

Shadow Report to the United Nations Committee Against Torture on the Review of the Periodic Report of the United States of America

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Prepared by

Advocates for U.S. Torture Prosecutions

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Summary:

Since the United States last reported to the Committee Against Torture in 2006, even more evidence has emerged confirming that civilian and military officials at the highest level created, designed, authorized, and implemented a sophisticated, international criminal program of torture. In August 2014, President Barack Obama conceded that the United States tortured people as part of its so-called “War on Terror,” yet the United States continues to shield senior officials from liability for these crimes, in violation of its obligations under the Convention Against Torture.

Recommended Questions:

1. Why has the United States not prosecuted senior officials for authorizing conduct it admits was torture?
2. Were the following people ever criminally investigated for their role in torture, and why have they not been prosecuted?
 - a. Former President George W. Bush
 - b. Former Office of Legal Counsel (OLC) at the Department of Justice lawyer John Yoo
 - c. Former Central Intelligence Agency (CIA) contractor Dr. James Mitchell

Suggested Recommendation:

1. That the United States promptly and impartially prosecute senior military and civilian officials responsible for authorizing, acquiescing, or consenting in any way to acts of torture committed by their subordinates.

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I. Reporting Organization

Advocates for U.S. Torture Prosecutions is a group composed of concerned U.S. citizens, residents, and students—scholars, legal and health care professionals, and law students¹—who have sought for years to use what modest levers we have to end the U.S. program of torture put in place post-9/11, to obtain justice and redress for those harmed, and to seek accountability for those responsible.² We are joined in our submission by supporting organizations and individuals from across civil society.³

II. Summary of the Issue

A. The U.S. Government’s criminal program of torture was authorized at the highest levels.

Since the United States last reported to the Committee in 2006, even more evidence has emerged confirming that civilian and military officials at the highest level created, designed, authorized, and implemented a sophisticated, international criminal program of torture between 2002 and 2007. Just this past August, President Obama conceded that the United States tortured people as part of its so-called “War on Terror,”⁴ yet the current administration continues to shield senior officials from liability for these crimes, in violation of its obligations under the Convention Against Torture.

The techniques in question, sometimes styled as interrogation techniques and sometimes as detention procedures, included near-drowning (“waterboarding”), sleep deprivation for days, and forced nudity.⁵ They have caused many people intense suffering, including severe mental harm⁶ and, in some cases, death.⁷

¹ See Appendix A.

² We have worked through organizations such as the Society of American Law Teachers, the American Psychological Association, and the American Society of International Law to seek accountability for the leaders of the U.S. torture program. We have written widely in social media, spoken at conferences, and published in law reviews and elsewhere on the need for criminal accountability. We have provided expert testimony in foreign proceedings in Germany brought under universal jurisdiction to seek criminal accountability. We have initiated domestic state licensing proceedings to challenge the licenses of psychologists who created the template or collaborated in torture in violation of the ethical rules of their profession. We have been human rights observers of the military commissions at Guantánamo Bay, Cuba and at Fort Meade, Maryland.

³ See Appendix B for List of Supporting Organizations and Individuals.

⁴ See Press Conference by the President, The White House (Aug. 1, 2014), available at <http://www.whitehouse.gov/the-press-office/2014/08/01/press-conference-president> (“With respect to the larger point of the RDI report itself, even before I came into office I was very clear that in the immediate aftermath of 9/11 we did some things that were wrong. We did a whole lot of things that were right, but we tortured some folks.”) [hereinafter Press Conference by the President (Aug. 1, 2014)].

⁵ See U.S. Department of Justice, *Memorandum for John R. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A*, 9-15 (May 10, 2005), available at http://media.luxmedia.com/aclu/olc_05102005_bradbury46pg.pdf [hereinafter Bradbury Memorandum].

⁶ See, e.g., PHYSICIANS FOR HUMAN RIGHTS, *BROKEN LAWS, BROKEN LIVES: MEDICAL EVIDENCE OF TORTURE BY U.S. PERSONNEL AND ITS IMPACT 91-93* (2008) available at https://s3.amazonaws.com/PHR_Reports/BrokenLaws_14.pdf (discussing the “presence of ongoing psychiatric disorders that can reasonably be attributed to [detainees’] experiences while in detention at U.S. facilities”); James Ball, *Guantánamo Bay files: Grim Toll on Mental Health of Prisoners*, THE GUARDIAN (Apr. 14, 2011), available at <http://www.theguardian.com/world/2011/apr/25/Guantánamo-files-mental-health-suicides>; Tom Ramstack,

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The post-9/11 U.S. torture program is breathtaking in scope. Two presidential administrations are implicated—one through design and implementation, the other primarily (though not exclusively)⁸ through its cover-up and obstruction of justice. The program was conducted in the U.S. Guantánamo Bay Military Base, Cuba, as well as in secret locations around the world in collaboration with fifty-four countries, including Bosnia-Herzegovina, Canada, Djibouti, Egypt, Indonesia, Iraq, Italy, Jordan, Libya, Lithuania, Mauritania, Morocco, Pakistan, Poland, Romania, Russia, Syria, Thailand, the United Arab Emirates, the United Kingdom (Diego Garcia), and Yemen.⁹ The program was conceived and authorized at the highest levels in the United States government, including by then President George W. Bush,¹⁰ then Vice President Dick Cheney,¹¹ then Director of the Central Intelligence Agency (CIA) George Tenet,¹² then

Guantánamo Judge Rules 9/11 Suspect Should be Tried with Others, REUTERS (Aug. 13, 2014), available at <http://www.reuters.com/article/2014/08/13/us-usa-Guantánamo-idU.S.KBN0GD22J20140813> (“A military judge ruled on Wednesday that one of the men accused of plotting the Sept. 11, 2001, attacks on the United States must at least temporarily rejoin the other four defendants in a single trial despite concerns about his mental health.”).

⁷ See, e.g., United States Army Criminal Investigations Command, *Army Criminal Investigators Outline 27 Confirmed or Suspected Detainee Homicides for Operation Iraqi Freedom, Enduring Freedom* (Mar. 25, 2005), available at <http://www.cid.army.mil/Documents/OIF-OEF%20Homicides.pdf>; Human Rights Watch, *Afghanistan: Killing and Torture by U.S. Predate Abu Ghraib* (May 21, 2005), available at <http://www.hrw.org/news/2005/05/20/afghanistan-killing-and-torture-us-predate-abu-ghraib> (“Human Rights Watch said that at least six detainees in U.S. custody in Afghanistan have been killed since 2002, including one man held by the CIA. ...[N]o U.S. personnel have been charged with homicide in any of these deaths, although U.S. Department of Defense documents show that five of the six deaths were clear homicides.”); Tim Golden, *The Bagram File: Afghan Prison Abuse*, THE NEW YORK TIMES (May 20, 2005), available at http://www.nytimes.com/packages/html/international/20050520_ABU.S.E_FEATURE/index.html (“The story of two Afghans’ brutal death at the Bagram U.S. military base comes from a nearly 2,000-page Army criminal investigation file, a copy of which was obtained by the New York Times.”).

⁸ See, e.g., Shadee Ashtari, *Guantánamo Bay Prisoner Files Historic Lawsuit Against Obama Over Force-Feeding*, THE HUFFINGTON POST (March 11, 2014) available at http://www.huffingtonpost.com/2014/03/11/Guantánamo-bay-force-feed-lawsuit_n_4942839.html (describing force-feeding that entails strapping detainee to a chair, inserting a tube down his throat, and feeding him liquid food while the detainee vomits and/or defecates on himself, a process that often results in internal injuries and has been described by detainees as a painful and humiliating experience); Charlie Savage, *Judge Orders U.S. to Stop Force-Feeding Syrian Held at Guantánamo*, NEW YORK TIMES (May 16, 2014) available at http://www.nytimes.com/2014/05/17/us/politics/judge-orders-us-to-stop-force-feeding-syrian-held-at-Guantánamo.html?_r=0.

⁹ See Peter Foster, *British Gave 'Full Co-operation' for CIA Black Jail on Diego Garcia, Report Claims*, THE TELEGRAPH (Apr. 10, 2014), available at <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/10758747/British-gave-full-co-operation-for-CIA-black-jail-on-Diego-Garcia-report-claims.html>; Jamie Doward, *UK Ambassador 'Lobbied Senators to Hide Diego Garcia Role in Rendition'*, THE GUARDIAN (Aug. 16, 2014), available at <http://www.theguardian.com/world/2014/aug/16/uk-ambassador-senators-hide-diego-garcia-rendition-cia>; OPEN SOCIETY JUSTICE INITIATIVE, *GLOBALIZING TORTURE: CIA SECRET DETENTION AND EXTRAORDINARY RENDITION*, 60-118 (2013), available at <http://www.opensocietyfoundations.org/sites/default/files/globalizing-torture-20120205.pdf>.

¹⁰ In his memoir, President Bush not only admits that he authorized “enhanced interrogation techniques” (i.e. torture) but also defends their use in interrogation, stating, “Had I not authorized waterboarding on senior al Qaeda leaders, I would have had to accept a greater risk that the country would be attacked. In the wake of 9/11, that was a risk I was unwilling to take. My most solemn responsibility as president was to protect the country. I approved the use of the interrogation techniques.” See GEORGE BUSH, *DECISION POINTS* 169 (2010). President Bush further relates a conversation he had with then CIA director George Tenet, in which the director asks for permission to use “enhanced interrogation techniques” – including waterboarding – on Khalid Sheikh Mohammed. In response to the request for permission, President Bush responded, “Damn right.” *Id.* at 170.

¹¹ In an interview with *The Washington Times*, Vice President Cheney responded to questions regarding the authorization of tactics such as waterboarding and sleep deprivation by saying, “I signed off on it; others did, as

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National Security Advisor Condoleezza Rice,¹³ then Defense Secretary Donald Rumsfeld,¹⁴ then Secretary of State Colin Powell,¹⁵ and then Attorney General John Ashcroft.¹⁶ The CIA, with advice from Egyptian and Saudi intelligence officials,¹⁷ designed an interrogation program premised on torture techniques and sought retroactive legal approval¹⁸ from the Department of

well, too. I wasn't the ultimate authority, obviously. As the Vice President, I don't run anything. But I was in the loop. I thought that it was absolutely the right thing to do." Jon Ward, *Cheney Interview Transcript*, THE WASHINGTON TIMES (Dec. 22, 2008), available at <http://www.washingtontimes.com/blog/potus-notes/2008/dec/22/cheney-interview-transcript/print/#ixzz3DsqSxGmG>.

¹² See Letter from Attorney General Eric Holder to Senator John D. Rockefeller, IV, *Release of Declassified Narrative Describing the Department of Justice Office of Legal Counsel's Opinions on the CIA's Detention and Interrogation Program*, at 3 (Apr. 22, 2009) available at <http://intelligence.senate.gov/pdfs/olcopinion.pdf> [hereinafter Letter from Attorney General Holder to Senator Rockefeller, *Release of Declassified Narrative*]. ("On July 17, 2002, according to CIA records, the Director of Central Intelligence (DCI) met with the National Security Adviser, who advised that the CIA could proceed with its proposed interrogation of Abu Zubaydah."); Jan Crawford Greenberg et al., *Sources: Top Bush Advisors Approved 'Enhanced Interrogation'*, ABC NEWS (Apr. 9, 2008), available at <http://abcnews.go.com/TheLaw/LawPolitics/story?id=4583256> [hereinafter Crawford Greenberg et al., *Sources, Top Bush Advisors Approved 'Enhanced Interrogation Techniques'*]. ("In dozens of top-secret talks and meetings in the White House, the most senior Bush administration officials discussed and approved specific details of how high-value al Qaeda suspects would be interrogated by the Central Intelligence Agency. [...] The advisers were members of the National Security Council's Principals Committee, a select group of senior officials who met frequently to advise President Bush on issues of national security policy. [...] At the time, the Principals Committee included Vice President Cheney, former National Security Advisor Condoleezza Rice, Defense Secretary Donald Rumsfeld and Secretary of State Colin Powell, as well as CIA Director George Tenet and Attorney General John Ashcroft.").

¹³ See Letter from Attorney General Holder to Senator Rockefeller, *Release of Declassified Narrative*; Crawford Greenberg et al., *Sources, Top Bush Advisors Approved 'Enhanced Interrogation Techniques'*.

¹⁴ UNITED STATES SENATE ARMED SERVICES COMMITTEE, INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY 94-97 (2008), available at <http://www.armed-services.senate.gov/imo/media/doc/Detainee-Report-Final-April-22-2009.pdf> [hereinafter SENATE ARMED SERVICES COMMITTEE REPORT]. In approving the use of "stress positions (like standing) for a maximum of four hours," the Secretary wrote: "However, I stand for 8-10 hours a day. Why is standing limited to 4 hours?" *Id.* at 97.

¹⁵ See Crawford Greenberg et al., *Sources, Top Bush Advisors Approved 'Enhanced Interrogation Techniques'*.

¹⁶ See Crawford Greenberg et al., *Sources, Top Bush Advisors Approved 'Enhanced Interrogation Techniques'*.

¹⁷ Scott Shane, David Johnston, & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, THE NEW YORK TIMES (Oct. 4, 2007), available at <http://www.nytimes.com/2007/10/04/washington/04interrogate.html?pagewanted=all> ("With virtually no experience in interrogations, the C.I.A. had constructed its program in a few harried months by consulting Egyptian and Saudi intelligence officials and copying Soviet interrogation methods long used in training American servicemen to withstand capture.").

¹⁸ CIA interrogators applied what came to be called "enhanced interrogation techniques" on at least one detainee prior to the Office of Legal Counsel's authorization of such techniques in the Yoo-Bybee Memorandum on August 1, 2002. Then CIA Director George Tenet has stated that just after capturing Abu Zubaydah on March 28, 2002, the "CIA got into holding and interrogating detainees...in a serious way" and sought policy approval from the National Security Council to begin an interrogation program. SENATE ARMED SERVICES COMMITTEE REPORT at 16. Abu Zubaydah's lawyer, George (Brent) Mickum, has stated unequivocally that his client "was tortured brutally well before any legal memo was issued." Jason Leopold, *Revealed: Senate Report Contains New Details on CIA Black Cites*, AL JAZEERA, available at <http://america.aljazeera.com/articles/2014/4/9/senate-cia-torture.html>. Abu Zubaydah confirmed in an interview with the International Red Cross that his interrogators water-boarded him only three months after he underwent surgery [ostensibly for injuries he sustained during his capture in March, 2002]. INTERNATIONAL COMMITTEE FOR THE RED CROSS, REPORT ON THE TREATMENT OF FOURTEEN "HIGH-VALUE DETAINEES" IN CIA CUSTODY 9-10 (2007), available at <http://assets.nybooks.com/media/doc/2010/04/22/icrc-report.pdf>; see also ALI H. SOUFAN, THE BLACK BANNERS: THE INSIDE STORY OF 9/11 AND THE WAR AGAINST AL QAEDA 383 (2011) (discussing Abu Zubaydah's surgery in the days after his capture); Brent Mickum, *The Truth about Abu Zubaydah*, THE GUARDIAN (Mar. 20, 2009), available at

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Justice. Government lawyers in the Office of Legal Counsel (OLC) of the Department of Justice provided legal pretext for the use of torture, euphemistically termed “enhanced interrogation techniques.”¹⁹ The OLC justified the use of techniques like near-drowning (“waterboarding”), stress positions, sleep deprivation, and forced nudity²⁰ by adopting an “absurdly narrow” legal definition of torture, described by the former Dean of Yale Law School Professor Harold Koh as “so narrow that it would have exculpated Saddam Hussein.”²¹ Even as the composition of the OLC and the legal memos changed over the following years, the standard effectively allowing for the use of torture techniques remained in place through the end of the Bush administration.²² A CIA lawyer sent to Guantánamo to advise military command on “legal authorities applicable to interrogations,” summarized the distorted standard concocted in these memos by explaining: “...it is basically subject to perception. If the detainee dies you're doing it wrong.”²³ By the time the legal guidance was disseminated, these techniques were already being applied by the CIA to some prisoners.²⁴ An internal government investigation found evidence that the OLC memoranda had been drafted to achieve a pre-ordained result desired by the client.²⁵ A U.S. Senate report

<http://www.theguardian.com/commentisfree/cifamerica/2009/mar/30/Guantánamo-abu-zubaydah-torture> (mentioning that Abu Zubaydah had surgery to treat wounds sustained in his capture in Pakistan). *See also, The CIA Interrogation Techniques: Abu Zubayda March 2001 – Jan. 2003*, available at https://www.aclu.org/sites/default/files/pdfs/natsec/20100415_CIArelease_destructionoftapes.pdf (at 113-114 of the electronic document).

¹⁹ U.S. Department of Justice, Office of Legal Counsel, *Memorandum for Alberto R. Gonzales, Counsel to the President* (Aug. 1, 2002), available at

<http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.08.01.pdf> [hereinafter 2002 Yoo-Bybee Memorandum].

²⁰ Bradbury Memorandum 9-15.

²¹ Harold Koh, *A World Without Torture*, 43 COLUM. J. OF TRANSNAT'L L. 641, 648, 654 (2005) [hereinafter Harold Koh, *A World Without Torture*]. *See* 2002 Yoo-Bybee Memorandum at 1 (“Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture [...] it must result in significant psychological harm of significant duration, e.g. lasting for months or even years.”). For further, extensive critique of the 2002 Yoo-Bybee Memorandum’s legal justification of torture, *see* SENATE ARMED SERVICES COMMITTEE REPORT at 31-35 and *infra* note 51.

²² On December 30, 2004, after the memorandum was released and just prior to the confirmation hearings of Alberto Gonzales for the position of Attorney General, the Department of Justice withdrew the 2002 Yoo-Bybee Memorandum and replaced it with new legal guidance purporting to clarify the standard. However, in preparing that advice, the memorandum added one carefully worded footnote: “While we have identified various disagreements with the August 2002 Memorandum, we have reviewed this Office’s prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum.” Daniel Levin, *Memorandum for James B. Comey, Deputy Attorney General, Re: Legal Standards Applicable under 18 U.S.C. Sections 2340-2340A*, n. 8 (December 30, 2004) available at <https://www.aclu.org/files/torturefoia/released/082409/olcremand/2004olc96.pdf> [hereinafter Levin Memorandum]. A 2005 Office of Legal Counsel memorandum, which established the legal standard that would remain in place through the end of the Bush Administration, concluded that “[I]nterrogators would not reasonably expect that the combined use of the interrogation methods under consideration... would result in severe physical or mental pain or suffering within the meaning of sections 2340-2340 [the U.S. extraterritorial torture statute].” Steven G. Bradbury, *Memorandum for John A. Rizzo, Senior Deputy Counsel, Central Intelligence Agency, Re: Application on 18 U.S.C. 2340 and 2340A to the Combined Use of Certain Techniques in the Interrogation of High Value Al Qaeda Detainees*, at 69 (May 10, 2005).

²³ SENATE ARMED SERVICES COMMITTEE REPORT at 54-55 (quoting CIA lawyer Jonathan Fredman in an October 2, 2002 meeting at Guantánamo Bay Military Base, Cuba).

²⁴ *See, e.g., supra* note 18.

²⁵ OFFICE OF PROFESSIONAL RESPONSIBILITY, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL’S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY’S USE OF “ENHANCED INTERROGATION

captured this scheme of high-level authorization by stating, “The fact is that senior officials in the United States government solicited information on how to use aggressive techniques, redefined the law to create the appearance of their legality, and authorized their use against detainees.”²⁶

B. Instead of prosecuting senior civilian and military officials responsible for the torture program, the United States has actively shielded them.

President Obama admitted that U.S. officials tortured people, using techniques that, in his estimation, “any fair-minded person would believe were torture.”²⁷ Nevertheless, the United States has yet to impartially and thoroughly investigate and prosecute senior officials, despite longstanding calls by U.S. civil society²⁸ and the previous Concluding Observations of the Committee considered below. The government has chosen instead to abide by the empty mantra of “look[ing] forward as opposed to looking backwards,”²⁹ at times even referring to the prospect of torture prosecutions as a “witch hunt.”³⁰ The legal rationales offered by U.S. officials in attempts to shield those responsible for torture, including those at the highest levels, are contrary to international law, in addition to being flawed, facially inapplicable to many senior officials, and inconsistent.

1. The United States seems not to have criminally investigated senior officials for involvement in torture and ill-treatment of detainees.³¹ The United States’ Periodic Report was either vague³² or referred to investigations that, based on statements made by

TECHNIQUES” ON SUSPECTED TERRORISTS 227 (2009) [*hereinafter* OPR INVESTIGATION]. *But see* David Margolis, *Memorandum for the Attorney General, Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the OPR’s Report of Investigation into the OLC’s Memoranda Concerning Issues Relating to the CIA’s Use of “Enhanced Interrogation Techniques” on Suspected Terrorists*, Jan. 5, 2010 at 53 [*hereinafter*, Margolis Memorandum] (declining to find on the preponderance of evidence that the CIA intended to obtain maximum license to engage in torture with impunity and Yoo was their willing facilitator). However, the Margolis Memorandum failed to consider the suppression of dissenting opinions of other government lawyers or the evidence that the torture of Abu Zubaydah had begun prior to the 2002 Yoo-Bybee Memorandum. *See supra* note 18; *infra* notes 54-56.

²⁶ SENATE ARMED SERVICES COMMITTEE REPORT at xii.

²⁷ *See* Press Conference by the President (Aug. 1, 2014).

²⁸ *See* Appendix F for efforts by representative U.S. non-governmental organizations seeking investigation and/or prosecution of U.S. government officials for torture.

²⁹ *See, e.g.*, David Johnston & Charlie Savage, *Obama Reluctant to Look Into Bush Programs*, THE NEW YORK TIMES (Jan. 11, 2009), available at http://www.nytimes.com/2009/01/12/us/politics/12inquire.html?pagewanted=all&_r=0.

³⁰ *See, e.g.*, Bill Meyer, *Obama Intel Pick Says No Torture on His Watch*, THE CLEVELAND (Jan. 22, 2009), available at http://www.cleveland.com/nation/index.ssf/2009/01/obama_intel_nominee_says_no_to.html (“However, a senior adviser to Obama told The Associated Press Wednesday that there is no intention to conduct a ‘witch hunt’ so prosecutions for those activities are unlikely.”).

³¹ *See* section below responding to the United States Government Report.

³² U.S. DEPARTMENT OF STATE, FOURTH PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE UNITED NATIONS COMMITTEE ON HUMAN RIGHTS CONCERNING THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS ¶532 (2011) [*hereinafter* FOURTH PERIODIC REPORT TO THE COMMITTEE ON HUMAN RIGHTS] (“The bulk of the investigation and prosecution of allegations of mistreatment of detainees held in connection with counterterrorism operations, including administrative and criminal inquiries and proceedings, have been carried out by the Department of Defense and other U.S. government components that have jurisdiction to carry out such actions.”).

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the government, would seem to exclude those in command.³³ In particular, the investigation called by Attorney General Eric Holder in August 2009 and led by prosecutor John Durham, seemed to have an excessively limited mandate. According to Holder, Durham investigated only “possible CIA involvement”³⁴ and focused primarily on CIA interrogators, and whether they used “unauthorized interrogation techniques.”³⁵ In 2009, the Attorney General said that officials who “acted reasonably and relied in good faith on authoritative legal advice” (emphasis added) from the Justice Department, and conformed their conduct to that advice, would not face federal prosecutions for that conduct.³⁶ For reasons that are unclear, the Attorney General’s stated rationales for declining to prosecute have been a moving target. By 2011, the Attorney General’s view of what merited prosecution had narrowed even further. He began to refer to his prior statements regarding the OLC’s legal memos as promises of protection to those who “acted in good faith and within the scope of the legal guidance given by the Office of Legal Counsel” (emphasis added).³⁷ In dropping the references to reliance and reasonableness, Holder may have been suggesting that any behavior falling within the OLC’s outlier definition of legality (whether done with knowledge of this legal guidance or not) would be protected, irrespective of whether an individual relied upon, reasonably believed in, or even knew of or had access to the contents of the memos.

- 2. The United States has not prosecuted any senior-level officials.** Courts-martial and administrative proceedings for acts of torture have been almost exclusively limited to low-level private contractors or soldiers.³⁸ In its recent Concluding Observations, the Human Rights Committee noted with concern that reported investigations have "result[ed] in only a meagre number of criminal charges being brought against low-level

³³ U.S. DEPARTMENT OF STATE, PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE UNITED NATIONS COMMITTEE AGAINST TORTURE ¶135 (2013) [*hereinafter* PERIODIC REPORT TO THE COMMITTEE AGAINST TORTURE]; FOURTH PERIODIC REPORT TO THE COMMITTEE ON HUMAN RIGHTS ¶182.

³⁴ U.S. Department of Justice, *Statement of the Attorney General Regarding Investigation into the Interrogation of Certain Detainees* (June 30, 2011), available at <http://www.justice.gov/opa/pr/statement-attorney-general-regarding-investigation-interrogation-certain-detainees> [*hereinafter* *Statement of the Attorney General Regarding Investigation*].

³⁵ U.S. Department of Justice, *Statement of Attorney General Eric Holder on Closure of Investigation into the Interrogation of Certain Detainees* (Aug. 30, 2012), available at <http://www.justice.gov/opa/pr/statement-attorney-general-eric-holder-closure-investigation-interrogation-certain-detainees> [*hereinafter* *Statement of Attorney General on Closure of Investigation*].

³⁶ U.S. Department of Justice, *Department of Justice Releases Four Office of Legal Counsel Opinions* (Apr. 16, 2009), available at <http://www.justice.gov/opa/pr/department-justice-releases-four-office-legal-counsel-opinions> [*hereinafter* *Department of Justice Releases Four Office of Legal Counsel Opinions*].

³⁷ *Statement of the Attorney General Regarding Investigation*; see also *Statement of Attorney General on Closure of Investigation*. (The Attorney General later referred to the review as “examin[ing] primarily whether any unauthorized interrogation techniques were used by CIA interrogators, and if so, whether such techniques could constitute violations of the torture statute or any other applicable statute.” (emphasis added).)

³⁸ The highest-ranked officials who were sanctioned seem to have been a Brigadier General and a Lieutenant Colonel, both of whom received only administrative sanctions. See Appendix C, *Disposition of Detainee Abuse Allegations*, containing a list compiled by The Constitution Project, an independent Task Force convened by civil society, from press accounts of court martial proceedings and transcripts of those proceedings where available; Eric Schmitt, *Four Top Officers Cleared by Army in Prison Abuses*, THE NEW YORK TIMES (Apr. 23, 2005), available at http://www.nytimes.com/2005/04/23/politics/23abuse.html?_r=0 (“Brig. Gen. Janis Karpinski, an Army Reserve officer who commanded the military police unit at the Abu Ghraib prison, was relieved of her command and given a written reprimand. She has repeatedly said she was made the scapegoat for the failures of superiors.”).

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operatives" and recommended that perpetrators, "including, in particular, persons in positions of command," be prosecuted and sanctioned.³⁹

The rationale of insufficient "admissible evidence"⁴⁰ to sustain a conviction was articulated by Attorney General Holder, specifically in the context of Durham's restricted investigation, which, by that time, had limited itself to the deaths of two men in CIA custody and, by all appearances, did not consider the criminal liability of senior-level officials.⁴¹ A rationale of insufficient evidence would be very difficult to defend in the context of officials who have left lengthy paper trails and even admitted in their published memoirs to authorizing the program.⁴²

- 3. Reliance on severely flawed legal advice cannot be invoked as a defense to torture.**⁴³ First, reliance on advice of counsel cannot be a defense if, as the evidence suggests, the OLC memoranda were reverse engineered in pursuit of a specific result. An internal government investigation found "evidence that the OLC attorneys were aware of the result desired by the client and drafted memoranda to support that result, at the expense of their duty of thoroughness, objectivity, and candor,"⁴⁴ supporting the United Nations

³⁹ HUMAN RIGHTS COMMITTEE, CONCLUDING OBSERVATIONS ON THE FOURTH PERIODIC REPORT OF THE UNITED STATES OF AMERICA at 3 CCPR/C/USA/CO/4, April 23, 2014 [*hereinafter* HUMAN RIGHTS COMMITTEE, CONCLUDING OBSERVATIONS ON THE FOURTH PERIODIC REPORT].

⁴⁰ This statement raises serious questions as to what other kinds of evidence Durham might have found and the reasons the Department of Justice concluded that it would be inadmissible.

⁴¹ *Statement of Attorney General on Closure of Investigation* ("Based on the fully developed factual record concerning the two deaths, the Department has declined prosecution because the admissible evidence would not be sufficient to obtain and sustain a conviction beyond a reasonable doubt.").

⁴² *See, e.g.,* GEORGE W. BUSH, *HARD DECISIONS* 168-181 (2010) ("Had I not authorized waterboarding on senior al Qaeda leaders, I would have had to accept a greater risk that the country would be attacked."); JOHN RIZZO, *COMPANY MAN* 181-191 (2014) ("Above all, I wanted a written OLC memo in order to give the Agency—for lack of a better term—legal cover.").

⁴³ In 2009, Attorney General Holder invoked reliance on legal advice as a rationale for protection from prosecution in his mandate for a preliminary review into the interrogation of detainees. *See* U.S. Department of Justice, *Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees* (August 24, 2009), available at <http://www.justice.gov/opa/speech/attorney-general-eric-holder-regarding-preliminary-review-interrogation-certain-detainees> [*hereinafter* *Statement of Attorney General Holder Regarding a Preliminary Review*]. This rationale has also been invoked by other high level officials, such as then General Counsel for the CIA John Rizzo. In his recent book, Rizzo states "An OLC legal memorandum - the Executive Branch's functional equivalent of a Supreme Court opinion - would protect the Agency and its people for evermore. It would be as good as gold, I figured confidently. Too confidently, as things would turn out." JOHN RIZZO, *COMPANY MAN* 188 (2014). Furthermore, in 2005 President Bush signed into law the Detainee Treatment Act of 2005 ("DTA"), which provides a legal defense to U.S. personnel dealing with the detention or interrogation of detainees, as long as those detainees were alleged by the President to be engaged in terrorist activities and the conduct was "officially authorized and determined to be lawful at the time that it was conducted." Detainee Treatment Act, P.L. 109-148, 19 Stat. 2680 § 1004(a) (2005) [*hereinafter* *Detainee Treatment Act of 2005*]. In 2006, the Military Commissions Act amended the DTA to provide that the defense based on reliance on legal advice contained in the DTA "relates to acts occurring between September 11, 2001, and December 30, 2005." Military Commissions Act, P.L. 109-366, 20 Stat. 2600 § 8(b) (2006) [*hereinafter* *Military Commissions Act of 2006*].

⁴⁴ OPR INVESTIGATION at 227 (2009). *But see* Margolis Memorandum at 67 (determining that there was no applicable duty to provide thorough, objective, and candid legal advice; stating that whether Yoo intentionally or recklessly provided misleading advice was a close question and concluding that he had not done so). *See supra* note 26.

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Human Rights Committee's characterization of the advice as "legal pretexts."⁴⁵ As such, neither the senior government officials who sought the pretexts nor the lawyers who provided them can claim reliance in good faith. Nor can the rationale apply in those cases when the legal memoranda were issued after the fact, in what would seem like an effort to justify and shield from criminal or civil liability conduct that was already underway.⁴⁶

Second, any reliance on the OLC memoranda would have been patently unreasonable.⁴⁷ As President Obama said in August, any "fair-minded person" would consider the conduct in question to be torture.⁴⁸ Thus, to state, for example, that the near-drowning of a captive is not torture is, and was, absurd. Indeed, prior to September 11, 2001, the practice had already been recognized as torture in the United States.⁴⁹ The conduct was "manifestly illegal," as the Human Rights Committee recognized in its 2014 review of the United States.⁵⁰ The OLC memoranda have been widely condemned by the legal academy.⁵¹

The OLC memoranda were also condemned by senior officials within the Bush administration, including Legal Adviser to the Department of State William Taft, who vehemently registered his dissent.⁵² Later, senior-level concerns and legal advice

⁴⁵ HUMAN RIGHTS COMMITTEE, CONCLUDING OBSERVATIONS ON THE FOURTH PERIODIC REPORT at 3.

⁴⁶ See *supra* note 18.

⁴⁷ In April of 2009, Attorney General Holder made clear that those who acted reasonably and relied in good faith on legal advice would not be prosecuted. See *Department of Justice Releases Four Office of Legal Counsel Opinions*. His later statements, however, require neither reasonability nor good faith reliance on the advice. See *Statement of Attorney General Holder Regarding a Preliminary Review*.

⁴⁸ See Press Conference by the President (Aug. 1, 2014).

⁴⁹ On January 21, 1968, *The Washington Post* published a front-page photo of a U.S. soldier waterboarding a Vietnamese detainee. Two months after this photo was posted, the soldier was court martialed. See ERIC WEINER, *WATERBOARDING: A TORTURED HISTORY* (Nov. 3, 2007), available at <http://www.npr.org/2007/11/03/15886834/waterboarding-a-tortured-history>; In 1901, in the aftermath of the Spanish-American War, the United States convicted an Army major for waterboarding an insurgent in the Philippines, sentencing him to 10 years of hard labor. See ABC NEWS, *HISTORY OF AN INTERROGATION TECHNIQUE: WATER BOARDING* (Nov. 29, 2005), available at <http://abcnews.go.com/WNT/Investigation/story?id=1356870>; In 1984, a Texas County Sheriff and his deputies were convicted in federal court for using "water torture" tactics on their prisoners. See *United States v. Lee*, 744 F.2d 1124, 1125 (5th Cir. 1984); In 2006, the U.S. Department of State recognized waterboarding techniques being practiced in Tunisia as torture, stating "The forms of torture and other abuse included: [...] submersion of the head in water." See U.S. DEPARTMENT OF STATE, *2005 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: TUNISIA* (March 8, 2006), available at <http://www.state.gov/j/drl/rls/hrrpt/2005/61700.htm>.

⁵⁰ HUMAN RIGHTS COMMITTEE, CONCLUDING OBSERVATIONS ON THE FOURTH PERIODIC REPORT at 3.

⁵¹ See, e.g., JOSEPH MARGULIES, *GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER* 89–95 (2007) (describing the "nearly unanimous" condemnation of the 2002 Yoo-Bybee Memorandum and citing Professors Harold Koh, Jeremy Waldron, David Luban and Ruth Wedgwood); Harold Koh, *A World Without Torture* at 647–654 ("in my professional opinion, the Bybee Opinion is perhaps the most clearly erroneous legal opinion I have ever read").

⁵² As early as January of 2002, the Department of State's Legal Adviser William Taft advised John Yoo that the legal analysis underlying the Office of Legal Counsel's opinion that the Geneva Conventions did not apply to Taliban soldiers detained in Afghanistan was "seriously flawed". See Memorandum from William H. Taft, IV to John C. Yoo, *Your Draft Memorandum of January 9* (Jan. 11, 2002), available at <http://www2.gwu.edu/~nsarchiv/torturingdemocracy/documents/20020111.pdf>. Secretary of State Colin Powell raised his objections to the Office of Legal Counsel's legal advice directly with the President. See John Barry et al., *The Roots of Torture*, NEWSWEEK, May 24, 2004, available at <http://www.globalpolicy.org/component/content/article/157/26905.html> [hereinafter *The Roots of Torture*]. Jack Goldsmith, head of the Office of Legal Counsel from 2003 to 2004, found the Bybee and Yoo memoranda "riddled

questioning the legality of the interrogation techniques in question were summarily quashed. Counselor of the Department of State Philip Zelikow reported that a memorandum he had written in opposition to the authorization of “enhanced interrogation techniques”⁵³ had been ordered collected and destroyed.⁵⁴ In late 2002, the Legal Counsel to the Chairman of the Joint Chiefs of Staff commenced an independent legal review into the legality of proposed interrogation techniques, prompted by serious concerns raised by senior military lawyers at the Air Force, the Navy, the Marine Corps, the Office of the Judge Advocate General, and the Criminal Investigation Task Force.⁵⁵ The Chairman of the Joint Chiefs of Staff (at the request of the General Counsel of the Department of Defense William Haynes II) quickly shut it down.⁵⁶ The deliberate sidelining and suppression of senior dissenting voices further underlines that the OLC memoranda were authored and applied as a legal pretext for what was known to be unlawful.

Third, President Obama’s position that the President has the authority to overrule an OLC decision in favor of advice from other administration lawyers—as he did when he disregarded the OLC’s determination that he needed Congressional authorization to continue air strikes on Libya⁵⁷—only emphasizes that the ultimate authority to authorize the torture program lies with the President, not the OLC. This renders reliance claims invoked by President Bush even less convincing.

Fourth, the attorneys who authored the legal memoranda authorizing the use of torture in the interrogation of detainees cannot claim reliance on their own legal advice. Moreover, in authorizing torture through distorted and clearly flawed interpretations of a State Party’s obligations under the Convention Against Torture, the issuing of the legal advice itself was a violation of the Convention.

- 4. Finally, the prohibition against torture is absolute.** The United States’ shielding of senior military and civilian officials who authorized, acquiesced or consented to torture violates the principle of non-derogability as understood in the Committee’s General Comment No. 2⁵⁸ and places the United States in continued breach of its obligations

with error” and characterized them as a “one-sided effort to eliminate any hurdles posed by the torture law.” See JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 149 (2009). Daniel Levin, head of the Office of Legal Counsel from 2004 to 2005, described the 2002 Yoo-Bybee Memorandum as “insane”. OPR INVESTIGATION at 160.

⁵³ Internal Memorandum, *The McCain Amendment and U.S. Obligations under Article 16 of the Convention Against Torture* (February 15, 2006), available at <http://www2.gwu.edu/~nsarchiv/news/20120403/docs/Zelikow%20Feb%2015%202006.pdf>.

⁵⁴ Statement of Philip Zelikow to the United States Senate Committee on the Judiciary, May 13, 2009 at 12, available at <http://www2.gwu.edu/~nsarchiv/news/20120403/docs/Statement%20of%20Philip%20Zelikow.pdf> (“I later heard the memo was not considered appropriate for a further discussion and that copies of my memo should be collected and destroyed”).

⁵⁵ COMMITTEE ON ARMED SERVICES, *INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY 67-70* (2008) [*hereinafter* COMMITTEE ON ARMED SERVICES, *INQUIRY INTO THE TREATMENT OF DETAINEES*].

⁵⁶ COMMITTEE ON ARMED SERVICES, *INQUIRY INTO THE TREATMENT OF DETAINEES* at 70-72.

⁵⁷ See Charlie Savage, *2 Top Lawyers Lost to Obama in Libya War Policy Debate*, *THE NEW YORK TIMES* (June 17, 2011) available at <http://www.nytimes.com/2011/06/18/world/africa/18powers.html?pagewanted=all>.

⁵⁸ COMMITTEE AGAINST TORTURE, *GENERAL COMMENT NO. 2: IMPLEMENTATION OF ARTICLE 2 BY STATES PARTIES*, CAT/C/GC/2, January 24, 2008 at ¶5 (“The Committee considers that amnesties or other impediments which

under the Convention. The Convention provides that neither exceptional circumstances nor an order from a superior officer may be invoked as a justification of torture.⁵⁹ In elaborating on the absolute character of the prohibition in its General Comment, the Committee described it as “essential that the responsibility of any superior officials ... be fully investigated through competent, independent and impartial prosecutorial and judicial authorities.”⁶⁰

C. The United States has gone to great lengths to block other efforts to secure accountability, belying any good faith commitment to upholding its obligations under the Convention.

- 1. The United States has blocked or failed to cooperate with pertinent criminal proceedings in foreign courts, including those of France,⁶¹ Spain,⁶² and Italy.⁶³**
- 2. The Bush and Obama administrations and the United States Congress have repeatedly blocked attempts at redress in civil courts by torture survivors and the relatives of torture victims.** The Department of Justice under both administrations has invoked jurisdictional and immunity doctrines to shield government officials from civil liability for torture, and U.S. courts have largely deferred to the government’s

preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability”) [*hereinafter* COMMITTEE AGAINST TORTURE, GENERAL COMMENT NO. 2].

⁵⁹ See, e.g., U.N. CONVENTION AGAINST TORTURE Article 2(3) (“An order from a superior officer or a public authority may not be invoked as a justification of torture.”); MANFRED NOWAK AND ELIZABETH MCARTHUR, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A COMMENTARY 123 (2008) (“a legal obligation to obey orders and lack of knowledge that an order to practise torture is unlawful does not relieve the defendant of criminal responsibility”). In the Committee’s 1990 consideration of Colombia, a Committee member noted that a Penal Code provision that justified illegal acts of subordinates if done “in compliance with a lawful order given by a competent authority in due form of law” was incompatible with Article 2(3) of the Convention. The Committee subsequently noted with satisfaction the law’s amendment (stating that due obedience will not justify offences of torture, genocide, forced disappearance and forced displacement) as a positive development. See COMMITTEE AGAINST TORTURE, REPORT OF THE COMMITTEE AGAINST TORTURE, CAT/A/45/44, June 21, 1990 at ¶322, available at http://www.bayefsky.com/general/a_45_44.pdf; COMMITTEE AGAINST TORTURE, CONCLUSIONS AND RECOMMENDATIONS OF THE COMMITTEE AGAINST TORTURE, CAT/C/CR/31/1, February 4, 2004 at ¶3(b).

⁶⁰ COMMITTEE AGAINST TORTURE, GENERAL COMMENT No. 2 at ¶26.

⁶¹ See CENTER FOR CONSTITUTIONAL RIGHTS, UNIVERSAL JURISDICTION: ACCOUNTABILITY FOR U.S. TORTURE, available at <http://www.ccrjustice.org/case-against-rumsfeld> (“In January 2012, the former investigating magistrate, Sophie Clement, issued a formal request, or ‘letter rogatory’, to the United States. According to news reports, the French investigative judge requested access to the detention camp at Guantánamo Bay, to relevant documents as well as to all persons who had contact with the three victims during their detention there. The United States still has not replied.”).

⁶² See Andreas Schüller and Morenike Fajana, *Piecing Together the Puzzle: Making U.S. Torturers in Europe Accountable*, 3 (2014), available at <http://www.statewatch.org/analyses/no-256-torture-schuller-fajana.pdf>.

⁶³ See Jacey Fortin, *CIA Terror War Torture and Rendition Program: An Italian Spy is Sentenced to Jail – Can Tenet, Rumsfeld, Cheney, Ashcroft Be Next?*, INTERNATIONAL BUSINESS TIMES (2013), available at <http://www.ibtimes.com/cia-terror-war-torture-rendition-program-italian-spy-sentenced-jail-can-tenet-rumsfeld-cheney> (“An additional 23 Americans, including former CIA Milan station chief Robert Lady, were convicted by the Italian court in absentia in 2009 [...] But the administration of U.S. President Barack Obama worked with then-Italian Prime Minister Silvio Berlusconi to suppress the court’s request for extradition.”).

arguments.⁶⁴ For its part, Congress has passed legislation intended to hinder civil suits of government officials who authorized or participated in torture.⁶⁵

- 3. The Bush and Obama administrations have also shielded torture psychologists from professional liability.** The CIA finances a \$5 million insurance policy⁶⁶ to cover the potential legal bills of the two contract psychologists who designed the foundation of the Agency's interrogation program and allegedly conducted dozens of waterboarding sessions themselves.⁶⁷ The Defense Department created Behavioral Science Consultation Teams, staffed with psychologists and psychiatrists who also developed torture techniques, advised interrogators on how to exploit prisoners, and calibrated their pain.⁶⁸ To protect them from professional liability, the Defense Department promulgated policies asserting that these psychologists, because they were not "charged with the medical care of detainees,"⁶⁹ were not subject to a duty to limit or avoid harm.⁷⁰ The Defense policies "conflate[d] legal standards with ethical ones," effectively declaring ethical anything that did not violate criminal laws⁷¹—the same laws that the Justice Department was busy redefining. By building these shields, the United States successfully set the stage for immunity and impunity in the sphere of professional regulation as well. To date, none of the psychologists who played key roles in the torture program has been disciplined by a licensing board or professional association.⁷²

⁶⁴ See Appendix D for a non-exhaustive list of cases brought by people held in U.S. custody abroad alleging torture or cruel, inhuman, or degrading treatment or punishment.

⁶⁵ See *Detainee Treatment Act of 2005* (giving immunity to U.S. personnel who used authorized "operational practices" in the detention and interrogation of detainees alleged to be engaged in terrorist activities); *Military Commissions Act of 2006*.

⁶⁶ CBS/Associated Press, *AP: CIA Granted Waterboarders \$5M Legal Shield*, CBS NEWS, available at <http://www.cbsnews.com/news/ap-cia-granted-waterboarders-5m-legal-shield/>.

⁶⁷ See, e.g., Katherine Eban, *Rorschach and Awe*, VANITY FAIR, (July 7, 2007), available at <http://www.vanityfair.com/politics/features/2007/07/torture200707> ("Two psychologists in particular played a central role: James Elmer Mitchell, who was attached to the C.I.A. team that eventually arrived in Thailand, and his colleague Bruce Jessen. [...] Both worked in a classified military training program known as SERE — for Survival, Evasion, Resistance, Escape — which trains soldiers to endure captivity in enemy hands. Mitchell and Jessen reverse-engineered the tactics inflicted on SERE trainees for use on detainees in the global war on terror, according to psychologists and others with direct knowledge of their activities. The C.I.A. put them in charge of training interrogators in the brutal techniques, including "waterboarding," at its network of "black sites." In a statement, Mitchell and Jessen said, "We are proud of the work we have done for our country."); Amy Goodman, *The Story of Mitchell Jessen & Associates: How a Team of Psychologists in Spokane, WA, Helped Develop the CIA's Torture Techniques* (Apr. 21, 2009), available at http://www.democracynow.org/2009/4/21/the_story_of_mitchell_jessen_associates.

⁶⁸ SENATE ARMED SERVICES COMMITTEE REPORT at 14, Tab 7 "Counter Resistance Strategy Meeting Minutes" (June 17, 2008), available at <http://www.levin.senate.gov/imo/media/doc/supporting/2008/Documents.SASC.061708.pdf>.

⁶⁹ See U.S. DEPARTMENT OF DEFENSE, INSTRUCTION 2310.08E, *Medical Program Support for Detainee Operations* 2 (June 6, 2006), available at http://fas.org/irp/doddir/dod/i2310_08.pdf [hereinafter INSTRUCTION 2310.08E].

⁷⁰ COLUMBIA UNIVERSITY INSTITUTE ON MEDICINE AS A PROFESSION & THE OPEN SOCIETY FOUNDATION, ETHICS ABANDONED: MEDICAL PROFESSIONALISM AND DETAINEE ABUSE IN THE WAR ON TERROR 58 (2013), available at <http://www.imapny.org/wp-content/themes/imapny/File%20Library/Documents/IMAP-EthicsTextFinal2.pdf> [hereinafter ETHICS ABANDONED].

⁷¹ See INSTRUCTION 2310.08E; ETHICS ABANDONED at 64-65.

⁷² See Appendix E for a representative list of the state licensing complaints filed and their disposition through dismissal in the state licensing organization and/or the U.S. courts.

D. Lack of accountability threatens the peremptory norm against torture.

The United States' failure to adequately investigate and prosecute senior military and civilian officials authorizing the post-9/11 criminal program of torture puts the United States in breach of its obligations under the Convention Against Torture. Proper accountability, including criminal prosecution of senior military and civilian officials authorizing acts of torture, is essential for the observance of the United States' international obligations under the treaty. It is also critical to preserving the meaning of the peremptory norm against torture.

III. Committee's Concluding Observations and List of Issues

The Committee recommended in 2006 that the United States “promptly, thoroughly, and impartially investigate any responsibility of senior military and civilian officials authorizing, acquiescing or consenting, in any way, to acts of torture committed by their subordinates.”⁷³ The United States did not respond to this recommendation in its Response to Specific Recommendations Identified by the Committee Against Torture.⁷⁴

The Committee raised the issue again in Question 23 of its 2010 List of Issues, requesting information on “[s]teps taken to ensure that all forms of torture and ill-treatment of detainees by its military or civilian personnel, in any territory under its de facto and de jure jurisdiction, as well as in any other place under its effective control, is promptly, impartially and thoroughly investigated, and that all those responsible, *including senior military and civilian officials authorizing, acquiescing or consenting in any way to such acts committed by their subordinates are prosecuted and appropriately punished, in accordance with the seriousness of the crime*” (emphasis added).⁷⁵ The Committee also requested information on “[t]he mandate of the prosecutor in charge of the preliminary review [initiated by Attorney General Holder in 2009 and undertaken by Assistant U.S. Attorney John Durham] into whether United States laws were violated by CIA officers and contractors during the interrogation of detainees at places outside the United States, including Guantánamo Bay,” “on the outcome of this investigation and, if applicable, on the steps taken to hold the responsible persons accountable.”⁷⁶

IV. United States Government Report

The United States' 2013 Periodic Report to the Committee Against Torture (Government Report) continued the pattern of resisting proper accountability, shielding from liability senior government officials who authorized torture, while also leaving survivors and victims of torture without means of redress.

⁷³ COMMITTEE AGAINST TORTURE, CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 19 OF THE CONVENTION: CONCLUSIONS AND RECOMMENDATIONS OF THE COMMITTEE AGAINST TORTURE (REGARDING THE UNITED STATES OF AMERICA), CAT/C/USA/CO/2, July 25, 2006 at ¶19 [*hereinafter* COMMITTEE AGAINST TORTURE, CONSIDERATION OF REPORTS UNDER ARTICLE 19]

⁷⁴ UNITED STATES RESPONSE TO SPECIFIC RECOMMENDATIONS IDENTIFIED BY THE COMMITTEE AGAINST TORTURE, available at <http://www.state.gov/documents/organization/100843.pdf> [*hereinafter* LIST OF ISSUES].

⁷⁵ LIST OF ISSUES at ¶23(a).

⁷⁶ LIST OF ISSUES at ¶23(b).

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In responding to the Committee's Question 23(a) regarding the obligation to investigate acts of torture (Article 12), the United States entirely failed to address the Committee's specific request for information related to investigations and prosecutions of "senior military and civilian officials." Neither the Department of Justice nor the U.S. military has prosecuted any senior-level officials who are alleged to have committed, ordered, or been complicit in torture in the context of the so-called "war on terror." Despite this evident lack of accountability, the Government Report ignored the Committee's reference to senior officials, instead pointing to 100 low-level service members that have been court martialed for mistreatment of detainees.⁷⁷

The Government Report offered little of substance in response to the Committee's question about the mandate Attorney General Holder gave to Durham for the "preliminary review" into whether laws were violated by the CIA. The Government Report offered only that the prosecutor was tasked with examining "whether federal laws were violated in connection with interrogation of specific detainees at overseas locations."⁷⁸ As discussed above, however, Attorney General Holder's statements suggest a much more restricted mandate.⁷⁹ A key limitation was the shielding of those who, according to Attorney General Holder, "acted in good faith and within the scope of the OLC's legal guidance." But Holder never defined "good faith," nor did he seem to give Durham the room to examine whether the guidance itself was given in good faith. The sheer breadth of this legal shield cannot be overstated. Ultimately, no prosecutions resulted from this preliminary review.⁸⁰

The Government Report lists several statutes as establishing criminal sanctions for torture, none of which the United States has actually used to prosecute senior-level officials for the torture of detainees in U.S. custody abroad. Despite the Government Report's assurance that it can prosecute U.S. military and civilian personnel who commit or attempt to commit torture abroad under the U.S. Extraterritorial Torture Statute (18 U.S.C. 2340A),⁸¹ the Department of Justice has not brought a single prosecution for the torture of detainees in U.S. custody under that statute.⁸² Further, it was the position of the U.S. Department of Justice, at least in a 2005 memo authored by Steven Bradbury, that the statute did not apply to the specific techniques used in the interrogation of al Qaeda detainees.⁸³ Although the memo has since been rescinded by President Obama,⁸⁴ the Department of Justice should clarify its position as to whether other so-called

⁷⁷ PERIODIC REPORT TO THE COMMITTEE AGAINST TORTURE at ¶129.

⁷⁸ PERIODIC REPORT TO THE COMMITTEE AGAINST TORTURE at ¶135.

⁷⁹ *See Statement of Attorney General Eric Holder on Closure of Investigation.*

⁸⁰ In the investigations that Durham decided to pursue regarding two detainees who died while in U.S. custody, he ultimately declared that the *admissible* evidence was not sufficient to sustain a conviction beyond a reasonable doubt. *See Statement of the Attorney General Regarding Investigation into the Interrogation.* Information on the two investigations: Detainee Rahman died of hypothermia and detainee al-Jamadi died of asphyxiation, a result of his being hung by his arms. *See Adam Serwer, Investigation of Bush-era Torture Concludes With No Charges*, MOTHER JONES (2012), available at <http://www.motherjones.com/mojo/2012/08/durham-torture-cia-obama-holder>.

⁸¹ PERIODIC REPORT TO THE UNITED NATIONS COMMITTEE AGAINST TORTURE ¶127. *See also* U.S. DEPARTMENT OF STATE, *COMMON CORE DOCUMENT OF THE UNITED STATES OF AMERICA* §158 (2011), available at <http://www.state.gov/j/drl/rls/179780.htm>.

⁸² In fact, the Department of Justice has prosecuted only a single person for perpetrating torture under the extraterritorial torture statute: Roy M. Belfast, son of Charles Taylor, the former president of Liberia. *See United States v. Belfast*, 611 F.3d 783 (11th Cir. 2010).

⁸³ Bradbury Memo at 9-15.

⁸⁴ *See* Executive Order 13491 of January 22, 2009, *Ensuring Lawful Interrogations*, 74 FR 4893.

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“enhanced interrogation techniques” beyond “waterboarding” are considered torture within the meaning of the statute.⁸⁵

Meanwhile, the Government Report conspicuously omits reference to the War Crimes Act (18 U.S.C. 2441) in its list of laws that provide jurisdiction to prosecute for the torture and ill-treatment of detainees. This omission is the latest in a series of steps taken by the United States to water down or evade its obligation to prosecute war crimes.⁸⁶ Despite these attempts to provide immunity, the War Crimes Act remains a possible avenue for prosecution.⁸⁷

Finally, the Government Report’s representation of the availability of civil remedies for torture committed abroad is incomplete and also disingenuous, considering the extent to which the United States invokes jurisdictional and immunity doctrines to shield government officials from civil liability for torture.⁸⁸ As a result, victims and survivors of U.S. torture have been unable to obtain full redress, compensation and rehabilitation. For example, the United States has asserted—and federal courts have accepted—that government employees should be granted immunity because they acted “within the scope of their employment” when they used waterboarding, dietary manipulation, walling, long-time standing, sleep deprivation, and water dousing on detainees, and because it was not “clearly established under the law at the time” that such techniques constituted torture.⁸⁹ The government has also blocked redress for survivors by arguing that the judicial imposition of such liability threatened national security,⁹⁰ and by invoking a vast “state secrets” privilege that suppressed information necessary to the victims’

⁸⁵ Similarly, the Department of Justice has not brought any related prosecutions under the Civil Rights Act (18 U.S.C. 245) or 18 U.S.C. 242, also cited in the Government Report.

⁸⁶ Enacted in 1996, the War Crimes Act allowed for the prosecution of war crimes—which it defined as any violation of the Geneva Conventions—when either the victim or the perpetrator was a U.S. national or a member of the U.S. armed services. War Crimes Act, 18 U.S.C. 2441 (1996). The Military Commissions Act narrowed the scope of the War Crimes Act in order to exclude all conduct save a set of domestically-defined “grave breaches”: torture; cruel or inhuman treatment; performing biological experiments; murder, mutilation, or maiming; intentionally causing serious bodily injury; rape; sexual assault or abuse; and hostage-taking. MCA § 6(b). Further, the MCA sought to immunize military and intelligence personnel from criminal prosecution for acts of torture or cruel or inhuman treatment committed as part of certain “authorized interrogations” committed between September 11, 2001, and the enactment of the Detainee Treatment Act in 2005. MCA § 8.

⁸⁷ WORLD ORG. FOR HUMAN RIGHTS USA & AMERICAN UNIVERSITY, WASH. COLLEGE OF LAW INT’L HUMAN RIGHTS CLINIC, INDEFENSIBLE: A REFERENCE FOR PROSECUTING TORTURE AND OTHER FELONIES COMMITTED BY U.S. OFFICIALS FOLLOWING SEPTEMBER 11TH 115-117 (2012), *available at* http://www.wcl.american.edu/clinical/documents/Indefensible_A_Reference_for_Prosecuting_Torture.pdf.

⁸⁸ See Appendix D.

⁸⁹ See, e.g., *Padilla v. Yoo*, 678 F.3d 748, 750 (9th Cir. 2012); *Ali v. Rumsfeld*, 649 F.3d 762, 774 (D.C. Cir. 2011) (holding that as government employees acting within the scope of their employment, the defendants were entitled to qualified immunity from tort claims brought under the Alien Tort Statute and the Fourth Geneva Convention); *Janko v. Gates*, 741 F.3d 136, 141 (D.C. Cir. 2014); *Ali v. Rumsfeld*, 649 F.3d 762, 770 (D.C. Cir. 2011).

⁹⁰ See, e.g., *Arar v. Ashcroft*, 585 F.3d 559, 574 (2d Cir. 2009) (declining to recognize a *Bivens* action against government officials allegedly responsible for Arar’s extraordinary rendition to Syria, where he was allegedly tortured, because “such an action would have the natural tendency to affect diplomacy, foreign policy, and the security of the nation.”); *Ali v. Rumsfeld*, 649 F.3d 762, 773 (D.C. Cir. 2011) (declining to recognize a *Bivens* action against former Secretary of Department of Defense and three high-ranking Army officers allegedly responsible for the plaintiffs’ torture in U.S. custody in Iraq and Afghanistan, because “ability of armed forces to act decisively and without hesitation in defense of liberty and national interests would have been disrupted and hindered.”); *Rasul v. Myers*, 563 F.3d 527, 530 (D.C. Cir. 2009) (holding that government officials enjoyed qualified immunity from plaintiffs’ *Bivens* claims).

claims.⁹¹ For its part, the U.S. Congress has passed legislation limiting civil liability for government officials who perpetrated torture. For example, in 2006, Congress passed the Military Commissions Act, denying courts the ability to hear civil claims brought by an “enemy combatant” against the United States and its agents.⁹² As recently as 2014, the U.S. government has successfully raised this defense in a number of cases brought by torture victims and survivors of the so-called “War on Terror.”⁹³ In turn, U.S. courts have deferred to Congress’s authority over the military system of justice, refusing to exercise judicial scrutiny over military affairs.⁹⁴

V. Recommended Questions

1. Why has the United States not prosecuted senior officials for authorizing conduct it admits was torture?
2. Were the following people ever criminally investigated for their role in torture, and why have they not been prosecuted?
 - a. Former President George W. Bush
 - b. Former Office of Legal Counsel (OLC) of the Department of Justice lawyer John Yoo
 - c. Former Central Intelligence Agency (CIA) contractor Dr. James Mitchell

VI. Suggested Recommendations

We respectfully encourage the Committee Against Torture to consider the following recommendation to the United States:

The United States should promptly and impartially prosecute senior military and civilian officials responsible for authorizing, acquiescing or consenting in any way to acts of torture committed by their subordinates.

This recommendation is supported by and builds on recommendations made by this Committee,⁹⁵ as well as by the Human Rights Committee,⁹⁶ the Special Rapporteur on torture,

⁹¹ See, e.g., *El-Masri v. United States*, 479 F.3d 296, 313 (4th Cir. 2007).

⁹² MCA 2006 § 7 (“Except as provided in [the Detainee Treatment Act of 2005] no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.”).

⁹³ See, e.g., *Janko v. Gates*, 741 F.3d 136, 141 (D.C. Cir. 2014) (dismissing a Syrian citizen’s claims for injuries sustained in Afghanistan and Guantánamo Bay); *Ameur v. Gates*, 759 F.3d 317, 322 (4th Cir. 2014) (dismissing an Algerian citizen’s claims for injuries sustained in Afghanistan and Guantánamo Bay).

⁹⁴ See, e.g., *Lebron v. Rumsfeld*, 670 F.3d 540, 550 (4th Cir. 2012) (recognizing that Congress has the “constitutionally authorized source of authority over the military system of justice” and determining that a *Bivens* remedy would be “plainly inconsistent with Congress’ authority in military affairs”).

⁹⁵ See COMMITTEE AGAINST TORTURE, CONSIDERATION OF REPORTS UNDER ARTICLE 19 at 7 (“The State party should take immediate measures to eradicate all forms of torture and ill-treatment of detainees by its military or civilian personnel, in any territory under its jurisdiction, and should promptly and thoroughly investigate such acts, prosecute all those responsible for such acts, and ensure they are appropriately punished, in accordance with the seriousness of the crime.”).

Advocates for U.S. Torture Prosecutions

the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on health, the Special Rapporteur on freedom of religion, and the Working Group on Arbitrary Detention.⁹⁷ These UN bodies have been calling for independent and impartial investigations of all perpetrators, including highest-level civilian and military officials, since 2006.⁹⁸ In its most recent 2014 review of the United States, the Human Rights Committee specifically recommended that “persons in positions of command, are prosecuted and sanctioned,”⁹⁹ and that the “responsibility of those who provided legal pretexts for manifestly illegal behavior should also be established.”¹⁰⁰

⁹⁶ See HUMAN RIGHTS COMMITTEE, CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT: CONCLUDING OBSERVATIONS OF THE HUMAN RIGHTS COMMITTEE (REGARDING THE UNITED STATES OF AMERICA) at 4, CCPR/C/USA/C0/3/REV.1 (Dec. 18, 2006) (“The Committee notes with concern shortcomings concerning the independence, impartiality and effectiveness of investigations into allegations of torture and cruel, inhuman or degrading treatment or punishment inflicted by United States military and non-military personnel or contract employees in detention facilities in Guantánamo Bay, Afghanistan, Iraq, and other overseas locations, and to alleged cases of suspicious death in custody in any of these locations. [...] The State party should conduct prompt and independent investigations into all allegations concerning suspicious deaths, torture or cruel, inhuman or degrading treatment or punishment inflicted by its personnel (including commanders) as well as contract employees, in detention facilities in Guantánamo Bay, Afghanistan, Iraq and other overseas locations.”) [*hereinafter* HUMAN RIGHTS COMMITTEE, CONCLUDING OBSERVATIONS 2006].

⁹⁷ See COMMISSION ON HUMAN RIGHTS, JOINT REPORT ON THE SITUATION OF DETAINEES AT GUANTÁNAMO BAY at 26, E/CN.4/2006/120 (Feb. 27, 2006) (“The Government of the United States should ensure that all allegations of torture or cruel, inhuman or degrading treatment or punishment are thoroughly investigated by an independent authority, and that all persons found to have perpetrated, ordered, tolerated or condoned such practices, up to the highest level of military and political command, are brought to justice.”) [*hereinafter* COMMISSION ON HUMAN RIGHTS, JOINT REPORT ON THE SITUATION OF DETAINEES AT GUANTÁNAMO BAY].

⁹⁸ See e.g., COMMISSION ON HUMAN RIGHTS, JOINT REPORT ON THE SITUATION OF DETAINEES AT GUANTÁNAMO BAY at 26; HUMAN RIGHTS COMMITTEE, CONCLUDING OBSERVATIONS 2006 at 4.

⁹⁹ HUMAN RIGHTS COMMITTEE, CONCLUDING OBSERVATIONS ON THE FOURTH PERIODIC REPORT at 3.

¹⁰⁰ HUMAN RIGHTS COMMITTEE, CONCLUDING OBSERVATIONS ON THE FOURTH PERIODIC REPORT at 3.

APPENDIX A

Advocates for U.S. Torture Prosecutions

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Dr. Trudy Bond is a civilian psychologist in Toledo, Ohio. Since 2006, she has worked towards and written about accountability for psychologists involved in U.S. torture, including through the filing of professional misconduct complaints with state licensing boards and as a plaintiff in various court cases.

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APPENDIX B

List of Supporting Organizations and Individuals

Organizations

[Appeal for Justice](#)

[Center for Constitutional Rights](#)

[Center for Justice and Accountability](#)

[Coalition for an Ethical Psychology](#)

[CODEPINK](#)

[Defending Dissent Foundation](#)

[Essential Information](#)

[Executive Committee of the Society for the Study of Peace, Conflict,
and Violence \(Peace Psychology\)](#)

[International Center for Advocates Against Discrimination \(ICAAD\)](#)

[International Human Rights Clinic at Santa Clara Law](#)

[International-Lawyers.org](#)

[Justiça Global](#)

[Law Office of Helen Lawrence](#)

[Massachusetts Peace Action](#)

[Medical Whistleblower Advocacy Network](#)

[The National Lawyers Guild](#)

[Peace Action](#)

[Physicians for Human Rights](#)

[Project Peace](#)

Advocates for U.S. Torture Prosecutions

[Psychoanalysis for Social Responsibility](#)
[Section IX, Division 39, American Psychological Association](#)

[Psychologists for Social Responsibility](#)

[The Rabbinic Call for Human Rights](#)

[Tackling Torture, Top Committee of Women Against Military Madness](#)

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APPENDIX C

Military Personnel Alleged to Have Engaged in Wrongful Conduct in Connection with Detainee Mistreatment

Source: The Constitution Project, *Disposition of Abuse Allegations*, available at <http://detainee taskforce.org/resources/alleged-wrongful-conduct-charges/#sdfootnote1sym>

“The following is a list of military personnel – by rank and age where available¹⁰¹ – alleged to have engaged in wrongful conduct in connection with detainee mistreatment after September 11. Some have been charged with and convicted of crimes in the military justice system, others have been acquitted of military criminal charges or had those charges against them dropped, still others have had allegations against them handled administratively by the military. The list also includes one CIA contractor who was subject to federal court criminal proceedings. The list was compiled from press accounts of court martial proceedings and in some instances from transcripts of those proceedings. While the list does not purport to be exhaustive, the Task Force believes that it is illustrative of who has borne responsibility to date for mistreating detainees, and who, particularly by omission, has not.”

1. Specialist, age 25, convicted of assault and two counts of making a false official statement while serving in Afghanistan in 2002. Sentenced to 90 days in prison, a reduction to the rank of Private, a fine of \$3,288.00, and a bad conduct discharge.
2. Private First Class, age 22, convicted of assault, prisoner maltreatment, maiming a prisoner, and providing a false statement to investigators while serving in Afghanistan in 2002. Sentenced to a reduction in rank to Private.
3. Specialist, age 21, convicted of assault and prisoner maltreatment while serving in Afghanistan in 2002. Sentenced to five months in prison and a bad conduct discharge.
4. Specialist, age 21, convicted of conspiracy to maltreat detainees, prisoner maltreatment, and committing an indecent act while serving in Iraq in 2003. Sentenced to three years in prison and a dishonorable discharge.
5. Sergeant, age 24, convicted of dereliction of duty for failing to protect prisoners from abuse, prisoner maltreatment, and assault while serving in Afghanistan in 2002. Sentenced to a reduction in rank, a \$1,000 fine, and a letter of reprimand.
6. Specialist, age 21, convicted of dereliction of duty for failure to protect prisoners from abuse and assault while serving in Afghanistan in 2002. Sentenced to two months in prison, a reduction in rank to Private, and a bad conduct discharge.
7. Specialist, convicted of assault, prisoner maltreatment, and dereliction of duty for failing to protect prisoners from abuse while serving in Afghanistan in 2002. Sentenced to 75 days in prison, a reduction in rank to Private, and a bad conduct discharge.
8. Specialist, age 34, convicted of assault, battery, indecency, conspiracy to maltreat detainees, maltreatment of detainees, committing an indecent act, and dereliction of duty for failure to protect prisoners from abuse while serving in Iraq in 2003. Sentenced to ten

¹⁰¹ The age listed is at the time of the alleged conduct. For those cases where age calculations were based on press accounts that specified the individual’s age at the time of reporting and the approximate date of the alleged conduct, the age listed here should be accurate within one year.

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- years in prison, a reduction in rank to Private, forfeiture of pay and benefits, and a bad conduct discharge.
9. Staff Sergeant, age 38, convicted of conspiracy to maltreat detainees, dereliction of duty for failure to protect detainees from abuse, maltreatment of detainees, assault, and committing an indecent act while serving in Iraq in 2003. Sentenced to eight years in prison, a reduction in rank to Private, a forfeiture of pay, and a bad conduct discharge.
 10. Sergeant, age 26, convicted of dereliction of duty for failure to protect detainees from abuse, providing false statements to investigators, and battery while serving in Iraq in 2003. Sentenced to six months in prison, a reduction in rank to Private, and a bad conduct discharge.
 11. Specialist, age 24, convicted of dereliction of duty for failing to protect prisoners from abuse, prisoner maltreatment while serving in Iraq in 2003. Sentenced to one year in prison, a reduction in rank to Private, and a bad conduct discharge.
 12. Specialist, age 24, convicted of conspiracy to maltreat detainees and maltreatment of detainees while serving in Iraq in 2003. Sentenced to eight months in prison, a reduction in rank to Private, and a bad conduct discharge.
 13. Specialist, age 25, convicted of conspiracy to maltreat detainees, maltreatment of detainees, and dereliction of duty for failing to protect prisoners from abuse while serving in Iraq in 2003. Sentenced to six months in prison, a reduction in rank to Private, and a bad conduct discharge.
 14. Specialist, age 28, convicted of dereliction of duty for failing to protect prisoners from abuse while serving in Iraq in 2003. Sentenced to a reduction in rank to Private, fine of a half-month's pay, and a bad conduct discharge.
 15. Sergeant, age 29, convicted of dereliction of duty for failing to protect prisoners from abuse and aggravated assault while serving in Iraq in 2003. Sentenced to 90 days' hard labor, a fine, and a reduction in rank to Private.
 16. Specialist, age 22, convicted of conspiracy to maltreat detainees and maltreatment of detainees while serving in Iraq in 2003. Sentenced to ten months in prison, reduction in rank to Private, and a bad conduct discharge.
 17. Specialist, age 22, convicted of conspiracy to maltreat detainees, maltreatment of detainees, assault, dereliction of duty for failing to protect prisoners from abuse and an indecent act while serving in Iraq in 2003. Sentenced to 179 days in prison, a fine of \$2,250, a demotion to the rank of Private, and a bad conduct discharge.
 18. Private First Class, age 19, convicted of murder, attempted murder, conspiracy to commit murder and conspiracy to obstruct justice while serving in Iraq in 2006. Sentenced to 18 years in prison, a demotion to the rank of Private, and a dishonorable discharge.
 19. Specialist, age 21, convicted of murder, attempted murder and conspiracy to obstruct justice while serving in Iraq in 2006. Sentenced to 18 years in prison, a demotion to the rank of Private, and a dishonorable discharge.
 20. Specialist, age 18, convicted of aggravated assault for shooting a detainee while serving in Iraq in 2006. Sentenced to nine months in prison.
 21. Private, age 19, convicted of aggravated assault on a detainee while serving in Iraq in 2006. Sentenced to ten months confinement, a fine of \$8,000, and a bad conduct discharge.

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22. Petty Officer 2nd Class, age 24, convicted of assault and conspiracy to mistreat detainees while serving in Iraq in 2007. Sentenced to 79 days in jail, a reduction of rank by two grades, and a loss of pay.
23. Petty Officer 2nd Class, age 26, convicted of conspiracy to maltreat detainees, cruelty and maltreatment of detainees, lying and assault. Sentenced to 45 days confinement and a reduction in rank.
24. Seaman, age 22, convicted of conspiracy to maltreat detainees, cruelty and maltreatment of detainees, lying and assault. Sentenced to 3 months in prison and a fine of \$3,600.
25. Chief Petty Officer, age 42, convicted of conspiracy and assault while serving in Iraq in 2007. Sentenced to 89 days in the brig, \$1,500 forfeiture, and a reduction in rank by one grade.
26. Master Sergeant, age 40, convicted of premeditated murder and conspiracy to commit murder while serving in Iraq in 2007. Sentenced to 40 years in prison, a reduction in rank to Private, dishonorably discharged, and forfeited all pay and allowances.
27. Sergeant First Class, age 25, convicted of premeditated murder and conspiracy to commit murder while serving in Iraq in 2007. Sentenced to 35 years in prison.
28. Sergeant, age 25, convicted of murder and conspiracy to commit murder while serving in Iraq in 2007. Sentenced to life in prison, a reduction in rank to Private, dishonorably discharged and forfeited all pay and allowances.
29. 1st Lieutenant, age 25, convicted of unpremeditated murder of a detainee while serving in Iraq in 2007. Sentenced to 25 years in prison.
30. Staff Sergeant, age 34, convicted of assault, maltreatment of a subordinate and making a false statement in a case involving the premeditated murder of a detainee in Iraq in 2007. Sentenced to 17 months in prison, a reduction in rank to Private, and a bad conduct discharge.
31. Specialist, age 24, convicted of conspiracy to commit murder while serving in Iraq in 2007. Sentenced to 8 months in prison.
32. Specialist, age 22, convicted of conspiracy to commit murder while serving in Iraq in 2007. Sentenced to 7 months in prison.
33. Petty Officer First Class, age 26, convicted of dereliction of duty for inhumane treatment of an Iraqi detainee while serving in Iraq in 2009. Sentenced to no punishment.
34. Sergeant, age 39, convicted of dereliction of duty and the abuse of prisoners while serving in Iraq in 2003. Sentenced to 60 days' hard labor and confinement to barracks, and demoted to the rank of Private.
35. First Lieutenant, age 24, convicted of assault and dereliction of duty for failing to protect detainees while serving in Iraq in 2004. Sentenced to 45 days in prison and fined \$12,000.
36. Sergeant 1st Class, age 33, convicted of aggravated assault and obstruction of justice while serving in Iraq in 2004. Sentenced to six months in jail and a reduction in rank to Staff Sergeant.
37. Captain, age 33, convicted of two counts of aggravated assault against detainees while serving in Iraq in 2003. Sentenced to 45 days prison time and a fine of \$1,000 per month for twelve months.
38. Lance Corporal, convicted of dereliction of duty for failing to protect prisoners from abuse, maltreatment of a prisoner, and assault for holding a pistol to the head of a

Advocates for U.S. Torture Prosecutions

- detainee while serving in Iraq in 2003. Sentenced to 90 days in prison, a fine of \$1500, and a reduction to the rank of Private.
39. Sergeant, age 27, convicted of conspiracy to commit prisoner maltreatment, prisoner maltreatment, dereliction of duty for failing to protect prisoners from abuse, and giving a false statement to investigators while serving in Iraq in 2003. Sentenced to 12 months in prison, a reduction to the rank of Private and bad conduct discharge.
 40. Sergeant, convicted of dereliction of duty for failing to protect prisoners from abuse, maltreatment of prisoners, and assault while serving in Iraq in 2003. Sentenced to a reduction in rank to Lance Corporal and 30 days' hard labor.
 41. Staff Sergeant, convicted of assault and maltreatment of prisoners while serving in Iraq in 2003. Sentenced to be discharged from the Army.
 42. Corporal, convicted of assault, conspiracy to maltreat a prisoner, and maltreatment of prisoners while serving in Iraq in 2003. Sentenced to one month hard labor, a fine, and reduction in rank to Lance Corporal.
 43. Major, age 35, convicted of dereliction of duty for failing to protect prisoners from abuse and maltreatment of prisoners while serving in Iraq in 2003. Sentenced to be discharged from the military.
 44. Chief Warrant Officer, age 40, convicted of negligent homicide and negligent dereliction of duty for failing to protect prisoners from abuse while serving in Iraq in 2003. Sentenced to a reprimand, forfeiture of \$6,000, and a restriction to barracks for two months.
 45. Sergeant First Class, age 36, convicted of assault on a prisoner and making false statements to investigators while serving in Iraq in 2003. Sentenced to receive a reprimand.
 46. Sergeant, age 25, convicted of dereliction of duty for failure to protect detainees and maltreatment of detainees while serving in Iraq in 2005. Sentenced to a reduction in rank and forfeiture of pay and confinement for five months.
 47. Sergeant, age 28, convicted of dereliction of duty for failure to protect detainees and maltreatment of detainees while serving in Iraq in 2005. Sentenced to a reduction in rank and forfeiture of pay, confinement for six months, and a bad conduct discharge.
 48. Sergeant, age 26, convicted of maltreatment of detainees, conspiracy to commit maltreatment of detainees, dereliction of duty for failing to protect detainees and obstruction of justice while serving in Iraq in 2005. Sentenced to 12 months of confinement, loss of one year's pay, demotion to Private and a bad-conduct discharge.
 49. Private First Class, age 20, convicted of manslaughter of a prisoner while serving in Iraq in 2004. Sentenced to three years in prison, a reduction in rank, forfeiture of pay, and a dishonorable discharge.
 50. Lance Corporal, age 23, convicted of assault, prisoner maltreatment while serving in Iraq in 2003. Sentenced to 120 days in prison, a reduction to the rank of Private, and discharged from the Marines.
 51. Private First Class, age 19, convicted of assault, prisoner maltreatment, dereliction of duty for failing to protect a prisoner, and conspiracy to commit assault while serving in Iraq in 2004. Sentenced to one year in confinement, demotion to the rank of Private, forfeiture of pay, and a bad conduct discharge.
 52. Private First Class, age 19, convicted of assault, prisoner maltreatment, dereliction of duty for failing to protect a prisoner, making a false statement to investigators, violating a

Advocates for U.S. Torture Prosecutions

lawful order, and conspiracy to commit assault while serving in Iraq in 2004. Sentenced to eight months in confinement, demotion to the rank of Private, forfeiture of pay, and a bad conduct discharge.

53. Private First Class, age 19, convicted of dereliction of duty for failure to protect a prisoner while serving in Iraq in 2004. Sentenced to 60 days in prison, 30 days of hard labor without confinement, reduction in rank to Private and forfeiture of pay and benefits.
54. CIA Contractor, age 37, convicted of felony assault and misdemeanor assault while working as a CIA civilian contractor in Afghanistan in 2003. Sentenced to eight years and four months in prison.

Acquitted/Charges Dropped or Matter Handled Administratively

- Lieutenant Colonel, age 46, disobeying an order. Criminal charges dismissed, issued an administrative reprimand.
- Lieutenant, age 30, negligence and conduct unbecoming an officer. Acquitted.
- Sergeant, maltreatment, dereliction of duty and assault. Charges dropped, received a letter of reprimand.
- Sergeant, assault, maltreatment of a prisoner and providing a false statement to investigators. Acquitted.
- Captain, age 36, dereliction of duty and making a false official statement. Charges dropped.
- Sergeant, assault, maltreatment of a prisoner and providing a false statement to investigators. Acquitted.
- Sergeant, age 32, assault and maltreatment. Acquitted.
- Specialist, assault, maltreatment and providing a false statement to investigators. Charges dropped.
- Private First Class, age 23, dereliction of duty, maltreatment, wrongful use of hashish, assault, and performing an indecent act with another person. Acquitted.
- Petty Officer 2nd Class, dereliction of duty, false official statement, and assault. Acquitted.
- Petty Officer, dereliction of duty and false official statement. Acquitted.
- Petty Officer, age 23, impediment of an investigation, dereliction of duty and false official statement. Acquitted.
- Machinist's Mate 2nd Class, age 28, conspiracy, false statement, and assault. Acquitted.
- Master Sergeant, age 35, punished for assaulting a detainee, received other than honorable discharge and forfeited 2 months' pay as nonjudicial punishment. Her other than honorable discharge status was later reversed.
- Staff Sergeant, age 38, punished for assaulting a detainee and providing false statements to investigators, received a demotion to Sergeant as nonjudicial punishment and a general discharge.
- Specialist, age 21, punished for assaulting a detainee and providing false statements to investigators, received a demotion to Private as nonjudicial punishment and a general discharge.
- Brigadier General, age 50, punished for dereliction of duty and shoplifting following her command of the 800th Military Police Brigade in Iraq, received a letter of reprimand and a demotion in rank to Colonel.

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- First Lieutenant, age 30, convicted of conduct unbecoming an officer for striking a detainee in the stomach while serving in Iraq in 2003. Sentenced to receive a letter of reprimand, and a fine of \$1003.00 for 12 months. Clemency granted.
- Staff Sergeant, acquitted of dereliction of duty and maltreatment.
- Sergeant, acquitted of charges of assault, maltreatment and making a false official statement.
- Staff Sergeant, age 23, convicted of obstruction of justice, conspiracy to obstruct justice and violation of a general order while hiding the murder of a detainee while serving in Iraq in 2006.
- Sentenced to 180 days of confinement, a reduction in rank, and a letter of reprimand. Conviction later overturned

APPENDIX D

Civil Cases against U.S. Military Personnel Alleging Detainee Torture

Below is a non-exhaustive list of cases brought as of September 11, 2014, by people in U.S. custody abroad, asserting that U.S. personnel, including civilian military contractors, subjected them to torture or cruel, inhuman, or degrading treatment.

A. Cases Brought against the United States Government or its Officials

1. *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007)
 - a. Facts: A German citizen brought suit against then Director of the Central Intelligence Agency (CIA) and other U.S. Government officials, alleging that he was tortured and subject to cruel, inhuman, and degrading treatment as part of the CIA's "extraordinary rendition" program.
 - b. Disposition: Dismissal affirmed. State secrets privilege barred disclosure of information necessary to the plaintiff's claim.
2. *Rasul v. Rumsfeld*, 414 F. Supp. 2d 26 (D.C. Cir. 2006)
 - a. Facts: Four former Guantánamo bay detainees brought suit against then Secretary of Defense Donald Rumsfeld alleging violations of the Alien Tort Statute (ATS), the Fifth and Eighth Amendments, the Geneva Conventions, and the Religious Freedom Restoration Act (RFRA).
 - b. Disposition: Dismissed claims under Alien Tort Statute and the Geneva Conventions, stating that torture was "a foreseeable consequence of the military's detention of suspected enemy combatants," and dismissed on "qualified immunity" ground. The court also stated that the Religious Freedom Restoration Act did not apply to detainees at Guantánamo.
3. *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009)
 - a. Facts: Dual Canadian–Syrian citizen brought suit against the United States Government and several government officials, alleging that the defendants violated the Torture Victim Protection Act and the Fifth Amendment of the United States Constitution by mistreating him and then removing him to Syria pursuant to an intergovernmental agreement that Syrian officials would interrogate him under torture.
 - b. Disposition: Dismissal affirmed. No standing. Plaintiff failed to state a claim under the Torture Victim Protection Act and the Fifth Amendment because he did not "specify any culpable action taken by any single defendant," nor did he allege the "meeting of the minds" required to support his claim that U.S. government officials conspired with the Syrian government to torture him. Further, plaintiff was not eligible to sue government officials for harms arising from his extraordinary rendition due to the suit's potential impact on national security, diplomacy, and foreign policy.
4. *Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011)
 - a. Facts: Nine citizens of Iraq and Afghanistan filed suit against then Secretary of Defense Donald Rumsfeld, Colonel Thomas Pappas, Lieutenant General Ricardo Sanchez, and Colonel Janis Karpinski, alleging that they were subjected to torture

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by U.S. military personnel while in U.S. custody in Iraq and Afghanistan. The plaintiffs sought monetary damages as well as a declaratory judgment that alleged that torture by military personnel was unlawful and violated the Fifth and Eighth Amendments of the U.S. Constitution, U.S. military rules and guidelines, and the law of nations.

- b. Disposition: Dismissed. As noncitizens detained abroad, plaintiffs did not enjoy the right to freedom from torture under the U.S. Constitution. As government employees acting within the scope of their employment, defendants were entitled to qualified immunity from claims brought under the Alien Tort Statute and the Fourth Geneva Convention. No standing to request declaratory relief.
5. *Padilla v. Yoo*, 678 F.3d 748 (9th Cir. 2012)
 - a. Facts: An American citizen detained as an enemy combatant by the United States Government in Afghanistan brought suit against a John Yoo, a Department of Justice attorney, alleging that he was held incommunicado and subjected to torture, in violation of his constitutional and statutory rights.
 - b. Disposition: Dismissed. Yoo was entitled to qualified immunity because, at the time of Padilla's detention and interrogation, it was not clearly established under the law that the treatment to which Padilla was subjected amounted to torture.
 6. *Al-Zahrani v. Rodriguez*, 669 F.3d 315 (D.C. Cir. 2012)
 - a. Facts: Survivors of detainees who died at Guantánamo Bay Naval Base sued the United States and various government officials under the Alien Tort Claims Act, the Federal Tort Claims Act, and the U.S. Constitution, asserting that the detainees had been subjected to torture and other forms of abuse.
 - b. Disposition: Dismissed. No jurisdiction. Military Commissions Act stripped civilian courts of jurisdiction to hear plaintiffs' claims relating to any aspect of their detention, treatment, transfer, trial, or conditions of confinement.
 7. *Vance v. Rumsfeld*, 701 F.3d 193 (7th Cir. 2012) *cert. denied*, 133 S. Ct. 2796, 186 L. Ed. 2d 877 (U.S. 2013)
 - a. Facts: Two American citizens who were working in Iraq as private security contractors brought suit against high-level military officials and the federal government, alleging that military personnel subjected them to abusive interrogation and mistreatment, including "hooding," "walling," and sleep deprivation, while in military detention in Iraq.
 - b. Disposition: Dismissed. American citizens had no private right of action against individual military officials, as creating such a right "would intrude inappropriately into the military command structure." There was no jurisdiction to consider claims against the federal government arising from military authority exercised in the field in the time of war or in occupied territory.
 8. *Hamad v. Gates*, 732 F.3d 990 (9th Cir. 2013) *cert. denied*, 134 S. Ct. 2866 (U.S. 2014)
 - a. Facts: Adel Hassan Hamad, a former detainee at Guantánamo Bay, brought suit against the United States Government, challenging his detention and treatment in U.S. custody.
 - b. Disposition: Dismissed. No jurisdiction. Military Commissions Act stripped civilian courts of jurisdiction to hear Hamad's claims relating to any aspect of his detention, treatment, transfer, trial, or conditions of confinement.

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9. *Janko v. Gates*, 741 F.3d 136 (D.C. Cir. 2014)
 - a. Facts: Abdul Rahim Abdul Razak Al Janko, who had mistakenly been captured and detained in Afghanistan and at Guantánamo Bay, brought suit against the United States Government, alleging violations of the Alien Tort Statute, the Federal Tort Claims Act, and the United States Constitution arising from his torture by U.S. officials in detention.
 - b. Disposition: Dismissal affirmed. No jurisdiction. The court lacked jurisdiction over plaintiff's action pursuant to a provision of the Military Commissions Act stripping civilian courts of jurisdiction to hear plaintiff's claims relating to any aspect of his detention, treatment, transfer, trial, or conditions of confinement.
10. *Allaithi v. Rumsfeld*, 753 F.3d 1327 (D.C. Cir. 2014)
 - a. Facts: Former Guantánamo detainees brought actions under the Alien Tort Statute, alleging that U.S. officials authorized their torture while in detention.
 - b. Disposition: Dismissal affirmed. Plaintiffs were required to bring suit against United States Government pursuant to the Foreign Tort Claims Act, rather than against individual officials pursuant to the Alien Tort Statute.
11. *Ameur v. Gates*, 13-2011, 2014 WL 3455741 (4th Cir. July 16, 2014)
 - a. Facts: An Algerian citizen brought suit against several former U.S. Government officials, alleging that he was subjected to torture and cruel, inhuman, or degrading treatment during his detention in U.S. military facilities in Afghanistan and Guantánamo Bay.
 - b. Disposition: Dismissal affirmed. No jurisdiction. The court lacked jurisdiction over plaintiff's action pursuant to a provision of the Military Commissions Act stripping civilian courts of jurisdiction to hear Ameur's claims relating to any aspect of his detention, treatment, transfer, trial, or conditions of confinement.

B. Cases Brought against Private Military Contractors

1. *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009)
 - a. Facts: Over 250 Iraqi nationals who had been detained by United States military forces at an Iraqi prison, or their widows, brought suit against two military contractors, Titan Corporation and CACI International, that provided interrogators or interpreters for the U.S. military in Iraq. The plaintiffs brought suit under the Alien Tort Statute as well as common law tort claims, alleging that they were subjected to torture while in detention.
 - b. Disposition: Dismissal affirmed. Held that tort claims against federal contractors under the command authority of the United States military are preempted pursuant to the combatant activities exception to the Federal Tort Claims Act (FTCA), which was intended to shield the U.S. Government and its agents from tort liability for authorized military action in wartime.
2. *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010)
 - a. Facts: Foreign nationals brought suit under the Alien Tort Statute against the defendant company, alleging that it assisted the Central Intelligence Agency's "extraordinary rendition" program, through which the plaintiffs were subjected to torture and cruel, inhuman, or degrading treatment.
 - b. Disposition: Dismissed. The state secrets privilege barred disclosure of information necessary to the plaintiffs' claims.

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3. *Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205 (4th Cir. 2012)
 - a. Facts: Iraqis who had been detained in U.S. military facilities in Iraq and elsewhere filed suit against private military contractors hired to provide interrogation and interpretation services to the U.S. military, alleging that the defendants and several of their employees tortured them, in violation of common law tort law and the Alien Tort Statute.
 - b. Disposition: Dismissing defendants' appeal of two lower courts' denial of defendants' motions to dismiss plaintiffs' suits, holding that the defendants were not immune from suit. One of the two cases later settled out of court. *See Al-Quraishi v. Nakhla et al.*, Center for Constitutional Rights, *available at* <http://ccrjustice.org/ourcases/current-cases/al-quraishi>.
4. *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516 (4th Cir. 2014)
 - a. Facts: Four Iraqi citizens brought suit under the Alien Tort Statute against the defendant military contractor, which provided interrogation services at Abu Ghraib prison, alleging that they were subjected to torture and cruel, inhuman, or degrading treatment by the defendant's employees during their detention at Abu Ghraib prison in Iraq.
 - b. Disposition: Remanded to the lower court to determine whether the plaintiffs' claims presented non-justiciable political questions.

APPENDIX E

Professional Misconduct Complaints Against Psychologists

The complaints below were filed against psychologists affiliated with U.S. military or intelligence forces in relation to the alleged mistreatment of prisoners in the course of U.S. counterterrorism operations since 2002.¹⁰²

Complaints Against Captain John Francis Leso: New York

Captain John Francis Leso allegedly led the first Behavioral Science Consultation Team (BSCT) at the U.S. Naval Station in Guantánamo Bay from June 2002 to January 2003. Dr. Leso devised, recommended, and implemented psychologically and physically harmful and abusive detention and interrogation tactics.

Dr. Trudy Bond v. Dr. John Francis Leso (2007)

1. Forum: New York Office of Professional Discipline (NYOPD)
Disposition: No written decision issued.

Dr. Steven Reisner v. Dr. John Francis Leso (2010)

1. Forum: New York Office of Professional Discipline (NYOPD)
Disposition: Dismissed for lack of jurisdiction. The NYOPD concluded that the alleged conduct did not constitute the practice of psychology. The licensing board considered that no therapist-patient relationship existed, and that behavior modification at the behest of a third party “as a weapon [and] not to help the mental health” of the subject did not fall within the definition of psychology. The NYOPD claimed that it was “not within [their] purview to express an opinion” on the “appropriateness” of the interrogation techniques used in Guantánamo, and that short of a conviction of Dr. Leso for committing a crime, there would be “no basis” for the board to open an investigation.
2. Forum: Supreme Court of New York (lower state court)
Disposition: Dismissed for lack of standing Dr. Reisner’s request that the court compel the NYOPD to initiate an investigation into his complaint.

¹⁰² This list is adapted from the appendix of another report co-written by one of the authors of this Shadow Report. See COLUMBIA UNIVERSITY INSTITUTE ON MEDICINE AS A PROFESSION & THE OPEN SOCIETY FOUNDATION, ETHICS ABANDONED: MEDICAL PROFESSIONALISM AND DETAINEE ABUSE IN THE WAR ON TERROR (2013) 201-213, available at <http://www.imapny.org/wp-content/themes/imapny/File%20Library/Documents/IMAP-EthicsTextFinal2.pdf>.

Complaints Against Retired Colonel Larry C. James: Louisiana and Ohio

Colonel Larry James was the senior intelligence psychologist for the Joint Intelligence Group and alleged commander of the Behavioral Science Consultation Team (BSCT) at the detention center at Guantánamo Bay from January 2003 to May 2003 and June 2007 to May or June 2008. He was also director of the Behavioral Science Unit in the Joint Interrogation and Debriefing Center at the Abu Ghraib prison in Iraq from June to October 2004. At least four professional misconduct complaints have been filed against Dr. James with psychology boards in two states, Louisiana and Ohio. Neither Board investigated or brought charges.

Dr. Trudy Bond v. Dr. Larry James (2008-2009)

1. Forum: Louisiana State Board of Examiners of Psychologists (LSBEP)
Disposition: Dismissed on statute of limitations grounds.
2. Forum: 19th Judicial District Court of the State of Louisiana
Disposition: Dismissed request for remand or discovery on the basis that the licensing board's dismissal was not an appealable decision, regardless of whether it was based in fact or law.
3. Forum: Louisiana First Circuit Court of Appeal
Disposition: Dismissed for lack of standing and for lack of a right of action to seek judicial review of the dismissal.

Dr. Trudy Bond v. Dr. Larry James (2008)

1. Forum: Ohio State Board of Psychologists
Disposition: Dismissed, finding “no foundation ... to support the initiation of formal proceedings” and providing no further justification.

Dr. Trudy Bond, Mr. Michael Reese, Rev. Colin Bossen, and Dr. Josephine Setzler v. Dr. Larry James (2010-2013)

1. Forum: Ohio State Board of Psychologists
Disposition: Dismissed, concluding that it was “unable to proceed to formal action in this matter” and providing no further justification.
2. Jurisdiction: Franklin County Court of Common Pleas (lower state court)
Disposition: Dismissed for lack of standing and failure to establish entitlement to a legal remedy.

Complaint Against Dr. James Mitchell: Texas

Dr. Jim Cox v. Dr. James Mitchell (2010-2011)

Dr. James Elmer Mitchell, a former military psychologist, allegedly served as a contract psychologist for the CIA in 2002.

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1. Forum: Texas State Board of Examiners of Psychologists
Disposition: Dismissed, citing insufficient evidence of a violation, following an informal settlement conference in which a panel heard from both parties in *ex parte* confidential proceedings.
2. Forum: 353rd Judicial District
Disposition: Dismissed for lack of standing (failure to show a “concrete and particularized” injury) and lack of jurisdiction based on Federal Military Commissions Act of 2006.

Complaint Against Retired Lt. Colonel Diane Zierhoffer: Alabama

Dr. Diane Michelle Zierhoffer was a lieutenant colonel in the U.S. Army who allegedly served as a Behavioral Science Consultation Team (BSCT) psychologist at Guantánamo.

Dr. Trudy Bond v. Dr. Diane Zierhoffer (2008-2009)

1. Forum: Alabama Board of Examiners in Psychology (2008-2009)
Disposition: Dismissed for lack of jurisdiction, citing extensive research into the “feasibility of the Board’s investigation of the issues raised in the complaint.” No response to supplemental evidence and follow-up letters from counsel.

APPENDIX F

U.S.-Based Non-Governmental Organizations That Have Called for Torture Investigations and Prosecutions

I. American Civil Liberties Union (ACLU)

- a. American Civil Liberties Union, *Accountability for Torture*, available at <https://www.aclu.org/accountability-torture>
 - i. “The Obama administration must take steps in four key areas to begin to redress the abuses perpetrated in our nation’s name, restore the rule of law, fully comply with U.S. obligations under the Convention Against Torture, and rebuild American credibility and standing in the world. These actions are legal, political, and moral imperatives.”
 - ii. “Investigation & Prosecution: Fully investigate the torture, kidnapping, and inhuman treatment inflicted by U.S. officials, prosecute wrong-doers when there is sufficient evidence, and cooperate with domestic and foreign investigations and legal proceedings. The United States has undertaken only limited investigations into post-9/11 torture inflicted by the CIA and Defense Department. It has failed to hold accountable any of the officials who authorized the use of torture, or designed or oversaw its implementation. Only a handful of low-level soldiers have been prosecuted for prisoner abuse. This is nothing short of a scandal, and violates the United States’ obligation under international law to investigate torture. The United States must open a full investigation, including, at minimum, examination of the role played by the senior officials most responsible for the torture program. Where there is sufficient evidence of criminal activity, the offenders should be prosecuted. The U.S. government must also cooperate with pending investigations and legal actions domestically and abroad. Continuing impunity undermines the universally recognized prohibition on torture and sends the dangerous signal to government officials at home and abroad that there will be few consequences for torture and other brutality. Accountability today is critical to stopping torture tomorrow.”

II. Human Rights Watch (HRW)

- a. Human Rights Watch, U.S.: *Bipartisan Study Shows Need to Investigate Torture: ‘Indisputable Evidence Requires Declassification, Official Inquiry*, (April 16, 2013), available at <http://www.hrw.org/news/2013/04/16/us-bipartisan-study-shows-need-investigate-torture>.
 - i. “The US government should pursue credible criminal investigations against US officials implicated in torture. If it does not, other countries should prosecute US officials involved in crimes against detainees in accordance with international law.”
- b. Human Rights Watch, *Getting Away with Torture: the Bush Administration and Mistreatment of Detainees*, at 3 (July 12, 2011), available at http://www.hrw.org/sites/default/files/reports/us0711webwcover_1.pdf.

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- i. “Those who authorized, ordered, and oversaw torture and other serious violations of international law, as well as those implicated as a matter of command responsibility, should be investigated and prosecuted if evidence warrants. Taking such action and addressing the issues raised in this report is crucial to the US’s global standing, and needs to be undertaken if the United States hopes to wipe away the stain of Abu Ghraib and Guantánamo and reaffirm the primacy of the rule of law.”
- c. Human Rights Watch, *Leadership Failure Firsthand Accounts of Torture of Iraqi Detainees by the U.S. Army’s 82nd Airborne Division* (Sep. 2005), available at <http://www.hrw.org/sites/default/files/reports/us0905.pdf>.
 - i. “The U.S. Attorney General should appoint a special counsel to investigate any U.S. officials—no matter their rank or position—who have participated in, ordered, or had command responsibility for war crimes or torture, or other prohibited ill-treatment against detainees in U.S. custody.” Id. at 7.
 - ii. “Human Rights Watch calls for investigations into all allegations of mistreatment of prisoners in U.S. custody. Appropriate disciplinary or criminal action should be undertaken against all those implicated in torture and other abuse, whatever their rank. As we have reported elsewhere, there is increasing evidence that high-ranking U.S. civilian and military leaders made decisions and issued policies that facilitated serious and widespread violations of the law. The circumstances strongly suggest that they either knew or should have known that such violations took place as a result of their actions. There is also mounting information that, when presented with evidence that abuse was in fact occurring, they failed to act to stop it.” Id. at 28.

III. Open Society Foundations (OSF)

- a. Open Society Foundations, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition*, at 9 (February 2013), available at (<http://www.opensocietyfoundations.org/sites/default/files/globalizing-torture-20120205.pdf>)
 - i. “Conduct an effective and thorough criminal investigation into human rights abuses associated with CIA secret detention and extraordinary rendition operations (including into abuses that had been authorized by the Office of Legal Counsel of the U.S. Department of Justice), with a view to examining the role of, and holding legally accountable, officials who authorized, ordered, assisted, or otherwise participated in these abuses.”

IV. Physicians for Human Rights

- a. Physicians for Human Rights, *Experiments in Torture: Evidence of Human Subject Research and Experimentation in the ‘Enhanced’ Interrogation Program*, at 4 (June 2010), available at <http://www.opensocietyfoundations.org/sites/default/files/phr-torture-report-20100607.pdf>.
 - i. “Conduct an effective and thorough criminal investigation into human rights abuses associated with CIA secret detention and extraordinary rendition operations (including into abuses that had been authorized by the

Office of Legal Counsel of the U.S. Department of Justice), with a view to examining the role of, and holding legally accountable, officials who authorized, ordered, assisted, or otherwise participated in these abuses.”

V. Center for Constitutional Rights

- a. Center for Constitutional Rights, *Restore. Protect. Expand. Ending Arbitrary Detention, Torture and Extraordinary Rendition, 100 Days to Restore the Constitution*, at 18 (2009), available at http://ccrjustice.org/files/CCR_100days_End_Torture_and_Rendition_0.pdf.
 - i. “Accountability – President Obama should, within the first 100 days, launch multiple Department of Justice investigations into all activities related to arbitrary detention, torture and extraordinary rendition. These investigations should be vast and comprehensive, and fully empowered to begin the process of criminal prosecution. The results of these investigations must be made public, to begin to overturn the legacy of secrecy left by the previous administration. Anyone who engaged in – or aided and abetted – such violations should be prosecuted to the fullest extent.”
- b. Center for Constitutional Rights, *Guantánamo and Its Aftermath: U.S. Detention and Interrogation Practices and Their Impact on Former Detainees*, at 5 (November 2008), available at http://ccrjustice.org/files/Report_GTMO_And_Its_Aftermath_0.pdf.
 - i. “As a first step, we recommend the establishment of an independent, nonpartisan commission to investigate and publicly report on the detention and treatment of detainees held in U.S. custody in Afghanistan, Iraq, Guantánamo Bay, and other locations since the attacks of September 11, 2001 [...] Most important, the commission should have authority to recommend criminal investigations at all levels of the civilian and military command of those allegedly responsible for abuses or having allowed such abuses to take place. The work of this commission must not be undercut by the issuance of pardons, amnesties, or other measures that would protect those culpable from accountability.”
- c. Center for Constitutional Rights, *Prosecutions and Accountability* (2008), available at http://ccrjustice.org/files/CCR_Prosecutions_Factsheet.pdf.
 - i. “A full investigation and prosecution of these actions by the Bush administration is necessary for the Obama administration to meaningfully reassert the rule of law in the United States. Government officials are not above the law, and their actions impact the lives of millions of people around the world. Prosecuting these officials for their activities is, in fact, a meaningful mechanism for securing justice for the victims and the survivors of torture and war crimes, as well as for deterring future government officials from repeating this conduct.”
 - ii. “Article 4 of the Convention Against Torture requires the new Obama administration convene a criminal investigation into the illegal acts and those responsible for them. As a treaty ratified by the United States, the Convention is binding on the government as “supreme law,” under the U.S. Constitution. No exceptional circumstances, including a state of war

or public emergency, may be invoked as a justification of torture, nor may an order from a superior officer or a public authority.”

- iii. “Prosecutions can provide a measure of justice for the survivors and victims of torture and abuse. Moreover, as we learned from Nuremberg, prosecutions will provide a meaningful disincentive for future government officials to abuse the law. No executive order, policy change or corrective legislation will provide such a lasting deterrence.”

VI. Society of American Teachers (SALT)

- a. SALT, *Letter to President Obama urging criminal prosecutions of those who have violated the law and the appointment of an independent prosecutor* (Jan. 30, 2009), available at <http://warisacrime.org/node/39434>.
 - i. “Over the last several years, as evidence of how the Office of Legal Counsel and Office of the Vice President ignored protocols for decision-making and justified pervasive human rights violations was revealed, SALT issued statements requesting investigation and prosecution, if appropriate, of those government officials responsible for authorizing the torture of suspects in Guantánamo Bay Prison, Iraq, and in the various secret prisons around the world. As law professors, we believe in the rule of law, and in the values underlying American democracy. We also believe that investigations without accountability, or with immunity from prosecution, will not remove the corruption caused by these abuses, which will continue to undermine the credibility of the United States and the safety of our military personnel, if left unexamined.”
- b. SALT, *SALT Urges President Obama to Reconsider His Decision on Prosecuting for Torture* (Apr. 20, 2009), available at <http://www.commondreams.org/newswire/2009/04/20/urges-president-obama-reconsider-his-decision-prosecuting-torture>.
 - i. “To disavow prosecution of those who engaged in interrogation methods you now condemn is to taint the honor of our uniformed military and civilian professionals who – in the darkest days of the “war on terror” – resisted such instructions and the mounting pressure to comply that pervaded certain US-controlled prisons and interrogation centers.”

VII. National Religious Campaign Against Torture (NRCAT)

- a. National Religious Campaign Against Torture, *Religious Organizations Call For Investigations* (Aug. 2010), available at <http://www.nrcat.org/about-us/nrcat-press-releases/462>.
 - i. “Twenty religious organizations, led by the National Religious Campaign Against Torture (NRCAT), are calling on Congress and President Obama to ensure a thorough investigation into allegations that the Central Intelligence Agency (CIA) engaged in illegal and unethical human subject research and experimentation on detainees after 9/11 and to make the findings public. The allegations were contained in a report released last month by the Physicians for Human Rights (PHR).”

VIII. World Organization for Human Rights USA & American University, Washington College of Law International Human Rights Clinic

- a. WORLD ORGANIZATION FOR HUMAN RIGHTS USA & AMERICAN UNIVERSITY, WASHINGTON COLLEGE OF LAW INTERNATIONAL HUMAN RIGHTS CLINIC, INDEFENSIBLE: A REFERENCE FOR PROSECUTING TORTURE AND OTHER FELONIES COMMITTED BY U.S. OFFICIALS FOLLOWING SEPTEMBER 11TH 6 (2012), *available at* http://www.wcl.american.edu/clinical/documents/Indefensible_A_Reference_for_Prosecuting_Torture.pdf
 - i. “In order to preserve the ideals and values upon which our country was founded and to restore our country’s status in the global community, the report urges the U.S. government to finally come to terms with the torture and abuse that occurred by investigating it and ultimately holding the appropriate administration officials and lawyers accountable for their actions.”

IX. Amnesty International

- a. AMNESTY INTERNATIONAL, TIME FOR TRUTH AND JUSTICE: REFLECTIONS AND RECOMMENDATIONS ON TRUTH, REMEDY AND ACCOUNTABILITY AS DECLASSIFICATION OF SENATE COMMITTEE SUMMARY REPORT ON CIA SECRET DETENTIONS AWAITED at 6-7 (June 23, 2014) *available at* <http://www.amnestyusa.org/sites/default/files/amr510352014en.pdf>
 - i. “The government must immediately take specific actions on individual investigations and prosecutions. These include the following measures: Effective, independent and impartial investigations, should be promptly commenced into every instance where there is reasonable ground to believe an act of torture or other ill-treatment, unlawful detention, or enforced disappearance, has been committed.”
 - ii. “Every act potentially constituting a crime under international law should be subject to an investigation capable of leading to a criminal prosecution. Where there is sufficient admissible evidence, suspects must be prosecuted. Prosecution should not be limited to those who directly perpetrated the violations. Individuals in positions of responsibility who either knew or consciously disregarded information that indicated that subordinates were committing violations, yet failed to take reasonable measures to prevent or report it, should also be included, as well as anyone who authorized or was potentially complicit or participated in the acts, including by knowingly providing assistance. [...] Amnesty International believes that justice is best served by prosecuting war crimes, crimes against humanity, and other grave violations of international law, such as torture and enforced disappearance, in independent and impartial civilian courts, rather than military tribunals.”
 - iii. “The authorities must not only ensure that investigations and prosecutions in individual cases are initiated, but also work simultaneously to remove legal or practical obstacles to criminal responsibility. Among these obstacles may be the use of classification

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or other forms of secrecy. Among the actions that should be taken in this regard is declassification and release of the full SSCI report, and indeed declassification of the information related to the CIA programs of detention, interrogation and rendition, with redactions only where strictly necessary.”