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Letter from Elizabeth Bartholet, James Cavallaro, & Christine Desan, Faculty, Harvard Law School, to the U.S. Congress on Recent Human Rights Issues in Iraq

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Letter sent to the United States Congress regarding recent human rights issues in Iraq

June 16, 2004

To: Members of the U.S. House of Representatives and the U.S. Senate.

As members of university faculties in law, international relations, diplomacy, and public policy, we write to register our objection to the systematic violation of human rights practiced or permitted by authorities of the United States within occupied Iraq during recent months: we request Congressional action to ensure accountability for such violations and to safeguard against such egregious abuses in the future. Current circumstances require that all transcend partisan politics or considerations. Action by Congress is necessary to promote a rule of law produced and enforced through a democratic process and to protect the physical and psychological integrity of all people consistent with the traditions of our nation.

I. Accountability for human rights violations

Congressional action is necessary to examine and ensure accountability for the organizational and individual failures that allowed persons within the control of U.S. forces to be subjected to acts of torture and to cruel, inhuman and degrading punishment.

There can be no doubt that the acts of abuse in Abu Ghraib prison constitute violations of both the domestic and international legal obligations of the United States and its agents. Executive Branch officials have admitted as much. International humanitarian law provides that those classified as prisoners of war are entitled to special protections against such abuses under the Third Geneva Convention, ratified by the United States in 1955. Inhabitants of occupied territories are protected under the Fourth Geneva Convention, also ratified by the United States in 1955, against physical or moral coercion to obtain information from them. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ratified by the United States in 1994,

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requires that States party take measures to prevent both torture, and other acts of cruel, inhuman, or degrading treatment. The Constitution of the United States protects prisoners from cruel and unusual punishment.

Accepting the applicability of international and domestic law, military officials have initiated prosecutions of lower level personnel. That response, while necessary, is clearly insufficient. Congress has an obligation to investigate and assess responsibility at all levels of the Executive Branch from the highest officers on down for the abuses in Abu Ghraib and other Iraqi prisons.

Despite clear and repeated notice [1], abuse of detainees has been both frequent and pervasive during the military occupation of Iraq. The fact that military officials failed after such notice to identify and eradicate the pattern of abuse itself constitutes a grave breach of responsibility.

In addition, a growing body of evidence indicates that the abuses practiced on detainees under American control are the consequence of policies developed at the highest levels in the months and years immediately preceding the scandal. First, there are reports that harsh interrogation tactics, designed for use against only the most serious terrorist suspects and themselves violative of humanitarian law, have been authorized and applied generally against detainees in Iraq. Second, authorization to coerce detainees to speak creates the potential for grave abuse. It is thus evident that very clear lines must be established and vigorously policed. Yet authorities failed to supervise subordinates adequately, or to establish minimal safeguards against abuse. Third, the dilatory response by military and other officials to reports by international agencies, human rights groups, and the media concerning egregious abuse operated as a predictable signal to those on various levels below that their admittedly illegal conduct was condoned, accepted, or encouraged. Fourth, Executive Branch officials have diverged from past practice by asserting presidential power to designate certain prisoners as not entitled to any judicial or other meaningful review of any aspects of the legality of their confinement, including imposition of torture. That approach to detainees created a culture facilitating disregard for the protections required to be accorded prisoners in Iraq.

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II. Democratic definition of policies involving coercion

Military and intelligence officials have acknowledged that official U.S. policy now involves use of coercive methods that are morally questionable and that may violate international and domestic law. The question whether various forms of coercion against persons under American control can be justified goes to the heart of our identity as a democratic community.

Given the profound problems it may raise as a moral, legal, and constitutional matter, any decision to adopt a coercive interrogation policy and the definition of any such policy, if adopted, should be made within the strict confines of a democratic process. While the Executive Branch should retain sufficient authority to conduct military affairs, basic principles and policies regarding human rights must be defined by a representative and accountable body acting in transparent and deliberative fashion. In turn, the courts must retain ultimate responsibility for judicial oversight in order to ensure that the law meets constitutional requirements.

Thus, insofar as Executive Branch officials have authored and implemented a coercive interrogation policy, that policy must be submitted to Congress for examination and debate. Congress should determine afresh its wisdom, its consistency with basic democratic principles of humane treatment, and its conformity with international and domestic law. If any such policy were to be adopted by Congress, the reviewability of such law through the operation of the courts in due course must be assured.

Conclusion

Given the accumulation of reliable evidence demonstrating the practice of torture and degrading treatment of detainees by U.S. forces, and given Executive responsibility for creating the conditions enabling such practice to occur, and with regard for democratic responsibility with respect to these issues at the heart of our understanding of our nation, its culture and values, we ask that Congress take action to:

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(1) assess responsibility for the abuses that have taken place, identifying the officials at all levels who must be held accountable for enabling these abuses to occur and for the failure to investigate them, and determining what sanctions, including impeachment and removal from office of any civil officer of the United States responsible, may be appropriate;

(2) decide whether the U.S. should have an official policy of coercion in connection with interrogation, and if so what form it should take as well as what safeguards it should include to protect against abuses in violation of the policy.

Sincerely,

[The undersigned]

[1] As summarized in a recent letter to President Bush:

For the past year and a half, The Wall Street Journal, Washington Post, USA Today, Newsday, New York Times, Los Angeles Times, Christian Science Monitor, and other leading newspapers have repeatedly quoted unnamed U.S. intelligence officials boasting about the use of torture and other ill-treatment of prisoners. Numerous detainees have been killed or attempted suicide in custody in Afghanistan, Iraq and Guantanamo Bay prompting unprecedented expressions of concern by the International Committee of the Red Cross; suspects have been turned over to the foreign intelligence services of countries, such as Syria, with records of brutal torture; the ICRC has also specifically expressed concern about conditions at Abu Ghraib prison in Iraq; and now, the US military's own inquiry has found "systemic and illegal abuse of detainees" at Abu Ghraib.

Letter of May 7, 2004 to President George W. Bush from William Schulz, Amnesty International USA, et al.

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