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Keynote: The Role of the United States in Strengthening the Prohibition against Torture

Michael Posner

Claudio Grossman

American University Washington College of Law

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KEYNOTE: THE ROLE OF THE UNITED STATES IN STRENGTHENING THE PROHIBITION AGAINST TORTURE

Introduction by Dean Claudio Grossman

We are very pleased to welcome the Honorable Michael Posner, Assistant Secretary of State for Democracy, Human Rights, and Labor. Michael was sworn in as the Assistant Secretary on September 23, 2009. His appointment was wonderful news for us as he brings tremendous knowledge and expertise to this position. Michael was the Executive Director and then President of Human Rights First. In those capacities, he became a very important voice for human rights, particularly with regard to promoting a rights-based approach to national security, refugee protection, and challenging discrimination and crimes against humanity. He also played a key role in proposing and advocating for the first U.S. law providing for political asylum, which was subsequently included in

the Refugee Act of 1980. Later, in 1998, he headed the Human Rights First delegation to the Rome conference during which the adoption of the Statute of the International Criminal Court was achieved.

Michael's extensive bio is impressive and listing his numerous accomplishments would consume all of our time. I know, however, that we prefer to hear directly from Michael himself. Michael, I think it is good news to see you here, and we look forward to your presentation. Please join me in welcoming the Assistant Secretary of State for Democracy, Human Rights, and Labor, Michael Posner.



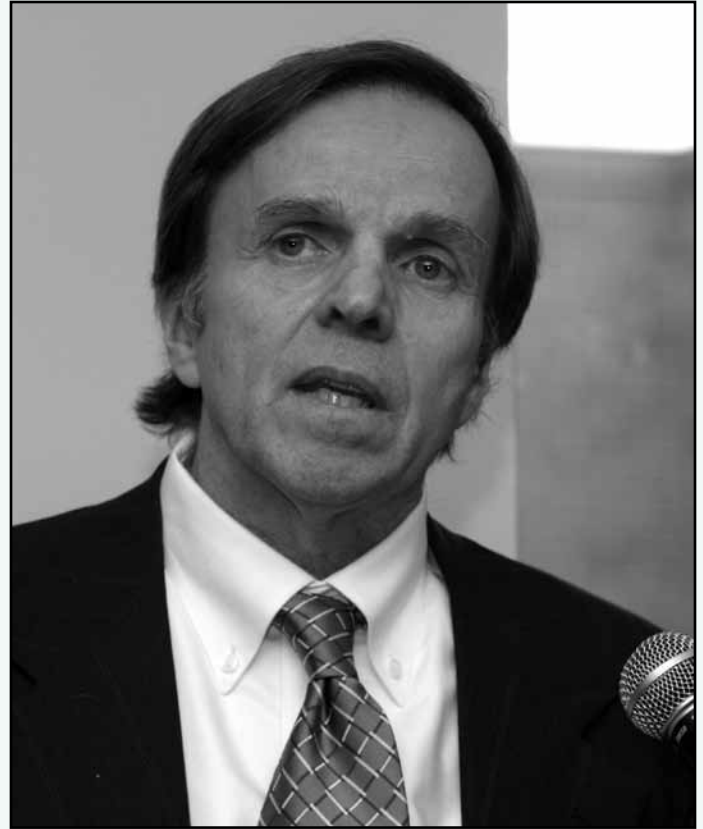
Remarks of the Honorable Michael Posner

Thank you, Claudio. It is a pleasure to be here, to see lots of old friends, and to participate in this important meeting. I thought I would speak for a few minutes and then open it up for questions and discussion, but I wanted to begin by putting a couple of ideas on the table.

First of all, I wanted to just say something about my own involvement in this. I spent most of my life in the non-governmental world, and so it is hard sometimes for me to separate my prior life from my current life, but there are a couple things from my time working with Human Rights First that do affect and color my approach to these issues. Actually, it is appropriate that this is a meeting that Amnesty International is co-sponsoring because my first serious involvement with this issue occurred in the context of what was a global effort by Amnesty International in 1983 or 1984 to launch an international campaign against torture. And, it was in that context of thinking about the subject of how do we take a public campaign and public education and public activism and turn it into government action that I was asked to testify at hearings in the U.S. Senate and the House of Representatives. In those hearings, organized by Amnesty International we proposed an addition to U.S. law called the Torture Victim Protection Act (TVPA),¹ which was finally adopted by Congress in 1992.

The TVPA provided a remedy in court for people who had been tortured anywhere in the world and who found their torturers in the United States. It is a companion to the old statute, the Alien Tort Claims Act (ATCA),² which was passed in 1789. In the early 1980s the ATCA was first applied to a torture case, *Filártiga v. Peña-Irala*.³ There was some debate, however, among lawyers and among judges about whether the ATCA was really intended to deal with torture. So, we decided to create a statute that made it clear that in the twentieth century there was a contemporary concern about torture that was equivalent to concerns about piracy in the 1700s. And that statute, I think, helped both in form and strength to move advocacy forward on the issue of torture.

The second thing personally for me was when the United States ratified the Convention against Torture. Elisa Massimino, who is now the Executive Director of Human Rights First, and I worked very hard on two things that we thought were important. The first was to provide a legal remedy for people who had been tortured and were facing deportation from the United States. So, in the implementing stage we went to the then Immigration and Naturalization Service (INS) and we said that under Article 3 of the Torture Convention⁴ there is an obligation of the United States not to send people back to be tortured that is separate and distinct from those seeking political asylum. And we got the INS to adopt an internal regulation, which provides in a sense a parallel remedy for people in deportation proceedings. There is now a range of cases that make it to the U.S. federal courts that provide protection to people who would face torture if they were deported, even those not eligible for asylum.



The second thing we did was to go to the Congress and say that there ought to be a federal criminal statute akin to the ATCA and the TVPA, which says that if somebody has committed torture somewhere in the world and they come to the United States they ought to find themselves subject to criminal prosecution. And that statute, 18 U.S.C. § 2340A, essentially was adopted with the thought that we would be finding people who come to this country and who at a minimum should not be immune from prosecution in situations where their own governments were either unwilling or unable to prosecute them. It took a long time for the statute to be applied. It was adopted in the 1990s, but it was not until last year that Charles “Chuckie” Taylor, Jr., Charles Taylor’s son, was convicted in Florida of human rights violations and torture.⁵

This takes me to the third piece of my own personal history. That is the statute, 18 U.S.C § 2340A, that essentially prompted John Yoo and Jay Bybee to write the “torture memos” in the last administration. In my previous life, I would go through a rant at this point about the previous administration. I am not going to do that, but I will at least say that I spent more than a few minutes over the past eight years of the previous administration focused on this issue of what I call official cruelty. Again as a personal matter, I think there is no human rights violation that deserves more attention than torture. The integrity of the person is where I start the discussion and the notion that a state with control of somebody, not in a custodial position, not in combat, but that the state would deliberately be abusive is to me the beginning of the

discussion of human rights. There has to be absolute moral and legal clarity that there can be no tolerance of torture or cruel, inhumane, or degrading treatment. And so we spent a lot of time and energy at Human Rights First, and in particular with people in the national security establishment in the United States. I am incredibly proud of the work we did, and that Human Rights First continues to do, with retired military leaders, who include fifty flag and field officers, generals, and admirals to come out and say “no” to official cruelty.

Next, I want to say a word about the current administration and what we are going to do about this, but to me the absolute precondition to joining the government — which I regard as a privilege and an honor — was that the President on the second day in office made it absolutely clear that there would be a zero tolerance of torture or official cruelty. I am committed to making sure that is not rhetoric, but policy. We can talk about how that is carried out in a minute.

Now, turning to what this administration is doing. I want to frame this in three broad aspects and give a sense of what we were trying to do and how it applies to the issue of torture, supporting the Committee against Torture and the UN’s efforts. U.S. Secretary of State Clinton gave a speech in December 2009 on human rights, democracy and development.⁶ In that speech, she echoed what President Obama has said on numerous occasions, which is that the U.S. government is committed to a strong policy on human rights, and this is framed in terms of three broad categories of approach.

The first is a sense of what we are calling principled engagements. Principled engagement means that both in bilateral and multilateral relations we are going to show up and we are going to raise these issues. We are going to raise these issues with friend and foe, and we are going to raise these issues not by standing outside, but by participating. The decision last year to join the UN Human Rights Council is a prime example of our commitment. It is not that we believe the Human Rights Council is doing a great job; we do not believe that. It is not as though we do not believe there are going to be situations that are going to be frustrating; we know that there will be. But there is a belief, and it is a belief that I hold very strongly, that the United Nations is an important institution. It is the only institution where all of the world’s governments congregate to talk about a range of issues, including human rights, and the best, and in fact the only way, to change it, to improve it, to make it more rights and people oriented is to participate as an active party. And so we joined the Council. I participated in the session in September in Geneva. I was there a couple weeks ago for the Universal Periodic Review discussion on Iran. I am going to be there at the end of the month.

I think that in looking at the Council and the Office of the High Commissioner for Human Rights, we see a moment in the next eighteen months where there is a chance to make some changes and improvements. It is not going to be easy, but in this context of this discussion on torture I want to just mention a couple things I think are important. One is that it is a deeply divided Council — divided politically, and divided with very strong regional

groupings. There is a very strong sense that countries are less and less free to speak as individual nations. I do not think that is a good thing. I know there are some representatives here from the EU and from European governments. I think the European governments actually have to work on this. What we have seen in the last ten years, is that because of the coming together of the European Union — which I totally appreciated and understand — is that the European Union countries are increasingly speaking with one voice. The effect of that is that the Islamic Conference countries and the African Union countries are now also saying, almost in response, we are going to speak with one voice. (These remarks, by the way, have not been cleared by anyone in the State Department.) What we have essentially is the European states devolving to the lowest common denominator — what is everyone in the EU willing to do? That can be a fairly mediocre position, quite honestly. And, we have from the African Union and the Islamic Conference quite terrible positions. So, mediocre and terrible tends to dominate a lot of the discussion. That is not a healthy situation. We used to look to the Danes, or to the Swedes, or to the Dutch to be at a very different place from some of the other European governments. Those voices are missing. The atmosphere is that we have a collective obligation to try and figure out how to deal with that.

There is a second piece of the atmosphere of the Council, which is that there is now a juxtaposition between those governments, including the United States, who push hard for a country-specific focus and a focus on tough issues, like torture. There are other governments that are in a defensive position, saying too much of the focus is on southern states, or too much of the focus is on condemnation and not help. We need to find a way to reconcile those positions. In fact, in my mind, the UN, the Human Rights Council, and the High Commissioner’s Office, seem to be doing both. It is a false dichotomy. There ought to be a way for the UN to provide both technical assistance and financial support to governments that do not have the capacity, but are willing, and at the same time, there needs to be space and a place for those governments who are willfully violating human rights to be held to account. And so, as I look at the future of the Human Rights Council, I see a need for us to take the politics out of the discussion and look and ask ourselves what are the things the Human Rights Council does uniquely, what are the things the UN treaty bodies do uniquely, and what are the ways that those things can be strengthened.

There are three categories of things. The first is that the Human Rights Council and the treaty bodies collect information through the periodic review of all countries, through the special procedures, for example the UN Special Rapporteur on Torture, and through the various treaty bodies that operate under the various conventions. That exercise of fact-gathering is being hampered, in many ways, by governments. We now have an odd situation that the rapporteurs are being called to task by some governments, under what they are calling a code of conduct, because the governments do not agree with what they are saying. There ought to be a code of conduct for governments. What happens when a government systematically refuses to let rapporteurs in? What is the sanction? Where is the discussion of that? We need to take a

serious look at access, at the means of information collection and dissemination, and the treaty bodies, including the Committee on Torture, are a piece of it.

The second thing the UN does in the human rights realm is to make recommendations. We ought to be looking across the board at the special procedures, at the treaty bodies, at various resolutions through the Human Rights Council to say, is there a systematic way that those recommendations can be presented in a coherent, consolidated way, that will actually be taken seriously by governments and that will enhance that aspect of what is being done. It is essential to every aspect of what the UN is doing on human rights.

The third piece is the remedy piece. And, again here going back to what I said a moment ago, I think there is a desire on the parts of some governments to limit that discussion to technical assistance or support, on other governments, to be condemnatory. We need to find a way to have a menu of options, and make it clear that every government is subject to the range of options that are in that menu. And so, there ought to be times in which there is a country-specific review and in some cases there ought to be a review that is tied to an analysis of what technical assistance is needed. In my judgment, there ought to be a piece of this that also looks at what resources are available throughout the UN system and from governments to make sure that countries can actually live up to their obligations, if they have the willingness to do so. We ought to do all of those things and we ought to do them in an intelligent, systematic way. Coming back to the notion of principled engagement, we are committed to trying to figure out how to break the political logjam that blocks voting, but we are also looking beyond the politics to try to find ways to make the institutions stronger on their own.

The second piece of what the administration is trying to do and is committed to doing is to say that there is a set of universal standards which apply: one set of standards, which apply to all governments including our own. That means for the United States — and this takes me back to John Yoo — that we have got to take our own responsibilities seriously. As I look at the agenda going forward, one of the things we are in the midst of doing right now, is putting ourselves through the paces, through the Universal Periodic Review.

For the first time, the United States is being reviewed, as are all UN members. In the next several months, we are holding a series of consultations with the NGO world. We had one in New York last week. We had one in Washington for national groups a few weeks ago and one in New Orleans to look at Katrina last month. There are going to be four or five more in the next few months, where groups are going to comment on our record and our performance.

One piece of that relating to this subject is a session we are going to hold, probably in April, on issues relating to national security. It is imperative to me and our government that we do not dump the subject of how national security and human rights inter-

sect, and that means looking into detention and interrogation policies, and privacy issues, which we will do with NGO consultation.

We are determined, I am determined, to make sure that there is an absolute clarity about the ban against torture and abuse and the kind of official cruelty — zero tolerance. We need also to ensure that there are safeguards in place so that there are early detections and warnings if those abuses occur, as they may and inevitably do in every conflict situation, and that we respond accordingly. I am glad to answer more questions about it, but to me that is the absolute key to our credibility, but more importantly, it is key to who we are as a people.

Last but not least, I want to end with the third element of what the administration does. I believe very strongly — and again this reflects my own NGO roots — that it is hard, albeit sometimes impossible, for any government to impose its will from the outside. Change occurs from within societies and the most important thing I think any of us can do to ensure change and protection of human rights is to make sure that we give support, amplify voices, and provide protection for those who are working within their own societies to challenge abuses and improper behavior, like torture.

It is always the case that people who are on the front end of that debate and people who are challenging official impropriety are going to be at risk. It is always the case that governments are going to try to shut them down. It is always the case that governments are going to look for ways to marginalize their voices, to deny them foreign funding, and to deny them the ability to be effective. So I think for all of us, and certainly for me now operating in a governmental capacity, I am particularly keen that we think about the creative range of ways that we can find to make that commitment real and to do it in every country in the world where the local, indigenous advocates are both in the best position to know what needs to be done and be the essential change agents.

I testified this morning at a Senate hearing on internet freedom. There is a whole subject that we were not thinking about twenty years ago or even ten years ago, and governments are getting increasingly aggressive. But, advocates are using these new technologies in ways that we never thought possible. As governments, we need to be thinking about how to use new information technologies as one way of amplifying voices and providing protection, and that includes the people who are working within their own societies to fight torture.

Let me end with that. That's a preview of what we are trying to do and I am eager to answer questions.

QUESTIONS AND ANSWERS

Q: *You rightly identify a lot of the problems with the Human Rights Council and the need to break the logjam, the block voting. The arrival of the United States on the Council, as you know, was warmly welcomed by the human rights community around the world. But, there was one glitch: one of the ways the Council could improve is if there was com-*

petitive voting. An obvious example is that Iran is now standing for candidacy in the Council. The Western European and Other States Group, which the United States and the Europeans are a part of, was on a noncompetitive slate last year, which allowed the United States to get in, which is great. But, that there was no competition set a pretty difficult signal around the world if any of the members of that group wish to tell others to be competitive. So, I would be interested in hearing your thoughts on moving forward in ensuring that there are competitive elections.

ASSISTANT SECRETARY POSNER: It is a real issue and I do not think I have honestly quite gotten to the bottom of it, but I do not think that there is an official U.S. government stance on so-called “clean slates.” The government of New Zealand dropped out when the United States came in. That was before I got there and there are different interpretations of what happened, but I think the notion is right. We have elections coming up, and I think that for all of the regions but one, the Asia region, there is a clean slate; there are four or five candidates for five positions. I think that there was to be a competitive election in Africa, but one dropped out. So, I think that really is a challenge. We are in the position of saying we want to encourage a vote. I think it is certainly the U.S. government’s position that we are not going to favor Iran’s candidacy, but I don’t think that’s a shock to anybody. The reality is that there have to be more choices and so, again from my vantage point, I am going to push for that, but I do not think there is yet a U.S. government position.

Q: *There has been a lot of discussion this morning about the obligation of states under the Convention against Torture to investigate and prosecute and punish. President Obama says we do not want to look back, we want to look forward, but clearly credibility depends on that issue. What are you going to say or do?*

ASSISTANT SECRETARY POSNER: It is a real subject of debate. Let me give you my own perspective. What the President has said and what Eric Holder, the Attorney General, has said is that there will be investigations of those in the intelligence agencies who violated the Bush-era rules. To say the least, that is not totally satisfying. I think that there are a range of battles we are having internally about issues relating to detention and dealing with the past. This is not a shock probably to anybody. I am particularly focused on some of the detention and trial issues, but there is a division of views in the administration on this. Some of us are certainly pushing for there to be criminal trials and if it is possible, to limit or eliminate administrative detention as an option and dispense with the military commissions. What I just mentioned, as well as detention practices in Afghanistan and closing Guantanamo, those things take more than a few minutes out of my day. In my own personal view, I think that there will come a time where we are going to have the opportunity for a more direct discussion and some action in terms of accountability for things that happened in the past. I think, personally, that should happen, but I do not think it is going to happen in the near future.

So, what do you do in the meantime? Information is collected. There are Congressional hearings. There are going to be hearings now in the House and Senate after the ethics decision out of the Justice Department about John Yoo and Jay Bybee. Let that hap-

pen. There will be more information that will come from that. Over time, more information will come out. I have no doubt. I certainly have said this plenty of times, that there were actions taken that were a violation of the law as I see it and at some point we are going to have to figure out how to deal with that. You know, Juan Mendez and Claudio Grossman and others have dealt with these issues of accountability and how to deal with the past. It takes time. There has to be a clarity about everything that happened with full detail and we are not there yet. There has to be an official acknowledgment in a way that is meaningful. We have got to get the full record out there and then figure out what that acknowledgement piece looks like. Then we have to enact policies going forward that are completely consistent with the lessons we need to have learned. I am very focused on that latter piece right now. I have already learned enough lessons — I hope everybody has — but I have a sense that there were so many things that we did that were detrimental to this country. We have got to, in the here and now, act in a way that is consistent with our obligations, and that is where my own energy is going right now. It does not mean that that agenda is not valid and that it will not come in the future, but it is not the place where I think we can make the most difference right now.

Q: *Switching to the future then, another obligation for the State Department is to take measures and adopt mechanisms to prevent torture of people. Is consideration being given by the current administration on what particular measures will be taken, and in particular, ratification of the Optional Protocol to the Convention against Torture or establishing a national prevention mechanism that will then regularly visit all places of detention?*

ASSISTANT SECRETARY POSNER: You know, the notion of getting ratification of treaties is another one of these things that dogs me every day. We have a very high commitment from Secretary of State Clinton, for example for the United States to ratify the Convention on the Elimination of All Forms of Discrimination against Women. A good amount of time has been spent trying to figure out how to go about doing that. The political reality is that you need 67 votes, and we are not close to that right now. We have the Convention on the Rights of the Child, which now every government in the world has ratified; I think even the Somalis, who sort of do not have a government. And we are still sitting paralyzed on that. We have got to find a way to break the logjam. By a national mechanism, do you mean a kind of an international monitoring or visiting, or do you mean something by the United States?

It would be a national body, or it could be several national bodies of experts who would visit all places of detention, both military and civil, in all parts of the country.

DEAN CLAUDIO GROSSMAN: This is the basis of an international treaty. It is an optional protocol that creates a national body.

ASSISTANT SECRETARY POSNER: I see. It is an optional obligation under the Protocol to set up a national process. We might be able to short-circuit that by just talking about what the mechanism looks like. Certainly we have a lot going on with the Red Cross, in terms of access to prisoners in combat situations, but we do

not combine that with visiting super-max prisons in Colorado. I would love to see a sort of map of what that looks like. I imagine that there would be some pretty stiff Congressional opposition to that, but it is worth looking at. The super-max prisons are going to be part of our look at the Universal Periodic Review, and inevitably it is one of the things we are going to be subject to criticism about. I have no doubt.

Q: *Jens Faerkel, Ministry of Foreign Affairs in Denmark.*

ASSISTANT SECRETARY POSNER: I did not mean to give you guys a hard time.

No, but you have got a pretty good idea of why I am commenting. I am not sure if I can frame it into a question. The picture that you were painting, first of all, is something that we have heard before, and it is also something that I have seen on a number of issues, where we are even more frustrated than outsiders are that we cannot really raise the bar. It does not apply to torture because the resolutions are national and, just as we consult with the United States on the issue, we do not buy all the suggestions that the United States makes. We also consult, of course, with our European partners and we — I would say very deliberately, even if we like the substance of the suggestions — make a point of not buying all of them because we want to make sure that this is not a pre-negotiated European resolution, because that way it will go further. Denmark also happens to be burden-sharing on the issue of torture, and I do not really think we have the experience we need to lower the bar on this issue. I do agree that there are other issues where this might happen. I am sorry I could not think of a question.

ASSISTANT SECRETARY POSNER: No, that is good. I am glad you clarified that, because I think that is important. I guess I was referring more broadly to the general atmospheric of the Council, and it would be interesting to figure out if there is more autonomy or latitude on the issue of torture. If there could be a kind of incremental approach to take that precedent and to start applying it to other things as well, because the more we move in a direction of states working independently and also across regions, I think we are more likely to make progress. But, that is a useful clarification.

Q: *I have a question with regards to weighing peace or justice first. After a decade-long high voltage internal conflict in Nepal concluded by the Comprehensive Peace Agreement, the human rights violators have become glorious victors of the peace process. Because of that, justice is likely to be compromised. There have been several incidences of war crimes, crimes against humanity, and serious breaches of international human rights and humanitarian law, but now in the name of preserving the peace process and leading the peace process to the logical conclusion, justice is likely to be compromised. The United States is supposedly monitoring and mentoring the peace process in Nepal, so what would be the position of the administration here with regards to rendering justice to the victims and bringing those perpetrators to justice?*

ASSISTANT SECRETARY POSNER: You know, again, this is always one of the hardest questions, and this is not just an issue for the U.S. government. It is something that many of us have debated for a long time in the context of human rights advocacy. I do not know the particulars of the Nepal negotiations or the U.S. position. I cannot tell you that, because I just do not know. The one thing I am sure about is that there is not one model that applies across the board. States — I should just yield the floor to Juan Mendez or others who have dealt with this a lot more than I — but different states at different stages with different contexts and different actors behave differently, and they even behave differently at different points in their histories. I think the principles I articulated are the right principles. There has to be some truth telling. There has to be some appropriate, official acknowledgment of what has gone wrong, and there have to be lessons learned. But, how you apply those principles in a particular place at a particular moment, I just would need to know a lot more about what is going on there and what is possible now and in the future. The idea of accountability, I think, we all believe in. Its application in a particular place at a particular time is so much dependent on a range of things that are going to be different.

Q: *You mentioned Eric Holder. During his confirmation hearing, he said that were he to face a situation known as the “ticking bomb” where there is urgently needed information and it would not work with legal interrogation methods he would advise the President — I am not quoting here, but this was the spirit of his words — he would advise the President to use whatever means it takes. Has the War on Terror put an end to the absolute prohibition on torture in the United States and possibly beyond? Is there — even though this administration says that torture is a total no-no — some contingency, at least towards if not planned, for extreme situations? And, perhaps more practically, whatever became of the task force that was, among other things, assigned to look into the possibility that there may be need for interrogation methods beyond those in the field manual?*

ASSISTANT SECRETARY POSNER: The President’s words on January 22, 2009 are the policy of the United States. There is a zero-tolerance policy on torture. The notion that there is a ticking time-bomb, although it makes good television and movies, it is not the real world. I really spent a lot of time talking to interrogators about what works and what’s right, and I have yet to find a senior, experienced interrogator who has any time for the notion that coercion is the way to go. It is the policy of the United States not to engage in torture, not to engage in cruel treatment. We have rejected the ticking time-bomb, and the task-force did meet, it did review everything and there is no change in that policy. Does it mean that every U.S. official is always going to behave according to the law? No, but the policy of the Defense Department, the policy of the President, and the policy of the U.S. government is not to engage in torture or cruel treatment. We are not going to play with words. We are not going to parse. We are not going to do those things. And so there is a commitment. It is a commitment that people understand, and it is a commitment that is being honored as a matter of policy. **HRB**

Endnotes begin on page 56.