

**DIPLOMATIC ASSURANCES AND RENDITION TO
TORTURE: THE PERSPECTIVE OF THE STATE
DEPARTMENT'S LEGAL ADVISER**

HEARING
BEFORE THE
SUBCOMMITTEE ON INTERNATIONAL
ORGANIZATIONS, HUMAN RIGHTS, AND OVERSIGHT
OF THE
COMMITTEE ON FOREIGN AFFAIRS
HOUSE OF REPRESENTATIVES
ONE HUNDRED TENTH CONGRESS
SECOND SESSION

—————
JUNE 10, 2008
—————

Serial No. 110-192
—————

Printed for the use of the Committee on Foreign Affairs



Available via the World Wide Web: <http://www.foreignaffairs.house.gov/>

—————
U.S. GOVERNMENT PRINTING OFFICE

42-903PDF

WASHINGTON : 2008

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512-1800; DC area (202) 512-1800
Fax: (202) 512-2104 Mail: Stop IDCC, Washington, DC 20402-0001

COMMITTEE ON FOREIGN AFFAIRS

HOWARD L. BERMAN, California, *Chairman*

GARY L. ACKERMAN, New York	ILEANA ROS-LEHTINEN, Florida
ENI F.H. FALEOMAVAEGA, American Samoa	CHRISTOPHER H. SMITH, New Jersey
DONALD M. PAYNE, New Jersey	DAN BURTON, Indiana
BRAD SHERMAN, California	ELTON GALLEGLY, California
ROBERT WEXLER, Florida	DANA ROHRABACHER, California
ELIOT L. ENGEL, New York	DONALD A. MANZULLO, Illinois
BILL DELAHUNT, Massachusetts	EDWARD R. ROYCE, California
GREGORY W. MEEKS, New York	STEVE CHABOT, Ohio
DIANE E. WATSON, California	THOMAS G. TANCREDO, Colorado
ADAM SMITH, Washington	RON PAUL, Texas
RUSS CARNAHAN, Missouri	JEFF FLAKE, Arizona
JOHN S. TANNER, Tennessee	MIKE PENCE, Indiana
GENE GREEN, Texas	JOE WILSON, South Carolina
LYNN C. WOOLSEY, California	JOHN BOOZMAN, Arkansas
SHEILA JACKSON LEE, Texas	J. GRESHAM BARRETT, South Carolina
RUBÉN HINOJOSA, Texas	CONNIE MACK, Florida
JOSEPH CROWLEY, New York	JEFF FORTENBERRY, Nebraska
DAVID WU, Oregon	MICHAEL T. McCAUL, Texas
BRAD MILLER, North Carolina	TED POE, Texas
LINDA T. SÁNCHEZ, California	BOB INGLIS, South Carolina
DAVID SCOTT, Georgia	LUIS G. FORTUÑO, Puerto Rico
JIM COSTA, California	GUS BILIRAKIS, Florida
ALBIO SIRES, New Jersey	VACANT
GABRIELLE GIFFORDS, Arizona	
RON KLEIN, Florida	
BARBARA LEE, California	

ROBERT R. KING, *Staff Director*

YLEEM POBLETE, *Republican Staff Director*

SUBCOMMITTEE ON INTERNATIONAL ORGANIZATIONS,
HUMAN RIGHTS, AND OVERSIGHT

BILL DELAHUNT, Massachusetts, *Chairman*

RUSS CARNAHAN, Missouri,	DANA ROHRABACHER, California
<i>Vice Chair</i>	RON PAUL, Texas
DONALD M. PAYNE, New Jersey	JEFF FLAKE, Arizona
GREGORY W. MEEKS, New York	
JOSEPH CROWLEY, New York	

CLIFF STAMMERMAN, *Subcommittee Staff Director*

NATALIE COBURN, *Subcommittee Professional Staff Member*

PAUL BERKOWITZ, *Republican Professional Staff Member*

ELISA PERRY, *Staff Associate*

CONTENTS

	Page
WITNESS	
The Honorable John B. Bellinger, III, Legal Adviser, U.S. Department of State	7
LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING	
The Honorable John B. Bellinger, III: Prepared statement	13

**DIPLOMATIC ASSURANCES AND RENDITION
TO TORTURE: THE PERSPECTIVE OF THE
STATE DEPARTMENT'S LEGAL ADVISER**

TUESDAY, JUNE 10, 2008

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON INTERNATIONAL ORGANIZATIONS,
HUMAN RIGHTS, AND OVERSIGHT,
COMMITTEE ON FOREIGN AFFAIRS,
Washington, DC.

The subcommittee met, pursuant to notice, at 2 o'clock p.m. in room 2172, Rayburn House Office Building, Hon. William D. Delahunt (chairman of the subcommittee) presiding.

Mr. DELAHUNT. The hearing will come to order.

I expect shortly the arrival of the ranking member, Mr. Rohrabacher. But I thought what I would do is I would proceed with a very short opening statement and begin this hearing. Then I would turn to Mr. Flake for any comments that he may wish to make and then, once the ranking member arrives, give him his opportunity to make his observations.

Well, today we are continuing the examination of the topic of diplomatic assurances. And with the appearance of the State Department's legal adviser, John Bellinger, we will turn our attention to the question of how the Department interprets its obligations under the Convention Against Torture and FARRA, the implementing legislation passed by Congress in the 1990s. And how diplomatic assurances are invoked in that context.

Diplomatic assurances, for those who are not familiar with the term, refers to the commitment another country makes not to torture a particular individual we decide to send them under a variety of various scenarios. Under the Convention Against Torture and FARRA, we are obligated not to send someone to a country where there will be torture. So we use these diplomatic assurances to hopefully constrain the actions of a country to which the individual is sent.

My concern with this practice of utilizing so-called assurances arises out of my interest in the case of Maher Arar, who was a Canadian citizen of Syrian origin who was detained while on a stop over at JFK airport in New York City. All on the basis of reports, now discredited reports, that linked him to al-Qaeda. He was rendered to Syria and, according to an independent commission report under the auspices of the Canadian Government, was tortured despite our having received assurances that he would not be.

These same assurances were the subject of a recently released, redacted report from the Department of Homeland Security Inspector General just last Thursday. The Inspector General Mr. Skinner made the report available to this subcommittee and Judiciary's Subcommittee on the Constitution. That report had some rather disturbing comments to make about these assurances, that they were ambiguous as to the source and the authority of the person within Syria providing them. And it appeared that no one checked to determine the sufficiency of these assurances.

So to sum it up, there was nothing particularly assuring about these assurances. And yet we sent Mr. Arar to Syria on the basis of those assurances.

Now we have agreed not to discuss any information or details of this case which is classified. Yet even on the basis of the unclassified information the Arar case demonstrates the dangerous practice of relying on these diplomatic assurances. This isn't just a concern in the rendition program; we use such assurances on a regular basis in extradition and withholding of removal cases, not to mention in transfers from Guantanamo.

It's our purpose today to examine how the process works. How does the Bush administration attain that is assurances before sending someone to a country with a poor human rights record? How do you assess their sufficiency? Who makes the call on whether or not they are accepted? Who exactly is the administration willing to take assurances from? And what can you do to ensure that the other side, the other nation, maintains its side of the bargain? Well, that is today's purpose. That is the purpose of this hearing.

I note the arrival of the gentleman from California, my friend and colleague, Mr. Rohrabacher. And I now turn to Mr. Rohrabacher for any statements or any observations he wishes to make.

Mr. ROHRABACHER. Thank you very much Mr. Chairman.

Just reconfirming one of the facts that I am about to say. Some of my colleagues appear to believe that our Foreign Service personnel just really don't care a wit about people, that our Foreign Service people and members of our intelligence agencies and our military personnel, our Reserves and National Guard, that they will come up with any old excuse to basically deport anybody who they want and torture people, and they will just do this because this is something that attracts them as individuals.

I will tell you that members of this committee have to understand and I think that the public has to understand that the people that we are talking about are American citizens who have taken on grave responsibility to defend this country. Our Foreign Service officers, people in the intelligence agencies, people in our Reserves and National Guard, people in our military, if they are accused of committing acts of physical violence against a hostage in order to get information and then we are told that that is not a way to get information from someone who is a suspected terrorist suspect, that is not a way to get information, that they will continue doing this, continue on with a torturous pattern because this is just the way they are, I guess.

If indeed the professionals found that using physical force against terror suspects does not gain information, well, there is no reason for them to have continued that practice if they have indeed

found out. And I would suggest that these people are just doing this and it is going on, even though it doesn't work, isn't really an attack on the integrity of those people involved in our system. And I do not share this belief that Americans who are engaged at that level of defending this country are ghouls and in some way enjoy giving physical torture to people. And especially what we have to keep in mind of course is we are not just talking about people, we are not just talking about individuals. We are talking about terrorist suspects, and in the hearing that we just had recently, we were talking about a specific terrorist, who the FBI had suggested it was not appropriate to use the tactics that we used against him.

The word "torture" has been bandied around so often, when I looked at the list of tactics that the FBI was complaining about, it included tying a leash to his chain and walking him around the room, repeatedly pouring water on his head, putting him in a stressful position, long interrogations. At one point, they stripped him naked in the presence of a female. They held him down while a female interrogator straddled him but without placing weight on his body. They placed women's underwear on his head and placed a bra in his clothing. A female interrogator massaged his back and neck region over his clothing. They described his mother and sister as whores. They showed him pictures of scantily clad women. They discussed his repressed homosexual tendencies in his presence. A male interrogator danced with him. They told him that people would tell other detainees that he got aroused when men searched him. There was forced physical training, and they instructed him to pray before an idol. This is from an FBI report.

Now all of those seem to be rather bizarre to me, but it is not torture. The person who these tactics were used against happened to be the 20th hijacker, the man who had been personally involved in the conspiracy that was part of 9/11. The man who these acts of humiliation and disorientation were committed against was a man who had conspired to get on the airplane, for some reason couldn't get on the airplane, for some reason couldn't get on the airplane, the 20th hijacker.

We have heard about Khalid Sheikh Mohammed and how he was waterboarded. We heard that three individuals, as reported to us, have been waterboarded. Khalid Sheikh Mohammed was one. Now, this was a man who has publicly taken credit for being involved in 9/11 and the planning of 9/11. But he is also the man who has been involved and bragged about killing, about personally slitting the throat of Daniel Pearl, an American journalist.

Now we are up against people who will brag about slitting the throat of Daniel Pearl, who will brag about their involvement in terrorist activities aimed at civilians. I think that our focus of trying to find fault with those people who are interrogating these terrorist suspects, realizing that, yes, if someone is going over the bounds and there is torture being committed that we have to talk about it, but what we have done is redefined "torture" to the point that if we were using a feather and tickling someone that that could be declared torture. We are at war with people who think nothing about going on TV and cutting the head off of someone in order to terrorize the American people, or to fly planes into build-

ings in order to kill tens of thousands of Americans; they only got 3,000 of us.

The fact that we have not had another such a terrorist strike since 9/11, a huge terrorist strike that caused so many lives to be lost, I believe it has a lot to do with the dedication of our intelligence agencies, of our military defenders, of the people in our Foreign Service. These are not ghouls. These are not people of low integrity. These are people are high integrity out on the front lines trying to defend us.

If we can find specific acts of terror and torture, well let's stand up for it. Let's admit there was a mistake. We have found at least one or two mistakes already in our hearings. We found where the Uyghurs, the Chinese situation, which was unacceptable, our chairman articulated it very well, how they were treated and made available to dictators in China, was unacceptable. And it did appear they had been picked up, and it was not reasonable to keep holding them as we have.

Also we have heard about this gentleman from Canada who was obviously misidentified by information that was false information provided the United States Government by the Canadian Government.

When we make a mistake, let's admit it. Let's offer compensation. But let's also admit that in so many other cases where we have people holding the line with integrity and love this country and are trying to protect our families, let's not belittle them and suggest that they are continuing on and using a tactic that doesn't work, meaning physical force; it doesn't work. They are not just doing this because it is fun for them. And let us make sure we give them the benefit of the doubt because they are our defenders, and these other people, as I say, do not deserve our respect. But they do deserve an honest look to see if they are indeed guilty of the terrorist charges that have been leveled against them.

Thank you very much.

Mr. DELAHUNT. I thank the gentleman.

And I want to be very clear when the gentleman refers to the professionals, the Foreign Service officers and those personnel work hard every day for those countries, I obviously concur.

But the gentleman is also right: When there are mistakes or when there are policies or when there are decisions that lead to egregious injustices, as the gentleman has noted, we are duty bound to go and find out why, because we hold ourselves to a different standard. We are America, after all. And as I have said on multiple occasions, mistakes happen, particularly in the fog of war, but when we inquire of the executive branch and information is withheld, there comes a point in time when a certain level of trust that is necessary for the functioning of our democracy begins to erode. And it is our obligation to see that that does not occur and doesn't occur in the next administration, whether it be a President McCain or a President Obama.

Let me note the presence of the gentleman from Pennsylvania, Mr. Joseph Pitts, who has for some time now taken a particular interest in a case involving a Coptic Christian from Egypt. I wish to commend him publicly. He has pursued this. The case itself is an-

other example of what can occur when things go wrong, badly wrong, when our system fails.

And I would put forth a unanimous consent request that Mr. Pitts be considered, for purposes of this particular hearing, as a member of the subcommittee to inquire of the witness.

And hearing no objection, I call on Mr. Pitts for any comments he wishes to make.

Mr. PITTS. Thank you, thank you, Mr. Chairman.

Thank you for holding this important hearing on diplomatic assurances and rendition to torture. And thank you for inviting me to participate in the hearing.

As someone who has been involved in human rights issues around the world, the issue of diplomatic assurances and returning individuals to countries where they will likely be tortured is of great concern. Each year, the U.S. Department of State publishes the Country Reports on Human Rights practices. Included under each country is a section on torture. Strangely, a number of countries to which individuals have been sent or to which the U.S. is intending to send people are countries in which the State Department describes torture as widespread.

It is disconcerting and troubling that individuals who technically should be staying in the United States and be granted asylum may be sent back to a country that, no matter what their government says, most likely will be tortured. For example, there is one case, which my constituents brought to my attention about a year ago, Mr. Sameh Khouzam, a Coptic Christian who was about to be deported back to Egypt. He fled Egypt for a number of reasons, including detention by security officials and threats against himself and his family.

U.S. Government lawyers told Mr. Khouzam that, in January 2007, they received diplomatic assurances from Egypt that he would not be tortured if he were to be returned to Egypt.

Interestingly, in the annual Country Reports, the State Department consistently finds incidents of torture there. I have worked on human rights issues in Egypt for a number of years, and it was shocking that, despite clear evidence of widespread torture, certain officials in the U.S. Government would accept at face value a promise that an individual would not be tortured were he to be sent back to Egypt.

The United States acceptance of these assurances was even more disturbing in light of the diplomatic assurances given to Sweden surrounding the case of Mr. Ahmed Agiza. The Swedish Government deported Mr. Agiza to Egypt after receiving diplomatic assurances that he would not be tortured upon his return to that country. Not surprisingly, given the Egyptian Government's history of human rights violations, Mr. Agiza was indeed tortured upon his return. Further, despite Egyptian Government assurances, Swedish officials frequently were denied access to Mr. Agiza and, when finally granted access, were not allowed to meet with him alone.

This year's State Department Country Reports reveal once again that "police, security personnel, and prison guards routinely tortured and abused prisoners and detainees." The Egypt section goes on to report that "there were numerous credible reports that security forces tortured and mistreated prisoners and detainees. Do-

mestic and international human rights groups reported that the SSIS police, the other government entities continued to employ torture to extract information or force confessions in numerous trials. Defendants alleged that police tortured them during questioning. Although the government investigated torture complaints in some criminal cases and punished some offending police officers, punishments generally did not conform to the seriousness of the offenses.”

In two news programs last year on an Australian TV station, former CIA agency official Bob Baer made it clear that the U.S. Government knows of the widespread torture in Egypt and in fact considers that knowledge in decisions to send individuals to Egypt. When asked if there was any doubt someone would be tortured if he were to return to Egypt, Mr. Baer answered, “Oh, absolutely no doubt at all. If you send them to Egypt, it might as well—it is tantamount to condemning them to death.”

In another part of the program, Mr. Baer stated, regarding sending people overseas, “If you never want to hear from them again, send them to Egypt. That is pretty much the rule.” When asked again when someone is rendered to Egypt, “Is there any doubt that they are going be tortured?” Mr. Baer said, “Oh, absolutely, no doubt at all.”

Yet the United States Government is willing to accept the diplomatic assurances of the Egyptian’s Government that an individual who has already been tortured by the Egyptians will not be tortured if he were to be deported.

Egypt is not the only country that should be examined. We should not be sending people who really should receive asylum to countries where the likelihood of their being tortured is extremely high, diplomatic assurances to the contrary.

Thank you, again, Mr. Chairman, for holding this important hearing. I look forward to hearing from our distinguished witness.

Mr. DELAHUNT. Yes, thank you, Mr. Pitts.

I look to the gentleman from Arizona, Mr. Flake, a member of subcommittee.

Mr. FLAKE. No, no statement.

Mr. DELAHUNT. Let us welcome Mr. Bellinger, who has a very extensive and very impressive resumé.

He was sworn in as the legal adviser to the Secretary of State on April 8th, 2005. He is the principal adviser on all domestic and international law matters to the Department of State, the Foreign Service, and the diplomatic and consular posts abroad.

From February 2001 to 2005, he served as senior associate counsel to the President and legal adviser to the National Security Council at the White House. As legal adviser, he provided legal advice to the President, the National Security Adviser, NSC principals, and NSC and White House staff on a broad range of national security and international legal matters. He was one of the principal drafters of the 2004 law that created the director of National Intelligence.

He served as counsel for the national security matters in the Criminal Division of the Department of Justice from 1997 to 2001. He previously served as counsel to the Senate Select Committee on Intelligence in 1996, as general counsel to the Commission on the Roles and Capabilities of the U.S. Intelligence Committee, and a

special assistant to Director of the Central Intelligence Agency William Webster.

From 1991 to 1995, he practiced with a major firm here in Washington. He received his A.B. cum laude in 1982 from Princeton and his J.D. cum laude in 1986 from Harvard. He also received a master's degree in foreign affairs in 1991 from the University of Virginia, where he was awarded a Woodrow Wilson Foreign Affairs Fellowship.

There is more here to read, but we will just omit that and conclude by saying, it is an impressive resumé.

We welcome here you here and would you proceed with your statement. And take your time because, as you can see, this is a small subcommittee in terms of our numbers, and we tend have a dialogue as opposed to a 5-minute rule.

And we want to listen carefully to what you have to say.

Mr. Bellinger.

**STATEMENT OF THE HONORABLE JOHN B. BELLINGER, III,
LEGAL ADVISER, U.S. DEPARTMENT OF STATE**

Mr. BELLINGER. Thank you very much, Mr. Chairman, and members of the committee.

I do really appreciate the chance to be here to talk about what is an important and difficult topic. I appreciate your reading my long background. The one little piece that you didn't mention is that I got my start in government as an intern here for one of your colleagues, now sadly no longer on the committee, Jim Leach. That is how I got my start in the foreign affairs world.

Mr. DELAHUNT. If I can interrupt you, I am on the Board of Advisers of the Institute of Politics at the Kennedy School. And as you well know then, the former Representative is the director now of the Institute of Politics and is doing everything that one would anticipate from an individual of his integrity and intelligence.

So that is a good beginning for you, Mr. Bellinger.

Mr. BELLINGER. Thank you, sir.

I do appreciate the chance to be here today to discuss the use of diplomatic assurances to protect individuals against torture in other countries. The use of diplomatic assurances in the practice of the Department of State arises in three different contexts: First, in the surrender of fugitives by extradition in the United States; second, in immigration removal proceedings initiated by the Department of Homeland Security and, of course, previously by the Immigration and Naturalization Service of the Department of Justice; and lastly, as you mentioned, Mr. Chairman, in the transfer of individuals from detention in Guantanamo Bay, Cuba.

My testimony will describe the use of diplomatic assurances and explain the reason why we believe that such assurances can be an important tool. I have a longer statement for the record because I think this is a useful topic for all of us to discuss, but I will keep my oral statement quite short.

At the outset, it is important to understand the United States' legal obligations and related policies with respect to sending individuals to countries where they might be tortured. The touchstone of our legal obligations with respect to transfers of individuals is Article 3 of the Convention Against Torture and Other Cruel, Inhu-

man or Degrading Treatment or Punishment, which we also call CAT.

As a state party to CAT, the United States has an international legal obligation under Article 3 not to expel, return, or extradite a person from the United States to a country, quote from Article 3, “where there are substantial grounds for believing that the person would be in danger of being subjected to torture.” So that is the legal standard that we observe as a matter of international law.

I want to note three things about this obligation. First, the United States interprets Article 3’s operative language to prohibit extradition or removal the words “substantial grounds” to mean if it is more likely than not that the person would be tortured. There has been some criticism about that standard, the “more likely than not” standard, but I want to make clear that that is the interpretation that was given to us by the Senate in 1990 and included in the U.S. Instrument of Ratification in 1994. So the standard we use is, “If it is more likely than not that a person would be tortured if returned to another country.”

Second, the obligation in Article 3 does not apply with respect to individuals who are outside the territory of the United States. This interpretation is supported by the text of the Convention Against Torture, its negotiating history and the U.S. Record of Ratification.

Mr. DELAHUNT. Mr. Bellinger, if I can interrupt you.

Mr. BELLINGER. Sure.

Mr. DELAHUNT. I am sure you would agree that there is some—well, significant disagreement on that particular interpretation.

Mr. BELLINGER. Well, I am not sure there is that much disagreement. That is an interpretation that accords with the way the Refugee Convention is interpreted, which the Supreme Court has held with precisely the same words, “Does not apply to transfers that take place outside the United States.”

Mr. DELAHUNT. But clearly you can make the distinction between the Convention on Refugees, and you do later in your written testimony, and that on the Convention Against Torture, as well as the position of at least one of your predecessors in the Office of Legal Adviser.

Mr. BELLINGER. I am not aware that the position of the U.S. Government on transfers outside the United States has changed. The legal standards that I am describing to you have been the long-standing legal positions of the U.S. Government since the Convention Against Torture was ratified in 1994. So these are not changes in legal position taken by the Bush administration.

I do know the point that you are making, and that is why as a matter of policy outside the United States and a policy that has in fact been stated by Congress in a statute we apply—

Mr. DELAHUNT. And that statute would be?

Mr. BELLINGER. That is the—it is a 1998 statute, I don’t have the precise title, that states the policy with respect to removals outside the United States.

Mr. DELAHUNT. That is a statute that was passed by this Congress and in effect is domestic law.

Mr. BELLINGER. It is a statement of policy. Of course, as you know, there are statements of policy that can be codified by Congress.

Mr. DELAHUNT. I think that we have a very divergent view on whether a law that is passed by the United States Congress must be complied with by the executive under those circumstances, because the language of FARRA, that is the acronym, is such that there is an expression, clear and unambiguous and unequivocal, that this applies—it is not about geography. It is not about the physical territory of the United States. It goes to the behavior of the United States.

Now, I don't know whether there was a signing statement at the time that the law was passed, but I am sure you have that information available to us. And I don't mean to interrupt, but I thought I would get us going.

Mr. BELLINGER. That is just fine. I recognize the point that you are making. And as a matter of policy, even where we take the position that it is a matter of international law that the CAT by its terms does not apply outside the United States, we comply as a matter of policy. That is why we take such a long time with the assurances that we seek for individuals who return from Guantanamo. But I do appreciate the question.

Now the last point I want to make on the law is that the obligation in Article 3 and our related policy are absolute. They are not subject to any exceptions or any kind of balancing of interests or harms, even in cases involving the possible removal or extradition of dangerous individuals who may pose a threat to the safety and security of the American people.

Now with that legal background, I would like now to explain how diplomatic assurances, when properly employed, come into play. Let me present it this way: When confronted with the presence in the United States of a dangerous foreign national, for example a suspected terrorist or a person who has been charged with a violent crime abroad, such as murder, what are our options?

Trying to detain the person is certainly one option, but we are limited in the legal regimes for detention. In many cases, we may not have the ability to detain someone. We might lack admissible evidence to support charging the individual with a crime, even though we may have reliable information that the person does actually pose a threat to our people.

Mr. DELAHUNT. Other than—let me interrupt once more.

Mr. BELLINGER. Sure, sure.

Mr. DELAHUNT. Other than lacking evidence, credible evidence. What would be the impediment? What other considerations in terms of detaining that individual exist? I guess, we have—I guess my concern is, as a former prosecutor myself, I like to see the evidence. I like to hear about it. I like to have trials before I reach conclusions. And my office had a pretty good record of putting people in jail. We didn't lose many cases. But if we are talking about suspicion and reliable information, it really is in the eye of the beholder, if that is the only impediment and problem to detaining someone whom we are concerned about.

Mr. BELLINGER. Well, it is not. And that is only one. And honestly, I appreciate the chance to talk this through because I think it is a serious policy problem between Congress and the executive as to what to do with these individuals. And I can tell you I talk to countries all around the world who have exactly the same prob-

lems with foreign nationals in their country who will pose damage, potential damage, to their citizens and they would like to send back to the countries they came from.

So you are right; one is an individual who we suspect might commit a crime but we cannot charge for lack of evidence. Another might be someone whom we have in fact charged, tried and convicted of a crime but may only have served a year or 2. We wouldn't want to then simply let that individual go into the general population of the United States. After they have served their sentence, if they are a foreign national who is in the United States illegally, we would not—

Mr. DELAHUNT. My response would be that any good assistant U.S. attorney or Deputy Attorney General, who had information that was of grave concern to the Government of the United States, or to an individual State for that matter, in the course of developing a sentencing memorandum for purposes of imposing sentence, that clearly would be appropriate to present that information to the court. And under the guidelines that exist now, to talk about a year or 2, I really don't think translates into reality.

I have had an opportunity to observe the Federal courts for some time now. And I see very long, lengthy sentences that are meted out on charges that as a state prosecutor I might describe as not—that the sentences would be surprisingly long.

I hear your argument, but to be candid and respectful, I find it difficult to accept, if the evidence is there, that I as an assistant U.S. attorney working in a talented U.S. attorney's office can't address the sentencing issue via a memorandum and presenting to the court a forceful argument in achieving the maximum. It is just my own observation.

Mr. BELLINGER. I would actually like to continue with this discussion. I tread at my peril because I know that you have more experience in prosecuting cases like this than I.

But, as you know, often we cannot get the sentences as long as we would like. We may be able to try someone for a lesser sentence. And you face the same thing for example in Massachusetts or in any State where we try someone, we get them to plead for maybe 5 years, and then we have to let them go. If they are U.S. citizens, we do have to let them go in the United States.

Mr. DELAHUNT. But we don't have to plea bargain is my point.

Mr. BELLINGER. And that is a risk we take every day.

But when you have a foreign national who has come into our country after they had served their sentence—and admittedly, our prosecutors do want to get the longest sentence they can, particularly if they think it is someone very dangerous—at that point, call it 2 years, 5 years, in your case, 20 years, we still don't want to let that person go in the United States. We want to have them go back to the country that they came from or another country.

Now one last example which comes up quite frequently is a person who is in the country illegally to begin with. In general, if we have someone who has entered the country illegally, we don't want to then prosecute the person and put them in our jail and hold them here. What we want to do is simply remove them or deport them from the country and send them back to the country that they came from. Where otherwise we would be detaining tens or

hundreds of thousands of people who have come into the United States illegally.

So, overall, there are a number of individuals who can pose a threat to our nationals. They are foreigners who, either because we can't try them or because we try them and they finish their sentence or we simply want to deport them, we want to send them back to another country.

The legal standard is always that we may not send them back to a country if we believe it is more likely than not that that they will be tortured.

And I will just finish, I will dispense with the rest of my oral statement, because we are having a discussion here, just to make the last couple of points.

Mr. DELAHUNT. Continue.

Mr. BELLINGER. In many of the countries, as noted by Mr. Pitts and you yourself, that we want to return people to may have a questionable human rights record. The legal standard, though, is not whether the country that we would like to turn someone back to has a questionable human rights record as a general matter but whether this particular individual is more likely than not to be tortured if we send them back. And that is where the diplomatic assurances come into play. If the country has a bad human rights record, there is immediately going to be a yellow light about whether we would send someone back, but because we would not want to have—

Mr. DELAHUNT. I am going to interrupt you just one more time.

Mr. BELLINGER. Sure.

Mr. DELAHUNT. I thought the point that Mr. Pitts made was a very important, salient point. I am going to pose some questions to you about various countries. We know that the Department of State puts out an annual human rights report. And as he indicated in his opening remarks, there is a section that is reserved for torture. And yet we have example after example of rendering to those countries, whether it be through extradition, whether it be through extraordinary rendition, which I note that you haven't addressed in your opening statement, but maybe we can get to it, or through immigration removal or through the issue of Guantanamo.

If a country, if we can agree that there is a number of countries that have a record that demonstrates time and time again that there is the systematic use of torture, does that for your purposes in terms of securing diplomatic assurances serve as a trigger, a trip wire, if you will? And have there been any cases? You don't have to answer this right now. You can finish your statement. Have there been any cases where a country with that kind of record has not been inquired of, or has not been the object of an effort by the Department of State or by any branch of the administration, to secure diplomatic assurances? And with that, I apologize and ask you to continue.

Mr. BELLINGER. I am happy to have the discussion.

First, let me emphasize, we rely on diplomatic assurances in rare cases. We accept far more individuals into the United States than we send people back and get diplomatic assurances. There have been only a handful in the case of immigration removals where the immigration service has decided that they want to deport or re-

move someone and there is a question about whether the individual will be tortured. There are only a handful of cases where diplomatic assurances have been sought.

Similarly, with respect to extraditions where a country has affirmatively sought an individual in this country, which is the case of Mr. Khouzam, there are about a dozen of cases where we have sought diplomatic assurances. So we are probably talking about less than 20 cases overall since the CAT was ratified. And this is not just this administration; this is going back to the previous administration that has relied on diplomatic assurances. But the key thing here—

Mr. DELAHUNT. But let me note to you—

Mr. BELLINGER. In none of those cases are we aware that there was any mistreatment of any of the individuals who were either removed under the immigration rules or who were extradited pursuant to a certificate by the Secretary of State on which we relied on diplomatic assurances. So there is an established practice of using diplomatic assurances in rare cases, and we are not aware there have been any cases of—

Mr. DELAHUNT. Well, you indicate rare, but yet at the same time, our information is that, from Guantanamo alone to Egypt, that the country which is the focus of Mr. Pitts' comments have received upwards of 70, the number 70, individuals from Guantanamo.

Mr. BELLINGER. Well, let me—

Mr. DELAHUNT. I would consider that not rare. I would consider that a significant number, particularly when your own annual Country Reports outline the history, if you will, of torture within the Egyptian penal system.

Mr. BELLINGER. I don't think that comports with the facts, sir, that I am aware of. Again, there are three types of cases where diplomatic assurances are sought: Extradition cases; immigration removal cases; and the Guantanamo cases. In the dozen cases in immigration or extradition where diplomatic assurances have been sought, we are aware of none going back two administrations in which anyone has been abused or tortured after the diplomatic assurances. We have no cases.

Mr. DELAHUNT. A lot, of course, depends upon the capacity of the Department of State to create a mechanism to monitor. And this is an area, hopefully, we can get into as well.

Mr. BELLINGER. Absolutely, and that is very important.

I do want to mention the Guantanamo cases. In the Guantanamo cases, we have returned more than 500 people from Guantanamo; the Department of Defense has returned more than 500 people from Guantanamo.

Mr. DELAHUNT. Seventy of which, I understand, to Egypt?

Mr. BELLINGER. I don't believe 70 have gone to Egypt. I think one person has gone to Egypt.

Mr. DELAHUNT. Our information is totally different, and I hope you know something that we don't.

Mr. BELLINGER. I think I—sir, we can certainly talk to you about the facts. But I don't think we ever had 70 Egyptians in custody in Guantanamo. There were only under five or so Egyptians in Guantanamo. Only one person has been sent back to Egypt, and I am not personally aware that there have been any allegations.

Mr. DELAHUNT. Maybe I am being unclear when I say there have been 60 or 70 that have been rendered to Egypt as opposed to returned to Egypt.

Mr. BELLINGER. Well, I am not aware of those cases. From Guantanamo, we have sent one person back to Egypt. But, I mean—

Mr. DELAHUNT. We will get into that. I don't want to hold you up.

Mr. BELLINGER. I understand the concerns overall. We have had some cases from Guantanamo where there have been allegations that individuals, even though we have gotten assurances, that there has been mistreatment, and we have been deeply concerned about those cases.

Now that is in a small handful of five or so out of a number of 500 whom the Department of Defense has returned. So that is about 1 percent of the cases of where people who have been transferred from Guantanamo where there have been issues of possible mistreatment.

Now the alternative, though, is to leave them all in Guantanamo. And that is why the diplomatic assurances are very important. If we want to transfer people out of Guantanamo to countries, almost all of whom have had some questionable human rights record, we have to seek diplomatic assurances. And in 99 percent of those cases, the diplomatic assurances have been fine.

I think the overall point that I am trying to make here is, we are certainly aware of the concerns that you raise. We have an international law obligation. We have a statutory obligation. We have policy concerns going back several administrations that we do not want to send an individual to any country where it is more likely than not that they will be tortured.

On the other hand, if someone poses a threat to our country, nor do we want to let them go into our general population. And so if they are in Guantanamo, it means that they just stay in Guantanamo. Or if they are in the continental United States and you can't keep them in prison, it means they go loose in the general population. Hence the tool of diplomatic assurances is an important one that allows us to seek assurances from a foreign country that an individual will not be mistreated, and there are not really other good alternatives.

[The prepared statement of Mr. Bellinger follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN B. BELLINGER, III, LEGAL ADVISER,
U.S. DEPARTMENT OF STATE

Chairman Delahunt and distinguished members of the Committee, I welcome the opportunity to appear before you today to discuss the United States' use of diplomatic assurances to protect individuals against torture in other countries.

The use of diplomatic assurances in the practice of the Department of State arises in three different contexts: (1) in the surrender of fugitives by extradition from the United States; (2) in immigration removal proceedings initiated by the Department of Homeland Security, and (3) in the transfer of terrorist combatants from detention at the Department of Defense detention facility at Guantanamo Bay, Cuba. My testimony today will describe the use of diplomatic assurances in these contexts, and explain the reasons why we believe diplomatic assurances, in appropriate cases, can be an important tool for protecting individuals against torture.

ARTICLE 3 AND THE RELATED POLICY AGAINST TRANSFERS TO TORTURE

First, it is important to understand the United States' legal obligations and related policies with respect to the sending of individuals to countries where they

there is a risk they may be tortured. The touchstone of our legal obligations is Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (“Convention” or “Convention Against Torture”). As a party to the Convention, the United States has undertaken an international legal obligation under Article 3 not to expel, return (“refouler”) or extradite a person from the territory of the United States to a country where there are substantial grounds for believing that person would be subjected to torture. Pursuant to the formal treaty understanding approved by the Senate and included in the U.S. instrument of ratification, the United States interprets the phrase, “where there are substantial grounds for believing that he would be in danger of being subjected to torture,” as used in Article 3 of the Convention Against Torture, to mean “if it is more likely than not that he would be tortured.” According to the August 30, 1990 Report from the U.S. Senate Committee on Foreign Relations, this understanding sought to apply the same legal standard under Article 3 that is used in determinations under the 1967 Protocol Relating to the Status of Refugees (“Refugee Protocol”). Under the Refugee Protocol, an individual may not normally be expelled or returned if it is more likely than not that his life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion. It is important to note that, by expressing the “more likely than not” standard as an Understanding to Article 3, the United States deemed it to be merely a clarification of the definitional scope of Article 3, rather than a standard that would modify or restrict the legal effect of Article 3 as it applied to the United States.

The non-refoulement obligations in Article 3 apply only with respect to individuals who are *in the territory of the United States*. This accords with our interpretation of similar language in the Refugee Protocol. Neither the text of the Convention, its negotiating history, nor the U.S. record of ratification supports a view that Article 3 of the Convention applies to persons outside the territory of the United States. By its terms, Article 3 applies only to expulsion, to what is described as “returns (‘refouler’),” and to extradition. “Expulsion” and “extradition” clearly describe conduct taken to remove individuals from a State Party’s territory.

Likewise, the U.S. Supreme Court has concluded that the term “return (‘refouler’),” in the context of Article 33 of the Convention Relating to the Status of Refugees (incorporated by reference into the Refugee Protocol), “was not intended to have extraterritorial effect.”¹ There is no basis for attaching a different meaning to “refouler” in Article 3 of the Convention Against Torture. This reading is further supported by the Convention’s negotiating record.² In addition, the record of proceedings related to U.S. ratification of the Convention demonstrates that at the time of ratification in 1994, the United States did not interpret Article 3 to impose obligations with respect to individuals located outside of U.S. territory.

Although the reach of Article 3 itself is limited, it is nevertheless the policy of the United States not to send *any* person, no matter where located, to a country in which it is more likely than not that the person would be subjected to torture. This policy applies to all components of the U.S. Government and applies with respect to individuals in U.S. custody or control regardless of where they may be detained. It has been set forth in statute and articulated at the highest levels of the United States Government. See Section 2242 of the 1998 Foreign Affairs Reform and Restructuring Act (PL 105–277).

I want to make clear that U.S. commitments under Article 3 and our related policy are absolute. There are no exceptions based on national security or the criminality of an individual, as there are regarding the non-refoulement obligation under the Refugee Protocol. Nor is the likelihood that an individual will be tortured weighed against the threat he or she poses to the safety and security of the American people.

¹ *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 179 (1993). In examining the text of Article 33, the Supreme Court found that the legal meaning of the term “return,” as modified by reference to the French “refouler” (English translations of which included “repulse,” “repel,” “drive back,” and “expel”), implied that “return” means a defensive act of resistance or exclusion at a border rather than an act of transporting someone to a particular destination.

² The original Swedish proposal spoke only of expulsion or extradition, and did not employ the term “return (‘refouler’).” However, when the draft was revised to expand the prohibition to include “return (‘refouler’),” considerable discussion ensued over the advisability of including the term, including references to ambiguity surrounding the extraterritorial reach of the provision. At no point was there agreement that the term was intended to apply to individuals located outside the territory of a State Party. Additionally, both the text and the negotiating history make clear that negotiators used explicit language applying certain provisions of the Convention extraterritorially when they intended those provisions to have extra-territorial effect (See, e.g. Articles 2(1), 5, 12, 13, and 16). The negotiators’ failure to do so in Article 3 further confirms that there was no express intent to apply Article 3 extraterritorially.

THE ROLE OF DIPLOMATIC ASSURANCES

Let me now explain where diplomatic assurances fit in the context of our obligations under Article 3 and related policies. When confronted with a dangerous foreign national—such as a serious criminal or terrorist—our Article 3 obligations may seriously constrain our options for removing or extraditing that individual from the United States. On the one hand, we may not have the ability to detain the individual. For example, even though we have reliable information that the individual poses a terrorist threat, we might lack admissible evidence to support charging the individual with anything more than a minor crime or immigration violation. Even if we could detain the individual under the laws of war or in immigration detention, there are legal restrictions on holding the individual for an extended period of time. A better option might therefore be to send the individual to his home country, or to a third country that is seeking to have him extradited for prosecution. But as I have explained, the Article 3 prohibition is categorical: no matter how dangerous the individual, he cannot be sent from the United States to any country if it is more likely than not that the individual will face torture there. In fact, it is often the case that very dangerous individuals may be nationals of, or sought for prosecution by, States with poor human rights records, giving rise to a concern about torture. This presents the United States—and all governments that, like ours, respect the rule of law—with a serious problem.

In such situations, diplomatic assurances can be a way to protect U.S. national security and public safety while still complying with relevant international law and policy not to send people to countries where they will be tortured. Credible diplomatic assurances from the receiving state may *reduce the risk of torture* such that the individual can be safely and appropriately transferred consistent with our Article 3 obligations. In other words, diplomatic assurances and the senior level communications with the foreign government on which they are based can be the vehicle by which the United States Government can reasonably find that it would not be more likely than not that the individual would be tortured by the receiving country if transferred.

To reduce the risk of torture, it is of course essential that diplomatic assurances be credible. This requires direct engagement with the potential receiving country. In such cases, where appropriate, the U.S. Government can change the facts on the ground by directly engaging with the receiving country regarding the treatment that a particular individual will receive and securing explicit, credible assurances that the individual will not be tortured.³

The seeking of diplomatic assurances is, of course, not appropriate in all cases. We would not rely upon assurances unless we were able to conclude that with those assurances, an individual could be expelled, returned, extradited, or otherwise transferred consistent with our treaty obligations and stated policy. The efficacy of assurances must be assessed on a case-by-case basis and can depend on a number of factors related to the particular country involved, including the extent to which torture may be a pervasive aspect of its criminal justice, prison, military or other security system; the ability and willingness of that country's government to protect a potential returnee from torture; and the priority that government would place on complying with an assurance it would provide to the United States government (based on, among other things, its desire to maintain a positive bilateral relationship with the United States government). But in cases where credible assurances could be effective in permitting removal or extradition consistent with our non-refoulement obligations, such assurances are a critical and valuable tool.

PROCEDURES FOR IMPLEMENTING ARTICLE 3 AND THE RELATED POLICY

In 1999, the United States government promulgated regulations to implement its Article 3 obligations, including regulations addressing diplomatic assurances. In the extradition context, the Secretary of State is the U.S. official responsible for determining whether to surrender a fugitive to a foreign country and decisions on extradition where there is a potential issue of torture are presented to the Secretary (or, by delegation, to the Deputy Secretary) pursuant to regulations at 22 C.F.R. Part

³ Of course, the United States also engages in bilateral and multilateral efforts to assist other countries in improving their human rights records. This policy is fully consistent with longstanding U.S. human rights policy, which strives to encourage countries around the world to improve their human rights performance to protect a broad array of civil and political rights. While we hope that such efforts will produce sustainable improvements in the conditions in those countries over the long term, they are inadequate for addressing the immediate problem of removing a charged or convicted criminal or suspected terrorist alien who is unlawfully present in the United States.

95. The decision to surrender a fugitive occurs only after a fugitive has been found extraditable by a United States judicial officer. In order to implement our Article 3 obligations, in cases where the issue arises, the Secretary or Deputy Secretary, in making the determination whether to surrender, considers the question of whether a person facing extradition from the U.S. 'is more likely than not' to be tortured in the State requesting extradition. In each case in which allegations relating to torture are made or the issue is otherwise brought to the Department's attention, appropriate policy and legal offices review and analyze information relevant to the case in preparing a recommendation to the Secretary or Deputy Secretary as to whether or not to sign the surrender warrant. Based upon the analysis of the relevant information, surrender may be conditioned on the requesting State's provision of specific assurances relating to torture or aspects of the requesting State's criminal justice system that protect against mistreatment. In addition to assurances related to torture, such assurances may include, for example, that the fugitive will have regular access to counsel and the full protections afforded under that state's constitution or laws. Assurances specifically against torture have been sought in only a small number of extradition cases. In this regard it is important to note that prior to negotiating new extradition treaties the United States undertakes a review of the potential treaty partner's human rights record to determine if they will respect both the rule of law and an extradited individual's human rights, including protections against torture. Consequently, extradition cases generally do not pose legitimate concerns about torture and such claims are rare. The use of assurances, however, is part of a longstanding and effective international practice in the extradition context, and assurances are often directly referenced in extradition treaties themselves.

In the immigration context, regulations codified at 8 C.F.R. 208.18(c) and 8 C.F.R. 1208.18(c) provide that the Secretary of State may forward to the Secretary of Homeland Security assurances that the Secretary of State has obtained from the government of a specific country that an alien would not be tortured there if the alien were removed to that country. In practice, the Department of State seeks assurances upon the request of the Department of Homeland Security and exercises discretion in deciding in particular cases whether or not to seek assurances upon receiving such a request. Under these regulations, if the Secretary of State obtains and forwards such assurances to the Secretary of Homeland Security, the Secretary of Homeland Security shall determine, in consultation with the Secretary of State, whether the assurances are sufficiently reliable to allow the alien's removal to that country consistent with Article 3 of the Convention. If the Secretary of Homeland Security determines that the assurances are sufficiently reliable, he or she may then terminate any deferral of removal the alien had been granted as to that country and the alien's torture claim may not be considered further by an immigration judge, the Board of Immigration appeals or an asylum officer.

Section 2242(c) of the 1998 Foreign Affairs Reform and Restructuring Act, the statute pursuant to which these regulations were promulgated, expressed Congress' concern with the possibility that terrorists, persecutors, and serious criminals will be released on our streets, and mandated that the regulations issued by the Executive Branch to implement the Convention against Torture provide for the removal of such aliens to the maximum extent possible consistent with our Art 3 obligations. The regulations regarding the use of diplomatic assurances in the immigration context are a reasonable and permissible response to this congressional mandate.

Since these regulations were promulgated in 1999, they have been used in less than a handful of cases. This is in contrast to the approximately five thousand individuals who have enjoyed protection in immigration proceedings through the withholding or deferral of removal on grounds that it was more likely than not that they would be tortured. This is in addition to the approximately 300,000 individuals who were granted asylum, either affirmatively or defensively during that same time period. This latter number includes individuals who may have been eligible for Article 3 protection, but whose claims for protection on that basis were never reached because they were granted asylum. This is a point worthy of some emphasis: in the vast majority of immigration cases where our obligations under Article 3 of the CAT are implicated, diplomatic assurances are never even considered, let alone pursued.

The issue of diplomatic assurances also arises in the context of the transfer of enemy combatants from detention at the Department of Defense detention facility at Guantanamo Bay, Cuba. Although Article 3 of the CAT does not as a matter of treaty law apply to Guantanamo transfers, the United States government nevertheless adheres to a policy that we will not transfer individuals from Guantanamo to countries where we determine that it is more likely than not that they would be tortured. With regard to Guantanamo transfers, the Department of State is also involved in seeking diplomatic assurances from a potential receiving government as to the treatment the individual will receive if transferred or returned to that coun-

try. Specifically, the Department of State's Office of War Crimes Issues (which generally has responsibility to communicate on transfer-related matters, in the Guantanamo context, as between the United States and foreign governments) seeks those diplomatic assurances, including assurances that they will be treated humanely and in accordance with the receiving country's international obligations when detention by the receiving government is foreseen.

In all contexts, evaluations as to the likelihood of torture require a particularized determination in each individual case. Generalizations about the overall human rights situation in a country or even a country's record with respect to torture do not necessarily provide a clear or obvious answer. Likewise, evaluations as to whether assurances should be sought and whether any assurances that are obtained are sufficiently reliable such that with such assurances it is more likely than not that the individual would not be tortured are also made on a case-by-case basis. When evaluating assurances provided by another country, Department officials may consider many factors including, but not limited to, the identity, position or other relevant information concerning the official relaying the assurances; information concerning the judicial and penal conditions and practices of the country providing assurances; political or legal developments in that country that would provide context for the assurances provided; that country's track record in complying with similar assurances previously provided to the U.S. or another country; and that country's capacity and incentives to fulfill its assurances to the United States.

As part of an assurance we receive from a foreign government, the Department may obtain arrangements by which U.S. officials or an agreed upon third party will have physical access to the individual during any period in which he or she is in the custody of the foreign State for purposes of verifying the treatment he or she is receiving. In addition, in instances in which the United States extradites, removes, returns, or transfers an individual to another country subject to assurances, we have and will continue to pursue any credible report and take appropriate action if we have reason to believe that those assurances will not be, or have not been, honored.

In many cases, the Department's ability to seek and obtain assurances from a foreign government depends in part on the Department's ability to treat dealings with the foreign government with discretion. The very fact that the United States would not consider removing an individual in the absence of an assurance on torture can itself be an embarrassment to the country in question. The delicate diplomatic exchange that is often required in these contexts typically cannot occur effectively except in a confidential setting. In such cases, consistent with the sensitivities that surround the Department's official diplomatic communications, the Department typically does not make public the details of the communications involved. If such details were regularly divulged, countries would likely prove far less willing to provide reliable assurances. In addition, making the details of these communications public would be inconsistent with the expectations of the government that have provided us assurances in the past, and would seriously undermine our ability to obtain similar assurances in the future.

CRITICISMS

Several criticisms have been made of our practice of obtaining assurances. Some have claimed that the confidentiality of assurances renders them suspect, or that assurances are inherently unreliable. Such challenges, to assurances *as such*, have been rejected by courts in the both the United States and in Europe. Rather, courts have found that, in appropriate circumstances, diplomatic assurances may be sufficient to enable a State to return an alien to a country, in compliance with its Article 3 obligations, even if that country has a recent history of human rights abuses. In this regard it should be noted that Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms subjects State Parties to a much broader non-refoulement obligation than the Convention Against Torture.⁴ Faced with the additional challenges this broader obligation imposes, governments in Europe have utilized diplomatic assurances to reduce the risk that aliens will face not only torture but other abuses and conditions as well.

Another criticism often leveled against the practice of utilizing diplomatic assurances is that the practice undermines the international human rights framework.

⁴As interpreted by the European Court of Human Rights, State Parties are prohibited under Article 3 of the European Convention from sending an individual to a country where he or she would face a "real risk" of being subjected to torture or to inhuman or degrading treatment or punishment. The scope of risks protected against under this non-refoulement obligation is greater than those protected against under the Convention Against Torture, and the standard of 'real risk' is substantively lower than 'more likely than not.'

We find the opposite to be true. Seeking assurances does not mean ignoring or condoning torture. On the contrary, when they seek assurances, countries signal the importance of, and their commitment to, their international human rights obligations and directly confront the country in question with their concerns. These discussions serve to bolster, not undermine, the international human rights framework. If successful, they lead to renewed commitments to and compliance with international human rights obligations by the country from which assurances are sought. In some cases, interest in reinforcing bilateral law enforcement relationships may serve as an incentive for receiving countries to improve their practices. Bilateral discussions regarding assurances may also lead to improved access to detention facilities in the receiving country on the part of the requesting state, or to a greater role for a particular domestic human rights institution and/or independent human rights group in the receiving country.

CONCLUSION

Diplomatically these are not easy discussions, but they are sometimes necessary and valuable in our efforts to protect our citizens from criminal and terrorist threats and, at the same time, to comply with our international human rights obligations. Assurances, if properly used, are a means of fulfilling, not avoiding, non-refoulement obligations. As such, those who categorically oppose the practice need to consider if they are content with the idea of dangerous criminals or unlawful aliens being released onto the streets of the United States, even though, with appropriate assurances, they could be sent to face justice in another country or otherwise expelled or removed consistent with U.S. treaty obligations. For its part, the Department of State is not content with that idea. Thus, the Department will continue to seek to utilize, where appropriate, assurances to assist in ensuring that we both protect our citizens and uphold our international legal obligations.

I thank the Committee for its interest in this issue and am happy to discuss with you any additional questions you may have.

Mr. DELAHUNT. You have concluded your remarks?

I thank you, Mr. Bellinger.

I want to go first for whatever questions he might have to Mr. Pitts.

Mr. PITTS. Thank you, Mr. Chairman.

I have a copy of an interview here, a 2005 Meet the Press interview where Prime Minister Nazif of Egypt said that approximately 60 to 70 people were sent by the U.S. Government to Egypt. Do you know, were diplomatic assurances obtained for these individuals who were sent back to Egypt?

Mr. BELLINGER. I am simply not aware of those cases. If that is an accurate statement, they were not extradition cases. They were not deportation removals, and they were not individuals from Guantanamo, which are the cases where we have been involved in getting diplomatic assurances. I simply do not know whether that is an accurate statement or not.

Mr. PITTS. Now if we receive diplomatic assurances, do we have any kind of tracking mechanism in place to ensure that these individuals are not tortured?

Mr. BELLINGER. It is an important question, and it is, if there is a question about a human rights record in the country and we do decide to seek diplomatic assurances, then there are a number of mechanisms that we can use to follow up. One of them may be to have the State Department be able to visit a person when he is returned if he is incarcerated.

It may be to have a third party, an NGO, a human rights organization. In cases from Guantanamo, the International Committee of the Red Cross may be able to go and visit the person.

And I can tell you, this is something that is not unique to our country. As the legal adviser for the State Department, I talk to

countries around the world, all of whom face the same problem, the Brits and others, who have individuals in their countries whom they want to expel or deport, and we all try to work out the same sets of assurances with monitoring mechanisms, sir.

Mr. PITTS. Who is allowed to view the actual written diplomatic assurances received from each country? Are Members of Congress or Senators allowed to view these assurances in a classified setting?

Mr. BELLINGER. Sir, it is a diplomatic function by its terms. It is something that the State Department is under—the entity responsible for conducting the diplomacy of the country who receives the assurances. So, no, these are not the details that we would provide to Congress, but certainly, in a particular case, but they are certainly ones that we can talk about the generalities of.

Mr. DELAHUNT. Would the gentleman yield on that question?

Mr. PITTS. Yes, I yield.

Mr. DELAHUNT. Let me be very clear, is your position that, in a classified context, if Mr. Pitts had specific questions about the case that he has expressed interest in, it is the position of the administration that they would not reveal them to Mr. Pitts as an elected Member of Congress?

Mr. BELLINGER. Well, sir, I would have to look back at the past practice. Again, this is something that is a practice that spans 10 or 15 years in terms of seeking diplomatic assurances. This is not an invention of this administration, but it is part of the carrying out of the foreign affairs functions of any State Department—

Mr. DELAHUNT. Mr. Bellinger, would you agree that this is the Committee on Foreign Affairs?

Mr. BELLINGER. There are certainly some functions though that are going to be—the details of which are going to be inherent—

Mr. DELAHUNT. And that this subcommittee is the committee that has been tasked with oversight of the Department of State?

Mr. BELLINGER. I am happy to take the question back and see if we can work with you on this. I simply don't know what the past practice has been on—

Mr. DELAHUNT. With all due respect, do not bother to take the question back to see if you can work with us on it, because I think it would be an inappropriate deference by this subcommittee and by this full committee and by this Congress, to engage in those kind of discussions or negotiations with the Department of State.

I think that Mr. Pitts is a Member of Congress, myself and any Member, not only have a right to that information, we have a responsibility that has been imposed on us by the fact that we are the first branch of government to have that information. So that we can determine what is happening in secret in our Government.

And with that, I yield back to the gentleman.

Mr. PITTS. Thank you, Mr. Chairman.

I might just add one thing, when it applies to one of your constituents, it is even more compelling that we have the ability to see that kind of evidence.

You mentioned in your statement, when confronted with a dangerous foreign national, such as a serious criminal or terrorist, our Article 3 obligations very seriously constrain our options removing

or extraditing that individual from the United States. You were explaining diplomatic assurances.

My question goes to the kind of evidence the U.S. uses. When you are defining “serious criminal,” in order to even consider accepting diplomatic assurances, what kind of evidence does the U.S. require regarding someone who is called a “serious criminal,” and is deemed so by another country that may or may not have a transparent judicial system in which an individual is innocent until proven guilty?

Mr. BELLINGER. Well, sir, as I have said, there are tens of thousands of cases where we have simply been willing to let an individual stay in the United States, even when they have otherwise violated our immigration laws, even violated our laws, and have allowed them to stay in the United States if they can show that they would face a risk of torture or persecution.

But there is a handful of cases, and as I have said, it is extremely small, in which our other agencies—this is not something that is left with the State Department; this is left with our Department of Justice, with our immigration service, with the Department of Homeland Security. So you would have to put the question to them to ask, what is that category of cases where they feel that it is so important for the security of our country rather than allowing an individual to stay on in the United States, go free in our population, that they would rather ask the State Department to get the diplomatic assurances to ensure the person is not mistreated if returned elsewhere?

We don’t quibble with other agencies and say to them, this person doesn’t look bad enough to us. If they ask us to go get the diplomatic assurances because they have reached the conclusion that the individual poses a threat, then it is our job to get the assurances.

Mr. PITTS. Do you require the foreign government to give you the evidence, show you the evidence? Do you maintain any kind of records of the alleged evidence?

Mr. BELLINGER. If a foreign—well, often, the evidence is in this country.

Mr. PITTS. No, I am talking about when you say, “When confronted by a dangerous foreign national, such as a serious criminal,” when you are receiving diplomatic assurances; if a person is accused in another country, or maybe convicted in their court system. Do you require that country to show you the evidence of that crime?

Mr. BELLINGER. Yes, sir. For someone to be extradited to another country, they would have to satisfy the conditions of our extradition treaty. They would have to show that it fit the elements of criminality in the extradition treaty. And there would have to be sufficient burden of proof shown

That the person was extraditable to that country.

Mr. PITTS. And who has the record of that evidence? Who keeps the records?

Mr. BELLINGER. That would be the Department of Justice, and then it would ultimately be shown to a Federal judge, who would determine whether the individual was extraditable to a foreign country. That is in the case of extradition.

Mr. PITTS. Again, like the previous question that I asked, is this record of evidence available for Members of Congress or Senators in a secure classified setting to view or not?

Mr. BELLINGER. Sir, I will have to get back to you.

I just don't know what the past practice has been with respect to law enforcement and the details of extradition cases. That would be information that would be provided by a foreign country to our Department of Justice.

Mr. DELAHUNT. Would the gentleman yield for a moment?

Mr. PITTS. I yield.

Mr. DELAHUNT. Would the diplomatic assurances that Mr. Pitts is referring to, would they be memorialized in writing by the Department of State?

Mr. BELLINGER. Often, yes. And that's often why it takes so long. In most causes, in fact, I would say yes.

The Guantanamo cases, as all of us in this room know, the administration takes a terrible beating about why it has taken so long to transfer people out of Guantanamo. One of the reasons is, and we don't talk much about this publicly, is that it will often take us months if not years to obtain written, high-level, detailed diplomatic assurances from a foreign government that individuals will not be mistreated.

Mr. DELAHUNT. Is there a protocol issued by the Department of State outlining the criteria and giving guidance to personnel within the Department of State about memorializing the diplomatic assurances?

Mr. BELLINGER. We do not have—

Mr. DELAHUNT. You used the word "often," and that says to me that sometimes it isn't reduced to writing or memorialized in some fashion.

Mr. BELLINGER. In all of the extradition and removal cases that I am aware of, there have been—because it would be done by cable back and forth with our Embassies around the world. It would all be reduced to writing in cables. So that would all be reduced to writing.

In the Guantanamo cases, where there had not been a past practice because it was a new situation, certainly in recent years and as far back as I am aware of myself that has been done in writing, but there was not an established protocol for return of people from Guantanamo to the countries that they have come from.

I can certainly tell you, and I gather you will be meeting with my colleague, the Ambassador for war crimes, Ambassador Williamson, later on this week to get a detailed briefing on how the negotiations for returns from Guantanamo were, but there will be a very detailed back and forth diplomatically in which—

Mr. DELAHUNT. I am thinking of the cases that have caused myself and Mr. Pitts and others concerns. The cases he refers to he has already described to you.

Mr. BELLINGER. Mr. Khouzam, absolutely.

Mr. DELAHUNT. And Mr. Arar.

Mr. BELLINGER. Mr. Arar was a Department of Justice removal.

I want to—within the limits of this hearing, I can say the following things: Number one, it is my understanding the case of Mr. Arar was handled by the Department of Justice and the Immigra-

tion and Naturalization Service pursuant to their immigration regulations. It was not a rendition. This is a myth that it was a rendition. A rendition, as I always understood the term as a lawyer, is a transfer of an individual outside of the extradition or other legal framework. In this case, Mr. Arar was removed from the United States pursuant to a legal framework. He was removed pursuant to the—

Mr. DELAHUNT. 235.

Mr. BELLINGER. 235(c) of the Immigration and Naturalization Act pursuant to immigration regulations, so—

Mr. DELAHUNT. Clearly, there is significant dispute in terms of the compliance even with the provisions in 235(c) in terms of counsel, in terms of being removed to Syria—this is now in the public domain—despite his objection.

And if what I am hearing from you is—and I want to be very clear that in that particular case the Department of State had no communication with either the Jordanians or with the Syrians regarding his removal—I am not going to use the word his “rendering”—or the Canadians, for that matter, or the Swiss, for that matter.

Mr. BELLINGER. Since this was a removal conducted by the then-Immigration and Naturalization Service pursuant to their regulations, I am going to have to urge you to get the details of it from them.

Mr. DELAHUNT. That provokes another question that I have. At the time you were legal adviser to the National Security Council, you weren't in your current capacity as legal adviser to the Department of State. In those cases where there is clearly going to be controversy, as was in the case of Arar and, I presume, in the Egyptian case and there are numerous, for example, El-Masri. There are numerous other cases. When you were there, what was the role that you played in those high-profile cases as the legal adviser to the National Security Council?

Mr. BELLINGER. The role of the National Security Council staff, of which I was a member, was to coordinate policy, not to get involved in directing or managing operations. So the different departments and agencies are the ones who conduct operations. The National Security Council staff oversees the policy.

In some cases, the NSC staff may be informed of actions that the Department of State, the Department of Justice, the intelligence agencies, the Department of Defense are taking. But we have a small staff, and it is not our job to be conducting immigration removals. We may or may not be involved in—be notified with respect to certain cases.

Mr. DELAHUNT. One of the reasons that I raise the issue with you is that there is a report that back in 2004, on orders from the then National Security Adviser Condoleezza Rice, she ordered an individual to be released from an Afghan prison where he had been in prison for 5 months. Does that provoke in you any particular memory of that case?

Mr. BELLINGER. That case is not one that—

Mr. DELAHUNT. That's El-Masri.

Mr. BELLINGER. The El-Masri case?

Mr. DELAHUNT. The El-Masri case.

Mr. BELLINGER. The El-Masri case is a case that is currently in litigation before the U.S. courts, and I would have to defer to the Department of Justice, who has asked for cases that are in litigation before U.S. courts that they be the ones who answer questions about matters in litigation.

Mr. DELAHUNT. Well, again, it raises an issue in terms of the role of—for me, without speaking specifically to a case in litigation—the role of the National Security Council. And you at the time were adviser to that body. Were there cases, without being specific, in which these kind of issues were brought to the attention, whether it be the principals, whether it be the director—in that case, it would have been the now Secretary of State Condoleezza Rice, cases such as the El-Masri case either about rendition or removal or Guantanamo or any of the context that you discussed in your opening statement?

Mr. BELLINGER. Well, one, as I understand it, this is an oversight hearing of the actions of the Department of State.

Mr. DELAHUNT. That's right. We also have oversight of the National Security Council as well.

Mr. BELLINGER. I think the National Security Council is part of the White House and would not be subject to the jurisdiction.

Mr. DELAHUNT. We are just doing our own kind of signing statements when it comes to that by extending it to the principals who comprise the National Security Council.

Mr. BELLINGER. Let me try the best I can to answer your question anyway, because I want to try to help you in the inquiry here.

It is going to vary in case to case. As I say, if the National Security Council staff got bogged down into every individual who is captured by the Department of Defense, removed by the Department of Justice, extradited by the Department of State, questioned by the CIA, we would get nothing else done. It is a small staff.

I worked close to 20 hours a day—going back to what Mr. Rohrabacher said, probably close to 20 hours a day, 7 days a week, through two wars, trying to do the best that I could. And I am proud of the work that I did. I think most people in Washington know, inside the executive branch and outside the executive branch, that I have been working for 7 years for better laws and better policies in the area of detention. I would be happy to go through the details of what I have done, but I am proud of the work that I have done.

Mr. DELAHUNT. Mr. Bellinger, no one is questioning whether you are proud of the work you have done. We are here to try to learn, and you have information that we do not have, and we find that disturbing. Not your conduct, not your behavior, not whether you did a good job.

I can assure you that the members of this panel have gone through two wars, took some very tough votes, and there are some very profound disagreements right here on this panel as to the basis for much of our foreign policy today. You understand that. I can assure you that I stay up late at night getting myself prepared to inquire of individuals such as yourself.

This is not meant to be an adversarial hearing. This is to exchange ideas, and I am hoping that we can continue this over the course of the next several years so that we can really grasp wheth-

er there needs to be significant changes in terms of how we function as it relates to diplomatic assurances.

And with that let me yield, before he takes the gavel, to my friend from California.

Mr. ROHRABACHER. Thank you very much, Mr. Chairman.

I think what we have been looking at in this series of hearings is, of course, torture, is the word that is being bandied around. That is what dominates our examination on all the issues. And I think that that word has not been thoroughly defined, and I think that is something people need to think about.

Most people believe torture is physical pain being intentionally inflicted on someone who is in captivity, and that may well not be what people mean when they are claiming that torture is being used. And to what degree is it pain and to what degree are we talking about humiliation or other forms of disorientation that might be inflicted upon someone, a terrorist suspect?

We are also talking about whether or not, once you define torture, whether or not it is actually effective in obtaining information that might save innocent lives.

So what is the definition? And once you have talked about the definition, at what point then is it effective? And then there is the debate as to whether or not, even if it saves innocent lives, whether or not the inflicting of pain on a captive is a moral thing to do. Even though that captive is a criminal engaged in murdering other people, to save the innocent people, is it right to inflict pain upon him?

And those are some of the questions that go to the heart of what we have been discussing here.

And, by the way, I worked at the White House for a long time. I guess if you don't get personally involved, it is not quite as fun as it was when I was in the White House with the NSC people, having worked with Ollie North and others.

But I will tell you this, Mr. Chairman. The people who work at the National Security Council, the people who work for the intelligence agencies, DIA, CIA, and others, NSA, people who work for our military, people who work for our Foreign Service, these people are not ghouls, and they are trying to be effective. They do not pick people up off the street to waste their time, just flippantly taking somebody.

But they do make mistakes, like everybody. Everybody in the world makes mistakes, and sometimes they do. But they are not flippant about their job. They are very serious. And if they found that inflicting certain pain in order to extract information was ineffective, I am sure they wouldn't do it. Or if you define torture beyond that and saying just humiliating someone and using pressure other than physical pain is not permitted as well, no type of aggressive action should be taken against a prisoner. If they found that to be ineffective, they are not ghouls. These are not sadists who want to just continue doing something for the fun of it.

And as we move forward in this discussion, it just seems to me that this is an implication to everything that is being said.

I was challenged by the chairman, for example, on a number of occasions to come up with information that would prove that waterboarding—"Just show me some sources where waterboarding

got someone to give information?” Now, the first question is, is waterboarding torture? It is a false sense of panic that is created in people. Our own Special Forces teams and many others, our intelligence agents, go through waterboarding as part of their training. As I say, if our own military does this, should we then be convicted of torturing? Are we torturing the people, our military? I don’t think so.

But let us look at whether or not waterboarding is torture, okay, where, again, a false sense of panic is created. And I was challenged to come up with some sources saying that it was effective, and I would like to submit those for the record right now.

We have several sources indicating that at least two al-Qaeda suspects—it says here—this is the testimony provided by Michael Hayden, of course, who is CIA director. Michael Hayden said that the information provided by two waterboarded prisoners, Khalid Sheikh Mohammed and Zubaydah—excuse me, I can’t pronounce his name—accounted for 25 percent of the human intelligence reports circulated by the CIA on al-Qaeda in the 5 years after the September 11 attacks.

We also have, coupled with that, reports that these prisoners held out until they were waterboarded; and we will put these quotes in the record. And basically having held out to give any information, shortly after being waterboarded, they began to give information that led to the unmasking of several terrorist operations, which are also detailed, and that will be for the record.

Mr. DELAHUNT. Will the gentleman yield?

Mr. ROHRABACHER. Sure. Absolutely.

Mr. DELAHUNT. I have read those reports, and there is no direct connection or nexus between the waterboarding that is now acknowledged and the information, but—

Mr. ROHRABACHER. It says here the leader of the team that captured Zubaydah—I can’t pronounce his name, I am sorry—said that he began to talk in less than 35 seconds after they began waterboarding after holding out. Now that would indicate that there was a relationship between the waterboarding and the fact that he was opening up information.

Mr. DELAHUNT. If my friend would continue to yield, I have no doubt that after 35 seconds he started talking. I am sure he wasn’t giving information. I presume he was saying, “What are you doing to me?” I am just speculating, like you are.

Mr. ROHRABACHER. Okay. It is not inconceivable to me—now, first of all, it is a debatable thing whether or not waterboarding, which is a false sense of panic in which someone’s life is not in danger and is not a physical pain but instead a psychological panic that is created, whether or not that is to be considered torture.

Other people would suggest—and, as I mentioned, this list of what the FBI had been so upset with about the behavior or the patterns of interrogation used against the 20th hijacker, none of them seemed to me to fit into physical pain being inflicted intentionally to get information, which is what I would call torture.

I am not sure whether or not—what the definition of “torture” is in some of the cases that we are talking about. I know if you apply the word “torture” to waterboarding of these gentlemen who were engaged in 9/11 or that the 20th hijacker, when he was hu-

miliated, whether or not those are considered to be torture or not. I personally do not think so. I don't believe the American people generally think of that.

But the American people do understand we have not had a major attack on this country since 9/11. There have been a lot of other smaller attacks throughout the world. But that has not been simply just our luck. It has not been our luck. It has been because guys like you are doing your job, people like the people who give you information are doing their job, the people on the front lines are doing their job, and I think that they have done a darn good job. And they have made some mistakes, and we should admit when they make a mistake and try to correct it, but we should make sure that we are indicating that the basic strategy of the United States has been good because it has prevented another 9/11.

Mr. DELAHUNT. Would my friend yield for a minute?

Mr. ROHRABACHER. Certainly, go ahead.

Mr. DELAHUNT. I think the point that Mr. Pitts and I are making is not about the types of conduct that you are alluding to. But, for example, in the case of Egypt, I think that you would agree with me—and this is from the Department of State's own Country Reports—principal methods of torture and abuse reportedly employed by the police and the secret services there, including stripping and blindfolding victims; suspending victims by their wrists and ankles in contorted positions or from a ceiling or a door frame with feet just touching the floor; beating victims with fists, whips, metal rods or other objects; using electric shocks—I think that you would agree with me that using an electric shock would amount to torture.

Mr. ROHRABACHER. Absolutely.

Mr. DELAHUNT. Thank you.

Mr. ROHRABACHER. So we both agree on that.

Mr. DELAHUNT. Dousing victims—

Mr. ROHRABACHER. But we don't agree on whether or not a situation exists where someone who is forced to strip in front—a Muslim man who was involved in the terrorist plotting on 9/11, which is the example we had in our last meeting, forced to strip and his mother and sister are called whores—which is not a nice thing. It is bizarre. But whether or not that tactic to disorient these Muslim terrorists is an act of torture, that I think is very debatable.

And, quite frankly, we are up against people who clearly—as I say, one of the gentlemen and how horrible it is that we waterboarded him is someone who bragged about beheading a journalist, an American journalist, on camera. And these people do that. They will take people out and behead them in order to what? To terrorize the population of other countries and to terrorize the people of United States. Now, is it okay to waterboard that guy and say, okay, who is working with you on this idea where you are kidnapping people and beheading them on tape?

Then again, Egypt goes ahead, and they beat people, and they do these things. That is an issue. There is no doubt about that.

Another issue is what about waterboarding when you are not inflicting pain? What about other techniques like the one that the FBI was complaining about with this 20th hijacker? They are nothing more than humiliation.

Let me ask you this, Mr. Bellinger—

Mr. DELAHUNT. If my friend would yield.

Mr. ROHRABACHER. Sure, go ahead.

Mr. DELAHUNT. This is about diplomatic assurances today. And since we are talking about Egypt, in deference to Mr. Pitts and to the questions here, I dare say I have no doubt that you would consider the act of sodomizing a prisoner torture.

Mr. ROHRABACHER. Of course.

Mr. DELAHUNT. And the concern that Mr. Pitts has suggested is securing diplomatic assurances from a nation that practices systematically torture, not, as you suggested in the last hearing, something about underwear over the head. I don't want to go into the details about that. But this is about physical torture, pulling fingernails out, cutting genitals. I mean—

Mr. ROHRABACHER. Reclaiming my time, that is not what it is all about. The fact is that most of what our hearings have been about, like last week, was an official FBI report detailing the technique of interrogation, and it wasn't about that. It was about exactly what was in that FBI report, which I just read into the record of all the things they did, none of which was pulling out fingernails, none of which was beatings, all of which were acts of humiliation, which, by the way, again, I may not think is effective, but let me get into that.

You have had to deal with people giving you information, people engaged in the activities we are talking about. Would you think that those people you are dealing with are intentionally wasting their time focusing on individuals that they think may or may not have some information or may or may not be involved with terrorist activities, or do they try to go out of their way to make sure they are not wasting their time and resources and do their very best job in trying to focus on people who might be involved in activities that would threaten the lives of Americans?

Mr. BELLINGER. I think the question that all three of you have been asking is what do we do in cases where we have got someone who poses a threat to the United States but if we return them to the country that they came from or another country that wants to prosecute them that has a bad human rights record and would torture them—the definition of “torture” is something that is defined in the convention against torture. It is defined in the U.S. statute.

What would do we do with that individual? We have a legal obligation not to send an individual back to a country where it is more likely than not that they would be tortured.

And certainly, Mr. Chairman, Mr. Pitts, we look at the reports and the human rights report that we prepare extremely seriously, and that is going to be a yellow flag and in some cases a red flag that would caution against sending someone back.

But I do have to say it is an individual determination. Simply that a country has a bad human rights record and we may be pounding on them every day with respect to their human rights record doesn't mean that every individual who is returned to that country would be tortured. And it raises a question if they have a bad human rights record and, in some cases, we will conclude we just simply can't ever send someone back.

You mentioned the case of the Uyghurs, I think, Mr. Rohrabacher. But that's where diplomatic assurances come in. Because if we don't have a good alternative, if the alternative is to let the person go into the United States, I think you will be hearing from your constituents as to why are we letting someone go who poses a risk to our country?

Mr. ROHRABACHER. The question about the Uyghurs, of course, was that the chairman and I have actually come to the conclusion, and I have looked at it, that they were not a threat to the United States. In fact, perhaps their original incarceration was an error in judgment. And when we have an error in judgment, again, we should admit it and in this case not to send them back to Communist China because of Communist China's human rights record and instead, by admitting our mistake, permit them to stay here. The chairman and I are in fact signing a letter to that accord to the State Department.

I know you wanted to get that on the record. I realize you had to get that on the record in your statement.

But let us get back to my question. People are not wasting their time intentionally unless they are doing their very best job to make sure that the people they focus on are actually members of a terrorist cell and threat to the United States; is that correct?

Mr. BELLINGER. I can tell you the Department of State does not interrogate people. But what I will say is that, with respect to others in our Government, the Defense Department, the Justice Department, and our intelligence agencies, absolutely, sir, they take their jobs very seriously.

I agree with your point that they have no desire to be interrogating the wrong people, and there is an obligation placed upon them by the people of United States to find out when the terrorist attacks—they are doing their jobs.

Mr. ROHRABACHER. When you were at NSC and you have dealt with these individuals, these professionals who are engaged in this activity, are they stupid enough to continue using a tactic like physical abuse if it is not being effective in gathering information? Or indeed is this that they have personal weaknesses like sadism or something like that really inspiring them, rather than actually they are trying to use the most useful method to try to find information to protect American lives?

Mr. BELLINGER. As you said, sir, there are a number of people involved in a variety of different agencies who are very dedicated to questioning suspected terrorists. I would urge the committee to talk to those individuals, talk to those departments about the techniques that they use.

But your basic point, which is are they there to waste their time? No, sir, I can't imagine they are there to waste their time. They are trying to do something which the American people expect them to do, which is to get information to save lives.

As far as the details, I would urge you to talk to those departments.

Mr. ROHRABACHER. I find there are two major areas of contention. Number one, what is the definition of torture, whether or not if you are inflicting pain on someone, whether that is actually tor-

ture? Also, at times what we are given as examples are innocent people who are being treated in a certain way.

That is not how you judge what your policy is going to be. How you judge it is a guilty person who is a terrorist and involved in terrorist activities. We have Khalid Sheikh Mohammed, who has been bragging this week on TV about his terrorist exploits, about murdering innocent people, that at this point where you have a guilty person or a terrorist who is bragging about his acts of terrorism, what amount of force is it morally and legally justified to use against him in order to obtain information that will save human lives?

The issue of some innocent person who has been accidentally picked up, that is not how you decide whether or not that policy is the right policy. Obviously, no one even wants that person picked in the first place.

In the case of our Canadian friend that we had here, in his testimony, that was obviously a mistake. The Canadian officials gave our people wrong information, and certainly he did go through some problems.

Which leads me to this last question: How many people have been, in your understanding, in rendition programs? We were told about 90 to 100 people.

Mr. BELLINGER. Sir, I don't have the answer to that question. And part of it is definitional.

Long before this administration came into office, renditions were conducted to capture suspected terrorists around the world, bring them back. A man named Amir Kanzi, who shot two CIA officials—I know you were in Congress at the time—outside the CIA was captured in Pakistan and rendered back to the United States because it was not an extradition or through otherwise a normal legal process.

So I don't have those details as to what would count as a rendition.

Mr. ROHRABACHER. Whatever it is, let us keep in mind when we are talking about these policy issues dealing with torture and rendition and sending people back, all of this is talking about a relatively small number of people; and in that relatively small number of people, again, we have had our own officials doing their very best job to make sure that their focus was on people who they believed, honestly believed, were engaged in activities that could threaten the United States and the people of the United States. We are not frivolous about it.

And even among that small number of people there were mistakes that have been made, and that should be admitted. But let us not try to look at this like we are talking about thousands of people, it's a huge American policy, and blow this out of proportion. Which is what I believe, of course, every time you use the word "torture" dealing with nonphysical pain interrogations, I think it is way out of line.

So, with that said, thank you very much.

Mr. DELAHUNT. The gentleman from Pennsylvania, Mr. Pitts.

Mr. PITTS. Thank you, Mr. Chairman.

Just to follow up on this Uyghur situation, the Department of Justice Inspector General report had a very interesting relevant

footnote, 134, where the IG revealed that an FBI agent told the IG that Chinese Government officials came to Guantanamo and interrogated the Uyghurs being detained there by the United States military. And he reported that at the request of the Chinese Government interrogators, these people, the Uyghur detainees, were subjected first to forced sleeplessness and then low-temperature rooms night and day before questioning by the Chinese officials.

The key point here is that United States Government officials invited the very Chinese Government, that mistreated the Uyghurs and caused them to flee China to the United States to interrogate the Uyghurs at a highly restricted U.S. military base where, ironically, Members of Congress are not even allowed to talk to the detainees. And allegedly the U.S. military personnel were directed to soften them up, abuse them, whatever you want to call it, before getting them ready for questioning by the Chinese officials.

Who made the decision to allow the Chinese Government to interrogate or persecute a religious minority in a United States military base? Who would make that decision?

Mr. BELLINGER. I assume that would be the Department of Defense, and you would have to put the question to them.

I will say, trying to connect this with the chairman's question, that we are concerned about the situation of the Uyghurs. We made the decision early on because we thought they would be mistreated if returned to China. That even though a number of years back we had concluded not that they were wrongly picked up—they were picked up because they were in a training camp in Afghanistan—but it was concluded rapidly that they were not trying to fight us but they were trying to fight the Chinese. So we made the decision early on that they need to be sent somewhere but they just couldn't be sent back to China.

But as far as that situation in Guantanamo, you would have to ask the Defense Department.

Mr. PITTS. Are there instances of other foreign government officials interrogating detainees being held by the U.S. at Guantanamo?

Mr. BELLINGER. It is my understanding as a general matter, sir, that the foreign governments who we want to take back their nationals are invited in. So that the British, the French, the Germans, any number of countries who have nationals at Guantanamo who have asked for access to their nationals and who we want to take their nationals back are invited in now. That's not in all cases, so it is not across the board.

Mr. DELAHUNT. Will the gentleman yield for a moment?

Mr. PITTS. Yes, Mr. Chairman.

Mr. DELAHUNT. I think—and we will obviously invite the Department of Defense to come before us and explain why the Communist Chinese security agents were allowed to interrogate the Uyghurs. I think that is a question that must be posed, and I think my friend from California concurs with me on that.

Mr. ROHRABACHER. If the gentleman, Mr. Pitts, would yield.

Mr. PITTS. Yes.

Mr. ROHRABACHER. I do concur, and I would associate myself with the outrage of Mr. Pitts and my chairman. And the fact is that this stems from the fundamentally flawed China policy itself

that this administration treats one of the world's most vicious dictatorships as if it is a country like Belgium, or a democratic country. And what we are seeing is flowing from that fundamental error on the part of the administration or amoral policy of the administration.

So I associate myself with the moral outrage of both of my colleagues on that.

Mr. PITTS. And let me just conclude. If you would provide a list to the committee of all the countries to which the U.S. has returned individuals and has received diplomatic assurances—could you provide that to the committee?

Mr. BELLINGER. We do have that information; and I know the chairman will be meeting with my colleague, the Ambassador for war crimes, who is the one who has the lead responsibility. And he travels around the world, in fact, trying to negotiate the return of people from Guantanamo, because it is really the only way to get people out of Guantanamo. I am sure we will be able to provide that.

[The information referred to follows:]

WRITTEN RESPONSE RECEIVED FROM THE HONORABLE JOHN B. BELLINGER, III, TO QUESTION ASKED DURING THE HEARING BY THE HONORABLE JOSEPH R. PITTS

We understand that relevant committees of Congress need to have information necessary to perform their oversight and other responsibilities relevant to the conduct of United States foreign policy. At the same time, we must be mindful of the importance of protecting communications that foreign countries have provided to the United States in confidence on this sensitive subject. We believe that an accommodation could be made in particular cases to ensure that members of Congress and their staff with the necessary security clearances would be informed concerning such confidential communications. In instances in which such information is related to ongoing litigation, the Department would consult closely with the Department of Justice.

Mr. PITTS. Thank you. I yield back, Mr. Chairman.

Mr. DELAHUNT. Well, I look forward to my meeting with Mr. Williamson. I think it is very good to have. However, these venues where people are listening and hearing, and the American people do have a right to know.

But putting that aside for a moment, first of all, let me ask you this. For foreign intelligence agents, the security apparatuses of particularly nations that have an abysmal record in terms of human rights are invited to Guantanamo, is there any clearance, visa, any document that has to be provided by the Department of State for their arrival, whether it is via Miami—I don't mean to put Miami on the spot, but, to get there, does it require approval by the Department of State?

Mr. BELLINGER. I don't know the details of how the visits are handled. I am aware that while some countries have been invited to visit their nationals, other countries have not been invited to visit their nationals. In some cases, individuals, countries who wanted to visit their nationals, the people who they wanted to send have been excluded. But I don't know the details, but we can certainly get them for you.

Mr. DELAHUNT. That would be most welcome.

[The information referred to follows:]

WRITTEN RESPONSE RECEIVED FROM THE HONORABLE JOHN B. BELLINGER, III, TO
QUESTION ASKED DURING THE HEARING BY THE HONORABLE BILL DELAHUNT

The Department of Defense does not seek State Department approval for foreign government visits to its detention facilities at Guantanamo Bay, Cuba. Foreign government officials who travel to Guantanamo through the United States would be required to obtain a visa for transit unless they are from visa waiver countries.

In addition, DoD advises that all foreign government officials who are granted access to detainees at Guantanamo must comply with DoD directives, policies, procedures and applicable U.S. and international law. Furthermore, all foreign government interrogations, debriefings and other questioning of detainees in DoD's control are monitored by trained and certified DoD interrogators to ensure compliance.

Mr. DELAHUNT. Because we did have testimony from an attorney that represents an individual by the name of Jabbarov, who is an Uzbek, who it is my understanding has been cleared for release, who was visited by an agent of the Uzbekistan security forces.

Now, I don't have to read to you the record of the Uzbek when it comes to the practice of torture. They are well known. They boil people alive. I am sure that you are intimately familiar with the massacre in Andijan. And yet that the United States is, in terms of the rest of the world, inviting the thugs of Islam Karimov to interview a prisoner in our custody and our control, how do we respond to that?

Mr. BELLINGER. I am not aware of whether that happened or not, but what I can say—

Mr. DELAHUNT. Let us presume for the sake of our discussion it happened.

Mr. BELLINGER. What I can say is that I would—given the human rights record of Uzbekistan, it is unlikely that anyone would be returned from Guantanamo to Uzbekistan.

Mr. DELAHUNT. That is true. And we are having difficulty securing—and this is part of the problem, Mr. Bellinger, which is significant. Because Guantanamo, as you are well aware, is symbolic at this point in time. It is revealed in all of the polling data that the Department of State has conducted regarding America's image in the world, and that stigma is clearly a deterrent to relocating the individuals that there is a consensus now should be allowed to leave Guantanamo and resettle someplace else, and we can't find a nation to take them. It is a real problem.

And what I find frustrating is that I am visited and I am sure other members of the committee are visited by representatives of other governments that are saying to us—independent of the executive branch because they read the newspapers. They know that this administration has 6 months or 7 months to go, and so everything is looking forward prospectively.

Yet none of us want to see individuals continue to be detained there that don't deserve to be there. If they deserve to be there, fine. Let us charge them. Let us give them a trial and move on.

But this is hurting us, and yet there is no reaching out, if you will, on the part of the administration, whether it is through you or whether it is through others, to utilize maybe whatever political capital that I might have along with the ranking member to assist in what I would suspect is a common goal. Because people do walk into his office, in Mr. Pitts' office, and my office, who say we want to see some demonstration on the part of the United States to ac-

cept responsibility for their mistakes, and if that happens, we will do what we can to resolve the issue.

Now, some might like to keep Guantanamo open forever, but it is not the next President of the United States. We know that. We know Senator McCain's position, we know Senator Obama's position, we know Secretary Gates' position and Bob Barr's position, who is a friend and colleague from years ago; everybody wants to close Guantanamo.

Secretary Gates speaks to that issue I think very eloquently. And I should note for the record that I have said it here publicly. I respect Secretary Gates. I think he is a man of integrity, and I think he is thoughtful and understands the implications for the United States long after he is gone as the Secretary of Defense.

So I would hope that some of the discussions that we have had among ourselves, whether it be in the case of Mr. Pitts or Mr. Rohrabacher or myself, that maybe as this administration exits that we can achieve something in terms of restoring America's claim to moral authority in this country. It is very, very important because, collectively, it is us. It is us, and we have got to take strides. But we have to continue to have these hearings to know what went wrong and how do we address it.

My friend talks about physical torture, and we know that Mr. Arar was sent to Jordan and then to Syria. And I really found it amusing when I read the United Nations Rapporteur report on the Jordanians that he got there on a Jordanian airline, got off the plane, and after a couple of conversations said, "I want to go to Syria." I mean, where is our credibility under those circumstances when that is the U.N. Committee on Torture's Rapporteur?

And then we read—my friend is concerned about physical torture and about Syria's record according to you, according to your department, not according to me or Rohrabacher or Pitts but according to you. He is worried about the methods of torture and abuse.

Well, I am sure he would concur that electric shocks, pulling out fingernails, burning genitalia, forcing objects into the rectum, sometimes while the victim was suspended from a ceiling, alternately dousing victims with freezing water and beating them in extremely cold rooms, bending the detainees into the frame of a wheel and whipping exposed body parts, using a backward-bending chair to asphyxiate the victim or fracture the victim's spine and stripping prisoners naked for public view—

And according to Amnesty International there are 38 types of torture and ill treatment used against detainees in Syria. What kind of diplomatic assurances would be satisfactory, would be sufficient?

That is the tripwire. Your reports are the tripwire, Mr. Bellinger. Whether they are being extraordinarily rendered, whether they are being released from Guantanamo, whether their removal from under 235 or even 240—we can talk all the legalese we want. But, in the end, we are being judged by a world that is being very harsh on us with cause. And I am not questioning the integrity of individuals and how hard you work and how hard I work, how hard Rohrabacher works or this staff here or your staff out there. But we can't lose sight of this. That is my point.

You spoke about three contexts: Removal proceedings under the immigration statute, Guantanamo, and—

Mr. BELLINGER. Extradition.

Mr. DELAHUNT. And extradition. Clearly, extradition, I don't think anyone has got a real problem with that. If there is an independent judge out there that says, okay, this is good—but even in diplomatic assurances, I wonder if we would have gotten into this situation if we had had some sort of independent board to review the sufficiency of diplomatic assurances.

I am not talking about people with any particular bias. I am just talking about getting the facts, determining them, and then making recommendations. And those recommendations could be advisory or they could be binding.

Well, let me ask you this: What about the area of extraordinary renditions? What is the role of the Department of State in terms of extraordinary renditions, in terms of the security of diplomatic assurances, if there is a role?

Mr. BELLINGER. Well, first, I guess we should start with the definition of what we mean by “extraordinary rendition.”

Mr. DELAHUNT. Let me give you my definition.

Mr. BELLINGER. Please.

Mr. DELAHUNT. It means grabbing somebody outside of another country or taking somebody from another country and sending them to a third country where there is a likelihood they will be tortured, in the context of diplomatic assurances.

Mr. BELLINGER. We stand ready—the Department of State stands ready—if we are asked by another government, department or agency to seek diplomatic assurances, we stand ready to provide those in the immigration context, for example—

Mr. DELAHUNT. Let us stick to extraordinary renditions. I think it was Mr. Pitts that talked about 100 or so extraordinary renditions. How many requests did you get from other government agencies to determine the sufficiency of those diplomatic assurances?

Mr. BELLINGER. I have only been legal adviser for 3½ years, and I would have to go back to look at what the Department has ultimately—

Mr. DELAHUNT. During your 3½ years—and I know you can't give me a specific number but give me a range.

Mr. BELLINGER. I can't actually think off the top of my head how many cases there have been where—

Mr. DELAHUNT. One, five, ten?

Mr. BELLINGER. I would have to get back to you.

[The information referred to follows:]

WRITTEN RESPONSE RECEIVED FROM THE HONORABLE JOHN B. BELLINGER, III, TO QUESTION ASKED DURING THE HEARING BY THE HONORABLE BILL DELAHUNT

To the best of my knowledge, the Department has not been asked by other agencies to obtain assurances from foreign countries in the type of situation described above.

Mr. BELLINGER. As I say, we stand ready if we are asked by another agency to seek diplomatic assurances to get them.

Mr. DELAHUNT. I guess what concerns me is I am not sure that you are asked in each case. That is the concern that I have. I am

speculating that there might be some agencies that don't seek your intervention, don't seek your good offices, if you will, in an attempt to secure those diplomatic assurances. Would you agree or disagree with my speculation?

Mr. BELLINGER. Certainly with respect to people who are returned by the Department of Defense from Guantanamo, we have been involved in getting diplomatic assurances in dozens, and dozens, and dozens of cases. With respect to immigration removals, we are getting involved in those cases when we are asked.

Mr. DELAHUNT. Were you asked in the case of Maher Arar?

Mr. BELLINGER. I think you acknowledged at the beginning of the hearing the precise handling of the case is classified. We are happy to give you a classified—

Mr. DELAHUNT. Let me tell you that the report from the Inspector General said that you were left out.

Mr. BELLINGER. I will have to let the report from the Inspector General speak for itself.

Mr. DELAHUNT. I just wonder if the Department of State—if that is accurate. We always have to put the appropriate caveats or preface everything with the appropriate caveats. If that were true, then maybe we would not have upset our friends on the northern side of our border where I can tell you it is clear, according to the polling data, the image of the United States has suffered as a result of this. There are concerns that are expressed to me privately by Canadian members of Parliament that, as far as cooperation is concerned, they are not happy. There are consequences.

Mr. BELLINGER. As you know, we have an MOU now that was entered into with Canada that would make clear that if either of our countries is to return either of our nationals to a third country that we would notify one another, and that was something that stemmed out of the Arar case. And I know Secretary Rice has made clear to you personally that the communication could have been handled better.

Mr. DELAHUNT. If you will indulge me for a minute.

Mr. ROHRBACHER. Mr. Chairman.

Mr. DELAHUNT. I yield to my friend.

Mr. ROHRBACHER. I am going to have to go over to the Rules Committee where I have an amendment coming over on another piece of legislation. I would just like to thank our witness and again just stress that I believe that our Government does not have evil intent, and I believe that we have people who are heroic people who have protected us since 9/11 from a very, very serious foreign threat.

I hope that the focus of this subcommittee, by trying to find the mistakes they have made or the flaws in their judgment over the years has resulted in some suffering of some innocent people, I hope that no one listening to this or your friends at the State Department and other people in our Government who are working hard for us do not take this as a personal insult. Because we are not just here to nitpick.

And I think the chairman is right. We serve a useful purpose. And then sometimes people get a little lazy and are willing to overlook some things if they don't think anybody is looking, isn't watch-

ing. So we serve as a watchdog force and an incentive for people to do their job.

But, by and large, I would say I believe people have done a terrific job with limited resources, limited information. They are not trying to convict somebody after an attack has happened. They are trying to prevent future attacks. And we haven't had a massive attack on our country since 9/11, and that is a very good thing, and I am very grateful for it.

So thank you, Mr. Chairman.

Mr. BELLINGER. Thank you, Congressman.

Mr. DELAHUNT. I thank my friend.

I want to get back to, very briefly, the legal analysis that you provide in terms of the CAT obligations. In just a quick review of the government's position at different times under both Mr. Taft and Mr. Sofaer, who was actually part of the Reagan administration and actually participated in the crafting, they seem to have a divergent point of view with respect to the reach of the convention in terms of our responsibility, extraterritorially. Care to comment?

Mr. BELLINGER. I would be happy to comment.

You are referring to Article 16 of the CAT, the question of whether the prohibition on cruel, inhuman, and degrading treatment applies extraterritorially; and the position of the Department of Justice was that it did not because the definition is tied pursuant to a reservation provided by the Senate to the 5th, 8th, and 14th amendments that don't apply outside.

Mr. DELAHUNT. I am sure you are familiar with the interpretation of that reservation by others that disagrees with yours.

Mr. BELLINGER. No, it does not. I agree with my predecessors that I believe Article 16 does apply extraterritorially. However, the position of the Department of Justice is binding on the U.S. Government with respect to the 5th, 8th and 14th amendments. So I do not have a different view on that subject.

Mr. DELAHUNT. You know, again, I don't want to get into the arcane, and I respect your legal scholarship, other than simply to say I disagree with your conclusions. But I do think that it is irrefutable in terms of the language that is part of the congressional act barring refolement, if you will.

Let me just read this into the record: Congress confirmed the CAT obligation not to expel or extradite on grounds for believing the person would be in danger or subject to torture, regardless of whether the person is physically present in the United States.

I think that is clear on its face. My own belief is, however you interpret, and there have been disagreements as far as the committee on torture in the U.S. position as articulated by yourself, but from a congressional perspective, I think the statute, as you say somewhere in your testimony and you refer to it as a policy, I think it is more than a policy. I think it is the law of the land in binding on the executive. You are free to respond. I just want to be clear as a matter of record what this particular Member of Congress's interpretation is of that section of the FARRA Act.

Mr. BELLINGER. Let me—I don't think there is a disagreement here either between me and you, or between me and my predecessor, so I just want to make this clear for the record. There has been a consistent position of the State Department that the Article

3 of the CAT does not have an international law obligation outside the United States because the language is similar to what is in the refugee convention. The interpretation provided in the refugee convention is the same and has been interpreted by the Supreme Court as not applying outside the United States. And that has been a consistent position of the Legal Adviser's Office.

Now with respect to the statute that you cite, that is not an interpretation of the treaty. That is a statement that is included in a congressional act. And so I don't disagree with you on that point. So this may be really a distinction without a difference.

Mr. DELAHUNT. In any event, the reality is that the act, the statute itself, has binding obligations upon the executive. That is my interpretation, and I wonder if you agree with me or not on that.

Mr. BELLINGER. It sets out the statement of policy in the beginning. It says it shall be the policy of the United States not to transfer anyone to a country. It then sets out binding obligations with respect to regulations that have to be put forth.

As I have said to you, we do, in addition to transfers from the United States, extradition immigration removals. We take that obligation outside the United States quite seriously.

Mr. DELAHUNT. As a matter of policy.

I guess where we disagree is that what I am submitting to you is that it is not a matter of policy, domestic policy; it is the statement itself and what I read to you is reflective of congressional intent as it relates to the so-called FARRA.

Mr. BELLINGER. 242(a) says, "a policy," and in fact, it is entitled, "United States policy with respect to the involuntary return of persons in danger or subjection to torture. It shall be the policy of the United States—"

Mr. DELAHUNT. You can finish that policy statement.

Mr. BELLINGER. Certainly Congress passes statements of policy all the time, and as it is a law—

Mr. DELAHUNT. Would you concur that it is evidence of congressional intent?

Mr. BELLINGER. Absolutely, sir.

Mr. DELAHUNT. Okay. We are getting closer, Mr. Bellinger.

You make the statement about diplomatic assurances in the senior level communications with which the foreign government on which they are based. What does "senior level" mean? Who in the Department of State picks up the phone, and who do you call? I mean, is this Legal Adviser Bellinger to the Egyptian foreign minister, Bashir Assad, or—

Mr. BELLINGER. This is a good question. I actually—

Mr. DELAHUNT. Thank you.

Mr. BELLINGER. I appreciate the chance to talk about this in the hearing, because it shows in fact the difficulties in this area. We may start to get—it depends what we feel is necessary to get a credible assurance. And the more problems we may have with the human rights record of a country, the higher up, the more detailed assurances we may want to get so that we can be absolutely confident.

So if it is a country—and we have had to seek assurances with respect to countries that would surprise you, like Mexico or India, because they have had isolated cases of mistreatment. In those

cases, it may not be necessary to get a high level assurance from the justice minister of the country. It may be important to make sure that you have it from the prosecutors dealing with the case.

In other cases, if there are very serious questions about the track record of the country such that it is absolutely necessary to put the highest levels of country on the hook and to do it in writing, then we will do it that, and then high levels of our Government that could include very senior officials of our Government will be the ones who will—

Mr. DELAHUNT. Such as, I mean, Secretary Rice?

Mr. BELLINGER. It would depend on the case. It could be the Secretary. It could be the Deputy Secretary. It could be the Assistant Secretary.

Mr. DELAHUNT. What about yourself, Mr. Bellinger? Have you ever had direct engagement with a potential receiving state?

Mr. BELLINGER. I have not had to do that. It generally falls to me to help, provide advice.

Mr. DELAHUNT. You delegate it to someone else.

Mr. BELLINGER. No. I provide here as to what is going to help, what will be necessary to satisfy the conditions.

But I think again the case of Guantanamo is a very good example. It has taken us years to return some people because it has taken us that long to get assurances out of governments. And until we think the assurances are credible, then we don't return people.

Mr. DELAHUNT. You talk about the need for confidentiality. I have serious reservations about confidentiality in this context. I mean, if we are going to have confidentiality, then why do we produce annual reports, annual Country Reports? We are talking about—I mean, I had staff pull all of these countries, and clearly, there is a predicate that, if you have to secure diplomatic assurances, you usually are not going to ask the Canadians, despite the fact that there was a finding that it would be detrimental to U.S. interest if we had sent Mr. Arar back there by the Deputy Attorney General. I always thought that they were pretty friendly. And clearly, I have never seen them on a state sponsor of terrorism list.

But be that as it may, I mean, whether it is Egypt, Jordan, Syria, Iran—this is according to the declaration of Joseph Benkert. People have been sent from Guantanamo to Iran. And it indicates in our report, in your reports, there were numerous credible reports security forces and prison personnel tortured detainees and prisoners. This is Iran. Tajikistan. Confessions obtained by torture, beatings and mistreatment were common. Libya, the nine reported methods of torture and abuse included chaining prisoners to a wall for hours, clubbing, applying electric shock, applying corkscrews to the back, pouring lemon juice on open wounds, suffocating with plastic bags.

You are familiar, of course, with the six foreign medical personnel that were released. Their stories are horrific. And yet, according to the declaration of Mr. Benkert, people have been sent from Guantanamo to Libya. According to Mr. Benkert's declaration, which I am sure you are familiar with, it is a matter of public record, people have been sent from Guantanamo to Sudan. They are beaten and harassed. I mean, Ethiopia, Somalia, Thailand. The list goes on and on and on.

Mr. BELLINGER. One, in a number of these cases the individuals themselves and their lawyers have said that they want to go back to those countries and do not believe that they will be mistreated if they will be turned back to those countries, which I think emphasizes the point that, even if a country has a terrible human rights record, something that we have outlined in our human rights report, that nonetheless not every person who goes back to that country will be mistreated. So we are not aware, in fact, of any cases of mistreatment with respect to a number of those countries that you have mentioned.

We are aware of some cases—

Mr. DELAHUNT. But, you know, even if you accept the premise that there is some validity to diplomatic assurances, I have yet to see any evidence whatsoever of an effective mechanism to review what occurs in the aftermath of the return.

Mr. BELLINGER. We have got, as I say, follow-up mechanisms either for the State Department to go in or human rights organizations to go in—

Mr. DELAHUNT. Do the Iranians really care what we think? Do they—are they going to open up their prisons and say, come on in and bring the doctor? I mean, as a practical, real world reality, there is just—do you trust the Libyans?

Mr. BELLINGER. Congressman, you are putting your finger as a policy matter on the great dilemma for our Government, where you have people in Guantanamo who can either keep staying in Guantanamo for years, and years, and years, or we can try to negotiate their return to different countries and we—

Mr. DELAHUNT. I encourage, you know, particularly those that are not a threat to the United States—and we have had testimony here, I am sure that you might be aware of it, coming from individuals who are part of the system there, who are, you know, involved in the CSRTs and the ARBs, and we have heard plenty of testimony about the bounty system, et cetera. We know that there have been hundreds that have been released. These are more than just mistakes. This is a system that didn't work and that has caused us real embarrassment. I can go on, and on, and on. But I also know that we have got to do something about it to restore, as said earlier, our credibility internationally.

And I am discouraged because no one from State or DOD has picked up the phone and said, "Listen, you are involved in this issue; we can use your help."

Because, you know what, with all due respect, Mr. Bellinger, you need our help.

Mr. BELLINGER. I appreciate that. There is probably—I spend an enormous amount of my time outside the country asking foreign governments for their help. We have had 30, 35 countries who have their nationals in Guantanamo, and we want them in many cases to take responsibility for their own nationals.

I was not personally aware that you had had these discussions with foreign Parliaments. I hear pretty regularly from foreign Parliaments who are concerned about Guantanamo. And we do need help in getting people returned. And if that is an additional avenue, essentially through parliamentary processes side, I would wel-

come the assistance. That is new information to me, and I appreciate the offer.

Mr. DELAHUNT. In your statement, I am reading your own words here: "Credible diplomatic assurances from the receiving state may reduce the risk of torture."

I mean, the reality is, you can't eliminate the risk. And earlier on, in your written statement, you talk about it being an absolute in terms of a bright red line or a black-and-white situation. I guess what I am suggesting is that there has to be a better way than to rely on diplomatic assurances, given all the problems that we have seen. And I am not talking just about extraordinary rendition. I am not talking just about the Maher Arar case. I am not talking just simply about the case that concerns Mr. Pitts and the Uyghurs. But as a matter of policy to ask people to make these kind of decisions that inherently are going to result in mistakes, further mistakes; it is a policy that really needs to be reviewed.

And I know that you know the committee on CAT has recommended the disuse of diplomatic assurances. I am open to some discussion on it, but clearly, that is the direction I believe that most European countries are going, including the Swedes.

Mr. BELLINGER. On that point, sir, I have had discussions with numerous European countries on precisely this point, and they have exactly the same concerns. They have terror suspects in Britain, in Italy, in other countries, people who have come from Jordan, Egypt, Saudi Arabia, other places who they do not want to stay in their countries. And the only way to send them back, because they have the same obligations and the CAT, is to get diplomatic assurances.

I agree with you, sir, it is not an easy area, but I think what you do have to look at is the alternatives. The alternatives are, one, you just leave people in Guantanamo. Or if they are people in the United States, you let people go free in the United States who would pose a risk to our citizens. And that is not acceptable either. So what we do is we try to take the best middle road.

Mr. DELAHUNT. But what I am suggesting is that a thorough review and investigation into the background of many of these cases now—let's use Guantanamo, I think reveals that many, not all, but many were there at the wrong time, at the wrong place. And we came up with a policy that said for \$3,000 or \$4,000 or \$5,000, you give us someone from al-Qaeda. You know what, if I did that with the informants that I utilized during my previous career, I would have had them lined up from here over to the White House for the handout. And they would have given me exactly when I wanted to hear, exactly what I wanted to hear. And I took a lot of pride in minimizing the use of informants.

And I dare say that this is a mistake that was made early on to create a bounty system. And now we have got ourselves into this mess; \$3,000, \$5,000 to an Afghani or to a Pakistani in war-like conditions, of course you are going to say it.

And you know, when it comes to torture. My friend talks about all this great information. I want to do a panel and have the professional interrogators out there that tell you that the information that they get in the ways that they do it is far more valuable than the let's break Khalid Sheikh Mohammed down; in 25 seconds, he

is going to tell us. That is great in the movies, okay? That is good cowboy material. But in real life, good FBI, good DIA, good military interrogators, good CIA interrogators will tell you, you are not going to get it. You are not going to get good information. That is why we have particular military personnel that are currently active that are saying, "Don't use torture," not because of any moral implications; putting them aside, but does it work? And the answer is no.

We would like to think it works, because we can go back to those cases where we are saving the lives of tens of thousands of Americans. Everybody wants to save the lives of thousands of Americans. No one wants to even contemplate another 9/11, but we want to do it in a way where we stay true to our values and at the same time are much more effective.

I dare say that if, 20 years from now, we open up all the books, we will find that more information came as a result of good work by professional FBI agents doing the kind of things that they do very, very well, which is elicit good information, having vetted and having come back. That is the direction you are going to go in. That is how you win.

Mr. BELLINGER. I am sure we will have learned a lot of lessons from this period. I have personally supported a lot of change in our Government over the last 6 years where we can have learned lessons.

I do think on the diplomatic assurances, it is a tough one. This is something that has continued from administration to administration, because it is simply—it is not something to do lightly, but there are going to be rare cases where one has someone in the United States, who we are not going to want to let go in the United States. And we want to return them somewhere, and the best we can do is to try to get assurances. If, even with assurances, we still think it is more likely than not that someone will be tortured, then we will not return the person. And that is what I meant by the absolute bar. If we, no matter what we get, still conclude it is more likely than not that someone is going to be tortured, then you can't balance that against what the threat is posed by the individual.

But if through getting diplomatic assurances, by getting high-level assurances, by getting follow-up mechanisms so that we conclude that a foreign government would really not mistreat the person, then we think we have done a service for the country because you allow someone to be expelled who would pose a threat to our country, but at the same time, we have minimized the risk they would be mistreated in their country. It is a balance in that case.

But there is an absolute bar; if we think someone is more likely to be tortured, we won't send them back.

Mr. DELAHUNT. Let me conclude with an off-the-wall question here. Are you familiar with the case of Luis Posada Carriles?

Mr. BELLINGER. I know the Posada case.

Mr. DELAHUNT. I find it really fascinating. There is good hard evidence, solid evidence, FBI evidence. It had nothing to do with the evidence in Venezuela or Cuba. Let's put all of that aside. And yet I hear the position of the State Department is that, as I look at the Venezuelan record on torture compared to some of the coun-

tries that I have alluded to, I mean it is a Club Med. It could be a Club Med compared to what we have heard previously.

And since this is on diplomatic assurances, but we won't extradite despite the fact that we have an extradition treaty because the Cubans might come over. Some of these countries make the Cubans look good. I was in Combinado del Este back in 1988. To be perfectly candid, I have seen some maximum security prisons in this country that are as tough as it gets. In fact, in my old career, I had the unenviable task of investigating and prosecuting crimes in most of the Commonwealth of Massachusetts penitentiaries. It was a lot of lessons learned. We did everything by videotape. But in any event, I find this—and I understand that it is not a good relationship between George Bush and Hugo Chavez, so I understand the realities.

But, again, we find ourselves in this inconsistent position, and maybe I am wrong, but have we sought or has the Venezuelan Government put out in their extradition request assurances that Posada Carriles would not be rendered, if you will, or Cuban agents would not be allowed to participate or interview Mr. Posada Carriles and he would not be subject to torture? If you know. I don't know if you know that.

Mr. BELLINGER. I don't know what is in their extradition request. Normally that would not be the place where one would be providing assurances. The extradition request would simply put forth the evidence to the Department of Justice that would justify why we would be required to extradite him under the terms of the treaty. That is not the place that the assurances would then be provided. It is my understanding that he is—we are not seeking his return to Venezuela at this time.

Mr. DELAHUNT. No, I understand that. In fact, he is having art exhibitions down in Florida that are getting a lot of attention, that are raising the questions that others have about our inconsistency. I mean, there is evidence, and I don't know whether you have had an opportunity to review the file, that indicates a probability that he was implicit in the destruction of a Cuban airliner with 73 civilians on board. And yet here we are dealing with terror and terrorism, and we are seeking diplomatic assurances from Libya, and in Syria and Egypt and Saudi Arabia and the whole list—and Tajikistan and Uzbekistan. I mean, do these kind of political concerns, and I don't mean it in a partisan way, but in terms of a public diplomacy approach, are they factored into the decision making? Because, again, these inconsistencies, I think, caused us to be accused of hypocrisy.

Mr. BELLINGER. Well, the Posada case again shows the difficulty of someone who could pose a threat to the United States. He had been involved in bombings 30, 40 years ago. I think he is now in his 70s, but for someone who had participated in active terrorism, even decades ago, there would be concern about having that person go free in the United States.

But I do think it is something both, certainly for us in the executive, it is a shared responsibility for all of us, the executive, the Congress and the courts. What does one do, not necessarily with a 70-, 75-year-old man, but with a person who, let's hypothesize, really does pose a current threat to our citizens but cannot be held

because they have served their term, they can't be convicted of a crime, it is only an immigration violation? Is it better to just let that person go free in the United States where they will pose a threat to our citizens, or is it better for us at the State Department to try to have them returned to the country that they came from, assuming that we can get credible assurances? That is the dilemma.

Mr. DELAHUNT. Again, but we, according to you, haven't even made the effort to get credible assurances. I mean, I guess what I am suggesting is, you know, okay, Venezuela, you know, give him a nice mountaintop retreat with, you know, around-the-clock medical aid and all of the accoutrements of fine living, or utilize our positive relationships with countries in Latin America to find a place for him. We get hurt by this.

Mr. BELLINGER. We have tried to find other places.

Mr. DELAHUNT. I know you have.

Mr. BELLINGER. That shows the difficulties and that often what I hear when there is the dilemma of let someone go in the United States versus send them to a country where they might get mistreated, people say find a third country for the person to go to. And we often do. That is what we tried to do with the Uyghurs. It is a great personal frustration for me that we have not been able to find places for people like the Uyghurs or others to go to. It often sounds like it is an easy answer when others say, find a third country for a person to be sent to, and we don't find it.

Mr. DELAHUNT. I do believe there exists on the part of some governments that I personally have communicated with a willingness to do something if there is some action on the part of the United States to accept some within our midst, within our own population, and resettle them here. Because I think to allow it to continue is a terrible mistake.

Mr. Bellinger, thank you very much.

And we look forward to seeing you again.

Mr. BELLINGER. Thank you, sir.

Mr. DELAHUNT. We are now adjourned.

[Whereupon, at 4:30 p.m., the subcommittee was adjourned.]

