



July 24, 2007

The Honorable John D. Rockefeller, Chairman  
The Honorable Christopher S. Bond, Vice-Chairman  
Senate Select Committee on Intelligence  
United States Senate  
Washington, DC 20510

Re: July 20 Executive Order on Common Article 3 and the CIA

Dear Chairman Rockefeller and Vice-Chairman Bond:

On July 20<sup>th</sup>, President Bush issued an Executive Order interpreting how Common Article 3 of the Geneva Conventions applies to the Central Intelligence Agency's (CIA) detention and interrogation program.<sup>1</sup> We are deeply concerned that this order opens the door to the kinds of abuses that Congress sought to prohibit in the Detainee Treatment Act and the Military Commissions Act. We urge you to explore the legal arguments behind the Executive Order, and the techniques that have been authorized pursuant to it, in order to ensure that the CIA's detention and interrogation program complies with the law.

Common Article 3 establishes a clear and absolute minimum standard of humane treatment and fair justice that the U.S. military has relied upon and been trained to abide by since the Geneva Conventions were adopted. In June 2006, the Supreme Court in *Hamdan v. Rumsfeld* rejected the administration's determination that Common Article 3 did not bind the United States in its treatment of detained al Qaeda and Taliban members. In response, the administration pressed Congress to re-define Common Article 3 in the Military Commissions Act of 2006 (MCA) by equating it to a standard that the Administration viewed as "more flexible." Congress refused, leaving the Geneva Conventions standard intact.

While the MCA recognizes the traditional role of the President to interpret international treaties, it reiterates the role of Congress and the courts to ensure that such interpretations are consistent with U.S. obligations under those treaties.<sup>2</sup> Senator John McCain, a lead sponsor of the MCA, cautioned when the

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<sup>1</sup> Executive Order on Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency, July 20, 2007 available at <http://www.whitehouse.gov/news/releases/2007/07/20070720-4.html>.

<sup>2</sup> Military Commissions Act of 2006, [Pub.L. 109-366, § 6\(a\)](#), Oct. 17, 2006, 120 Stat. 2632 (2006).

**Headquarters**  
333 Seventh Avenue  
13<sup>th</sup> Floor  
New York, NY 10001  
Tel: 212.845.5200  
Fax: 212.845.5299

**Washington D.C. Office**  
100 Maryland Avenue, N.E.  
Suite 500  
Washington, DC 20002  
Tel: 202.547.5692  
Fax: 202.543.5999

[www.humanrightsfirst.org](http://www.humanrightsfirst.org)

Act was passed that the President remains bound by the conventions themselves and that “[n]othing in this bill gives the President the authority to modify the conventions or our obligations under those treaties.”

In March of 2002, the CIA reportedly authorized its interrogators to use “enhanced” interrogation techniques including waterboarding, stress positions, hypothermia, sensory deprivation, sleep deprivation and isolation. Despite the fact that the Judge Advocates General of each of the uniformed services has testified that at least some of these techniques violate Common Article 3, the new Executive Order fails explicitly to prohibit any of these methods of interrogation. If the Executive Order is interpreted by the CIA as authorizing this “alternative set of techniques,” it will send a powerful – and dangerous – message: that the United States believes these techniques can lawfully be used against captured Americans, now and in future wars.

Last September, 49 retired generals, admirals, and other senior retired military leaders warned Congress that “[i]f degradation, humiliation, physical and mental brutalization of prisoners is decriminalized or considered permissible under a restrictive interpretation of Common Article 3, we will forfeit all credible objections should such barbaric practices be inflicted upon American prisoners.” The new Executive Order opens the door to just this danger. By issuing an interpretation of Common Article 3 solely for the purposes of the CIA program, and by failing to make clear that previously authorized techniques which violate Common Article 3 are no longer permissible, the Executive Order threatens to thwart Congress’s effort to establish a single standard of humane treatment that is consistent with how the United States wants its own troops to be treated.

We believe the Senate Select Committee on Intelligence was right to question in its May report on the Intelligence Authorization Act for Fiscal Year 2008 “whether having a separate CIA detention program that operates under different interrogation rules than those applicable to military and law enforcement officers is necessary, lawful, and in the best interests of the United States.” We urge you to investigate whether the President has exceeded his authority to interpret Common Article 3 and to determine whether CIA policy and practices are in full compliance with the law by asking the administration:

- What specific interrogation methods has the CIA authorized for use under the Executive Order and what is the legal argument as to why the Order permits each authorized technique? Would you be comfortable with each of these techniques being used against captured Americans?
- What, if any, opportunity was given to the Judge Advocates General to review and provide feedback on the Executive Order, the legal arguments behind the Order, and the techniques that have been authorized pursuant to it, particularly with respect to the Order’s likely impact on the safety of U.S. troops? If the Judge Advocates General did provide feedback, were their suggestions incorporated in the final Order?
- Do you understand the Order to prohibit any of the techniques that have reportedly been authorized for use by the CIA in the past, for example: waterboarding; stress

positions; hypothermia; sensory deprivation; sleep deprivation; and isolation? If so which ones?

- Do you understand the legality of techniques used by the CIA under this Order to turn on the specific intent of the interrogator?
- Do you believe that techniques that would otherwise constitute violations of the law, including the Detainee Treatment Act's ban on cruel, inhuman or degrading treatment, could be lawful under this Order depending on who is being interrogated and/or what information the U.S. believes that person knows?
- Do you understand the Order to authorize the CIA to hold detainees in secret or to deny the International Committee of the Red Cross access to detainees?
- Is there any limit to how long the CIA can lawfully detain an individual under the Order?
- The Geneva Conventions prohibit "humiliating and degrading treatment" while section 3(b)(E) of the Order prohibits "willful and outrageous acts of personal abuse done for the purpose of humiliating or degrading" an individual. What is the administration's understanding of the intent required by section 3(b)(E)?
- What are the "circumstances" that will be considered in determining whether an act would be deemed "beyond the bounds of human decency" under section 3(b)(E)?
- In describing the CIA program authorized by the Executive Order, Adm. John Michael McConnell, Director of National Intelligence, stated that medical doctors would be used to ensure the safety of detainees being interrogated. If torture and other cruel, inhuman or degrading treatment are banned, then why are detainees at risk of medical harm from interrogation?

For the safety of U.S. troops, the administration needs to make clear — to Congress, the American people, and U.S. allies — what the United States means when it says that it will abide by its obligations under Common Article 3.

Sincerely,

A handwritten signature in black ink that reads "Elisa Massimino". The signature is written in a cursive, flowing style.

Elisa Massimino  
Washington Director