

United States Senate

WASHINGTON, DC 20510

February 13, 2008

The Honorable George W. Bush
President
The White House
1600 Pennsylvania Ave, NW
Washington, DC 20500

Dear Mr. President:

We write in reference to your Executive Order 13440 interpreting Common Article 3 of the Geneva Conventions as applied to CIA detention and interrogation. We are concerned that the Executive Order permits abusive treatment or techniques of interrogation that violate Common Article 3. The failure of the Executive Order to clarify what interrogation techniques the CIA can and cannot lawfully use under Common Article 3 could put U.S. personnel at risk of violating the Geneva Conventions and of being subjected to abusive treatment if detained by enemy forces. We urge you to revise the Executive Order to comply with the plain language of Common Article 3.

The Military Commissions Act reaffirmed your authority to interpret the meaning and application of the Geneva Conventions, just as you may interpret any treaty. The MCA did not grant you the authority to redefine or narrow the Geneva Conventions. In fact, during the consideration of the MCA, Congress specifically rejected your Administration's request to redefine Common Article 3. In the Senate debate leading up to the passage of the MCA, a number of senators emphasized the importance of abiding by our Common Article 3 obligations and not redefining such obligations. For example, Senator John McCain, one of the authors of the MCA, stated that "nothing in this bill gives the President the authority to modify the [Geneva] conventions or our obligations under those treaties. That understanding is at the core of this legislation." Nonetheless, the Executive Order appears to redefine the meaning of Common Article 3 in a manner that could permit abusive interrogation techniques. As the American Bar Association concluded, the Executive Order "authorizes the Central Intelligence Agency to operate a program of detention and interrogation that is inconsistent with U.S. obligations under Common Article 3 of the Geneva Conventions."

Common Article 3 states that "outrages upon personal dignity, in particular humiliating and degrading treatment" are absolutely prohibited. The Executive Order, on the other hand, prohibits "willful and outrageous acts of personal abuse done for the

purpose of humiliating or degrading the individual in a manner so serious that any reasonable person, considering the circumstances, would deem the acts to be beyond the bounds of human decency.” This means that the Executive Order could be interpreted to permit the CIA to subject a detainee to willful and outrageous acts of personal abuse as long as they are done for some purpose other than humiliating or degrading the detainee, such as protecting national security, even if the effect of such treatment is to humiliate and degrade the individual. Moreover, abuse done for the purpose of humiliating and degrading a detainee could be permitted under the Executive Order as long as it is not “willful and outrageous” or a reasonable person would not consider it “beyond the bounds of human decency.” These interpretations cannot be reconciled with Common Article 3’s unconditional prohibition of humiliating and degrading treatment without respect to purpose or degree.

The Executive Order is silent on whether so-called “enhanced” interrogation techniques are permitted under Common Article 3 and fails to clarify which interrogation techniques are permitted and which are not. The Judge Advocates General, the highest-ranking attorneys in each of the four military services, have stated that each of the following interrogation techniques is illegal and violates Common Article 3 of the Geneva Conventions: a) painful stress positions, b) threatening detainees with dogs, c) forced nudity, d) waterboarding and e) mock execution. With regard to painful stress positions, Major General Scott C. Black, the Judge Advocate General of the U.S. Army, has stated that “forcing detainees to stand, sit, or kneel in abnormal positions for prolonged periods of time is not legal.”

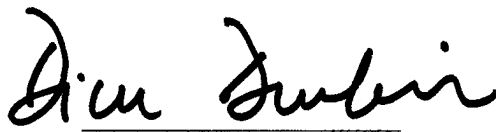
The Executive Order states that detainees “receive the basic necessities of life, including adequate food and water, shelter from the elements, necessary clothing, protection from extremes of heat and cold, and essential medical care,” but fails to specify that sleep is a basic necessity of life. In *Ashcraft v. Tennessee*, 322 U.S. 143 (1944), the Supreme Court held that a confession obtained by depriving a suspect of sleep was involuntarily coerced. For the majority, Justice Hugo Black noted that “[i]t has been known since 1500 at least that deprivation of sleep is the most effective torture and certain to produce any confession desired.” Recently, the U.S. State Department has condemned Indonesia, Iran, Jordan, Libya, Saudi Arabia and Turkey for using sleep deprivation as a form of torture or cruel inhuman, or degrading treatment.

In light of these concerns, we strongly urge you to revise the Executive Order to:

1. Make clear that humiliating and degrading treatment violates Common Article 3 in all circumstances, regardless of purpose and degree;
2. Prohibit explicitly any abusive techniques that violate Common Article 3, including but not limited to: a) painful stress positions, including standing; b) threatening detainees with dogs; c) forced nudity; d) waterboarding; and e) mock execution; and
3. Specify that sleep constitutes a basic necessity of life and prohibit the use of sleep deprivation as an interrogation technique.

We believe that the Executive Order's narrowing definition of Common Article 3 of the Geneva Conventions and the failure to make clear that the interrogation techniques named above violate Common Article 3 may embolden our enemies to abuse American prisoners. In a *Washington Post* column, P.X. Kelley and Robert F. Turner wrote they could not defend a decision that they believed "compromised our national honor and that may well promote the commission of war crimes by Americans and place at risk the welfare of captured American military forces for generations to come." The Executive Order's redefinition of Common Article 3 weakens the protections the Geneva Conventions afford U.S. personnel and risks undermining the effectiveness of these important protections for our troops for generations to come.

Sincerely,



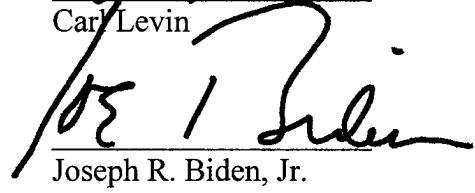
Richard J. Durbin



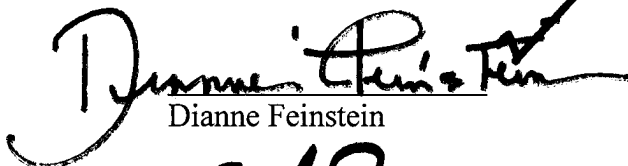
Carl Levin




Edward M. Kennedy



Joseph R. Biden, Jr.



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Sheldon Whitehouse