jurisdiction over crimes committed outside the United States by civilians who accompany U.S. military forces. It applies to American and foreign nationals (who are not nationals of the host country) who serve as contractors or are employed by our military abroad, and also civilians who accompany those individuals (such as dependants). It creates no new substantive offenses, but incorporates by reference existing federal laws that would cover most war crimes.

The Detainee Treatment Act of 2005⁷¹ provided, *inter alia*, that no one “in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment” – again tying the definitions of those offenses to violations of the Fifth, Eighth, or Fourteenth Amendments as the United States had done when ratifying the CAT.⁷² It also created a statutory defense to the prosecution of any government employee who previously engaged in any interrogation technique that had been “officially authorized and determined to be lawful at the time threat they were conducted” so long as the employee “did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful.” The Act authorized the government to provide counsel or pay counsel fees, etc., for government employees involved in civil or criminal legal proceedings for such behavior.

I should perhaps add here that this statute does not protect military or CIA interrogators from future criminal charges either in a foreign tribunal (since there is universal jurisdiction for war crimes) or even within the United States should a future Congress elect to repeal this protection. While Congress is prohibited by the Constitution from enacting *ex post facto* laws⁷³ that criminalize past behavior, the commission of war crimes was clearly illegal well prior to the start of the war against terrorism. Nothing in the Constitution would preclude a future Congress from withdrawing a statutory defense that did not exist at the time an alleged offense was committed, and were that defense withdrawn such a prosecution could proceed. I am aware of nothing that could protect interrogators or their superiors from foreign judicial proceedings, but a presidential pardon could be issued that would permanently prevent any prosecution by the United States Government.

⁷⁰ 18 U.S.C. §§ 3261-3267.

⁷¹ Detainee Treatment Act of 2005 Pub. L. No. 109-148, 42 U.S.C. 2000dd-1.

⁷² U.S. reservations, declarations, and understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, § I(1), Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990).

⁷³ U.S. CONST., Art. I, Sec. 9, cl. 3.

The Military Commissions Act of 2006⁷⁴ was enacted in response to the Supreme Court’s *Hamdan* decision, and seeks *inter alia* to deny detainees (or anyone else) access to federal courts based upon allegations of violations of the 1949 Geneva Conventions. It also clarifies that acts which violate the 1996 War Crimes Act constitute violations of Common Article 3 of the Geneva Conventions “prohibited by United States law.” It further states that these statutory provisions “fully satisfy the obligation under Article 129 of the Third Geneva Convention for the United States to provide effective penal sanctions for grave breaches which are encompassed in common Article 3 in the context of an armed conflict not of an international character,” and adds: “No foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions enumerated in subsection (d) of such section 2441.” As already noted, it calls upon the President to issue an Executive Order “to interpret the meaning and application of the Geneva Conventions” In an effort to immunize prior questionable conduct by government interrogators, the act is made retroactive to November 26, 1997.

A number of scholars (including at least one former CIA attorney⁷⁵) have suggested that the definitions of prohibited conduct under Common Article 3 in some of these statutes fall short of America’s obligations under Common Article 3. I don’t disagree.

The *Hamdan* Case

As already noted, the Military Commissions Act was passed as a legislative response to the Supreme Court’s June 2006 decision in *Hamdan v. Rumsfeld*. Coincidentally, as the Court was announcing its opinion I was giving a paper at the Naval War College in Newport, Rhode Island, in which I asserted that the United States had an obligation under both Common Article 3 and customary international law⁷⁶ to treat all detainees in armed conflicts “humanely.” And this was as well the conclusions of the Supreme Court, which rejected the argument that the conflict with al Qaeda was “international” in scope by explaining: “The term ‘conflict not of an international character’ is used here [in Common Article 3] in contradistinction to a conflict between nations.”⁷⁷

Executive Order 13440

On July 20th of this year, acting pursuant to the Military Commissions Act, President Bush issues Executive Order 13440. I first learned of the order that afternoon, when I was invited by the Department of Justice to take part in a conference call discussing the order. I was sent a copy, and upon reading it I was absolutely outraged – to the point that

⁷⁴ Military Commissions Act of 2006, Pub. L. No. 109-336, 120 Stat. 2600 (codified in scattered sections of 10 and 18 U.S.C.)

⁷⁵ John Radsan, *The Collision Between Common Article Three and the Central Intelligence Agency*, 56 CATH. U. L. REV. 959, (2007) at 971. See also, *id.* at 962-63.

⁷⁶ I noted that the United States has repeatedly affirmed that the humanitarian requirements of Article 75 of Protocol I Additional to the Geneva Conventions constituted customary international law and was thus binding on the United States. This issue will be addressed below.

⁷⁷ *Hamdan v. Rumsfeld*, 548 U. S. 1, 67 (2006).

I repeatedly raised my voice during the subsequent conference call, which is very atypical behavior for me.

My concern focused on the language in **bold** (my emphasis) below from the order:

(b) I hereby determine that a program of detention and interrogation approved by the Director of the Central Intelligence Agency fully complies with the obligations of the United States under Common Article 3, provided that:

(i) the conditions of confinement and interrogation practices of the program do not include:

(A) torture, as defined in section 2340 of title 18, United States Code;

(B) any of the acts prohibited by section 2441(d) of title 18, United States Code, including murder, torture, cruel or inhuman treatment, mutilation or maiming, intentionally causing serious bodily injury, rape, sexual assault or abuse, taking of hostages, or performing of biological experiments;

(C) other acts of violence serious enough to be considered comparable to murder, torture, mutilation, and cruel or inhuman treatment, as defined in section 2441(d) of title 18, United States Code;

(D) any other acts of cruel, inhuman, or degrading treatment or punishment prohibited by the Military Commissions Act (subsection 6(c) of Public Law 109-366) and the Detainee Treatment Act of 2005 (section 1003 of Public Law 109-148 and section 1403 of Public Law 109-163);

(E) **willful and outrageous acts of personal abuse done for the purpose of humiliating or degrading the individual in a manner so serious that any reasonable person, considering the circumstances, would deem the acts to be beyond the bounds of human decency, such as sexual or sexually indecent acts undertaken for the purpose of humiliation, forcing the individual to perform sexual acts or to pose sexually, threatening the individual with sexual mutilation, or using the individual as a human shield; or**

(F) acts intended to denigrate the religion, religious practices, or religious objects of the individual;

As most of you will know from law school, the Latin expression *expressio unius est exclusio alterius* roughly translates “the expression of one thing excludes other things.” As I read subsection (E) in the language above, so long as the subjective “purpose” of the

interrogator is not to “humiliate” or “degrade” the detainee – for example, if the purpose instead is the gather intelligence that might be used to save American lives from future attacks – this subparagraph does not apply. Thus, presumably, “outrageous acts of personal abuse” like “forcing an individual to perform sexual acts” and threatening “sexual mutilation” are not constrained by this subsection.

Now, clearly, some of these acts would clearly be barred by other provisions of the Executive Order and by applicable federal law. But as I read the order, all of my alarms from years of working in government went off. It appeared to me that *someone* – almost certainly not the President himself, as Presidents don’t normally draft such documents – had inserted an “escape clause” designed to authorize serious physical abuse of detainees in flagrant violation of America’s obligations under international law, on the theory that the “purpose” of the abusive treatment was intelligence gathering and not a desire to humiliate or degrade the individual *al la* Abu Gharib.⁷⁸

Much of my initial anger, I suspect, was focused on the fact that any bright high school graduate who read the order would likely spot this language and conclude that the President was trying to deceive the country into believing America was going to comply with its Common Article 3 obligations while actually reserving to option of serious physical and mental abuse. This was but the latest of many examples where it appeared this administration simply didn’t care about domestic or international public opinion.⁷⁹

The Kelley-Turner Op-Ed

I can’t remember being so angry since the immediate aftermath of 9/11. To release some of that emotion, I sent a long private e-mail to a small number of very close friends that evening expressing my outrage and mentioning that I was considering writing an op-ed article. General P. X. Kelley – a former Commandant of the Marine Corps and one of my very few living “heroes” for his courage in standing up to *despicable* congressional abuse in the wake of the 1983 Beirut bombing, knowing as he did that it would cost him his chance to become the first Marine general to serve as Chairman of the Joint Chiefs of Staff – e-mailed me back a supportive note and offered to co-author such an op-ed (which we had done in 1994). The resulting article was quickly accepted by the *Washington Post* and was published as the lead op-ed on Thursday, July 26, under the title “War Crimes and the White House.”⁸⁰ To my shock, it remained the most frequently e-mailed

⁷⁸ Here I am relying on the conclusions of the Schlesinger Report and conversations with close friends who were personally involved in the Abu Ghraib investigation that the horrible abuse captured in photographs from Abu Ghraib was a result of personal misconduct of a small number of soldiers whose superiors were negligent in providing adult supervision. I am led to believe that only one of the individuals in the original photographs was even being held for intelligence purposes. I have no personal expertise on this matter, other friends who have read the same materials have reached different conclusions, and this reference is not intended to initiate a quarrel. My strong expectation is members of this Committee will have had access to classified materials of direct relevance to this issue for which I am no longer cleared to read.

⁷⁹ I will return to this issue in Part III of my presentation.

⁸⁰ P.X. Kelley & Robert F. Turner, *War Crimes and the White House*, WASH. POST, July 26, 2007 at A21.

story from the Post for more than twenty-four hours and was later cited by an American Bar Association resolution.

This was a personally painful article to write. I love this country dearly, and I grew up in a military family believing that all partisanship must stop at the water's edge and we must unite against the common enemy during wartime. I have a bumper sticker on the back of my Prius that reads "STAND UNITED IN WAR" and had a red circle and slash – the international symbol for a prohibited act – over the words "political partisanship." (It is the only one you are likely to see, because I had it custom made.)

I am far from perfect in my own existence, and I do not insist that my government be perfect. We have done many things in Iraq⁸¹ and elsewhere that have struck me as being very unwise, but I have remained quiet (save for some candid discussions with my students) just as I did when America violated international law to overthrow Panamanian dictator Manuel Noriega in 1989. Had I been asked by my government about the wisdom (or legality) of that action in advance, I would have opposed it. But I wasn't asked, and there was no reason which I should have been asked.

I decided to speak out on Executive Order 13440 because I hoped I (and, when General Kelley offered to join me, *we*) might make a difference. My strong suspicion was that the President had not even read the full text of the EO, which presumably was drafted and staffed through an inter-agency process and then put on his desk for his signature. And I thought if the obvious "escape clause" were actually brought to the attention of the President and his senior political advisers, they would realize it was a great blunder and quickly issue a corrected version along with a public statement regretting the error and affirming the American commitment to the humanitarian principles of the Geneva Conventions. Sadly, that hasn't happened.

⁸¹ I strongly felt that something needed to be done to address both the security threat and the humanitarian crisis caused by Saddam Hussein in Iraq. Candidly, I was furious at the UN Security Council, which after more than a dozen resolutions in as many years was emulating the League of Nations, issuing reports and drawing new lines in the sand to be ignored by Saddam. The very first principle set forth under the "Purposes" of the United Nations in the UN Charter is "[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace" At the same time, I feared that unilateral action might destabilize the balance of power in the region to Iran's benefit. I was glad I was a schoolteacher and not back in the White House, State Department, or the policy cluster of the Pentagon – where someone might seriously care about my views. But when a decision was made to go to war, I readily accepted invitations from both CINCPAC and EUCOM to defend Operation Iraqi Freedom before foreign international lawyers in Honolulu and Munich and wrote a number of articles defending the war. While the WMD issue was certainly a consideration, in a 15,000-word defense of the war written as it began I barely mentioned that issue, focusing instead on the need to enforce the rule of law if we wanted it to be a force for peace and the humanitarian crisis. *See*, Robert F. Turner, *Was Operation Iraqi Freedom Legal?*, in LAURIE MYLROIE, *BUSH VS. THE BELTWAY* 164-210 (2003).

II. Considerations of International Law

Let me now turn to issues of international law. In 1752, the great French political philosopher Montesquieu wrote in volume one of *The Spirit of the Laws* that “[t]he law of nations is naturally founded on this principle; that different nations ought in time of peace to do one another all the good they can, and in time of war as little injury as possible, without prejudicing their real interests.”⁸² Forty-one years later, Thomas Jefferson wrote in a legal memorandum to President Washington:

The law of nations . . . is composed of three branches. 1. The moral law of our nature. 2. The usages of nations. 3. Their special conventions. . .

Compacts then, between nation and nation, are obligatory on them by the same moral law which obliges individuals to observe their compacts. There are circumstances, however, which sometimes excuse the non-performance of contracts between man and man; so are there also between nation and nation. When performance, for instance, becomes impossible, non-performance is not immoral; so if performance becomes self-destructive to the party, the law of self-preservation overrules the laws of obligation in others.⁸³

Since there was no “International Court of Justice” to resolve legal disputes between sovereign States, Jefferson recognized that each nation was to judge for itself. But, being an honorable man and wishing the new nation to cherish its honor as well, he wrote:

Of these [obligations], it is true, that nations are to be judges for themselves; since no one nation has a right to sit in judgment over another, but the tribunal of our consciences remains, and that also of the opinion of the world. These will revise the sentence we pass on our own case, and as we respect these, we must see that in judging ourselves we have honestly done the part of impartial and rigorous judges.⁸⁴

Two decades later, Jefferson addressed this same issue in a much different context in a letter to a Maryland newspaper editor:

A strict observance of the written laws is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher

⁸² 1 MONTESQUIEU, *THE SPIRIT OF LAWS* 5 (Thomas Nugent, trans. Rev. ed., 1900).

⁸³ *Opinion on the question whether the United States have a right to renounce their treaties with France, or to hold them suspended till the government of that country shall be established*, in 3 WRITINGS OF THOMAS JEFFERSON 226, 228 (Mem. ed. 1903).

⁸⁴ *Id.* at 229.

obligation. To lose our country by a scrupulous adherence to written law, 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.⁸⁵

I think America can learn a great deal from the wisdom of Thomas Jefferson, and I think he is exactly right on two points: (1) international law is important, and if we elect to violate our commitments we will jeopardize critical support both from our own people and from people of good will around the world; and (2) ultimately, if international law prevents us from taking otherwise reasonable measures to protect our people from catastrophic terrorist attacks, we ought not sacrifice *end* of a free and secure nation upon the altar of the *means* of international law. I will address these issues a bit more in Part III of my presentation. For I fear that some in Washington do not fully understand the effect of being perceived as a lawbreaker can have on the long-term support of our own people, of people of good will around the globe, and even of our allies.

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

The “law of war”⁸⁶ (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”⁸⁷ 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 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

⁸⁵ *Jefferson to J.B. Colvin*, 12 *id.* 418.

⁸⁶ 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).

⁸⁷ U.S. CONST., Art. I, Sec. 8, cl. 11.

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.⁸⁸ 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."⁸⁹

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."⁹⁰ 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."⁹¹

This principle of "reciprocity" was a key element in international law, as nations 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 war⁹² -- argued that engaging in reprisals in response to mistreatment of prisoners of war was the most humane approach,⁹³ 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, and no derogation should be permitted from these rules.

Pictet asserts that the reciprocity clause was ultimately omitted because "doubt was

⁸⁸ G. I. A. D. Draper, *Humanitarian Law and Internal Armed Conflicts*, 13 GA. J. INT'L & COMP. L. 253, 256-57 (1983).

⁸⁹ Much of this historical material can be found in 1 JEAN S. PICTET, COMMENTARY ON THE GENEVA CONVENTIONS 39-43 (1952).

⁹⁰ *Id.* at 41-42.

⁹¹ *Id.* at 42.

⁹² Note to follow. XXX

⁹³ Note to follow. XX

expressed as to whether insurgents could be legally bound by a convention which they had not themselves signed.⁹⁴ 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."⁹⁵

The ICRS 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.⁹⁶

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.

Pictet asserts that this deletion had the effect of enlarging the scope of the provision,⁹⁷ which is a reasonable interpretation. However 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."⁹⁸ 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.⁹⁹

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

⁹⁴ PICTET, COMMENTARY ON THE GENEVA CONVENTIONS 51.

⁹⁵ *Id.* at 52.

⁹⁶ PICTET, COMMENTARY ON THE GENEVA CONVENTIONS 42-43.

⁹⁷ *Id.* at 43.

⁹⁸ *Id.*

⁹⁹ *Id.* at 44.

war.”¹⁰⁰ 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.”¹⁰¹

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.¹⁰² In 1949, delegates from fifty-nine countries took part in a diplomatic 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”¹⁰³ 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.¹⁰⁴

In the end, Common Article 3 (called “Common” because it appears as the third article of each of the 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:

¹⁰⁰ *Id.* at 45.

¹⁰¹ *Id.* at 46.

¹⁰² *Id.* at 47-48.

¹⁰³ *Id.* at 36.

¹⁰⁴ *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.¹⁰⁵

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”;
- 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.¹⁰⁶ Indeed, Pictet writes that it was

¹⁰⁵ Geneva Convention Relative to the Treatment of Prisoners of War, Art. 3 (emphasis added), available online at: <http://www.icrc.org/ihl.nsf/WebART/375-590006>.

¹⁰⁶ 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).

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.¹⁰⁷

The interpretation of treaties and other international agreements is governed 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. These 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.”¹⁰⁸ 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.”

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,’¹⁰⁹ and the conflict with al Qaeda is clearly taking place in several nations. Thus, the

¹⁰⁷ Note to follow. XXX

¹⁰⁸ Vienna Convention on the Law of Treaties, Art. 31. Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. U.N.T.S., vol. 1155, p. 331

¹⁰⁹ Quoted in A. John Radsan, *The Collision Between Common Article Three and the Central Intelligence Agency*, 56 CATH. U. L. REV. 959, 972 (2007).

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,¹¹⁰ 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 scholar 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.”¹¹¹

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.¹¹² 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.”¹¹³ 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.¹¹⁴ However, this view is rejected by some of the world’s foremost scholars of international law.¹¹⁵

¹¹⁰ 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.”)

¹¹¹ See, e.g., 1 JEAN S. PICTET, COMMENTARY ON THE GENEVA CONVENTIONS (1952) p. 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.”).

¹¹² *Id.* at 49-50.

¹¹³ *Id.*

¹¹⁴ *Paramilitary Activities Case (Nicaragua v. United States)*, 1986 I.C.J. 14, 113-14 (June 27, 1986). 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).

¹¹⁵ 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.

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.’”¹¹⁶ Other scholars make similar points.¹¹⁷

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 *Prosecutor v. Tadic* case.¹¹⁸ 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 as discussed in Part I, under *Whitney v. Robertson*,¹¹⁹ the Court will be bound by an inconsistent statute of more recent date.

Can the United States Withdraw from the Geneva Conventions?

I can’t imagine that the United States would want to withdraw from the 1949 Geneva Conventions, but it is a legal issue that some may find of interest so I will address it briefly. As a general principle, State Parties can denounce the Convention and be liberated from its constraints as conventional international law upon one-year notice. However, that is not the case if the country is engaged in an ongoing conflict when notice of denunciation is given. Article 142 is clear on this point:

Article 142

Each of the High Contracting Parties shall be at liberty to denounce the present Convention.

Stockton Chair of International Law at the Naval War College, and I took the liberty of communicating with him in preparation for this hearing.

¹¹⁶ G. I. A. D. Draper, *Humanitarian Law and Internal Armed Conflicts*, 13 GA. J. INT’L & COMP. L. 253, 268 (1983). 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.

¹¹⁷ See, e.g., Fionnuala Ní Aoláin, *Hamdan and Common Article 3*, 91 MINN. L. REV. 1523, 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 interstate (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).

¹¹⁸ *The Prosecutor v. Dusko Tadic*, Case No. IT-94-1-T, Opinion and Judgment, May 7, 1997.

¹¹⁹ See *supra* note ___ and accompanying text.

The denunciation shall be notified in writing to the Swiss Federal Council, which shall transmit it to the Governments of all the High Contracting Parties.

The denunciation shall take effect *one year* after the notification thereof has been made to the Swiss Federal Council. *However, a denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict shall not take effect until peace has been concluded, and until after operations connected with the release and repatriation of the persons protected by the present Convention have been terminated.*

The denunciation shall have effect only in respect of the denouncing Power. It shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.¹²⁰

One might argue that the President could relieve the United States of the obligations of Common Article 3 on the theory of *rebus sic stantibus* or “fundamental change of circumstances.” Both international¹²¹ and American¹²² law recognize this doctrine, which permits a State to terminate a treaty obligation as a result of an unforeseen change of conditions from when the obligation was assumed that makes compliance far more burdensome to the party. For example, if State A enters into a treaty with State B to provide electricity from a hydroelectric power plant near the mutual border, and a subsequent earthquake diverts the river into a third State – or merely reduces the flow to the point that State A can no longer satisfy its own power needs – international law will allow State A to terminate the agreement.

One might make the argument that when the United States ratified the four Conventions in 1955 it understood Common Article 3 to apply solely to internal conflicts or civil wars, and it had not foreseen the possibility that more than half-a-century later there would be transnational non-governmental organizations in search of weapons of mass destruction and capable of covert attacks within this country slaughtering thousands of innocent people at a time. If a decision were made to violate Common Article 3, it might make more sense to argue such a case than to simply announce that the United States has decided to violate its solemn international legal obligations. As discussed, the President has the power to do either. But such an argument would find little support around the world, and relieving the United States from the obligations of Common Article 3 would not really solve the problem.

¹²⁰ Geneva Convention Relative to the Treatment of Prisoners of War, Art. 142 (emphasis added).

¹²¹ Vienna Convention on the Law of Treaties, Art. 62.

¹²² AMERICAN LAW INSTITUTE, RESTATEMENT (3D) ON THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 336.

First of all, since every single State in the world has ratified the Geneva Conventions, it would be extremely difficult to argue that the fundamental provisions of Common Article 3 are not binding upon the United States as customary international law even if we could withdraw from or denounce the treaties themselves. Indeed, the majority view today is certainly that offenses like torture are already established as *jus cogens* or peremptory norms from which no derogation is permitted under any circumstances.¹²³

And Common Article 3 is hardly the sole source of these basic obligations. Although the United States is not a Party to Protocol Additional I to the 1949 Geneva Conventions, we have a long record of stating officially that Article 75 of that treaty (which has been ratified by 167 States) binds us as customary international law. Article 75 contains an even more detailed list of wrongful acts in assuring humane treatment of detainees and others who are no longer able to take part in a war, and it has been formally recognized as customary international law binding upon the United States by President Reagan's Secretary of State George Shultz¹²⁴ and Deputy State Department Legal Adviser Michael Matheson,¹²⁵ and the current administration's State Department Legal Adviser William Howard Taft, IV.¹²⁶ Indeed, this recognition was noted by the Supreme Court in *Hamdan*.¹²⁷ So freeing ourselves of the obligation to treat detainees captured during armed conflict humanely – even if we were inclined to do that – would be extremely difficult and would likely do irreparable damage to our global reputation as an honorable and law-abiding nation.

Learning to Live With Common Article 3

As noted in Part I of my testimony, both Congress and the President clearly have the power to relieve the government from the constraints of Common Article 3 *as a matter of United States law*. Neither can relieve us from our obligations under international law, nor immunize our interrogators or their superiors all the way up the chain of command from the possibility of being arrested and tried as war criminals if they ever travel to a foreign country. (Let me emphasize that I am not suggesting that many interrogators have actually committed war crimes. I don't have the facts. But the perception is there, and there is universal jurisdiction that would permit 193 foreign countries to initiate such a trial.)

I believe it is important to find a way to operate without violating Common Article 3, and to that end a discussion of the actual meaning of its terms may be useful. In addition, the letter of invitation I received to testify at this hearing specifically asked me to address “historical U.S. and international interpretations of the obligations of Common Article 3 .

¹²³ See, e.g., Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L L. 1, 15 (1986). A New York University law Professor, Meron is among the nation's most distinguished scholars of public international law and a former President of the UN International Criminal Tribunal for the Former Yugoslavia (ICTY).

¹²⁴ 2 MARCO SASSÒLI & ANTOINE A. BOUVIER, *HOW DOES LAW PROTECT IN WAR* (2nd ed., 2006) at 972-73.

¹²⁵ E-mail from Michael Matheson to Robert F. Turner, Sept. 21, 2007, *citing* 2 Am. U. J. Int'l L. & Pol. 427-28.

¹²⁶

¹²⁷ 548 U.S. at 70.

. . .” I want to emphasize that I am not an expert on international tribunals, but I have done some quick research in an effort to find cases that might be of assistance to you. Unfortunately, most of the opinions are rather tautological – almost along the lines of “inhumane treatment means treating someone inhumanely.” And rather than focusing on the specific language of Common Article 3, they tended to address similar language in other treaties.

Perhaps the most on-point case I found was from the European Court of Justice in 1978 involving British interrogation practices in Northern Ireland. In *Ireland v. United Kingdom*, the Irish government charged that forcing detainees to stand on their toes, covering their heads with hoods, playing loud music, and depriving them of sleep, food, and water violated Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which provides:

Article 3 – Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

By a vote of 16 to 1, the Court held that the use of the five techniques “constituted a practice of inhuman and degrading treatment” in violation of Article 3. By a vote of 13 to 4, the Court found that “the five techniques did not constitute a practice of torture within the meaning of Article 3.”¹²⁸

In another case, the same Court defined “degrading treatment” as “feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical and moral resistance.”¹²⁹ Of course, that is presumably the purpose for which the techniques were being used – to break the detainees’ resistance to interrogation. As a result of such cases, the British Government announced it would cease relying on such techniques.

The United States is not a Party to the International Criminal Court, but given that I was asked to discuss international interpretations of Common Article 3, I might call to your attention the volume *Elements of War Crimes Under the Rome Statute of the International Criminal Court*, by Knut Dörmann. In discussing the meaning of “wilfully causing great suffering, or serious injury to body or health,” he notes the ICTY in the *Aleksovski* case defined it as “intentionally and unlawfully inflicting serious injury to the body or health of the protected person,” and in the *Blaskic* case “an intentional act or omission consisting of causing great suffering or serious injury to body or health, including mental health”¹³⁰ Relying on the ordinary meaning of the words as defined in the *Oxford English Dictionary* (“not slight or negligible”), the International

¹²⁸ This opinion is available online at: <http://www.worldlii.org/eu/cases/ECHR/1978/1.html>.

¹²⁹ *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A at 39 (1989)).

¹³⁰ KNUT DÖRMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 77(2003).

Criminal Tribunal for Rwanda (the Chief Judge of which was a distinguished American retired Army JAG officer and now a Distinguished Professor at Syracuse College of Law) discussed “serious injury to body or health” by emphasizing: “Causing serious bodily or mental harm to members of the group does not necessarily mean that the harm is permanent and irremediable.”¹³¹ In its *Musema* case, this same tribunal defined “degrading and humiliating treatment” as “Subjecting victims to treatment designed to subvert their self-regard.”¹³²

In distinguishing causing “great suffering” or “serious injury to body or health” from “inhuman treatment,” the ICTY in the *Kordic and Cerkez* case found that: “This crime is distinguished from that of inhuman treatment in that it requires a showing of serious mental or physical injury. Thus, acts where the resultant harm relates solely to an individual’s human dignity are not included within this offense.”¹³³

A 2003 decision of the ICTY provides this description of the offense of “willfully causing great suffering” in the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War:

The Commentary to Article 147 of Geneva Convention IV describes the offence of willfully causing great suffering as referring to suffering which is inflicted without ends in view for which torture or biological experiments are carried out. It could be inflicted for other motives such as punishment, revenge or out of sadism, and could also cover moral suffering. *In describing serious injury to body or health, it states that the concept usually uses as a criterion of seriousness the length of time the victim is incapacitated for work....* This offence includes those acts that do not fulfill the conditions set for torture even though acts of torture may also fit the definition given. . . . [S]erious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment, or humiliation. It must be harm that results in a *grave and long-term disadvantage to a person’s ability to lead a normal and constructive life.*¹³⁴

I’m no expert, but this language might well exclude many of the techniques that have

¹³¹ *Quoted in id.* at 78.

¹³² *Prosecutor v. Musema*, Case. No. ICTR-96-13-A, Judgment and Sentence 285 (Jan 27, 2000).

¹³³ DÖRMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 79-80.

¹³⁴ *Naletilic and Martinovic*, (Trial Chamber), March 31, 2003, para. 339-343 (emphasis added).

been attributed to CIA interrogators.

My final “interpretation” is not from an international tribunal at all, but instead from the Army Judge Advocate General’s Legal Center and School, located right next door to our law school. In training their lawyers to teach the obligations of Common Article 3, JAG School instructors use what they call a “Modified Golden Rule”: “Would it bother you if it was done to one of your soldiers?” They also teach “There are things we can do to U.S. soldiers that we CANNOT do to Detainees (SERE training, lack of sleep, mandatory PT).” In dealing with 99 percent of detainees, that strikes me as an excellent approach. The difficulty comes in dealing with the small number of high-value subjects who reportedly have been entrusted to the care of the CIA. If these hard core al Qaeda lieutenants are providing us with 75 percent of our HUMINT intelligence, and that information is being used to save lives in this country and abroad, I can understand why the President and General Hayden are not anxious to shut the program down.

When I was first asked my views on the reports of “torture” and abuse of detainees, it was by a Voice of America reporter who caught me on my cell phone while I was driving across the Midwest taking my son on vacation. My response was that some very good people had apparently done some very bad things for very good reasons.” I have no personal information on the treatment that has actually taken place, and trust with your security clearances you are far closer to the truth on that issue than I am. If there really has been “torture,” I believe it was a horrible mistake and it deeply saddens me. If detainees have been treated “inhumanely,” that, too, is illegal under our international treaty commitments and it saddens me. But I bear no hatred for our interrogators, and I understand their desire to get information that may save the lives of thousands of our fellow citizens. Indeed, one of my concerns about this entire issue is that we may have set up some extraordinary fine young men and women to spend the rest of their lives afraid to travel outside our borders for fear of facing a war crimes trial.

Do the Alleged CIA Interrogation Techniques Violate Common Article 3?

Again, I stress that I have no personal knowledge about what the CIA is or has been doing in this area. Good friends within the government assure me that most detainees are being treated exceptionally well, with three meals planned to accommodate their religious preferences served each day and the best medical and dental care of their lives. The Abu Ghraib photographs, I am assured, were the result of individual misconduct rather than some planned effort to soften up detainees for intelligence interrogation. (The one major exception, I am told, was the use of an unmuzzled working dog to terrify a detainee who was in fact of interest to our intelligence people.) But you know the facts better than I do.

There are a few things that are clear. There is nothing wrong with assigning a female soldier or an individual of the Jewish faith to interrogate Muslim detainees. While we must be respectful towards their religion, we don’t have to practice it with them or punish our own forces because of a detainee’s prejudices. Using our most able interrogators does not constitute wrongful “humiliation” of a detainee.

. Indeed, a multi-volume 2006 publication by the International Committee of the Red Cross provides a useful discussion of “International Humanitarian Law and Cultural Relativism”:

Jean Pictet, one of the most famous thinkers and practitioners of IHL, tried to explain the cultural universalism of this branch of public international law:

The modern world has placed its hopes in internationalism and therein no doubt its future lies. Now, in an international environment, man’s rights can only be on what is universal, on ideas capable of bringing together men of all races

This leads to an awareness that humanitarian principles are common to all human communities wherever they may be. When different customs, ethics and philosophies are gathered for comparison, and when they are melted down, their particularities eliminated and only what is general extracted, one is left with a pure substance which is the heritage of all mankind.

. . . . Unfortunately, the question of the universal nature of international humanitarian law has prompted little scholarly deliberation [T]he great non-Western legal traditions present, both for international humanitarian law and for human rights law, obstacles which at first seem insurmountable, at least in terms of their legitimacy.

However, it cannot be denied that respect for human dignity is an eminently universal concept. The foundations of international humanitarian law, or at least their equivalents, are thus found in the major cultural systems on our planet: the right to life, the right to physical integrity, the prohibition of slavery and the right to fair legal treatment. However, a considerable problem is the fact that those principles are not universally applied. . . .

This does not, however, necessarily negate the universal foundations of international humanitarian law. Non-Western cultures cannot escape the steamroller of modern life

Moreover, the showing of respect for other cultural systems . . . must not mean that we cast aside the greatest achievements of modern times: the critical faculty. Thus, if we came across a group of human beings who practiced the systematic torture of prisoners in the name of tradition or religion, this would not make torture somehow more acceptable.¹³⁵

¹³⁵ 1 MARCO SASSÒLI & ANTOINE A. BOUVIER, HOW DOES LAW PROTECT IN WAR (2nd ed., 2006) at 85-87.

According to Physicians for Human Rights and Human Rights First, the CIA interrogation techniques are based largely on techniques long used on American forces by our own military as part of its Survival, Evasion, Resistance, and Escape (SERE) program.¹³⁶ I gather these techniques include “waterboarding,” which these human rights group report may no longer be used in interrogation but which many legal experts view as not only “inhumane” but crossing the line into torture.

I’m not the witness to tell you what the CIA is still doing or what the long-term physical or psychological effects of playing loud music, adjusting room temperature, or depriving detainees of sleep or food will be. I was concerned by a letter sent to Senator McCain cosigned by “several leading medical and psychological experts, including current and past presidents of the American Psychiatric Association and the American Psychological Association,” that was quoted in a booklet published by the two human rights groups I just mentioned. The letter declared that: “Prolonged sleep deprivation, induced hypothermia, stress positions, shaking, sensory deprivation and overload, and waterboarding . . . among other reported techniques, can have a devastating impact on the victim’s physical and mental health.”¹³⁷

Each of these techniques involves variables. Keeping someone awake for 18 hours with a 60 watt light bulb on while they listen to an iPod set at maximum volume is not likely to qualify as “inhumane.” Keeping the same person awake for 5 days with four klieg lights shining at close range in their eyes with rap music blasting in their ears at 140 decibels almost certainly would constitute “torture.” And accusations involving words like “prolonged” and “loud” are even less precise than the language of Common Article 3.

¹³⁶ PHYSICIANS FOR HUMAN RIGHTS & HUMAN RIGHTS FIRST, LEAVE NO MARKS: ENHANCED INTERROGATION TECHNIQUES AND THE RISK OF CRIMINALITY 2 (2007).

¹³⁷ PHYSICIANS FOR HUMAN RIGHTS & HUMAN RIGHTS FIRST, LEAVE NO MARKS: ENHANCED INTERROGATION TECHNIQUES AND THE RISK OF CRIMINALITY 2-3 (2007). *See also*, Metin Basoglu, *et al. Torture vs. other Cruel, Inhuman, and Degrading Treatment: Is the Distinction Real or Apparent?*, 55 ARCHIVES GEN. PSYCHIATRY 277 (2007).

III. Public Policy Considerations

Earlier this month, CIA Director General Michael Hayden – whom I have never met, but for who I have the greatest respect – gave an excellent speech¹³⁸ to the Council on Foreign Relations in New York City. I’ve been a member of the Council for decades, but I was not present and had to read the speech later. I was particularly impressed with the observation that, to an extraordinary extent, the outcome of this war will be determined by how good our intelligence is as opposed to how good our military is. We need intelligence to find al Qaeda and discover their plans. Unlike World War II or the Cold War – where our enemies were numerous and equipped with tanks, airplanes and other intimidating weapons of war – killing members of al Qaeda is a fairly easy process. It is *finding* them that I difficult. And in that sense, I submit that this committee is more critical to this war than the Committee on Armed Services, and leaks or legislation that compromise sources and methods or hamstringing the ability of our intelligence professionals to do their job are more harmful than publishing the sailing dates of warships or the locations of our forces in the field.

In his CFR address, General Hayden revealed that more than seventy percent of the actionable human intelligence we are receiving in this war is coming from detainee interrogations. He is an honorable man, and I believe him. And we need to take that reality to heart as we assess what to do about the CIA interrogation program. Recognizing that all human life has moral value, we must nevertheless ask how many American lives are we prepared to sacrifice so that an al Qaeda terrorist can be guaranteed his right to humane treatment under international law. I have the greatest respect for international law – teaching it is part of my profession – and I view preserving and upholding the rule of law to be a very conservative value. With the Lieber Code, we led the world in trying to codify the humanitarian law of armed conflict. Abandoning that historic commitment would come at a high cost. But I cannot say that if we were actually confronted by a “ticking bomb” scenario, that Osama bin Laden’s personal comfort ought to outweigh the right to life of thousands or perhaps hundreds-of-thousands of innocent human beings.

But there were other parts of General Hayden’s speech that also caught my attention and reaffirmed my sense that he is an exceptionally wise man. Time and again, he emphasized that “American cannot win this war without allies,” and “[w]inning the war of ideas actually defines the long-term victory that we seek.” I could not agree more. And I am once again reminded of an observation by Thomas Jefferson, the founder of my university, who in an 1809 letter to President Madison observed: “It has a great effect on

¹³⁸ General Hayden’s Remarks at the Council on Foreign Relations, Sept. 7, 2007, available online at: <https://www.cia.gov/news-information/speeches-testimony/general-haydens-remarks-at-the-council-on-foreign-relations.html>.

the opinion of our people and the world to have the moral right on our side.”¹³⁹ If we are to prevail in this conflict, we *must* maintain the high moral ground.

As I discussed in Part I of my testimony, both Congress and the President have the constitutional power to violate international law. That is not in my view at issue. The question we must all ask is whether doing so makes sense as a matter of public policy.

I’m not talking about the exceptional case – if, indeed, there would ever be such a case – involving a “ticking bomb” scenario in which we know with reasonable certainty that a terrorist in our control has information that might save thousands or innocent lives. I cannot imagine any moral person arguing that Osama bin Laden’s right to personal integrity outweighs the right to life of thousands of innocent human beings. In a very thoughtful case, the Supreme Court of Israel suggested that an interrogator who violated the law in such a setting might be able to offer a “necessity” defense – a legal principle that breaking the law can be justified if done to achieve some extraordinary moral end, such as saving the lives of innocent people. The problem with this reasoning is that the necessity defense is not allowed if the legislature has considered the contingency at issue and precluded derogation from the legal norm. And certainly in international law, that is the case.¹⁴⁰

Alternatively, the Israeli Supreme Court notes, the legislature could authorize a departure from the norms of international humanitarian law. Some feel Congress did that with the Military Commissions Act. My own sense is that “ticking bomb” cases will be so rare that formally undermining our international law obligations is not warranted. If such a case ever actually happened, the first line of defense might be a presidential pardon. Jury nullification is also a possibility, as few jurors would likely relish sending to prison a hero who had saved thousands of innocent lives. Neither approach, of course, will immunize any American who actually commits a war crime from possible international prosecution.

As I made clear in the *Washington Post* op-ed I co-authored with General Kelley, I was personally *outraged* by the language of Executive Order 13440. It read as if the President was reserving America’s right to engage in “willful and outrageous acts of personal abuse . . . in a manner so serious that any reasonable person . . . would deem the acts to be beyond the bounds of human decency . . .” It was a political gift to America’s enemies around the globe – written “proof” that George W. Bush was masterminding war crimes while pretending to do the right thing. It sometimes seems like this administration doesn’t understand that public opinion matters.

In reality, I doubt *seriously* that is what has been going on or what anyone has planned. Someone – perhaps the CIA Inspector General, perhaps this Committee – needs to find out what is actually going on, correct any problems, and then reassure the American people and the world that the CIA is not hiring retired Nazis to torture our enemies.

¹³⁹ Note to follow. xxxx

¹⁴⁰ Note to follow. xxx

Over the past three or four decades I've met eight of the twenty-one Directors of Central Intelligence who have served since the CIA was first established. Some I considered good friends, all were exceptionably honorable and able men. I've known scores if not hundreds of CIA employees over the years, and as a group they have been as fine as any career public servants I have encountered. They are often mission-oriented, to be sure, but their commitment to our Constitution and the rule of law is unsurpassed. I don't know what is going on with the detainee interrogation program, but I very much hope you will be able to learn the truth, fix any problems, and assure the American people that all is well.

The Church Committee and Hollywood have done a grave disservice to this nation and to the tens of thousands of public servants who have proudly served in our Intelligence Community. I was visiting friends in Tulsa a couple of Christmas' ago when they showed a DVD called "The Borne Identity." It was about a highly trained CIA assassin who had lost his memory. It is but one of numerous modern films that tell stories about CIA assassins, usually casting them as arch-villains. When the movie ended, I asked my hosts if they actually believed that the CIA went around the word assassinating people. "Of course they do," came the answer. After all, they saw it on TV.

As I'm sure all of you know, the Church Committee spent months investigating allegations of CIA "assassinations." In the end, they reported that Presidents Eisenhower and Kennedy had directed that the CIA try to kill Fidel Castro (whose unlawful efforts to overthrow a variety of governments in Latin America may well have made him a lawful target in collective self-defense under Article 51 of the UN Charter and the OAS Charter). There was also a plan to kill Patrice Lumumba of the Congo. They bungled the Castro hits repeatedly, and Lumumba was killed by rival leftist guerrillas before the CIA could get its plan in motion. In the end, the Church Committee concluded that it had not found a single instance in which the CIA had ever "assassinated" anyone.¹⁴¹ Indeed, both Richard Helms and my old friend Bill Colby had each issued internal CIA directives prohibiting any CIA involvement in assassination years before the Church Committee was set up.

Let me close with a great concern. I spent a good deal of time in Indochina between 1968 and the final evacuation in April 1975. During the final 15 months, I was national security adviser to a member of the Senate Foreign Relations Committee. And I watched with a great sense of sadness as misinformed "peace" protesters fed untrue information to the Hill and fueled a horribly partisan struggle that weakened this country for decades. In the end, I was the last congressional staff member in Vietnam – trying desperately to get permission to travel to Phnom Penh and rescue Cambodian orphans before the Khmer Rouge seized control. I failed in that mission, and most of those orphans were among the estimated 1.7 million Cambodians who were slaughtered by the Communists. In Vietnam, by betraying our solemn SEATO Treaty pledge, John F. Kennedy's promise that America would "oppose any foe" for the cause of human freedom, and a statutory commitment to defend South Vietnam and Cambodia approved by 99.6 percent of the Congress, Congress consigned tens of millions of decent people to a Communist tyranny

¹⁴¹ Note to follow. xxx

that for decades ranked among the “dirty dozen” and “worst of the worst” human rights violators.

Stalin once remarked that a single death was a tragedy, a million deaths but a statistic. Most Americans have difficulty envisioning the slaughter of 1.7 million human beings (the Yale Cambodia Genocide Program estimates more than 20 percent of the entire population of Cambodia¹⁴²), just as they can’t relate to the genocide in Darfur that continues as we meet here this afternoon. So let me put it in more micro terms. National Geographic Today ran a story about the Cambodian killing fields in 2003. It noted that, to save bullets, the Khmer Rouge would often murder small children by simply picking them up by their legs and *bashing them against trees*.¹⁴³

Like the 1983 slaughter of 241 sleeping Marines in Beirut, that didn’t have to happen. And also like Beirut, had it not been for an irresponsible U.S. Congress (which in both instances was violating the Constitution), it probably would not have happened. In Beirut, the partisan congressional debate virtually placed a bounty on the lives of our Marines, announcing to our enemies that if they would kill a few Marines Congress would reconsider its vote and probably bring the American forces home. I would add that bin Laden has stated that he concluded from our withdrawal from Beirut that America could not tolerate casualties, which may well have been a factor in his decision to attack us on 9/11.

I’ve authored or edited three major books about Vietnam and numerous articles, and I’ve taught seminars on the war at the undergraduate and graduate level at Virginia and also at the Naval War College. There is a growing consensus today among Vietnam scholars that America essentially had the war won by the early 1970s. Indeed, this version of history is reinforced by accounts written by former North Vietnamese and Viet Cong officials, who note we had them on the ropes and their only hope was that the American peace movement – which we now know was wrong about virtually every issue – would pressure Congress into cutting off funds. Congress went them one better and actually made it unlawful for the President to spend treasury funds defending victims of armed international aggression in Indochina. (Hanoi has since the war ended repeatedly boasted of its May 19, 1959, decision to open the Ho Chi Minh Trail and send tens of thousands of soldiers and hundreds of tons of supplies into South Vietnam to overthrow that country’s government.)

In Vietnam, we won every major battle. But we lost the war because we failed to engage in the political struggle, and by the early 1970s the American people didn’t know what to believe and had lost their will to continue. Public opinion matters. Let’s not have another “Vietnam.”

In Part I of my testimony I documented the Founding Father’s understanding the Congress was to have no role in intelligence save for providing the President with adequate funds to do his job. (At one point, the foreign affairs fund constituted 14

¹⁴² Note to follow. xxx

¹⁴³ Note to follow. xxx

percent of the federal budget.) Many of you have scored political points against the incumbent President by telling the American people he thinks he is “above the law.” If you’ve read Part I of this testimony, you should realize that it is Congress rather than the President that has been breaking the law. You have the power to take a leadership role in fixing that situation, or you can sit back, score partisan political points, and pray that the American people don’t learn the truth before the next election.

Mr. Chairman, in closing I would like to leave you with one of my favorite quotations from a distinguished member of this Chamber. On February 10, 1949, Senator Arthur Vandenberg delivered a “Lincoln Day” address in Detroit. His theme was the importance of bipartisanship. And he told his audience:

It will be a sad hour for the Republic if we ever desert the fundamental concept that politics shall stop at the water’s edge. It will be a triumphant day for those who would divide and conquer us if we abandon the quest for a united voice when America demands peace with honor in the world. In my view nothing has happened to absolve either Democrats or Republicans from continuing to put their country first. Those who don’t will serve neither their party nor themselves.¹⁴⁴

Thank you, Mr. Chairman. That concludes my prepared statement.

¹⁴⁴ *Quoted in* TURNER, THE WAR POWERS RESOLUTION 118.