Statement of

Alberto J. Mora

Senate Committee on Armed Services
Hearing on the Treatment of Detainees in U.S. Custody

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Chairman Levin, Senator McCain, and Members of the Committee, it is a pleasure and an honor to appear before you today and to have been asked to testify on the treatment of detainees in U.S. custody. I regard these hearings as critical both to a better understanding of the interrogation policies and practices adopted by our government since 9/11 and – perhaps of even greater importance – to a better understanding of the costs and consequences to our Nation if we were to continue to employ cruelty in the interrogation of detainees.

Two prefatory comments are in order.

First, I wish to thank the Members and the Committee staff for their many courtesies to me during my tenure as General Counsel of the Department of the Navy. Both during my confirmation process and while serving as Navy General Counsel, I witnessed the Committee unfailingly live up to its well-earned reputation for civility, diligence, professionalism, and non-partisanship as it attended to the legislative affairs of our Nation's defense.

Second, in my brief testimony today I intend not to recount my record on interrogation while serving as Navy General Counsel, but to summarize briefly my views on the policy consequences of the use of cruelty as a weapon of war. My official conduct on this issue is already a matter of record inasmuch as I prepared and submitted a

comprehensive account of these matters to the Navy Inspector General in 2004, following the Abu Ghraib scandal. This memorandum is in the public domain and may be accessed on the Web.[1] Similarly, I wish to note that I have spoken at greater length in various venues on the issues I will touch on today, and I draw the Committee's attention to my speech to the American Bar Association in February of this year.[2] I ask that both of these documents be included as part of the record of these proceedings.

I.

Mr. Chairman, our Nation's policy decision to use so-called "harsh" interrogation techniques during the War on Terror was a mistake of massive proportions. It damaged and continues to damage our Nation in ways that appear never to have been considered or imagined by its architects and supporters, whose policy focus seems to have been narrowly confined to the four corners of the interrogation room. This interrogation policy – which may aptly be labeled a "policy of cruelty" – violated our founding values, our constitutional system and the fabric of our laws, our over-arching foreign policy interests, and our national security. The net effect of this policy of cruelty has been to weaken our defenses, not to strengthen them, and has been greatly contrary to our national interest.

Before turning to this damage, it may be useful to draw some of the basic legal distinctions pertinent to interrogation. The choice of the adjectives "harsh" or "enhanced" to describe these interrogation techniques is euphemistic and misleading. The more precise legal term is "cruel." Many of the "counter-resistance techniques" authorized for use at Guantanamo in December 2002 constitute "cruel, inhuman, or

[1] "Statement for the Record: Office Of General Counsel Involvement in Interrogation Issues," (July 7, 2004)(May be accessed at www.newyorker.com/images/pdfs/moramemo.pdf).
[2] The speech was given at the ABA's Center for Human Rights Fourth Annual House of Delegates Luncheon. The text is located at www.abavideonews.org/ABA496/media/pdf/navycounsel_OMKall.pdf.

degrading" treatment that could, depending on their application, easily cross the threshold of torture.

Many Americans are unaware that there is a legal distinction between cruelty and torture, cruelty being the less severe level of abuse. This has tended to obscure important elements of the interrogation debate from the public's attention. For example, the public may be largely unaware that the government could evasively if truthfully claim (and did claim) that it was not "torturing" even as it was simultaneously interrogating detainees cruelly. Yet there is little or no moral distinction between cruelty and torture, for cruelty can be as effective as torture in savaging human flesh and spirit and in violating human dignity. Our efforts should be focused not merely on banning torture, but on banning cruelty.

Except in egregious cases, gauging the precise legal category of abuse inflicted on a detainee is difficult because it depends on specific facts, including the techniques used and the medical and psychological impact. In general, however, it is beyond dispute that techniques constituting cruel treatment were authorized and applied. Tragically, credible reporting also makes it appear probable that some detainees were tortured. Certainly, the admission that waterboarding – a classic and reviled method of torture – was applied to some detainees creates the presumption that those detainees so interrogated were tortured.

II.

The United States was founded on the principle that every person – not just each citizen – possesses certain inalienable rights that no government, including our own, may violate. Among these rights is unquestionably the right to be free from cruel punishment or treatment, as is evidenced in part by the clear language of the Eighth Amendment and

the constitutional jurisprudence of the Fifth and Fourteenth Amendments. If we can apply the policy of cruelty to detainees, it is only because our Founders were wrong about the scope of inalienable rights. With the adoption of this policy our founding values necessarily begin to be redefined and our constitutional structure and the fabric of our legal system start to erode.

III.

Because the international legal system, the legal system of many countries, and the international human rights system are all largely designed to protect human dignity, the decision of the United States to adopt cruelty has had devastating foreign policy consequences. For most, perhaps all, of our traditional allies, the cruel treatment of detainees is a criminal act. As these nations came to recognize the dimensions of our policy of cruelty, political fissures between us and them began to emerge because none of them would follow our lead into the swamp of legalized abuse, as we should not have wished them to. These fissures only deepened as awareness grew about the effect of our policies on fundamental human rights principles, on the Geneva Conventions, on the Nuremberg precedents, and on the incidence of prisoner abuse worldwide. Respect and political support for the United States and its polices decreased sharply abroad.

IV.

These adverse foreign policy consequences would inevitably damage our national security strategy and our operational effectiveness in the War on Terror. Our ability to build and sustain the broad alliance required to fight the war was compromised. International cooperation, including in the military, intelligence, and law enforcements arenas, diminished as foreign officials became concerned that assisting the U.S. in

detainee matters could constitute aiding and abetting criminal conduct in their own countries. As the difficulties of Prime Ministers Tony Blair and Jose Maria Aznar demonstrated, seemingly every European politician who sought to ally his country with the U.S. effort on the War on Terror incurred a political penalty.

All of these factors contributed to the difficulties our nation has experienced in forging the strongest possible coalition in the War on Terror. But the damage to our national security also occurred down at the tactical or operational level. I'll cite four examples:

First, there are serving U.S. flag-rank officers who maintain that the first and second identifiable causes of U.S. combat deaths in Iraq – as judged by their effectiveness in recruiting insurgent fighters into combat – are, respectively the symbols of Abu Ghraib and Guantanamo. And there are other senior officers who are convinced that the proximate cause of Abu Ghraib was the legal advice authorizing abusive treatment of detainees that issued from the Department of Justice's Office of Legal Counsel in 2002.

Second, allied nations reportedly hesitated on occasion to participate in combat operations if there was the possibility that, as a result, individuals captured during the operation could be abused by U.S. or other forces.

Third, allied nations have refused on occasion to train with us in joint detainee capture and handling operations because of concerns about U.S. detainee policies.

And fourth, senior NATO officers in Afghanistan have been reported to have left the room when issues of detainee treatment have been raised by U.S. officials out of fear that they may become complicit in detainee abuse.

V.

Mr. Chairman, Albert Camus cautioned nations fighting for their values against selecting those weapons whose very use would destroy those values. In this War on Terror, the United States is fighting for our values, and cruelty is such a weapon.

I thank you and the Committee for your laudatory focus on this issue and for the invitation to appear today.