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American Cruelty and the Defense of the Constitution

Thank you, CAPT Michel, for your gracious introduction and for your invitation to present this year's Stutt Lecture. This is a great distinction for me, and I'm very grateful to have been selected by the Academy's Leadership Education and Development Division to deliver these remarks.

I, too, would like to join CAPT Michel in thanking Mr. and Mrs. William Stutt for their generosity in funding this lecture. They have rendered a great service to the Academy and the Naval Services – and to all of us here today – by calling us to focus on the complex issues of values, character, and ethical leadership in the defense of our nation. We are all grateful to you.

Lastly, let me acknowledge the presence tonight of Professor Stephen Wrage. I've known Stephen for a number of years and I count him as a friend. But, more importantly, as I've learned from a number of graduates who've sought his mentorship, Stephen has been an important factor in building character and sharpening the critical reasoning faculties of more than a generation of midshipmen.

I've had the good fortune to visit the Academy many times since my former boss and an extraordinary leader, Secretary of the Navy Gordon England,

swore me in as the twentieth General Counsel of the Navy on July 25, 2001. Every time I've set foot on this campus I've experienced the same emotions. I'm inspired by the Academy's beauty. I'm moved by the force of the naval heritage and history that these buildings, fields, and memorabilia represent. And, not least, I wonder, given the undergraduate workload, how on Earth anyone manages to graduate from the Academy. I know I would have had a difficult time. Dino Aviles, Naval Academy class of 83 and my friend and colleague as an Assistant and then Under Secretary of the Navy, would describe the ordeal of rowing crew here. The experience of pain may be subjective and ephemeral, but not when Dino describes the sheer agony of pre-dawn practices on the Severn on winter days. The Nation is fortunate that men and women of your caliber will be joining the Fleet and the Corps.

The mission of the Academy is to prepare you for "the highest responsibilities of command, citizenship, and government." This is exactly the right formulation for the service academy of a nation whose entire military is composed of citizen-soldiers. These are three different responsibilities, but they are interrelated and mutually supportive. The obligations of command could not be responsibly discharged without an understanding of the responsibilities of citizenship. The same must be said of the obligations of government. The three functions, however, are bridged and rest on the common obligation to "support and defend the Constitution of the United States." This is the core obligation that all Americans share, the one from which the functions of command, citizenship, and government flow and are built on. It is also the basis for understanding the

concepts of honor, respect, duty, service, courage, commitment, loyalty, and integrity that the book The Armed Forces Officer – a Department of Defense publication that each of you should know – identifies as some of the key virtues that a military officer should possess. More on that later.

I.

I propose to explore with you this evening what it means to "support and defend the Constitution." I will use as a prism the 2002 decision of the Bush administration to use torture as a weapon of war and my own involvement in the matter as Navy General Counsel. Although I was not part of the decision to adopt torture, I learned about it relatively early and became deeply engaged in opposition to it. And though the Bush administration largely abandoned the use of torture – or, as they euphemistically called it, "Enhanced Interrogation Techniques" – before the end of the administration and President Obama formally outlawed it in his second day in office, the allure of torture is still with us. Like a low-grade fever that threatens to flare up, the use of torture is an issue that has been the subject of discussion and debate almost continuously since the terrorist attacks on 9/11. It promises to continue to be a matter of controversy in the Trump administration. As many of you may know, President Trump has repeatedly declared himself to be a supporter of torture both during the electoral campaign and after his inauguration. Sadly, he is not an outlier: recent polling indicates that more than 62% of the American public supports the use of torture. Also, every Republican candidate for president, with the exception of Sen. Lindsay Graham, either openly supported torture or refused to condemn it.

Same thing. Despite Secretary of Defense Mattis' efforts to educate the President, my guess is that many of you will confront the issue very quickly upon your graduation from the Academy.

II.

But first, let me address my role as the Navy General Counsel in general. I bring this up because I've met many serving naval officers and Marines who did not know what that official did or, sometimes, that the Navy even had a General Counsel. This wounded my pride -- and now I get to apply some salve.

Briefly stated, the General Counsel is the chief legal officer of the Department of the Navy and reports directly to the Secretary. Along with the Under Secretary and four Assistant Secretaries of the Navy, these seven officials constitute the senior civilian leadership team of the Department and embody in it the constitutional principle of civilian leadership of the military. Each of us is appointed by the President, confirmed by the Senate, and carries the equivalent military rank of four stars. On the legal side, although the Judge Advocate General of the Navy and the Staff Judge Advocate of the Marine Corps do not report to the General Counsel, in practice we worked very closely together during my era and acted as the de facto managing partners of the civilian and military sides of the Navy and Marine Corps legal enterprise. The more than 640 civilian attorneys in the Navy Office of General Counsel reported directly to me, as did the Naval Criminal Investigative Service. Before 9/11 NCIS was already deeply involved in the fight against Al Qaeda due to their involvement in the response to the USS Cole bombing in 2000; after 9/11 NCIS moved the front lines in the fight

against terrorism and, as a consequence, so did I to a larger extent than most Pentagon civilians.

III.

My involvement with the issue of torture began very unexpectedly in November of 2002. Then-NCIS director David Brant took me aside after a meeting on an unrelated issue and said to me, in a low voice: "We [meaning NCIS] are hearing rumors that detainees are being abused in Guantanamo. Do you want to hear more?" The question was cryptic and a bit odd, but my response to him was instantaneous: Of course I did. He nodded and said he'd be back the following day with his team to give me a brief.

Now, there are a couple of contextual things to bear in mind. The first is that in 2002 neither the Department of the Navy nor I had any official responsibility for detention operations in Guantanamo or anywhere else. The mission of each military department is to train, organize, and equip combat ready forces and to furnish them to the combatant commands. Detention operations and interrogation tactics were operational matters within the purview of the operational chain of command. Although Guantanamo was a Navy base, the detention facilities on the base reported to Southern Command, not to the Navy Department. At the moment that Director Brant asked me his question, I had had zero involvement in detention matters – not a single conversation or meeting and no knowledge of any aspect of detainee treatment.

Dave's question was subtly phrased. He was offering me the opportunity to get involved, but also the opportunity to <u>not</u> get involved before hearing details

that would give me actual knowledge of the problem. It was, in a way, a courtesy. But for me the thought of not getting involved simply never crossed my mind.

Director Brant came back the following day with a number of his NCIS agents assigned to Guantanamo. I had invited the Navy JAG, RADM Mike Lohr, and the Marine SJA, BGEN Kevin Sandkuhler, to attend. At Guantanamo, the NCIS agents explained, there were two interrogation task forces operating at the time, an intelligence task force and a criminal investigation task force. NCIS was assigned to the second. The agents had not personally witnessed any abuse, but Guantanamo was a small place and they had heard from personnel assigned to the intelligence task force that coercive interrogation tactics were being used.

Then NCIS went snooping. Without authorization, they tapped into the intelligence task force's computers and extracted interrogation transcripts, one of which they pushed across the conference table to me. The transcript detailed the sexual taunting of an unidentified detainee (whom years later I would learn was Mohammed Al-Qahtani, the so-called "Twentieth Hijacker") by female Army personnel, who were straddling him and placing women's underwear on his head. While this did not constitute cruel treatment, much less torture, it was evidence of abusive and degrading treatment and helped substantiate the NCIS concerns.

Director Brant and his NCIS colleagues were worried that the phenomenon known as "force creep" was already at play in Guantanamo. This is the situation common in the history of interrogation that occurs when the use of cruelty is

authorized. In this setting, the interrogators tend to ratchet up the level of cruelty because, they figure, if cruelty is an effective tool, then twice the level of cruelty is twice as effective, and so on. Abuse inevitably segues into cruelty, and cruelty into torture. Brant closed the brief by saying that NCIS did not know how many of the detainees were being abusively interrogated, but thought it was a few of them. Also, they had heard that the use of abusive interrogation techniques had been approved "at the highest levels" of the Pentagon, but had not seen any documents to corroborate that.

I was appalled by the NCIS account because any abuse of detainees in Guantanamo was presumptively unlawful. However, the degree of abuse I had been shown, while unacceptable, was still relatively mild; the number of prisoners being abused appeared to be low; and this had to be rogue activity – no American service member, I thought, would purposefully authorize the abuse of any enemy prisoner. Still, my duty was clear: if there was any prisoner abuse in Guantanamo, my duty as Navy General Counsel, as a lawyer, as a member of the Bush Administration, and as a citizen was to uncover it and stop it. I was confident in my ability to do that. I promised my colleagues that I would investigate.

IV.

What follows now is a highly truncated version of my activities over a number of weeks.

The very next day after Director Brant's briefing I called the Army General Counsel, Steve Morello. To my shock, he acknowledged that he had information about the detainee abuse in Guantanamo and offered to share it.

The following day, day two, I met with the Steve. He gave me a copy of a memorandum signed by Secretary of Defense Donald Rumsfeld authorizing the use of "Counter-Resistance Interrogation Techniques" against the detainees in Guantanamo. Among these techniques were the use of sensory deprivation, detainee-specific phobia techniques, stress positions, and the use of some force. To the memo, which had been authored by the DOD General Counsel, Jim Haynes, there was also attached the initial memo from the Guantanamo base commander requesting the authority to use the techniques and a legal memo from his SJA, an Army lawyer, concluding that their use would be legal. Other parts of the composite memo indicated that the commander of SOUTHCOM had endorsed the request, and that the Chairman and Vice-Chairman of the JCS, GEN Richard Myers and GEN Peter Pace, had given verbal approval.

When I reviewed the composite memorandum, it was clear that its effect, even if nowhere stated, was to authorize torture. The legal memo itself was an incompetent treatment of the law, particularly given that some of the proposed techniques could easily rise to the level of torture whether applied singly or in combination, depending on severity. Also, nowhere in the memorandum could one find words of limitation, that is, an instruction that the techniques could be applied, but only to the point that their effect did not reach the level of "cruel, inhuman, or degrading treatment". Had abuse at and beyond that limit had been

prohibited, the memo would have arguably complied with all legal standards. But it didn't, and thus the memo authorized unlawful conduct. Despite this fatal flaw in the memo, it didn't occur to me at that moment that anyone in the chain of approval, including Secretary Rumsfeld, had acted knowingly or in bad faith. This was, I felt, a case of simple error, no more: the lawyers had made a mistake and the principals had predictably relied on the poor advice. All parties had failed to think through the full implications of their decisions. This would be a simple matter to correct once it was pointed out.

The next day, day three, I was in Jim Haynes' office, memo in hand. I told him that his memo authorized torture. "No it doesn't," he responded. I then spent the next hour walking him through its language and explaining to him why it did. Although Jim was almost completely silent during the rest of the meeting, I was confident that he saw the problem and that the interrogation authorization would be rescinded within a few hours. Problem solved, I thought.

But it wasn't. About ten days later I was at my Mother's home in Miami on Christmas vacation with my family when I was called to the phone. It was Dave Brant, calling from the Pentagon. "Remember the problem in Guantanamo we thought we had solved? Well, the abuse is still going on." This was a shocking and even bizarre moment for me. People I liked and trusted, fellow colleagues, had been cautioned about potentially unlawful activity involving the abuse of human beings and had not changed their behavior. This was no longer a matter of simple error: the behavior was not inadvertent -- it was clearly deliberate. This matter had just become much more serious.

I returned to the Pentagon and increased my advocacy. Over the next two weeks, I met with the Secretary of the Navy and senior members of the Commandant and CNO's staffs. All were completely supportive of my position. I met with the senior JAGs and the GCs of all the services and the Chairman's Legal Adviser. From that point forward until the end of my tenure at Navy, the JAGs of the Navy, Marine Corps, Army, and Air Force and I always acted as a team on this issue. I also met with a number of Rumsfeld's senior advisors and met with Haynes again. Despite all this activity, I wasn't making any progress in getting the authorization rescinded, so I decided to put my concerns in writing for the first time. I wrote a memo to Haynes analyzing the flawed Guantanamo legal memo and characterizing it as an incompetent piece of legal analysis that authorized the unlawful use of torture. I predicted that any abuse of prisoners would not only produce legal fallout, but also significant adverse policy and political consequences, including damage to any person authorizing or involved in the abuse, damage to the effective prosecution of the war on terror, and potentially damage to the Presidency itself. I had the memo delivered to Haynes in draft form early one morning and indicated to him that I would sign it out by close of business that day unless there was a reason not to.

By 3:00 o'clock that afternoon and after another meeting with him, Haynes called me to say that Secretary Rumsfeld had rescinded the authorization to use counter-resistance techniques. All of us opposed to the use of cruelty were elated. It had taken longer than we had wished, but in the end reason had prevailed and we had conformed back to our values and laws. About ten days

later, Dave Brant called to say that NCIS could then confirm that the abuse of detainees in Guantanamo had stopped.

V.

Or so we thought. On April 28, 2004, or about a year-and-a-half later, the CBS news program "60 Minutes II" broadcast the revolting and now iconic photographs of the sexual and physical abuse of Iraqi prisoners by American soldiers at the Abu Ghraib prison in Iraq. The ensuing investigations, reporting, and hearing revealed that Abu Ghraib and Guantanamo were not isolated events, but the metastasis of a conscious and deliberate US policy to use torture in the interrogation of so-called "unlawful combatants" captured in the war on terror.

As we now know, the CIA initially conceived the torture program in the summer of 2002. The Agency advised the White House and the Justice Department that, because of legal limits, the standard interrogation techniques then commonly in use would be inadequate to extract from prisoners the intelligence that could be vital in helping save lives from future terrorist attacks. The Agency – which at the time had zero institutional experience or capability in the field of interrogation -- proposed that it be authorized to employ what it termed "Enhanced Interrogation Techniques". These were, in the main, reverse-engineered from North Korean torture techniques used against Americans during the Korean War. Despite the opposition of Secretary of State Colin Powell, who opposed the suspension of the Geneva Conventions for legal, foreign policy, and practical reasons, and, later, the FBI, which regarded torture not only as unlawful

but as an inferior interrogation method as compared to time-tested, non-coercive interrogation techniques, the President approved the use of the Enhanced Interrogation Techniques. He was strongly supported in this by the Vice President, Dick Cheney, by the Attorney General, John Ashcroft, and by White House Counsel, Alberto Gonzalez. At Ashcroft's direction, the DOJ Office of Legal Counsel prepared legal memos – all of which have since been discredited and withdrawn – that disregarded and distorted the clear body of law prohibiting torture for the purpose of providing both legal clearance for the use of torture and the foundation for a legal shield that would immunize those who authorized and executed the program from future legal accountability for the commission of war crimes.

With this authority in hand and CIA Director George Tenet as the lead manager, the CIA established a program that became known as the Rendition, Detention, and Interrogation (RDI) Program. Dozens of victims – some completely innocent of any combatant activity – were tortured in this program either directly by CIA officers or contractors at "black sites" established in half-a-dozen or so countries around the world or by cooperative third countries (including Syria and Egypt) that applied the torture at our request. And the US military, too, as we have seen, also participated in the abuse. At Guantanamo, Abu Ghraib, and multiple other locations in Afghanistan, Iraq, and in the field, US soldiers -- acting either under orders or on the widespread belief that the "gloves had comes off" and that abuse could be applied with impunity – inflicted cruelty on hundreds of prisoners.

And what happened to Al-Qahtani, the prisoner held in Guantanamo? Here is how journalist Jane Mayer described his treatment:

> Qahtani had been subjected to a hundred and sixty days of isolation in a pen perpetually flooded with artificial light. He was interrogated on 48 of 54 days, for eighteen to twenty hours at a stretch. He had been stripped naked; straddled by taunting female guards; …forced to wear women's underwear on his head and to put on a bra; threatened by dogs; placed on a leash; and told that his mother was a whore. [He] had been subjected to a phony kidnapping, deprived of heat, given large quantities of intravenous liquids without access to a toilet, and deprived of sleep for three days. [At one point,] Qahtani's heart rate had dropped so precipitately, to thirty-five beats a minute, that he required cardiac monitoring.

Make no mistake – this was torture, and it was acknowledged as such by the Department of Defense in 2009. Three years ago, Qahtani's civilian lawyer told me that it was her belief that had Secretary Rumsfeld not rescinded his interrogation authorization when he did, Qahtani would have died after another one or two weeks of such abuse. He has, she added, suffered permanent physical and psychological damage.

VI.

How did our Nation come to use torture in this war?

Clearly, the fear and fury we all felt after 9/11 was a critical factor, as was the belief that those who belonged to Al Qaeda had self-selected to opt out of the human race through their savagery. But the authorization to apply torture rested

on six implicit policy assumptions. The first five assumptions are clearly false but the sixth is, so far, still quite correct. I'll list and discuss them:

First, the use of torture was necessary if our nation was to be protected against further loss of life.

This is assumption is categorically false and, in fact, the clear failure redord of torture during the Bush administration proves this. Despite the folklore that torture is uniquely effective in eliciting truthful information rapidly, this was not only not the case, but also the use of torture was both counter-productive and distracted from the use of non-brutal interrogation techniques that were more effective. In December 2008, the Senate Committee on the Armed Services concluded in a report entitled "Inquiry into the Treatment of Detainees in U.S. Custody," which was issued without dissent, that brutal interrogation techniques "damaged our ability to collect accurate intelligence that could save lives, strengthened the hand of our enemy, and compromised our moral authority." Similarly, in 2015 the Senate Select Committee on Intelligence examined the CIA's 20 major claims of success in the RDI Program after reviewing the totality of the Agency's internal records and documents and concluded, in its final report, that:

#1: The CIA's use of its enhanced interrogation techniques was not an effective means of acquiring intelligence or gaining cooperation from detainees, and

#2: The CIA's justification for the use of its enhanced interrogation techniques rested on inaccurate claims of their effectiveness.

I should note that in 2005 GEN Stanley McChrystal, when he was commanding US troops in Iraq, turned down an offer by President Bush in 2005 to confer upon him authority to use "EITs in theater. By then, GEN McChrystal had seen data indicating that units that did not use brutality obtained better intelligence and had better relations with the local communities, and thus as a rule had better combat records.

Second, no law prohibited the application of cruelty. Thus, the government could direct the use of cruelty as a matter of policy depending on the dictates of perceived military necessity.

This, too, was false. US law in 2002 and before – including the Constitution and constitutional jurisprudence, statutes, and treaties -- categorically prohibited the use of cruelty on captives. The proof of this extensive, but the Supreme Court held as such when it proclaimed in its 2006 *Hamdan* decision that the Geneva Conventions applied in the war on terror, thus declaring President Bush's 2001 declaration that Geneva did not apply invalid.

Third, even if such a law were to exist, the President's constitutional commander-in-chief authorities included the unabridged discretion to order torture and other forms of abuse. Any existing or proposed law or treaty that would purport to limit this discretion would be an unconstitutional limitation of his powers.

Tlhis is utterly false as well. No person, including the President, is above the law. The constitutional limitations on the commander-in-chief authorities are well established, as evidenced, for example, in the Supreme Court's 1952

Youngstown Sheet & Tube decision, which invalidated President Truman's assertion of that authority to seize steel mills during the Korean War.

Fourth, the use of cruelty in the interrogation of unlawful detainees held abroad would not implicate or adversely affect our values, our domestic legal order, our international relations, or our security strategy.

This constituted a major miscalculation by the Bush administration, but the truth is that the administration appears never to have conducted a full policy analysis of the second-order policy consequences of the use of torture. In fact, the adverse consequences were massive, as I'll describe in a moment.

Fifth, if this abuse were disclosed or discovered, virtually no one would care.

While in truth some citizens don't care, actually many did. This is why the controversy continues and the issue will not go away.

Sixth and last, if the abuse were discovered, no one responsible would be held accountable.

This could be true, and it would be tragic because accountability should be central to our law and government, but it's still too early to tell. The gravitational pull of the law towards accountability is powerful and it is difficult to envisage that our system of justice would fail to respond to a crime such as torture, but so far it hasn't.

VII.

I wish to do two more things. First, I've mentioned the adverse policy consequences of our use of torture, and I wish to expand on that. And, second, I

would like to close by addressing how you as future Navy and Marine Corps officers will have to respond to any proposed use of cruelty.

Let's turn to the issue of policy. Many Americans are less concerned by law and morality than by what could make them safer. If torture can make them safer, these people ask, why should the law prohibit torture? Why should we not disregard the law? They've heard the repeated claims of President Cheney and some of the other architects of the Bush-era torture policy – and now the similar claims of President Trump – that torture is effective and helps keep the country safe. They now ask – as they have a right to – why not torture? They are entitled to an answer.

And here it is: we don't torture on moral, legal, and policy grounds. We don't torture because we are Americans and torture is antithetical to our commitment to human dignity and is illegal. Beyond that, we don't torture because the evidence shows that torture is not effective; because it makes us weaker, not stronger, and less safe; and because it is contrary to our strategic interest. The application of cruelty and torture harmed and continues to harm our nation's legal, foreign policy, and national security interests in multiple ways. I'll discuss each of these harms.

A. The Legal Harm

The first harm was to our laws. The acceptance of cruelty is contrary to and damages our values and legal system by discarding the basic principle that the highest purpose of law is to protect human dignity. As Professor Lou Henkin wrote: "Every man and woman between birth and death counts, and has a claim

to an irreducible core of integrity and dignity."

Cruelty damages and ultimately would transform our constitutional structure because cruelty is incompatible with the philosophical premises upon which the Constitution is based. Our Founders drafted the Constitution inspired by the belief that law could not create, but only recognize, certain inalienable rights – rights vested in every person, not just citizens, and not just here, but everywhere. These rights are the shield that protects core human dignity.

To have adopted and applied a policy of cruelty anywhere within this world was to say that our Founders and the successor generations were wrong about their belief in the rights of the individual, because there is no right more fundamental than the right to be safe from cruel and inhumane treatment.

If we can lawfully abuse Qahtani and others the way they were abused – however reprehensible their acts may have been – it is because they did not have the inalienable right to be free from cruelty. And if that is the case, then the foundation upon which our own rights are based starts to crumble, because it would then ultimately be left to the discretion of the state whether and how much cruelty may be applied to each of us or to any person.

The infliction of cruelty damages not only the victims, but also the fabric of the law itself in two ways. It does so, first, because if cruelty is taken out of the law's ambit and placed within the realm of policy, the scope of the law is then by definition diminished. Also, cruelty violates the important principle of law that Professor Jeremy Waldron terms the "principle of non-brutality." He writes:

> Law is not savage. Law does not rule through abject fear and terror,

> or by breaking the will of those whom it confronts…. [There is] an enduring connection between the spirit of the law and respect for human dignity – respect for human dignity even in extremis, where law is at its most forceful and its subjects at their most vulnerable. [T]he rule against torture … is vividly emblematic of our determination to sever the link between the law and brutality, between the law and terror, and between law and the enterprise of breaking a person's will.

B. <u>The Harm to our Foreign Policy Interests</u>

The second category of the harm from torture is to our foreign policy interests. In sum, the effects and consequences of cruelty were contrary to our long-term and over-arching strategic foreign policy interests, including many of the principal institutions, alliances, and rules that we have nurtured and fought for over the past sixty years.

America's international standing and influence stems in no small measure from the effectiveness of a foreign policy that harmonized our policy ends and means with our national values. The employment of cruelty not only betrayed our values, thus diminishing the strength of our example and our appeal to others, it impaired our foreign policy by adopting means inimical to our traditional national objective of enhancing our security through the spread of human rights protected by the rule of law.

From World War II until today, American foreign policy has been grounded in strong measure on a <u>human rights</u> strategy. We have fought tyranny and promoted democracy not <u>only</u>, or even primarily, because it was the right thing to

do, but because the spread of democracy made us safer and protected our freedoms. In ways that echoed the development of our own domestic legal system, we successfully promoted the development of a rules-based international order based on the rule of law. Across the world, human rights principles, international treaties and laws (particularly humanitarian and international criminal law**)** and many domestic constitutions and legal systems owe their character, acceptance, and relevance to our inspiration, efforts, or support.

Let's look at three examples, out of many, of these foreign policy achievements:

- **The Geneva Conventions**, as do most of the major human rights treaties adopted and ratified by our country during the last century, forbid the application of cruel, inhuman, and degrading treatment to all captives. Thousands of American soldiers have benefited from these conventions;
- **The Nuremberg Trials**, a triumph of American justice and statesmanship that launched the modern era of human rights and international criminal law, treated prisoner abuse as an indictable crime, helped cement the principle of command responsibility, and started the process whereby national sovereignty no longer served as a potential shield to protect the perpetrator of crimes against humanity from the long arm of justice; and
- **The German Constitution** has helped transform a country that

helped launch two of the most destructive wars in history into the responsible society it is today. Its Article one, Section one, states: "The dignity of man is inviolable. To respect and protect it is the duty of all state authority." That this should be an element of the German Constitution today reflects credit only on the German nation and its citizens. However, that it should have been adopted by Germany in 1949, the year the constitution was first ratified, also reflects credit on an American foreign policy that had integrated our national focus on human dignity as an operational objective.

Each of these three achievements has returned massive dividends to our nation. We are all the better for them. However imperfectly these precedents, rules, or laws may be observed or enforced, they have helped shape public opinion world wide, created global standards of conduct, and influenced the conduct of foreign individuals, groups, and nations in ways that are overwhelmingly supportive of our national interest and objectives.

When we adopted our policy of cruelty we sabotaged these policies and achievements. Consider the following. When we tortured:

- We rendered incoherent a core element of our foreign policy -- the protection of human dignity through the rule of law;
- We violated the letter and spirit of the Geneva Conventions;
- We weakened the Nuremberg principle of command responsibility;
- We damaged he very fabric of human rights and international law and fostered a spirit of non-compliance with both;

- We fostered the incidence of prisoner abuse around the world;
- We created a deep legal and political fissure between ourselves and our traditional allies; and
- We fueled public disrespect for and opposition to our country around the world, thus hampering the achievement of our foreign policy objectives and compromising our ability to provide human rights leadership;

None of this has been to our benefit, yet all of these harms were among the costs we suffered when we adopted the policy of cruelty and transformed our foreign policy into incoherency.

C. The Harm to our National Security

Let me now turn to the third category of harm, that to our national security. Simply stated, the use of torture is a quintessential example of allowing tactical considerations to override strategic objectives. Our nation's defenses were materially and demonstrably weakened, not strengthened, by the practice of torture. Cruelty made us weaker, not stronger. Not only did it blunt our moral authority, it sabotaged our ability to build and maintain the broad alliances needed to prosecute the war effectively, it diminished our military's operational effectiveness, it had adverse consequences on the battlefield, and it presented our enemies with a strategic gift.

In the fight against terror, our national security is achieved not solely through military action, but also through the simultaneous use of ideas and communications, political persuasion, intelligence and law enforcement, and diplomacy. The attacks on the World Trade Center, the Madrid railway station,

and the Paris club, among many others, evidence a terrorist ideology that would obliterate human dignity. Our defense to this assault cannot be solely military. These terrorist acts emanated from specific ideas that fostered and propagated this cycle of hate -- ideas that must be combated by our own ideas and ideals. Our defense must also consist of rallying to our mutual defense those who share our values and our vision of a humane civilization.

The fight against terror is not a war we can fight alone. Our political and military strategy must be geared to building and sustaining a large, unified alliance that cooperates across the spectrum of the conflict. Yet we will not be able to build this alliance unless we are able to articulate a clear set of political objectives and prosecute the war using methods consistent with those objectives; we will not be able to build this alliance unless we construct with our leading allies a common legal architecture that is true to our shared values; and we will not be able to establish that common legal architecture if were to insist, as we once did, on the discretionary right to apply cruel treatment to detainees.

When our nation adopted our policy of cruelty we compromised our ability to accomplish these national security objectives. Here are four examples of the strategic damage to our national security that we suffered:

- First, because the cruel treatment of prisoners constitutes a criminal act in every European jurisdiction, European cooperation with the United States across the spectrum of activity -- including military, intelligence, and law enforcement – diminished once this practice became apparent;
- Second, almost every European politician who sought to fully ally

his country with the U.S. effort in the fight on terror incurred a political penalty as a consequence, as the political difficulties of Prime Ministers Tony Blair and Jose Maria Aznar demonstrated;

- Third, our abuses at Abu Ghraib, Guantanamo, and elsewhere perversely generated sympathy for the terrorists and eroded the international good will and political support that we had enjoyed after September 11; and
- Fourth, we lost the ability to draw the sharpest possible distinction between our adversaries and ourselves and to contrast our two antithetical ideals. By doing so, we compromised our ability to prosecute this aspect of the war – the war of ideas – from the position of full moral authority.

All of these factors contributed to the difficulties our nation has experienced in forging the strongest possible coalition in the fight on terror. But the damage to our national security also occurred not only at the strategic, but also at the operational and tactical military levels. Consider these following four points:

- Senior US officers maintain that the first and second identifiable causes of U.S. combat deaths in Iraq were, respectively, Abu Ghraib and Guantanamo, because of the effectiveness of these symbols in helping attract and field insurgent fighters into combat;
- At various different points, some allied nations – including New Zealand -- refused to participate in combat operations with us out of fear that, in the process, enemy combatants captured by their forces could be abused by U.S. or other forces;

- At other times, allied nations refused to train with us in joint detainee capture and handling operations, also because of concerns about U.S. detainee policies. And
- Lastly, our policy of treating detainees harshly could have stiffened our adversaries' resolve on the battlefield by inducing them to fight harder rather than surrender, and this too could have led to loss of American lives.

Whatever intelligence obtained through our use of harsh interrogation tactics may have been, on the whole the military costs of these policies and practices greatly damaged our overall efforts and impaired our effectiveness in the war.

VIII.

Let me close by focusing on your duty as future Navy and Marine Corps officers.

Because you are prepared to give your lives for your country, you, better than anyone else, understand that life is precious but that the values and freedoms that define our country and help give our life its meaning are as precious. Because your oath binds you to defend the Constitution, you understand that our core strategic objective in the defense of the Nation can never be reduced to the solitary objective of protecting lives, but must always be defined as the dual objective of protecting lives and our values and freedoms. We pursue both objectives equally and simultaneously. And, in the realm of values, you understand that the core value of our constitutional order is the protection of and the respect for the human dignity of every individual, and that

the right to be free from cruelty is a constituent element of human dignity.

This is the cause you serve. This is part of the moral boundary – the duty to which you are committed -- that defines you as a sailor or Marine, in peacetime or at war, and which you may never breach. The measure of your moral courage and integrity will be gauged by your loyalty to this moral boundary. Your honor will depend on it.

Honor, courage, service, duty, loyalty, service, commitment, respect, integrity – these are the virtues you aspire to. All of them are defined by the values of the nation we serve, whether as an officer or citizen. All of these virtues are incompatible with the application of cruelty to another human being. This is why you may never obey an order to apply cruelty, or give an order to apply cruelty, or apply cruelty yourself. It would be, to paraphrase the French philosopher Albert Camus, equivalent to using a weapon that would destroy what we're trying to protect.

Let's give the last word to Senator John McCain, who took to the floor of the Senate on December 9, 2014, to reflect on torture and what it means to be an American. He said, and I'll quote at length:

> "In the end, torture's failure to serve its intended purpose isn't the main reason to oppose its use. I have often said, and will always maintain, that this question isn't about our enemies; it's about us. It's about who we were, who we are and who we aspire to be. It's about how we represent ourselves to the world.
>
> We have made our way in this often dangerous and cruel world, not

by just strictly pursuing our geopolitical interests, but by exemplifying our political values, and influencing other nations to embrace them. When we fight to defend our security we fight also for an idea, not for a tribe or a twisted interpretation of an ancient religion or for a king, but for an idea that all men are endowed by the Creator with inalienable rights. How much safer the world would be if all nations believed the same. How much more dangerous it can become when we forget it ourselves even momentarily.

Our enemies act without conscience. We must not…. [A]cting without conscience isn't necessary, it isn't even helpful, in winning this strange and long war we're fighting…."

And McCain continues:

"Now, let us reassert the contrary proposition: that is it essential to our success in this war that we ask those who fight it for us to remember at all times that they are defending a sacred ideal of how nations should be governed and conduct their relations with others – even our enemies.

Those of us who give them this duty are obliged by history, by our nation's highest ideals and the many terrible sacrifices made to protect them, by our respect for human dignity to make clear we need not risk our national honor to prevail in this or any war. We need only remember in the worst of times, through the chaos and terror of war, when facing cruelty, suffering and loss, that we are always Americans, and different, stronger,

and better than those who would destroy us."[1]

Thank you again so very much for being here tonight and inviting me back to the Academy.

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[1] Senator John McCain, "Floor Statement on Senate Intelligence Committee Report on CIA Interrogation Methods," (Dec. 9, 2014).