#### CJA Attachment L

#### Alberto Mora Keynote Speech

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My thanks to the CJA for inviting me to this important event.  I am deeply honored to be with you here today.

This evening, I’ll address the self-inflicted wounds our nation has suffered from the decision to adopt cruelty as a weapon of war, and the even graver damage that we would suffer if we were to legalize cruelty, as some have advocated.

I use the term cruelty, not torture, because – as everyone here understands – there is a legal distinction between the two and cruelty is the lower level of abuse.  Cruelty can be as effective as torture in destroying human dignity, and there is little or no moral distinction between one and the other.  If cruelty is abolished, so is torture, but not vice versa.  Consistent with our traditions and laws, it is the application of all pain – not only severe pain – that we wish to prohibit.

**I.**

    Once again, on September 11, history demonstrated the essential truth in Leon Trotsky’s dictum that “You may not be interested in war, but war is interested in you.”   Once again, the wisdom and necessity of maintaining vigilant and strong defenses had been demonstrated.  And, once again, we were asked by some to compromise our rights in the belief this might enhance our security.

  Everyone here will be aware that there have been occasions during our history – usually during wartime or other times of perceived danger – when our nation has transgressed our laws and values in pursuit of security.  Such excess occurred during the Civil War, World War I, and the Cold War.  We all recall with shame and revulsion the internment of U.S. citizens of Japanese ancestry during World War II as another such historical example.   We all recall how these patently illegal internments were found to be lawful by the Supreme Court in 1942 in its Korematsu decision.  And, by remembering these episodes, we resolve to apply yesterday’s lessons to help ensure that similar mistakes are not made today.

But, as many Americans fully understand, we have repeated these mistakes.  We have departed from our laws and values during this War on Terror, and, in the process, we have damaged them.  The greatest damage has been caused by our embrace of cruelty.  We have forgotten the wisdom in Albert Camus’ observation that a nation fighting for its values – as we are fighting externally and internally for our values in this War on Terror – must take care that it not kill those values with the very weapons used in their defense.

Whatever else may be said about this war in the future, it is historically significant because we as a nation – despite our laws, values, and traditions – consciously applied cruelty against captives and sought to amend or reinterpret our laws so as make this, which was illegal, legal.  What Korematsu signifies for World War II, the decision to apply waterboarding to our captives represents to this war.

**II.**

Cruelty harms our Nation’s legal, foreign policy, and national security interests.  Before we examine in greater detail these three categories of harm, let’s take a moment to discuss what cruelty is.  It is important that we not only dwell on abstraction, but also seek to understand some of the physical reality.

Here’s how we treated Mohammed al-Qahtani, the detainee believed to be the “Twentieth Hijacker”.  According to the journalist Jane Mayer:

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

And here is how the DOJ’s Office of Legal Counsel, in an astonishing memorandum dated August, 1, 2002, advised the CIA’s General Counsel to employ insects in the interrogation of a detainee:

In addition to using the confinement boxes alone, you also would like to introduce an insect into one of the boxes with Zubaydah.  As we understand it, you plan to inform Zubaydah that you are going to place a stinging insect into the box, but you will actually place a harmless insect in the box, such as a caterpillar.  If you do so, to ensure you are out of the predicate act requirement, you must inform him that the insects will not have a sting that would produce death or severe pain.  If, however, you were to place the insect in the box without informing him that you are doing so, then, in order not to commit a predicate act, you should not affirmatively lead him to believe that any insect is present which has a sting that could produce severe pain or suffering or even cause his death.

As Professor Joseph Lavitt has pointed out, this bizarre passage could have been lifted textually from George Orwell’s 1984, the principal distinction being that Orwell wrote of the use of rats, not caterpillars, in the torture of the book’s protagonist.

How did our Nation came to use cruelty in this war?

    This policy originated in the aftermath of 9/11.  At Guantanamo and elsewhere, U.S. authorities held in detention individuals thought to have information on other impending attacks against the United States.  It was believed that, unless this information was obtained, more Americans could die.  Spurred by this belief, our government made legal and policy decisions providing, in effect, that for some of those detainees labeled as “unlawful combatants,” harsh interrogation methods could be applied.  Many of the methods approved and applied constituted cruel, inhuman, and degrading treatment – a degree of abuse that the Eighth Amendment and the constitutional jurisprudence of the Fifth and Fourteenth Amendments have long outlawed.

But the abuse, we now know, was not limited to cruel treatment – it included torture, a fact that is not open to serious debate.  Despite consistent declarations from the former President and others in his administration that torture was never used or authorized, the admission in February 2008 that waterboarding was among those interrogation methods employed constituted the first admission that, in fact, torture was expressly authorized and applied.

And we know that others were tortured using other methods.  Susan Crawford, a Convening Authority of the Military Commissions and a former General Counsel of the Army, flatly stated the following about Guantanamo detainee, Mohammed al-Qahtani, who was not waterboarded:  “We tortured Qahtani.  His treatment met the legal definition of torture.”  And, as we also know, the International Committee of the Red Cross informed the U.S. government in February 2007 – after interviewing detainees held in Guantanamo -- that its treatment of certain detainees held there constituted torture.

The authorizations to apply torture and cruelty rested on six beliefs or assumptions.  The first five are clearly false and the sixth is likely to be false.  These six assumptions are:

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

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

Third, the President’s constitutional commander-in-chief authorities included the unabridged discretion to order cruelty.  Any existing or proposed law or treaty that would purport to limit this discretion would be an unconstitutional limitation of his powers.

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

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

Sixth (and it is not yet certain whether this assumption is true or false), if the abuse was discovered, no one responsible would be held accountable.

The treatment meted to Qahtani illustrates the results of the policy that ensued from these false assumptions.  Not all unlawful combatants in custody were mistreated, but it is enough to say that some were.  Not all were treated as badly as Qahtani, but some were treated much worse.  And not all who were mistreated were abused as a result of official policy – there were other factors in some cases – but many were.

History will ultimately judge what the cause and level of the abuse was for each detainee – whether it was torture or some lesser cruelty – and whether it resulted from official commission, omission, or occurred despite every reasonable effort to prevent the mistreatment.  Whatever the ultimate historical judgment, however, it is established fact that the brutal interrogation of detainees was officially sanctioned and that abuse occurred as a consequence.  No matter how circumscribed  these policies were, or how short their duration, or how few the victims – for as long as these policies were in effect our government had adopted and practiced what only can be labeled as a policy of cruelty.

**III**.

Let’s now examine more precisely the three categories of harm generated by our policy of cruelty.

The first damage is to our laws.  Legally, the acceptance of cruelty is contrary to and damages our values and legal system by discarding the basic principle that all human beings have the right to be free from cruelty and that the highest purpose of law is to shield core human dignity.

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

These rights form a shield that protects core human dignity.  Because this is so:  due process is required; the equal protection of the law is mandated; slavery is outlawed; coerced confessions are excluded; the vote is extended to all citizens who have attained their majority; racial discrimination is forbidden; and men and women are to be treated equally – to cite just a few of our rights that issue from the foundation of personal dignity.  And, most notably for purposes of today’s discussion, the Eighth Amendment prohibits cruel punishment and the constitutional jurisprudence of the Fifth and Fourteenth Amendments outlaws cruel treatment that “shocks the conscience”.

These rights, to be sure, have been enlarged and gained greater definition during the course of our history.  But to adopt and apply a policy of cruelty anywhere within this world is to say that our Founders were wrong about their belief in the rights of the individual, because there is no right more fundamental than the right to be safe from cruel and inhumane treatment.

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

The infliction of cruel treatment damages not only the foundation of our laws; it damages the fabric of the law itself.  It does so because if cruelty is taken out of the law’s ambit and placed within the realm of policy, the scope of the law is, by definition, diminished.  And cruelty also violates an important principle of law that Professor Jeremy Waldron terms the “principle of non-brutality.”  He writes:

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

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

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

At least from World War II until today, American foreign policy has been grounded on a human rights strategy.  We fought tyranny and promoted democracy not only, or even primarily, because it was the right thing to do, but because the spread of democracy made us safer and protected our freedoms.  In ways that echoed the development of our own domestic legal system, we successfully promoted the development of a rules-based international order based on the rule of law.  Across the world, human rights principles, international treaties and laws – particularly humanitarian and international criminal law – and many domestic constitutions and legal systems owe their character, acceptance, and relevance to our inspiration, efforts, or support.

Let’s look at three examples, out of many:

The Nuremberg Trials – that triumph of American justice and statesmanship that launched the modern era of human rights and international criminal law – treated prisoner abuse as an indictable crime, helped cement the principle of command responsibility, and started the process whereby national sovereignty no longer served as a potential shield to protect the perpetrator of crimes against humanity from the long arm of justice.

The Geneva Conventions, as do most of the major human rights treaties adopted and ratified by our country during the last century, forbid the application of cruel, inhuman, and degrading treatment to all captives.  Thousands of American soldiers have benefited from these conventions.

And the German Constitution, article one, section one, states:  “The dignity of man is inviolable.  To respect and protect it is the duty of all state authority.”  That this should be an element of the German Constitution today reflects credit only on the German nation and its citizens.  That it should have been adopted by Germany in 1949, the year the constitution was first ratified, reflects credit on an American foreign policy that had integrated our national focus on human dignity as an operational objective.

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

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

o    We rendered incoherent the core element of our foreign policy -- the protection of human dignity through the rule of law;
o    We abused the letter and spirit of the Geneva Conventions;
o    We weakened the Nuremberg principle of command responsibility;
o    We damaged he very fabric of human rights and international law and fostered a spirit of non-compliance with both;
o    We fostered the incidence of prisoner abuse around the world;
o    We created a deep legal and political fissure between ourselves and our traditional allies;
o    And we fueled public disrespect for our country and its polices around the world, thus hampering the achievement of our foreign policy objectives.

None of this has been to our benefit, yet all of these harms were among the costs we suffered when we adopted the policy of cruelty.  These are the self-inflicted wounds we caused to ourselves when we abused Qahtani and adopted the policies that permitted his mistreatment and that of others.

Let me now turn to the third category of damage, that to our national security.  Simply stated, our nation’s defenses were materially and demonstrably weakened, not strengthened, by the policy and practice of cruelty.  Cruelty made us weaker, not stronger.  Not only did it blunt our moral authority, it sabotaged our ability to build and maintain the broad alliances needed to prosecute the war effectively, and diminished our military’s operational effectiveness.

In the War on Terror, our national security is achieved not solely through military action, but also through the simultaneous use of ideas and communications, political persuasion, intelligence and law enforcement, and diplomacy.

The attacks on the World Trade Center, the Madrid railway station, and the London buses, among many others, evidenced a terrorist ideology of nihilism that obliterates human dignity.  Our defense to this assault cannot be solely military.  These terrorist acts emanated from specific ideas that fostered and propagated this cycle of hate -- ideas that must be combated by our own ideas and ideals.  Our defense must also consist of rallying to our mutual defense those who share our values and our vision of a humane civilization.

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

When our nation adopted our policy of cruelty we compromised our ability to accomplish these national security objectives.  These are some examples of the damage we suffered to our security:

•    Because the cruel treatment of prisoners constitutes a criminal act in every European jurisdiction, European cooperation with the United States across the spectrum of activity -- including military, intelligence, and law enforcement – diminished once this practice became apparent;
•    Almost every European politician who sought to fully ally his country with the U.S. effort on the War on Terror incurred a political penalty as a consequence, as the political difficulties of Prime Ministers Blair and Aznar demonstrated;
•    Our abuses at Abu Ghraib, Guantanamo, and elsewhere perversely generated sympathy for the terrorists and eroded the international good will and political support that we had enjoyed after September 11.
•    And we lost the ability to draw the sharpest possible distinction between ourselves and our adversaries and to contrast our two antithetical ideals.  By doing so, we compromised our ability to prosecute this aspect of the war – the war of ideas – from the position of full moral authority.

    All of these factors contributed to the difficulties our nation has experienced in forging the strongest possible coalition in the War on Terror.  But the damage to our national security also occurred at the military level.  Consider the following five points:

•    According to some senior flag-rank officers in our military, the proximate cause of Abu Ghraib was the legal advice authorizing abusive treatment of detainees that issued from the Department of Justice’s Office of Legal Counsel in 2002;
•    Other senior officers maintain that the first and second identifiable causes of U.S. combat deaths in Iraq were, respectively Abu Ghraib and Guantanamo, because of the effectiveness of these symbols in helping attract and field insurgent fighters into combat;
•    At various different points, allied nations refused to participate in combat operations with us out of fear that, as a result, individuals captured by their forces could be abused by U.S. or other forces;
•    At other times, allied nations refused to train with us in joint detainee capture and handling operations, also because of concerns about U.S. detainee policies.  Of course, if you don’t train together, you can’t fight together.  And
•    A policy of treating detainees harshly could have stiffened our adversaries’ resolve on the battlefield by inducing them to fight harder, because of fear of capture, rather than surrender, and this could have led to loss of American lives.

Each of these points demonstrates how our policy of cruelty weakened our national security and our defenses.  Whatever intelligence obtained through our use of harsh interrogation tactics may have been, on the whole the military costs of these policies and practices greatly damaged our overall efforts and impaired our effectiveness in the war.

President Obama has commendably barred the use of cruel interrogation techniques, but the damage caused to our nation by their use persists and, for that matter, is not yet even fully understood.  Some senior members of the former administration continue to insist that waterboarding and other similarly cruel interrogation techniques were necessary, effective, and legal.  These same individuals assert that to abandon these practices would make the nation less safe.  And these claims resonate with many Americans.  How could they not?  The probability of other terrorist attacks is great.  What American would not wish for perfect security?  After all – many would say – where security is concerned, too much – surely – can’t be enough.

Yet the truth is that our nation’s descent into cruelty and torture was not legal, was not necessary, and was not effective.

This understanding is what prompted the Senate Committee on the Armed Services to conclude about brutal interrogation techniques, in its December 2008 report entitled “Inquiry Into the Treatment of Detainees in U.S. Custody,” which was issued without partisan dissent, that “those efforts damaged our ability to collect accurate intelligence that could save lives, strengthened the hand of our enemy, and compromised our moral authority.”

And this is why every military officer I have spoken with on this issue – including dozens of Service Chiefs and other four-star admirals and generals – describe of the authorization to engage in cruel interrogations as contrary to our national interest and contemptible.  This was captured by General David Petraeus in a May 2007 letter to his troops:  “Our values and the laws governing warfare teach us to respect human dignity, maintain our integrity, and do what is right. Adherence to our values distinguishes us from our enemy. This fight depends on securing the population, which must understand that we - not our enemies - occupy the moral high ground.”

But whether our nation will firmly reject this policy of cruelty – as we should – or adopt it still hangs in the balance.

Before 9/11, the national consensus held that neither cruel treatment nor punishment could be applied to human beings.  This was -- then -- a consensus cemented by the convergence of our national values, our laws, our foreign policy interests, our human rights principles, and even our military doctrine.

Now, there is no longer a consensus.  Now, many Americans are of the view that cruel treatment or even torture may and should be applied against our enemies, or those who may possibly be our enemies, if doing so could make us safer.  And many others who have not yet abandoned our traditional abhorrence of cruel treatment are now asking how much abusive treatment can be applied lawfully to these captives.  What was once unspeakable is now a subject of polite conversation.  Cruelty, once held in disrepute, has been – astonishingly – rehabilitated in the minds of many.

We know that, if there is another terrorist attack, the numbers of those who support cruelty will rise again.  They will press the case that the national security requires harsh interrogations, and demand that our values yield to the purported dictates of the threat.

This is why we need to restore now the national consensus against cruelty, why we need to revert to a legal standard that clearly outlaws cruel treatment anywhere and defines it as a criminal offense, and why we need to ensure accountability for those who engage in it.

The issue of cruelty cannot be reduced simply to what happens in the interrogation room or to whether some of the information obtained through its application may have had some use.  It is, as Sen. John McCain has said, about who we are as a nation.  It is about remaining faithful to our heritage and constitutional order.  It is about who we wish to become and what kind of world we wish to live in.  It is about protecting human dignity at home and abroad.  It is about mounting the most effective defense to the terrorist threat, a defense that is weakened when we depart from our values.  And it is about our understanding – to return to Camus’ formulation –that cruelty is the weapon whose use would destroy the very values we seek to protect.

    My thanks again to the CJA and each of you.