

Looking Back to Move Forward: Holding the United States Accountable for Torture and Abuse in the Name of Counterterrorism

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I was asked to talk about the American Civil Liberties Union's experience in combating torture and ill-treatment, or as we know it in the legal framework, CIDT: cruel, inhuman or degrading treatment. Today, I will talk about accountability and the ways in which we see accountability following 9/11 and the wars in Iraq and Afghanistan.

Definitive evidence has come to light that Bush administration officials committed serious crimes under the U.S. Constitution and international law by authorizing the torture and CIDT of detainees in U.S. custody. Although the Obama administration has rightly disavowed torture, it has shielded former senior government officials who authorized torture and abuse from accountability, civil liability and public scrutiny.

To date, no senior government official responsible for the creation and implementation of the Bush administration's torture program has been charged with a crime. At the same time, the U.S. government has sought to end civil lawsuits brought by torture victims seeking redress under the U.S. Constitution and international law. It has done so both by invoking immunity doctrines and by employing an over-expansive interpretation of the "state secrets" privilege to shield Bush administration officials from civil liability. As a result, torture survivors have been denied recognition as victims of illegal U.S. government policies and practices, compensation for their injuries, and even the opportunity to present their cases. Finally, the U.S. government continues

to withhold from the public key documents relating to the CIA's rendition, detention, and interrogation program.

My presentation will address the U.S. government's efforts to stymie meaningful accountability for torture, including its failure to comprehensively investigate and criminally prosecute officials responsible for the creation and implementation of the Bush-era torture program, the practice of securing the dismissal of civil suits brought by torture victims by asserting the state secrets privilege and claiming effective immunity from suit, and opposition to full transparency regarding the use of torture during the Bush administration.

The U.S. government has failed to comprehensively investigate and criminally prosecute Bush administration officials who planned, authorized, and committed torture, despite clear documentation of these serious crimes. In April 2009, the Obama administration released Justice Department memos that exposed a torture program that was conceived and developed at the highest levels of the Bush administration. Justice Department lawyers wrote legal opinions meant to justify torture, senior civilian and military officials authorized torture, and CIA and military interrogators used torture at Guantánamo, in the CIA's black sites, and elsewhere. In fact, President Bush recently admitted in a memoir published in November 2010 that he had personally ordered the waterboarding of Khalid Sheikh Mohammed. Waterboarding constitutes an act of torture and is prohibited under U.S. and international law. Bush said that he had been told that it was a legal act and that he accepted the advice and approved the torture of Khalid Sheikh Mohammed, who was waterboarded 183 times while held in CIA secret detention, including at a CIA-run secret facility in Poland.

Government documents show that hundreds of prisoners were tortured in U.S.-run detention facilities, and that more than one hundred were killed, many in the course of interrogations. Through Freedom of Information Act (FOIA) lawsuits, the ACLU uncovered approximately 150,000 pages of formerly-secret government documents related to the abuse and torture of prisoners in U.S. custody overseas. Leaked confidential reports by the International Committee of the Red Cross of its interviews with detainees transferred to Guantánamo and other U.S.-held detainees provided incontrovertible documentation of the use of torture and abuse by the United States.

Despite this well-documented and credible evidence of the deliberate and widespread use of torture and other illegal abuse during the Bush administration, the U.S. government has not prosecuted the high-level officials who authorized violations of federal criminal statutes and international law. Indeed, President Obama himself has publicly opposed criminal investigations of the architects of the torture regime.

Following the ACLU's repeated requests to Attorney General Eric Holder and his two predecessors to appoint an independent prosecutor with a full mandate to investigate



and prosecute credible allegations of torture, Holder announced in August 2009 that he had ordered an investigation into incidents involving CIA interrogations. The Attorney General characterized Assistant U.S. Attorney John Durham's investigation, however, as a "preliminary review," meant to gather information to determine whether there were sufficient grounds for a full investigation. While the current scope of the sealed Durham investigation is unclear, thus far none of the architects of the torture program has been charged with any crime. In addition, with respect to the criminal investigation, the administration has offered a type of immunity to interrogators who relied on the torture memos while also declining, at least so far, to investigate those who wrote the memos or authorized torture.

The ACLU has advocated that the prosecutor's mandate in the ongoing criminal investigation include the conduct and decisions of senior government officials. Although interrogators who violated the law should be held accountable, the criminal investigation must reach not only the interrogators, but also the senior officials who authorized torture. On June 30, Attorney General Eric Holder announced that the Justice Department was launching a "full criminal investigation" into the deaths of only two detainees in U.S. custody, while closing inquiries into the treatment of nearly a hundred other detainees.

The Department of Justice has made clear that waterboarding is torture and, as such, a crime under the federal anti-torture statute. It is difficult to understand the prosecutor's conclusion that only two deaths warranted further investigation. The narrow investigation that Attorney General Holder announced was not proportionate to the scale and scope of the wrongdoing. The ACLU continues to believe that the scope of Mr. Durham's mandate was far too narrow. The central problem was not with interrogators who disobeyed orders, but with senior officials who authorized a program of torture. We believe that the Justice Department must conduct a broader investigation if it is to reach the senior officials who were most responsible for developing the torture program, including former President Bush and Vice President Cheney.

Moreover, despite the voluminous evidence that senior Bush administration officials authorized torture, the only people who have been held accountable for this maltreatment of prisoners are low-ranking soldiers. To date, over 600 individuals have been accused of having abused prisoners, yet only about ten of them have received prison terms of more than one year. Even more troubling, the highest-ranking officer prosecuted for the abuse of prisoners was a Lieutenant Colonel, Steven Jordan, who was court-martialed in 2006 for his role in the Abu Ghraib scandal, but acquitted in 2007. Only one government contractor has been charged for any crime related to interrogation, and that indictment was in June 2004.

No government official has been charged in relation to the CIA's torture program, which was plainly authorized by the Bush administration's most senior officials.

Numerous prisoners were transferred to torture at secret CIA prisons overseas. At least five individuals are alleged to have died in CIA custody. No one has been held to account.

In May 2009, the Justice Department's Office of Professional Responsibility issued a report on the role of three Office of Legal Counsel lawyers who wrote the "torture memos" legally sanctioning illegal interrogation methods. The report concluded that the lawyers had suffered serious lapses of judgment but should not be disciplined for breach of their ethical responsibility as lawyers. To date, no charges have been brought against these lawyers.

Regarding civil suits seeking justice and remedies for survivors of torture, to date not a single victim of the Bush administration's torture program has had his day in a U.S. court. The U.S. government has sought to extinguish lawsuits brought by torture survivors at their initial stages, thereby protecting senior officials and corporations from civil liability. As a result, victims of torture and secret detention have been denied any form of justice or remedy.

The federal government has invoked the judicially-created doctrine of qualified immunity to successfully secure the dismissal of civil suits – alleging torture, CIDT, forced disappearance, and arbitrary detention – without consideration of the merits. In addition, civil cases alleging torture, CIDT, and extra-judicial killings by private military contractors face procedural hurdles and defenses, resulting in dismissal.

Most problematically, the U.S. government has intervened in cases that allege forced disappearance and torture by U.S. officials and U.S.-based corporations to assert the "state secrets" privilege and to have these cases dismissed without any consideration of unclassified, publicly available information substantiating victims' allegations. Courts by and large have accepted the government's assertions. The U.S. government's "state secrets" tactic to dispose of lawsuits, claiming that any discussion of a lawsuit's accusations would endanger national security, has allowed the government not only to restrict discovery, but also to quash entire lawsuits.

For example, the U.S. government invoked the common-law "state secrets" privilege to squelch a lawsuit brought by the ACLU in April 2006. The lawsuit concerned the

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secret detention of German citizen Khaled El-Masri, and it sought compensation for his unlawful detention and torture by U.S. agents in Afghanistan. Khaled El-Masri was kidnapped while visiting Macedonia at the end of 2003. He was then handed over by the Macedonian authorities to the CIA operatives. They drugged, hooded, sodomized and strip-searched him, then put him on a secret flight to Afghanistan, where he was held for about four months in a secret facility called the Salt Pit, a small detention facility run by the CIA with help from Afghan authorities. He was abused and tortured, only for the U.S. government to realize that they had the wrong person. It was a case of mistaken identity. His name, Khaled El-Masri, apparently matched the name of a terrorist suspect. Instead of acknowledging the fact and sending him back to Germany with an apology, he was put on another secret flight and dumped on a hill in Albania, from where he had to make his way back to Germany. Mr. El-Masri's rendition to illegal detention and torture represents the most widely known example of a publicly acknowledged program.

For those of you who don't know, the "extraordinary rendition" program was developed under the Bush Administration to facilitate forced disappearances and torture by the CIA, often with involvement of foreign secret services, and to evade accountability for these egregious human rights abuses. Working in complete secrecy, CIA operatives would take the individual in question and transport him to a third country where he would be subjected to torture and abuse, forced disappearance, and other forms of ill-treatment. This program has been well documented by human rights organizations, investigative journalists, United Nations human rights experts, and public inquiries in Canada and Europe.

High-level government officials have publicly discussed the rendition program, and Mr. El-Masri's allegations have been the subject of widespread media reports in the world's leading newspapers and news programs, many of which are based on the accounts of government officials. The CIA's Office of Inspector General determined there had been no legal justification for Mr. El-Masri's rendition and essentially concluded that the agency had acted illegally.

When a German reporter asked Secretary of State Condoleezza Rice in 2005 whether the United States would provide redress for its horrific abuse of El-Masri, she responded, "When mistakes are made, we work very hard to rectify them. I believe that this will be handled in the proper courts, here in Germany and if necessary in American courts as well." El-Masri sought to bring his claims to those "proper courts," both in the United States and in Germany. But the ACLU lawsuit that was brought on behalf of El-Masri against the CIA was dismissed by American courts, which essentially accepted the government-invoked defense of the "state secrets" privilege. In October 2007, the U.S. Supreme Court refused to review Mr. El-Masri's case, denying Mr. El-Masri's only real chance for justice before domestic courts. We now know – through documents released by Wikileaks – that Secretary Rice's State

Department expended considerable diplomatic resources in seeking to terminate El-Masri's judicial proceedings in Germany as well.

Having exhausted domestic remedies, in April 2008, the ACLU filed a petition to the Inter-American Commission on Human Rights (IACHR) on behalf of Mr. El-Masri, arguing, *inter alia*, that due to the application of the state secrets doctrine, Mr. El-Masri had been deprived of the right of effective access to a court and that his right to a remedy for the human rights violations he suffered had been violated. Despite repeated requests from the Commission, the U.S. government has not responded to the petition to date.

While Mr. El-Masri has received no remedy, the CIA officers determined by the Office of Inspector General to be responsible for his mistaken detention and torture have been promoted. The CIA analyst who pushed for Mr. El-Masri's rendition now has one of the premier jobs in the CIA's Counterterrorism Center, running the CIA's Global Jihad unit dedicated to disrupting al-Qaida. The lawyer who signed off on Mr. El-Masri's rendition is now legal advisor to the CIA's Near East division.

The U.S. government invoked the "state secrets" privilege in another lawsuit brought by the ACLU in 2007 against Jeppesen DataPlan, Inc., a subsidiary of Boeing Company. Since we were not able to seek any kind of accountability against official government personnel, we pursued corporations that had knowingly profited from arranging rendition torture flights. The ACLU filed a federal lawsuit against Jeppesen on behalf of five victims of the CIA's extraordinary rendition program. The suit charges that Jeppesen knowingly participated in these renditions by providing critical flight planning and logistical support services to aircraft and crews used by the CIA to forcibly "disappear" these five men to torture and illegal detention. According to published reports, Jeppesen had actual knowledge of the consequences of its activities.

Shortly after the suit was filed, the government intervened and asserted the "state secrets" privilege, claiming further litigation would undermine national security interests, even though much of the evidence needed to try the case was already public. The trial court accepted claims by the Bush administration that the "state secrets" privilege allowed them to put an end to the entire proceedings. After three judges from the federal appeals court reversed that ruling, the Obama administration asked for a hearing before the full appeals court, asserting again the right to quash a lawsuit against a company that was a knowing accomplice to torture. Interestingly, the Obama administration adopted almost the same position as the Bush Administration, that these kinds of civil cases should not proceed and that judges should have nothing to do with them as they raise issues of national security. In September 2010, an 11-judge en banc panel of the Ninth Circuit federal appeals court dismissed the lawsuit, accepting the Obama administration's argument that the case could not be litigated without disclosing state secrets. In May 2011, the Supreme Court refused to review the case, again denying justice to victims of torture.

The state secrets doctrine is not the only mechanism the Obama administration has invoked to extinguish civil suits by torture survivors. In *Rasul v. Rumsfeld*, a suit brought by former Guantánamo detainees seeking redress for torture, abuse, and religious discrimination, the Obama administration argued, remarkably, that the government defendants were immune from suit because, at the time that the abuse occurred, established law did not clearly prohibit torture or religious discrimination at Guantánamo. In *Arar v. Ashcroft*, the administration argued that the Constitution provided no cause of action to an innocent man who had been identified by the U.S. as a terrorist, rendered to Syria for torture, and not released until ten months later when it was determined that he was not a terrorist after all. In that case, the administration also argued to the courts that affording Mr. Arar a judicial remedy would breach the

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separation of powers and harm U.S. foreign policy, and impermissibly involve the courts in assessing the motives and sincerity of the officials who authorized Mr. Arar's rendition.

Most recently, in *Padilla v. Rumsfeld*, a federal court dismissed a lawsuit filed against former Defense Secretary Donald Rumsfeld and other current and former government officials for their roles in the unlawful detention and torture of U.S. citizen Jose Padilla. South Carolina federal judge Richard Mark Gergel held that Mr. Padilla had no

right to sue for constitutional violations during his nearly four-year imprisonment, and that Rumsfeld and the other defendants were entitled to qualified immunity against all claims of alleged constitutional violations concerning his detention as an enemy combatant.

The Obama administration has sometimes suggested that civil suits are unnecessary because the Justice Department has the authority to investigate allegations that government agents violated the law. But civil suits, of course, serve purposes that criminal investigations do not: they allow victims their day in court, and they provide an avenue through which victims can seek compensation from perpetrators.

Moving on to the issue of the lack of transparency, the U.S. government has fought to keep secret hundreds of records relating to the Bush administration's rendition, detention, and interrogation policies. This secrecy has shielded government officials from accountability for developing and implementing national security policies that violate international law. The U.S.'s lack of transparency not only precludes accountability for U.S. officials, but it also makes it more difficult for citizens of other countries – including Egypt, Tunisia, and Libya – to hold officials or former officials of their own countries accountable for harm that those governments caused to their own citizens while cooperating with the U.S. Moreover, this secrecy has kept secret

some of the documents that would allow the public to better understand how the torture program was conceived, developed and implemented.

To take just a few of many possible examples, the U.S. government has fought to keep secret: a directive in which President Bush authorized the CIA to establish secret prisons overseas; the Combatant Status Review Transcripts in which former CIA prisoners describe the abuse they suffered in the CIA's secret prisons; records relating to the CIA's destruction of videotapes that depicted some prisoners being waterboarded; and cables containing communications between the CIA's secret prisons and officials at CIA headquarters. The current administration also reversed its decision to comply with a court decision ordering the release of photographs depicting the abuse of prisoners in Iraq and Afghanistan. The current administration has also supported legislation granting the Secretary of Defense unprecedented authority to conceal evidence of misconduct, including photographs depicting the abuse of prisoners in Defense Department custody, and it has argued that the CIA's authority to withhold information concerning intelligence sources and methods extends even to methods that are illegal.

The ACLU continues to advocate for the creation of a public record of the Bush administration's policies and their consequences, to obtain recognition and compensation for torture victims, to ensure that government officials who violated the law are held to account, and to reduce the likelihood that the abuses of the last administration are repeated by the current administration, or by a future one.

But the story is far from over. Foreign prosecutors and magistrates are already undertaking the investigations that U.S. legal institutions have refused to conduct, and they are shrinking the world for America's torturers. The U.S. has a choice between silence, inaction and allowing the culture of impunity to take root as foreign courts attempt to clean up a mess of America's making, or firmly turning away from the dark side of torture and fully embracing justice and accountability.