108TH CONGRESS, 2d Session | HOUSE OF REPRESENTATIVES | REPORT 108–658

DIRECTING THE ATTORNEY GENERAL TO TRANSMIT TO THE HOUSE OF REPRESENTATIVES DOCUMENTS IN THE POSSESSION OF THE ATTORNEY GENERAL RELATING TO THE TREATMENT OF PRISONERS AND DETAINEES IN IRAQ, AFGHANISTAN, AND GUANTANAMO BAY

SEPTEMBER 7, 2004.—Referred to the House Calendar and ordered to be printed

Mr. SENSENBRENNER, from the Committee on the Judiciary, submitted the following

ADVERSE REPORT

together with

DISSENTING VIEWS

[To accompany H. Res. 700]

[Including Committee Cost Estimate]

The Committee on the Judiciary, to whom was referred the resolution (H. Res. 700) directing the Attorney General to transmit to the House of Representatives documents in the possession of the Attorney General relating to the treatment of prisoners and detainees in Iraq, Afghanistan, and Guantanamo Bay, having considered the same, reports unfavorably thereon with an amendment and recommends that the the resolution not be agreed to.

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THE AMENDMENT

The amendment is as follows:

Strike all after the resolving clause and insert the following:

Resolved, That the Attorney General is directed to transmit to the House of Representatives not later than 14 days after the date of the adoption of this resolution all documents in the possession of the Attorney General, except those documents in the Attorney General's possession that have been found by a court to be protected by Federal Rule of Criminal Procedure 6(e) in a proceeding at which the Attorney General or the Department of Justice is a party, relating to the treatment of prisoners or detainees in Iraq, Afghanistan, or Guantanamo Bay and any requisite instructions for handling such documents, including—

(1) every report, memorandum, or complaint from the International Committee of the Red Cross relating to the treatment of detainees or prisoners and any documents that reference such memorandum, report, or complaint by the Attorney General or by any agency under the Attorney General;

(2) every report, memorandum, or complaint from Human Rights Watch, Amnesty International, Iraqi Human Rights Association, Afghan Human Rights Commission, Physicians for Human Rights, or Human Rights First relating to the treatment of detainees or prisoners and any documents that reference such memorandum, report, or complaint by the Attorney General or by any agency under the Attorney General;

(3) every document relating to interrogation techniques;

(4) every internal report of a law enforcement, military, or intelligence agency or organization concerning interrogation or detention operations;

(5) every internal report of a law enforcement, military, or intelligence agency in response to allegations that the treatment of prisoners or detainees violated or continues to violate international or American law;

(6) every document and memorandum regarding the applicability of the Geneva Conventions, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Covenant on Political and Civil Rights, sections 2340–2340A of title 18, United States Code, the War Crimes Act of 1996, and the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States to the treatment of prisoners or detainees;

(7) every document and memorandum relating to command relationships between military police units and military intelligence units;

(8) every document and memorandum directing personnel to abstain from using specific interrogation techniques or to withdraw themselves from interrogations being conducted by other departments;

(9) any Presidential directive or other writing authorizing the use of interrogation tactics or claiming the constitutional authority to do so;

(10) any documentation of training received by the 800th Military Police Brigade and the 205th Military Intelligence Brigade regarding the treatment of prisoners or detainees;

(11) any documentation of special access programs as they were applied to prisoners or detainees;

(12) all records of meetings regarding the treatment of prisoners or detainees at which one or more officials of the Department of Justice were present and the presence of those officials is apparent from the face of the record;

(13) every document and memorandum concerning the practice of keeping prisoners or detainees off the official roster;

(14) a list of every ongoing and completed investigation into the treatment of prisoners or detainees, and any written reports produced by any such investigation;

(15) every document relating to civilian contract employees and their role in prisons;

(16) all written statements of prisoners or detainees, military personnel, civilian employees of the Federal Government, or civilian contractors regarding the treatment of prisoners or detainees;

(17) all reports of interrogation of each prisoner or detainee that reflect a claim of abuse by military or civilian personnel or by civilian contractors;

(18) any documents for work under contracts (including subcontracts and task orders) and all reports on such documents, for interrogation or translation

work by CACI International, Titan Corporation, and any other entity that may have performed such work;

(19) any documents or testimony presented to or prepared by the Detainee Assessment Branch at Abu Ghraib prison at any time after September 1, 2003 regarding the treatment of Iraqi prisoners or detainees by members of the Armed Forces or by civilian contractors working in Iraq employed on behalf of the Department of Defense;

(20) any complaint forms filled out and submitted at any time after March 1, 2003 by a member of the Armed Services or by a civilian contractor employed on behalf of the Department of Defense or Central Intelligence Agency regarding the treatment of detainees or prisoners;

(21) any reports or documents reflecting the death or injury of prisoners or detainees; and

(22) all documentation, including video evidence, of any sexual assault of any prisoner or detainee who is a minor.

PURPOSE AND SUMMARY

H. Res. 700, introduced by Representative John Conyers, Jr. on June 25, 2004, directs the Attorney General to transmit to the House of Representatives, not later than 14 days after the date of adoption of this resolution, all physical and electronic records and documents in his possession relating to the treatment of prisoners and detainees in Iraq, Afghanistan, and Guantanamo Bay.

BACKGROUND AND NEED FOR THE LEGISLATION

H. Res. 700 is a resolution of inquiry. Clause 7 of Rule XIII of the Rules of the House of Representatives provides that if the Committee does not act on the resolution within 14 legislative days, a privileged motion to discharge the Committee is in order on the floor. In calculating the days available for Committee consideration, the day of introduction and the day of discharge are not counted.[1] On introduction, H. Res. 700 was referred to the Committee on the Judiciary. The Committee ordered it reported adversely with an amendment on July 21, 2004. Mr. Conyers also introduced two other resolutions of inquiry requesting identical information from other officials in the Administration. On June 23, he introduced H. Res. 689 that requested similar information from the President, the Attorney General, and the Secretaries of Defense and State. H. Res. 689 was referred to the Committee on Armed Services, which subsequently reported H. Res. 689 adversely on July 15, 2004 by a vote of 31 yeas to 23 noes with one voting present.[2] On June 25, 2004, he introduced H. Res. 699 that again requested the same information from the Secretary of State. That resolution was referred to the Committee on International Relations and was adversely reported on July 15, 2004 by a vote of 23–19.[3]

Under the rules and precedents of the House, a resolution of inquiry allows the House to request information from the President of the United States or to direct the head of one of the executive departments to provide such information. According to Deschler's Precedents, it is a "simple resolution making a direct request or demand of the President or the head of an executive department to

[1] William Holmes Brown, House Practice: A Guide to the Rules, Precedents, and Procedures of the House, chp. 49 § 4 (2003).
[2] H.Rep. No. 108–632 (2004).
[3] H.Rep. No. 108–631 (2004).

furnish the House of Representatives with specific factual information in the possession of the executive branch."[4]

If a Committee does not timely report the motion of inquiry, it may be discharged from a Committee under a privileged motion. If a Committee acts in a timely manner, it may report favorably or adversely.

A Committee that adversely reports a resolution of inquiry does not necessarily oppose the resolution under consideration. In the past, resolutions of inquiry have frequently been reported adversely for various reasons, two of which are that an Administration has substantially complied with the request or that there is an ongoing competing investigation. There is also past precedent for a resolution of inquiry to be adversely reported because the nature of the information reported was highly sensitive.[5]

H. Res. 700 would direct the Attorney General to transmit to the House of Representatives documents related to ongoing criminal investigations and documents that are of a highly sensitive nature. Furthermore, the Congress has received and continues to receive information responsive to the legislative purposes sought by the resolution.

A. The War on Terrorism

1) The September 11, 2001 Attacks

On the morning of September 11, 2001, the deadliest international terrorist attack against the United States in history occurred. Using four hijacked airliners, 19 al-Qaeda terrorists attacked the World Trade Center and the Pentagon, causing unprecedented structural damage and civilian casualties. The two 110-story towers of the World Trade Center collapsed, and part of the Pentagon was destroyed.

The terrorists initiated the attack in New York City. At 8:45 a.m., American Airlines Flight 11 out of Boston with 81 passengers and 11 crew members, dove full-speed into the north tower of the World Trade Center. Only minutes later, at 9:03 a.m., a second airliner, United Airlines Flight 175 from Boston with 56 passengers and 9 crew members, crashed into the south tower and exploded. Both towers billowed smoke into the sky prior to collapsing and retreating below the New York skyline. The New York attack took the lives of 2,801 innocent Americans.

The attack then turned to the Nation's capital. At 9:43 a.m., American Airlines Flight 77 with 58 passengers and 6 crew members, struck the Pentagon. The portion of the Pentagon hit was consumed by fire and collapsed, taking the lives of 125 innocent Americans. The terrorists' plans were not yet complete. A fourth airliner, United Airlines Flight 93, believed to be bound for the Capitol or White House, crashed into a field in Somerset County, Pennsylvania. The passengers and crew, numbered at 45, were able to redirect the plane to the rural area and undoubtedly saved hundreds or thousands of lives in the process.

The Nation watched as the number of confirmed dead grew. The Americans killed in the World Trade Center and Pentagon attacks numbered 3,030 and over 2,000 were injured. In New York City,

[4] 7 Deschler's Precedents of the House of Representatives, ch. 24, § 8.
[5] H.Rep. No. 92–1331 (1972).

343 firefighters and 75 police died attempting to save the people trapped in the towers. The hijacked planes carried 265 passengers and crew who lost their lives. The dead were memorialized through countless tributes.

The effects and aftermath of the 9/11 attacks had an immediate and overwhelming impact on the citizenry of the United States. Support for retaliatory operations against the perpetrators of the attacks 9/11 was strong and bipartisan.

2) Operation Enduring Freedom (Afghanistan)

The country rallied around the flag and prepared for the War on Terror that began in Afghanistan on October 7, 2001. After the 9/11 attacks, the United States entered into a war against global terrorism under the name "Operation Enduring Freedom." The United States gathered evidence that the attacks were directed by "a collection of loosely affiliated terrorist organizations known as al-Qaeda"[6] under the leadership of Osama bin Laden, who was being harbored by the Taliban in Afghanistan.

In President George W. Bush's Address to the Joint Session of Congress on September 20, 2001, he demanded the Taliban, "[d]eliver to United States authorities all the leaders of al-Qaeda who hide in your land; release all foreign nationals . . . unjustly imprisoned, and protect foreign journalists, diplomats and aid workers in your country; close immediately and permanently every terrorist training camp in Afghanistan and hand over every terrorist, and every person in their support structure, to appropriate authorities; and give the United States full access to terrorist training camps, so we can make sure they are no longer operating."[7]

When these demands were not met, the U.S. commenced military operations on October 7, 2001, to "disrupt the use of Afghanistan as a terrorist base of operations, and to attack the military capability of the Taliban regime," as stated in President Bush's October 7 address to the country. In addition to the objectives laid out by President Bush in his address to the Joint Session of Congress on September 20, other objectives, as mentioned in Secretary of Defense Donald Rumsfeld's Department of Defense News Briefing, "were to make clear to Taliban leaders that the harboring of terrorists is unacceptable, to acquire intelligence on al-Qaeda and Taliban resources, to develop relations with groups opposed to the Taliban, to prevent the use of Afghanistan as a safe haven for terrorists, and to destroy the Taliban military allowing opposition forces to succeed in their struggle. Finally, military force would help facilitate the delivering of humanitarian supplies to the Afghan people."[8]

The military operations began with air strikes from B–1, B–2, and B–52 bombers and F–14 and F/A–18 fighters in addition to Tomahawk cruise missiles fired from U.S. and British vessels.[9] By October 20, virtually all Taliban air defenses had been destroyed. The provincial capital of Mazar-e-Sharif fell twenty days later with

[6] President Bush's Sept 20th Address to a Joint Session of Congress, 147 Cong. Rec. H5859 (daily ed. September 20, 2001).
[7] *Id.*
[8] http://www.globalsecurity.org/military/ops/enduring-freedom.htm.
[9] *Id.*

Herat, Kabul, and Jalalabad soon thereafter.[10] "By mid-December, U.S. Marines had secured Qandahar Airport and the Taliban capital was in the hands of Anti-Taliban forces."[11] On December 22, 2001, the interim Afghan government was inaugurated. In mid-March of 2002, the Taliban was out of power and al-Qaeda was reduced to pockets of fighters, many of them hiding in caves after "Operation Anaconda."[12] Within the first 169 days of the operation, 50 million leaflets had been dropped, 2.5 million humanitarian daily rations had been delivered, 1,700 tons of wheat delivered, 328,200 blankets distributed, and radio broadcasts and 5,000 radios given to the people of Afghanistan.[13] On May 1, 2003, Secretary of Defense Donald Rumsfeld announced the end of major combat operations in Afghanistan and a shift in directives to the stabilization and rebuilding of Afghanistan.[14] Approximately 11,000 American soldiers continue the operations in Afghanistan in addition to 5,500 soldiers from 21 countries with the support of 70 total nations.[15]

3) Operation Iraqi Freedom

On March 19, 2003, the U.S. and coalition forces began conventional military operations against Iraq and the regime of Saddam Hussein. At approximately 7:12 p.m., President Bush gave the order for two F–117s to drop bombs on a suspected location of Saddam Hussein. The bombs were dropped at approximately 9:30 p.m., launching "Operation Iraqi Freedom."[16]

The ground war commenced on March 20 and began with the 3rd Infantry Division and the 1st Marine Expeditionary Force invading from the south. Over 300,000 coalition forces deployed to the Gulf region for the operation.[17] After taking control of the southern oil fields and gradually defeating resistance in both the Sunni Triangle and Baghdad, the coalition forces gained control of Iraq and ended the regime of Saddam Hussein. President Bush declared major combat operations over on May 1, 2003. Since ending major combat operations, the U.S. led coalition has maintained a force to battle Iraqi resistance. Saddam Hussein was later captured by coalition troops on December 13, 2003.

Several reasons justified the war. On March 20, 2003, the State Department declared, "Over the past 12 years, Iraq has violated more than 17 United Nations Security Council Resolutions (UNSCRs) and remains in material breach of disarmament obligations."[18] Notably, Iraq was in violation of Resolution 1441, dated November 8, 2002. The United Nations Security Council Resolution 1441 gave Iraq a final opportunity to comply fully with U.N. inspections. In addition to noncompliance, there were several military objectives that drove "Operation Iraqi Freedom." Notable objectives included: to end the regime of Saddam Hussein; to identify and eliminate any weapons of mass destruction; to locate and

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[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] Vernon Loeb, *Rumsfeld Announces End of Afghan Conflict.* Washington Post. May 2, 2003. http://www.washingtonpost.com.
[15] http://www.army.mil/operations/; http://www.centcom.mil/Operations/Coalition/joint.htm.
[16] http://www.globalsecurity.org/military/ops/iraqi—freedom.htm.
[17] http://www.disinfopedia.org/wiki.phtml?title=Operation—Iraqi—Freedom.
[18] http://www.usembassy.lv/EN/Iraq/defiance.

eradicate terrorist cells in Iraq; and to help the Iraqis develop a system of self-government.[19]

4) Libya

Since the war in Iraq, Libya has made efforts to "strengthen peace and stability in the world."[20] According to officials at the Department of State, Libya has "renounced programs, materials and equipment which might lead to the production of internationally banned weapons or delivery systems,"[21] and "Libya wishes to announce officially the application of this decision to its military dealings with other states."[22] Libya mentioned specifically that it "will not deal in any military goods or services with" Syria, North Korea, or Iran.[23] "When Italian Prime Minister Silvio Berlusconi spoke with Qaddafi last year, Qaddafi explained he would be acting out of a fear of America birthed by the rapid destruction of Saddam's regime."[24]

B. Allegations of Prison Abuse

As a result of these military operations, a number of prisoners have been taken in Afghanistan and Iraq. Some of these prisoners have been held at the U.S. military base in Guantanamo Bay, Cuba. There are ongoing criminal and administrative investigations stemming from allegations of prisoner and detainee abuse at the Baghdad confinement facility at Abu Ghraib and other places.

Reports of U.S. prisoner abuse during the war of terror have sporadically entered the press. The world knows of the prisoner abuse at Abu Ghraib, but other examples have been reported as well. In Afghanistan at Baghram in December 2002, U.S. military pathologists reported the deaths of two Afghan detainees due to "blunt force injuries" to "the lower extremities" and "legs."[25] In addition, in June 2003, an Afghan prisoner died at a U.S. military camp in the Kunar province and since then a CIA contractor has been charged in the beating.[26] Other reports have arisen out of Camp Cropper near the Baghdad International Airport where hooded beatings occurred, handcuffs were put on so tight that prisoners' skin was broken, beatings with rifles and pistols occurred, threats against family members arose, and stripped detainees were thrown into completely dark solitary confinement.[27] The Red Cross has reported prisoner abuse at Al Baghdadi, Heat Base, Habbania Camp in the Ramadi governorate, Tikrit, a former train station at Al-Khaim, the Ministry of Defense in Baghdad, the Presidential Palace in Baghdad, the former *mukhabarat* office in Basrah, and at several Iraqi Baghdad police stations.[28] Suspicions of prisoner

[19] http://www.globalsecurity.org/military/ops/iraqi—freedom.htm.
[20] Libya Ending Military Trade with States of Serious Weapons of Mass Destruction Proliferation Concern, http://www.state.gov/p/nea/rls/rm/32491.htm.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] Hewitt, Hugh, "The War Dividend," *The Weekly Standard,* June 24, 2004.
[25] John Barry, Mark Hosenball and Babak Dehghanpisheh, *Abu Ghraib and Beyond,* Newsweek, May 17, 2001, http://www.msnbc.msn.com/id/4934736/site/newsweek.
[26] http://primetimecrime.com/Recent/War%20on&20terror/prisoner%20abuse.htm.
[27] John Barry, Mark Hosenball and Babak Dehghanpisheh, *Abu Ghraib and Beyond,* Newsweek, May 17, 2001, http://www.msnbc.msn.com/id/4934736/site/newsweek.
[28] Report on the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions

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abuse have also arisen at "ghost facilities" believed to be located in Thailand and the North-West Frontier province of Pakistan where 9/11 co-conspirator Ramzi bin al-Shibh and al-Qaeda leaders Shaikh Mohammed and Abu Zubaida are reportedly held.[29]

C. Ongoing Investigations of Allegations of Prison Abuse

On January 16, 2004, the Headquarters United States Central Command issued a press release that stated:

> BAGHDAD, Iraq—An investigation has been initiated into reported incidents of detainee abuse at a Coalition Forces detention facility. The release of specific information concerning the incidents could hinder the investigation, which is in its early stages. The investigation will be conducted in a thorough and professional manner. The Coalition is committed to treating all persons under its control with dignity, respect and humanity. Lt. Gen. Ricardo S. Sanchez, the Commanding General, has reiterated this requirement to all members of CJTF–7.

On March 20, 2004, Brigadier General Mark Kimmit issued a press statement that:

> [O]n 14 January 2004, a criminal investigation was initiated to examine allegations of detainee abuse at Baghdad confinement facility at Abu Ghraib.
>
> Shortly thereafter, the commanding general of Combined Joint Task Force Seven requested a separate administrative investigation into systemic issues such as command policies and internal procedures related to detention operations.
>
> . . .
>
> As a result of the criminal investigation, six military personnel have been charged with criminal offenses to include conspiracy, dereliction of duty, cruelty and maltreatment, assault, and indecent acts with another.

Relating to the treatment of detainees in the War on Terrorism, the Department of Defense has conducted 11 administrative investigations or reviews of detainee policy and abuses. The Ryder, Miller, and Taguba investigations are complete and have been provided to Congress. Furthermore, the Department of Defense has committed to the Committee on Armed Services to provide the rest of the investigations to Congress, including: the Navy Inspector General's review of procedures at Guantanamo Bay and Charleston; the Fay investigation into military intelligence and contractor interrogation practices at Abu Ghraib prison; the Army Inspector General's assessment of doctrine and training for detention operations; Brigadier General Jacoby's assessment of detainee operations and facilities in Afghanistan; Vice Admiral Church's collection and review of all authorized interrogation practices to ensure that appropriate guidance is being followed; the Army Reserve Inspector General's assessment of reserve training with focus on mili-

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in Iraq During Arrest, Interrogation, and Internment. February 2004. Http://msnbcmedia.msn.com/i/msnbc/Sections/News/International%20News/Mideast%20and%20N.%20Africa/Iraq%20conflict/Red%20Cross%20report.pdf.

[29] John Barry, Mark Hosenball and Babak Dehghanpisheh, *Abu Ghraib and Beyond,* Newsweek, May 17, 2001, http://www.msnbc.msn.com/id/4934736/site/newsweek.

tary intelligence and police; and the former Secretary of Defense and Secretary of Energy Schlesinger review of all detainee issues.

With regard to military criminal investigations, the House Armed Services Committee has indicated that as of July 13, 2004 there are 164 active military criminal investigations related to abuse of detainees or prisoners.

With regard to civilian criminal investigations, on May 7, 2004, *The Washington Post* reported that the Attorney General said that Federal criminal prosecutors can pursue cases against nonmilitary personnel and against those who have left the military. The article also reported that the Attorney General and other Department of Justice officials said the Military Extraterritorial Jurisdiction Act of 1999 allows for prosecution of civilian contractors who commit crimes while working overseas for the military.[30]

On June 17, 2004, the press reported that a Federal grand jury indicted a contractor working for the CIA on charges related to abuse of a prisoner in Afghanistan. The report stated:

> An indictment was returned by a grand jury in Raleigh, N.C., for David Passaro "for brutally assaulting an Afghan detainee at a U.S. military base in Afghanistan," Ashcroft said.
>
> Passaro faces two counts of assault with a dangerous weapon and two counts of assault resulting in serious bodily injury; each of the four charges carries a maximum penalty of 10 years prison and $250,000 fine. He's scheduled for an initial appearance before a judge later Thursday. Passaro was arrested Thursday morning in Fayetteville, N.C.[31]

D. Documents already Presented to the Congress

H. Res. 700 requests internal documents related to law enforcement, military, or intelligence agency investigations in response to allegations that the treatment of prisoners or detainees violated or continues to violate international or American law. The Department of Defense and the Administration have already provided Congress with numerous documents relating to these issues.

The Department of Defense supplied Documents

The Department of Defense has released the following documents:

1. All International Committee of the Red Cross ("ICRC") memoranda or reports submitted to the Administration regarding detention facilities in Iraq, Afghanistan, and Guantanamo Bay.
2. All formal responses by the Administration to ICRC memoranda or reports, including but not limited to Brigadier General Janice Karpinski's December 24, 2003 response.
3. The Department of Defense interrogation guidelines approved by Secretary of Defense Donald Rumsfeld in April 2003.
4. The October 12, 2003, directive of Lieutenant General Ricardo Sanchez entitled, "Interrogation and Counter-Resistance Policy."

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[30] Dan Eggen and Walter Pincus, *Ashcroft Says U.S. Can Prosecute Civilian Contractors for Prison Abuse,* Washington Post, (May 7, 2004, p. A18).

[31] *CIA Contractor Charged with Abuse,* June 2004, http://www.foxnews.com/story/0,2933,122962,00.html.

5. All interrogation reports from Abu Ghraib and other detention facilities in Iraq from May 2003 through December 2003 were provided to the House Committee on Intelligence.

6. The February 5, 2003, three-page memo from senior military attorneys regarding interrogation techniques at Guantanamo Bay.

7. The October 2003 report of Major General Geoffrey Miller regarding intelligence, interrogation operations, and detention operations.

8. The November 2003 report of Major General Donald Ryder regarding the detention and corrections system in Iraq.

9. The November 19, 2003, order by Lieutenant General Sanchez transferring tactical control of the military police at Abu Ghraib to Colonel Thomas Pappas, commander of the 205th Military Intelligence Brigade.

10. The March 2004 report of Major General Antonio Taguba regarding the treatment of detainees at Abu Ghraib, including the complete annex.

11. Any interrogation or detainee treatment guidelines posted or distributed at Abu Ghraib, including the "interrogation rules of engagement" posted by Captain Carolyn A. Wood in August 2003.

12. All summaries of relevant investigations currently pending or already closed that have been prepared by military investigative services, including but not limited to the May 5, 2004 synopsis prepared by the Criminal Investigation Command.

13. A list of all ongoing investigations by the Defense Department, State Department, Justice Department, CIA, or their inspectors general into the abuse or killing of detainees in Iraq, Afghanistan, and Guantanamo Bay, indicating those cases that are being considered for prosecution by the Defense Department or Justice Department.

14. A list of all investigations completed by the Defense Department, State Department, Justice Department, CIA, or their inspectors general into the abuse or killing of detainees in Iraq, Afghanistan, and Guantanamo Bay, along with any written reports produced by investigators.

The Administration Provided Documents

The following documents were released by the Administration:

1. The January 22, 2002 Department of Justice memorandum regarding "Application of Treaties and Laws to al-Qaeda and Taliban Detainees."

2. The February 1, 2002 Attorney General letter to the President regarding status of Taliban detainees.

3. The February 6, 2002 Information Paper regarding "Background Information on Taliban Forces."

4. The February 7, 2002 Department of Justice memorandum regarding "Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949."

5. The February 7, 2002 memorandum from the President stating that although the Justice Department concluded that "as a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva," regardless of the Department of Justice's

conclusion that the Geneva convention does not apply to al-Qaeda or the Taliban.

6. The February 26, 2002 Department of Justice memorandum regarding "Potential Legal Constraints Applicable to Interrogations of Persons Captured by U.S. Armed Forces in Afghanistan."

7. The August 1, 2002 Department of Justice letter regarding application of Convention Against Torture and Rome Statute on the International Criminal Court.

8. The August 1, 2002 Department of Justice memorandum regarding "Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A."

9. The December 2, 2002 Department of Defense memorandum regarding "Counter-Resistance Techniques" (includes document created for June 22, 2004 press briefing listing interrogation techniques).

10. The January 15, 2003 Department of Defense memorandum regarding "Counter-Resistance Techniques."

11. The January 15, 2003 Department of Defense memorandum regarding "Detainee Interrogations."

12. The January 17, 2003 Department of Defense memorandum implementing January 15, 2003 Department of Defense memorandum regarding "Detainee Interrogations."

13. The April 4, 2003 Department of Defense Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations.

E. Sensitive Documents Requested

The country is at war and this resolution calls for information, much of which is of a highly sensitive nature. For instance, the resolution requests every document relating to interrogation techniques; or the request for every internal report of a law enforcement, military, or intelligence agency or organization concerning interrogation or detention operations.

REASONS FOR REPORTING RESOLUTION ADVERSELY

The Committee is reporting this resolution adversely for three reasons. First, the Administration has substantially complied with information requested in the three resolutions. Congress has received and continues to receive information responsive to these resolutions. The Administration has sent this Committee a binder full of documents on the Administration's exhaustive legal review on the treatment of detainees and prisoners of war during the current War on Terrorism. The release of these documents was announced at a June 22, 2004 White House press conference.

A part of this release is a memorandum from President Bush himself. In this memorandum, the President clearly directed that, regardless of any conclusions on the treatment of detainees, "[a]s a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva." This instruction was issued even though the President accepted the Department of Justice's conclusion that none of the Geneva conventions apply to al-Qaeda.

Members of the House of Representatives have had adequate access to recently released information and continue to receive more. In fact, the Armed Services Committee Chairman Hunter offered Mr. Conyers and other Democrat Members an opportunity to review a great deal of classified information related to his resolution. Mr. Conyers and others had not, at the time of the Committee's markup, availed themselves of that opportunity.

Second, many of the documents requested are sensitive as they relate to military operations in a time when the country is at war. Because the resolution requests highly sensitive information, the Committee should follow the precedent set in H.Rep. No. 92–1331. In that case, the Armed Services Committee adversely reported a resolution asking for certain military information on the location of all known or suspected prisoner-of-war camps in North Vietnam and all bombing strikes against North Vietnam during a certain period of time.

The Armed Services Committee report concluded that, because of the highly sensitive nature of the information requested, the public revelation of such information would not be compatible with the national security interest. In making this recommendation, the Armed Services Committee took into account that the Congress had and continued to receive information responsive to the legislative purpose sought by that resolution. The same is true here.

Third, and to complicate matters further, this resolution exempts grand jury material but only if a court explicitly finds that it is protected. This would place an unnecessary burden on the courts and the Department of Justice. The resolution also requests other information that may relate to ongoing criminal investigations. With regard to civilian criminal investigations, the Department of Justice has charged a CIA contractor with abuse of a detainee in Afghanistan, and it is probable that there are additional civilian criminal investigations that are ongoing. The House Armed Services Committee has indicated that as of July 13, there are 164 active military criminal investigations related to abuse of detainees or prisoners.

A competing investigation is a common reason that Committees have opposed resolutions of inquiry in the past. This Committee has previously reported such resolutions adversely for this reason. On February 27, 2004, this Committee adversely reported House Resolution 499, a resolution of inquiry, due to an ongoing grand jury investigation and, on July 17, 2003, adversely reported House Resolution 287, a resolution of inquiry, due to an ongoing competing investigation of the Inspector General of the Department of Justice. In an earlier Congress, the Committee also reported a resolution of inquiry adversely to avoid jeopardizing a competing investigation into the Abscam case.

HEARINGS

No hearings were held in the Committee on the Judiciary on H. Res. 700.

COMMITTEE CONSIDERATION

On July 21, 2004, the Committee met in open session and adversely reported the resolution H. Res. 700 with an amendment by a rollcall vote of 15 yeas to 12 noes, a quorum being present.

VOTE OF THE COMMITTEE

In compliance with clause 3(b) of Rule XIII of the Rules of the House of Representatives, the Committee sets forth the following rollcall votes that occurred during the Committee's consideration of H. Res. 700:

Motion to Report Adversely. The motion to report the resolution, H. Res. 700, adversely with an amendment was agreed to by a rollcall vote of 15 yeas to 12 noes.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Hyde	X		
Mr. Coble	X		
Mr. Smith	X		
Mr. Gallegly			
Mr. Goodlatte	X		
Mr. Chabot	X		
Mr. Jenkins	X		
Mr. Cannon			
Mr. Bachus			
Mr. Hostettler	X		
Mr. Green	X		
Mr. Keller	X		
Ms. Hart	X		
Mr. Flake			
Mr. Pence	X		
Mr. Forbes	X		
Mr. King	X		
Mr. Carter	X		
Mr. Feeney			
Mrs. Blackburn			
Mr. Conyers		X	
Mr. Berman		X	
Mr. Boucher			
Mr. Nadler			
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren		X	
Ms. Jackson Lee		X	
Ms. Waters		X	
Mr. Meehan		X	
Mr. Delahunt		X	
Mr. Wexler			
Ms. Baldwin		X	
Mr. Weiner			
Mr. Schiff		X	
Ms. Sánchez		X	
Mr. Sensenbrenner, Chairman	X		
Total	15	12	

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of Rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activi-

ties under clause 2(b)(1) of Rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of Rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

COMMITTEE COST ESTIMATE

In compliance with clause 3(d)(2) of Rule XIII of the Rules of the House of Representatives, the Committee estimates the costs of implementing the resolution would be minimal. The Congressional Budget Office did not provide a cost estimate for the resolution.

PERFORMANCE GOALS AND OBJECTIVES

H. Res. 700 does not authorize funding. Therefore, clause 3(c)(4) of Rule XIII of the Rules of the House of Representatives is inapplicable.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of Rule XIII of the Rules of the House of Representatives, the Committee finds that the rule does not apply because H. Res. 700 is not a bill or joint resolution that may be enacted into law.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

The Resolution directs that the Attorney General transmit to the House of Representatives not later than 14 days after the date of the adoption of this resolution all documents in the possession of the Attorney General, except those documents in the Attorney General's possession that have been found by a court to be protected by Federal Rule of Criminal Procedure 6(e) in a proceeding at which the Attorney General or the Department of Justice is a party, relating to the treatment of prisoners or detainees in Iraq, Afghanistan, or Guantanamo Bay and any requisite instructions for handling such documents. The resolution then sets forth a list of 21 types of documents that are requested. The Committee adopted an amendment adding one additional category of documents to the request.

CHANGES IN EXISTING LAW MADE BY THE RESOLUTION, AS REPORTED

In compliance with clause 3(e) of Rule XIII of the Rules of the House of Representatives, the Committee notes that H. Res. 700 makes no changes to existing law.

MARKUP TRANSCRIPT

BUSINESS MEETING

WEDNESDAY, JULY 21, 2004

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to call, at 10:00 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. [Chairman of the Committee] presiding.

The Committee will come to order. A quorum is present.

[Intervening business.]

Chairman SENSENBRENNER. Now, pursuant to notice I call up H. Res. 700, a resolution directing the Attorney General to transmit to the House of Representatives documents in the possession of the Attorney General relating to the treatment of prisoners and detainees in Iraq, Afghanistan, and Guantanamo Bay, for the purposes of markup and move its adverse recommendation to the House.

Without objection, the resolution will be considered as read and open for amendment at any point.

[The resolution, H. Res. 700, follows:]

IV

108TH CONGRESS
2D SESSION

H. RES. 700

Directing the Attorney General to transmit to the House of Representatives documents in the possession of the Attorney General relating to the treatment of prisoners and detainees in Iraq, Afghanistan, and Guantanamo Bay.

IN THE HOUSE OF REPRESENTATIVES

JUNE 25, 2004

Mr. CONYERS (for himself, Ms. PELOSI, Mr. HOYER, Mr. MENENDEZ, Mr. CLYBURN, Mr. DINGELL, Mr. OBEY, Mr. RANGEL, Mr. WAXMAN, Mr. SKELTON, Mr. LANTOS, and Mr. HINCHEY) submitted the following resolution; which was referred to the Committee on the Judiciary

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RESOLUTION

Directing the Attorney General to transmit to the House of Representatives documents in the possession of the Attorney General relating to the treatment of prisoners and detainees in Iraq, Afghanistan, and Guantanamo Bay.

1 *Resolved*, That the Attorney General is directed to
2 transmit to the House of Representatives not later than
3 14 days after the date of the adoption of this resolution
4 all documents in the possession of the Attorney General,
5 except those documents in the Attorney General's posses-
6 sion that have been found by a court to be protected by

1 Federal Rule of Criminal Procedure 6(e) in a proceeding
2 at which the Attorney General or the Department of Jus-
3 tice is a party, relating to the treatment of prisoners or
4 detainees in Iraq, Afghanistan, or Guantanamo Bay and
5 any requisite instructions for handling such documents,
6 including—
7 (1) every report, memorandum, or complaint
8 from the International Committee of the Red Cross
9 relating to the treatment of detainees or prisoners
10 and any documents that reference such memo-
11 randum, report, or complaint by the Attorney Gen-
12 eral or by any agency under the Attorney General;
13 (2) every report, memorandum, or complaint
14 from Human Rights Watch, Amnesty International,
15 Iraqi Human Rights Association, Afghan Human
16 Rights Commission, Physicians for Human Rights,
17 or Human Rights First relating to the treatment of
18 detainees or prisoners and any documents that ref-
19 erence such memorandum, report, or complaint by
20 the Attorney General or by any agency under the
21 Attorney General;
22 (3) every document relating to interrogation
23 techniques;

(4) every internal report of a law enforcement, military, or intelligence agency or organization concerning interrogation or detention operations;

(5) every internal report of a law enforcement, military, or intelligence agency in response to allegations that the treatment of prisoners or detainees violated or continues to violate international or American law;

(6) every document and memorandum regarding the applicability of the Geneva Conventions, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Covenant on Political and Civil Rights, sections 2340–2340A of title 18, United States Code, the War Crimes Act of 1996, and the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States to the treatment of prisoners or detainees;

(7) every document and memorandum relating to command relationships between military police units and military intelligence units;

(8) every document and memorandum directing personnel to abstain from using specific interrogation techniques or to withdraw themselves from interrogations being conducted by other departments;

(9) any Presidential directive or other writing authorizing the use of interrogation tactics or claiming the constitutional authority to do so;

(10) any documentation of training received by the 800th Military Police Brigade and the 205th Military Intelligence Brigade regarding the treatment of prisoners or detainees;

(11) any documentation of special access programs as they were applied to prisoners or detainees;

(12) all records of meetings regarding the treatment of prisoners or detainees at which one or more officials of the Department of Justice were present and the presence of those officials is apparent from the face of the record;

(13) every document and memorandum concerning the practice of keeping prisoners or detainees off the official roster;

(14) a list of every ongoing and completed investigation into the treatment of prisoners or detainees, and any written reports produced by any such investigation;

(15) every document relating to civilian contract employees and their role in prisons;

(16) all written statements of prisoners or detainees, military personnel, civilian employees of the Federal Government, or civilian contractors regarding the treatment of prisoners or detainees;

(17) all reports of interrogation of each prisoner or detainee that reflect a claim of abuse by military or civilian personnel or by civilian contractors;

(18) any documents for work under contracts (including subcontracts and task orders) and all reports on such documents, for interrogation or translation work by CACI International, Titan Corporation, and any other entity that may have performed such work;

(19) any documents or testimony presented to or prepared by the Detainee Assessment Branch at Abu Ghraib prison at any time after September 1, 2003 regarding the treatment of Iraqi prisoners or detainees by members of the Armed Forces or by civilian contractors working in Iraq employed on behalf of the Department of Defense;

(20) any complaint forms filled out and submitted at any time after March 1, 2003 by a member of the Armed Services or by a civilian contractor employed on behalf of the Department of Defense or

1 Central Intelligence Agency regarding the treatment
2 of detainees or prisoners; and
3 (21) any reports or documents reflecting the
4 death or injury of prisoners or detainees.

○

Chairman SENSENBRENNER. The Chair recognizes himself for 5 minutes to explain the resolution.

Today, the Committee considers H. Res. 700, a resolution of inquiry directing the Attorney General to transmit to the House all physical and electronic records and documents in its possession relating to the treatment of prisoners and detainees in Iraq, Afghanistan, and Guantanamo Bay, Cuba except for those documents in the AG's possession found by a court to be protected by grand jury secret.

I move that the Committee report the resolution adversely for several reasons. First, the Administration has substantially complied by providing the information requested in this resolution and other similar ones. Congress has received and continues to receive information responsive to congressional requests for information. The Administration has sent to this Committee a binder full of documents on the Administration's exhaustive legal review on the treatment of detainees and POWs during the current war on terrorism.

Yesterday, the Justice Department wrote me indicating that it has released all unclassified written opinions addressing the legality of interrogation techniques for al-Qaeda and the Taliban. Without objection, that correspondence will be placed in the record.

[The information referred to follows:]

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 20, 2004

The Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Thank you for your letter, dated July 13, 2004, to the Attorney General regarding documents related to the interrogation of detainees.

The Department of Justice ("the Department") can assure you that the Administration has released all unclassified, final written opinions from the Department addressing the legality of interrogation techniques used in interrogations conducted by the United States of al Qaeda and Taliban enemy combatants. The Department has not issued written opinions addressing interrogation practices in Iraq. However, it has been the consistent understanding within the Executive Branch that the conflict with Iraq is covered by the Geneva Conventions, and the Department has concurred in that understanding.

On June 22, 2004, the White House released several documents related to the interrogation of detainees. Included among those documents were six documents that originated with the Department: 1) a memorandum from the Office of Legal Counsel (OLC) to the Counsel to the President and the General Counsel of the Department of Defense on the "Application of Treaties and Laws to al Qaeda and Taliban Detainees," dated January 22, 2002; 2) a letter from the Attorney General to the President on the status of Taliban detainees, dated February 1, 2002; 3) a memorandum from OLC to the Counsel to the President on the "Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949," dated February 7, 2002; 4) a memorandum from OLC to the General Counsel of the Department of Defense on the "Potential Legal Constraints Applicable to Interrogations of Persons Captured by U.S. Armed Forces in Afghanistan," dated February 26, 2002; 5) a letter from OLC to the Counsel to the President on the legality, under international law, of interrogation methods to be used during the war on terrorism, dated August 1, 2002; and 6) a memorandum from OLC to the Counsel to the President on "Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A," dated August 1, 2002.

The Honorable F. James Sensenbrenner, Jr.
Page Two

Although these documents that have been released are documents that would not usually be disclosed to anyone outside the Executive Branch, the Administration decided to release a number of documents, including the Department documents listed above and including many from the Department of Defense, to provide a fuller picture of the issues the Administration had considered and the narrower policies the Administration actually adopted in this important area.

It should also be noted that many of the documents requested in H. Res. 700 originated with other agencies such as the Department of State and the Department of Defense. Consistent with established third-agency practice, those agencies should be contacted directly if Congress wishes to inquire further about any documents they may possess.

Thank you for contacting the Department of Justice. Please do not hesitate to contact this office if we may be of assistance with this, or any other matter.

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General

cc: The Honorable John Conyers, Jr.
Ranking Minority Member

Chairman SENSENBRENNER. In addition, on June 30 the Administration released a memorandum from President Bush himself in which he clearly directed that regardless of any conclusions on the treatment of detainees, as a matter of policy the United States Armed Forces shall continue to treat detainees humanely and to the extent appropriate and consistent with military necessity in a manner consistent with the principles of Geneva. This instruction was issued even though the President accepted the Department of Justice's conclusion that none of the Geneva Conventions apply to al-Qaeda.

Members of the House have had adequate access to recently released information and continue to receive more. In fact, the Armed Services Committee offered Mr. Conyers and other Democratic Members an opportunity to review a great deal of classified information related to this resolution. Mr. Conyers and the others declined.

Without objection, letters relating to that offer will be entered into the record.

[The information referred to follows:]

DUNCAN HUNTER, CALIFORNIA, CHAIRMAN
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COMMITTEE ON ARMED SERVICES

U.S. House of Representatives

Washington, DC 20515–6035

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MADELEINE Z. BORDALLO, GUAM
RODNEY ALEXANDER, LOUISIANA
TIM RYAN, OHIO

ROBERT S. RANGEL, STAFF DIRECTOR

June 21, 2004

The Honorable Henry A. Waxman
2204 Rayburn House Office Building
U.S. House of Representatives
Washington, D.C. 20515

The Honorable John Conyers, Jr.
2426 Rayburn House Office Building
U.S. House of Representatives
Washington, D.C. 20515

The Honorable David R. Obey
2314 Rayburn House Office Building
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Tom Lantos
2413 Rayburn House Office Building
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Jane Harman
2400 Rayburn House Office Building
U.S. House of Representatives
Washington, D.C. 20515

Dear Colleagues:

Based on your continuing interest in the Department of Defense's handling of the Abu Ghraib prison abuse investigation as evidenced in your letter to the President of June 3, 2004, I am writing to formally invite you to review the full version of the classified report prepared by Major General Antonio Taguba on this matter.

As you are likely aware, the so-called Taguba investigation and resulting report is the most exhaustive review completed to date of the allegations of misconduct by American personnel at Abu Ghraib. Accordingly, it stands to reason that anyone seeking to gain a more informed and objective perspective on this issue will want to avail themselves of this material first.

The Committee on Armed Services received a copy of the full Taguba report with all annexes on May 10, 2004 and notified members of the committee on May 11, 2004 that it was available for their review. As the committee of prime jurisdiction over this matter, our members have been and will continue to review these and other documents to stay properly informed on this issue. However, while I believe that under the rules of the

House, the proper committee is and has already been conducting a prudent review of this matter, in the interest of comity, I invite you to personally review these materials at a time of your convenience.

Please contact Mr. Robert Rangel, the committee's Staff Director, at 225-9648 to make appropriate arrangements.

Sincerely,

Duncan Hunter
Chairman

cc: Honorable Dennis Hastert
Honorable Nancy Pelosi
Honorable Ike Skelton
Honorable Tom Davis
Honorable Jim Sensenbrenner
Honorable C.W. Bill Young
Honorable Henry Hyde
Honorable Porter Goss

JAMES SENSENBRENNER, JR., Wisconsin
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ONE HUNDRED EIGHTH CONGRESS

Congress of the United States
House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6216

(202) 225–3951
http://www.house.gov/judiciary

JOHN CONYERS, JR., Michigan
RANKING MINORITY MEMBER

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ANTHONY D. WEINER, New York
ADAM B. SCHIFF, California
LINDA T. SANCHEZ, California

July 9, 2004

The Honorable Duncan Hunter
Chairman
Committee on Armed Services
U.S. House of Representatives
2120 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Hunter:

Thank you for your invitation to view the full classified report prepared by Major General Antonio Taguba. Because of the sheer volume of the report and the thorough review that is needed to assess it, we believe it would be more practical for our offices to make arrangements to obtain a copy of the report from your staff. We assure you we will handle this document in the same manner as we handle other classified or sensitive materials received by our committees, including limiting access only to those individuals with appropriate clearances.

While the Taguba report is a useful starting point for our constitutionally mandated oversight activities, we hope you would agree that it is just that: a starting point. In fact, General Taguba himself stated "my task was limited to the allegations of detainee abuse involving M.P. personnel and the policies, procedures and command climate of the 800th M.P. Brigade."[1] It now appears that the circumstances and policies that led to the abuse in Abu Ghraib reach far beyond one brigade in one prison.

As a result, we very much look forward to working with you to obtain your support to obtain the myriad other documents that are relevant to conducting a full and fair investigation into this matter that have not yet been released by the White House, such as reports of the International Committee of the Red Cross and other human rights organizations, findings of investigations instigated since Maj. Gen. Taguba's report, and records documenting the role of

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[1] *Full Committee Hearing to Receive Testimony on Allegations of Mistreatment of Iraqi Prisoners before the Senate Armed Services Committee*, 108th Cong. (May 11, 2004) (testimony of Maj. Gen. Antonio Taguba).

The Honorable Duncan Hunter
Page Two
July 9, 2004

contractors in interrogation and detention and the practice of keeping detainees off the official rosters.

We would therefore invite you cosponsor H. Res. 689 and H. Res. 690 which we recently introduced and which would request all the pertinent documents and create a select committee to conduct a fair and thorough investigation. Beyond that we are more than happy to work with you to develop other means of receiving these materials so we can assure the American public and the international community that the prison abuse scandal is being fully reviewed and investigated.

Sincerely,

John Conyers, Jr.
Ranking Member
Judiciary Committee

Tom Lantos
Ranking Member
International Relations Committee

Henry A. Waxman
Ranking Member
Government Reform Committee

Chairman SENSENBRENNER. A staff member of the Armed Services Committee is present here today with that information, and there is a box full of it over there. While it cannot be reviewed in this room due to its classified information, everyone can see that it is voluminous.

Secondly, many of the documents requested are sensitive because they relate to military operations at a time when the country is at war. Because this resolution requests highly sensitive information, the Committee should follow the precedent set forth in House Report 92–1331. In that case the Armed Services Committee adversely reported a resolution asking for certain military information on the location of all known and suspected POW camps in North Vietnam and all bombing strikes against North Vietnam during a certain period of time. The Armed Services Committee's report concluded that because of the highly sensitive nature of the information requested, the public revelation of such information would not be compatible with the national security interest. In making this recommendation, the Armed Services Committee took into account that Congress had and continued to receive information responsive to the legislative purpose sought by the resolution. I assume the same is true here.

Third, and to complicate matters further, this resolution exempts grand jury material, but only if a court explicitly finds that it is protected. This would place an unnecessary burden on the courts and the Department of Justice, as they would be forced to expend time to make a final determination in each case where such an exemption might apply.

The resolution also requests other information that may relate to ongoing criminal investigations. With respect to civilian criminal investigations, the Department of Justice has charged the CIA contractor with abuse of a detainee in Afghanistan and it is probable that there are additional similar criminal investigations ongoing. The House Armed Services Committee has indicated that as of July 13, there are 164 active military criminal investigations relating to the abuse of detainees and prisoners. Avoiding competing investigations is a common and well-founded reason the Committees have opposed the resolutions of inquiry in the past. This Committee has previously supported such resolutions adversely for this very reason.

Last week the House Committees on Armed Services and International Relations voted to report similar resolutions requesting information related to this matter adversely for the same reasons. Today, Members of this Committee should also reject this resolution, which could jeopardize the national security and compromise several ongoing criminal investigations.

Without objection, all Members' opening statements will be placed in the record at this point.

[The prepared statement of Ms. Waters follows:]

PREPARED STATEMENT OF THE HONORABLE MAXINE WATERS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman, I move to strike the last word.

I strongly support the Resolution of Inquiry. In order to discharge our legislative responsibilities and provide proper oversight of the activities of the Administration with respect to prisoners and detainees in Iraq, Afghanistan, and Guantanamo Bay,

it is essential that all Members of Congress have full unfettered access to all documents or other materials that bear upon these issues.

If there are grand jury materials that need to be protected, or discrete cases or investigations that may require limitations on the manner in which certain materials may be disseminated or used, we can then address the type of protective order, if any, that may be required. Yet, House and Senate practices in recent years certainly demonstrate that the pendency of legal proceedings or other investigations is no legal bar to making relevant documents available to Congress.

Mr. Chairman, we had numerous investigations during the eight years of the Clinton Administration that took place at the insistence of the majority party.

It certainly will come as a surprise to Democratic Members now to hear the argument that the pendency of legal proceedings somehow should automatically deprive the Members of Congress or duly authorized Congressional Committees from access to source documents on matters of public concern.

Mr. Chairman, all of us know that the despicable abuses that we have read and heard about do not represent the values of our country, or the behavior of the vast majority of our military. Yet the abuses of prisoners and detainees that have occurred have stained the honor of the United States and tarnished the reputation of our military.

We owe it to the millions of men and women in our military who had nothing to do with this misconduct, as well as to the victims of this abuse and their families, to find out just how and why these abuses occurred and to ensure that they never happen again.

While I certainly hope that these horrendous abuses will prove to be the aberrant acts of a few cruel, misguided soldiers who were acting on their own outside the scope of their authority, this outcome seems improbable. Everything that we know about the military suggests that soldiers generally do not freelance, particularly not with respect to major issues of policy. When they do, such freelancing represents a serious breakdown in command and control and military discipline.

So we need to determine where the orders came from that led to these abuses. We need to know how far up the chain of command these decisions reached. Did local commanders make them? Were they made or approved at the Pentagon? What role, if any, did the Department of Justice play in this process? What was the nature and extent of the White House's involvement in these issues? What role, if any, did the Vice President or the President play in this process?

We need to know what training our soldiers received and what role private contractors played in the process. We need to know where and when and why the determination was made that the Geneva Convention did not apply to detainees. And, unfortunately, we need to know whether the decision to force detainees to engage in lewd sexual acts was made because of the belief that these practices would be particularly offensive to the Islamic faith and the religious practices of the detainees.

Mr. Chairman, the Members of Congress need access to the documents sought in the Resolution of Inquiry to do our job and serve the American people. I urge all my Colleagues to support the Resolution.

I yield back.

[The prepared statement of Mr. King follows:]

PREPARED STATEMENT OF THE HONORABLE STEVE KING, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF IOWA

Thank you Mr. Chairman.

I would like to voice my opposition to House Resolution 700.

I believe that, at this time, House Resolution 700 would only compromise our efforts in the worldwide War on Terror. This Resolution is nothing more than election-year politics. Criticism such as Mr. Conyers's only serves to damage the morale and safety of our thousands of troops who continue to serve admirably and honorably in Iraq and elsewhere.

The Bush Administration has been more than upfront and open with respect to the documents that Mr. Conyers hopes to obtain through this Resolution. Furthermore, the Justice Department has already released all unclassified information on the legality of interrogation techniques for al Qaeda and the Taliban. The Administration has been as open as they can be, considering we are at war. The release of any further information would compromise our mission in the War on Terror and, ultimately, put our soldiers' lives in danger by giving aid and comfort to our enemy.

Let me be clear: I support further investigation and punishment of those who truly were wrong-doers in this situation, but we must not allow this to turn into an election-year hunt for scapegoats. Our military justice system is carrying out its

duties, deterring those who would consider similar acts in the future. Now is the time for those of us who make the laws to step back and allow them to be enforced.

In closing, I would ask the Committee to recognize the enemy we are up against, an enemy who murdered 3000 innocent victims on September 11, 2001, an enemy who has shown no remorse, an enemy who would kill each and every Jew, Christian, and capitalist if we let them have their way. We must not go forward with a Resolution that will take attention away from the matter at hand, winning this war on terrorism and bringing to justice those who wish to kill innocent, freedom-loving people.

I thank the Chairman for his hard work and dedication to this Committee, and I look forward to working with all Members of this Committee in winning this War on Terror.

I now recognize the gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you very much, Chairman Sensenbrenner, and I commend you for scheduling this hearing so that we can continue the inquiry into something that has been very disturbing internationally and around the world concerning the way we have treated some of our prisoners. This is one of the scandals of this so-called war against terror.

I have to begin by pointing out, Chairman Sensenbrenner, that the letter that not only I, but Henry Waxman, Chairman, Ranking Member of the Government Reform Committee, and Tom Lantos, Ranking Member of International Relations Committee, sent to Chairman Duncan Hunter of the Armed Services Committee, dated July 9, 2004, requesting the classified information that you have pointed out is sitting on the table in this hearing room presently has never been responded to, and I am happy that it is sitting there this morning. Now that it is within about 30 yards of me, maybe me and my staff, all cleared for Top Secret, will have some opportunity to look at it, and I don't even mind if it is after the work of the Committee has been disposed of this morning.

And I would yield to the Chairman if he chooses to grant me permission for that request.

Chairman SENSENBRENNER. Will the gentleman yield?

Mr. CONYERS. With pleasure.

Chairman SENSENBRENNER. That is up to the Chairman of the Armed Services Committee, but he has already made the offer to allow Members, as well as Judiciary Committee staff who have appropriate security clearances, to examine the information, and no one has responded to the offer that the Chairman of the Armed Services Committee has made.

Ms. LOFGREN. Mr. Chairman.

Mr. CONYERS. Well, may I point out with respect, Mr. Chairman, that my letter of July 9, 2004, has never been responded to, and I might add that this Committee is as entitled to this information as either of the Committees. I mean, this isn't something that we have to negotiate with. We have a right to this material, and it has not been proffered before your kind offer this morning. So if the offer still holds, I would like very much to be able to avail ourselves of it.

Now, let me bring this matter forward. We have got a resolution before us that directs the Attorney General of the United States under H. Res. 700 to transmit to the House all documents relating to the treatment of prisoners and detainees in Iraq, Afghanistan, and Guantanamo Bay. The resolution is privileged. The Committee has 14 legislative days to report the bill favorably or unfavorably.

Otherwise, this privileged motion can be brought directly to the House floor for consideration.

Now, to date there have been closed sessions of the Intelligence Committee and two Armed Services hearings, but there is no ongoing public investigation by any House Committee with a plan to acquire the necessary documents and testimony. Every attempt to review these serious charges of abuse and inhumane treatment on a bipartisan basis has been rejected and with each request——

The CHAIRMAN. The gentleman's time has expired.

Mr. CONYERS. Mr. Chairman, I ask unanimous consent for 5 additional minutes.

Chairman SENSENBRENNER. Without objection.

Mr. CONYERS. I thank the Chairman.

Every attempt to review these serious charges of abuse and inhumane treatment on a bipartisan basis has been rejected and with each request that has been made, the majority party leadership has responded but not any Member of a Republican committee of the House of Representatives has responded by challenging the patriotism of those who question the tactics of this Administration.

Now, there have been a lot of new information provided by investigative journalist Seymour Hirsch since before this matter was filed with the House of Representatives but—and so there are newer reports of abuse that indicate that the intimidation tactics, including torture, are likely to have been approved at the highest levels of Government. For example, the December 2002 Pentagon memo that was recently released to Congress indicates that Secretary Rumsfeld personally authorized using dogs for intimidation purposes, in addition to stripping prisoners of their clothes and hooding them. Furthermore, these memos and orders were signed not only by Mr. Rumsfeld but by President Bush and Attorney General John Ashcroft.

Further investigation into this matter then is obviously necessary, given the numerous loopholes in the information that we do have. For example, the President's February 7, 2002 memorandum directing that detainees be treated humanely commands this humane treatment only to the extent appropriate and consistent with military necessity. Because this is not a term recognized by law, it is unclear to what extent the Justice Department or the Administration found it militarily necessary to act inhumanely.

Another problem that presents itself to this Committee: The President's February 7, 2002 memorandum notes that he has the authority under the Constitution to suspend Geneva as between the United States and Afghanistan, but he declined to exercise that authority at that time. It is unclear whether the President ever exercised that authority.

Another problem that needs to be examined: The Justice Department continued to debate whether detainees could be tortured and what the legal ramifications would be long after the President's February 7, 2002 directive to treat detainees consistent with the Geneva Conventions. This implies that further decisions were made by the President that are not reflected in the memorandum currently available.

Another point: The memoranda from the Justice Department abruptly stops in August 2002. It is highly unlikely that the Justice Department had not issued any legal advice on the laws of war and

how they relate to the detention and interrogation over the last 2 years.

Another point: The interrogation specific documents stop in April 2003 and do not cover practices at Abu Ghraib and other military prisons in Iraq.

Point six: There is a major discrepancy in the——

Chairman SENSENBRENNER. The time of the gentleman has once again expired.

Mr. CONYERS. I thank the Chair and I request an additional 5 minutes, please.

Chairman SENSENBRENNER. Without objection.

Mr. CONYERS. I thank the Chair.

There is a major discrepancy in the released documents that show that in December 2002, Secretary Rumsfeld approved the use of the documented abusive techniques that are in fact illegal. Secretary Rumsfeld later rescinded his approval of these techniques on Guantanamo detainees. Yet, these techniques later featured prominently in the documented abuses at Abu Ghraib.

Item eight: The documents that were released by the Department of Defense are incomplete and raise questions in terms of how the illegal tactics that were approved in Guantanamo were later approved and applied in Afghanistan and Iraq, resulting in the torture and other mistreatment of detainees in those places.

Item nine: The memos that were released to Congress concern the DOD interrogation techniques, but nothing has been provided in terms of CIA interrogation practices.

And the last item, the International Committee of the Red Cross reports that were delivered to the House Armed Services Committee last week are only one aspect of the investigation, are incomplete, were only made available for a period of 6 hours, and were not available to staff and other Members outside the Committee.

I would like now, Mr. Chairman and Members of the Committee, to comment on the recent release of Justice Department and other departmental memoranda. On June 23, 2004, the White House and the Department of State released a number of documents relating to the treatment of detainees. There are also a number of memoranda that have been leaked and distributed on the Internet. Those drafted by the Justice Department or drafted on its advice include these following two, four, six, seven points.

January 22, 2002, Department of Justice memorandum regarding application of treaties and laws to al-Qaeda and Taliban detainees. February 1, 2002, Attorney General letter to President regarding status of Taliban detainees.

February 7, 2002, Department of Justice memoranda regarding status of Taliban forces under Article IV of the Third Geneva Convention of 1949. And there are four other related kinds of letters or memoranda.

In tandem, these documents argue that first the Geneva Conventions and other international laws banning torture do not apply to our detainees and, second, that if they do, they can be construed so narrowly that the events such as those at Abu Ghraib are not legally torture. And third, and finally, even if these acts could be defined as torture, the Administration and its military are not lia-

ble under the President's Commander-in-Chief authority and other defenses.

And so, in conclusion, Mr. Chairman, I would argue that this resolution, H. Res. 700, should and ought to be favorably reported by the full Committee of the Judiciary, this Committee, immediately and brought forward to the floor. And I again thank the Chairman for his generous allotment of time.

[Intervening business.]

Chairman SENSENBRENNER. Debate will now resume on H. Res. 700. The pending question is the Chair's motion to report the resolution adversely.

For what purpose does the gentleman from Texas, Mr. Smith, seek recognition? Aren't you going to respond?

Ms. LOFGREN. Mr. Chairman.

Chairman SENSENBRENNER. The gentlewoman from California, Ms. Lofgren.

Ms. LOFGREN. Move to strike the last word.

Chairman SENSENBRENNER. The gentlewoman is recognized for 5 minutes.

Ms. LOFGREN. Mr. Chairman, I was very surprised to hear that Members of this Committee had been invited to review the classified documents relative to the Abu Ghraib matter because I never received a letter, and while you were going through your statement, I called my scheduler to confirm that we have never received any letter to that effect. And I guess it is that box that is full of the documents. I would like to assume my responsibility to review that material. And so the question I have is in addition to this resolution, which I support, I am wondering how Members of this Committee who want to fulfill our obligation to review this matter actually avail ourselves of that opportunity since I have not received the invitation, and checking with others.

I would certainly yield.

Chairman SENSENBRENNER. The gentlewoman can contact the Armed Services Committee and be able to review the documents in an appropriately secured room. The invitation that was made by the Chairman of the Armed Services Committee was sent to the Ranking Member.

Ms. LOFGREN. Well, in checking with the staff, they were unaware of the offer as well. So there has obviously been a miscommunication of some sort here.

I would just like to further add that this Committee has jurisdiction over the Department of Justice. And the Chairman, although we don't agree obviously on many items, the Chairman has been vigorous in pursuing this Committee's jurisdiction, something that we have all appreciated. To suggest that the Judiciary Committee is subservient to the Armed Services Committee in the review of the Department of Justice seems to me contrary to the type of record the Chairman has established in making sure that the Judiciary Committee actually discharges its obligation.

So I would suggest that Mr. Conyers' resolution is an appropriate one, but that in addition any classified materials ought to be presented to this full Committee by the staff at the Department of Justice. We have all been to classified briefings. It is not just a matter of sitting down and looking through documents. We always get a report from the staff.

Chairman SENSENBRENNER. Would the gentlelady yield again?

Ms. LOFGREN. I would certainly yield, Mr. Chairman.

Chairman SENSENBRENNER. If the gentlewoman would yield, there was a binder that the Department of Justice sent over that contained all of the documents that they had, which was released to the public, and the Chair received a letter from Assistant Attorney General William Moschella that basically says they don't have any more documents, and I have a copy of the letter. A copy of it was sent to the Ranking Member, Mr. Conyers as well. Unfortunately, it doesn't have a date on this. But it does refer to the letter which I sent to the AG dated July 13. I am informed that the Moschella response was received yesterday.

Ms. LOFGREN. Well, I have not received that document either, Mr. Chairman, nor have I received the binder. So I look forward to reviewing that material. But I don't think it really changes the suggestion that I am making, which is that we—if we have a box of classified documents that relate to this investigation, I think it would be appropriate for the full Judiciary Committee on a bipartisan basis to arrange for a classified briefing on these documents and a presentation by the appropriate staff. I don't know which staffers that would be, so that we might have their guidance in how to interpret the classified documents that we are going to review, and I would yield to the Ranking Member, Mr. Conyers.

[The prepared statement of Ms. Lofgren follows:]

PREPARED STATEMENT OF THE HONORABLE ZOE LOFGREN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

For the past several months, stories of prisoner abuse have been dominating much of the discussion about the war in Iraq. And the stories are becoming more and more disturbing.

A recent article in U.S. News and World Report detailed life at Abu Ghraib this way: "[r]iots, prisoner escapes, shootings, corrupt Iraqi guards, unsanitary conditions, rampant sexual misbehavior, bug-infested food, prisoner beatings and humiliations, and almost-daily mortar shellings from Iraqi insurgents—that pretty much sums up life at Abu Ghraib." Even more disturbing, journalist Seymour Hersh recently asserted that the Bush Administration has videotapes of young boys being sodomized by American soldiers.

Enough is enough. We need to get to the bottom of this. And that does not only mean prosecuting low-ranking soldiers. We need to find out whether those in command authorized these tactics, either explicitly or implicitly.

President Bush claims that the abuse was the conduct of a few bad apples. But there are signs pointing elsewhere. For example, we recently learned that Secretary Rumsfeld initially authorized the use of dogs for intimidation purposes, and that some in the Department of Justice believed that, as Commander-in-Chief, President Bush could loosen the definition of "torture" without risking any legal consequences.

In short, there are major questions that need to be answered. Those questions need to be answered by this Congress, not a panel appointed by Secretary Rumsfeld. Why then, are Republicans refusing to act? Not one House committee has undertaken a formal, public investigation of this matter.

The eyes of the world are watching. I urge my colleagues to support this resolution so that we can finally investigate these issues and match our principles with our actions.

Mr. CONYERS. I want to thank the gentlelady for raising this subject again, because, let's be clear about it. The carton of information sitting on a desk in the Judiciary Committee now is from the Armed Services Committee. I hold in my hand our report from staff that points out that there are five categories of Department of Justice documents over and above the ones that they released that we do not have.

So you know, this shell game with documents and letting us be prepared to vote on an important resolution like this—for example, Congresswoman Lofgren, we do not have the Attorney General drafts as well as final documents, classified as well as unclassified documents, all legal issues surrounding the applicability of torture laws and conventions not to——

Chairman SENSENBRENNER. The time of the gentlewoman has expired.

Mr. CONYERS. I ask unanimous consent she be given 3 additional minutes, Mr. Chairman.

Chairman SENSENBRENNER. Without objection.

Mr. CONYERS. Thank you. If I may continue, not just the legality of the interrogation tactics and all detainees in Iraq, Afghanistan, and Guantanamo Bay, not just al-Qaeda and the Taliban.

Now, this is not complex requests we are making. We want all the documents from the Department of Justice relating to the subject matter of H. Res. 700, and we haven't received it, and your focus on this matter allows us a chance to once again reraise this very important consideration.

Ms. LOFGREN. Mr. Conyers, if I may just briefly, reclaiming my time, this letter from Mr. Moschella, which I have just seen for the first time—I guess it was—just arrived yesterday afternoon, I have learned to read letters from the Administration very carefully. And if I take a look at the second paragraph, it says that the Department of Justice; i.e. The Department, can assure you that the Administration has released all unclassified final written opinions from the Department addressing the legality, et cetera, et cetera. That does not mean that all material has been released. That only says that unclassified final written opinions has been released.

So I think that we should inquire further of the Department and see what additional information is available that we have an obligation to pursue, whether it is in public or, if necessary, in a classified setting so that we can assure ourselves that we have discharged our obligations as the Judiciary Committee. And I think that, you know, I plan to vote for Mr. Conyers resolution, but I think that is just step one of what our obligation is in this matter. And I would yield again to Mr. Conyers.

Mr. CONYERS. Well, the gentlelady is absolutely correct, and the quandary that we are put in at this very moment is whether to seek additional time to examine the documents we are asking for or merely put our complaints on the record and stumble forward. I don't know whether to request a recess to discuss this with all the Members on this side of the Committee or just to put these very pointed complaints into the record and move ahead. I leave it to the judgment of my colleagues.

I thank the gentlelady.

Chairman SENSENBRENNER. The time of the gentlewoman has once again expired. The gentleman from Illinois, Mr. Hyde.

Mr. HYDE. Thank you, Mr. Chairman. I congratulate you on this hearing and in no way do I minimize the significance of the effort being made to examine minutely, microscopically, how this Administration reacted to the disgraceful circumstances in Abu Ghraib prison. But I think we are only partially examining this phenomenon. I would like to start every meeting of this Committee with a film of 9/11 showing the aircraft crashing into the two sky-

scrapers and incinerating 3,000 people; showing the ship diving into the Pentagon right down the road here, killing how many people I don't know. And then I would like to remind us, because we forget these things, and that we should know the whole total circumstances of what we are doing. I would also like pictures of perhaps Mr. Johnson, who was beheaded. They discovered his head today or yesterday. And since pictures have animated this flurry of activity, perhaps a picture of that as well as the other people who have been beheaded. Then we could have selective pictures of the suicide bombing that kills little children and elderly people promiscuously almost every day.

We spend so much time on this issue that we kind of fail to emphasize the totality of what is going on over there. So I would hope, sir, that at some time we can put this into context, in no way minimizing the disgraceful conduct at the prisons, but trying to understand the backdrop, the background that sometimes drives people to do things that are disgraceful.

Thank you.

Mr. CONYERS. Would the Chairman—the former Chairman of this Committee yield to me?

Mr. HYDE. With great pleasure.

Mr. CONYERS. Thank you very much, Chairman Hyde. I would take you at your word. I assume you are serious. Why don't we do that? I think it would be very instructive for the same reasons you have enunciated. But in the end, we in the Judiciary have a different function from that role that you carry so well as Chairman of International Relations. We have to determine whether the Geneva Conventions to which we are a signatory were, in fact, deliberately violated not by privates and corporals, but by the President of the United States, the Secretary of the Defense and the Attorney General of the United States.

Mr. HYDE. I would be happy to inform the gentleman that I am keenly aware that those are the targets of this effort. That is no secret.

I yield back my time.

Mr. WATT. Mr. Chairman——

Chairman SENSENBRENNER. Are there any amendments? The gentleman from North Carolina, Mr. Watt.

Mr. WATT. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman. I recognize that these are very dangerous days, because we are in the process of winding down this session leading up to a major national election, and there is a tendency, obviously, to have our judgments reflect on both sides, either side, what may serve the purpose of getting one or the other sets of nominees elected to office. But in the process of doing that, I hope we will not lose sight of our own responsibilities, aside from protecting whoever or scandalizing whoever may have made decisions for which there should be disclosure to other people, not necessarily disclosure to the public, but certainly disclosure to Members of the relevant oversight Committees that have jurisdiction here. And it seems to me that to not report this resolution favorably, or pursue these records runs very counter to a number of things that I thought this Committee and the Chair has stood for.

First of all, it has not gone unnoticed by us, me, by a number of people, that every time there is a hearing before the Judiciary Committee, each witness is requested to stand and raise their right hand and take an oath. And for some reason, today, we are prepared to sit here and accept a letter from an Administration official that doesn't even go near as far as even representing that all of the documents have been turned over apparently. The letter is not under oath. We can't cross-examine it. We can't ask it questions. We can only review its conclusory comments, which I think fall far, far short of the standard that this Committee has set for receiving information and documentation before this Committee.

Second, as Ms. Lofgren has pointed out, this Committee has been assiduous, the Chair of this Committee has been assiduous in protecting the jurisdiction of this Committee. And the notion that we should, as a Judiciary Committee, having oversight of the Attorney General, go and cower to another Committee to get documents that should be under our review or subject to our review, is just inconsistent with the philosophy, it seems to me, that this Committee has followed of safeguarding the jurisdiction and fulfilling the responsibility that this Committee and the Members of this Committee have to the public. And I don't—I have no idea what is in the box down there. But it seems to me that we ought to be assured that whatever is there is complete and the full record, classified and unclassified, and that we can review it without falling under the jurisdiction of some other Committee.

Chairman SENSENBRENNER. The time of the gentleman has expired.

Mr. WATT. I ask unanimous consent for 30 additional seconds.

Chairman SENSENBRENNER. Without objection.

Mr. WATT. I just think the interest of protecting somebody and not embarrassing somebody and not running the risk that this could be embarrassing in an upcoming political election is taking more power over this decision, because it is just inconsistent with prior decisions that this Committee has made.

Chairman SENSENBRENNER. The time of the gentleman has once again expired.

Are there amendments? If there are no amendments—there are no amendments. The question——

Mr. CONYERS. There is—I have an amendment at the desk.

Chairman SENSENBRENNER. The Clerk will report the amendment.

Mr. CONYERS. I am reporting the amendment on behalf of Sheila Jackson Lee. Different from another——

Chairman SENSENBRENNER. Is this Conyers, 121 XML?

Mr. CONYERS. No, sir, it is not.

Chairman SENSENBRENNER. Okay. Then the Clerk will report the correct amendment.

Mr. CONYERS. It is the Jackson Lee amendment, 254 XML.

Chairman SENSENBRENNER. The Clerk will report the amendment.

The CLERK. Amendment to H. Res. 700 offered by Mr. Conyers. At the end of the resolution, add the following new paragraph (and make such technical and conforming changes as may be appropriate): (22).

[The amendment to H. Res. 700 offered by Ms. Jackson Lee follows:]

H.L.C.

AMENDMENT TO H. RES 700

OFFERED BY MS. JACKSON-LEE OF TEXAS

At the end of the resolution, add the following new paragraph (and make such technical and conforming changes as may be appropriate):

1 (22) all documentation, including video evi-
2 dence, of any sexual assault of any prisoner or de-
3 tainee who is a minor.

Chairman SENSENBRENNER. Without objection, the amendment is considered as read and the gentleman from Texas is recognized—or the gentleman from Michigan is recognized for 5 minutes.

Mr. CONYERS. Thank you, Mr. Chairman. I offer this amendment on behalf of——

Chairman SENSENBRENNER. Will the gentleman yield?

Mr. CONYERS.—Miss Jackson Lee, and I certainly yield.

Chairman SENSENBRENNER. I believe that the minority should be allowed to amend their resolution as they see fit, and I would ask for an aye vote on the amendment and then again reporting the amendment or the resolution out adversely.

Mr. CONYERS. I return any time that I have been granted. Thank you.

Chairman SENSENBRENNER. Okay. The question is on the amendment offered by——

Ms. JACKSON LEE. Strike the last word.

Chairman SENSENBRENNER. The gentlewoman is recognized for 5 minutes.

Ms. JACKSON LEE. Thank you. I ask the support of the amendment and yield back.

Chairman SENSENBRENNER. Okay. The question is on the amendment offered by the gentlewoman—or gentleman from Michigan,

Mr. Conyers. Those in favor will say aye. Opposed no. The ayes appear to have it. The ayes have it. The amendment is agreed to.

Are there further amendments?

Ms. JACKSON LEE. Mr. Chairman.

Chairman SENSENBRENNER. The gentlewoman from Texas. For what purpose do you seek recognition?

Ms. JACKSON LEE. To strike the last word.

Chairman SENSENBRENNER. The gentlewoman is recognized for 5 minutes again.

Ms. JACKSON LEE. I thank the distinguished gentleman. First of all, I want to thank the Committee and Mr. Conyers for that amendment. But I do want to applaud Mr. Conyers for this resolution and simply, as I was leaving the room I heard my colleague, Congresswoman Lofgren mention her interest in reviewing documents. I just want to add to the fact that I too did not receive information, and we know how information is disseminated, to be able to look at the documents of what I think is a very important issue.

I will not take this time to finger point, but I do think it is important for any Administration in any system of government to be transparent. I recall the years in this Committee during the last Administration when I believe we spent any number of hours investigating. This issue dealing with the prison scandal in Iraq and in Afghanistan is worthy of investigating. We know that there is an investigation of a very able public servant who served in the Clinton administration. We know that that investigation was going on for a period of time. Some of us wonder why the issue was leaked now. But we realize that in all instances government should be transparent.

There is no doubt that the Attorney General has attempted to cover up and prevent a full oversight investigation and review of all matters dealing with Abu Ghraib. We also know that there are brutal acts that occurred. We also know that there are possibilities that the direction to act as those individuals did act at the respective prisons may have come from the highest levels of government.

I believe this resolution, if acted upon by this Committee in good faith, would be a true testimony and statement to the integrity not only of this Committee but to the governmental process, that we are not afraid of investigations and that what we want most of all is for the best of this Nation and our people.

Tomorrow the 9/11 Commission will come out and I am sure there will be enough finger pointing for all of us. I hope the most that we will glean out of it is that we failed on 9/11. We failed the American people, and that it is important and imperative that we fix the broken system, particularly intelligence, the intelligence system. But if we report this resolution unfavorably, it will be indicative of our fear of the truth or the facts, whichever one you so choose. I believe, and I would hope my colleagues on the other side of the aisle would refresh their memory and be reminded of one investigation after another of the previous Administration in which those of us on this side of the aisle either had to sit through or participate in, even to the extent of a constitutional impeachment proceedings. Why is it, when we raise questions of fact, truth, integrity and the need for a proper governmental system, why isn't it that we are not joined in by the Members of good faith on the other side of the aisle? And I know that they are in fact individuals who be-

lieve in the integrity of government. My remarks are not in any way intended to diminish their commitment to this process of good government. But I would say that it would be shame on us——

Mr. DELAHUNT. Would the gentlelady yield?

Ms. JACKSON LEE.—today if we would not move forward. And I would be happy to yield to the distinguished gentleman.

Mr. DELAHUNT. Yeah. I thank the gentlelady for yielding. If the motion offered by Mr. Sensenbrenner should prevail, and I have reason to believe that it will, I would hope that the Chair would consider that those documents that are currently in the possession of the Armed Services Committee that are properly within the jurisdiction of the House Judiciary Committee be brought physically to a venue which is under the control of the Judiciary Committee for review by all Members on both sides of the aisle at their convenience.

Chairman SENSENBRENNER. Will the gentlewoman from Texas yield to respond to that point?

Ms. JACKSON LEE. I would be happy to yield.

Chairman SENSENBRENNER. The problem is that the Uniform Code of Military Justice is not under the jurisdiction of the Judiciary Committee. It is under the jurisdiction of the Armed Services Committee. And you know, I don't want to get involved into a jurisdictional dispute where that big box will end up dropping through the cracks to some classified safe. I think the arrangement that has been made to allow the examination of those records by Members of our Committee, you know, is a good one. It is just as a matter of physically where the records are.

I thank the gentlewoman for yielding.

Mr. DELAHUNT. If the gentlewoman would continue to yield. I would ask unanimous consent——

Ms. JACKSON LEE. If I could have an additional.

Chairman SENSENBRENNER. Without objection.

Ms. JACKSON LEE. So that I can close and yield to the gentleman.

Mr. DELAHUNT. I respect the Chair's statement and I understand the logistical issue, however, under the War Crimes Act, that does fall, it is my understanding from staff that that does fall within the purview, if you will, of the Committee. And again, without being unreasonable, I think it is important to, as the Chair has done continually, and much to the encouragement and support of Members on this side of the aisle, been very clear about the jurisdiction of the Judiciary Committee.

Ms. JACKSON LEE. If I may reclaim my time and just close, let me, after that exchange, also acknowledge the Chairman's consistency in protecting and also recognizing the jurisdiction of this Committee. I would only say that after this vote, and I hope that it will be a positive vote to send this out favorably, if the Chair would help facilitate Members being able to see all documents that they can see, because we do in fact have jurisdiction, as the distinguished gentleman from Massachusetts did say, under certain elements, certain laws, but also on the human rights violations as well. It is just imperative that we get to the bottom of what happened, and I think there is no better Committee on the question of the law and of course the integrity of the process than this Judiciary Committee, and I would ask my colleagues to support H. Res.

700 of Mr. Conyers, and I thank them for supporting the Conyers-Jackson Lee amendment dealing with the——

Chairman SENSENBRENNER. The time of the gentlewoman has once again expired.

Ms. JACKSON LEE. I yield back.

Chairman SENSENBRENNER. Are there further amendments?

Hearing none, the question is on the motion to report the resolution of inquiry, H. Res. 700, adversely, as amended. All in favor will say aye. Opposed no. The ayes appear to have it.

Mr. CONYERS. I request a record vote, Mr. Chairman.

Chairman SENSENBRENNER. A record vote is requested. The question is on the motion to report H. Res. 700 adversely, as amended. All in favor will as your names are called answer aye. Those opposed no, and the Clerk will call the roll.

The CLERK. Mr. Hyde.

Mr. HYDE. Aye.

The CLERK. Mr. Hyde votes aye.

Mr. Coble.

[no response.]

The CLERK. Mr. Smith.

Mr. SMITH. Aye.

The CLERK. Mr. Smith votes aye.

Mr. Gallegly.

[no response.]

The CLERK. Mr. Goodlatte.

Mr. GOODLATTE. Aye.

The CLERK. Mr. Goodlatte votes aye.

Mr. Chabot.

Mr. CHABOT. Aye.

The CLERK. Mr. Chabot votes aye.

Mr. Jenkins.

Mr. JENKINS. Aye.

The CLERK. Mr. Jenkins votes aye.

Mr. Cannon.

[no response.]

The CLERK. Mr. Bachus.

[no response.]

The CLERK. Mr. Hostettler.

Mr. HOSTETTLER. Aye.

The CLERK. Mr. Hostettler votes aye.

Mr. Green.

[no response.]

The CLERK. Mr. Keller.

Mr. KELLER. Aye.

The CLERK. Mr. Keller votes aye.

Ms. Hart.

[no response.]

The CLERK. Mr. Flake.

[no response.]

The CLERK. Mr. Pence.

Mr. PENCE. Aye.

The CLERK. Mr. Pence votes aye.

Mr. Forbes.

Mr. FORBES. Aye.

The CLERK. Mr. Forbes votes aye.

Mr. King.
Mr. KING. Aye.
The Clerk. Mr. King votes aye.
Mr. Carter.
Mr. CARTER. Aye.
The CLERK. Mr. Carter votes aye.
Mr. Feeney.
[No response.]
The CLERK. Ms. Blackburn.
[no response.]
The CLERK.Mr. Conyers.
Mr. CONYERS. No.
The CLERK. Mr. Conyers votes no.
Mr. Berman.
Mr. BERMAN. No.
The CLERK. Mr. Berman votes no.
Mr. Boucher.
[no response.]
The CLERK. Mr. Nadler.
[no response.]
The CLERK. Mr. Scott.
Mr. SCOTT. No.
The CLERK. Mr. Scott votes no.
Mr. Watt.
Mr. WATT. No.
The CLERK. Mr. Watt votes no.
Ms. Lofgren.
Ms. LOFGREN. No.
The CLERK. Ms. Lofgren votes no.
Ms. Jackson Lee.
Ms. JACKSON LEE. No.
The CLERK. Ms. Jackson Lee votes no.
Ms. Waters.
Ms. WATERS. No.
The CLERK. Ms. Waters votes no.
Mr. Meehan.
[no response.]
The CLERK. Mr. Delahunt.
Mr. DELAHUNT. No.
The CLERK. Mr. Delahunt votes no.
Mr. Wexler.
[no response.]
The CLERK. Ms. Baldwin.
Ms. BALDWIN. No.
The CLERK. Ms. Baldwin votes no.
Mr. Weiner.
[no response.]
The CLERK.Mr. Schiff.
Mr. SCHIFF. No.
The CLERK. Mr. Schiff votes no.
Ms. Sanchez.
Ms. SANCHEZ. No.
The CLERK. Ms. Sanchez votes no.
Mr. Chairman.
Chairman SENSENBRENNER. Aye.

The CLERK. Mr. Chairman votes aye.

Chairman SENSENBRENNER. Members who wish to cast or change their vote.

The gentleman from Massachusetts, Mr. Meehan.

Mr. MEEHAN. No.

The CLERK. Mr. Meehan votes no.

Chairman SENSENBRENNER. The gentlewoman from Pennsylvania, Ms. Hart.

Ms. HART. Aye.

The CLERK. Ms. Hart votes aye.

[11:00 a.m.]

Chairman SENSENBRENNER. The gentleman from Wisconsin, Mr. Green.

Mr. GREEN. Aye.

The CLERK. Mr. Green aye.

Chairman SENSENBRENNER. The gentleman from North Carolina, Mr. Coble.

Mr. COBLE. Aye.

The CLERK. Mr. Coble aye.

Chairman SENSENBRENNER. Further Members in the chamber who wish to cast or change their votes?

If not, the clerk will report.

The CLERK. Mr. Chairman, there are 15 ayes and 12 noes.

Chairman SENSENBRENNER. And the motion to report adversely is agreed to. Without objection, the resolution will be reported adversely to the House in the form of a single amendment in the nature of a substitute incorporating the amendment adopted here today. Without objection, the staff is directed to make any technical and conforming changes. And all Members will be given 2 days, as provided by the rules, in which to submit additional dissenting, supplemental, or minority views.

DISSENTING VIEWS

On April 28, 2004, *60 Minutes II* aired photographs of detainees in American-run Abu Ghraib prison outside of Baghdad, Iraq. These photograph depicted men wearing hoods, stacked naked in pyramids, sexually abused, and threatened with attack dogs, casting doubt upon the nation and the world's view of the United States as a human rights leader was forever changed. In the nearly 4 months since this tragedy became public, the picture of what has happened in American run prison facilities abroad has only worsened. A recent report found approximately 300 allegations of abuse,[1] and ongoing investigations will likely turn up more. In fact, the press continues to uncover more stories, each more depraved than the next, some of which even involve the use of attack dogs on children.[2]

As members of the Judiciary Committee, we were even more ashamed when it became apparent that the Justice Department and its Office of Legal Counsel were twisting and distorting well settled law in order to shield the Administration from any liability for these acts. This resolution was drafted to request all the documents produced in that effort.

We strongly dissent from this Committee's decision to adversely report H. Res. 700. Those Office of Legal Counsel memoranda that have been either leaked to the press or released by the White House detail an intricate, though faulty, argument for why tortuous treatment of prisoners is not barred by American or international law. It is this Committee's duty to trace the evolution of these documents to discover who commissioned these documents and whether the blank check given to the Administration under their rationale was ever used. We are gravely disappointed that this Committee shirked that critical oversight responsibility.

A. THE HISTORY OF H. RES. 700 AND OTHER CONGRESSIONAL OR ADMINISTRATION INQUIRIES

H. Res. 700 was introduced on June 25, 2004 by Congressman Conyers and 45 cosponsors. It directed the Attorney General to transmit to the House of Representatives all documents in his possession relating to the treatment of prisoners and detainees in Iraq, Afghanistan and Guantanamo Bay. On July 21, 2004, the resolution was reported unfavorably by the Committee on a party-line vote of 15 to 12.

While there have been a few hearings in the House and Senate about abuse at Abu Ghraib, none have taken a systematic review of the circumstances, including legal justifications, leading to the

[1] Final Report of the Independent Panel to Review Department of Defense Detention Operations, August 2004, at http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf.

[2] Josh White and Thomas E. Ricks, *Iraqi Teens Abused at Abu Ghraib, Report Finds,* WASH. POST, Aug. 24, 2004 at A1.

abuse. Those hearings dealt with the military chain of command and reviewed Maj. Gen. Taguba's report issued in March;[3] they did not unveil new information, nor did they address the myriad issues that this resolution would have. Most importantly, H. Res. 700 would have garnered all legal advice about the international laws of war and U.S. torture statutes given to the Administration. At this time, no body has reviewed how such faulty legal opinions could have been generated by such a prestigious office, nor how those opinions affected the decision making of the Administration. The resolution also would have solicited any information about contractors and their role in prisons, solely held by the Department of Justice.

Ongoing Administration and military investigations are often cited as the reason for Congress' inaction. Again, it is important to note that none of those ongoing investigations are inquiring about the Justice Department's role in sanctioning such behavior. Because that is the sole purview of this Committee, this Committee's silence on the abuse leaves the Department's legal fiction unquestioned. While the Administration has promised to review these memoranda and to rewrite those sections that are "overbroad"—as it terms the justification of torture[4]—there has been no comprehensive repudiation of the memoranda, and as of yet, the memoranda have not been revised or replaced.

This Committee's refusal to exercise its oversight role is not unique. Every attempt to review these serious charges of abuse and inhuman treatment on a bipartisan basis has been rejected, and with each request that has been made to them, the House Republicans have responded by challenging the patriotism of those who question the tactics of the administration.[5]

B. RECENT RELEASE OF JUSTICE DEPARTMENT AND OTHER DEPARTMENTAL MEMORANDA

On, June 23, 2004, the White House and Department of State released a number of documents relating to the treatment of detainees. There are also a number of memoranda that have been leaked and distributed on the Internet. Those drafted by the Justice Department, or drafted on its advice, include:

- January 22, 2002, Department of Justice memorandum to Alberto Gonzales regarding "Application of Treaties and Laws to al Qaeda and Taliban Detainees"
- February 1, 2002, Attorney General Letter to President regarding status of Taliban detainees
- February 7, 2002, Department of Justice memorandum regarding "Status of Taliban forces Under Article 4 of the Third Geneva Convention of 1949"

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[3] Major General Antonio M. Taguba, Article 15–6 Investigation of the 800th Military Police Brigade.

[4] Mike Allen and Susan Schmidt, *Memo on Interrogation Tactics is Disavowed,* WASH. POST, June 23, 2004 at A1.

[5] *See,* for example, "There are well over 140 criminal investigations into detainee abuse worldwide that are ongoing . . . we should not divert further executive branch resources and energy in the midst of a global war." Statement of Chairman Henry J. Hyde Before the Committee on International Relations, July 15, 2004.

- February 7, 2002, Presidential memorandum regarding "Humane Treatment of al Qaeda and Taliban Detainees"
- February 26, 2002, Department of Justice memorandum regarding "Potential Legal Constraints applicable to Interrogations of Persons Captured by U.S. Armed Forces in Afghanistan"
- August 1, 2002, Department of Justice letter regarding application of Convention Against Torture and Rome Statute on the International Criminal Court
- August 1, 2002, Department of Justice memorandum regarding "Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A."

In tandem, these documents argue that 1) the Geneva Conventions and other international laws banning torture do not apply to our detainees, 2) if they do, they can be construed so narrowly that events such as those at Abu Ghraib are not legally 'torture," and 3) even if these acts could be defined as "torture," the Administration and its military are not liable under the President's Commander-in-chief authority and other defenses.

The Justice Department vehemently refused to publicly release these documents in their entirety, despite the fact that several had been leaked to the press and widely distributed on the Internet.[6] The Attorney General stated before the Senate Judiciary Committee that, "I believe it is essential to the operation of the executive branch that the president have the opportunity to get information from the attorney general that is confidential."[7] Two weeks later, the President released 13 documents to the press, including those listed above and others from the Department of Defense detailing the approval of specific interrogation techniques.

C. PUBLICLY RELEASED MEMORANDA CONTRAVENE LONG ESTABLISHED LAW

Those memos that are now publicly available show marked deviation from long established law. As David B. Rivkin Jr., former White House lawyer in the Reagan administration, and a supporter of the August 1, 2002 memo himself admitted, "If you line up 1,000 law professors, only six or seven would sign up to it."[8] In fact, attorneys have come out in full force against the memoranda's legal conclusions. Over 300 attorneys have signed a bipartisan *Lawyers' Statement on Bush Administration's Torture Memos* that denounces the legal arguments in the memo, including 12 former judges, eight former American Bar Association Presidents, and countless human rights professors and advocates.[9] Also, the American Bar Association has passed a resolution condemning any "endorsement or au-

[6] Susan Schmidt, *Ashcroft Refuses to Release '02 Memo,* WASH. POST, June 9, 2004 at A1.
[7] *DOJ Oversight: Terrorism and Other Topics, Hearing Before the Senate Judiciary Committee,* 108th Cong., (June 8, 2004) (statement of Attorney General John D. Ashcroft).
[8] R. Jeffrey Smith, *Slim Legal Grounds for Torture Memos,* WASH. POST, July 4, 2004 at A12.
[9] Letter *available at www.allianceforjustice.org.*

thorization of [torture] by government lawyers, officials and agents."[10]

Because these documents are so far afield of the legal consensus in the American and International legal community, an investigation into their creation and to what extent they evolved and were utilized is necessary.

1. The memoranda incorrectly conclude that international protections do not apply to many detainees in U.S. custody.

The memoranda advise the President that the Geneva Conventions do not apply to al Qaeda or Taliban detainees. The Third Geneva Convention applies to recognized soldiers, or "prisoners of war," and the Fourth Convention applies to all civilians.[11] The memoranda argue that because these groups are technically neither, and are instead "enemy combatants" or "illegal combatants," they do not receive any protections. On February 7, 2002, the President affirmed this logic and announced that the treatment of neither group would be governed by the Conventions, although the detainees would be treated "consistent" with such principles.[12]

However, long standing international interpretations of the Geneva Conventions state that a person "cannot fall outside of the law," and that each individual must fall under either the Third or Fourth Conventions.[13] Even if the Administration can withhold prisoner of war status from the detainees, they are bound to treat them with the respect afforded to citizens under the Fourth Convention. As the International Committee of the Red Cross stated in its commentary to the Fourth Convention:

> Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, [or] a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can fall outside the law.[14]

Therefore, the detainees are protected by Common Article 3 of the Conventions, which prohibit "[v]iolence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; . . . outrages upon personal dignity, in particular humiliating and degrading treatment."[15]

Even if the argument that enemy combatants do not fall under either the Third or Fourth Conventions is accepted, detainees are clearly afforded protection against torture and other degrading

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[10] ABA, Resolution on the use of torture or other cruel, inhuman or degrading treatment or punishment upon persons within the custody or under the physical control of the United States government, at 4–5.

[11] Geneva Convention (III) Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3317, 75 U.N.T.S. 135; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 351, 75 U.N.T.S. 287.

[12] Memorandum from the President of the United States, to the Vice President, et. al, Regarding the Humane Treatment of al Qaeda and Taliban Detainees (February 7, 2002).

[13] Summary of International and U.S. Law Prohibiting Torture and Other Ill-Treatment of Persons in Custody," Human Rights Watch, May 24, 2004 (citing Geneva Convention III & IV, Art. 3).

[14] International Committee of the Red Cross, "Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War," (Geneva: 1958).

[15] *See supra* note 12.

treatment. Customary law, adopted through tradition of the United States and other nations, has established the common practice that these protections are larger than technical legal definitions. And at the very least, Article 75 of Protocol 1 of the Geneva Conventions covers the rights of anyone captured on the battlefield and clarifies the responsibilities of nations to civilians, military forces, non-state aggressors and others caught during a war. It prohibits murder, "torture of all kinds, whether physical or mental," "corporal punishment," and "outrages upon personal dignity, in particular humiliating and degrading treatment, . . . and any form of indecent assault."[16] Because these provisions cover everyone, whether civilian, military, or somewhere in between, torture and other degrading treatment is banned regardless of how the U.S. classifies the detainees. While the United States has not officially adopted Protocol 1, "article 75 is widely considered to be universally binding as customary international law."[17]

Finally, what is sorely missing from this analysis is the recognition that the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment prohibits the torture of anyone at anytime, and does not differentiate amongst captives.[18] Regardless of whether the Geneva Conventions apply, torture is prohibited by international law by this treaty.

2. The memoranda narrowly redefine torture in ways unsupported by law.

The August 1, 2002 Department of Justice memo creates a definition of torture that is contrary to international law, domestic law and legislative intent. The memo claims that torture consists of "extreme acts" under U.S. law, inflicting severe pain that "must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure. Severe mental pain requires suffering not just at the moment of infliction but it also requires lasting psychological harm, such as seen in mental disorders like posttraumantic [sic] stress disorder."[19] However, 18 U.S.C. § 2340–2340A, the Federal law executing the U.N. Convention Against Torture,[20] does not use the word "extreme" or otherwise suggest the conclusion that "those acts must be of an extreme nature to rise to the level of torture within the meaning of Section 2340A and the Convention."[21] Instead, the law provides:

> (1) "torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering inci-

[16] Protocol (1) Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 75, 1125 U.N.T.S. 3.

[17] Jennifer K. Elsea, "U.S. Treatment of Prisoners in Iraq: Selected Legal Issues," Congressional Research Service, May 24, 2004, note 15. *See also* Derek Jinks, *The Declining Significance of POW Status,* 45 HARV. INT'L. L.J. 367 (2004) (arguing that all detainees are protected by common article 3 and article 75 of Protocol 1).

[18] United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984).

[19] Memorandum from the Department of Justice to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation Under 18 U.S.C §§ 2340–2340A, (August 1, 2002) at 46.

[20] Convention Against Torture *supra* note 19.

[21] Memorandum, *supra* note 20 at 1.

dental to lawful sanctions) upon another person within his custody or physical control;

(2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from—(A) the intentional infliction or threatened infliction of severe physical pain or suffering; (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (C) the threat of imminent death; (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality."[22]

There is nothing in this definition that requires the sensation of organ failure or death nor requires mental harm rising to the level of a disorder to invoke the law's protections. In fact, the United States has repeatedly condemned far lesser acts in other countries as torture or cruel and inhuman treatment.[23]

Finally, it is important to note that the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment prohibits "other cruel, inhuman or degrading treatment or punishment." Because the memoranda are mostly concerned with avoiding criminal prosecution in the United States, they only attempt to redefine torture—the only thing that is criminalized under the law. They do not mention that even if the bad actors can avoid the technical term of torture, the United States as a country would be in violation of this international agreement for lesser acts of degradation.

3. The memoranda wrongfully excuse the Administration from liability under the Commander-in-chief-clause of the Constitution.

The August 1, 2002 memorandum also argues that prosecution of a torture case under section 2340A would constitute an unconstitutional infringement of the President's ultimate authority over interrogations of enemy combatants pursuant to his Commander-in-Chief powers.[24] In essence, this means that there is no limit to actions taken under the President's military authority, not even by Congress or the courts.[25] It is a prescription for arbitrary, dictatorial power that no society faithful to the rule of law can accept; our country certainly cannot. That notion not only contravenes the basic tenet of separation of powers, but also the vast majority of international human rights norms and U.S. legal protections enshrined over the last century. Notably, the memorandum does not

[22] 18 U.S.C. 2340A (2002).

[23] State Department Country Reports on Human Rights, 2003. The reports condemn beatings, blindfolding, burning, denial of food and water, dog attacks dripping water on a person's head, exposure to excessive heat and cold, forced painful positions, humiliation, sexual assaults, slapping, sleep deprivation, solitary confinement, stripping, water-boarding, suspension from the limbs and threats.

[24] Memorandum, *supra* note 20 at 6.

[25] *Id* at 36. "Any effort by congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President . . . Congress can no more interfere with the President's conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield." *Id.* at 39.

even mention *Youngstown Sheet & Tube Co.* v. *Sawyer*[26], where the Supreme Court held that the President's Commander-in-chief authority did not trump all other laws and Constitutional provisions.[27] As Justice Jackson stated in his famous concurrence, "when the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . . Presidential claim to [such] a power . . . must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."[28] The memorandum also omits *Missouri* v. *Holland*, a case in which the Supreme Court held that absent some other constitutionally explicit authority to the contrary, international treaties created under Article 6 of the constitution are binding law.[29]

The Supreme Court recommitted this system of checks and balances in *Hamdi* v. *Rumsfeld*, decided on June 28, 2004. Justice O'Connor said the Government's argument that courts were required to forgo examination of the enemy combatant case "cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens.[30] Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."[31] In view of what we have learned in recent months and weeks about the inhumane and shameful treatment inflicted on detainees in our custody, the insistence in the August 2, 2002 memo that no limits can be imposed on the President in his capacity as Commander-in-Chief must be rejected.

We strongly believe that the President may not use his Commander-in-chief authority to override lawfully created international treaties or portions of the United States Code; in the present case, the Geneva Conventions, the Convention Against Torture, and 18 U.S.C. §§ 2340–2340A.

4. The memoranda incorrectly invoke the "necessity defense" in justifying torture.

Similarly, the August 1, 2002 memorandum's analysis of the availability of the necessity defense is erroneous. Article 2 of the Convention Against Torture clearly says that torture is always prohibited; there are no exceptions for wartime situations or states of

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[26] 343 U.S. 579 (1952).

[27] *See id.* at 587 (invalidating an Executive Order directing the Secretary of Commerce to seize and run privately owned steel mills for the benefit of the military).

[28] *Id.* at 637–38. (Jackson, J., concurring).

[29] *Missouri* v. *Holland,* 252 U.S. 416, 432 (1920) (". . . the power to make treaties is delegated expressly, and by Article 6 treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land.")(holding that states' 10th Amendment rights could not overrule an international treaty protecting birds).

[30] *Hamdi* v. *Rumsfeld,* 124 S.Ct. 2633, 2650 (2004)(citing *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952)).

[31] *Id.* (citing *Mistretta* v. *United States*, 488 U.S. 361, 380 (1989)(". . . the separation of powers into three coordinate Branches is essential to the preservation of liberty"); *Home Building & Loan Assn.* v. *Blaisdell*, 290 U.S. 398, 426 (1934)(". . . even the war power does not remove constitutional limitations safeguarding essential liberties."))

emergency.[32] The crime of torture, following the convention, is codified in the U.S. Code, yet the memo says that the necessity defense is available because "Congress has not explicitly made a determination of values vis-a-vis torture."[33] The analysis concludes that because Congress did not specifically exclude the necessity defense in the enacting statute, it must have intended to include it.[34] This argument justifying the bizarre reading of section 2340 is illogical, and no case law or legislative history is cited to support this interpretation.

5. The memoranda incorrectly use a "self-defense" theory to justify torture.

Finally the August 1, 2002 memorandum takes self-defense, which is available to individuals in our criminal law, and bootstraps it into "self-defense" of nation in a period of war. The argument is that the U.S. was attacked by Al Qaeda and can, therefore, can be excused for torturing an individual in an interrogation because Al Qaeda may strike again.[35] Under this theory, torture of the one, may prevent harm to many. However, this contradicts the laws on armed conflict, especially Article 13 of the 3rd Geneva Convention that says no nation can ever torture or abuse a person in detention during an armed conflict.[36] One cannot transpose a rule of law that applies to individuals facing imminent attack onto a nation under a general threat of terrorist attack at some unknown point in the future, simply because it is politically convenient to the legal argument one wishes to create. Here, Congress has adopted the torture convention, yet the OLC argues that the President can act beyond the limits of that legislation. As noted, Justice O'Connor has now clarified that the President is not beyond the checks and balances of our separation of powers system, even and especially during this war on terrorism.[37]

D. THE PUBLICLY RELEASED MEMORANDA ARE NOT A COMPLETE PICTURE OF WHAT THE ADMINISTRATION RECEIVED AS ADVICE ON THE LAWS OF WAR.

During the markup of H. Res. 700, Chairman Sensenbrenner revealed a letter from the Justice Department assuring him that "the Administration has released all unclassified, final written opinions from the Department addressing the legality of interrogation techniques used in interrogations conducted by the United States of al Qaeda and Taliban enemy combatants."[38] He then declared this resolution unnecessary. However, H. Res. 700 would have requested a much larger universe of documents than professed available by the Justice Department. For example, it would acquire 1)

[32] Convention Against Torture, *supra* note 19, art. 2. ("No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency may be invoked as a justification of torture.")
[33] Memorandum, *supra* note 20 at 41.
[34] *Id.* at note 23.
[35] *Id.* at 42–46.
[36] Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 13, 6 UST 3316.
[37] *See supra* note 31 and accompanying text.
[38] Letter to the Honorable F. James Sensenbrenner, Jr., Chairman, House Judiciary Committee from William E. Moschella, Assistant Attorney General (July 20, 2004) (on file with Committee Majority office).

drafts as well as final documents; 2) classified as well as unclassified documents; 3) all legal issues surrounding the applicability of torture laws and conventions, not just the legality of interrogation tactics; 4) all detainees in Iraq, Afghanistan and Guantanamo Bay, not just al Qaeda and the Taliban; and 5) all documents in the Attorney General's possession, not just those that originated in his department.

There is no reason to believe that the memoranda the White House released represent a complete accounting of all Justice Department documentation of its legal advice to the President. Indeed the July 20th letter to the Chairman appears to implicitly concede as much. Until the moment of their selective release to the press, the Administration claimed that their release would not only violate the privilege between the President and his advisors, but aid terrorists in their ability to resist future interrogations.[39]

Further, the selection of documents that have been released leave large gaps not only in time, but in substance. H. Res. 700 would have filled these holes. For example:

- The President's February 7, 2002 memorandum directing that detainees be treated humanely commands this "humane" treatment only "to the extent appropriate and consistent with military necessity." Because this is not a term recognized by law, it is unclear to what extent the Justice Department or the Administration found it militarily necessary to act inhumanely.
- The President's February 7, 2002 memorandum notes that he has "the authority under the Constitution to suspend Geneva as between the United States and Afghanistan, but [he] decline[d] to exercise that authority at [that] time." It is unclear whether the President ever exercised that authority.
- The Justice Department continued to debate whether detainees could be tortured and what the legal ramifications would be long after the President's February 7, 2002 directive to treat detainees consistent wit the Geneva Conventions. This implies that further decisions were made by the President that are not reflected in the memoranda that are currently available.
- The memoranda from the Justice Department abruptly stop in August 2002. It is highly unlikely that the Justice Department has not issued any legal advice on the laws of war and how they relate to detention and interrogation over the last 2 years.
- The interrogation-specific documents stop in April 2003 and do not cover practices at Abu Ghraib and other military prisons in Iraq.
- There is a major discrepancy in the released documents that show that in December 2002, Secretary Rumsfeld approved the use of the documented abusive techniques that are in fact illegal. Secretary Rumsfeld later rescinded his approval of these techniques on Guantanamo detainees, yet these

[39] *DOJ Oversight: Terrorism and Other Topics, Hearing Before the Senate Judiciary Committee,* 108th Cong., (June 8, 2004) (statement of Attorney General John D. Ashcroft).

techniques later featured prominently in the documented abuses at Abu Ghraib.

- The documents that were released by DOD are incomplete and raise many questions in terms of how the illegal tactics that were approved in Guantanamo were later approved and applied in Afghanistan and Iraq, resulting in the torture and other mistreatment of detainees in those places.
- The memos that were released to Congress concern the DOD interrogation techniques, but nothing has been provided in terms of CIA interrogation practices.

E. CONCLUSION

This Committee has once again abdicated its oversight role. This time, we fear the repercussions will long be felt through the damage to our international reputation, the risk to our own troops when captured by the enemy, and the violation of this country's conscience. For these reasons, we dissent from the Committee's unfavorable reporting of H. Res. 700.

JOHN CONYERS, JR.
HOWARD L. BERMAN.
JERROLD NADLER.
ROBERT C. SCOTT.
MELVIN L. WATT.
ZOE LOFGREN.
SHEILA JACKSON LEE.
MAXINE WATERS.
WILLIAM D. DELAHUNT.
ROBERT WEXLER.

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